IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, et al.	)	
	)	
Plaintiffs,	)	Case No. 03-CV-0213-EGS
	)	
v.	)	
	)	
DISTRICT OF COLUMBIA, et al.	)	
	)	
Defendants.	)	
	)	
	)	

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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In accordance with the Order of the Court issued in this action on August 15, 2003, *amicus curiae* American Civil Rights Union submits this brief in support of Plaintiffs' Motion for Summary Judgement and in opposition to Defendants' Motion to Dismiss.

INTEREST OF AMICUS CURIAE

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., and nationally syndicated columnist Joseph Perkins.

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about protecting those whose rights and liberties may be overlooked or infringed due to political correctness or other political bias. In this case, we are particularly concerned that the rights of gun owners, or those who like Plaintiffs want to become gun owners for good reasons, be fully understood and enforced.

INTRODUCTION

Amicus curiae ACRU respectfully urges the Court to focus first and foremost on the facts of the case now before the Court, for we are not engaged here in a debating society exercise, but to decide a particular case on its particular facts.

This case involves a complete ban on the right to keep and bear arms in non-commercial settings within the District of Columbia.[1] The case does not involve criminal defendants, but innocent, law abiding plaintiffs, including one law enforcement officer, who have a well grounded need to protect themselves. Since this case arises in the District of Columbia, we are dealing with direct regulation under the authority of the Federal government, and not state regulation.

Recognizing an individual right to keep and bear arms in the Second Amendment does not mean there can then be no regulation and no restriction on the private ownership and use of arms, any more than the freedom of speech or freedom of religion must be completely unregulated and without restriction. With a recognized individual right, the courts could still balance the interests in that right against the interests in state or Federal regulation, and critical and essential regulations and restrictions would be found valid on that basis. But the issue before the Court in this case is only whether a complete ban on the right to keep and bear arms except in commercial settings can pass constitutional muster.

The Bill of Rights is to be interpreted broadly to protect the rights and liberties of the people. While Defendants and their *amici* argue every word in the Second Amendment must be considered in its interpretation, they then advance an interpretation which would render the entire amendment meaningless. For the right to keep and bear arms while serving in the military is about as meaningless a right as can be imagined.

[1] The D.C. Code prohibits the possession or use of any handgun not registered prior to 1976. D.C. Code Sections 7-2502.01(a) and 7-2502.02(a). Grandfathered handguns and registered rifles and shotguns must be kept unloaded and disassembled or bound by a trigger lock outside of commercial settings or recreational use. D.C. Code Section 7-2507.02. Consequently, any allowed arms in the home or outside of commercial settings or quite limited recreational uses must be kept in a nonfunctional condition. This means citizens are not allowed to *bear* arms within the home or otherwise outside a commercial setting. We submit that the use of arms in a recreational setting does not amount to *bearing* arms.

Only an ideologically predetermined analysis could conclude that this was what the framers of the Constitution were so concerned about that they included it as the second of only 10 amendments in the Bill of Rights.

We respectfully submit that approaching this case with an objective mind open to all of the arguments and evidence, there can be no conclusion but that the Second Amendment does protect an individual right to keep and bear arms, and that a complete ban on that right in this case in general circumstances is unconstitutional. Such an objective and open approach led the court to reach that same conclusion in United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), cert. denied, 536 U.S, 907 (2002), a recent case that analyzed the text, its history, and all of the surrounding issues far more thoroughly than any other. That same approach also recently led Harvard Professor and Constitutional Law scholar Lawrence Tribe to change his longstanding position and recognize as well that the Second Amendment does protect an individual right to keep and bear arms.[2] Most recently, such an analysis has led the government of the United States to change its position as well, and join in the recognition of such an individual right.[3]

SUMMARY OF ARGUMENT

Any analysis of the Second Amendment must begin with its text. That text provides for an individual right in the clear declaratory phrase, "the right of the people to keep and bear arms shall not be infringed." As a matter of plain English, nothing in the prefatory language, "A well-regulated Militia being necessary to the security of a free

[2] 1 Tribe, American Constitutional Law, n. 221 at 902 (3d ed. 2000).
[3] *Opposition to Petition for Certiorari in* United States v. Emerson, No. 01-8780, at 19 n. 3, Appendix A; *Memorandum From The Attorney General To All United States Attorneys, Re:* United States v. Emerson, Nov. 9, 2001, www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf.

State…", limits the substantive, clearly individual right granted in the rest of the Amendment.

Defendants and their *amici* want to read that prefatory language as not only limiting, but nullifying the individual right stated in the rest of the Amendment, by turning that individual right into some poorly defined right of a state to arm a militia. As a matter of plain English, that prefatory statement cannot accomplish such an acrobatic feat.

The language of the Constitution is to be interpreted as internally consistent whenever possible. A preamble in particular is not to be interpreted as contradicting the substantive right that follows if at all possible. Rather than reading the prefatory language to nullify the following statement of an individual right, it would be more reasonable and consistent with canons of constitutional interpretation to read it as strengthening the statement of the following right. The prefatory language does this by bringing up the importance of the militia, which the public so strongly favored at the time for defense of the country, rather than standing Federal armies. What that prefatory language is adding is that the individual right to keep and bear arms that follows must be especially protected, because it is essential to maintaining the state militias (non-standing armies of armed citizens), which were to be the first line of defense for the new nation.

Defendants and their *amici* advance a collective rights interpretation of the Amendment, which holds that it does not provide for any individual right, but only a collective right of each state to arm and maintain its own militia. But the Second Amendment says the right belongs to the people, not the states. Moreover, such a reading would contradict several other provisions of the Constitution, which provide for ultimate

Federal authority and control over the militias, with the states limited to training their respective militias and appointing their officers. Indeed, would we really want a Second Amendment that grants the states a constitutional right to resist the authority and control of the Federal government over a state military force?

Defendants' *amici* offer another alternative interpretation. They argue that the Second Amendment does provide for an individual right, but only a right of citizens to keep and bear arms while serving in the military. But such a right could not be more meaningless, for surely those serving in the military would be provided with weaponry, and they would be required to use the weapons their commanding officers ordered them to use. Reading the Second Amendment in this way effectively just reads the entire Amendment out of the Constitution altogether. Consequently, that could not be what the framers meant.

The individual rights interpretation of the Second Amendment is well supported by the history surrounding the Amendment, which shows that the framers clearly intended to provide for an individual right to keep and bear arms. The overwhelming nature of the weight of this evidence is why there has been a recent strong trend to the individual rights view, as reflected in the change by Professor Tribe, the embrace of this view by the court in Emerson, and the adoption of this view by the government of the United States itself, again changing its previously held view.

United States v. Miller, 307 U.S. 174 (1939) does not preclude an individual right to keep and bear arms. The Court in that case never said anything about the Second Amendment solely protecting a right of the states to arm and maintain a militia, nor did it deny that the Amendment protected an individual right to keep and bear arms. Rather,

the Court simply decided the case by analyzing whether the Second Amendment would protect possession of the weapon in question under the circumstances of the case, and concluded that it did not.

But in analyzing whether the Amendment applied to the weapon at issue, the Court implicitly indicated that the Amendment applied to the individual Defendant in question. For if the Second Amendment does not protect an individual right to keep and bear arms, why analyze whether it covered the Defendant's weapon?

Moreover, in a recent 1997 case, Prinz v. United States, 521 U.S. 898 (1997), the Supreme Court itself stated that it had not decided the scope of the Second Amendment in Miller, but left that question open. Consequently, Miller cannot be dispositive of this case. Other Supreme Court precedents expressly refer to the Second Amendment as encompassing an individual right the same as all other individual rights in the Bill of Rights. Overall, there is substantial legal authority for interpreting the Second Amendment as providing for an individual right to keep and bear arms.

The current DC regulations have been in effect for a quarter century, and they have not been effective in curbing violent crime in the District. Quite to the contrary, such violent crime continues to rage. If this Court recognizes the Second Amendment's individual right to keep and bear arms, that would only mean law abiding individuals such as the Plaintiffs here would be better able to protect themselves. Moreover, the arming of potential victims of violent crime is quite likely to deter criminals from even attempting many such crimes, in addition to stopping such crime once it is initiated. The end result is likely to be a sharp reduction in such crime.

ARGUMENT

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

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

The Second Amendment states in part, "[T]he right of the people to keep and bear arms shall not be infringed." As a matter of plain English, this language provides for an individual right to own, possess, and use firearms. It plainly says that this is a right of the people, not the states. That same term, the people, is used to refer to individual rights in the First, Fourth, Ninth, and Tenth Amendments. Moreover, the Constitution never conflates, but always distinguishes between the terms "state" and "people". E.g. U.S. Const., Amendment Ten, ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the *States*, are reserved to the *States* respectively, or to the *people*.")(emphasis added); Lund, A Primer on the Constitutional Right to Keep and Bear Arms (Virginia Institute for Public Policy, 2002), at 5 ("The Constitution nowhere uses the term 'the people' to refer to state government.").

Moreover, the terms "keep" and "bear" are actions that individuals do. States do not bear firearms. Rather, as Emerson quotes Black's Law Dictionary, "bear" refers to carrying "upon the person or in the clothing or in a pocket, for the purpose…of being armed and ready for offensive or defensive action in a case of conflict with another person." Emerson, 270 F.3d at 232 (quoting Muscarello v. United States, 524 U.S. 125 (1998)(Ginsburg, J. dissenting).[4] The term "keep" is also commonly used to refer to

[4] *Amicus Curiae* Violence Policy Center (VPC) states that the phrase "bear arms" customarily refers to a military function. VPC Brief at 18-19. But as the quote from Black's Law Dictionary above indicates, the

personal ownership. Emerson, 270 F.3d at 232; Nordyke v. King, __F.3d___, 2003 U.S. App. LEXIS 2911 (9th Cir., Feb. 18, 2003)(Gould, J. specially concurring)(…the distinct right to 'keep' arms is individual…." 2003 U.S. App. LEXIS 2911 at *21).

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

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

The only textual argument for suggesting that the Second Amendment protects some collective right of the states rather than an individual right rests on the prefatory language preceding the statement of the substantive right: "A well regulated militia being necessary to the security of a free state…." U.S. Const. Amend. Two. But as a matter of plain English, nothing in that prefatory statement limits the substantive, clearly individual right granted in the rest of the Amendment.

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term also refers to carrying an arm ready for use in a nonmilitary setting. Similarly, the Random House Unabridged Dictionary (2d. ed. 1993) defines the verb "bear" as "to hold or carry" and "to carry, bring". In none of the other definitions listed is there any reference to the word military, let alone a suggestion that the term is used exclusively in a military context.

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

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

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

Defendants and their *amici* want to read that prefatory language as not only limiting, but nullifying the individual right stated in the rest of the Amendment, by turning that individual right into some poorly defined right of a state to arm a militia. As a matter of plain English, that prefatory statement cannot accomplish such an acrobatic feat.

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

Rather than reading the prefatory language to nullify the following statement of an individual right, it would be more reasonable and consistent with canons of

constitutional interpretation to read it as strengthening the statement of the following right. The prefatory language does this by bringing up the importance of the militia, which the public so strongly favored at the time for defense of the country, rather than standing Federal armies. What that prefatory language is adding is that the individual right to keep and bear arms that follows must be especially protected, because it is essential to maintaining the state militias (non-standing armies of armed citizens), which were to be the first line of defense for the new nation.[5]

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

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

Defendants and their *amici* advance a collective rights interpretation of the Amendment, which holds that it does not provide for any individual right, but only a collective right of each state to arm and maintain its own militia. Brady Center Brief at 11-15; Violence Policy Center (VPC) Brief at 7-9, 22-25. But that interpretation contradicts not only the language of the Second Amendment, but the language of other provisions of the Constitution as well.

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[5] We also endorse the well-reasoned argument of the Plaintiffs that the Preamble to the Constitution itself is not used to limit the powers or the rights specified in the Constitution, and similarly the prefatory language of the Copyright Clause has not been read to limit the powers of Congress under that Clause. Consequently, the prefatory clause of the Second Amendment should not be used to limit the following substantive right. Memorandum In Support of Plaintiffs' Motion for Summary Judgement, at 26 –29; Memorandum In Opposition to Defendants' Motion to Dismiss the Complaint, at 30-34. Professor Lund takes the same position. Lund, *supra,* at 7-8.

We endorse as well the well-supported argument of Plaintiffs that even if the prefatory clause is read to limit the right specified in the Amendment, the term militia in that clause should be read to include all adults capable of utilizing firearms, based on the history and judicial precedent cited by Plaintiffs. As a result, the Second Amendment would still protect an individual right to keep and bear arms for all such adults. Memorandum In Support of Plaintiffs' Motion for Summary Judgement, at 12-13, 29-31; Memorandum In Opposition to Defendants' Motion to Dismiss the Complaint, at 6-8, 34-35.

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

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

Thirdly, Article I, Section 8 provides that Congress has the authority to provide for arming the militia. That section grants the states only the authority to train the militia and appoint is officers. The states are granted no other authority over the militia anywhere else in the Constitution. Reading the Second Amendment as providing for the right of the states to arm the militia would again flatly contradict these provisions, which everyone must concede remain effective today.

Fourthly, Article II, Section 2 states that “[T]he President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states….” If the President orders a state militia to stand down, abandon any arms provided by the state, and go home with any individually owned arms, are we to believe that the Second Amendment grants the states a constitutional right to disobey and refuse? That leaves us with a total of 3 other provisions of the Constitution that would have been

repealed by the Second Amendment under the interpretation of the Defendants and their *amici.* But again all of those provisions remain effective today, so the states rights view is not a viable, possible interpretation of the Second Amendment.

Would we really want a Second Amendment that says an openly rebellious state has a constitutional right to arm and maintain a militia and the Federal government cannot order it to disband and leave all but personal weapons behind? If so, wouldn't the actions of the Federal government in the Civil War have been unconstitutional? Isn't such an interpretation far more dangerous than to interpret the Amendment to provide for an individual right of the Plaintiffs in this case, sorely in need of individual self-defense, to keep and bear arms?

As Professor Lund concludes,

> Turning back to the Second Amendment with these facts in mind, it becomes apparent why the Second Amendment cannot possibly have been meant to constitutionalize a right of the states to keep up military organizations like the National Guards. That theory implies that the Second Amendment silently repealed or amended two separate provisions of the Constitution: the clause giving the federal government virtually complete authority over the militia, and the clause forbidding the states to keep troops without the consent of the Congress. When the Bill of Rights was adopted, nobody so much as suggested that it would alter these provisions, and nobody claims such a thing today. Indeed, these two provisions of the original Constitution have allowed the federal government essentially to eliminate the state militias as independent military forces by turning them into adjuncts of the federal army through the National Guard system. Under the states' right theory of the Second Amendment, the National Guard system must be unconstitutional, which everyone (including the Supreme Court) agrees is not the case.

Lund, *supra,* at 9.

Defendants' *amici* offer another alternative interpretation. They argue that the Second Amendment does provide for an individual right, but only a right of citizens to keep and bear arms while serving in the military. VPC Brief at 14-20 ("The Right to

Keep and Bear Arms Is a Right To Use Arms In Military Service As Part Of a State-Organized Militia." Id. at 18); Brady Center Brief at 5-6, 16-17 ("The intent of the Second Amendment was to give individuals an unrestricted access to firearms when the individual had been called to serve in a state militia and when the individual was acting in concert for the common defense. Id. at 6, quoting Robert Hardaway *et al., The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms,* 16 St. Johns J. Legal Comment 41, 114 (2002)).

But are we to believe that what the framers were concerned about in the Second Amendment was to protect the right of citizens to be armed while serving in the military? Indeed, that they were so concerned about it that they listed it second in the sacred list of protected individual rights consecrated in the Bill of Rights? Were the framers concerned that without the Second Amendment Americans might be sent into battle by the government unarmed? Do we have any history of any problem of citizens called into service in the U.S. military, but denied arms while so serving? Surely our history is quite to the contrary, that Americans called to military service have been quite amply armed.

And how exactly would this supposed right to unrestricted access to firearms while serving in the military work? If a commanding officer orders his troops to advance with rifles, could they insist on machine guns instead? Could the ACLU sue the commanding officer if their request for machine guns was not honored? Would soldiers have the constitutional right to ditch their military issue weapons in favor of weapons they brought from home that they preferred?

Quite clearly, a right to keep and bear arms while serving in the military could not be more meaningless, for surely those serving would be provided with weaponry, and they would be required to use the weapons their commanding officers ordered them to use. Reading the Second Amendment in this way again effectively just reads the entire Amendment out of the Constitution altogether. For these reasons, that could not be what the framers meant. See Emerson, 270 F.3d at 232 n.30.

The only possible interpretation of the Second Amendment is that it provides for an individual right to keep and bear arms.

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

The United States of America was born out of the crucible of a great debate between the Federalists and the Anti-Federalists. The Federalists wanted a national government strong enough to be effective in performing the essential functions of government for an increasingly sprawling and ultimately huge nation. The Anti-Federalists wanted to make sure the new national government did not exceed those proper bounds, and invade the rights and liberties of the people, or worse. It was the grand compromise between them embodied in the Constitution that has made America far and away the greatest and most successful exercise in self-government in the history of the world.

That grand compromise involved a Constitution granting the Federal government only certain, limited, enumerated powers. Then a Bill of Rights was added in response to popular demand, insisting upon it as a condition of ratification of the Constitution. That

Bill of Rights listed specifically what the Federal government could not do, the rights and liberties of the people the new national government could not invade.[6]

One of the central concerns in this great debate was that the new Federal government would establish a large standing army with the power to oppress the people. To address this concern, the Federalists offered the guarantee of an individual right of the people to keep and bear arms, empowering them with a healthy measure of self-security. With such a right firmly protected, the new nation could rely for its security where feasible on state militia composed of part-time citizen soldiers who would bring their own arms when they were needed to assemble for a fight. This would minimize the need for Federal standing armies, though the framers recognized that the militia alone would not be sufficient to counter foreign threats. This was the great compromise embodied in the Second Amendment, based precisely on an individual right to keep and bear arms.

The entire sweep of early American history is consistent with and supports this analysis. John DeWitt expressed the Anti-Federalist concern over standing federal armies in saying that under the new Constitution, without the Second Amendment, Congress "may arm or disarm all or any part of the freemen of the United States, so that when their army is sufficiently numerous, they may put it out of the power of the freeman militia of America to assert and defend their liberties…." The Antifederalist Papers, 75 (M. Borden, ed. 1965).

In Federalist 29, Hamilton responds to this concern by offering the individual right to keep and bear arms, writing

[6] The Brady Center completely misconstrues this fundamental history when it says, "The Second Amendment, like the other provisions comprising the Bill of Rights, was intended to achieve this goal by limiting the power of the federal government over the states." Brady Center Brief at 13. But, quite clearly, almost all of the provisions of the Bill of Rights involved individual rights, not states' rights. The rights of

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

The Federalist No. 29, at 145 (Alexander Hamilton)(G. Carey, J.McClellan eds. 1990).

Madison offered this same response, raising "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast to Europe, where "the governments are afraid to trust the people with arms. The Federalist No. 46 at 244 (James Madison)(G. Carey, J. McClellan eds. 1990). With the grand compromise between the Federalists and the Anti-Federalists, the new American government would be unlike these European governments as the right of the people to keep and bear arms would be constitutionally protected through the Second Amendment.

Madison continues his response by saying that any threat of oppression from a Federal standing army would be opposed by "a militia amounting to near half a million of citizens with arms in their hands…." Id. Defendants' *amici* cite this passage as well, VPC Brief at 24, Brady Center Brief at 14. But where, pray tell, do they expect the arms for these half million citizens to come from? In an unguarded moment, the Brady Center tells us, correctly stating that the U.S. Supreme Court in Miller, "noted that, historically, militia members were expected to supply their own arms 'when called for service' to '[t]he militia which the States were expected to maintain and train.'" Brady Center Brief at 4-5, quoting Miller at 178-179. But how could this be a protection for the Anti-Federalists if the new federal government would have the power to disarm the citizens, as would be the case under the interpretation of the Second Amendment advanced by

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the states are mentioned only once, in the Tenth Amendment, and then only as a leftover catchall, along with individual rights of the people.

defendants and their *amici*? It would only be a protection if the Second Amendment in fact did provide for an individual right to keep and bear arms.

The Anti-Federalists accepted this compromise, as reflected in the amendments they proposed from the ratifying conventions in calling for a Bill of Rights. These amendments uniformly called for an individual right to keep and bear arms. New Hampshire proposed that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." 1 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 326 (2d ed. 1836). Madison's home state of Virginia proposed, "That the people have a right to keep and bear arms; that a well-regulated Militia composed of the body of the people trained to arms is the proper, natural, and safe defense of a free state." 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 658 (2d. ed. 1836). Sam Adams of Massachusetts, one of the foremost patriots behind the Revolution, proposed an amendment that Congress shall never "prevent the people of the United States who are peacable citizens from keeping their own arms." VPC Brief at 26.

Defendants *amici* state that since the framers didn't use the exact language of these proposals that means they "rejected" them, or even "emphatically rejected" them. Brady Center Brief at 19; VPC Brief at 26. But where are the quotes and the statements showing that the framers emphatically rejected them, which Defendants' *amici* would surely have cited with glee if they existed. And if the Antifederalists and others who supported a true, individual right to keep and bear arms were "the **losers** in the great struggle over the Constitution," VPC Brief at 26, then where are the quotes and statements from these losers complaining about and protesting their loss?

What everyone knows is that the Bill of Rights was meant precisely to satisfy the concerns of the Antifederalists and others worried about protecting individual rights and liberties against the powers of the new Federal government. So the proposed amendments from the state ratifying conventions should be taken as legislative history indicating what the framers were trying to say in the Second Amendment.

This is reflected in Madison's original proposal for the Second Amendment, which followed the language from the Virginia ratifying convention. 12 Papers of James Madison 193-194 (C. Hobson et al. eds. 1979). Madison's notes from the speech introducing the amendments that became the Bill of Rights show that Madison understood his Second Amendment to provide for an individual right to keep and bear arms, not a collective right of the states. His notes said that the proposed amendments "relate first to private rights." Id. This is shown as well by his placing the Amendment second among a long list of individual rights in the Bill of Rights, instead of among the provisions relating to the militias and their governance in Article I.

Instead of statements rejecting the proposals of the supposed loser Antifederalists and others seeking protection for an individual right to keep and bear arms, Madison and his colleagues stated that such an individual right was precisely what they were adopting. For example, Rep. Fisher Ames of Massachusetts included the right to keep and bear arms among the other individual rights in his statement "The rights of conscience, of bearing arms, of changing the government are declared to be inherent in the people." Letter from Fisher Ames to George Richards Minot (June 12, 1789)(excerpt reprinted in Young, The Origin of the Second Amendment 668 (2d. ed. 1995). Not one statement can be found indicating that the framers thought the Second Amendment provided for some

collective right of the states to arm a militia, or that they were rejecting the idea of an individual right to keep and bear arms.

While defendants' *amici* repeatedly cite the recently published articles of their colleagues in the gun control movement, they never mention the more contemporaneous top constitutional scholars and authorities from the 19th century who recognized the Second Amendment as providing precisely for an individual right to keep and bear arms. Supreme Court Chief Justice Joseph Story stated in an 1842 treatise that the Second Amendment protects "a right of the citizen" and emphasized that "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…." Story, A Familiar Exposition of the Constitution of the United States, 264-265 (1842). Story also wrote in an 1833 treatise, "[T]he right of the people to keep and bear arms has justly been considered as the palladium of the liberties of the republic." Story, Commentaries on the Constitution, Vol. 3, at 746 (1833).

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

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

Rawle, A View of the Constitution of the United States of America 125-26 (Da Capo Press 1970)(2d. ed. 1989). It doesn't sound like Rawle thought the Amendment created a right of the states, but rather an individual right that should be applied against the states as well as the Federal government.

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

> Perhaps the most accurate conclusion one can reach with any confidence is that the core meaning of the Second Amendment is a populist/republican/federalism one: Its central object is to arm "We the People" so that ordinary citizens can participate in the collective defense of their community and their state. But it does so not through directly protecting a right on the part of states or other collectivities, assertable by them against the federal government, to arm the populace as they see fit. Rather, the amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in defense of themselves and their homes…a right that directly limits action by Congress or by the Executive Branch….

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

This overwhelming evidence also convinced the court in Emerson, which wrote, "[T]he history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training." 270 F.3d at 260. The same conclusion can be found in Kasler v. Lockyer, 23 Cal.4th 472, 505 (2000)(Brown, J. concurring), cert. denied, 531 U.S. 1149 (2001): "The founding generation certainly viewed bearing arms as an individual right based upon both English common law and natural law, a right logically linked to the natural right of self-defense."

The evidence has also now convinced the government of the United States of the correctness of the individual rights view, again changing its previous position.[7] As a result, the Executive Branch of the U.S. government, led by the President relying on the research and analysis of the U.S. Justice Dept., now holds that the Second Amendment does provide constitutional protection for an individual right to keep and bear arms.

No doubt the framers did not intend for the right to keep and bear arms to be absolute, allowing for no restriction or regulation, a position not taken by Plaintiffs or their *amici* in this case either.[8] Any statement of the framers that may be found reflecting this non-absolute position would not mean that they intended no protection for the individual right to keep and bear arms. Similarly, any regulation or restriction on the ownership or use of firearms in the colonies or early states would also not mean that the framers intended no protection for this individual right, particularly in regard to the power of the Federal government to disarm the citizens completely.

Despite any such regulations or restrictions, some of which may have been reasonable and some of which may have been out of bounds on analysis, gun ownership and use in the colonies and early states was widespread. Dederer, War In America to 1775 (1990)("[B]y the eighteenth century Americans were the most heavily armed people in the world; not only did colonial law mandate owning and maintaining a firearm, but through the Revolution *most* colonials still shot for the table." Id. at 251); Black, War for

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[7]See footnote 3 above.

[8] The Brady Center suggests that an individual right to keep and bear arms would "eviscerate the capacity of the government to suppress domestic insurrections…." and seriously undermine "the ability of the government to suppress domestic insurrections." Brady Center Brief at 20-21. But, again, under the non-absolute right undoubtedly intended by the framers, and advanced by Plaintiffs and their *amici*, Federal and state governments would have all necessary powers to counter domestic insurrections. It is the interpretation advanced by Defendants and their *amici* that would eviscerate the power to counter such insurrections. For they read into the Amendment a right of the states to arm and maintain a militia, constitutionally protected from the authority of the Federal government.

America: The Fight for Independence 1775-1783 (1991), at 48; Staples v. United States. 511 U.S. 600, 610 (1994)("[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country."). Jefferson, in fact, attributed Revolutionary War victories to "our superiority in taking aim when we fire; every soldier in our army having been intimate with his gun since infancy."[9]

While the framers did not intend an absolute right, it is completely unbelievable to suggest, given the political context of the times, that the Antifederalists and others would have quietly accepted a Federal government with the power to disarm the public. But Defendants' *amici* not only insist on that indefensible position, they go on to say that disagreeing with their transparent error is akin to arguing for an alternative history of "science fiction fantasy, stories about parallel historical universes in which the South won the Civil War[10] or the American Revolution never happened." VPC Brief at 26-27 (quoting Saul Cornell, *A New Paradigm for the Second Amendment,* 22 Law and His. Rev. (forthcoming 2004)). Such is the character of their argument.

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

Defendants and their *amici* rely heavily on the U.S. Supreme Court precedent of United States v. Miller, 307 U.S. 174 (1939). But that case does not preclude an individual right to keep and bear arms. Rather, that case and other Supreme Court precedents support such a right.

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

[10] Actually, under the interpretation of the Second Amendment offered by Defendants and their *amici,* the South could well have won the Civil War, for the southern states would have had a constitutionally protected right to arm and maintain militias in defiance of the Federal government.

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

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

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

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

In fact, the Court expressly held that the Defendant was a member of the militia referred to in the Second Amendment, because all adults capable of utilizing a firearm were considered part of the militia. The Court said,

> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia *comprised all males physically capable of acting in concert for the common defense.* "A

> body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms *supplied by themselves* and of a kind in common use at the time.

Miller, 307 U.S. at 178-79(emphasis added). This strongly suggests that the Amendment does apply to individuals like the Defendant in that case, and, indeed, all adults capable of bearing arms.

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

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

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

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

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

> who have otherwise developed sufficient connection with this country to be considered part of that community.

Id. at 265 (citation omitted)(emphasis added).

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

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

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

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

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

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

Emerson summarized these Supreme Court cases by saying,

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

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

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

All of this constitutes substantial legal authority for interpreting the Second Amendment as providing an individual right to keep and bear arms. The opinions of the DC Circuit in Fraternal Order of Police v. United States, 332 U.S. App. D.C. 49, 152 F.3d 998 (D.C.Cir. 1998) and Fraternal Order of Police v. United States, 335 U.S. App. DC 359, 173 F.3d 898 (D.C. Cir.), cert. denied, 528 U.S. 928 (1999) also do not preclude this result, and, again, appear, in fact, to further support it.

Those opinions again never said anything about the Second Amendment solely protecting a right of the states to arm and maintain a militia, nor did they deny that the

Amendment protected an individual right to keep and bear arms. They simply followed the Miller analysis, and concluded that, "We suppose Miller would be met by evidence supporting a finding that the disputed rule would materially impair the effectiveness of a militia, though perhaps some other showing could suffice." 173 F.3d at 906. Applying that standard to the present case, it appears that the effectiveness of the militia would, indeed, be materially impaired if the law abiding population were virtually disarmed through regulations that bar the possession and use of functional firearms in general circumstances, as the DC regulation does here.

Among the other circuit courts, Emerson provided the most comprehensive analysis of any court concerning the scope and history of the Second Amendment, in concluding that the Amendment clearly does protect an individual right to keep and bear arms. Other circuits reaching a different result present just conclusory analyses and do not nearly outweigh the overwhelming burden of evidence, precedent, and textual analysis discussed above.

Consequently, there is ample legal authority for finding that the Second Amendment does, indeed, provide for an individual right to keep and bear arms.

IV. THE EFFECTIVE BAN IN THE DISTRICT OF COLUMBIA ON THE RIGHT TO KEEP AND BEAR ARMS HAS NOT BEEN EFFECTIVE, AND MAY HAVE BEEN COUNTERPRODUCTIVE.

The recognition of an overtly expressed constitutional right does not turn on empirical data regarding the effectiveness and impact of that right, though these factors may affect the ultimate scope given the right. The present case just raises for the Court the question of whether an individual right to keep and bear arms is to be recognized at

all, for the challenge is to regulation that bans completely the right to keep and bear functional arms in general circumstances.

However, it is important to note that the effect of recognizing such a right and ruling for the Plaintiffs would not be socially negative, but, rather, quite positive.

The current DC regulations have been in effect for a quarter century, and they have not been effective in curbing violent crime in the District. Quite to the contrary, such violent crime continues to rage.

If this Court recognizes the Second Amendment's individual right to keep and bear arms, that would only mean law abiding individuals such as the Plaintiffs here would be better able to protect themselves. Moreover, the arming of potential victims of violent crime is quite likely to deter criminals from even attempting many such crimes, in addition to stopping such crime once it is initiated. The end result is likely to be a sharp reduction in such crime. This argument is broadly supported by the most comprehensive analysis of such issues ever conducted, which can be found in Lott, More Guns, Less Crime (University of Chicago Press, 2000).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully urges this Court to grant Plaintiffs' motion for summary judgment, and deny Defendants motion to dismiss.

Dated: August 28, 2003

Respectfully submitted,

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