No. 03-51

In The
Supreme Court of the United States

SILVEIRA, et al.,

Petitioners,

v.

LOCKYER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL RIFLE ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Rifle Association (the "NRA") is a nonprofit voluntary membership corporation. Its 4 million members are bound together by a common desire to ensure the preservation of the Second Amendment right of individual citizens to keep and bear arms. More than 250,000 of the NRA's members reside in California and thus are subject to the Assault Weapons Control Act ("AWCA"), which forbids the purchase of many so-called "assault weapons" and requires registration of grandfathered guns. The Ninth Circuit upheld the AWCA based on its conclusion that the Second Amendment does not guarantee any individual the right to keep and bear arms. Thus, the NRA's most vital interest is directly implicated by the Ninth Circuit's decision, which effectively writes the Second Amendment out of the Constitution.

SUMMARY OF ARGUMENT

1. Petitioners have standing under Article III to challenge the AWCA. The Ninth Circuit reasoned that the Second Amendment provides only a "collective right" to the States and thus that individuals have no standing to challenge laws prohibiting gun ownership. In so holding, the court conflated the standing and merits inquiries in contravention of this Court's settled precedent that plaintiffs' legal theories are assumed to be valid for purposes of determining standing. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975).

2. The Second Amendment applies to the States. Although the Ninth Circuit neglected to analyze this threshold question, this Court should clarify that *United States v. Cruikshank*, 2 Otto (92 U.S.) 542, 553 (1876),

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that it authored this brief and that no entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this *amicus* brief.

which held that the Second Amendment was not incorporated against the States, is no longer good law. The debate surrounding the adoption of the Fourteenth Amendment makes plain that its Framers fully intended to ensure that States could not transgress an individual's right to keep and bear arms.

3. The Second Amendment secures individual liberties, as does each provision of the Bill of Rights. We know this from the text of the Second Amendment, which guarantees "the *right of the people* to keep and bear arms." We know this from the historical record, which reveals that at the time of the founding citizens had the right, and indeed the duty, to possess and have at the ready a firearm. And we know this from the very purposes of the Amendment – the preservation of the rights of self-defense and resistance to government oppression – purposes which depend upon individual ownership of firearms.

REASONS FOR GRANTING THE WRIT

The decision below addresses a question of paramount national importance: the meaning of the Second Amendment, a core provision of the Bill of Rights. As Circuit Judge Kleinfeld noted, the decision below effectively strips 20 percent of the American people of their constitutional right to keep and bear arms. Appendix to Petition for a Writ of Certiorari ("Pet. App.") 49. This Court should grant certiorari to resolve the sharp split in authority between the Ninth Circuit's decision below and the Fifth Circuit's decision in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), which conclusively demonstrated that individuals have a constitutional right to keep and bear arms.

I. Petitioners Have Article III Standing To Challenge the Assault Weapons Control Act.

The Ninth Circuit held that petitioners had no standing to challenge the provisions of the AWCA as a violation of the Second Amendment, because that Amendment

confers a collective, rather than an individual, right. Under the Ninth Circuit's approach, then, any party whose claim rests on an erroneous legal premise loses not on the merits, but lacks standing. As the Seventh Circuit correctly recognized, that is not the law. *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 & n.12 (7th Cir. 1999). For purposes of standing, a federal court must accept a plaintiff's legal argument as correct. *See Warth*, 422 U.S. at 501.

Petitioners clearly have Article III standing. They are individuals who either own firearms subject to the registration requirements of the AWCA or would like to own weapons that may not be purchased now. Petitioners have suffered an injury-in-fact, caused by the challenged provisions, which would be redressed by a decision holding that the challenged provisions are unconstitutional. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[2]

II. The Second Amendment's Guarantee Of An Individual Right To Keep And Bear Arms Applies To State Action.

Although the Ninth Circuit engaged in a detailed discussion of the meaning of the Second Amendment in its "standing" analysis, the panel failed to consider the threshold question of whether the Amendment even applies to the States. *See* Pet. App. 94 ("Because we decide

[2] To be sure, the D.C. Circuit found that plaintiffs lacked standing to challenge the Violent Crime Control and Law Enforcement Act of 1994, where they had failed to demonstrate that the "threat of prosecution [for violating the law]" was "genuine" and "imminent." *Navegar, Inc. v. United States*, 103 F.3d 994, 999 (D.C. Cir. 1997) (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)); *see also Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1139 (9th Cir. 2000) (a plaintiff must face a "genuine threat of imminent prosecution" to obtain standing) (citation omitted). But this Court has never required individuals to risk criminal prosecution in order to vindicate their constitutional rights. *Cf. Regional Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974); *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 332 (1999).

this case on the threshold issue of standing, however, we need not consider the question whether the Second Amendment presently enjoins any action on the part of the states."). Even though the court below did not address the incorporation issue, this Court should grant certiorari to resolve this important question. Over a century ago, this Court held that the Second Amendment was not incorporated against the States. *See Cruikshank*, 92 U.S. at 553.[3] *Cruikshank* and its progeny were decided, however, before the Court incorporated virtually every provision of the Bill of Rights against the States. *See Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). Thus, there is now widespread agreement that *Cruikshank* is not good law. *See* Pet. App. 94 ("One point about which we are in agreement with the Fifth Circuit is that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited.").[4]

In determining which provisions of the Bill of Rights are incorporated, the Court has assessed whether the right is "so rooted in the tradition and conscience of our people to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (citation omitted). In *Duncan*, the Court identified four factors that guide this inquiry: (1) the history of the right; (2) historical recognition of the right by the States; (3) recent trends, including current recognition by States, with respect to the right; and (4) the purposes behind the right. *Duncan*, 391 U.S. at 151-56. As demonstrated below, each of these factors supports

[3] *See also Presser v. Illinois*, 116 U.S. 252, 264-65 (1886) (noting in *dicta* that the Second Amendment "is a limitation only upon the power of Congress and the National government, and not upon that of the States"); *Miller v. Texas*, 153 U.S. 535, 538 (1894) ("[I]t is well settled that the restrictions of these amendments operate only upon the Federal power, and have no reference whatever to proceedings in state courts.").

[4] Recent scholarship addressing this issue has concluded that the Second Amendment is incorporated against the States. *See*, *e.g.*, Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 898-901 (2001).

incorporating the right to keep and bear arms through the Due Process Clause of the Fourteenth Amendment.

1. The right of individuals to keep and bear arms is a bedrock feature of the Anglo-American legal tradition and was firmly established in the British Bill of Rights. *See* 1 W. & M. 2, ch. 2, 7 (1689); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831, 832 (1998); *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). In the English tradition, that right was understood to serve at least two purposes: an individual's rights to self-preservation, and to resist oppression. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *143-*144 (1765). Thus, "'the preservation [of this right] as a protection against arbitrary rule [was] among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.'" Nelson Lund, *The Past & Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 54 (1996) (hereinafter "Lund") (quoting *Duncan*). As the Court in *United States v. Miller*, 307 U.S. 174, 179 (1939), recognized, the colonies mandated the exercise of this right by imposing a "'general obligation [on] all adult male inhabitants to possess arms. . . . '" *Id*. (quoting 1 OSGOOD, THE AMERICAN COLONIES IN THE 17TH CENTURY).

The right to keep and bear arms played a significant role in the process of ratifying the Constitution. At the Pennsylvania Convention, for example, the Anti-Federalists made clear that the omission of an individual right to bear arms was a primary reason for rejecting ratification. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623-24 (Merrill Jensen ed., 1976). "Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights," *Duncan*, 391 U.S. at 153, and the right to bear arms was "the most frequently appearing proposed amendment." William Plouffle, *A Federal Court Holds the Second Amendment Is An Individual Right*: *Jeffersonian Utopia or Apocalypse Now?*, 30 U. MEM. L. REV. 56, 80 (1999) (hereinafter "Plouffle"). Immediately after the adoption of the Second

Amendment, the Second Congress passed the Militia Act *requiring* every male citizen between the age of 18 and 45 to own a firearm and ammunition. 1 Stat. 271 (1792).

Most importantly, the historical evidence surrounding the adoption of the Fourteenth Amendment confirms that it was intended to prevent the States from abridging "the personal right guaranteed and secured by the first eight amendments of the Constitution, such as . . . the right to keep and bear arms." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Senator Howard). Thaddeus Stevens confirmed that "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). And there can be no doubt that the Second Amendment was included among the provisions that Congress sought to apply to the States. During the same year as the Fourteenth Amendment was debated, Congress passed legislation aimed at reversing the southern States' efforts to disarm the newly freed black citizens. Specifically, in the Freedmen's Bureau Bill of 1866, Congress made clear that "in every State [lately in rebellion] the right . . . to have full and equal benefit of all laws . . . including *the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens* of such State . . . without respect to race or color, or previous condition of slavery." Freedmen's Bureau Act of 1866, 14 Stat. 173, 176-77 (1866) (emphasis added).

2. From the founding of the Republic, the States have recognized the right to keep and bear arms. When the Second Amendment was adopted, almost half of the States with bills of rights included provisions recognizing that right, and many States affirmatively protected the right.[5] Recognizing the value of a well-armed populace,

[5] *See* Lund, at 54; Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251, 259, tbl. III (1992); Janice Baker, *The Next Step in Second Amendment Analysis: Incorporating the Right to*

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many States went farther, requiring the ownership of guns. Plouffle, at 64.

3. Forty-four States continue to maintain constitutional provisions protecting the right to keep and bear arms. Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59 (1989), Appendix (collecting provisions); WIS. CONST. art. I, § 25. Since 1970, fifteen States "have enacted new state constitutional rights to bear arms or strengthened old ones." Janice Baker, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms Into the Fourteenth Amendment*, 28 U. DAYTON L. REV. 35, 48-49 (2002) (internal quotation omitted). State laws also reflect the modern consensus as to the importance of the right to bear arms. Currently, thirty-five States allow large classes of individuals to carry concealed firearms. *See id.*

4. The Second Amendment was intended, in part, to promote the right of self-defense. *See*, *e.g.*, Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992); Lund, at 12 (citing WILLIAM BLACKSTONE, COMMENTARIES at 136, 139). Given the level of criminal activity that pervades our society, the right of individuals to protect themselves and their property with a firearm is as important as ever. Put simply, "our modern governments have proved no more able . . . to protect law-abiding citizens from criminal predators than their predecessors were." *Id.* at 55. "More important, the police do not and cannot protect law-abiding citizens from criminal violence." *Id.* at 61-62. *See also* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL'Y REV. 509 (1993). In today's society, the Second

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Bear Arms Into the Fourteenth Amendment, 28 U. DAYTON L. REV. 35, 41 (2002) (citing authorities).

Amendment remains an essential bulwark against the predations of violent criminals.

The Second Amendment right to keep and bear arms also empowers the citizenry to protect against state-sponsored or private oppression. Justice Story captured this basic truth:

> One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men.

JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 450, at 264 (1840). This historical leitmotif is reflected in this Nation's foundation. The British attempted just such tactics on the eve of the American Revolution. The Militia Acts of 1757 and 1763 authorized British officials to "seize and remove the arms" of colonists, and it was just such an effort by General Gage that led to the Battles of Lexington and Concord. *See* Pet. App. 62.

The historical experience that led to the ratification of the Second Amendment remains as vital at the end of the Twentieth Century as at any time. As Judge Kozinski eloquently wrote, dissenting from denial of rehearing *en banc* in the court below:

> All too many of the other great tragedies of history – Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name but a few – were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece, as the *Militia Act* [of 1792] required here. If a few hundred Jewish fighters in the Warsaw Ghetto could hold

> off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.
>
> . . . However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Pet. App. 46.

The Framers of the Fourteenth Amendment understood as much, and they ensured that the States could not infringe upon an individual's right to keep and bear arms.[6]

III. The Second Amendment Guarantees An Individual Liberty Both To "Keep" And To "Bear" Arms.

The Bill of Rights guarantees rights to individuals. *E.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). This is no less true of the Second Amendment than it is of the other amendments in the Bill of Rights. The Second Amendment's very text, the history surrounding its adoption, and the purposes it was intended to serve make clear that individuals have a right to keep and bear arms. The Fifth Circuit's decision in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), and the dissenting opinions in this case make clear that the textual and historical evidence overwhelmingly

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[6] Although the court below did not address this issue, incorporation of the Second Amendment also presents an opportunity for this Court to revisit the original understanding of the Privileges or Immunities Clause of the Fourteenth Amendment. *See*, *e.g.*, *Nordyke v. King*, 319 F.3d 1185, 1193 n.4 (9th Cir.) (Gould, J., specially concurring), *petition for rehearing en banc filed* (9th Cir. Apr. 1, 2003) (No. 99-17551); *see also Saenz v. Roe*, 526 U.S. 489, 521-23 (1999) (Thomas, J., joined by Rehnquist, C.J., dissenting) (suggesting that the *Slaughterhouse Cases* misinterpreted the Privileges or Immunities Clause); Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 898-901 (2001).

supports such an interpretation. *See also Printz v. United States*, 521 U.S. 898, 939 n.2 (1997) (Thomas, J., concurring) ("Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that 'the right to keep and bear arms' is, as the Amendment's text suggests, a personal right.") (citations omitted); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000) (The Second Amendment includes "a right (admittedly of uncertain scope) on the part of individuals."). Due to space constraints, we can only touch upon the most salient evidence discussed in these opinions.

1. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. This Court has long emphasized the importance of the textual commands of the Constitution: "'The enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said.'" *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618-19 (1895) (quoting *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1, 188 (1824)); *see also McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged."). As we demonstrate below, both the operative clause and the preface of the Second Amendment secure an individual right.

The People. Throughout the Constitution, "*the people*" has a uniform meaning, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), and consistently refers to individuals. In addition to securing "the right of *the people* to keep and bear arms," the Bill of Rights also protects "the right of *the people* peaceably to assemble" and to "petition the Government for a redress of grievances," affirms the "right of *the people* to be secure in their persons, houses, papers, and effects," and safeguards the rights "retained by *the people*." U.S. CONST. amends. I, IV & IX.

All of these rights belong to each individual. *See*, *e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (Fourth Amendment); *Roberts*, 468 U.S. at 618-19 (First Amendment). These precedents confirm the obvious: every individual has a constitutional right to be free from unreasonable searches and seizures and to assemble and petition the government. The exercise of these rights is not contingent upon collective action. The Second Amendment is no different. "The people" are individuals, and to them the Second Amendment belongs.

Right. The term "Right" mandates the same conclusion. The Constitution both protects "rights" and confers "powers." Throughout the Constitution, rights are vested *exclusively* in individuals: for instance, the rights to a speedy and public trial by jury, and to be secure in the home against unreasonable searches and seizures. U.S. CONST. amends. IV & VI. In securing a "right" to "the people," the operative clause of the Second Amendment clearly protects an individual liberty to "keep and bear arms."

Keep Arms. To "keep" arms and to "bear" them, have separate meanings, each of which supports the conclusion that the Second Amendment secures an individual liberty. The common usage of the term "keep" establishes an individual right. Noah Webster's 1828 dictionary defined the term as:

> **1.** To hold; to retain in one's power or possession; not to lose or part with; as, to keep a house or a farm; to keep any thing in the memory, mind or heart; **2.** To have in custody for security or preservation.

See also SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1770) (defining "keep" as "1. To retain; not to lose. 2. To have in custody. . . . "). Thus, "to keep" suggests a personal act of possession. Since it is impossible to give any other coherent meaning to this term, the Ninth Circuit simply chose to give no effect at all to this portion of the Second Amendment. *See* Pet. App. 105 ("The reason why [keep] was included in the amendment is not

clear. . . . [I]t seems unlikely that the drafters intended the term 'keep' to be broader in scope than the term 'bear.' "). Such a cavalier approach to the Constitution's text is squarely foreclosed by this Court's precedents. *See Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 77-78 (1946) (" 'In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.' ") (quoting *Holmes v. Jennison*, 14 Pet. (39 U.S.) 540, 570-71 (1840)); *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 174 (1803).[7] Thus, the Amendment's designation of a right to "keep" arms alone makes clear that individuals have the right to possess firearms.

Bear Arms. Commonly understood, to "bear" means "to carry." Webster's 1828 dictionary provided these definitions of "to bear":

> **1.** To support; to sustain; as, to bear a weight or burden; **2.** To carry; to convey; to support and remove from place to place; as, "they bear him upon the shoulder"; "the eagle beareth them on her wings;" **3.** To wear; to bear as a mark of authority or distinction; as, to bear a sword, a badge, a name; to bear arms in a coat.

By the plain meaning of "to bear," the Second Amendment means that the right of the people to carry, convey, wear on their person, support, or transport arms is protected. *Cf. Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsberg, J., with whom Rehnquist, C.J., and Justices Scalia and Souter joined, dissenting) (equating the term

[7] Eighteenth Century usage further undercuts the suggestion that "keep" simply melts into "bear arms." As Judge Kleinfeld noted, colonial statutes, among others, employed "keep" and "bear" together with separate meanings. Pet. App. 52 (Kleinfeld, J., dissenting from denial of rehearing *en banc*).

"carry" with the term "bear" as used in the Second Amendment).[8]

The collectivist interpretation of the Second Amendment is further undercut by the historical record. While "bear arms" has a military connotation, that has never been its only one. Contemporaneous state constitutions protected individuals' right to "bear arms" in "self-defense"; the Fifth Circuit cited no less than eleven such examples. *Emerson*, 270 F.3d at 230 n.29. The phrase was also used to refer to hunting activities. *See*, *e.g.*, 2 THE PAPERS OF THOMAS JEFFERSON 443-44 (J.P. Boyd ed., 1950) (in 1785 James Madison proposed to the Virginia Legislature a bill that would penalize any hunter who "shall bear a gun out of his inclosed ground, unless whilst performing military duty"). And, of course, "bear arms" may be limited to its military connotation only if the term "militia" in the prefatory clause requires the bearer to be in the military.[9]

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[8] Some argue that "keep and bear arms," must be read as a unitary phrase, which in turn has a specialized military meaning. Pet. App. 105 (citing Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 317 (2000)). But this reading fails the text for a number of reasons. First, "keep" has no military connotation. Second, the primary and secondary definitions of "bear" are nonmilitary. Third, even assuming *arguendo* that "bear arms" has a military connotation, the Second Amendment lacks the requisite textual evidence to constrain the phrase to that meaning. As discussed *infra*, the term "militia" does not limit the Amendment, and the term "keep" does not have a military connotation.

[9] Proponents of a more limited reading of the Second Amendment point to Madison's first draft, which included the clause "but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Here, they argue, "bearing arms" can have only a military connotation. But surely, one who is "religiously scrupulous of bearing arms" can have an equal aversion to the use of firearms in hunting or in self-defense as in military service. That the term "bearing arms" does not refer exclusively to military service is plain on the face of this draft, as Madison found it necessary next to refer specifically to "military service" as the thing from which one "religiously scrupulous" was to be excused. Were it otherwise, it would have sufficed to say that such a person should be excused from "bearing arms." As

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But, as discussed *infra*, "militia" referred to a much broader swath of the civilian population, regardless of actual military service. *Cf. Miller*, 307 U.S. at 179. Thus, the term "bear," as applied to arms, has its usual meaning – to carry, whether militarily or not. And that understanding in turn underscores the conclusion that the right is vested in the individual.[10]

2. Contrary to the Ninth Circuit's conclusion, this Court's decision in *Miller* does not establish that the Second Amendment protects only a communal right. If the Second Amendment vests no individual right, the Court need only have said so. Instead, the Court looked to the merits of the constitutional challenge as it applied to a sawed-off shotgun:

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

307 U.S. at 178. To the extent that a case is made that a weapon falls within the "ordinary military equipment," *Miller* strongly suggests that the Amendment does have individual application.

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different terms in close proximity are presumed to have different meanings, *United States v. Bean*, 123 S. Ct. 584, 587 n.4 (2002), the use of "military service" itself suggests that "bear arms" did *not* have a purely military meaning.

[10] Given its holding, the Ninth Circuit did not pass on the next logical question: what falls within the meaning of the term "arms" within the Second Amendment? *See*, *e.g.*, Lund, at 56-76. As the lower court did not address the question, it is not properly before this Court.

Miller lends further strong support to the view that the Second Amendment secures an individual right. Article I allows Congress to call the militia into federal service, but reserves the appointment of militia officers and training to the States. U.S. CONST. art. I, § 8, cls. 15-16. The Court in *Miller* observed that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces" – *i.e.* to ensure that the militia was available for federal service, whether or not the States attended to it, "the declaration and guarantee of the Second Amendment were made." 307 U.S. at 178. The Second Amendment "must be interpreted and applied with that end in view." *Id.* As the Second Amendment was intended, in part, to secure the militia's effectiveness regardless of whether the States attended to it, it cannot be that the Second Amendment protects only States' right to organize a militia.

3.a. In the face of the clear meaning of the Second Amendment's operational language, the Ninth Circuit attempted to justify its collectivist interpretation by seizing upon the Amendment's prefatory clause. While a preamble may inform, influence, or shape the operational clause, it cannot compel a result contrary to its meaning. *See* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 807 (1998). The Second Amendment's preamble, however, is not inconsistent with the individual liberty mandated by the operational clause.

Certainly, the prefatory clause proffers a purpose for the right to "keep and bear arms." But nothing compels the conclusion that this is the only purpose. Earlier this Term in *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003), the Court addressed a similar construction of the preambulatory language in the Copyright Clause, which reads "The Congress shall have the power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. CONST. art. I, § 8, cl. 8. The Court concluded that Congress's power to secure exclusive rights to authors and inventors is not limited by the prefatory purpose to "promote the progress of science

and useful arts." *Eldred*, 123 S. Ct. at 784. While promoting science and the arts may be the chief purpose of the copyright power, that is not the only purpose. *See*, *e.g.*, *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (advancing science and the useful arts is the "primary purpose" of the clause); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (rewarding inventors and authors is "a secondary consideration" of the clause).

The operational language of the Copyright Clause is expressly contingent on the prefatory language, as it is introduced with the words "by securing." The Second Amendment, by contrast, has no such limitation. If the prefatory language of the Copyright Clause cannot be read to state its sole justification, nor can that of the Second Amendment. Volokh, *The Commonplace Second Amendment*, at 807-13. Rather, the right to keep and bear arms must be understood in light of the many reasons that the founding generation of Americans valued that right, including hunting and self-defense. *See*, *e.g.*, *The Address & Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, Pennsylvania Packet (Dec. 18, 1787) (*reprinted in* 1 DEBATE ON THE CONSTITUTION 526, 532 (Lib. of Am. 1993)).

b. Even assuming *arguendo* that the prefatory clause places a limitation on the scope of the "right of the people to keep and bear arms," it cannot be properly understood to curtail the *individual* nature of the freedom to keep and bear arms.

Militia. The invocation of "the militia" as being "necessary to the security of a free state" supports the conclusion that the right to "keep and bear arms" is an individual one. As the Court in *Miller* acknowledged,

> *the Militia comprised all males physically capable of acting in concert for the common defense*. . . . [O]rdinarily when called for service *these men were expected to appear bearing arms supplied by themselves* and of the kind in common use at the time.

Miller, 307 U.S. at 179 (emphases added). In reaching this conclusion, the *Miller* Court drew upon centuries of consistent understanding. The ratifying debates confirm the Court's understanding of the term "militia." Both the Virginia and North Carolina ratifying conventions spoke of "a well regulated militia composed of the body of the people." *Ratifications and Resolutions of Seven State Conventions* (Sept. 1788) (r*eprinted in* 2 DEBATE ON THE CONSTITUTION 561, 568 (Lib. of Am. 1993)). And, as noted above, the Second Congress defined the militia to comprise "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years." Militia Act, 1 Stat. 271 (1792).[11] Nor can the text be confined to a statist reading. If "the militia" is read to refer to a standing fighting force, the Second Amendment would directly conflict with Article I, which expressly bans the States from maintaining troops. U.S. CONST. art. I, § 10, cl. 3.

Well Regulated. The modifier "well regulated" does not alter the Amendment's meaning. Some argue that "well regulated" constrains the militia to those enrolled, trained, and supplied by the State. Pet. App. 100. This cannot be the case for the same reasons why "militia" by itself cannot mean a specific military force. The historical record further refutes this contention. The Constitution preserved the appointment of officers for, and the training of, the militia to the States, but subject to "the discipline prescribed by Congress." U.S. CONST. art. I, § 8, cl. 16. Under the Militia Act of 1792, the well regulated militia hence meant one enrolled on the public lists, armed, decently equipped, and perhaps occasionally drilled. *Accord Emerson*, 270 F.3d at 234-35 & nn.33-34 (citing authorities). "Well regulated" emphatically did not mean a

[11] The views of early Congresses are strongly persuasive as to Constitutional meaning. *Eldred v. Ashcroft*, 123 S. Ct. at 779; *Printz*, 521 U.S. at 905.

militia armed by the Government, or a militia of trained soldiers.[12]

The term "militia" may be read to limit the right of "the people" only if the former term is held to mean the latter. Such a reading would be inconsistent with several canons of construction. It is presumed that different words used in proximity have different meanings. *See supra* note 9. The Framers employed the term "the people" elsewhere in the Bill of Rights and certainly did not confine it to the "militia." *See supra* at 11; *Verdugo-Urquidez*, 494 U.S. at 265. As Thomas Cooley concluded:

> The meaning of the provision undoubtedly is, 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.

THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES 281-82 (2d ed. 1891). That is why the right is secured to "the people," not to "the militia."

Finally, reading the prefatory clause so narrowly would be to depart from this Court's wealth of decisions affording broad construction to individual civil liberties. *See*, *e.g.*, *Byars v. United States*, 273 U.S. 28, 32 (1927) ("Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'") (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

Security Of A Free State. If anything in the prefatory clause shapes the "right of the people to keep and bear

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[12] Pet. App. 59-63 (Kleinfeld, J., dissenting from denial of petition for rehearing *en banc*); Lund, at 24-25 ("A well regulated militia is, among other things, one that is not overly regulated or inappropriately regulated. The Second Amendment simply forbids one form of inappropriate regulation: disarming the people from whom the militia must necessarily be drawn.").

arms," it is the focus on "the security of a free State." In the Framers' view, the Republic could be challenged either from without *or from within*. *See*, *e.g.*, *Nordyke v. King*, 319 F.3d at 1196 (Gould, J., specially concurring).

The Anti-Federalists had complained bitterly that the Federal government would abuse the militia, allow it to wither, and replace it with a potentially oppressive standing army. *See*, *e.g.*, *Patrick Henry's Objections to a National Army, Speech at the Virginia Ratifying Convention* (June 16, 1788) (*reprinted in* 2 DEBATE ON THE CONSTITUTION, 695-97 (Lib. of Am. 1993)); *Brutus IX*, NEW YORK JOURNAL (Jan. 17, 1788) (discoursing the dangers of standing armies); *Brutus X*, NEW YORK JOURNAL (Jan. 24, 1788) (same); *see also Emerson*, 270 F.3d at 237-39. Their concern ran not only to a professional federal army, but also to a standing, or "select" militia – one always formed, rather than civilian and waiting to be called up. *See Emerson*, 270 F.3d at 250 & n.58 (citing authorities).

The Second Amendment answered the perceived threat to freedom posed by these powers with the guarantee that individual citizens could not be disarmed. This lessened the need for a standing army by providing a ready fighting force if necessary, diminished the specter of a standing army, and thus minimized the potential for domestic despotism, whether state or federal. "[I]f in any blind pursuit of inordinate power, either [the Federal or a State Government] should attempt [to disarm the people], this amendment may be appealed to as a restraint on both." WILLIAM RAWLE, A VIEW OF THE CONSTITUTION (1829).

4. As demonstrated above, the historical circumstances surrounding the Amendment and its very purpose confirm that it secures an individual right. From the English Bill of Rights to the Militia Act of 1792 to the Freedmen Bureau's Bill of 1866, the history of this Nation demonstrates a profound respect for an individual's right

to possess firearms. The Second Amendment empowers individual citizens to defend themselves and their property against the acts of criminals, mob violence, and even state-sponsored oppression. Only individual possession of firearms allows for the effective exercise of self-defense against such threats. It does the rape victim no good to have armed police arrive at the scene after the crime has been committed. It does the shopkeeper no good to have national guardsmen restore order after a riot has destroyed his livelihood. And it would have done the Minutemen no good if the Crown alone had been in possession of guns in the colonies. The Founders understood all this, as reflected in the Second Amendment. As Justice Story observed, "The *right of the citizens* to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary powers of rulers." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1890 (1833) (emphasis added).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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