No. 04-7041

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, *et al.*,
Appellants,

v.

DISTRICT OF COLUMBIA and ANTHONY A. WILLIAMS,
Appellees,

Appeal from the United States District Court for the District of Columbia,
(No. CIV. A. 03-0213-EGS)

BRIEF OF THE BRADY CENTER TO PREVENT GUN VIOLENCE, THE VIOLENCE POLICY CENTER, AND THE CITY AND COUNTY OF SAN FRANCISCO AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*

All parties, intervenors, and *amici curiae* appearing before the District Court and in this Court, with the exception of the City and County of San Francisco, are listed in the briefs for Appellants and Appellees District of Columbia and Williams.

Rulings Under Review

References to the rulings at issue appear in the briefs for Appellants and Appellees District of Columbia and Williams.

Related Cases

This case was not previously before this Court or any other Court. The only related case of which *amici curiae* are aware is *Seegars v. Gonzales,* 396 F.3d 1248, *r'hg denied*, 413 F.3d 1 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1187 (2006). As in this case, the plaintiffs in *Seegars* purported to challenge the District of Columbia's firearms restrictions under the Second Amendment, among other grounds. This Court affirmed the dismissal of those claims as a preenforcement challenge to a criminal statute that the plaintiffs lacked standing to assert.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c) and D.C. Cir. R. 26.1, *amici curiae* the Brady Center and the VPC state as follows:

The Brady Center is a non-profit organization that works to reduce firearm deaths and injuries through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center participates in key court cases throughout the nation, advocating legal principles that will reduce gun violence. The Brady Center has no parent companies and no publicly held company has a 10% or greater ownership interest in the Brady Center.

The VPC is a national, not-for-profit association that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, grassroots advocates, and the general public. It has no parent companies and no publicly held corporation owns 10% or more of its stock.

Amicus Curiae the City and County of San Francisco, as a governmental entity, is not required to file a corporate disclosure statement under Fed. R. App. P. 26.1 and 29(c), and D.C. Cir. R. 26.1.

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TABLE OF AUTHORITIES

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(Authorities upon which we chiefly rely are marked with asterisks.)

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GLOSSARY

Word(s)	Abbreviation
Amici Curiae the States of Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Utah, and Wyoming	"Texas"
Brady Center to Prevent Gun Violence	"Brady Center"
City and County of San Francisco	"San Francisco"
Congress Of Racial Equality	"CORE"
Violence Policy Center	"VPC"

INTEREST OF *AMICI*

The Brady Center is a non-profit public interest organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that the Second Amendment is not misinterpreted as a barrier to strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous *amicus* briefs in cases involving the constitutionality of gun laws. Brady Center attorneys have also made significant contributions to Second Amendment scholarship.

The VPC is a non-profit educational organization that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, grassroots advocates, and the general public. Among other initiatives, the VPC examines the role of firearms in America, analyzes trends and patterns in firearms violence, and works to develop policies to reduce gun-related death and injury.

The VPC is an active participant in the debate over the meaning of the Second Amendment. The VPC monitors and participates in Second Amendment litigation around the country, and has filed *amicus* briefs in several Second Amendment cases.

San Francisco has a population of 776,733. In recent years, gun violence in San Francisco has been increasing, resulting in significant human and economic

costs to the city and its citizens. To combat this gun violence, San Francisco has enacted measures that limit and regulate gun possession within its borders. California has also passed gun regulation measures that assist San Francisco in combating gun violence within its borders. These measures cannot, however, address the violence fostered by lax regulation of guns in other parts of the United States. San Francisco therefore has a strong interest in supporting the constitutionality of efforts by other municipalities to regulate handguns and can offer this Court its experience in addressing issues surrounding gun regulation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Amendment protects the ability of the states to maintain a "well regulated Militia," and secures to the people a right "to keep and bear arms" specifically and exclusively for that purpose. U.S. CONST. amend. II. Yet Plaintiffs ask this Court to invalidate the firearms restrictions of the District of Columbia, claiming that the Second Amendment guarantees an individual right to keep and bear arms *unrelated* to militia service. The District Court correctly recognized that long-settled precedent, fundamental principles of constitutional interpretation, and the vast weight of historical evidence confirm the militia-based understanding of the Second Amendment. In short, the Second Amendment confers no individual right to own or use firearms for purposes unrelated to militia service.

United States v. Miller, 307 U.S. 174 (1939), the Supreme Court's last opinion construing the Second Amendment, directly refutes Plaintiffs' reading of the Second Amendment. The Court held that the "possession or use" of a weapon must bear "some reasonable relationship to the preservation or efficiency of a well regulated militia" to receive Second Amendment protection. *Id.* at 178. Since *Miller*, the Supreme Court has twice confirmed this approach to Second Amendment analysis. Moreover, every federal court of appeals to consider the issue except one has followed suit, rejecting the proposition that the Second Amendment protects any right to own or use firearms unrelated to militia service.

The Second Amendment's text confirms this long-standing interpretation. It reads: "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." The Amendment's first, or prefatory, clause anchors the Amendment in the Framers' concerns regarding the militia and the military, rather than individual self-defense. Nothing in the rest of the Amendment's text or the Constitution justifies disregard of the prefatory clause.

Further, many prominent scholars have endorsed this militia-based interpretation of the Second Amendment after careful analysis of its text and historical origins. *See, e.g.*, Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123 (2006); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000); Garry Wills, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT (1999); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); Kenneth R. Bowling, *"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223 (1988); Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); Frederick B. Wiener, *The Militia Clause*

of the Constitution, 54 HARV. L. REV. 181 (1940); Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915). This includes scholars on whose works the Plaintiffs rely. *See, e.g.*, Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 895 (describing the Amendment as "an inherently collective and political right").

To be sure, proponents of the individual-right approach have flooded law reviews in recent years with articles suggesting a private right to own firearms. Texas Br. 21-22 & n.9. These authors generally rely upon a small set of historical references, often quoted out of context. They also swim against the tide of a well-established body of case law. Indeed, considering the longstanding acceptance of the militia-based rights view, there has been little reason for scholars who support that view to address the topic. *See* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHICAGO-KENT L. REV. 3, 24 (2000).

In sum, Plaintiffs' Second Amendment claims are controlled—and defeated—by *Miller* and its progeny. Plaintiffs rely chiefly on an interpretation of the Second Amendment that has been roundly rejected by almost every court of appeals. On close examination, moreover, the bulk of Plaintiffs' historical and textual arguments run smack against *Miller*'s basic holding that the Second Amendment protects a right to bear arms related to, and inextricably bound with, state militia

service. Plaintiffs provide no persuasive legal, textual, or historical justification for this Court to abandon *Miller*, even if it were free to do so. Accordingly, the Court should affirm the dismissal of Plaintiffs' Second Amendment claims.[1]

ARGUMENT

I. *UNITED STATES V. MILLER* ESTABLISHED THAT ANY SECOND AMENDMENT RIGHT MUST RELATE TO MILITIA SERVICE.

Miller is without question the seminal case interpreting the Second Amendment. Contrary to a long line of deliberate interpretation, Plaintiffs contend *Miller* turned not on the substantive issue of Miller's right to bear arms, but on the nature of the weapon at issue (*i.e.*, whether the weapon was suitable for militia service). Pls. Br. 25-26. But Plaintiffs' argument is wishful thinking, dependent upon a highly selective reading of *Miller*. As every federal appellate court save the Fifth Circuit (in dictum) recognizes, *Miller* firmly rejected the notion of a Second Amendment right unrelated to militia service. That decision is binding upon this Court.

As Justice McReynolds explained in *Miller*, it was the "obvious purpose" of the Amendment to "assure the continuation and render possible the effectiveness" of militia forces, and the Amendment "*must* be interpreted and applied with that end in view." 307 U.S. at 178 (emphasis added). Historically, the Court noted, mi-

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[1] *Amici* agree with, but do not herein address, Appellees' standing argument.

litia members were expected to supply their own arms "when called for service" to "[t]he militia which the States were expected to maintain and train," and militia members were expected to act "in concert for the common defense." *Id.* at 178-79. *Miller*'s plain message was that the right to "keep and bear arms" in the Second Amendment refers only to arms borne in lawful militia service, not any rights of individuals to possess and use firearms for their own private ends.[2] Because defendants failed to demonstrate that the "possession or use" of their firearm had "some reasonable relation to the preservation or efficiency of a well regulated militia," *id.* at 178, the Second Amendment gave them no defense.

Since *Miller*, the Supreme Court has twice affirmed the militia-based interpretation of the Second Amendment. In *Lewis v. United States*, 445 U.S. 55 (1980), the Court addressed whether 18 U.S.C. § 1202(a)(1), which criminalizes possession of a firearm by a convicted felon, could survive an equal protection challenge. The Court applied rational-basis review, rather than strict scrutiny, noting the stat-

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[2] The Court should not accept Plaintiffs' suggestion that *Miller* turned on the nature of the "arms" at issue. Pls. Br. 26. The result of that argument would be absurd; it suggests *Miller* would have upheld defendants' Second Amendment challenge if only their weapon had been employable in military service. The First, Third, and Tenth Circuits have rightly rejected this attempt to distinguish *Miller,* refusing to posit a constitutional right to possess military weapons, capable of mass killing, for private purposes. *See United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

ute at issue "[did not] trench upon any constitutionally protected liberties." 445 U.S. at 65 n.8 (citing *Miller*). By not applying strict scrutiny, *Lewis* presupposed that *Miller* did not recognize a fundamental, individual right to possess firearms. Similarly, the Court dismissed the appeal of *Burton v. Sills*, 248 A.2d 521, 527 (N.J. 1968), in which the state court cited *Miller* in concluding that the Second Amendment did not confer a right to bear arms unrelated to militia service, for "want of a substantial federal question." *Burton v. Sills*, 394 U.S. 812 (1969). This dismissal would have been inappropriate if the Court believed there was any doubt about whether *Miller* endorsed the militia-based view.

Thus, *Miller* firmly rejected the individual-rights view espoused by Plaintiffs, and the Supreme Court has seen no need to revisit the issue since. With the exception of dictum by the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 233 (2001), this has been the accepted construction of *Miller* for more than six decades, including every published federal opinion since *Emerson*.[3] This Court "would be in error to overlook sixty-five years of unchanged Supreme Court

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[3] *See, e.g., United States v. Parker*, 362 F.3d at 1284; *United States v. Lippman*, 369 F.3d 1039, 1044 (8th Cir. 2004); *United States v. Price*, 328 F.3d 958, 961 (7th Cir. 2003); *Silveira v. Lockyer*, 312 F.3d 1052, 1066, *reh'g en banc denied*, 328 F.3d 567 (9th Cir. 2003); *Olympic Arms v. Buckles*, 301 F.3d 384, 388-89 (6th Cir. 2002); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997); *Rybar*, 103 F.3d at 286; *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984).

precedent and the deluge of circuit case law rejecting an individual right to bear arms not in conjunction with service in the Militia." *Parker*, 311 F. Supp. 2d at 109-10.[4]

II. TEXTUAL ANALYSIS CONFIRMS THAT THE SECOND AMENDMENT CONFERS NO INDIVIDUAL RIGHTS.

The unique textual structure of the Second Amendment sets it apart from all other provisions in the Bill of Rights.[5] Courts and scholars agree that the meaning of the Second Amendment's right "to keep and bear arms" must be informed by the prefatory clause concerning a "well regulated Militia." *See, e.g., Miller*, 307 U.S. at 178. Of course, it is fundamental that "every word must have its due force, and appropriate meaning" in constitutional interpretation. *Wright v. United States*, 302 U.S. 583, 588 (1938). Even *Emerson* recognized that the prefatory clause must

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[4] Plaintiffs cite *Fraternal Order of Police ("FOP") v. United States*, 173 F.3d 898 (D.C. Cir. 1999), arguing that it is "[i]mplicit in [this] Court's reasoning ... that if a rule could be shown to impair a significant portion of 'ordinary citizens' from functioning as a militia ... it would violate the Second Amendment." Pls. Br. 31. *FOP*, however, did not attempt to "fix the exact form of the required relationship ... because [the appellant] presented no evidence on the matter at all." *FOP*, 173 F.3d at 906.

[5] "What renders the language and structure of the amendment particularly striking is the existence of a prefatory clause, a syntactical device that is absent from all other provisions of the Constitution, including the nine other provisions of the Bill of Rights." *Silveira*, 312 F.3d at 1068.

be given "its full and proper due." 270 F.3d at 236.[6] Under plaintiffs' reading, the first nine words of the Amendment serve no function whatsoever; the meaning of the Amendment would be the same if they were omitted entirely.

The Second Amendment's prefatory clause is much more than exhortatory preamble, as Plaintiffs suggest. Rather, the accepted reading—embraced by *Miller* and courts since—is that the prefatory clause "helps shape and define the meaning of the substantive provision contained in the second clause, and thus of the amendment itself." *Silveira*, 312 F.3d at 1075.

> When the second clause is read in light of the first, so as to implement the policy set forth in the preamble, ... the most plausible construction of the Second Amendment is that it seeks to ensure the existence of effective state militias in which the people may exercise their right to bear arms, and forbids the federal government to interfere with such exercise.

Id. See also Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999) ("The link that the amendment draws between the ability 'to keep and bear Arms' and '[a] well regulated Militia' suggests that the right protected is limited, one that inures not to the individual but to the people collectively, its reach extending so far

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[6] Contrary to Plaintiffs' view, this approach would not "eviscerate," Pls. Br. 39, the import of other portions of the Amendment. It merely recognizes that the prefatory clause should not be rendered superfluous or dormant. In contrast, Plaintiffs' reading relies on an unjustified preference for one clause—deemed the "operative clause"—over the rest.

as is necessary to protect their common interest in protection by a militia.").[7] At a minimum, the Second Amendment by its very terms must be construed as protecting a "well regulated Militia."

A. "Militia" Refers To An Organized Military Unit Under State Control.

Plaintiffs repeatedly insist that the "people" referenced in the Second Amendment are the same "people" mentioned elsewhere in the Bill of Rights. Pls. Br. 47.[8] Their argument, however, assumes that the term "Militia" can be reduced

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[7] Plaintiffs suggest that the Copyright and Patent Clause, U.S. CONST. art. I, § 8, cl. 8, provides an analogy for interpreting the prefatory clause of the Second Amendment. *See* Pls. Br. 40-43. But the analogy is inapt. The Copyright Clause's syntax is consistent with other clauses in Article I, Section 8, which each enumerate a power of Congress using a similar infinitive construction ("To ..."). The Second Amendment follows no similar syntactical pattern in the Bill of Rights. Furthermore, the Copyright Clause's "preamble"—if it may be deemed one—is part of a clause that bestows an affirmative power on Congress. The Second Amendment, by contrast, *restricts* Congress' power. *See Silveira*, 312 F.3d at 1068 n.23.

[8] Plaintiffs argue that *United States v. Verdugo-Urquidez* establishes that "the people" referenced in the First, Second, Fourth, Ninth, and Tenth Amendments refers uniformly "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. 259, 265 (1990). But *Verdugo-Urquidez* discusses "the people" to draw a distinction between rights conferred under the Fifth and Sixth Amendments to "persons," meaning *all* persons, versus rights reserved to "the people," meaning a more selective community defined by membership. *See* Amar, *supra*, at 892 ("[W]hen the Constitution speaks of 'the people' rather than 'persons,' the collective connotation is primary."). Moreover, "bear arms" still refers to the use of arms in a military sense, and the Second Amendment must still be interpreted in light of its prefatory clause. Thus, it may well be the same "people"

to the term "people"—that "[t]he two are synonyms," Pls. Br. 45—and that "'militia' referred simply to members of the public," in their *individual* capacities, who were "capable of bearing arms in defense of the government." Pls. Br. 24. But as Pulitzer Prize-winning scholar Jack Rakove has explained, Plaintiffs' textual argument inappropriately requires one to presume that "people" should be "defined intratextually, by reference to its use in other amendments," but that "Militia" should be interpreted as if it "leaps beyond the proverbial four corners of the document," and is not, in the Second Amendment, the same organized military unit well known to the Framers and referenced repeatedly in the rest of the Constitution. Rakove, *supra*, at 124. Such unprincipled reasoning has been criticized as the "most striking defect in the textualist component of the individual rights interpretation." *Id.* at 123; *see also Silveira*, 312 F.3d 1070 ("That same interpretive principle is unquestionably applicable when we construe the word 'militia.'").

The word "militia" appears in four clauses of the Constitution outside the Second Amendment. In each, it can only be understood to refer to a military unit, and *not* to an undifferentiated mass of individuals.

"Militia" first appears in Article I, which grants Congress the powers:

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do have a right to use arms *as part of an organized militia. See United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) (rejecting an individual-rights argument based on *Verdugo-Urquidez*).