No. 04-7041
NOT SCHEDULED FOR ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

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SHELLY PARKER, *ET AL.*,

Plaintiffs–Appellants

v.

DISTRICT OF COLUMBIA, *ET AL.*,

Defendants–Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE DISTRICT OF COLUMBIA

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. PARTIES AND *AMICI*. All parties, intervenors, and *amici* appearing in the district court and in this Court are listed in appellants' brief.

B. RULINGS UNDER REVIEW. This appeal is from the March 31, 2004, judgment dismissing the complaint (Sullivan, J.) A.46, 62. The court's accompanying opinion is reported at 311 F. Supp.2d 103. A.47-61.

C. RELATED CASES. This case has not been before the Court previously. *Seegars v. Gonzales,* 396 F.3d 1248, *rehearing denied*, 413 F.3d 1 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1187 (2006), raised identical legal issues involving indistinguishable facts. Counsel for the District of Columbia knows of no related cases in this jurisdiction.

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ISSUES PRESENTED

As in *Seegars v. Gonzales*, 396 F.3d 1248, *rehearing denied*, 413 F.3d 1 (D.C. Cir. 2005), *cert. denied*, 126 S.Ct. 1187 (2006), the complaint here contains facial, pre-enforcement challenges to District of Columbia statutes allowing rifles, shotguns, and other firearms to be registered but prohibiting registration and licensing of most pistols, and requiring that firearms kept at home have trigger locks or be disassembled and unloaded. The issues are,

1. Whether plaintiffs have standing to bring these pre-enforcement facial challenges when they have not properly alleged a threat of imminent prosecution?

2. Whether, in a facial challenge, the laws are constitutional even if the Second Amendment protects the right to keep weapons for purely personal use?

3. Whether the laws violate the Second Amendment absent allegations that they impair either the preservation and efficiency of a well-regulated state militia or the common defense?

STATUTES

United States Constitution

Article I, § 8

The Congress shall have Power

* * *

[cl. 15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[cl. 16] 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[.]

Article II, § 2

The President shall be Commander in Chief of Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States * * *.

Article III, § 3:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. * * *

Amendment II:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. [Ratified December 15, 1791].

Other relevant statutes appear in a separately bound addendum (ADD).

STATEMENT OF THE CASE

I. DISTRICT LAWS.

A. REGISTRATION AND SAFETY.

1. *Statute.* The Firearms Control Regulation Act of 1975 prohibits individuals from possessing firearms unless they hold valid registration certificates for the weapons (D.C. Code § 7-2502.01). It prohibits registration of pistols not registered before September 24, 1976, the Act's effective date (§ 7-2502.02(a)(4)). Those seeking registration certificates must apply before taking possession of a firearm or bringing it into the District (§ 7-2502.06(a)).

If the Chief of Police denies registration, the applicant may seek reconsideration and review of the Chief's "final decision" before an independent administrative law judge under the D.C. Administrative Procedure Act (§§ 7-2502.10, 7-2507.09; 2-1831.03(a); 2-1831.16(d)-(e)).

Judicial review is available in the D.C. Court of Appeals (§§ 7-2502.10(b); 2-510(a)), where the individual may challenge the constitutionality of the administrative decision and the statute (§ 2-

510(a)(3)(B)); *see Fesjian v. Jefferson*, 399 A.2d 861 (D.C. 1979)). The individual may then seek Supreme Court review. 28 U.S.C. § 1257.

Possession of an unregistered firearm is punishable by a $1000 fine or one year's imprisonment (§ 7-2507.06). A second offense is punishable by a $5000 fine or five years' imprisonment (§ 7-2507.06(2)(A)).

The Act contains a safety provision. Registered guns must be kept "unloaded and disassembled or bound by a trigger lock or similar device" except in a "place of business" or "while being used for lawful recreational uses" (§ 7-2507.02). Violation is punishable by a $1000 fine or one year's imprisonment (§ 7-2507.06).

2. *Legislative Purpose.* The Council enacted these provisions because existing law failed to prevent "gun-related deaths and * * * crimes." Rept. on Bill No. 1-164, Committee on the Judiciary and Criminal Law, Apr. 21, 1976, *reprinted in* H. Rep. Committee on the District of Columbia, Hearing and Disposition of H. Con. Res. 694, Serial 94-24, Aug. 25, 1976 at 24-41 ("Hearing").

The Council was informed that handguns had been used in 155 of 285 murders (54%) in 1974. *Id.* at 26. Handguns had been used in 88% of robberies and 91% of assaults. *Id.*; *see* Hearing at 103 (in fiscal year 1975, handguns had been used in 695 aggravated assaults, 3405 robberies, and 133 homicides in the District). All rapes involving firearms involved handguns. Tr., 6/15/76 Council sess. (evening) at 11. Nationwide, handguns had been used in 87% of recent murders of law enforcement officials. Hearing at 26.

The Council discussed the trigger-lock requirement extensively, making an exception for guns kept at businesses and declining to extend the exception to homes. Tr., 5/18/76 Council sess. (afternoon) at 31, 33; tr., 6/15/76 Council sess. at 33-34. Councilmember Clarke said 3000 deaths resulted from accidental misuse of firearms annually: "* * * that loaded weapon in the home often winds up in a criminal usage. * * * Somebody goes and gets that gun in a moment of passion and shoots somebody else * * *." *Id.* at 21; *see id* at 33; Hearings at 25 (most murders are committed

by law-abiding citizens in moments of passion or intoxication). Gun-related accidents happen four times more frequently than when gun-wielding homeowners foil intrusions; children under fourteen account for one-quarter of accidental deaths. *Id.*

Councilmember Clarke described a trigger-lock as a mechanism placed between the trigger and its housing capable of being locked with a key. Tr., 6/15/76 Council sess. at 49. He estimated unlocking and loading a weapon should take under a minute. *Id.* at 42.

B. LICENSING.

In 1932, Congress enacted comprehensive legislation requiring possession of a license to carry concealed pistols or other dangerous weapons except at gun-owners' residences, businesses, or lands. Act of Jul. 6, 1932, 47 STAT. 560, ch. 465. It prohibited possession of machine guns, sawed-off shotguns, and silencers (§ 6, now D.C. Code § 22-4514). The legislation was enacted because of the increase in crimes involving guns and because ineffective regulation had led to weapons proliferation. S. Rept. 575, 72nd Cong., 1st Sess., Apr. 19, 1932, at 2.

The law was amended in 1994 to require weapons capable of bodily concealment, including pistols, to be licensed (§ 22-4504(a)). The law defines a pistol as "any firearm with a barrel less than 12 inches in length" (§ 22-4501(a)). The Police Chief may issue licenses to carry concealed pistols when satisfied the applicant has good reason to fear injury or for other important reasons (§ 22-4506). Applicants must meet physical and mental standards and satisfactorily complete training on weapon use and care. 24 D.C.M.R. §§ 2303.1 *et seq.* (1996). Applicants for licenses must "register the pistol for which the license will apply." 24 D.C.M.R. § 2304.15

Denials of licenses entitle applicants to evidentiary administrative hearings, judicial review by the D.C. Court of Appeals, and discretionary review in the Supreme Court (§§ 2-501(8); 2-509; 2-510; 2-1831.03(a); 2-1831.16(d)-(e); 28 U.S.C. § 1257).

Carrying an unlicenced pistol at home, place of business, or one's land is a misdemeanor. D.C. Code §§ 22-4504(a)(1), 22-4515. A second violation is a felony (§ 22-4504(a)(2)). Unlicensed

carrying of a firearm is a separate offense from possessing an unregistered pistol. *Tyree v. U.S.*, 629 A.2d 20 (D.C. 1993).

II. COMPLAINT.

As in *Seegars*, the complaint here is a pre-enforcement, facial challenge to these particular gun laws. *Compare* A.1-10 *with* Seegars complaint. As in *Seegars*, no plaintiff claims to have been prosecuted or threatened with prosecution. The complaint alleges only that the District and its Mayor "actively enforce" the licensing law (A.7, ¶ 19) and that the Mayor is enforcing the other laws as well. (A.5, ¶ 8).

Each plaintiff intends to have "functional" firearms, including handguns, at home but fears arrest and punishment. A.2-4, ¶¶ 1-6. Plaintiffs Heller, Palmer, and Lyon assert that they own handguns and long guns they keep outside the District. A.2-4, ¶¶ 2, 3, 6. Heller is licensed to carry a handgun in his employment as a special police officer. A.2-3, ¶ 2.

Heller alleges that he applied to register a pistol but was refused. *Id.*; *see* A.32. He does not allege that he sought administrative or judicial review. No other plaintiff alleges to have applied to register pistols and none (including Heller) alleges applying for licenses to carry weapons at home. The complaint alleges that "[l]icenses to carry a handgun are rarely, if ever, issued to private citizens * * *." A.7, ¶ 20.

Plaintiff St. Lawrence does not claim to want registration or a license. She alleges she owns a registered shotgun that she "presently intends to use * * * *if necessary* in lawful self-defense within her home." A.3-4, ¶ 4; italics added. Appellants' brief (at 5) states she has no objection to storing the gun securely when not in use, but fears punishment if she were to "render the gun operational." A.3-4.

The complaint alleges that D.C. Code §§ 7-2502.02(a)(4), 7-2507.02, 22-4504, and 22-4515 violate the Second Amendment and demands they be permanently enjoined (the latter two sections insofar as they require licenses for gun possession at home). A.8. It also demands declaratory relief and attorneys' fees. A.9.

III. DISTRICT COURT DECISION.

The district court dismissed the complaint and did not reach plaintiffs' motion for summary judgment. A.46-62.[1] Although it had raised the issue of standing (A.65-67, 76-77) and received briefing (S.A., entries ## 29-30, 32), its opinion fails to address the issue. On the merits, based on its survey of precedent (A.49-71), it rejected "the notion that there is an individual right to bear arms separate and apart from service in the Militia" and concluded that "because none of the plaintiffs has asserted membership in the Militia, plaintiffs have no viable claim under the Second Amendment * * *." A.61.

SUMMARY OF ARGUMENT

1. Appellants' claims should be dismissed under *Seegars*. The complaints in both cases are indistinguishable. Appellants do not argue otherwise. They rely instead on post-complaint events. Standing, however, is determined at commencement of suit. Appellants did not amend their complaint or file affidavits to bring these events to the district court's attention. Moreover, no post-complaint event could distinguish this litigation from *Seegars* because none heightened the imminence of prosecution.

2. If the Court reaches the merits, it can affirm judgment on the narrow ground that the District's laws reasonably regulate whatever right the Second Amendment might be read to confer. A right to weapons is not absolute and appellants do not contest that weapons possession is subject to regulation. Appellants' facial challenge fails unless there are *no* circumstances under which the laws would be constitutional. The District's laws survive appellants' challenge.

a. Registration. *U.S. v. Miller*, 307 U.S. 174 (1939), held that weapons that do not contribute to the common defense and to effective militia have no Second Amendment protection. In the

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[1] Plaintiffs filed individual statements in support of their motion. (A.20-31). None claims to have been threatened with prosecution or that prosecution is imminent. In boilerplate, five state that they cannot use a rifle or shotgun as effectively as a handgun "to defend myself and my ability to act in concert" with others. A.21, 23, 25, 29, 31. St. Lawrence finds her shotgun suitable for defense but asserts she would not "always be able to [act] effectively" by unlocking her weapon if her home were to be invaded. A.26. The District disputed these assertions. A.33-36.

exercise of police powers and power over militia, legislatures may reasonably determine which weapons do not contribute to public security. Prohibiting a particular type of weapon while freely allowing access to hundreds more does not frustrate the Amendment's core purposes.

b. Gun-safety. St. Lawrence concedes (PB5) that requiring guns to be stored securely is reasonable. Since there are circumstances when the storage law is constitutional, her facial attack fails. In an as-applied case, local courts are likely to give the law a narrowing construction for emergencies.

c. Licensing. Appellants acknowledge there are circumstances in which the licensing law can constitutionally be applied to felons and others who menace society. The facial attack fails.

3. Alternatively, affirmance is proper even if the Court deems it necessary to describe the Second Amendment's scope more precisely. The Amendment's "obvious purpose" is to assure the effectiveness of state-regulated militias and "it must be interpreted and applied with that end in view." *Miller*, 307 U.S. at 178. Every circuit but one (in dictum) has followed that Supreme Court directive.

Miller's reading is binding and correct. The Amendment's language relates to civic military matters and its legislative history confirms that reading. The Amendment addresses federalism concerns raised in state constitutional ratification conventions. In Congress, the debate focused on the militia; no one spoke of a right to weapons for personal use.

The Districts's laws do not implicate federalism, and appellants have not pled that the laws interfere with their militia duties.

ARGUMENT

I. PLAINTIFFS HAVE NO STANDING TO CHALLENGE THE DISTRICT'S GUN LAWS.

A. *SEEGARS* IS BINDING AND INDISTINGUISHABLE.

Seegars held that plaintiffs whose complaint contained allegations indistinguishable from those in this case had no standing to challenge the District's gun legislation. *Seegars* and the precedent it cites – *Navegar v. U.S.*, 103 F.3d 994 (D.C. Cir. 1997), and *Lion Mfg. v. Kennedy*, 330

F.2d 833 (D.C. Cir. 1964) – are binding on panels of this Court. *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (*en banc*). There has been no intervening precedent undermining *Seegars*.[2]

In *Seegars*, as here, the plaintiffs alleged they would obtain, register, and license pistols to keep at home but for the District's restrictions. 396 F.3d at 1254. *Seegars* held that the plaintiffs had not demonstrated "a threat of prosecution reaching the level of imminence" required by *Navegar*. *Id.* at 1255. *Navegar*, 103 F.3d at 994 held two gun manufacturers had no standing to challenge a law referring to weapons by their features rather than by brand name and model numbers. Absent specificity, the threat of prosecution was not imminent: " * * * although the government has demonstrated its interest in enforcing the Act generally, nothing in the [generic] portions indicates any special priority placed upon preventing these [plaintiffs] from engaging in specified conduct." *Id.* at 1001.

Seegars also relied on *Lion*, in which manufacturers and their officers sued preemptively for declaratory and injunctive relief, asserting they might have to close their plants to avoid criminal prosecution. 330 F.2d at 837. The Court held that plaintiffs had not established Article III jurisdiction. "[T]he mere generalized declarations of purpose by a law enforcement officer that he will do his duty do not serve to provide a judicial forum to one who purports to fear the possible impact of that duty upon himself." *Id.* at 839; footnote omitted.

Based on these precedents, *Seegars* held that plaintiffs there had no standing even though the District prosecutes violators of the registration and licensing laws "'under normal prosecutorial standards.'" 396 F.3d at 1255, quoting *Austin v. U.S.*, 847 A.2d 391, 393-394 (D.C. 2004). The *Seegars* complaint alleged no prior specific threats by the government against plaintiffs and established no "characteristics indicating an especially high probability of enforcement against them." *Id.* It was irrelevant that one plaintiff already owned a pistol outside the District. Although

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[2] The district court's failure to address standing is irrelevant; jurisdictional issues are always before a reviewing court. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

that might reinforce his claim of a "conditional intent" to import the gun into the District, nothing in the record showed that the government had given his prosecution "'special priority.'" *Id.*

The complaint here makes no explicit allegation – nor allows fair inference – that the *Parker* plaintiffs face more imminent threats of prosecution than the *Seegars* plaintiffs. Their complaint contains no allegation they have been prosecuted or threatened with prosecution, only that they "fear" – a subjective state – prosecution. At most, they allege the District is enforcing its gun laws. A.5, ¶¶ 8, 19. That is plainly insufficient to establish "any characteristics indicating an especially high probability of enforcement against them." 396 F.3d at 1255; *cf. Allen v. Wright*, 468 U.S. 737, 751-752 (1984) (in standing cases, courts "compar[e] the allegations of the particular complaint to those made in prior standing cases").

Seegars applies also to the safe-storage provision, which it held that no plaintiff had standing to challenge, including a plaintiff (Hailes) who owned a registered shotgun she wished to keep unlocked. Hailes alleged that she would "'remove the trigger lock when she deems it necessary to defend herself in her home.'" 396 F.3d at 1256. The Court recognized that she had no administrative mechanism for obtaining pre-enforcement review; neither had the *Navegar* gun manufacturers. *Id*. The unavailability of an administrative remedy is insufficient to make a claim justiciable when the government has signaled no threat of imminent prosecution. *Id.*

Nothing in the complaint implies St. Lawrence faces a more imminent threat of prosecution than Hailes did in *Seegars*. Appellants' brief (at 5) states that she does *not* object to storing her gun securely but fears arrest and prosecution if she makes her shotgun "operational" in exigent circumstances for self-defense. That is inadequate to show a sufficient threat of prosecution under *Seegars-Navegar-Lion* standards. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (internal quotations omitted). Even if St. Lawrence needs to unlock her gun for self-

defense in the future and is apprehended, it is completely speculative whether a prosecutor would prosecute. *See Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102, 142 n.29 (1974).[3]

B. POST-COMPLAINT OCCURRENCES CANNOT ESTABLISH STANDING.

1. Because defects in standing are defects in jurisdiction, standing is determined at the commencement of the action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 571 n.5 (1992). Appellants attempt to distinguish *Seegars* by introducing matters occurring after their complaint was filed. Appellants essentially claim they can bootstrap themselves into standing by filing a complaint and then insisting that they have become more likely to be prosecuted because they provoked government reaction. Standing doctrine does not recognize such circularity. Indeed, *Seegars* focused on the lack of "*prior* threats" against plaintiffs there. 396 F.3d at 1255; italics added.

The post-complaint events are not properly part of standing analysis for another reason: none was properly supported in the district court. Appellants did not amend the complaint or introduce additional affidavits relying on post-complaint events (despite moving for summary judgment). *See Lujan*, 504 U.S. at 561 (party invoking jurisdiction bears burden to demonstrate standing); *Frito-Lay v. Willoughby*, 863 F.2d 1029, 1035-36 (D.C. Cir. 1988) (refusing to consider evidence not before district court at time of summary judgment).

2. Even if appellants' post-complaint developments were relevant, they would not establish standing. One is a newspaper article, published a few days after plaintiffs' complaint was filed. It quotes a spokesman for the Mayor in full:

> • The last thing this city needs is more handguns. You're not going to see any will on the part of the mayor to relax the gun laws in the District.
> • We have to maintain the deterrent effect of the gun laws. I think it's a real myth that people would be able to arm themselves and avoid being shot. Chances are very good that they would accidentally shoot themselves or that the gun would find its way into the hands of a child, which is not what we want.

J. Ward, "Residents Challenge District's Gun Ban," *Washington Times*, Feb. 12, 2003, A1. The same article quotes the deputy mayor in full:

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[3] Even if the question were not foreclosed, *Seegars* was decided correctly, largely for the reasons stated in the U.S. brief in opp., *Seegars v. Gonzales*, S.Ct. no. 05-365.

> The mayor's policy is very clear. He does not support abolition of our very strict gun laws. Gun ownership is not a means to control crime, and it's not a good thing for the city and its social structure.

None of these remarks threatens plaintiffs with prosecution; they do not address prosecution at all. They reflect the Mayor's opposition to changes to the gun laws. At most, one might infer that the District will continue to enforce its weapons laws under normal prosecutorial standards. The statements apply as much – and as little – to the *Seegars* plaintiffs as to appellants.

Appellants also misconstrue colloquy during the motions hearing (A.66-67) in which the District's counsel stated plaintiffs lacked standing and agreed with the district court that they would not necessarily be immunized by participation in this litigation. Plaintiffs would receive no special consideration, one way or another. Counsel's remarks were couched in the hypothetical ("*if*, in fact, they break the law and we would enforce the law * * *[;] it's still a situation where you're dealing with the abstract"; A.67). Nothing said heightened the threat of imminent prosecution or distinguished plaintiffs from the *Seegars* plaintiffs. Moreover, the District's later filing on standing assured the court that prosecution was "speculative at best" (doc. 30 at 2-3).

Even more remote to appellants' standing at commencement of suit is an event occurring over a year *after judgment*. According to statements filed only in this Court, three plaintiffs attended a public forum in July 2005 at which the Mayor and police chief defended the gun-control laws and said "tougher enforcement" was necessary. A.83-88. Neither referred to appellants or threatened their imminent prosecution. Appellants' post-judgment statements are not parts of the record on appeal and should be disregarded.

II. IF THIS COURT REACHES THE MERITS, IT SHOULD AFFIRM BECAUSE THE DISTRICT'S LAWS REASONABLY REGULATE WHATEVER RIGHT THE SECOND AMENDMENT COULD BE READ TO CONFER.

A. APPELLANTS' FACIAL CHALLENGE CAN SUCCEED ONLY IF THE LAWS ARE UNCONSTITUTIONAL IN EVERY APPLICATION.

When confronting constitutional issues courts "should not formulate a rule of law broader than is required by the precise facts." *Liverpool, N.Y. & P. Steam-ship v. Commissioners*, 113 U.S.

33, 39 (1885); *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173, 175 (1999). This appeal does not necessitate deciding the Second Amendment's full reach.

When considering a facial attack to a law, courts must decide whether there is "*no* set of circumstances" under which the law would be constitutional. *U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (italics added); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1077-1078 (D.C. Cir. 2003). That a law may have unconstitutional consequences under some circumstances is insufficient to render it wholly invalid. *Id.* Federal courts are not "roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-611 (1973).

The *Salerno* rule is particularly compelling when federal courts are asked to assess the constitutionality of state laws. In such cases, application of *Salerno* "fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities." *New York v. Ferber,* 458 U.S. 747, 768 (1982) (First Amendment); *see Watson v. Buck*, 313 U.S. 387, 403 (1941) (law unconstitutional when applied in one manner may be constitutional as applied in others). The rule should apply equally to District law. *Cf. Justice v. Superior Ct.*, 732 F.2d 949, 950 (D.C. Cir. 1984) (applying *Pullman* abstention).

B. The District's Gun Laws Are Constitutional Even If the Second Amendment Is Deemed to Protect Individual Rights Unrelated to Common Defense.

Whatever the Second Amendment's precise dimensions, the Amendment does not prohibit reasonable regulation of lethal weapons. Appellants do not dispute as much. Their argument is based on the false contention that the District's laws do not constitute regulation of gun possession, but rather a ban on home possession of "*any* functional firearm." PB 16.

The District's laws do not "disarm" the citizenry. Laws such as the District's "do not seek to ban all firearms, but seek only to prohibit a narrow type of weaponry * * * or to regulate gun ownership by means of * * * mandatory safety devices * * *. *Such measures are plainly constitutional.*" 1 L.H. Tribe, American Constitutional Law (3d ed. 2000) 902; italics added. The District's laws thus survive facial scrutiny even were the Second Amendment construed to recognize

a right to keep weapons for purely personal use. Although we agree with the district court that the Amendment confers no such broad right (for the reasons stated below), this Court can affirm judgment on narrower grounds.

1. A right to weapons possession has never been absolute. *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897), held that the Bill of Rights is "subject to certain well-recognized exceptions, arising from the necessities of the case." Thus, the Second Amendment "is not infringed by laws prohibiting the carrying of concealed weapons." *Id*. In *Lewis v. U.S.*, 445 U.S. 55, 65 n.8 (1980), the Court held that a law prohibiting gun possession by felons trenched on no liberty protected by the Amendment. Under the common law, weapon bearing "was never treated as anything like an absolute right." *U.S. v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).[4]

In *Miller*, 307 U.S. at 176, the Court stated that the right created by the Amendment cannot be uncoupled from its stated civic purpose: to assure the "security of a free State" by means of an armed, well-regulated militia. After quoting the Militia Clauses of the Constitution, Art. 1, § 8, cl. 15-16, the Court explained how the Amendment should be interpreted: "With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made. *It must be interpreted and applied with that end in view.*" *Id*. at 178; italics added.

The full implications of *Miller*'s holding are discussed further below; here we address a narrower point, the weapons that are "Arms" and thereby may have constitutional protection. In *Miller*, two criminal defendants had been indicted for shipping an unregistered, short-barreled shotgun. Placing the burden on the defendants, the Court held that absent a showing that "possession or use" of such a weapon "could contribute to the common defense" or "at this time has some

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[4] The Department of Justice, which recently reversed its over six-decades-long interpretation of the Amendment (below at 23, n.14), carefully notes that "nothing in [its explanatory] memorandum is intended to * * * call into question the constitutionality * * * of any particular limitations on owning, carrying, or using firearms." Off. Legal Counsel, "Whether the Second Amendment Secures an Individual Right," http://www.usdoj.gov/olc/secondamendment2.pdf at 2 (Aug. 24, 2004). The U.S. continues to enforce the District's weapons laws.

reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep such a weapon." *Id.* at 178.

Miller's placement of the burden of proof on criminal defendants – and, by logical extension, civil plaintiffs – to demonstrate that the legislature exceeded its constitutional powers when it designated a type of weapon as not contributing to the common defense and the preservation or efficiency of the militia fairly implies that those legislative choices are presumptively reasonable. Massachusetts, New York, and Virginia post-colonial laws cited in *Miller* (307 U.S. at 180-182) required militia members to produce muskets or rifles of specified lengths, traditional military long-arms. The 1792 Militia Act, enacted by the Second Congress after adoption of the Second Amendment, required men subject to militia duty to arm themselves with muskets or firelocks. Act of May 8, 1792, 1 STAT. 271 ch. 33 § 1. Weaponry other than that specified by the legislature would not have satisfied militia obligations.

It follows that legislatures may reasonably determine which weapons undermine the common defense and the efficiency of the militia because they *threaten* public security – the security of a free State – that the arms are to protect. A legislature in an exclusively urban jurisdiction may reasonably determine that pistols are more harmful to public security because of their predominant use in urban crime than they are helpful in the common defense and the efficiency of its militia. That is especially so for pistols, weapons with no strong historical tie to common defense or the militia. As of 1789, pistols were not normally associated with militia service, other than by officers.[5] *See Miller*, 307 U.S. at 180-182; W. Moore, WEAPONS OF THE AMERICAN REVOLUTION 7 (1964); G. Wills, NECESSARY EVIL 30-31 (1999). As *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 n.8 (7th Cir. 1982), noted in light of *Miller*, "we do not consider individually owned handguns to be military weapons." *See U.S. v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004) (revolver); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) (handgun); *cf. Sklar v. Byrne*, 727 F.2d 633, 637 (7th Cir. 1984) (upholding handgun ban under Illinois constitution). In short, even if *Miller* is read narrowly, the

[5] No plaintiff claims to be a militia officer.

District's restrictions on handgun possession do not violate the Second Amendment because its legislature could reasonably determine, as part of its power to regulate the militia, that pistols should not be deemed militia "Arms" in this jurisdiction.

Outlawing a particular type of weapon because its harms outweigh its benefits does not frustrate the core purposes of constitutional arms provisions – whether to promote the common defense, the militia, *or* self-defense – so long as other arms remain available to serve those purposes.[6] Thus, courts have upheld legislation restricting possession of particular weapons, including pistols, notwithstanding state constitutional provisions similar to or broader than the Second Amendment. *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 273 (Ill. 1984) (upholding ordinance banning handguns; Illinois constitution guards against confiscation of *all* firearms (ADD11)); *Benjamin*, 662 A.2d at 1226 (upholding ban on possession of assault weapons despite Connecticut constitution (ADD11)); if permitted weapons are adequate reasonably to vindicate right to bear arms in self defense, state may proscribe possession of other weapons); *Robertson v. Denver*, 874 P.2d 325, 328 & nn.15-16 (Colo. 1994) (sustaining ban on possession of assault weapons despite Colorado constitution (ADD11)); *Arnold v. Cleveland*, 616 N.E.2d 163 (Ohio 1993) (rejecting facial challenge to assault weapons' ban although Ohio constitution created "fundamental" right (ADD12)); ban of only one type of weapon was reasonable); *State v. LaChapelle*, 451 N.W.2d 689, 690-691 (Neb. 1990) (upholding prohibition on possession of short rifles, short shotguns, and machine guns despite Nebraska constitution (ADD12)).

The District's refusal to register pistols not owned and registered before 1976 restricts a type of weapon but residents still have access to hundreds more. *See Robertson*, 874 P.2d at 333 (noting availability of 2000 types of firearms). Aside from having had no major role in militia service, handguns have long been treated differently from other guns because of their frequent use in crime.

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[6] The bearing of arms is not an end in itself but a means to achieve stated or implicit purposes. Even were appellants correct that the Second Amendment embodies a right of individual self-defense, the constitutional text is subject to a rule of reason because the common law right to self-defense is itself subject to the rule of reason. *Benjamin v. Bailey*, 662 A.2d 1226, 1232 (Conn. 1995).

As early as 1858, the city of Washington made it unlawful "to carry or have concealed about their person any dangerous weapon, such as * * * [a] pistol." Act of Nov. 18, 1858, Laws of the City of Washington (W.B. Webb, 1868). In 1871, the law was extended to the entire District. *Cooke v. U.S.*, 275 F.2d 887, 889 n.3 (D.C. Cir. 1960). In 1892, Congress enacted a concealed weapons law, specifically including pistols. Act of July 13, 1892, 27 Stat. 116, ch. 159.

As the Council committee report noted, handguns by 1975 had become the weapons of choice in urban crime. They were used in an overwhelming number of robberies, aggravated assaults, rapes, and murders. Nationwide, 87% of murders of police officers resulted from pistol shots. The Council concluded that pistols, including pistols stolen from homes of law-abiding citizens, misused by members of their families, or fired accidentally, contributed disproportionately to death and injury. The prohibition of one particularly dangerous type of weapon is therefore justified by the "necessities of the case." *Robertson*, 165 U.S. at 281.[7]

2. Just as legislatures may reasonably determine which weapons deserve constitutional protection, so have they traditionally been authorized to determine how lawful weapons are to be borne and kept. To prevent misuse and preserve public security, a legislature may constitutionally prohibit the carrying of concealed weapons. *Robertson*, 165 U.S. at 281-282. States have traditionally had safe-storage laws. S. Cornell, *Well Regulated Right*, 73 FORDHAM L. REV. 487, 505-511 (2004). A 1783 Massachusetts law prohibited keeping a loaded gun in a "Dwelling-House." *Id.* at

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[7] Appellants' policy arguments that the District's laws may not have their intended results are addressed to the wrong forum. The best policies for reducing crime will vary from jurisdiction to jurisdiction. They are legitimate subjects for political dispute, not for resolution by the judiciary.

Appellants' arguments, moreover, are wrong. *See* D. H. Hemenway, PRIVATE GUNS, PUBLIC HEALTH 65-66, 69-74, 79-83 (2003) ; "Guns and Crime" *Bureau of Justice Statistics Crime Data Brief* (NCJ 147003, Apr. 1994, rev. Sept. 2002), http://www.ojp.usdoj.gov/bjs/pub/ascii/hvfsdaft.txt; I. Ayres, *Latest Misfires in Support of More Guns, Less Crime*, 55 STAN. L. REV. 1371 (2003); P.H. Rubin, *Effect of Concealed Handgun Laws on Crime*, 23 INT'L REV. LAW & ECON. 199 (2000).

Since 1976, the role of handguns in crime nationwide has not diminished; between 1993 and 2001 handguns were still used in 87% of the annual average of 847,000 violent crimes. DOJ Bureau of Justice Statistics, "Weapon Use and Violent Crime," NCJ 194820, at 3 (Sept. 2003). By contrast, a study in the *New England Journal of Medicine* concluded that the District's pistol ban coincided with an abrupt decline in firearm-caused homicides and suicides in the District but no comparable decline elsewhere in the metropolitan area. A.37-43; P.J. Cook, GUN VIOLENCE 122-123 (2000).

512 & n.172. As early as 1828 a Washington city ordinance specified how to store gunpowder and how much could be stored. Act of May 28, 1828, § 2, Laws of the City of Washington.

Similarly, more recent safety laws regulating the manner of keeping lethal weapons have been held to satisfy state constitutional standards. In *State ex rel. Division of Natural Resources v. Cline*, 488 S.E.2d 376 (W. Va. 1997), the court upheld a law (similar to those in other states) requiring all weapons in vehicles to be unloaded and encased or disassembled between dusk and dawn because of frequent deaths and injuries caused by accidental discharge of guns. *Id.* at 382. The statute was a legitimate use of police power to protect against the accidental discharge of loaded guns and did not violate the state constitution (ADD12). *Cline*, 488 S.E.2d at 382. *See also Parker*, 362 F.3d at 1282-1284 (carrying loaded weapon); *City of Tucson v. Rineer*, 971 P.2d 207, 211-215 (Ariz. App. 1998) (public possession of firearms); *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33, 34 (Mo. App. 1994) (open possession of firearms "readily capable of lethal use" within city); *Second Amendment Foundation v. City of Renton*, 668 P.2d 596 (1983) (gun possession in places selling alcohol); *State v. Boyce*, 658 P.2d 577, 579 (Ore. App. 1983) (public possession of loaded firearm).

In 1976, the Council learned that gun-related accidents kill or wound people four times more frequently than guns foil intrusions at home.[8] To avoid that accidental carnage, the Council required guns to have trigger locks (or be disassembled) when stored at home and not in legitimate use. The Council appears to have recognized that on rare occasions, in the event of a true emergency when necessary for self-defense, a gun could be unlocked. Otherwise there would have been no point to Councilmember Clarke's assurance (above at 4) that locked guns can be ready for use in under a minute.

Since there are many circumstances when the law will be reasonable and thus constitutional, St. Lawrence's facial attack on the trigger-lock statute necessarily fails. *Salerno*, 481 U.S. at 745. Only under extremely rare circumstances – when the gun owner faces genuine imminent danger –

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[8] The Council's conclusion that gun-related accidents constitute a significant public health issue are echoed in scholarly research. *See* Hemenway, at 27, 33, 36, 38, 41, 51, 80, 83; Violence Policy Center, *Safe at Home*, at 2 (2005) http://www.vpc.org/studies/dcsuicide.pdf.

might the statute's reasonableness be questioned. But the law is likely to be given a narrowing construction to permit exceptions in those rare circumstances. This Court and the D.C. Court of Appeals have long recognized exceptions to general law under exigent circumstances. *See Wilson v. United States*, 198 F.2d 299, 300 (D.C. Cir. 1952) (recognizing defense to crime of unlicensed gun possession when possessor faces immediate threat of bodily harm);[9] *Emry v. U.S.*, 829 A.2d 970, 972 (D.C. 2003) (necessity defense exonerates criminal conduct when harm caused by compliance with law significantly exceeds harm caused by violating law).

Rather than facially invalidating the trigger-lock provision because it might be unconstitutionally applied under extraordinary conditions, federal courts should await an as-applied case in which those conditions are relevant, especially where the local courts are likely to accommodate the statute to unique circumstances. Even then, a federal court's equitable invalidation of state law must be restrained. As the Supreme Court explained when it reversed total invalidation of a parental-notification abortion law: "We prefer to enjoin only the unconstitutional applications of a statute while leaving other applications in force." *Ayotte v. Planned Parenthood*, __ U.S.__, 126 S.Ct. 961, 967-968 (2006).

3. There are plainly circumstances when the licensing law will be constitutional under any plausible construction of the Second Amendment. People whose access to lethal weapons creates a foreseeable danger have no unrestricted right to arms. *See Lewis,* 445 U.S. at 55 (felons); *U.S. v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (persons under domestic restraining orders and (*dictum*) infants and those of unsound mind); PB31 n.10.

The District's licensing law is designed to ensure that individuals with criminal convictions or significantly impaired physical or mental conditions will have no lawful access to lethal weapons. Applicants must also establish proficiency in the handling and care of their weapons. Ensuring that only law-abiding, competent individuals have access to dangerous weapons is a legitimate use of the

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[9] The Court of Appeals follows this Court's pre-1971 case-law. *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971) (*en banc*).

police power to safeguard public safety. *See Mosby v. Devine*, 851 A.2d 1031, 1047 (R.I. 2004); *State v. Mendoza*, 920 P.2d 357, 368 (Hawaii, 1996); *Heidbrink v. Swope*, 170 S.W.3d 13, 15 (Mo. App. 2005).[10]

When addressing the "necessities of the case," *Robertson*, 165 U.S. at 281, a legislature must consider the need to "maintain an orderly and safe society." *Arnold*, 616 N.E.2d at 173. Even if a constitutional arms provision is read broadly, "[l]egislative concern for public safety and security is not only a proper police objective – it is a mandate." *Id.; cf. People v. Brown*, 235 N.W. 245, 246 (Mich. 1931) (while interpretations of gun-related constitutional provisions are irreconcilable, all accept the proposition that the governments have police powers reasonably to regulate gun possession); *Mendoza*, 920 P.2d at 368.

Since 1791, weaponry has become increasingly powerful and deadly. The Framers' militia has faded into insignificance. The Civil War has intervened, fundamentally altering federal-state relationships. Death and maiming by misuse of firearms is a daily phenomenon, especially in urban centers. At the least, the language of the Amendment should not be a barrier to reasonable regulation of weapons most closely associated with crime and to laws designed to forestall accidental or impulsive carnage.

Even if the Second Amendment creates a right to weapon possession for personal use, the complaint fails to state a claim because the District's laws are facially constitutional in some or all circumstances. This Court can affirm judgment on the narrow ground that those laws reasonably regulate whatever right the Amendment could be read to confer.

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[10] St. Lawrence has not been harmed by the license law because § 22-4506 does not require licenses for shotguns. The complaint does not allege that other plaintiffs have applied for licenses and been denied, much less that they invoked their administrative appeal rights. Their challenge to the licensing law therefore fails on ripeness grounds as well. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967).

III. ALTERNATIVELY, JUDGMENT SHOULD BE AFFIRMED BECAUSE THE SECOND AMENDMENT RECOGNIZES A RIGHT TO WEAPONS POSSESSION ONLY FOR CIVIC DUTIES.

The Second Amendment protects private possession of weapons only in connection with the performance of civic duties as part of a well-regulated citizens militia organized for the security of a free state. Although the right may be enforceable by individuals, they must plead and establish that a congressional or state law will impair their participation in common defense and law enforcement when called to serve in the militia. The complaint does not allege that District law creates such an impairment.

A. GOVERNING PRECEDENT HOLDS THAT THE AMENDMENT RELATES ONLY TO ARMS POSSESSION FOR CIVIC FUNCTIONS.

1. Precedent establishes that the Amendment applies only to possession and use of weapons for the common defense and the efficiency of the militia. As noted, *Miller* stated that the Amendment's right cannot be uncoupled from its stated civic purpose: "With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration *and* guarantee of the Second Amendment were made. *It must be interpreted and applied with that end in view.*" 307 U.S. at 178; italics added.

To stress the importance of the Amendment's militia language, the Court spent four pages discussing the civic role of the militia in colonial and post-colonial America. It comprised all able-bodied men capable of "acting *in concert* for the *common defense*." *Id.* at 179; italics added. Its role was to make a standing army unnecessary by providing "adequate defense of country and laws." *Id.* When called into service, militia members were usually expected to bring their own arms and ammunition as specified by state law. *Id.* at 179-182.[11]

The Court's holding forecloses the argument that the Amendment protects gun possession for purely private purposes, such as personal security. The weapon at issue in *Miller* presumably would have been perfectly suitable for self-defense. The nature of the weapon is important only to

[11] Georgia law required the state to supply weaponry. *Silveira v. Lockyer*, 312 F.3d 1052, 1077 n.36, *rehearing denied*, 328 F.3d 567 (9th Cir. 2002).

the extent that it is to be *used* in the common defense or promotes the efficiency of the militia. As the court noted in *U.S. v. Rybar*, 103 F.3d 273, 286 (3rd Cir. 1996),

> however clear the Court's suggestion that the firearm before it lacked the necessary military character, it did not state that such a character alone would be sufficient to secure Second Amendment protection. In fact, the *Miller* Court assigned no special importance to the character of the weapon itself, but instead demanded a reasonable relationship between its "possession or use and militia-related activity."

See Cases v. U.S., 131 F.2d 916, 922 (1st Cir. 1942); *U.S. v. Hale*, 978 F.2d 1016, 1020 & n.4 (8th Cir. 1992).[12]

Miller cannot reasonably be read as interpreting only a single word of the Amendment, "Arms." Rather, the Court used the language of the remainder of the Amendment to construe that term, emphasizing the necessity to relate "Arms" to the "efficiency of the militia" and the "common defense." That same analysis logically applies to every term used in the Amendment. If the arms protected by the Second Amendment must relate to the preservation and efficiency of a well regulated militia, it is inescapable that "Arms" must be kept and borne for those purposes as well. Indeed, far from focusing on "Arms," *Miller* stressed that the Amendment in its entirety – the "declaration" and the "guarantee" – is to be interpreted to protect private action only insofar as it leads to an efficient militia for the common defense.[13]

2. This Court addressed the Second Amendment in *Fraternal Order of Police v. U.S.*, 173 F.3d 898, 906 (D.C. Cir. 1999), where it recognized that *Miller* placed the burden on the civil plaintiff to establish that a challenged law would materially impair the effectiveness of a militia. The

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[12] The National Firearms Act of 1934 prohibited possession of unregistered shotguns with barrels under eighteen inches. 26 U.S.C. § 1132(a) (1940). Miller was convicted of having such a weapon, so the Court had to discuss the weapon's nature for statutory purposes. The fact that the Court could dispose of his constitutional claim by reference to the weapon, without having to inquire into his militia status or, intent does not alter its central holding: that the Amendment recognizes a right to arms possession or use only for specified civic purposes.

[13] *Lewis*, 445 U.S. at 65 n. 8, despite citing and quoting *Miller*, did not focus on the weapon when it held a law that criminalized possession of *any* firearm by a convicted felon trenched on no constitutionally protected liberties.

Court held that the plaintiff failed to prove that a law prohibiting domestic violence misdemeanants from possessing firearms met that burden.

Ten other federal circuits have held that the Amendment recognizes weapon possession and use only for the civic purposes identified by *Miller*. *Thomas v. City Council of Portland*, 730 F.2d 41 (1st Cir. 1984); *U.S. v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984); *Rybar*, 103 F.3d at 286; *Love*, 47 F.3d at 124; *U.S. v. Napier*, 233 F.3d 394, 404 (6th Cir. 2000); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *U.S. v. Pfeifer*, 371 F.3d 430 (8th Cir. 2004); *Nordyke v. King,* 319 F.3d 1185 (9th Cir. 2003), *rehearing denied,* 364 F.3d 1025 (2004); *Silveira*, 312 F.3d at 1052; *Parker*, 362 F.3d at 1279; *U.S. v. Wright*, 117 F.3d 1265 (11th Cir. 1997). The District of Columbia Court of Appeals held likewise as to the District's gun-registration and -licensing laws. *Austin*, 847 A.2d at 391; *Sandidge v. U.S.*, 520 A.2d 1057 (D.C. 1987). In *dictum*, *Emerson*, 270 F.3d at 203, disputed this line of authority but held constitutional 18 U.S.C. § 922(g)(8), which prohibits individuals bound by domestic restraining orders from possessing firearms.[14]

In *Emerson*'s wake, five circuits and the D.C. Court of Appeals reaffirmed their position that the Amendment does not protect weaponry for private activities. *U.S. v. Willaman*, 437 F.3d 354 (3d Cir. 2006); *Parker*, 362 F.3d at 1284; *U.S. v. Price*, 328 F.3d 958, 961 (7th Cir. 2003); *U.S. v. Wilson*, 315 F.3d 972, 973-974 (8th Cir. 2003); *U.S. v. Younger*, 398 F.3d 1179 (9th Cir. 2005); *Silveira,* 312 F.3d at 1052; *Barron v. U.S.*, 818 A.2d 987, 994 n.7 (D.C. 2003); *Austin*, 847 A.2d at 391.[15]

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[14] The August 24, 2004, Legal Counsel memorandum to the U.S. Attorney General (above, n.4), deserves little deference. It repudiates sixty-five years of uniform Justice Department construction of the Second Amendment. *See, e.g.,* U.S. br. in *United States v. Miller*, U.S. No. 606, at 4-5, 15; op. cert., *Fraternal Order of Police v. U.S.,* no. 99-106; rep. br., *U.S. v. Emerson*, No. 99-10331 (5th Cir. 2001).

[15] Prevailing case law has substantial support from historians and legal scholars. *See* C.T. Bogus, *History and Politics of Second Amendment Scholarship*, 76 CHI.-KENT L.R. 3 (2000) (collecting authorties); R.J. Spitzer, *Lost and Found*, 76 CHI.-KENT L.R. 349, 384-401 (2000).

B. THE SUPREME COURT'S READING ACCORDS WITH THE AMENDMENT'S TEXT.

The starting point for interpreting the Constitution is the language the Framers used, and the context in which it appears. "[E]very word must have its due force, and appropriate meaning; * * * no word was unnecessarily used or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-571 (1840). "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. 137, 174 (1803) Yet, appellants discard almost half of the Second Amendment. Under their reading, its first thirteen words "might as well have been written in invisible ink." L.A. Powe, Jr., *Guns, Words and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1336 (1997).

Miller held that the two clauses of the Amendment – the opening "declaration" and the concluding "guarantee" – must be read jointly as protecting the bearing and keeping of "Arms" only for a civic purpose, the "security of a free State" through a militia. Both halves relate to military matters. Arms and militia exist to provide security for a free State – the former to be used by the latter. The Second Amendment identifies its own purpose.

Eldred v. Ashcroft, 537 U.S. 186 (2003), on which appellants rely, does not supplant *Miller*'s holding, 307 U.S. at 178, that the Second Amendment's "declaration and guarantee" must be "interpreted and applied" together. *Eldred* construed the Copyright Clause (Art. I, § 8, cl. 8), which authorizes Congress to establish copyright and patent systems "To promote the Progress of Science and the useful Arts * * *." Petitioners in *Eldred* had *not* argued that the purpose statement was a substantive limit on Congress's powers, 537 U.S. at 211, and the Court therefore did not reach the question. In an earlier patent decision, *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966), cited by *Eldred*, the Court held that Congress is bound by "the restraints imposed by the stated constitutional

purpose." Promoting the useful arts "is the *standard* expressed in the Constitution and it may not be ignored." *Id.* at 6; italics in original. *See Silveira*, 312 F.3d at 1068 n.23.[16]

Moreover, as we show below, the Framers were especially punctilious in their wording of the opening clause of the Second Amendment to ensure it would be correctly interpreted. All alterations to the Amendment were to words in its opening clause (other than the omission of a conscientious-objector clause). Plainly, the Framers deemed the purpose clause, which is without parallel elsewhere in the Bill of Rights, essential to an understanding of the Amendment as a whole. *See* D.T. Konig, *Reconsidering the Second Amendment*, 22 LAW & HIST. REV. 119, 154-157 (2004) (discussing eighteenth-century modes of drafting).

Furthermore, a truncation of the Amendment would not compel appellants' conclusion that the Amendment confers a right to weaponry for purposes other than the common defense and the organized enforcement of law. A parsing of the second half in isolation – illegitimate in itself – tends to confirm, rather than refute, *Miller*'s reading of the Amendment.

1. The Amendment's "declaration" defines its civic purpose.

The Amendment's declaration unmistakably relates the right to arms to assurances that the militia has the means to provide security for a free State. This is a purely civic purpose; it is impossible to read it as anything else.

In revolutionary America, militia service formed a key aspect of citizenship. Well-regulated militias drawn from the community's propertied class and led by its prominent citizens were thought to preserve liberty; "armed individuals threatened it." L.D. Cress, *An Armed Community*, 71 JOURNAL OF AMERICAN HISTORY 22, 24 (1984).

The militia was the military counterpart to the civilian jury. Both were populist, local, and intended to check the misuse of governmental power. D.C. Williams, *Civic Republicanism and the Citizen Militia*, 101 YALE L.J. 551, 579 n.161 (1991). But both the jury and the militia were

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[16] The Necessary and Proper Clause, Article I, § 8, cl. 18, affects interpretation of the Copyright and Patent Clause. *Graham*, 383 U.S. at 6. *See Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981). The Necessary and Proper Clause has no bearing on the Second Amendment.

regulated and organized by state law and institutions. The militia was not individuals acting on their own; one cannot be a one-person militia. *See* G. Wills, "To Keep and Bear," 42 *New York Review of Books* 62, 71 (1995).[17] Rather, the militia was a "*body* of citizens *enrolled* for military discipline," subject to state law and leadership. *Miller*, 307 U.S. at 179; italics added. Without discipline and universal service, it is not the people who are armed but only some individuals acting on their own: "rather than a construct for public service, the private ownership of guns becomes an act of private domination of some citizens over others." J.R. Prince, *Naked Emperor*, 40 BRANDEIS L.J. 659, 696 (2002).

Under Articles of Confederation Article VI, each state was responsible for disciplining and maintaining its militia in readiness: "* * * every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, * * * a proper quantity of arms * * *." Rather than using public funds to supply small arms, most states compelled individual militiamen to buy their own muskets and rifles. *Miller*, 307 U.S. at 180-182. Militia membership varied from state to state. *Id.* at 179-182. Membership was not universal: non-whites, women, and men older than 45 (or so), were excluded. *Id.*

The Militia Clauses conspicuously cited by *Miller* entrusted the national government with substantial powers over the militias although they remain "the Militia of the several States" (Art. 2, § 2), as they had been under the Confederation. *See Silveira*, 312 F.3d at 1079. The Second Amendment's declaration assures that the militia will remain available to provide security for states despite the Militia Clauses, a matter of uncertainty and dispute in the state ratification conventions, as we discuss below.

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[17] "Well-regulated" is the antithesis of self-directed action in the military context. Regulated means: "*a.* Governed by rule, properly controlled or directed, adjusted to some standard. * * * *b*. Of troops: Properly disciplined." VIII OXFORD ENGLISH DICTIONARY 380 (1933). Individuals, acting in self-interest, are not "well-regulated."

2. In context, the Amendment's "guarantee" is civic, not individual.

The "guarantee" is as civic as the "declaration." The only "Arms" it protects are those that are shown to have a "relationship to the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178. The other terms of the guarantee have a similar cast.

The Second Amendment is best read to use a right to "bear * * * Arms" in a military sense (even if the Amendment's opening clause is improperly ignored). In the eighteenth-century, "bear arms" was used almost exclusively in a military context, as in the 1780 Massachusetts constitution and 1776 North Carolina Declaration of Rights. *See* Mass. Const., Pt. I., Art. XVII ("The people have a right to keep and to bear arms for the *common* defense"); N.C. Decl., Art. XVII ("The People have a Right to Bear Arms, for the *Defense of the State* * * *"), quoted in N.H. Cogan, THE COMPLETE BILL OF RIGHTS 183 (1997); italics added. Bear arms "is such a synonym for waging war that Shakespeare can call a just war 'just borne arms' and a civil war 'self-borne arms.'" Wills (EVIL) at 256-257 & n.7. Appellants cite examples in which "bear arms" was used in a non-military sense in the 1780s. But exceptions do not invalidate *Silveira*'s conclusion (312 F.3d at 1072) that the "overwhelming" use of "bear arms" during the late eighteenth-century was in connection with military service. *See* D. Yassky, *The Second Amendment*, 99 MICH. L.R. 588, 618-619 (2000) (finding thirty contemporaneous uses, all unambiguously military).

Moreover, the House-passed draft contained a conscientious-objector clause that excused individuals religiously-scrupulous of "bearing arms" from military service. There is no legal obligation to "bear arms" for hunting and self-protection. *Silveira* at 312 F.3d at 1073. The presumption must be that drafters used the verb identically – *i.e.,* militarily – in both parts of a single-sentence amendment.

While "keep" in isolation would not necessarily be a military term, here it unavoidably reflects the coloration of its associated words, "Arms" and "bear." Under *Miller*, "Arms" refers exclusively to military weapons needed for the militia and common defense. "Bear" refers to carrying those weapons on military duty. It follows that even if the phrase "keep and bear" is not

unitary – like "arbitrary and capricious" – the right conferred is to keep military weapons' for the purpose of bearing them when called into militia duty for common security. As *Silveira* notes, 312 F.3d at 1074, the only right to *use* arms in the Amendment is to bear them in service. The right to keep them cannot plausibly be broader than the use to which they are to be put.

The guarantee recognizes a right of the "People" but that word alone does not expand (or contract) the right or specify whether the right relates to civic or personal weapons' use. The Constitution does not uniformly use "people" as a synonym for individuals. *See* J.N. Rakove, *Second Amendment*, 76 CHI.-KENT L.R. 103, 119 n.38 (2000). The primary meaning of "people" is "A body of persons composing a tribe, race or nation." VII OXFORD ENGLISH DICTIONARY 661 (1933). In the Constitution's Preamble, "People" appears as such a collective term – the body politic, the people as a whole. In Article I, § 1, it denotes an electoral majority (representatives "chosen * * * by the People"). It remains an open question whether the rights and powers of the people mentioned in the Ninth and Tenth Amendments are individual or civic and communal. The Fourth Amendment protects the "people" from unreasonable searches and seizures but the meaning is clarified by reference to their (individual) "*persons*, houses, papers, and effects." The First Amendment's expression that the "people" have a right to assemble is at least partly explainable by the need for a plural noun for assembly to be possible.[18]

The original draft of the Second Amendment itself distinguished the plural "people" from the individual "person." The "people" had a right to keep and bear arms but another clause specified "no *person* religiously scrupulous of bearing arms" would be forced to render military service. See below, at 33. Use of a different term for the individual implies that "people" referred to the citizenry as a whole. When a single constitutional provision uses different words to address a similar subject,

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[18] Madison often used "people" as a collective noun. His proposed amendments were prefaced by a declaration that all power is derived from "the people"; government exists for the benefit of "the people"; and "the people" have a right to reform or change "their" government. 1 GALES & SEATON'S HISTORY OF DEBATES IN CONGRESS (1787) ("ANNALS") at 451.

"a difference in meaning is assumed." *Harmelin v. Michigan*, 501 U.S. 957, 978 (1991) (per Scalia, J.)

In the eighteenth-century, it was not unusual for declarations of rights to mix purely personal and communal rights. The Massachusetts Constitution and North Carolina Declaration provisions cited above, referring to "people," do not recognize a personal right. In addition, several state declarations included language that would not be considered today as conferring rights. For example, Virginia's Bill of Rights provided (Cogan at 185):

> XIII. THAT a well-regulated Militia, composed of the body of the *people*, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; * * *.

Delaware's and Maryland's declarations had virtually identical provisions. Del. Decl. (1776) §§ 18-20 (ADD9); Md. Decl. (1776), art. XXV-XXVIII (ADD9). Recognizing a civic right in a bill of rights, using the term "people" for the citizenry as a body, was more a rule than an exception.

U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990), on which appellants rely, is not a Second Amendment decision and does not purport to decide whether the term "people" in the Amendment refers to individuals; neither does it decide whether the Second Amendment right refers solely to civic functions. The Court held that the "people," protected by the Fourth Amendment, refers to "a class of persons who are part of a national community," a *class* that does not normally encompass nonresident aliens. *Id*. at 265. "People" appeared to the Court to be a term of art in the Preamble and the Bill of Rights in an exclusionary sense but the Court did not purport to decide whether "people" refers to a class or individuals. *Id*. The Court warned that none of its assumptions binds it when that assumption is directly called into question in another case. *Id.* at 272.

C. THE AMENDMENT'S HISTORY ACCORDS WITH THE SUPREME COURT'S READING THAT ARMS POSSESSION RELATES ONLY TO CIVIC FUNCTIONS.

The right contained in the Second Amendment was associated with civic matters throughout, from its initial formulation at the Virginia ratification convention through revision in the First Congress; it was never associated with personal defense, hunting, or rebellion.

1. Pre-introduction history.

As of 1787, state constitutions – with one possible exception – recognized no right to firearms for private purposes. Two states, Massachusetts and North Carolina, explicitly recognized a right to arms for common defense. See above, at 26. Connecticut, Delaware, Georgia, Maryland, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, and Virginia had no provision on arms as such. Cogan at 183-184. Virginia had rejected a Jefferson draft stating: "No freeman shall ever be debarred the use of arms." 1 PAPERS OF THOMAS JEFFERSON 344 (J. Boyd, ed. 1950).

Several states, using language that differed from Massachusetts's and North Carolina's but with the same meaning, stressed a preference for use of the militia – and, by extension, privately owned military arms – for the common defense. The Virginia, Delaware, and Maryland declarations of rights stressed well-regulated militias as "the proper, natural, and safe defence of a free State" to elevate them above standing armies. Above at 28-29. New York's 1777 constitution (art. XL) stated that the militia "at all times * * * shall be armed and disciplined." If there was a right associated with these declarations it was only to have arms for common defense. R. Hardaway, *The Inconvenient Militia Clause of the Second Amendment*, 16 ST. JOHN'S J.L. COMM. 41, 82 (2002). Pennsylvania's 1777 declaration (art. XIII) reached the same result with a fourth formulation: "That the people have a right to bear arms for the defense of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up * * *." Despite its somewhat different wording, it is unlikely that the Pennsylvania declaration involved a personal right because it was available only to men who took an oath of loyalty to the state. S. Cornell, *Commonplace or Anachronism*, 16 CONST. COMMENTARY 221, 228-229 (1999); Cornell (*Well Regulated Right*), at 495-499.

While the state constitutional wordings differ, "the meaning was the same. Only the citizenry, trained, armed, and organized in the militia, could be depended on to preserve republican liberties for 'themselves' and to ensure the constitutional stability of 'the state.'" Cress, at 29.

Rights associated with these state declarations are rights associated with the common defense, as the Massachusetts and North Carolina constitutions make explicit.

Control of the militia was extensively debated at the Constitutional Convention. *See Perpich v. Department of Defense*, 496 U.S. 334, 340 (1990); *Silveira*, 312 F.3d at 1078. The confederal militia system had proved to be unworkable in practice. As became apparent in 1786 with Shays' Rebellion in Massachusetts, existing militias were undisciplined. Disgruntled farmers, joined by militia units drawn from the area, threatened civil war in the state. The rebellion deeply frightened the men at the Constitutional Convention. *See* P. Finkelman, *A Well Regulated Militia*, 76 CHI. KENT L.R. 195, 211-212 (2000); *cf.* FEDERALIST No. 21 (Rossiter ed. (1961)) at 140 (Hamilton). In his opening address to the Convention, Virginia Governor Edmund Randolph cited Shays and warned of "the prospect of anarchy from the laxity of government everywhere." 1 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18-19 (1937). Randolph's "Virginia Plan" placed the "Militia of all the States * * * under the sole and exclusive direction of the United States." *Id.* at 293. Madison supported that proposal in principle. 2 Farrand at 293, 332, 388; *see* Finkelman, at 211-212. The Convention rejected such a drastic shift of power in favor of the Militia Clauses. Even so, delegates forecast the states' demise if the Militia Clauses were adopted. 1 Farrand at 330-331 (Ellsworth, Dickinson, Sherman); 385, 388 (Gerry); 387 (Martin).

The Militia Clauses produced a "storm of violent opposition" at state ratifying conventions. F.B. Wiener, *Militia Clauses of the Constitution*, 54 HARV. L.R. 181, 185 (1940). In Maryland, Martin called the Militia Clauses the "coup de grace to the State governments." 3 Farrand at 209; *see* Cogan, at 191. One major criticism, voiced by George Mason at the Virginia ratification convention, was that Congress could alter the composition of the militia at will:

> Who are the militia? They consist now of the whole people, except a few public officers. But I cannot say who will be the militia of the future day. If that [Constitution] gets no alteration, the militia of the future day may not consist of all classes * * *.

3 J. Elliot, ed., DEBATES IN THE SEVERAL STATE CONVENTIONS, etc. 425 (1888); *compare* FEDERALIST # 29 (Hamilton) (C. Rossiter, ed., 1961) 184 ("What plan for the regulation of the militia may be pursued by the national government is impossible to be seen").[19]

The fear that the Militia Clauses give Congress exclusive power to provide arms for militias was a particularly contentious issue at the Virginia convention. George Mason feared that the federal government could "disarm" the militia by neglecting to provide military arms; "the state government cannot do it, for Congress has an exclusive right to arm them." 3 Elliot at 379. The federal government's power could be used to "abolish our militia. If they neglect to arm them, and prescribe proper discipline, they will be of no use." *Id.* at 380. He asked for "an express declaration that the state governments might arm and discipline them." *Id.*[20]

As an outgrowth of the debates, and to deflect demands to convene a second constitutional convention before ratification, the Virginia Federalist delegates agreed to append proposals for

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[19] Mason was right; Congress altered the composition of the militia. In the 1792 Militia Act, Congress expressly excluded several groups from service (still not counting women, men over 45, and non-whites) including stage drivers, ferrymen, mariners, and everyone exempted by state law. 1 Stat. 271-272, Ch. 33, §§ 1-2. Since 1901, a well-regulated and governmentally-armed National Guard system, composed of a small percentage of the population, serves as the state militia. *Perpich,* 496 U.S. at 341-346. Although an "unorganized militia" exists on paper, it has no function. *Id.* at 342; 10 U.S.C. § 311(b)(2). It receives no military training, discipline, or supervision by state-appointed officers. The District's unorganized militia "shall not be subject to any duty" but may be called to help execute the laws and suppress riots. D.C. Code § 49-404. District law does not require militia members to have arms. The unorganized militia comprises neither women nor men over 45. *See* 10 U.S.C. § 311(b)(2); D.C. Code § 49-401; *cf. Rostker v. Goldberg*, 453 U.S. 57 (1981) (excluding women from military draft constitutional).

Mere eligibility for an unorganized militia is insufficient to trigger Second Amendment protection. *Parker*, 362 F.3d at1284; *Rybar*, 103 F.3d at 286; *Hale*, 978 F.2d at 1020; *U.S. v. Warin*, 530 F.2d 103 (1976).

[20] It was during this debate that Patrick Henry made oft-misconstrued remarks (*id.* at 386) in response to Madison's argument that states retained concurrent power to arm the militias. If so,

> at a very great cost, we shall be doubly armed. The great object is, that every man be armed. But can the people afford to pay for double sets of arms, &c? Every one who is able may have a gun. But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, * * * for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress without limitation or bounds, how will your militia be armed?

Henry was referring to *military* weapons for militia, not personal, use.

changes to the Constitution for Congress to consider at the first opportunity. K.R. Bowling, "*A Tub to the Whale*," 8 J. EARLY REPUBLIC 223, 227 (1988); 3 Elliot at 657-662. On June 27, 1788, without debate, the convention unanimously adopted forty additions and changes presented by a committee, including (*id.*):

> 17th 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 defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided * * *.
>
> * * *
>
> 19th That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.

New York's convention next narrowly ratified; proposed a bill of rights (including clauses patterned on Virginia's seventeenth declaration); and called for a second constitutional convention. Cogan at 181; Bowling, at 227. Meanwhile, North Carolina's convention adopted all of Virginia's proposals, also parroting Virginia's seventeenth and nineteenth declaration. 4 Elliot at 242-247 North Carolina, however, refused to ratify the Constitution unless its amendments were first added. *Id.*

2. Actions at the First Congress.

At no time during consideration of the Second Amendment did any member of Congress, including Madison, mention a right to arms for personal, rather than civic, use. Madison's draft, introduced June 8, 1789, tracked Virginia's seventeenth and nineteenth declarations. It read (1 ANNALS at 451):

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

Madison plainly rejected language proffered by New Hampshire's convention ("Congress shall never disarm any Citizen unless such are or have been in Actual Rebellion," Cogan at 181) and proposals previously *rejected* by Massachusetts and Pennsylvania conventions that would have recognized a right to arms for personal use. *Id*. at 181-182; s*ee Silveira*, 312 F.3d at 1083-1084. Even in Madison's formulation, "[t]he whole sentence looks to military matters, the second clause giving reason

for the right's existence, and the third giving an exception to that right * * *." Wills (*NYRB*) at 63.[21] As noted above, Madison's draft distinguishes between "people" and "person," people being used for the citizenry as a whole and person for each individual.[22]

A select House committee (1 ANNALS at 699) meeting in executive session transposed Madison's first two clauses and substituted a comma for the semi-colon, tightening the connection between the two clauses and giving more emphasis to the purpose behind the right. *See* C.T. Bogus, *Hidden History*, 31 U.C. DAVIS L.R. 309, 370 (1998). It shifted the militia's role from ensuring the "security of a free country" to that of the "free State," more closely connecting the militia to the states. The change assured that an armed citizenry would be available for state needs, the issue debated at the Virginia ratification convention. The committee added a definition of the militia as the "body of the people" (Cogan at 170), a phrase that could have limited Congress's Militia Clause authority to determine the composition of the militia. It dropped "in person" from the conscientious-objector clause. *Id.*

All remarks recorded in the House debate related to military service. 1 ANNALS at 778-781. Rep. Gerry (a leading Anti-Federalist member) expressed concern that the conscientious-objector clause could allow the federal government to "declare who are the religiously scrupulous and prevent them from bearing arms." *Id.* at 778. The provision, combined with the Constitution's Militia Clauses, would "make a standing army necessary." *Id.* Gerry also expressed concern that reference

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[21] Appellants cite an essay by Tench Coxe, commenting that "the people are confirmed by the next article in their right to keep and bear their private arms." A Pennsylvanian (Coxe), *Phil. Fed. Gazette*, Jun. 18, 1789, at 2, Cogan at 203. Madison thanked Coxe for his support of the entire bill but never confirmed Coxe's characterization of the text. H.E Veit, CREATING THE BILL OF RIGHTS, 254 (1991). Madison's draft amendment was later revised to give the militia more prominence. In any event, a right to "private arms" would be compatible with the proposition that those private arms were protected only so long as they were for militia service.

[22] Contrary to appellants' argument, Madison's proposal to include amendments in Constitution Article I, § 9, does not clarify the right protected by the Second Amendment. Section 9 lists restrictions on the powers of Congress. Some are traditional civil rights restrictions such as *habeas corpus*; others involve the slave trade, taxes, etc. Section 9 was a logical place for all limits on congressional power.

to the militia "being the best security of a free State, admitted an idea that a standing army was a secondary one." *Id*. at 780.

The Senate, in closed session without recorded debate, altered the House draft to the present language but retained the intimate relationship between explicit purpose and right. It eliminated description of the militia as the "body of the people." 1 *Journal of the First Session of the Senate* (Gales and Seaton 1789) ("S.J.") 71. It is probable that a Federalist-dominated body wanted to preclude having the Amendment construed to limit Congress's Militia Clause powers to define and organize the militia, as Mason had wished. Rakove, at 125. Perhaps to allay objections such as Gerry's, it substituted "necessary to" for "best security of" (S.J. at 77), a change that changed neither the subject nor the object of the clause. The Senate deleted the conscientious-objector clause. S.J. at 71.

The Senate rejected an amendment to add "for the common defence" after "Arms." S.J. at 77. The most probable reason is that the phrase was a redundancy, given the remaining language: "The military sense is the obvious sense. It does not cease to be the obvious sense if something that might have been added was not added." Wills (*NYRB*), at 64. Another reason for rejecting the phrase may have been to foreclose interpretations that would preclude use of the militia for law enforcement. *See* Rakove, at 126. Rejection of the change affirmed there would be no diminution in the national government's authority to use the militia to enforce federal law.

The Senate explicitly defeated a proposal to recognize a right of armed rebellion: "* * * that the doctrine of non-resistance, against arbitrary power and oppression [by government] is absurd slavish and destructive of the good and happiness of mankind." S.J. at 74. That was surely because the Senate did not accept that doctrine, not because the doctrine was already embodied in the Second Amendment. Certainly, nothing said in the Federalist-dominated First Congress suggests an intent to sanction armed opposition to the national government.

D. APPELLANTS' PRE- AND POST-ADOPTION CITATIONS DO NOT JUSTIFY A DIFFERENT READING OF THE AMENDMENT'S LANGUAGE AND HISTORY.

Appellants quote selectively from writings published before and after adoption of the Second Amendment – most of them decades before and after. Argument from pre- and post-adoption writers is no substitute for the language itself and its legislative history.

1. Appellants misread FEDERALIST PAPER No. 46 (Rossiter ed. 1961), written by Madison in 1788, a year before he drafted his amendments. Far from approving of weapons for personal use or individual armed resistance, Madison was assuring the *states* they had nothing to fear from a federal army because the states could enlist the militia in *their* defense. He considered the likelihood of a federal military assault on the states the product of "the incoherent dreams of a delirious jealousy or the misjudged exaggerations of a counterfeit zeal," but was willing to imagine that "extravagant * * * supposition." *Id*. at 299. If an unlikely attack occurred, the states "would be able to repel the danger" because a small federal army would be opposed "by a militia amounting to near a half a million citizens with arms * * *. * * * [T]he existence of *subordinate governments*, to which the people are attached, and by which the militia officers are appointed forms a barrier against the enterprises of ambition. * * *." *Id*.

Madison did not favor individual armed resistance, but a state-led and -organized military force. Madison had long warned against armed rebellion by private individuals and groups. During the Virginia ratifying convention he said, "public force must be used when resistance to the laws required it, otherwise society itself must be destroyed." 3 Elliot at 384. He asked, "Was there ever a constitution, in which if authority was vested, it must not have been executed by force, if resisted?" *Id.* at 413; *see id.* at 399. He stressed the militia's role in assisting governments: "If insurrections should arise * * * the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army." *Id.* at 378. He called Shays' Rebellion "treason." Madison to Jefferson, Mar. 19, 1787, 1 REPUBLIC OF LETTERS (Smith ed. 1995) 469, 473.

It is inconceivable that Madison and the other Federalists in the First Congress designed the Second Amendment as a "suicide clause" (Finkelman at 221, 236):

> Indeed, allowing for armed, unregulated citizens who could threaten the public order and the national state, was * * * utterly in conflict with the "more perfect union" the framers had created in Philadelphia. The "father of the Constitution," as Madison is often called, did not draft the Bill of Rights to undo his hard work at Philadelphia.[23]

2. Blackstone's views on arms, W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1765), were never mentioned in the ratification conventions or First Congress and it cannot be assumed those views were incorporated in the Second Amendment. Bogus, 31 U.C. DAVIS at 396. Citing the 1689 English Bill of Rights, 1 W. & M. st. 2 c. 2, Blackstone had written that English subjects have a right "of having arms for their defence *suitable to their condition and degree*, and *such as are allowed by law*." 1 COMMENTARIES at *143-*144; italics added.

Until 1689, the English had no individual right to keep guns and English historians agree that the Bill created no new rights. Bogus, 31 U.C. DAVIS at 377; J.M. Trevelyan, ENGLISH REVOLUTION, 1688-1689 at 79-80 (1938); *see* L.G. Schwoerer, *To Hold and Bear Arms, the English Perspective*, 76 CHI.-KENT L.R. 27, 43-60 (2000). The Bill qualified the right to arms by religion, socio-economic status, and parliamentary law. Schwoerer, at 43. The "as allowed by law" language "'limited the type of weapon that could be legally owned to a full-length firearm * * * and permitted legal definition of appropriate use.'" Hardaway, at 70 n.121, quoting J.L. Malcolm, *Right of the People, etc.*, 10 HASTINGS CONST. L.Q. 285, 313 (1983). Because the Bill was designed to limit the Crown in the wake of the Glorious Revolution, it places no restrictions on Parliament. Bogus, 76 CHI.-KENT at 11-12; W. Geldart, INTRODUCTION TO ENGLISH LAW 3 (1991).

Blackstone understood that the English right was hedged with legal restrictions and that Parliament could change the law. *See* S.J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 252-260 (2000); Schwoerer, *id.* at 27, 55-56. He upbraided "over zealous republicans" who would "allow[] to every individual * * * *private* force to resist even *private*

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[23] The assertion that the Second Amendment was also intended to allow individuals to take up arms against the central government is incompatible with the Militia and Treason Clauses. The Second Amendment promotes the *security* of a free state, not its destruction. The first Militia Clause (cl. 15) anticipates that the militia will be summoned to "execute the Laws of the Union," not to prevent their execution. The Treason Clause (Art. III, §3) defines treason as "levying War against" the United States and "adhering to their Enemies."

oppression. A doctrine productive of anarchy, and in consequence, equally fatal to civil liberty, as tyranny itself." 1 COMMENTARIES, at *251; italics added.

3. The contention that Tucker (1 St. George Tucker, BLACKSTONE'S COMMENTARIES, Note D, pt. 6 (*Of the Constitution of the United States*) (1803)) interpreted the Second Amendment as embodying a right to guns for personal uses "rests on a serious misreading of Tucker's constitutional writings." S. Cornell, *St. George Tucker and the Second Amendment*, 47 WM. & MARY L. REV. 1123 (2006). In earlier unpublished law lectures, Tucker saw the Amendment as a concession to the states to assuage fears about the central government's control of the militia. *Id.* at 1125, 1127-1134, citing Tucker, Ten Notebooks of William and Mary Lectures 126-129. In later writings, including the passages that appellants cite, Tucker refined his views, seeing the right guaranteed by the Second Amendment as a civic right, rather than as a state right. *Id.* at 1126, 1134-1140. Tucker located a right to personal defense in the common law, not the Second Amendment. *Id.* at 1126-1127. He acknowledged that the common law varied from state to state and guns could be regulated by states, at least to the extent that they did not interfere with participation in the militia. *Id.* at 1144-1149.

4. Justice J.H Story, 2 A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 1890, 746-747 (1842), writing a half century after adoption of the Amendment, saw the Second Amendment in classic communal, not individual, terms. When he wrote that arms provided a "*moral* check" on rulers, he was speaking in the context of a militia system that he feared was disappearing "despite its 'undeniable' importance." *Id*. He lamented: "How it is practicable to keep the people duly armed without some organization, it is difficult to see." *Id.* Story was not speaking of a right to arms possession for personal use "but a [civic] discipline, at times onerous, imposed from without." Prince, at 693-694; *see* Cress, at 42; S. Cornell, *New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161, 165-167 (2004).

5. There is no merit in *amicus* CORE's argument that the Fourteenth Amendment altered the meaning of the Second. *First*, its citations to congressional debate on the Civil Rights Act of 1866, related reconstruction-era statutes, the Fourteenth Amendment, and *post*-Amendment laws

unmistakably show that members of Congress intended to ensure newly freed slaves the same rights as whites, including those in the Bill of Rights, which some legislators summarized more or less correctly. The language of the Second Amendment was not at issue. Some legislators, to be sure, argued that former slaves should have guns for personal protection. But none of the scattered references to weapons are sufficient to support the argument that the Fourteenth Amendment altered the Second. *See* Spitzer, at 372. *Second*, insofar as CORE's argument depends on the Privileges and Immunities Clause, that Clause does not restrict legislative power in the District. *Banner v. U.S.*, 428 F.3d 303, 308 (D.C. Cir. 2005), *cert. denied*, 126 S.Ct. 2021 (2006). Even if it did, *U.S. v. Presser*, 116 U.S. 252, 267 (1886), held that the Clause recognized no privilege to parade in public with weapons in violation of state law.

E. The District's Laws Do Not Interfere with a State Militia and Plaintiffs Did Not Allege They Do.

The federalism concerns embodied in the Amendment have no relevance in a purely federal entity such as the District because there is no danger of federal interference with an effective *state* militia. This places District residents on a par with state residents. The Second Amendment does not restrict state regulation of weapons. *Presser,* 116 U.S. at 265 (Amendment is not a limitation on the state power to regulate weapons so long as states do not "disable the people from performing their [military] duty to the general government").[24] The Amendment, concerned with ensuring that the national government not interfere with the "security of a free State," is not implicated by local legislation in a federal district having no possible impact on the states or their militias. *See Seegars v. Ashcroft*, 297 F. Supp.2d 201, 237-239 (D.D.C. 2004), *rev'd on other grounds,* 396 F.3d 1248.

In addition, no plaintiffs alleges that District law prevents their participation in the common defense or interferes with their ability to further the preservation and efficiency of the militia. The

[24] In the District, Congress (and the Council) possess "all the police and regulatory powers which a state legislature or municipal government would have." *Palmore v. U.S.*, 411 U.S. 389, 396 (1973).

complaint recites only that District law prevents them from acting as they would like "for self defense." A.2-4. Those allegations do not state violations of the Second Amendment.

CONCLUSION

Dismissal of the complaint should be affirmed for lack of standing. Alternatively, judgment should be affirmed on the merits.

Respectfully submitted.

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I certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B)(i). It consists of 13,995 words as counted by WordPerfect 11, excluding the material permitted to be excluded by FRAP 32(a)(7)(B)(iii) and by D.C. Cir. R. 32(a)(2). The typeface is 12 pt. Times New Roman.

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