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 RESPONSE TO AMICI**
	)	
DISTRICT OF COLUMBIA, et al.,	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO AMICI

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 pursuant to the Court's order of August 15, 2003, submit their Memorandum of Points and Authorities in Response to Amici.

Dated: September 11, 2003

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PRELIMINARY STATEMENT

The Brady Center and the Violence Policy Center ("BC/VPC amici") seek to avoid the clear command of the Second Amendment that the right of the *people* to keep and bear arms *shall not be infringed* by distorting the historical record and torturing language. It is quite clear that BC/VPC amici would have preferred a Constitution that allowed the government to disarm law-abiding citizens and treat the ownership of firearms as a privilege rather than a right. But that is not the Constitution we inherited, and it is not for future generations to substitute their own policy preferences for those of the Framers, as the BC/VPC amici have attempted to do in their briefs. The undeniable fact is that American citizens enjoy the personal right to possess weapons. While that right, like all others protected by the Constitution, is not absolute, it is a *right*; it cannot be repudiated by legislative fiat or judicial inaction.

ARGUMENT

I. ANTI-FEDERALIST ARGUMENTS AGAINST THE ORIGINAL CONSTITUTION PROVIDE NO GUIDANCE TO THE SECOND AMENDMENT.

The BC/VPC amici's interpretation of the Second Amendment is ahistorical because they interpret the Second Amendment based on criticisms the *Anti-Federalists* made of the original Constitution. But the Anti-Federalists lost. The Federalists, who were the solid majority nationwide, forged the Constitution and obtained ratification by the states over the Anti-Federalist objections to its contents. The Federalists had only to accommodate the Anti-Federalist objection to what the Constitution did not contain: a Bill of Rights.

The historical record utterly precludes the BC/VPC amici's contention that the Second Amendment derived from the Anti-Federalists' rejected criticisms of the Constitution's military-

militia provisions. The Bill of Rights was authored not by an Anti-Federalist, but by James Madison, who was, more than any other, the architect of the original Constitution and its defender against those very Anti-Federalist criticisms. To ensure that the Virginia Convention would ratify the Constitution, Madison had committed to sponsoring guarantees of what he called "private rights" – rights, he insisted, the Constitution never gave the federal government the power to infringe in the first place.[1] But Madison's commitment did not include institutional change. He strongly favored the federal military-militia clauses the Anti-Federalists so opposed. Contrary to an intent to modify those clauses, on introducing his Bill of Rights Madison stressed that it "'deliberately proposed amendments *that would not detract from federal powers.*'"[2] From these facts it is clear that the Second Amendment concerns "private rights," not state powers.[3]

This presents a further problem with the BC/VPC amici's suggestion that the Second Amendment "limit[ed] the power of the federal government over the states," by transferring back to the states power over militia that the Constitution gave to the federal government. BC Brief at 13; see also VPC Brief at 22. By that claim, VPC and BC contradict more than 180 years of Supreme Court precedent to the effect that federal power over the militia supersedes that of the

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[1] Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 221-23 (1983).

[2] Glenn H. Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1748 (1995) (quoting JOYCE L. MALCOLM, THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162 (1994) (emphasis in Reynolds & Kates)).

[3] Note that "[a]s used throughout the Constitution, the people have 'powers' or 'rights,' but federal and state governments have 'powers' or 'authority,' never 'rights.'" United States v. Emerson, 270 F.3d 203, 228 & n.24 (5th Cir. 2001). Wherever the Constitution and Bill of Rights speak of individual rights they are called "rights" while state or federal governmental powers are invariably called "power."

states. Indeed, the "preemption doctrine" actually originated in cases holding that state power over the militia exists only so far as federal power has not been exercised.[4]

Further support for the proposition that the Second Amendment relates to the rights of individuals, and not, as the BC/VPC amici erroneously contend, the allocation of power between the national and state governments is provided by Madison's intended placement of what is now the Second Amendment in the Constitution. When Madison first proposed a Bill of Rights, no one conceived of adding the proposed amendments at the end of the Constitution. Rather, Madison's notion was simply to insert the amendments into the relevant sections of the original Constitution. He intended the Second Amendment – and all the remaining Amendments I-IX – to go in Article III, which contained the original Constitution's handful of individual *rights* guarantees, such as the right to a jury trial, the prohibition against ex post facto laws, etc. By contrast, Madison intended the Tenth Amendment, dealing with state powers, to go in a new and renumbered Article VII.[5]

II. THE SECOND AMENDMENT'S PURPOSE WAS TO GUARANTEE INDIVIDUALS THE MEANS OF SELF-DEFENSE.

Generally speaking, Anti-Federalist views that did not prevail during the ratification process are relevant to constitutional interpretation only when they evidence a consensus across the entire political spectrum of the early Republic. Such a consensus existed that the most basic

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[4] Houston v. Moore, 18 U.S. 1, 23-24 (1820) (federal power is paramount; federal militia law preempts state authority), Martin v. Mott, 25 U.S. 19 (1827) (federal power to call militia from state into federal service), Selective Draft Law Cases, 245 U.S. 366, 383 (1918) (Congress may abolish state militia by incorporating it in federal army), Perpich v. Department of Defense, 496 U.S. 334 (1990) (militia may be called into federal service over state objection; federal authority is paramount).

[5] Emerson, 270 F.3d at 264 n.54 (5th Cir. 2001).

"human right," as James Monroe phrased it, is the right to possess the means of defending oneself and one's family.[6] Expressing that consensus, Thomas Paine wrote:

> The peaceable part of mankind will be continually overrun by the vile and abandoned while they neglect the means of self-defense. The supposed quietude of a good man allures the ruffian; while on the other hand, arms like laws discourage and keep the invader and the plunderer in awe, and preserve order in the world as well as property. . . . Horrid mischief would ensue were one half the world deprived of the use of them; . . . the weak will be come a prey to the strong.[7]

Similarly, a consensus existed among the political philosophers who most influenced the Founders that

> [i]t is a natural right which the people have reserved to themselves, confirmed by the [English] Bill of Rights to keep arms for their own defense, and, as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.[8]

This philosophical consensus, which the BC/VPC amici fail to acknowledge, much less refute, provides the theoretical underpinning of the Second Amendment, while the Founders' recent experiences in defeating English tyranny and settling a wild, unexplored, and often dangerous continent lends practical insight to their views on the importance of recognizing a personal right to own weapons.

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[6] See, e.g., Kates, *supra* note 1, at 228-30 (citing John Adams, Patrick Henry, Thomas Jefferson, James Madison, George Mason, and James Monroe).

[7] 1 WRITINGS OF THOMAS PAINE 56 (Conway ed. 1894).

[8] BOSTON UNDER MILITARY RULE 79 (Oliver Dickerson ed., 1936), *quoted in* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 58 (1984); see also Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, *in* 9 CONSTITUTIONAL COMMENTARY 101-02 (1992) (every free man has an inalienable right to defend himself; self-defense is the primary natural right).

III. THE TEXT OF THE SECOND AMENDMENT DOES NOT DIVERGE FROM THE PRECEDING "RIGHT TO ARMS" PROPOSALS.

The BC/VPC amici highlight what they consider to be a disparity between the Second Amendment's succinct rights clause and the language of various preceding proposals that the right to arms be guaranteed. See BC Brief at 18-19; VPC Brief at 25-26. But neither Madison nor his contemporaries saw any such disparity. To the contrary, review of their

> writings, both public and private, finds the Founders consistently, routinely jumbling the Second Amendment together with the freedoms of speech, press and/or religion in the same sentence and referring to them jointly as "*human* rights," "*private* rights," rights "respecting personal liberty," "essential and sacred rights" which "each individual reserves to himself." *No instance whatever* has been found of them referring to the right to arms as being fundamentally different from the others guaranteed in the Bill of Rights in that it was narrow or limited to the militia or to militiamen.[9]

Furthermore, Madison endorsed a commentary which appeared in Federalist papers in Philadelphia (where Congress was considering his Bill of Rights) describing the effect of what became the Second Amendment as confirming the people "'in their right to keep and bear *their private arms*.'"[10] The BC/VPC amici briefs actually reinforce plaintiffs' point by emphasizing the supposed disparity between the Second Amendment's wording and Sam Adams' proposal in the Massachusetts Convention that "the said Constitution be never construed to prevent . . . the people of the United States who are peaceable citizens from keeping their own arms." Once again, contemporaries saw no disparity. In supporting Madison's proposed Bill of Rights, Anti-

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[9] Randy E. Barnett & Don B. Kates, "*Under Fire: The New Consensus on the Second Amendment*," 45 EMORY L.J. 1139, 1211 (1996) (italics in original; internal citations omitted). Of course the general rule in constitutional construction is deference to interpretations close in time to the provision being interpreted. Powell v. McCormack, 395 U.S. 486, 547 (1969).

[10] Kates, *supra* note 1, at 224 (quoting an article by Madison ally and correspondent Tench Coxe that first appeared in the Philadelphia Federal Gazette on June 18, 1789 and was subsequently endorsed in a letter from Madison to Coxe).

Federalist newspapers described it as a reiteration of the *Anti-Federalist* Adams' proposed amendments. *See id.* In sum, there was bi-partisan agreement that the Second Amendment embodies the vital "human right" of individuals' "to keep and bear their private arms."

Moreover, contrary to the BC/VPC amici's assertions, there was bipartisan agreement that the Second Amendment did *not* embody Anti-Federalist objections to the original Constitution. An Anti-Federalist editorial bitterly lamented that "the absolute command vested . . . in Congress over the militia, are [sic] not in the least abridged by this amendment."[11] Accordingly, the Anti-Federalists in the First Congress tried to supplement Madison's Bill of Rights, proposing additional constitutional amendments that actually did embody the concerns BC/VPC amici claim the Second Amendment addresses. But those proposals were voted down by the Federalist majority.[12]

IV. THE "STATES' RIGHTS" VIEW WAS A CONCEPT UNKNOWN TO THE FOUNDING FATHERS.

As discussed below, *one* reason the Second Amendment guaranteed individuals the right to arms was to protect the arms of the militia – *i.e.*, the personal arms of the individuals who made up the militia. But that does not make the Second Amendment a guarantee of "states' rights" (a term not used by the Framers), nor does it mean that the Framers' did not also intend to guarantee the basic "human right" to possess arms for self defense.

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[11] JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 163 (1994) (quoting the prominent Anti-Federalist Centinel, written by Samuel Bryan).

[12] *Id*. at 161; Kates, *supra* note 1, at 225 n. 89.

The very idea of the Second Amendment as a "states' right" rather than an individual right is an artifact of the twentieth century gun control debate:

> If anyone entertained [the states' right concept] in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for *no known writing surviving from the period between 1787 and 1791 states* [that concept].[13]

The "states' right" view remained unknown to Americans for at least another century. Thus, a 183-page law review article examining all nineteenth century discussions finds *none* asserting that the Second Amendment guarantees a states' right rather than an individual one.[14] Commentators routinely analogized the right to arms to free speech and jury trial, as did the Founders themselves. See *supra*, note 9. And Justice Story's authoritative commentary explained that the reason for the right to arms was the fact that "[o]ne of the ordinary modes, by which tyrants accomplish their purpose without resistance, is, by disarming the people, and making it an offense to keep arms."[15] This understanding of the Amendment "was held by [Judge Cooley and] every other scholar in the period who discussed the issue." Id. at 1468.

Besides its counterfactual historical analysis, the Brady Center offers the red herring that "those who created the Bill of Rights did not believe that the Second Amendment constrained" state regulation of guns. BC Brief at 22. But of course the Framers did not believe that, for the Bill of Rights served to limit federal, not state power. Barron v. Baltimore, 32 U.S. 243 (1833).

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[13] William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L. J. 1236, 1243 n.19 (1994) (emphasis added) (quoting Halbrook, *supra* note 8, at 83).

[14] David Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359.

[15] Id. at 1395 (quoting JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264-65 (1842).

Provisions of the Bill of Rights were only made applicable to the states by the 14th Amendment. And the standard history of the 14th Amendment shows that its advocates, like all other nineteenth century commentators, viewed the Second Amendment as an individual right and that they intended it to apply against the states: "the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right[s] to freedom of speech . . . due process . . . and to bear arms."[16] In any event, the District of Columbia is not a state and thus the incorporation doctrine is not an issue in this litigation.

V. THE PHRASE "KEEP AND BEAR ARMS" HAS NEVER BEEN LIMITED TO THE MILITARY CONTEXT.

While the phrase "keep and bear arms" is certainly useful in describing military activity, that is hardly the only context in which the phrase can be used. The late eighteenth century saw numerous uses of the phrase "keep and bear" arms which referred to individuals engaged in private self-defense, hunting, or other non-military activities. These included Madison's sponsorship in the Virginia legislature of a law expressly differentiating people who "bear a gun" for hunting and other non-military purposes from people having guns "whilst performing military duty."[17] Indeed, the Pennsylvania Constitution of 1776 guaranteed people the "right to bear arms in defense of themselves and the state," as did Vermont's identically phrased 1777 Declaration of Rights. Id. at 152-53. And, once again, the Madison-approved commentary described the Amendment as confirming the people's right "to keep and bear their private arms."

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[16] MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 104 (1986).

[17] Stephen P. Halbrook, *What the Framers Intended: A Linguistic Interpretation of the Second Amendment*, 49 LAW & CONTEMP. PROBS. 151, 153 (1986); see also Halbrook, *supra* note 8, at 64, 75-77.

The current Supreme Court justices have all endorsed opinions using the phrase "bear arms" to describe a situation in which an individual "carries" a firearm. Muscarello v. United States, 524 U.S. 125, 128, 130, 142 (1998). And lest anyone suggest modern court usage may differ from late eighteenth century usage, note that Noah Webster, who participated in the 1787 ratification debate, later famously published a dictionary of American English. Its definition of "keep" has no military connotation at all. Its definition of "bear" is even more adverse to the BC/VPC amici, mentioning arms in a context that applied to civilians, not uniformed soldiers: "to bear arms in a coat."[18]

VI. FORFEITURE OF A CONSTITUTIONAL RIGHT BY CERTAIN PEOPLE DOES NOT NEGATE THE EXISTENCE OF THE RIGHT FOR ALL.

The BC/VPC amici note that Pennsylvanians who refused to take a loyalty oath were disarmed during the Revolution, VPC Brief at 27, as were Catholics for a short time in Maryland, BC Brief at 22, and suggest this provides further evidence that there is no constitutional right to arms. But it proves no such thing: "In classical republican political philosophy, the concept of a right to arms was inextricably and multifariously tied to that of the 'virtuous citizen'" – wherefore enemies of the state, children, the insane, criminals and the irresponsible have always been understood to have no rights under the Second Amendment.[19] Tories could be disarmed

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[18] Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), defined "keep" as "1. To hold: to retain in one's power or possession; not to lose or part with; as, to keep a house or a farm; to keep anything in the memory, mind or heart. 2. To have in custody for security or preservation." It defined "bear" as "1. To support; to sustain; as to bear a weight or burden; 2. To carry; to convey; to support and remove from place to place; as, 'they bear upon the shoulder'; 'the eagle beneath them on her wings;' 3. To wear; to bear as a mark of authority or distinction; as, to bear a sword, a badge, a name; *to bear arms in a coat*." (emphasis added).

[19] Halbrook, *supra* note 13, at 146; see also Kates, *supra* note 1, at 266; Emerson, 270 F.3d at 227 n.21.

during the Revolution because they were considered enemies of the state, as were Catholics at times in Protestant England and its colonies. In modern times, children, felons, and the mentally infirm are routinely deprived or restricted in their exercise of numerous core constitutional rights, but that is hardly an argument against the existence of such rights.

VII. AMICI RELY UPON DISCREDITED SOURCES IN ATTEMPTING TO DEPICT EARLY AMERICA AS A PLACE WHERE PRIVATE POSSESSION OF ARMS WAS ROUTINELY PROHIBITED BY GOVERNMENT.

On page 22 of its brief, The Brady Center cites a rather obscure book by Harold Peterson for the proposition that "colonial legislatures from New Hampshire to South Carolina imposed communal storage of firearms, permitting them to be removed only in times of crisis or for muster day." Surely the Brady Center, which presumably examines gun-related literature in meticulous detail, must know that its assertion has been unmasked as a blatant falsehood ginned up by historian Michael Bellesiles in his thoroughly discredited book, *Arming America: The Origins of a National Gun Culture*.[20]

In reality, far from requiring that arms be stored communally, colonial militia laws typically required that: (i) every man carry a gun whenever he left his home for the fields or to

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[20] Bellesiles, a supporter of the collective right view, argued in his book that gun ownership in America was rare and regulated until the twentieth century. The book garnered much attention, initially for its bold argument, later because it turned out Bellesiles fabricated most of his sources. For example, Columbia University awarded Bellesiles its prestigious Bancroft Prize for *Arming America,* and then revoked the prize when it became clear the book "violated the basic norms of acceptable scholarly conduct" – in other words, that it was a fraud. *Announcement of Dec. 13, 2002 of Columbia University Board of Trustees*, http://hnn.us/articles/1157.html. Bellesiles was forced to resign his position at Emory University in October, 2002. Despite the widely publicized Bellesiles scandal, the Brady Center apparently accepted Bellesiles' representation about what Peterson's book said rather than actually consulting the book itself. The Peterson book, as cited by Brady, provides no support whatsoever for the proposition that "communal storage of firearms" was common throughout the colonies. Excerpts of Peterson's book are available at www.guncite.com/gun-control-more-bellesiles.html.

travel; (ii) all households contain a gun, even if only women or others exempt from militia call-up resided there; and (iii) every physically able man of military age be armed and respond to militia call-up.[21] Prof. John Dederer, quoted but dismissed by Bellesiles, wrote that "by 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."[22] English historian Jeffrey Black agreed with Dederer.[23]

Indicative of the universality of access to firearms – and of the Founders' strong approval – is Jefferson's attribution of 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.*"[24] At the outset of the Revolution, an Englishman residing in colonial America wrote home: "Rifles infinitely better than those imported [to the colonies] are daily made in Pennsylvania, and all the gunsmiths everywhere employed. . . . In marching through the woods one thousand of these riflemen would cut to pieces ten-thousand of your best English Troops."[25] Moving to the period immediately after the Bill of Rights was written, two other historians state that "[m]ost

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[21] See, e.g., Barnett & Kates, *supra* note 9, at 1205.

[22] JOHN M. DEDERER, WAR IN AMERICA TO 1775: BEFORE YANKEE DOODLE (1990), *quoted in* MICHAEL BELLESILES, ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE 12 (2000).

[23] JEREMY BLACK, WAR FOR AMERICA: THE FIGHT FOR INDEPENDENCE 1775-1783 48 (1991).

[24] Letter from Thomas Jefferson to Giovanni Fabbroni dated June 8, 1778 in THOMAS JEFFERSON: WRITINGS 760 (Merrill D. Peterson ed., 1984).

[25] ROBERT L. O'CONNELL, OF ARMS AND MEN: A HISTORY OF WAR, WEAPONS AND AGGRESSION 172 (1989).

Americans entered the nineteenth century with firearms still at their sides. *Men and boys carried firearms into the fields to work.*"[26]

VIII. AMICI'S DISCUSSION OF THE MILITIA IS UNAVAILING.

The BC/VPC amici present a false dichotomy according to which the Second Amendment *either* relates to weapons of the militia *or* it relates to individuals' personal arms, despite the fact that the Amendment itself mentions both militia and the "right of the people." But as one commentator has explained:

> The Second Amendment was meant to accomplish two distinct goals each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defense and self-preservation.
>
> . . . . The second and related objective concerned the militia and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public, and Madison's original version of the Amendment, as well as those suggested by the states, described the militia as . . . the body of the people.[27]

Moreover, the BC/VPC amici simply assume, without ever explaining why, that if the Second Amendment did relate only to the arms of the militia that would somehow validate a law prohibiting the militia's members – who are, after all, the entire adult citizenry – from possessing those arms as personal weapons. And this is no anachronism; current federal law provides that the militia of the United States consists not only of the National Guard but also "all able-bodied males at least 17 years of age . . . and under 45 years of age." 10 U.S.C. § 311; see also D.C. Code § 49-401 (all able-bodied males aged 18 to 45 except incompetents, felons and members of select professions).

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[26] LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 108 (1975) (emphasis added).

[27] Malcolm, *supra* note 2, at 162-63.

Without directly addressing these issues, the BC/VPC amici seek to avoid them by mischaracterizing "militia" as meaning troops or soldiers. See BC at 14-18; VPC at 14-20. Besides being factually inaccurate, this argument reinforces the disparity between what the BC/VPC amici say the Second Amendment is limited to – namely, the arms of troops – and the actual text of the Second Amendment, which addresses the "right of the *people* to keep and bear arms." By so distorting the meaning of "militia," the BC/VPC amici transform it into something the Constitution specifically forbids states to have: "troops." U.S. Const. art. I, § 10, cl. 3.

The Constitution allows states to have militias precisely because the militia known to the Founders did not consist of professional soldiers, but rather individual citizens carrying their own personal weapons. See, e.g., United States v. Miller, 307 U.S. 174, 179 (1939). Far from being "an organized military unit," VPC Brief at 14, the militia was a *system of laws* that imposed arms duties on the entire law-abiding adult populace. True, women, seamen, over-age men, clergymen and some officials were exempt from training and service call-ups. But "the duty to keep arms applied to *every* household, not just to those containing persons subject to militia service."[28] A typical colonial law ordained

> that every house keeper or housekeepers within this Province shall have ready continually upon all occasions within his *her* or their house for him or themselves and for every person within his *her* or their house able to bear armes one Serviceable fixed gunne of bastard muskett boare.[29]

So vital was it considered that the whole populace be armed that the colonies mandatorily distributed arms to those who could not afford them with the recipients being required to pay

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[28] Kates, *supra* note 1, at 215 (emphasis in original)

[29] ARCHIVES OF MARYLAND 1:77 (William Hand Browne, ed., 1885) (emphasis added).

"when they shal be able,"[30] while parents and employers were required to provide guns for the servants and adult children of their households.[31]

The colonial militia laws also required that all men – again including the over-aged and others exempt from militia service – carry arms while in the fields or while traveling. See Barnett & Kates, *supra* note 9, at 1205. Compliance with that requirement might have been spottier in urban areas where Indian attack was a dim memory and militia training call-ups were uncommon. But the basic arms possession requirements were seriously enforced. Officials were charged to inspect homes and parishioners were required to bring their guns for inspection by deacons (church attendance being compulsory).[32] As late as 1770, Georgia required church officials to inspect parishioners fourteen times a year to assure they had working firearms.[33]

The BC/VPC amici's failure to grasp the true nature of the American militia is epitomized by the Brady Center's assertion that "[t]here is no sensible way to believe that allowing all citizens to bear arms would create a 'well regulated' fighting force." BC Brief at 18. But however senseless it may seem to amici, that is exactly the system of militia regulation known to the Founders. Likewise, in equating militia with soldiers or troops rather than the entire people, the BC/VPC amici conflate the militia as understood by the Framers with a "select" militia like today's National Guard. See, e.g. Emerson, 270 F.3d at 251 n.58 (providing

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[30] NATHANIEL B. SHURTLEFF, RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1:83 (1853).

[31] For the actual texts, of the various militia law requirements described in this section see http://www.claytoncramer.com/primary.html#MilitiaLaws.

[32] See Malcolm, *supra* note 2, at 139-40.

[33] See Kates, *supra* note 1, at 216.

numerous examples of distrust and fear of a "select militia.") One scholar derives from these facts the following explanation of the Second Amendment:

> In short, one purpose of the Founders having been to guarantee the arms of the militia, they accomplished that purpose by guaranteeing the arms of the individuals who made up the militia. In this respect it would never have occurred to the Founders to differentiate between the arms of the two groups in the context of the amendment's language. The personally owned arms of the individual were the arms of the militia. Thus the amendment's wording, so opaque to us, made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free state, they guaranteed the people's right to possess those arms.

See Kates, *supra* note 1, at 217-18.

Another of the BC/VPC amici's false assumptions is that Madison's unsuccessful attempt to include a right of conscientious objection in the proposed Second Amendment has some bearing on its guarantee of the right to arms. See BC Brief at 14-16. On the contrary, the Bill of Rights is made up of loosely connected provisions whose co-existence in one amendment has never been deemed to minimize each other. There is no more reason to see the conscientious objector provision as limiting the right to arms than there is to see freedom of the press as a limit on freedom of speech, simply because those related rights are included in the same amendment.

IX. THE ENGLISH RIGHT TO ARMS WAS SOLELY INDIVIDUAL.

The Violence Policy Center acknowledges the importance of the English Declaration of Rights in the history of the Second Amendment but, asserts, mistakenly, that the Declaration or Rights "did not concentrate on individuals" and that "during the debates over [it] no one complained that individuals were unable to keep arms for their personal use." VPC, at 21-22. As with the Brady Center's unfortunate reliance on Bellesiles' fictitious history suggesting communal ownership of arms in the colonies, the VPC's discussion of the English Declaration of

Rights grossly distorts the historical record. In reality, William III accepted the Declaration as a pledge that he would refrain from James II's tyrannical acts. Among these were James' use of the militia to disarm Protestants, and the case of Sir John Knight, a wealthy and prominent Anglican official prosecuted under an ancient law about carrying arms and famously acquitted. The court ruled that the law recognized a privilege of "Gentlemen to ride armed for their security."[34].

Contrary to the assertion on page 21 of the Violence Policy Center's brief, not only was James' general disarmament of Protestants cited as a grievance in the debates on the Declaration of Rights, members of Parliament bitterly complained that King James had personally disarmed them. Id., at 115-21. As originally drafted, the provision on arms asserted "'It is necessary for the Public Safety, that the Subjects which are Protestants [then 98% of the population] should provide and keep arms for their common Defence.'" Id., at 117. But when enacted, this formulation was watered down to a right to have arms for *individual* defense. As a leading English historian of the period notes: "The original wording implied that everyone had a duty to be ready to appear in arms whenever the state was threatened. *The revised wording suggested only that it was lawful to keep a blunderbuss to repeal Burglars*."[35] The English right clearly dealt with individuals because, with typical aristocratic elitism, it specified the kinds of arms it guaranteed would vary according to "the condition and degree" of the person involved.[36]

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[34] Malcolm, *supra* note 2, at 104-05.

[35] J.R. WESTERN, MONARCHY AND REVOLUTION: THE ENGLISH STATE IN THE1680S 339 (1972) (emphasis added).

[36] 1 BLACKSTONE'S COMMENTARIES 143 n.40 (St. George Tucker ed., 1803).

In support of its mistaken assertion that the English Declaration of Rights did not deal with personal arms, the Violence Policy Center asserts that both before and after the Declaration, Parliament passed Game Acts that restricted the right to bear arms. But that point is another red herring because the Declaration did not restrict Parliament – it was a restraint only on the King. By contrast, Madison's notes on his own Bill of Rights stressed that, unlike its English predecessor, it would restrain *Congress* and its right to arms was not limited to Protestants.[37]

The first legal analysis of the Second Amendment appeared in 1803, authored by the eminent St. George Tucker, a member of the Jefferson-Madison circle and a Justice of the Virginia Supreme Court. Annotating Blackstone's discussion of the English right to arms under the title "the absolute right of individuals," Tucker wrote that in America that right is guaranteed to "the people" by our Bill of Rights, "and this without any qualification as to their condition or degree, as is the case in the British government."[38] In an appendix discussing the right to arms in greater detail, Tucker roundly condemned any who would "seek to confine this right within the narrowest limits possible." Id. at 300. Hailing self-defense as the cardinal natural right and the right to arms as "the true palladium of liberty," Tucker wrote that liberty "is all but extinguished when arms are prohibited." As to the militia, Tucker does mention it, but only secondarily and in a context that makes clear the Second Amendment deals with an individual right. Id.; see also Kates, *supra* note 1, at 237 & n.144, 241-42.

X. SLAVE STATES DID NOT GENERALLY DEMAND A RIGHT TO ARMS.

On page 22 of its brief, the Violence Policy Center tries to sully the Second Amendment

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[37] See Kates, *supra* note 1, at 237 & n.144.

[38] BLACKSTONE'S COMMENTARIES, *supra* note 37 at 143 n.40.

as a slavery-era anachronism by arguing that the Amendment stemmed from Southern fears of vulnerability to slave revolt. Not only is that claim demonstrably false, it actually undercuts the BC/VPC amici's arguments because white Southerners, being terrified of slave revolt,[39] doubtless valued the right of (white) individuals to possess weapons. So even if it were true that the impetus for the Second Amendment came from Southern states, that fact would provide further support for the notion that the right to arms is an individual rather than "collective" right.

But it is not true. Excepting only Virginia, all the state convention requests for a guarantee of the right to arms came from northern states. See Kates, *supra* note 1, at 222. The importance attached to this right is indicated, incidentally, by the fact that more conventions requested it than requested guarantees of the rights of free speech, assembly, due process, confrontation of witnesses and prohibition of cruel and unusual punishment. Id.

CONCLUSION

As demonstrated above, the BC and VPC amici's briefs are riddled with inaccuracies and mischaracterizations of the historical record, including:

- Using Anti-federalist criticism of federal power in the original Constitution as a basis for interpreting the Second Amendment, which was authored by a leading Federalist opponent of such criticism, James Madison, who specifically explained that *the Second Amendment did not affect federal power over the militia.*
- Mistakenly asserting that the Second Amendment guaranteed state power (vis-a-vis federal) over the militia – despite consistent Supreme Court rulings that federal power over the militia remains plenary, with state power existing only

[39] See, e.g., HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS 18 (1963).

insofar as the federal government has not acted.

- Disregarding the *unanimous* belief of the Founders that there is a basic human right to possess arms for defense of self, home, and family.
- Inaccurately depicting the "militia" as troops or soldiers rather than the general populace despite the fact that existing militia laws required individual members of the general populace to be armed and despite the fact that *every* definition the Founders gave of the "militia" used terms such as "the whole body of the people."
- Assuming from the existence of the militia clause that the rights clause does not mean what it says – i.e., that there is some conflict between guaranteeing individuals a right to arms and guaranteeing the arms of the militia which were, in fact, the personal arms of the militia's members.
- Purporting to identify a discrepancy – which *no* contemporary saw – between the wording of the Second Amendment's "right of the people" clause and the wording of preceding state proposals regarding the right to bear arms.
- Ignoring the Madison-approved commentary describing the Second Amendment as confirming the people in the right "to keep and bear their private arms," as well as the Anti-federalist editorials declaring the Second Amendment to be a plagiarism of Sam Adams's proposal to guarantee the people in "their own arms."
- Incorrectly asserting that the eighteenth century meaning of "bear" arms was distinctively military when in fact Madison himself, along with numerous contemporary documents, used the phrase "bear arms" in reference to the carrying of weapons by hunters and for other purely civilian purposes.

- Propounding a "states' right" view of the Second Amendment which is an artifact of the twentieth century gun control debate – a concept utterly unknown to the Founders and for more than a century beyond their time.
- Falsely asserting that colonial law required that firearms be communally stored despite the total absence of such laws and the universality of laws that required every person or household be continually armed and that men carry arms while traveling and working in the fields.
- Asserting that the Second Amendment stemmed from southern states' concern that slave holders be armed to defeat slave revolts when in fact, except for Virginia's, all the state requests for a right to arms came from northern states.

The BC/VPC amici's textual analysis is tortured, their historical scholarship is suspect, and their suggestion that the Framers of the Constitution, fresh from their experience with English tyranny and in the midst of settling a vast, untamed continent, did not intend to protect the right of American citizens to possess arms is, in a word, absurd.

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