

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, et al.,)	Case No. 03-CV-0213-EGS
)	
Plaintiffs,)	MEMORANDUM OF
)	POINTS AND AUTHORITIES
v.)	IN REPLY TO OPPOSITION
)	TO MOTION FOR
DISTRICT OF COLUMBIA, et al.,)	SUMMARY JUDGMENT
)	
Defendants.)	
)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY
TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

COME NOW the Plaintiffs, Shelly Parker, Dick Anthony Heller, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon, by and through undersigned counsel, and submit their Memorandum of Points and Authorities in Reply to the Opposition to the Motion for Summary Judgment.

Dated: June 10, 2003

Respectfully Submitted,

Alan Gura (D.C. Bar No. 453449)
Gura & Day, LLC
Robert A. Levy (D.C. Bar No. 447137)
Gene Healy (D.C. Bar No. 468839)
Clark M. Neily, III (D.C. Bar No. 475926)
1717 K Street, N.W., Suite 600
Washington, D.C. 20036
Phone: 202.550.8777
Fax: 202.318.4512

By: _____

Alan Gura

Attorneys for Plaintiffs

**MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY
TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

Defendants reveal a profound misunderstanding of constitutional government and the rule of law. What civil right could possibly survive the following analysis:

Conditions and practical considerations, not arcane legal theories and historical excursions, should determine the outcome of cases like the present and the constitutionality of statutes like those at issue here.

Opp. and Reply, p. 16.

In other words: the constitutionality of a statute is controlled by what the government believes will work in practice, not by what the Constitution requires. Rather than meet the plaintiffs' "arcane legal theories and historical excursions" about the meaning of the Constitution, defendants urge the Court to dismiss the case because the challenged statutes are guided by a benevolent purpose.

There is no reason to limit this logic to Second Amendment rights. Does the Fourth Amendment impede the police in their search for evidence? It must be disregarded. Does political discourse interfere with efficiently implementing the government's policies? The First Amendment must be an anachronism. Do the Fifth and Sixth Amendments help the guilty escape justice? They must be obsolete. Under defendants' theory of this case, Americans enjoy only those rights that the government wishes to honor.

A policy argument can be advanced against any constitutional right, but such arguments are best left for a constitutional convention or the ratification debates for constitutional amendments. Once ratified, constitutional provisions impose policy choices respecting

individual rights, *all* of which restrict governmental actors from doing whatever they wish. “The Constitution with its amendments is the supreme law of this land, not historical artifact, so we must read it, determine what it means, and follow it, regardless of our policy preferences.”

Silveira v. Lockyer, 328 F.3d 567, ___, 2003 U.S. App. LEXIS 8564 *14 (9th Cir. May 6, 2003) (Kleinfeld, J., dissenting).

Defendants’ statistics confirm that violent crime in the District of Columbia is out of control. Yet neither the city nor any of its employees can be held accountable for the failure to provide adequate public safety services, and not a single such service has been free of scandal. Plaintiffs could justifiably argue that the superior policy choice is to allow individuals the means with which to defend themselves against violent crime in their own homes. But plaintiffs do not need to make such an argument. The Second Amendment already incorporates that policy preference, and it must be enforced in plaintiffs’ favor and against the city and its mayor, whether the defendants agree with the Constitution’s wisdom on this point, or not.

Perhaps because the defendants’ opposition is so pre-occupied with an irrelevant policy preference, it also contains a heartening degree of concession. Defendants’ summary judgment papers make clear that there is no factual dispute between the parties. Many of plaintiffs’ factual assertions are not contested, and of those that are contested, none is opposed with competent, relevant evidence.

Furthermore, defendants *do not even address, let alone contest*, plaintiffs’ following arguments:

1. That handguns are protected “militia” weapons under the test set forth in United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L.Ed. 1206 (1939), regardless of how one otherwise interprets Miller or the Second Amendment right;
2. That plaintiffs’ ability to defend themselves and act in concert with others for the common good is impaired by the challenged statutes, which effectuate a ban on all functional firearms within the home and practically all handguns;
3. That the challenged statutes could not survive if the Second Amendment right, assuming it is an individual right, were fundamental in nature;
4. That the term “militia,” as used in the Second Amendment and other federal laws, does not refer to a specific organization but rather to the body of the people capable of carrying arms; Miller, 307 U.S. at 178-79; Perpich v. Dept. of Defense, 496 U.S. 334, 110 S. Ct. 2418, 2423, 110 L. Ed. 2d 312 (1990); 10 U.S.C. § 311;
5. That “the people” referred to in the Second Amendment are the same “people” referred to throughout the Bill of Rights, United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990);
6. That the District of Columbia Circuit implicitly adopted the individual rights interpretation of the Second Amendment by holding that a law impairing an individual’s ability to serve in the militia may violate the Second Amendment, Fraternal Order of Police v. United States (“FOP II”), 335 U.S. App. D.C. 359, 173 F.3d 898 (D.C. Cir.), cert. denied, 528 U.S. 928, 120 S. Ct. 324, 145 L. Ed. 2d 253 (1999);

7. That ordinary rules of grammatical and statutory construction logically support an individual rights interpretation of the Second Amendment;
8. That the collective or states' rights interpretation is incompatible with U.S. Const., art. I, sec. 8, cl. 16 (reserving to Congress the power to arm the Militia);
9. That the collective or states' rights interpretation is incompatible with U.S. Const, art. I, sec. 10, cl. 3 (forbidding the states from keeping troops without Congressional consent); and
10. That preambular statements cannot meaningfully limit or override the operative clauses of constitutional provisions, Eldred v. Ashcroft, 537 U.S. 186, 123 S. Ct. 769, 154 L. Ed. 2d 682 (2003).

Defendants' opposition repeats and builds upon a recitation of case law supporting the collective rights viewpoint, but does not engage in any analysis of these decisions, which are actually quite weak analytically. Defendants appear to assert two core, though mutually exclusive, arguments:¹ (1) that the Second Amendment right is a collective right, not an individual right; (2) that even if the Second Amendment were an individual right, the right is not fundamental and the statutes could withstand rational basis scrutiny. Defendants mention but do not explore several other points of opposition, which nonetheless merit some reply.

¹Defendants' motion to dismiss contained only the argument relating to collective rights. The other asserted theories in defendants' combined brief must therefore be considered only in relation to plaintiffs' motion for summary judgment.

SUMMARY OF ARGUMENT

All of plaintiffs' asserted facts are now established, as they are either unchallenged, or denied without any evidentiary basis. Plaintiffs have requested that defendants supplement their factual disputes with *evidence*, as required by Fed. R. Civ. P. 11(b)(3), (4).

Defendants do not address the substance of United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), cert. denied, 536 U.S. 907, 122 S. Ct. 2362, 153 L. Ed. 2d 184 (2002), claiming only, incorrectly, that the case's discussion of Second Amendment rights is dicta. The argument is demonstrably incorrect. The hinted suggestion that plaintiffs other than Dick Heller lack standing to challenge the ban on handgun ownership because they did not engage the futile act of applying for an unavailable permit is also wrong. The D.C. Circuit recognizes that futile acts are not required to sustain a facial challenge to the validity of governmental policy.

Defendants assert that the Second Amendment protects only a collective right, but they do not explain their reasoning beyond reciting the facts and conclusions of some collective rights cases. In large part, defendants' brief repeats verbatim argument from their motion to dismiss, which plaintiffs have already addressed in some detail. The critical flaw in defendants' collective rights arguments is their persistent failure to recognize that "the Militia" described in the Second Amendment and elsewhere in the Constitution is not a discreet organization such as the National Guard, but rather the body of the people of the United States capable of bearing arms and acting in concert for the common good – as defined both by Congress and the Supreme Court.

Finally, defendants claim that if the Second Amendment secured individual rights, such rights would not be fundamental, and the challenged statutes would survive rational basis review.

Neither claim is correct. To the extent defendants claim that any right subject to police power regulation is reviewed under a *rational basis* standard, they are plainly incorrect. No right is absolute, but the power to regulate is often subject to intermediate or even strict scrutiny. The precedent cited by defendants purportedly supporting rational basis review of Second Amendment claims does no such thing; those cases, mostly discussing equal protection or the incorporation doctrine, depend on the assumed absence of Second Amendment rights.

Defendants themselves acknowledge that the regulation of firearms involves issues of “life and death,” Opp. and Reply, p. 16. Moreover, defendants’ collective rights theory is rooted in the notion that the militia is “necessary to the security of a free state.” How, then, could Second Amendment rights not be “fundamental”? And even if those rights were not fundamental, defendants’ total ban on the keeping of ordinary, functional firearms within one’s home is plainly incompatible with an express constitutional right, no matter what level of judicial scrutiny is applied.

ARGUMENT

I. ALL OF PLAINTIFFS’ ASSERTED FACTS ARE NOW ESTABLISHED.

As plaintiffs have consistently maintained, this case presents only a question of law, there being no possible factual dispute either as to plaintiffs’ intentions nor the operation of the challenged statutes and policies. Considering defendants’ response to the motion for summary judgment, the absence of a factual dispute is established.

Fed. R. Civ. P. 56(e) provides, in pertinent part:

. . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this

rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

LCvR 7.1(h) and 56.1 each provide, in pertinent part:

. . . An opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement . . . In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

Failing to file an adequate separate statement of genuine issues that points to specific evidence establishing a dispute is grounds for treating the moving party's statement of facts as admitted. SEC v. Banner Fund Int'l, 341 U.S. App. D.C. 175, 211 F.3d 602 (D.C. Cir. 2000).

The following numbered facts in plaintiffs' separate statement of undisputed material facts are not challenged: 1, 2, 3, 4, 5, 6, 8, 9, 10, 12, 14, 16, 18, 20, 22, 25, 28, 29, 30, 31, 32, 33, and 34. Among these are *all* factual assertions regarding the defendants' policies, including the facts that defendants maintain a complete ban on the ownership of handguns not registered by September 24, 1976, and forbid the possession of lawfully owned firearms for self-defense within the home, even where self-defense by other means would be lawful under District of Columbia law. Defendants also do not contest that plaintiffs Parker and Heller live within high-crime neighborhoods, the latter containing two open-air drug markets, nor do defendants contest Parker's on-going problems with drug dealers in her neighborhood or the fact that plaintiff Palmer has successfully used a handgun to ward off a hate crime.

The assertions ostensibly challenged by defendants relate to the plaintiffs' intention to possess firearms within their homes, ownership of firearms outside the District of Columbia, and

the effect of firearm limits on plaintiffs' abilities to defend themselves and act in concert with others for the common good. Such facts are established by plaintiffs' sworn declarations, which are not controverted. Rather, to challenge these facts, defendants refer globally to an article from the New England Journal of Medicine, a table of District crime statistics, and a news release from the Bureau of Alcohol, Tobacco and Firearms about statistics regarding the sources of guns used to commit crime in the year 2000.²

None of defendants' exhibits quotes plaintiffs as making statements contrary to their sworn declarations, or even relates to the plaintiffs in any way whatsoever. Therefore, the tacit assertion that these exhibits provide evidentiary support for a factual dispute about whether plaintiffs would possess functional firearms in the absence of the challenged statutes, or own firearms located outside the District of Columbia, or be better able to defend themselves and act in concert with others with firearms than without, is utterly specious.³

II. PLAINTIFFS ARE NOT REQUIRED TO ENGAGE IN A USELESS ACT IN ORDER TO BRING THEIR FACIAL CHALLENGE.

Defendants state that "only one of the four [sic] plaintiffs has actually applied for and been denied a license to [possess guns in their home for self-defense]." Opp. and Reply, p. 2.

²The usefulness of the BATF statistics for any purpose is questionable. The study states that the majority of *recovered* crime guns originate from outside the District of Columbia. That tends to prove the irrelevance of the District's various gun bans. Of course, since the District solves so few of its many crimes, and aspires to solve barely over half its murder cases, David A. Farenthold, "D.C. Police Cut Goal on Closing Homicides; Ramsey Calls New Target For Solving Cases Realistic," Washington Post, June 26, 2002, p. B01, it is difficult to come to any conclusions about the origin of guns used in District crimes.

³Moreover, defendants' statement is itself a plain violation of Fed. R. Civ. P. 11(b)(3), (4) – which will be explored more fully in a forthcoming motion if defendants do not supplement or withdraw their separate statement as plaintiffs have requested.

The sentence is false, misleading, and in any event irrelevant.

There are six plaintiffs in this case, not four. None of the *six* plaintiffs has applied for a license to possess guns in his or her home for self-defense, which plaintiffs would interpret to mean a license to render a firearm functional. The law does not provide for the existence of licenses that would exempt a person from the operation of D.C. Code § 7-2507.02 (forbidding the possession of any functional firearm). Defendants do not challenge the fact that they maintain a complete ban on the possession of all firearms for purposes of otherwise lawful self-defense within the home. Pl. Statement of Undisputed Material Fact, Nos. 29, 34. Indeed, plaintiff St. Lawrence owns a lawfully registered shotgun, a fact that is apparently disputed by defendants, but not by reference to any evidence.

It is true, of course, that none of the plaintiffs has applied for a license to carry a pistol within his or her home. However, since none of the plaintiffs could be granted permission to possess a pistol, much less carry it, application for a carry permit would be premature even if it were necessary. But it is not necessary: defendants do not challenge the fact long recognized by the District of Columbia's Court of Appeals: that such licenses are "virtually unobtainable." Bsharah v. United States, 646 A.2d 993, 996 n.2 (D.C. 1994); Pl. Separate Statement of Undisputed Material Facts, Nos. 32, 34.

One plaintiff, Dick Heller applied for a license to possess a pistol within his home and was summarily denied in accordance with D.C. Code § 7-2502.02(a)(4), which provides that no such licenses will be provided after September 24, 1976. Defendants do not challenge the fact of this ban. Pl. Statement of Undisputed Material Fact, Nos. 28, 34.

Heller's experience confirms that application for possession of a handgun is a futile act. The notion that all six plaintiffs were required to undertake a futile act to maintain a challenge to the handgun ban is simply incorrect as a matter of law. Grid Radio v. F.C.C., 349 U.S. App. D.C. 365, 278 F.3d 1314 (D.C. Cir.), cert. denied, 123 S. Ct. 82 (2002).

In Grid Radio, an unlicensed radio broadcaster challenged the constitutionality of the F.C.C.'s ban on micro-broadcasting. The F.C.C. asserted that because the broadcaster did not apply for a license, he lacked standing to challenge the policy forbidding the issuance of such licenses. The D.C. Circuit rejected the F.C.C.'s reasoning:

The record before us is clear: But for the ban, Szoka would have applied for a license, and the Commission points to no individual characteristics--of either Szoka or Grid Radio--that would have led it categorically to deny his application in the absence of the ban. Moreover, we agree with Szoka that applying for a waiver would have been futile.

Grid Radio, 278 F.3d at 1319 (citing Prayze FM v. FCC, 214 F.3d 245, 251 (2nd Cir. 2000); Ellison v. Connor, 153 F.3d 247, 255 (5th Cir. 1998); DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev., 258 U.S. App. D.C. 257, 810 F.2d 1236, 1238 (D.C. Cir. 1987)).

Grid Radio is consistent with the law's general disdain for requiring futile acts. For example, it is well-established that minority job applicants need not test a "whites only" sign before filing a Title VII claim. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-66, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). As defendants do not deny that handgun permits are unavailable, there is no reason to believe that a handgun application by plaintiffs other than Heller would have been granted.

III. IN ASSERTING THE COLLECTIVE RIGHT THEORY, DEFENDANTS MERELY RECITE UNEXAMINED AND IRRELEVANT CONCLUSIONS, INACCURATELY DESCRIBE SUPREME COURT PRECEDENT, AND ERRONEOUSLY DEFINE THE “THE MILITIA.”

Defendants’ opposition and reply brief rests upon a collective right interpretation of the Second Amendment, but offers no analysis or discussion of that theory beyond reciting the conclusory and unpersuasive opinions that recite the theory. Much of this recitation simply repeats the same list of precedent provided in defendants’ memorandum in support of their motion to dismiss. As plaintiffs have already responded to this list, there is little need to repeat the analysis.

In reply, plaintiffs again emphasize that opinions of the District of Columbia Court of Appeals, such as the unpersuasive opinion in Sandidge v. United States, 520 A.2d 1057 (D.C.), cert. denied, 484 U.S. 868, 108 S. Ct. 193, 98 L. Ed. 2d 145 (1987), are not binding on this Article III court and may well be at odds with the District of Columbia Circuit’s opinion in FOP II, 173 F.3d 898; that dismissal of a direct appeal in the United States Supreme Court,⁴ is no more authoritative than a denial of certiorari; and that “the militia,” as discussed at length by plaintiffs without response from defendants, does not refer to any specific organization.

The erroneous definition of “the militia” is repeated, yet again, in defendants’ attempts to describe Miller. Defendants posit the following misleading description, which confuses the facts of Sandidge with those of Miller, and refers to “Sandidge” when discussing the subject of Miller:

⁴As in Burton v. Sills, 53 N.J. 86 (N.J. 1968), appeal dismissed, 394 U.S. 812, 89 S. Ct. 1486, 22 L. Ed. 2d 748 (1969), whose defects have otherwise been examined at length in plaintiffs’ opposition to the motion to dismiss. Opp. to Motion to Dismiss, pp. 9-10.

The Supreme Court held that the “obvious purpose” of the Second Amendment was “to assure the continuation and render possible the effectiveness of” state militias. *Id.*, 307 U.S. at 178.

Opp. and Reply, p. 7.

Note the placement of defendants’ closing quotation mark. “State militias” is substituted for the original words of the Supreme Court, “such forces.” Within the context of that quote, it is apparent that “such forces” means *the* Militia, not a *state* militia or *state* militias. Here is an *accurate* reproduction of Miller’s language:

The Constitution as originally adopted granted to the Congress power -- "To provide for calling forth *the* Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, *the* Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." With obvious purpose to assure the continuation and render possible the effectiveness of *such forces* the declaration and guarantee of the Second Amendment were made.

Miller, 307 U.S. at 178 (emphasis added).

It bears repeating that Miller was quoting article I, section 8 of the Constitution, one of various constitutional provisions that describe “the Militia.” See, i.e. U.S. Const. amend. V; art. II, sec. 2 (“*the* Militia of the *several* States”) (emphasis added); see, e.g. Perpich v. Dept. of Defense, 496 U.S. 334, 340, 110 S. Ct. 2418, 2423, 110 L. Ed. 2d 312 (1990); 10 U.S.C. § 311 (defining “the militia of the United States”).

Miller, of course, proceeded to define “the militia” – a definition once again ignored by defendants:

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 the kind in common use at the time.

Miller, 307 U.S. at 179 (emphasis added).

“The militia” of the Second Amendment is plainly not a state organization. Even if the Second Amendment’s preamble were relevant to the nature of the substantive rights protected by the amendment’s operative clause, the preamble plainly refers to private individuals.

IV. EMERSON IS NOT DICTA, BECAUSE ITS REASONING WAS REQUIRED TO DECIDE THE ISSUE BEFORE THE FIFTH CIRCUIT.

Rather than address the substance of the Fifth Circuit’s opinion in Emerson, 270 F.3d 203, defendants seize upon Judge Parker’s concurring opinion in the case labeling the court’s opinion as “dicta.” With all due respect to Judge Parker, Emerson cannot be dicta.

Black defines dicta as “[o]pinions of a judge which do not embody the resolution or determination of the specific case before the court.” Black’s Law Dictionary, Sixth ed., p. 454 (1991).

The District Court’s opinion in Emerson held that the Second Amendment secures an individual right to keep and bear arms, and dismissed the government’s indictment as being inconsistent with such rights. Emerson v. United States, 46 F. Supp. 2d 598 (N.D. Tex. 1999), rev’d, 270 F.3d 203 (5th Cir. 2001). The Fifth Circuit could not reverse that outcome without reviewing the District Court’s individual rights analysis. It would have been inefficient and unusually circuitous for the Fifth Circuit to skip the question of whether the Second Amendment guarantees any individual rights, but then issue an advisory opinion as to that right’s parameters.

That precise issue was decided by the district court and was briefed and argued by both parties in this court and in the district court . . . unless we were to determine the issue of

the proper construction of section 922(g)(8) in Emerson's favor (which the special concurrence does *not* suggest), resolution of this appeal requires us to determine the *constitutionality* of section 922(g)(8), facially and as applied, under the Second Amendment . . . We have done so on a straightforward basis.

Emerson, 270 F.3d at 265 n.66.

V. RATIONAL BASIS REVIEW IS NOT AN APPROPRIATE STANDARD FOR REVIEWING LAWS REGULATING SECOND AMENDMENT RIGHTS, NOR CAN A COMPLETE PROHIBITION ON EXERCISE OF A RIGHT BE A REASONABLE REGULATION CONSISTENT WITH THE RIGHT'S EXISTENCE.

Defendants apparently conclude that simply because firearms may be regulated, any infringement of Second Amendment rights must be subject to rational basis review. Defendants apparently conflate the general definition of the police power with a conclusion that all exercises of the police power must be subject to rational basis review. Opp. and Reply, p. 3.

The conclusion is illogical. Governments exercise their police powers whenever they enact regulations, regardless of whether such regulations touch upon fundamental rights. That does not mean that regulations impinging upon First Amendment speech rights, for example, are subjected to rational basis review. It is the nature of the right in question, not the fact that the government is exercising regulatory authority, that determines the level of constitutional review.

Defendants' rational basis claim is clearly a fallback position, as well it should be: Even if the Second Amendment were held to create or recognize an individual right of gun ownership or possession, the District statutes challenged here would survive attack because they satisfy the "rational basis" standard for evaluating the constitutionality of legislation in this area of the law.

Opp. and Reply, p. 12.

However, all of the cases that purportedly support defendants' assertion that rational basis is the proper standard of review for Second Amendment claims suffer from one fatal defect – all

are dependent on assuming the *absence* of an individual Second Amendment right. All of defendants' cited cases assumed that the Second Amendment does not apply – either because the evidentiary record did not support a Second Amendment claim, or because the court rejected incorporation of the Second Amendment against the state, or because the court simply refused to recognize the existence of any Second Amendment rights to which any level of review would apply.

For example, defendants point to a footnote in Lewis v. United States, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980), and FOP II, *supra*, as supporting the notion that “[i]t is well settled that the ‘rational basis’ test is the appropriate standard for measuring gun control legislation against constitutional attack.” *Opp. and Reply*, p. 12. Lewis and FOP II contain no such holdings. Lewis affirmed the constitutionality of prohibiting felons from possessing firearms against an equal protection challenge. The Second Amendment was mentioned only in a footnote observation that no constitutional rights were implicated by the restriction. Considering that the support for this conclusion was a parenthetical description of Miller as a case holding that “the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia,’” Lewis, 445 U.S. at 65 n.8, it is fair to conclude only that no serious argument was entertained about felons’ role in the effectiveness of the militia.

Pages 903 and 904 of FOP II, which are quoted by defendants as preferring “‘rational basis’ review of gun legislation over ‘strict scrutiny’ or some other standard,” *Opp. and Reply*, pp. 12-13, contain no such language. Indeed, the D.C. Circuit explicitly begins its discussion of the *Fifth Amendment* analysis on those pages by stating, “we assume for the purposes of this

section that the regulation does not infringe a fundamental right,” FOP II, 173 F.3d at 903, because the record in the case did not establish such a violation.

Similarly, defendants claim that pages 268 and 269 of Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), cert. denied, 464 U.S. 863, 104 S. Ct. 194, 78 L. Ed. 2d 170 (1983), support their rational basis position, but those pages contain only a discussion of the appropriate level for reviewing application of Illinois’s constitution to that state’s police power. Quilici, of course, contains no holding about the substance of the Second Amendment, as it held the amendment was not incorporated against the state.

Similarly, defendants conjure “holdings” about the appropriate level of Second Amendment review by citing to Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999), cert. denied, 528 U.S. 1116, 120 S. Ct. 9341, 145 L. Ed. 2d 813 (2000); United States v. Warin, 530 F.2d 103 (6th Cir.), cert. denied, 426 U.S. 948, 96 S. Ct. 3168, 49 L. Ed. 2d 1185 (1976) and Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002) for the same proposition. Gillespie’s cited analysis is a Fifth Amendment, not a Second Amendment analysis. For the conclusion that the right to possess firearms is not fundamental, Gillespie drew upon the Seventh Circuit’s earlier opinion in Sklar v. Byrne, 727 F.2d 633, 637 (7th Cir. 1984), and Sklar’s progeny, United States v. Jester, 139 F.3d 1168, 1171 (7th Cir. 1998), which followed Quilici’s holding that the Second Amendment is inapplicable to the states.⁵ Warin held only that no right is absolute, and

⁵Sklar also curiously asserted, without explanation, “Nor is the asserted right to bear arms pivotal in the effective exercise of constitutionally guaranteed rights.” Sklar, 727 F.2d at 637 (citation omitted). Such reasoning is the very definition of circular. Unfortunately, Sklar’s self-contradictory analysis is characteristic of the remarkably shallow, atextual and ahistorical reasoning employed by many courts refusing to recognize any meaningful content in the Second Amendment.

specifically declined to recognize the existence of an individual Second Amendment right.

Silveira applied rational basis to the equal protection portion of that case only after concluding that the Second Amendment guarantees no individual rights.

As discussed exhaustively in plaintiffs' moving papers, the right to keep and bear arms was widely considered, like most provisions of the Bill of Rights, a fundamental and critical check on potential tyranny. That view has been repeatedly re-enforced by the Supreme Court's reference to the Second Amendment among "[t]he full scope of the liberty guaranteed by the Due Process Clause." Planned Parenthood v. Casey, 505 U.S. 833, 848, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (quoting Poe v. Ullman, 367 U.S. 497, 543, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (Harlan, J., dissenting)); Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 1937, 52 L. Ed. 2d 531 (1977). Miller itself provides a good account of the Amendment's deep historical roots; see also Baker, Janice, "Comment: The Next Step In Second Amendment Analysis: Incorporating the Right To Bear Arms Into The Fourteenth Amendment," 28 Dayton L. Rev. 35 (Fall, 2002) (arguing Second Amendment should be fundamental, qualified right subject to intermediate scrutiny). As summed up most recently by Judge Kozinski,

[T]he simple truth--born of experience--is that tyranny thrives best where government need not fear the wrath of an armed people . . . The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed – where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Silveira, 2003 U.S. App. LEXIS 8564 at *5-7 (Kozinski, J., dissenting).

The claim that Second Amendment rights are not fundamental is also at odds with the collective right theory. Although the Second Amendment's preamble is merely explanatory and

prefatory, providing one possible justification for the right to keep and bear arms, it is critical to the collective right theory. As that theory goes, the government, not the individual, is charged with securing the freedom and survival of the state. The Second Amendment rights are intended only for the preservation of the militia, which is, in turn, “necessary to the security of a free state.” Yet how could such a critical right – a right necessary to the state’s survival and freedom – not be fundamental?

The Second Amendment cannot be both collective yet of minimal importance. The very argument that the Second Amendment secures a collective right – incorrect though it may be – underscores the amendment’s fundamental policy aims – the survival of a free society – on which point there is no dispute among the parties.

Finally, even if the individual rights protected by the Second Amendment were not fundamental, and subjected to only rational basis review, the challenged statutes would plainly fail even that level of scrutiny. Assuming the existence of an individual right to keep and bear arms, that right must include, at an absolute minimum, the right to keep ordinary, functional firearms in one’s home. Licensing, registration, and educational mandates are regulatory in nature, and their reasonableness may be open to debate. However, a *complete ban* on the possession of functional firearms certainly cannot be consistent with a right to such arms.

As defendants admit, the rate of violent crime in this city is alarming. Defendants are unable to keep the peace, and unwilling to be held accountable for the general failure of their police department. As a result, many unfortunate District of Columbia citizens are transformed into the statistics of defendants’ Exhibit A.

Plainly, an armed citizen is better able to defend herself against assault than an unarmed citizen. If possessing a gun were riskier than not possessing a gun, the District's police officers, including plaintiff Heller while he is at work, would be unarmed. Whether gun ownership, on balance, is a societal good or evil can certainly be debated. See, i.e. Kleck and Gertz, "Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun", 86 J. Crim. L. & Criminology 150 (1995) (reviewing ten different studies, concluding that handguns are used by victims in self defense three times as often as they are used by criminals). The news is replete not only with gun crimes, but also life-saving, defensive uses of firearms. A small sample from this month thus far: Schmit and Angel, "Robbed Ex-Cop Kills Suspect," Detroit Free Press, June 6, 2003; Groark, Virginia, "Police: Dad Shot Intruder Outside Daughter's Room," Chicago Tribune, June 6, 2003; "Woman Fends Off Burglars With Shotgun," Port Clinton (Oh.) News Herald, June 3, 2003; James, Stacy, "Bedridden Man Shoots, Kills Home Invasion Suspect," KOMO-TV 4 News (Seattle), www.komotv.com/stories/25168.htm, June 3, 2003; Glenn, Mike, "2 Suspects Shot Dead In Robbery," Houston Chronicle, June 1, 2003.

The Court's role, however, is not to constitutionalize policy preferences. It is to discern which policies are already embodied in the document. Plaintiffs respectfully submit that the Second Amendment guarantees them a right to keep and bear ordinary, functional firearms, including handguns, within their own homes. However else firearms may be regulated, defendants' complete bans are simply incompatible with the Constitution's plain text.

CONCLUSION

There being no factual disputes, and no reasonable dispute as to the constitutionality of the challenged statutes, plaintiffs respectfully pray that the motion for summary judgment be granted.

Dated: June 10, 2003

Respectfully Submitted,

Alan Gura (D.C. Bar No. 453449)
Gura & Day, LLC
Robert A. Levy (D.C. Bar No. 447137)
Gene Healy (D.C. Bar No. 468839)
Clark M. Neily, III (D.C. Bar No. 475926)
1717 K Street, N.W., Suite 600
Washington, D.C. 20036
Phone: 202.550.8777
Fax: 202.318.4512

By: _____

Alan Gura

Attorneys for Plaintiffs