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Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et. al.,

Plaintiffs,

v.

STATE OF CALIFORNIA; WILLIAM LOCKYER, Attorney General of the State of California, et. al.,

Defendants.

CASE NO. 01CECG03182

EX PARTE APPLICATION FOR CONTINUANCE OF TRIAL, OR IN THE ALTERNATIVE REQUEST FOR TEMPORARY STAY OF PROCEEDINGS PENDING THE UNITED STATES SUPREME COURT'S RULING IN *DISTRICT OF COLUMBIA V. HELLER*, SLIP NO. 07-290; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF JASON A DAVIS IN SUPPORT THEREOF; EXHIBITS "A-F"

Date: April 22, 2008
Time: 3:30 p.m.
Dept.: 97C

TO EACH PARTY AND THEIR ATTORNEYS OF RECORD:

Plaintiffs EDWARD W. HUNT, et. al., hereby submit an ex parte application to move this court to continue the presently set trial date of May 27, 2008 at 8:30 a.m. in Department 72 of the

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TO EACH PARTY AND THEIR ATTORNEYS OF RECORD:

Plaintiffs EDWARD W. HUNT, et. al., hereby submit an ex parte application to move this court to continue the presently set trial date of May 27, 2008 at 8:30 a.m. in Department 72 of the

Fresno Superior Court and all applicable trial related deadlines for sixty (60) days, or in the alternative to stay the proceedings pending the resolution of *District of Columbia v. Heller*, Slip No. 07-290.

The grounds for continuance of trial and/or stay of the proceedings are:

Plaintiffs' preparation for trial is dependant on the constitutional standard of review that will be applied to this case. As the statutes and regulations at issue in this case involve constitutionally protected *liberty interests*, they are subject to scrutiny for unconstitutional vagueness under *Kolender v. Lawson* (1983) 461 U.S. 352, 358. Defendants, however, contend that Plaintiffs must prove that the provisions of the Assault Weapons Control Act and regulations thereunder that are at issue in this case are "impermissibly vague in all applications" under *Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, in order to succeed on a facial constitutional vagueness challenge.

Even if this Court were to accept Defendants' position regarding the constitutional standard of review governing Plaintiffs' claims, the Supreme Court's decision pending in *Heller v. District of Columbia*, Slip No. 07-290 will likely mandate the application of the *Kolender* standard of review and therefore may affect the outcome of this litigation.

For this reason, Plaintiffs request that the Court continue the current trial date of May 27, 2008 for sixty (60) days and all applicable trial related deadlines, pursuant to California Rules of Court, Rule 3.1332(b). In the alternative, Plaintiffs request the Court issue a stay of the proceedings pending the Supreme Court's ruling in *District of Columbia v. Heller*, Slip No. 07-290.

This application is based on all papers filed and records in this action, the attached memorandum of points and authorities, the attached declaration of Jason A. Davis, Exhibits "A-F," all evidence taken at the hearing on this motion, and argument at that hearing.

I. INTRODUCTION

As this Court is aware, Plaintiffs and Defendants are odds as to the constitutional standard of review that will be applied to Plaintiffs' constitutional vagueness challenge. (See Exhibit "A"; Declaration of Jason A. Davis at ¶ 2.) In issuing its order on the parties' cross-motions for

summary judgment, the Court addressed the constitutional standard of review that will govern this case. (See Exhibit "B"). This Court determined that ". . . [T]he Supreme Court has indicated that a law may be void for vagueness where it reaches a substantial amount of constitutionally protected conduct. (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 8.) Also, where a statute imposes criminal penalties, the standard of certainty is higher. (Ibid.) "When vagueness *permeates the text of such a law*, it is subject to facial attack." (*City of Chicago v. Morales* (1999) 527 U.S. 41, 55.) (Order, p.3) (Italics added.)

Defendants, however, contend that Plaintiffs must prove that the challenged statutes and regulations are "vague in all applications" in order to prevail on their claims under *Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, because there is not any "constitutionally protected conduct" at stake. (See Exhibits "A" and "B.") Further, Defendants argue that the, "where vagueness permeates the text" standard of *City of Chicago* does not apply because of the lack of a *mens rea* requirement despite criminal penalties for violations of the Assault Weapons Control Act ("AWCA"). (*Id.*)

District of Columbia v. Heller, Slip No. 07-290, currently pending before the United States Supreme Court, may determine whether constitutionally protected conduct is at issue in this case under the second amendment, i.e., the individual right to keep and bear arms.

Thus, *even if Defendants were to prevail on their argument*, if the Court were to find that the challenged statutes and regulations "reach a substantial amount of constitutionally protected conduct" *under Heller*, then the laws may be void for vagueness under *Kolender*. Accordingly, the "vague in all applications" test of *Hoffman* would not apply and an analysis under *City of Chicago* would not need to be reached.

Heller is an appeal from *Parker v. District of Columbia*, (D.C. Cir. 2007) 478 F.3d 370, a decision in which the United States Court of Appeals for the District of Columbia Circuit became the first federal appeals court in the United States to rule that a firearm ban was an unconstitutional infringement of the Second Amendment to the United States Constitution, and the second appeals court to *expressly interpret the Second Amendment as protecting an*

"individual right to possess firearms for private use."[1] (A copy of that opinion is attached hereto as Exhibit "F".) The U.S. Supreme Court heard oral argument in the case on March 18, 2008 and a decision is expected by the end of June 2008.[2] (See Exhibit "C;" Davis Decl. ¶ 3.)

A decision in *Heller* interpreting the Second Amendment as protecting an individual right to possess firearms for private use would therefore clarify that Penal Code Section §12276.1, subd.(a)(1)(E) & (a)(4)(A), Penal Code, §§12020, subd. (c)(25)(A) and Cal. Code Regs., tit. 11 §5469(g)) do in fact reach a substantial amount of constitutionally protected conduct. Notwithstanding *Heller*, Plaintiffs may be limited to demonstrating that the statute and regulation infringe on constitutionally protected *liberty interests*. Depending on the Court's decision in *Heller*, however, an individual's right to keep and bear arms would be, for the first time, constitutionally protected conduct, *in and of itself.* Accordingly, Plaintiffs' constitutional vagueness challenge would not be governed by the "vague in all applications" standard lobbied by Defendants, but would instead be reviewed for unconstitutional vagueness under *Kolender*.

Due to the imminent pending decision in *Heller* that may significantly impact the outcome of the this litigation, the interests of justice and judicial economy favor a grant of Plaintiffs' application for continuance of trial for sixty (60) days, or in the alternative, a stay of the current proceedings pending a decision in that case.

II. FACTUAL BACKGROUND

A. *Heller v. District of Columbia*

In 2003, six residents of Washington, D.C. (Shelly Parker, Tom Palmer, Gillian St. Lawrence, Tracey Ambeau, George Lyon and Dick Heller) filed a lawsuit in the United States District Court for the District of Columbia, challenging the constitutionality of provisions of the

---

[1] The first significant federal case that interpreted the Second Amendment as protecting an individual right to keep and bear arms was *United States v. Emerson* (5th Cir. 2001) 270 F.3d 203.

[2] Twenty-nine out of fifty-eight district attorneys in California signed on to an amicus brief submitted in support of the respondents in *Heller* urging the Court to find that the second amendment protects an individual right to bear arms. A copy of that brief is attached hereto as Exhibit "D."

Firearms Control Regulations Act of 1975, a local law enacted pursuant to District of Columbia home rule. (*Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).) This law restricts residents from owning handguns, excluding those grandfathered in by registration prior to 1975, and those possessed by active and retired law enforcement officers. (*Id.*) The law also requires that all firearms, including rifles and shotguns, be kept "unloaded, disassembled, or bound by a trigger lock." (*Id.*) The District Court dismissed the lawsuit. (*Id.*)

On appeal, the U.S. Court of Appeals for the D.C. Circuit reversed the dismissal, striking down provisions of the Firearms Control Regulations Act as unconstitutional. Judges Karen L. Henderson, Thomas B. Griffith and Laurence H. Silberman formed the Court of Appeals panel, with Senior Circuit Judge Silberman writing the court's opinion. (*Parker*, 478 F.3d 370.)

The court's summary of its substantive ruling on the right protected by the second amendment is provided at the end of section III of the opinion:

> " To summarize, we conclude that the Second Amendment protects an individual right to keep and bear arms. That right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad). In addition, the right to keep and bear arms had the important and salutary civic purpose of helping to preserve the citizen militia. The civic purpose was also a political expedient for the Federalists in the First Congress as it served, in part, to placate their Antifederalist opponents. The individual right facilitated militia service by ensuring that citizens would not be barred from keeping the arms they would need when called forth for militia duty. Despite the importance of the Second Amendment's civic purpose, however, the activities it protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia."

As noted, this case is under review by the Supreme Court of the United States. The Court heard oral argument in the case on March 18, 2008, and a decision is expected by the end of June 2008 clarifying whether an individual's right to keep and bear arms is protected conduct under the United States Constitution. (See Exhibit "C;" Davis Decl. ¶ 3.)

B. FACTUAL AND PROCEDURAL HISTORY OF CASE

This is an action involving a constitutional vagueness challenge to California's Assault Weapons Control Act ("AWCA") and regulations promulgated by the Department of Justice ("DOJ"). After extensive law and motion proceedings, including opposing Motions for Summary

Judgment, three claims now remain for trial: (1) a challenge to the validity of the Department's regulatory definition of "flash suppressor" as that term is used in the AWCA (Penal Code, §12276.1, subd.(a)(1)(E) & (a)(4)(A); Cal. Code Regs., tit. 11 §5469(g)); (2) a claim that the Department abused its discretion in *not* issuing a regulatory definition of the term "permanently altered," as used in the AWCA (Penal Code, §§12020, subd. (c)(25)(A) & 12276.1 subd. (d)(2)); and (3) a challenge to the determinations by the Department that the "Browning Boss" and the Springfield Muzzle Brake" are *not* flash suppressors within the meaning of the AWCA. (See Exhibit "B," pp. 4-8.)

In issuing its order on the cross motions for summary judgment, this Court clarified the constitutional standard of review that will govern this case, and stated, in pertinent part:

> " ... [T]he Supreme Court has indicated that a law may be void or vagueness where it reaches a substantial amount of constitutionally protected conduct. (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 8.) Also, where a statute imposes criminal penalties, the standard of certainty is higher. (Ibid.) "When vagueness *permeates the text of such a law*, it is subject to facial attack." (*City of Chicago v. Morales* (1999) 527 U.S. 41, 55.)

(See Exhibit "B," p.3) (Italics added.)

As the statutes and regulations at issue in this case involve constitutionally protected liberty interests, they are subject to scrutiny for unconstitutional vagueness under *Kolender*. (See Exhibits "A" and "B.") Despite the ruling of this Court, Defendants contend that Plaintiffs must prove that the provisions of the AWCA are "impermissibly vague in all applications" under *Hoffman* in order to succeed on a facial constitutional vagueness challenge. (*Id.*)

Plaintiffs 'preparation for trial is necessarily dependant on the constitutional standard of review that will be applied to this case. (See Davis Decl., ¶¶ 4-10.) Even if this Court were to accept Defendants' position regarding the constitutional standard of review governing Plaintiffs' claims, the Supreme Court's decision in *Heller* will likely mandate the application of a different standard of review. (See Exhibits "A-D;" Davis Decl., ¶¶ 4-6.) Accordingly, Plaintiffs, in the interests of judicial economy and to prevent potential appeal and/or re-litigation of the issues in this case, respectfully request a continuance for sixty (60) days, or alternatively, a stay of the current proceedings pending the Supreme Court's ruling in *Heller*. (See Davis Decl., ¶¶ 6-8.)

Per California Rules of Court, Rule 3.1203 and 3.1204, notice of this Ex Parte Application was given by Plaintiffs' counsel. (See Davis Decl., ¶¶ 10-11.) On April 16, 2008, Plaintiffs' spoke with Mr. Mark Beckington, counsel for Defendants, to inquire whether Defendants' counsel would be willing to stipulate to a trial continuance. (*Id.*) Plaintiffs' counsel refused to stipulate to a trial continuance and/or a stay of the current proceedings. (*Id.*) On April 18, 2008, Plaintiffs' counsel subsequently notified Mr. Beckington of the Ex Parte Application and provided a copy of the Application via e-mail. Plaintiffs further informed that Plaintiffs will personally serve the Ex Parte Application and, in the alternative, Request for Stay of Proceedings on Monday, April 21, 2008. (See Exhibit "E"; Davis Decl., ¶¶ 10-11.)

III. ARGUMENT

A. The Discretionary Authority of This Court Favors Granting Plaintiffs' Ex Parte Motion to Continue Trial Based on Good Cause

1. An Order To Continue Trial May Be Made By Ex Parte Application

Plaintiffs seek an order from this Court pursuant to California Rules of Court, Rule 3.1332 continuing the trial in this matter for at least sixty (60) days. Rule 3.1332(b) states:

> A party seeking a continuance of the date set for trial, whether contested or uncontested or stipulated to by the parties, must make the request for continuance by a noticed motion *or an ex parte application* under the rules in chapter 4 of this division, with supporting declarations. The party must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered.(Emphasis added.)

Because Rule 3.1332 grants statutory authority for an ex parte application for continuance, this application also necessarily complies with Rule 3.1202 et. seq. regarding ex parte applications. (See Davis Decl., ¶¶ 9-12.) This application for a trial continuance is therefore timely.

2. Good Cause Exists For Granting a Continuance of Trial

As outlined above, good cause exists for the granting of this application because the standard of review that will be applied to this case, and therefore potentially the outcome of the case, are dependant upon the result of *Heller*.

California Rules of Court Rule 3.1332(c) states, in pertinent part:

> The court may grant a continuance only upon an affirmative showing of good cause requiring the continuance. Circumstances that may indicate good cause include:
> (7) A significant, unanticipated change in the status of the case as a result of which the case is not ready for trial.

Likewise, California Rules of Court Rule 3.1322 lists, in pertinent part, other factors to be considered by the court in making its determination:

> In ruling on a motion or application for continuance, the court must consider all the facts and circumstances that are relevant to a determination. These may include:
>
> (3) The length of the continuance requested;
> (5) The prejudice that parties or witnesses will suffer as a result of the continuance
> (10) Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance; and
> (11) Any other fact or circumstance relevant to the fair determination of the motion or application.

a) Circumstances Indicating Good Cause

Under Rule 3.1332(c), circumstances substantiating good cause for a continuance exist because this case is not currently ready for trial due to recent significant developments in this case. (See Davis Decl. ¶¶ 2-10.) Specifically, as Plaintiffs have begun to prepare for trial, it has become readily apparent to them that the parties will not be able to come to terms on the constitutional standard of review that will control this case. (See Davis Decl., ¶¶ 2-6.) Moreover, the Supreme Court recently heard arguments in *Heller v. District of Columbia*, and is expected to issue a ruling on whether the individual right to keep and bear arms is a constitutionally guaranteed freedom. (See *Parker*, *Supra*; Exhibits "C" and "D.") Plaintiffs recent trial preparation efforts and their analysis of the issues remaining in this case led Plaintiffs to realize that, should this Court deviate from its previous rulings and adopt the standard of review lobbied by Defendants, the Supreme Court's decision in *Heller* may very well *preclude adoption of that standard in this case.* (See Davis Decl. ¶¶ 4-6.)

b) Other Factors Supporting a Continuance

As this case has been ongoing for over seven years, the length of the stay/continuance requested by Plaintiffs is reasonable. (Cal. Rules of Ct. Rule 3.1332(d)(3).) Plaintiffs request the

continuance for only sixty (60) days, and, only do so in light of the pending decision in *Heller* that could drastically affect the outcome of this litigation. (See Davis Decl. ¶¶ 2-7.)

Additionally, a continuance will not prejudice the parties or witnesses. (Cal. Rules of Ct. Rule 3.1332(d)(5).) Rather, a continuance would prevent the parties from facing potential relitigation of the issues at trial and/or on appeal, and provide them an opportunity to gain insight from the United States Supreme Court prior to forming their arguments. Likewise, a continuance would spare the witnesses the aggravation of providing testimony if the Court of Appeal were to order a new trial down the line.

Finally, the interests of justice are best served by the granting of a continuance. (Cal. Rules of Ct. Rule 3.1332(d)(10).) A continuance pending the outcome of *Heller* will ensure that this case is decided correctly on the merits in the first instance, and will prevent the potential for needless, costly, and time consuming relitigation of the constitutional standard of review that should be applied to Plaintiffs' vagueness challenge. (Cal. Rules of Ct. Rule 3.1332(d)(11).)

Based on the foregoing, it is evident there is good cause to grant a continuance pursuant to California Rules of Court, Rule 3.1332.

3. This Court Has Discretion to Grant a Continuance of Trial

It is within this Court's discretion to grant this ex parte application for a continuance (*Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496.) "In passing on the motion for a continuance, which rests to a great extent in the sound discretion of the trial court, the trial judge may inquire into the merits of the defense, pass on any questions presented as to any possible prejudice to either of the parties which would result from granting or denying the motion, and determine whether there is good cause therefor." (*Schwartz v. Magyar House, Inc.,* (1959) 168 Cal.App.2d 183,188-189). In addition, though this Court has an interest in avoiding delay, it must weigh that concern with the importance of determining cases on their merits:

> Delay reduction and calendar management are required for a purpose: to promote the just resolution of cases on their merits. Accordingly, decisions about whether to grant a continuance or extend discovery "must be made in an atmosphere of substantial justice. When the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency" (emphasis added). (*Hernandez v. Sup. Ct.* (1994) 115 Cal.App.4th 1242, 1246, citing *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 398-399).

As described above, Plaintiffs have demonstrated good cause for the Court to grant the continuance. There also does not appear to be any harm to the Defendants as a continuance gives them more time to prepare for trial. Finally, the granting of a continuance by the Court will ensure that this case is decided correctly on the merits the first instance and will prevent potential relitigation of the standard of review that should be applied to Plaintiffs' vagueness challenge. (See Davis Decl. ¶¶ 4-10.) The Court should therefore exercise its discretionary powers and continue the trial.

B. In The Alternative, The Interests of Justice and Judicial Economy Favor a Stay of the Proceeding Pending The Supreme Court's Ruling in *District of Columbia v. Heller*

Should the Court be inclined to deny Plaintiffs' Ex Parte Application for Continuance of Trial, Plaintiffs respectfully request it grant a temporary stay of the proceedings in this matter pending the Supreme Court's review of *Heller v. District of Columbia*, Slip No. 07-290. The U.S. Supreme Court heard oral argument in that case on March 18, 2008, and a decision is expected by the end of June 2008. (See Exhibit "C;" Davis Decl. ¶ 3.) Additionally, as the trial date in this matter is rapidly approaching, should the Court determine briefing to be necessary, Plaintiffs respectfully request that the Court issue an order shortening time and set an expedited briefing schedule.

IV. CONCLUSION

In light of the foregoing, Plaintiffs respectfully request the Court grant Plaintiffs' Application and continue the trial for at least sixty days and all applicable trial related deadlines, or in the alternative issue a stay of the proceedings pending the Supreme Court's ruling in *Heller v. District of Columbia*.

Dated: April 18, 2008

TRUTANICH • MICHEL, LLP:

Jason A. Davis
Attorney for Plaintiffs

DECLARATION OF JASON A. DAVIS

I, the undersigned, declare as follows:

1. I am an attorney at law, duly licensed to practice and practicing before all the Courts of the State of California. I am an associate with the law firm of Trutanich•Michel, LLP, attorneys of record for Plaintiffs in this action. I am one of the attorneys assigned to this matter and, as such, I am readily familiar with this litigation. The facts herein are within my personal knowledge and if called and sworn as a witness, I would and hereby do, testify competently thereto.

2. Plaintiffs and Defendants disagree over the constitutional standard of review that should be applied to Plaintiffs' constitutional vagueness challenge. Both parties' positions are outlined in detail in the proposed Joint Request for Clarification that was drafted but was never filed. The Court's analysis of the constitutional standard of review that should be applied to this case is set forth in the Court's Order on the parties' cross-motions for summary judgment. A true and correct copy of the Request for Clarification is attached hereto as Exhibit "A." A true and correct copy of the Court's order on the parties' cross-motions for summary judgment is attached hereto as "Exhibit "B."

3. The U.S. Supreme Court heard oral argument in *District of Columbia v. Heller*, Slip No. 07-290 case on March 18, 2008, and the Court is expected by to issue a ruling by the end of June 2008. True and correct copies of the transcripts from the oral arguments in this case are attached hereto as Exhibit "C."

4. Plaintiffs' ability to adequately prepare for trial is dependant on the constitutional standard of review that will be applied to this case. Plaintiffs believe that even if this Court were to accept Defendants' position regarding the constitutional standard of review governing Plaintiffs' claims, the Supreme Court's decision in *Heller* will require the application of a different standard of review.

5. As Plaintiffs have begun to prepare for trial, it has become apparent to Plaintiffs that the parties will not be able to agree on the constitutional standard of review that will control this case.

///

6. Plaintiffs recent trial preparation efforts and an analysis of the issues remaining in this case have lead Plaintiffs to the realization that, should this Court deviate from its previous rulings, and adopt the standard of review lobbied by Defendants, the Supreme Court's decision in *Heller* will likely preclude adoption of that standard in this case.

7. Plaintiffs believe that the parties, the interests of justice, and in the interests of judicial economy, will be best served by a continuance and/or a stay of the current proceedings pending the Supreme Court's decision in *Heller*.

8. Trial in this matter is set for May 27, 2008. Without a trial continuance at this point in the litigation, Plaintiffs would be severely burdened in their ability to adequately prepare for this trial. It is also in the interests of judicial economy.

9. Should Plaintiffs request for continuance, and alternatively, for stay of the proceedings be denied, Plaintiffs intend on filing a new complaint for declaratory and injunctive relief, and/or an appeal of the Court's decision in this case.

10. On April 18, 2008, I spoke with Mr. Mark Beckington, counsel for Defendants, to inquire whether he would be willing to stipulate to a trial continuance. He refused to stipulate to a trial continuance and/or a stay of the current proceedings.

11. Formal Notice of this Ex Parte Application was given per California Rules of Court, Rule 3.1203 and 3.1204 by facsimile and email correspondence on Friday, April 18, 2008. This letter states Plaintiffs intent to seek a continuance of this trial via an ex parte appearance on Tuesday, April 22, 2008 at 8:30 a.m. in Department 97C of the Fresno Superior Courthouse, located at 2317 Tuolumne Street, Fresno, CA 93712. Fresno or in the alternative for stay of the proceedings pending a decision by the Supreme Court in *District of Columbia v. Heller*, Slip No. 07-290. Additionally our office informed Mr. Beckington of our intention to provide to his office with a copy of the Ex Parte Application via email by the close of business on April 18, 2008, and to personally serve a copy of the Ex Parte Application on his office on Monday, April 21, 2008. A true and correct copy of this notice is attached hereto as Exhibit "E."

12. Furthermore, I know of no prejudice to Defendants that will result from a continuance of this trial. Defendants will be able to complete discovery, address this Court in

light of Supreme Court clarification, be shielded from costly and time consuming re-litigation of the aforementioned issues regarding the constitutional standard of review, and are not otherwise restrained from asserting any of their other rights in this action.

13. Attached hereto as Exhibit "D" is a true and correct copy of the Amicus Brief submitted by twenty-nine elected California District Attorneys in support of Respondent in *District of Columbia v. Heller*, Slip No. 07-290. Additionally, attached hereto as Exhibit "F" is a true and correct copy of *Paker v. District of Columbia* (2007) 478 F.3d 370.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that it was executed on April 18, 2008, at Long Beach, California.

Jason A. Davis
Declarant

Exhibit A

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EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et. al.,

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et. al., Plaintiffs, v. STATE OF CALIFORNIA; WILLIAM LOCKYER, Attorney General of the State of California, et. al., Defendants.	CASE NO. 01CECG03182 **REQUEST FOR CLARIFICATION OF GOVERNING STANDARD ON CONSTITUTIONAL FACIAL VAGUENESS CLAIMS**

All parties hereby respectfully submit this request for clarification of the governing standard on plaintiffs' constitutional facial vagueness claims in this action, in connection with the Court's ruling on the parties' cross-motions for summary judgment.

INTRODUCTION

This matter is an action in which plaintiffs seek declaratory and injunctive relief in regard to certain provisions related to the regulation of "assault weapons" and "large -capacity" ammunition feeding devices. In sum, for the reasons set forth below, defendants have contended that plaintiffs' burden on their claims that these provisions are unconstitutionally vague on their face is to show that they are "impermissibly vague in all of their applications." For the reasons set forth below, plaintiffs have contended that "vague in all applications" is not the governing standard, and instead that the provisions at issue are subject to facial attack if they prove "vagueness permeates the text" of the provisions.

In the ruling on the parties' cross-motions for summary judgment, the Court references both sides' contentions (Ruling, p.3), but defendants maintain that it is unclear which side's position was adopted, and what the Court considers the governing standard to be.

The parties' respective arguments as to the governing standard were laid out in the cross motions for summary judgment and are set forth below. For the benefit of informing the parties' preparation for trial, including guidance as to possible remaining discovery inquiries and disagreements, the parties respectfully request clarification of the Court's view as to the governing standard on plaintiffs' constitutional facial vagueness claims in this action.

PLAINTIFFS' POSITION

This clarification is defendants' idea and is largely unnecessary from plaintiffs' perspective. If the Court had adopted the defendants' position during the litigation of the summary judgment issues, summary judgment would likely have been granted in their favor. It wasn't. But defendants insist that this issue must be resolved in order for discovery or settlement discussions to move forward. Accordingly, in an effort to break the log jam that is stalling discovery and settlement talks, plaintiffs have agreed to join in this request.

With respect to the issues needing clarification, as this Court stated:

> [T]he Supreme Court has indicated that a law may be void for vagueness where it reaches a substantial amount of constitutionally protected conduct. (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 8.) Also, where a statute imposes criminal penalties, the standard of certainty is higher. (*Ibid.*) "When vagueness permeates the text of such a law, it is subject to facial attack." (*City of Chicago v. Morales* (1999) 527 U.S. 41, 55.)
>
> (Ruling, p. 3.)

Defendants focus on the first sentence above and ignore the latter two in arguing that a vagueness claim lacks merit if the questionable provision is not impermissibly vague in *all* applications. Thus, defendants argue that plaintiffs must show there is *no set of circumstances* where the statute might be applied in a constitutional manner. Alternatively, under this "no set of circumstances" test, defendants need only produce an example in which the statute could be applied constitutionally to defeat the facial challenge. In either event, however, the standard of certainty is at the low end of the scale. That is inappropriate where, as here, criminal penalties and property seizures are at issue. *See Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 8 ("where a statute imposes criminal penalties, the standard of certainty is higher") discussed below.

Defendant's Reliance on *Hoffman Estates* Is Misplaced; *Hoffman Estates* Concerns Economic Regulations and Civil Penalties

Defendants cite *Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 494-95, in support of their argument. But *Hoffman Estates*, at best, sets out the test for economic regulations with civil penalties, only. The limited applicability of *Hoffman Estates* is evident in Justice White's concurring opinion, where he states: "I agree with the majority that a facial vagueness challenge to an *economic regulation* must demonstrate that 'the enactment is impermissibly vague in all of its applications.'" *Id.* at 507 (emphasis added). It is also evident in the text of the main opinion, wherein the Court directly addresses the varying standards applicable to a vagueness test depending on the nature of the provisions at issue.

In *Hoffman Estates*, the ordinance at issue required a business to obtain a license to sell drug paraphernalia, violation of which was punishable by fine only. An official advised businesses about which products were covered by the ordinance. Instead of obtaining a license or filing an administrative proceeding, the business filed suit. *Id.* at 493. In considering the

vagueness challenge, the Court focused on several factors, including: (1) the type of regulation – economic; (2) the type of penalty – civil versus criminal; and (3) the level of scienter. The Court held that: "The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment." *Id.* at 498. It continued:

> Thus, economic regulation is subject to a less strict vagueness test . . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Id. at 498-99.

Hoffman Estates added: "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Id.* at 499. This does not deny that the other factors listed above are still important, though "perhaps" not "the most" important. The Court in *Hoffman Estates* considered all factors and found that the ordinance simply regulated business, required scienter, and imposed only civil penalties. *Id.* at 499. On that basis, it found the regulations were not unconstitutionally vague. *Id.* at 500.

The regulations here, however, are not mere economic regulations with civil penalties and an actual knowledge element. Instead, they concern a felony crime and require only civil negligence – the "should have known" mental state, not actual knowledge. Thus, the facts here are readily distinguishable from the facts in *Hoffman Estates*. Moreover, the "vague in all its applications" language in *Hoffman Estates* relied upon by Defendants has been criticized by later Supreme Court decisions, as well as by legal scholars.[1]

In short, defendants' reliance upon *Hoffman Estates* is misplaced. The holding in that case actually supports a *less* tolerant view of the vague regulations at issue here because: (1) the Court

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[1] *See generally, Chicago v. Morales* (1999) 527 U.S. 41, 55 n.22 and M. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L.Rev. 235, 284 (1994) (cited by the *Morales* Court in footnote 22).

implemented *mens rea* test is weak, here, with no actual knowledge required; and (2) the criminal penalty is extremely high.[2] Pen. Code § 12280. Property (the firearm) is seized as well. All these factors require greater scrutiny.

In *Morales*, the Supreme Court Distinguished the Test in *Hoffman Estates* and Held that It Does *Not* Apply Where Criminal Penalties Are at Issue

In *Chicago v. Morales* (1999) 527 U.S. 41, the United States Supreme Court declared as facially vague a prohibition on loitering with "no apparent purpose"after police have ordered dispersal and one of the persons is a "criminal street gang member." The following holding is dispositive here: "[E]ven if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* at 52.

Morales is a plurality opinion joined in by three Justices, but six Justices concurred with Part V of the opinion.[3] Part V does not suggest that any constitutionally protected interest was implicated, and instead holds that the law violated "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 60. "Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it 'necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat.'" *Id.* Although the Justices who dissented differed with the majority on the answer to that question, they did not dispute the principle. As in *Morales*, the Act here reaches otherwise innocent conduct – mere possession of a device on a firearm. Further, it lacks sufficient standards

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[2] Hypothetically, if a firearms collector is charged with three counts of possession for his inadvertent possession of three firearms deemed "assault weapons" that he lawfully purchased prior to the registration period, but failed to register due to the vagueness of the law, he faces three years in prison. If he is charged with transferring these same firearms, he faces 24 years in prison. (Penal Code section 12280(a) and (b), respectively.)

[3] Souter and Ginsburg, JJ., joined in the plurality opinion by Stevens, J. *See id.* at 66-67 (O'Connor, J., concurring, joined by Breyer, J.) ("I agree with Part V of the Court's opinion"); *id.* at 69 (Kennedy, J., concurring) ("I join Parts I, II, and V").

to put the public on notice of what conduct it prohibits, or to protect the public from arbitrary or discriminatory enforcement.

The regulatory definition here (and/or lack thereof) is parallel with the vague terminology in *Morales*: "The 'no apparent purpose' standard for making that decision [to order dispersal] is inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene.'" *Id.* at 61-62. Since "we must assume that the ordinance means what it says," the Court "refused to accept the general order issued by the police department as a sufficient limitation on the 'vast amount of discretion' granted to the police in its enforcement." *Id.* at 63. Loitering is "innocent and harmless," *id.* at 64, but that does not imply that it is constitutionally protected. Thus, six Justices agreed with the rule in Part V that a criminal law lacking sufficient standards is facially vague, regardless of whether it implicates a constitutional right.

The plurality opinion states that the law "does not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional," but suggests that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 52-53. But that need not be resolved:

> There is no need, however, to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine. . . . For it is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that "simply regulates business behavior and contains a scienter requirement."
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> *Id.* at 55.

Similarly, in this case it is not necessary to resolve the question whether possession of a firearm implicates a liberty interest, either in terms of property rights or the right to protect one's own life and property. It is enough that the statute imposes criminal penalties – including prison time. As discussed in more detail, below, the right *not* to be imprisoned based on arbitrary or discriminatory enforcement of a vague statute implicates liberty interests, in and of itself.

Moreover, *Morales* expressly rejected the view that "to mount a successful facial challenge, a plaintiff must 'establish that no set of circumstances exists under which the Act would be valid.'" *Id.* at 55 n.22, citing *United States v. Salerno* (1987) 481 U.S. 739, 745. "To

the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself . . . ."[4] *Id.* at 55 n.22. "Since we . . . conclude that vagueness permeates the ordinance, a facial challenge is appropriate." *Id.*

Justice O'Connor concurred that the "ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement officers." *Id.* at 65-66 (O'Connor, J., concurring). Similarly, Justice Breyer denied that the ruling violated the "rules governing facial challenges," concluding that "the ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what circumstances." *Id.* at 71 (Breyer, J., concurring). "[I]f every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications." *Id.* Finding examples where a vague law might apply will not save the law:

> But the city of Chicago may no more apply *this* law to the defendants, no matter how they behaved, than could it apply an (imaginary) statute that said, "It is a crime to do wrong," even to the worst of murderers. *See Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1939) ("If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it").
>
> *Id.*

The Court in *Morales* stated the general rule on vagueness in the context of criminal statutes, as follows: "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Id.* at 56. Besides not providing notice, the ordinance violated "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 60. Like here, the law "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." *Id.* Further, the "Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who

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[4] *Salerno* concerned the constitutionality of the Bail Reform Act and presented no issue of vagueness.

could be rightfully detained, and who should be set at large.'" *Id.* at 60, quoting *United States v. Reese* (1876), 92 U.S. 214, 221. The net cast by the DOJ's regulations on "flash suppressors" and the lack of a definition for "permanently alter" violates this legal maxim on its face.

The Right *Not* to Be Imprisoned Based on Arbitrary or Discriminatory Enforcement of a Vague Statute Implicates Liberty Interests, in and of Itself

Lanzetta v. New Jersey (1939) 306 U.S. 451, which the Supreme Court has cited as authority in virtually every vagueness decision, invalidated a law as facially vague without any constitutional right at stake other than the Due Process right not to be subject to criminal penalties for conduct which is not clearly proscribed. It invalidated a prohibition on "gang" membership as vague under the principle: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta,* 306 U.S. at 452-53.

The rule advocated by the defendant here is at odds with the Supreme Court's jurisprudence from *Lanzetta* through *Morales*. "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948). Economic regulations which establish crimes have been declared facially vague.[5] *Papachristou v. Jacksonville* (1972) 405 U.S. 156, 164, held a vagrancy prohibition facially vague even though the activities at issue "are not mentioned in the Constitution or in the Bill of Rights."

Colautti v. Franklin (1979) 439 U.S. 379, invalidated a law requiring a physician performing an abortion to utilize certain techniques when there is "sufficient reason to believe that the fetus may be viable." *Colautti* explained:

> This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea. . . . Because of the absence of a scienter requirement in the provision

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[5] *United States v. Cardiff*, 344 U.S. 174, 174-75 (1952) (refusal of factory owner to permit entry "at reasonable times" held vague); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) ("wilfully" charging "any unjust or unreasonable rate" for "necessaries" held vague); *International Harvester Co. v. Kentucky*, 234 U.S. 216, 223-24 (1914) (Holmes, J.) (compelling persons "to guess on peril of indictment" uncertain facts "is to exact gifts that mankind does not possess").

> directing the physician to determine whether the fetus is or may be viable, the statute is little more than "a trap for those who act in good faith." *United States v. Ragen* (1942) 314 U.S. 513, 524.[6]

Id. at 395.

Ragen was a tax-evasion case not involving constitutionally-protected conduct, and thus the above states the rule for all criminal statutes.[7]

Kolender v. Lawson, (1983) 461 U.S. 352, 353-54, held as vague on its face a requirement that persons who loiter provide a "credible and reliable" identification. Since the police determined what was "credible and reliable," the provision lacked any standard and was vague. "[T]his is not a case where further precision in the statutory language is either impossible or impractical." *Id.* at 361.

Kolender rejected the argument that a statute "should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." *Id.* at 358 n.8. It explained:

> The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." . . . Second, where a statute imposes criminal penalties, the standard of certainty is higher. . . . This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. *See, e.g.,* . . . *Lanzetta v. New Jersey* (1939) 306 U.S. 451.

Kolender, 461 U.S. at 358-59 n.8.

Again, *Lanzetta* did not involve constitutionally-protected conduct, yet it invalidated the statute on its face even though it may have had some valid application.[8] Thus, the above rule applies to all criminal provisions.

Kolender also rejected the view that a facial challenge is restricted to First Amendment

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[6] *Ragen, id.*, noted: "A mind intent upon willful evasion is inconsistent with surprised innocence. . . . [T]he charge . . . amply instructed the jury that scienter is an essential element of the offense."

[7] *See Hill v. Colorado* (2000) 530 U.S. 703, 120 S. Ct. 2480, 2498 (vagueness "ameliorated" by scienter requirement).

[8] For instance, in *Lanzetta* the defendant might have confessed to being a "gang" member, just as in *Kolender* a person may have exhibited a passport and a driver's license as "credible and reliable" identification.

cases, also recognizing "facial challenges in the arbitrary enforcement context." *Id.* Reliance on *Hoffman Estates* was misplaced, given that "economic regulation is subject to a less strict vagueness test . . . ."[9] *Id.*

Similarly, the Ninth Circuit in *Forbes v. Napolitano* (9th Cir. 2000) 236 F.3d 1009, invalidated on its face a prohibition on certain medical procedures due to the vagueness of the terms "experimentation," "investigation," and "routine." Based on the above precedents, *Forbes* held that the strict test for vagueness applies *regardless of* whether constitutionally-protected conduct is involved:

> If a statute subjects transgressors to criminal penalties, as this one does, vagueness review is even more exacting. . . . In addition to defining a core of proscribed behavior to give people constructive notice of the law, a criminal statute must provide standards to prevent arbitrary enforcement. . . . Without such standards, a statute would be impermissibly vague even if it did not reach a substantial amount of constitutionally protected conduct, because it would subject people to the risk of arbitrary deprivation of their liberty. . . . Regardless of what type of conduct the criminal statute targets, the arbitrary deprivation of liberty is itself offensive to the Constitution's due process guarantee. (*Id.* at 1011-12 (citations omitted).)

The Lack of a Strict Mens Rea Requirement Also Militates in Favor of a Higher Level of Scrutiny

Defendants attempt to distinguish this case based upon the *mens rea.* Penal Code section 12280 does not expressly contain a *mens rea* requirement. Where substantial penalties are imposed, California law normally establishes a presumption against criminal liability without at least some *mens rea. In re Jorge M* (2000) 23 Cal.4th 866, 879. However, *In re Jorge M* held that a negligence standard applies to Penal Code section 12280, contending that "An actual knowledge element has significant potential to impair effective enforcement" (*id.* at 884) and stating that:

> A scienter requirement satisfied by proof that the defendant *should have known* the characteristics of the weapon bringing it within the AWCA, however, would have little or no potential to impede effective enforcement. . . .

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[9] The dissent argued that the test should be whether the law has a "core" and is not vague in all its applications, giving an example in which the ordinance would not be vague. *Id.* at 370-73 (White, J., dissenting). "The majority attempts to underplay the conflict between its decision today and the decision last Term in *Hoffman Estates* . . . ." *Id.* at 372 n.*. If true, *Kolender* is the more recent, binding precedent.

In re Jorge M (2000) 23 Cal.4th 866, 885. (Emphasis added.)

Accordingly, the Court held: "we construe section 12280(b) as requiring knowledge of, *or negligence in regard to*, the facts making possession criminal. In a prosecution under section 12280(b), that is to say, the People bear the burden of proving the defendant knew or *reasonably should have known* the firearm possessed the characteristics bringing it within the AWCA." *Id.* at 887 (emphasis added). Moreover, "Our 'reasonably should have known' formulation departs somewhat from the usual description of criminal negligence." *Id.* at 887 n.11. The Court rejected the normal rule that "[T]o constitute a criminal act the defendant's conduct must go beyond that required for civil liability and must amount to a 'gross' or 'culpable' departure from the required standard of care." *Id.* It concluded that "the Legislature intended guilt to be established by proof of a mental state slightly lower than ordinarily required for criminal liability." *Id.*

In re Jorge M thus rejected the standard set forth in *Staples v. United States* (1994) 511 U.S. 600, that unlawful machinegun possession under federal law requires proof that the accused knew that a firearm had the requisite characteristics of a machinegun. In dissent, Justice Kennard would have followed the *Staples* rule and would have held that "unlawful possession of an assault weapon, which carries a maximum three-year state prison sentence, requires knowledge by the defendant that the firearm has the characteristics that make it an assault weapon." 23 Cal.4th at 894 (Kennard, J., dissenting). Justice Kennard explained:

> Disregarding this usual presumption, the majority injects into the offense of possession of an unregistered assault weapon a mental state taken from the civil law of torts: whether the accused "knew or reasonably should have known" the firearm possessed the characteristics that made it an assault weapon. (Maj. opn., ante, 98 Cal.Rptr.2d at p. 482, 4 P.3d at p. 311, italics omitted.) That this is the test for civil negligence is not disputed by the majority (maj. opn., ante, at p. 482, fn. 11, 4 P.3d at p. 311, fn. 11), which cites no decision by this court adopting this civil law standard as the requisite mental state in a criminal case.

Id. at 894.[10]

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[10]Justice Kennard further opined:

> The only prosecutions that are likely to be aided by the majority's "should have known" standard are those of novice firearm owners, such as a widow who inherits her husband's rifle that she has never fired or even

Accordingly, given the majority decision in *In re Jorge M.* that the normal mens rea requirements of criminal law generally do not apply, the court must review the definitions at issue strictly to determine whether they are "little more than 'a trap for those who act in good faith.'" *Colautti, supra*, 439 U.S. at 395.

As alleged in the Complaint, the definition of "flash suppressor" does nothing to clarify the law for a person who actually does investigate. On the contrary, it worsens the application of the law. Similarly, the lack of a definition for "permanently alter' creates similar confusion. With such a low standard, the civil *mens rea* established in *In re Jorge M* does little to clarify the vagueness that permeates the Act and is not the protection that would allow application of the "vague in all applications standard" – as urged by the Defendants.

In sum, the DOJ "flash suppressor" regulation, and the lack of a regulation defining "permanently alter" fail to provide adequate notice to the public or adequate guidance to law enforcement regarding what conduct is prohibited by the Act. Consequently, the Act subjects the public to arbitrary and discriminatory enforcement of regulations that could lead to a felony conviction and prison time for otherwise innocent behavior. The lack of an "actual knowledge" scienter requirement exacerbates the problem. Because the law challenged by plaintiffs involves criminal penalties, property rights, and the liberty interests of those charged under the Act, it should be subjected to greater scrutiny than that applied to the economic regulations in *Hoffman Estates*. The proper vagueness test is the one employed when reviewing criminal laws, with criminal penalties: "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and

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> handled. The majority's holding will facilitate her prosecution. It may not have occurred to her to examine the rifle to determine its precise make and model, the characteristics making it an assault weapon. Yet, under the majority's holding, she could now face felony conviction and state imprisonment because, in the majority's view, those characteristics are something she "should have known."

Id. at 895.

discriminatory enforcement." *Morales* at 56.

This Court must examine each of these independent factors to determine the validity, *vel non*, of the Regulations.

DEFENDANTS' POSITION

As the Court states:

> "A law failing to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited violates due process under both the federal and California Constitutions." (*Harrott v. County of Kings* (2001) 25 Cal. 4th 1138, 1151.) "A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nonetheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all its applications." (*Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 498.)

(Ruling, p.3.)

The law is thus clear that in order to challenge a law that does not implicate constitutionally protected conduct as unconstitutionally vague on its face, a plaintiff must show that such law is impermissibly vague in all applications. The decisions relied upon by plaintiff, which involved challenges to laws that did in fact implicate constitutionally protected conduct, are distinguishable and have no application in this action.

To begin with, unlike the loitering provisions at issue in *Kolender v. Lawson* (1983) 461 U.S. 352 and *City of Chicago v. Morales* (1999) 527 U. S. 41, it is undisputed that the provisions challenged here do not "reach a substantial amount of constitutionally protected conduct." (Compare *Kolender*, 461 U.S. at 358 ["Our concern here is based upon the 'potential for arbitrarily suppressing First Amendment liberties' . . . . In addition [the provision] implicates consideration of the constitutional right to freedom of movement."] *City of Chicago*, 527 U.S. at 53 ["freedom to loiter for innocent purposes is part of the ' liberty' by the Due Process Clause of the Fourteenth Amendment"]). Recognizing this, plaintiffs attempt to argue that the challenged provision need no "reach a substantial amount of constitutionally protected conduct" in order to avoid the ordinary "vague in all applications" standard, notwithstanding protected conduct" in order to avoid the ordinary "vague in all applications" standard, notwithstanding, that such requirement is recognized not just in *Village of Hoffman Estates*, but also in the very decisions

cited by plaintiffs, as th Court has already recognized. (See Ruling, p. 3: *Kolender*, 461 U.S. at 358, fn. 8 ["we permit a facial challenge if a law reaches 'a substantial amount of constitutionally protected conduct'"]; *City of Chicago*, 527 U. S. At 52-53.)

In making this attempt, plaintiffs take the Supreme Court's language from *City of Chicago* out of context in arguing that it is "dispositive" here that the Supreme Court stated: "Even if an enactment does not reach a substantial amount of constitutionally protected conduct, if may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." In context, the "substantial amount of constitutionally protected conduct" in this statement simply referred to First Amendment conduct, and the "deprivation of liberty interests" simply referred to First Amendment conduct, and the "deprivation of liberty interests" simply referred to the freedom to loiter for innocent purposes. (See *City of Chicago*, 527 U.S. at 52-53.) The Supreme Court was simply confirming that the "constitutionally protected conduct" in question need not be, strictly speaking, First Amendment conduct. But by no reach of the imagination was the Supreme Court abrogating the ordinary rule that the challenge law must reach "a substantial amount of constitutionally protected conduct" in order for a plaintiff to avoid the high burden on a facial challenge identified in *Village of Hoffman Estates*. The decisions in *Kolender* and *City of Chicago*, addressing challenged provisions implicating constitutionally protected conduct, simply do not apply to the present matter.

Nor did the loitering provisions at issue in those cases include a *mens rea* requirement to protect against prosecution of the innocent, unlike the provision at issue in *Village of Hoffman Estates*, and unlike the provisions at issue here as the Court has confirmed at pages 3-4 of its Ruling. (Compare *City of Chicago*, 527, U.S. at 55 [provision "contains no *mens rea* requirement"], with *Village of Hoffman Estates*, 455 U.S. at 499 [provision "contains a scienter requirement"].)

Moreover, the high standard of certainty applicable to criminal provisions does not create any exception to the ordinary Village of Hoffman Estates facial challenge "vague in all applications" evaluation. In Village of Hoffman Estates, the quasi-criminal provision at issue was

subject to the strict certainty test, but the Supreme Court nonetheless found: "Flipside's facial challenge fails because, under the test appropriate to either a quasi-criminal or a criminal law, the ordinance is sufficiently clear as applied to Flipside." (*Village of Hoffman Estates*, 455 U.S. at 499-500, emphasis added.) A high degree of certainty is indeed required of criminal provisions, but a facial challenge to such a provision still requires proof that such certainty cannot be achieved in any application.

Accordingly, the standard applied in *Village of Hoffman Estates* governs on this facial challenge, and plaintiffs' burden on this facial challenge is to demonstrate that the provisions challenged are "impermissibly vague in all of their applications.[11]"

Dated: October _____, 2007

Respectfully Submitted,

TRUTANICH - MICHEL, LLP

_____
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Dated: October _____, 2007

Respectfully Submitted,

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_____
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Attorneys for Defendants

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[11] As an aside, defendants note that the Court's determination on this issue may be dispositive in this case. If the Court confirms that "vague in all applications" is the governing standard, it is expected that, upon reflection, plaintiffs would acknowledge that they cannot prevail in this action. On defendants' part, if the Court were to determine that "vagueness permeates the text" is the governing standard, and if the Court deems it necessary that there be flash suppressor testing capability, established flash measurement standards, and/or established baseline assumptions as to whether the firearm is held at the shoulder or the hip, as to whether the firearm has iron sights or telescopic sights, and/or to particular ammunition variables, *it is undisputed that plaintiffs would prevail.*

Exhibit B

03

Tentative Ruling

Re: ***Hunt v. State of California***
Case No. 01 CE CG 03182

Hearing Date: March 22nd, 2007 **(Dept. 72)**

Motion: Plaintiffs' Motion for Summary Judgment/Summary Adjudication

Defendants' Motion for Summary Judgment/Summary Adjudication

Tentative Ruling:

To deny the plaintiffs' motion for summary judgment, or in the alternative summary adjudication, in its entirety. (CCP § 437c.)

To grant defendants' motion for summary adjudication as to the first cause of action. (CCP § 437c.) To deny defendants' motion as to the second, fifth and sixth causes of action. (*Ibid.*)

Explanation:

Plaintiffs' Motion: The plaintiffs have moved for summary adjudication of the first, second, fifth and sixth causes of action. With regard to the motion for summary adjudication of the first cause of action, plaintiffs argue that the DOJ's regulation defining the term "flash suppressor" unlawfully expands the concept of a flash suppressor to include other types of devices such as muzzle brakes and compensators, which the Legislature did not intend to include as characteristics of assault weapons.

However, judicial review of administrative rulemaking is generally deferential, and "is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether he has failed to follow the procedure and give the notices required by law." (*Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 605.) In the present case, the Legislature authorized the DOJ to promulgate those regulations "that may be necessary and proper to carry out the purposes and intent of [the Assault Weapons Control Act]." (Penal Code § 12276.5(c).)

Thus, the Legislature granted the Attorney General broad authority to enact regulations necessary to effectuate the purposes of the AWCA.

DOJ regulation 12.8.978.20(b) defines the term "flash suppressor" as "any device designed, intended or that functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision." (CCR § 12.8.978.20(b).) Plaintiffs contend that this definition conflicts with the established definition of the term "flash suppressor", which is generally defined as an object designed or intended to reduce flash. (See Decl. of Torrey Johnson, ¶. 6, Decl. of Jess Guy, ¶ 13.) However, defendants contend in opposition that there was no single, established definition of the term "flash suppressor" before the DOJ adopted its regulation, and that the existing definitions of the term did not consistently state that a flash suppressor must be designed or intended to reduce flash. (Ignatius Chinn decl., ¶ 13, Exhibit A to Chinn decl.)[1]

The sources cited by defendants do appear to show that there were many conflicting definitions of the term "flash suppressor" in use at the time the DOJ adopted its regulation, and that many of the definitions did not rely on the fact that the device was designed or intended to reduce flash. (Chinn decl., Exhibit A.) For example, The NRA/ILA Glossary does define a flash suppressor as "a muzzle attachment intended to reduce visible muzzle flash caused by burning propellant." (*Ibid.*) However, the Dictionary of Weapons and Military Terms states that a flash suppressor is "a device attached to the muzzle of a weapon which reduces the amount of visible light or flash created by burning propellant gases." (*Ibid.*) Thus, at least some reference materials did not rely on the design or intent of the device, but apparently defined a flash suppressor by the effect that the device has on flash. Consequently, the court cannot state as a matter of law that the DOJ's definition unlawfully expanded the accepted definition of the term "flash suppressor", since there was no unified definition of the term at the time the DOJ adopted its regulation.

Plaintiffs contend that the regulatory definition is not "necessary and proper to carry out the purposes and intent" of the AWCA, because the Act specifically states that it is not intended to restrict weapons that are primarily designed for legitimate purposes such as hunting, target shooting and other sporting or recreational activities. (Penal Code § 12275.5.) Plaintiffs contend that the DOJ's definition of "flash suppressor" would encompass legitimate civilian weapons with muzzle brakes or compensators, and thus the DOJ's definition violates the Legislature's declared purpose. However, the court notes that the language of the AWCA does not expressly exclude weapons with

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[1] Plaintiffs have raised multiple objections to the declaration of defendants' expert, Ignatius Chinn. Plaintiffs claim that Chinn is not qualified to offer expert testimony. However, the declaration of Chinn appears to sufficiently establish his credentials as a firearms expert. (See Chinn decl., ¶¶ 2-4.) Plaintiffs also question Chinn's qualifications to testify as to the legal position of the DOJ. Again, however, as a supervisor with the DOJ, Chinn appears to be qualified to testify as to the DOJ's position regarding the law. Therefore, the court intends to overrule the objections to Chinn's declaration, except as noted below with regard to defendants' motion.

compensators or muzzle brakes, nor does it define the term "flash suppressor." Therefore, it is unclear whether the Legislature even intended to make a distinction between the different types of devices. As defendants' expert points out, some devices that are labeled muzzle brakes or compensators also have the effect of reducing flash. (Chinn decl., ¶ 13.) Thus, there is no reason to believe that simply because the DOJ's definition of the term "flash suppressor" might encompass some muzzle brakes or compensators, therefore the regulation violates Legislative intent. Consequently, the court intends to deny the plaintiff's motion for summary adjudication as to the first cause of action.

Plaintiff's second cause of action raises a vagueness challenge regarding the regulatory definition of "flash suppressor." Plaintiffs argue that the defendants' definition of flash suppressor as a device that is "designed, intended to, or that functions to perceptibly reduce or redirect flash from the shooter's field of vision" is impermissibly vague, because there is no way for a person of ordinary intelligence or a law enforcement official to determine whether a device actually functions to reduce or redirect flash.

"A law failing to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited violates due process under both the federal and California Constitutions." (*Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1151.) "A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications." (*Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 498.)

On the other hand, the Supreme Court has indicated that a law may be void for vagueness where it reaches a substantial amount of constitutionally protected conduct. (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 8.) Also, where a statute imposes criminal penalties, the standard of certainty is higher. (*Ibid.*) "When vagueness permeates the text of such a law, it is subject to facial attack." (*City of Chicago v. Morales* (1999) 527 U.S. 41, 55.)

Recently, the California Supreme Court in *In re Jorge M.* (2000) 23 Cal.4th 866 ruled on the question of whether the AWCA was unconstitutionally vague on its face. The court noted,

> That a criminal statute contains one or more ambiguities requiring interpretation does not make the statute unconstitutionally vague on its face (see *People v. Askey* (1996) 49 Cal. App. 4th 381, 386-387 [56 Cal. Rptr. 2d 782]), nor does it imply the statute cannot, in general, be fairly applied without proving knowledge of its terms. In cases where the information reasonably available to a gun possessor is too scant to prove he or she should have known the firearm had the characteristics making it

> a defined assault weapon, the possessor will not be subject to section 12280(b) as construed here. This is sufficient to protect against any significant possibility of punishing innocent possession. To require more--especially to require knowledge of the law as the amici curiae propose--would seriously impede effective enforcement of the AWCA, contrary to the legislative intent. Nothing in the language or history of the AWCA suggests the Legislature intended to create, in section 12280, an exception to the fundamental principle that all persons are obligated to learn of and comply with applicable laws. (*Id.* at 886.)

Thus, the Supreme Court found that a gun owner does not have to have actual knowledge that a gun possesses certain characteristics making it an assault weapon under the AWCA, as long as the owner knew or reasonably should have known that the weapon possessed characteristics bringing it within the AWCA. (*Id.* at 885.) In other words, the *mens rea* requirement of the AWCA sufficiently protects against the possibility that innocent gun owners will be prosecuted under the AWCA due to a failure to understand what types of weapons are restricted under the law. (*Id.* at 886.)

Here, there is at least a triable issue as to whether the *mens rea* requirement of the AWCA provides insurance that innocent firearms owners will not be unfairly prosecuted based on their failure to understand what constitutes a flash suppressor. Since the prosecution will have to prove beyond a reasonable doubt that the defendant in a criminal prosecution under the AWCA knew or reasonably should have known that his or her weapon had a flash suppressor, the fact that some devices may, unbeknownst to the owner, function to reduce or redirect flash will not necessarily expose the owner to a high risk of criminal conviction. It is worth noting in this regard that plaintiffs have never pointed to any criminal prosecutions or threatened prosecutions based on confusion over the flash suppressor definition of the AWCA, despite the fact that the present case has been pending for over five years. The absence of such prosecutions indicates that the danger to an average gun owner posed by any confusion over the definition of the term "flash suppressor" is not inordinately high.

Also, while plaintiffs may be correct that it is difficult or impossible for an average person to determine with any degree of certainty whether a device actually functions to reduce or redirect flash, since proper testing procedures and facilities are not generally available to the public, an average gun owner may nevertheless be on notice that their particular weapon might have a flash suppressor based on a visual inspection of the weapon. Therefore, defendants' expert's statement that an ordinary person could determine whether their rifle has a flash suppressor by inspection of the device is sufficient to raise a triable issue of material fact with regard to the vagueness challenge. (Chinn decl., ¶ 11.) Likewise, if the manufacturer's manual describes the device as a flash suppressor, then clearly the owner would be on notice of the fact that his weapon falls within the DOJ definition. (*Ibid.*)

In addition, law enforcement officials are also on notice as to what constitutes a flash suppressor based on the same widely available and easily obtained information, so there is no need for them to develop complicated testing procedures. (Chinn decl., ¶ 11.) Nor is there a need for the DOJ incorporate standards for such testing in its regulatory definition of the term "flash suppressor." Therefore, the court intends to deny the plaintiffs' motion for summary adjudication on the second cause of action.

Plaintiffs' fifth cause of action alleges that the term "permanently alter" in Penal Code §§ 12020(c)(5) and 12276.1 is unconstitutionally vague and confusing, and that the DOJ must issue a regulation defining the term. Plaintiffs claim that the term "permanently alter" is subject to multiple interpretations, and therefore the DOJ must issue a regulation to define the term more precisely. However, the plaintiffs concede that the DOJ original proposed definition of the term to mean "any irreversible change or modification" was not helpful, because any object can be altered given sufficient time and resources. (Decl. of Jess Guy, ¶ 47-51.) Indeed, the DOJ apparently agreed with the plaintiffs' position, since it decided that its original proposed definition did not add any clarity to the term. (See Chinn decl., ¶ 17.) The DOJ concluded that the term "permanently alter" was sufficiently understood without further definition. (*Ibid.*)

There is at least a triable issue as to whether the term "permanently alter" is not so confusing or unclear that the DOJ was required to issue a regulation defining it further. An administrative agency is not required to issue regulations to address every conceivable question. (*Shalala v. Guernsey Memorial Hospital* (1995) 514 U.S. 87, 96.)

> [I]n the absence of an express legislative command, the decision whether administrative regulations are necessary or appropriate is a matter entrusted to the discretion of the administrative agency. [Citation omitted.] The agency's decision, which is legislative in character, comes to the court with a strong presumption of correctness, and the court must defer to the agency's expertise unless its decision is arbitrary and capricious. [Citations.] As stated in *Tailfeather v. Board of Supervisors* (1996) 48 Cal. App. 4th 1223 [56 Cal. Rptr. 2d 255], an agency decision not to institute rulemaking should be overturned only in the rarest and most compelling circumstances. [Citation.] (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 503.)

Here, the court cannot hold as a matter of law that the DOJ's decision not to issue a rule was arbitrary or capricious. The DOJ determined that any definition it issued would not provide greater clarity to the term "permanently alter", and it therefore chose not to issue any definition at all, instead relying on the common meaning of the term. (Chinn decl., ¶ 17.) Webster's Dictionary defines "permanent" as "continuing or enduring without fundamental or marked

change." (Webster's New Collegiate Dictionary (1977), p. 854.) Thus, applying the commonly understood definition, to "permanently alter" a magazine to accept no more than 10 rounds would mean to alter the magazine in a way that continues without fundamental change. As a practical matter, it does not appear to be possible for the DOJ to issue a definition that lists every possible way for a gun owner to permanently alter a magazine to accept no more than 10 rounds. (Chinn decl., ¶ 18.) At the very least, there is a triable issue of material fact as to whether the DOJ's decision not to issue a regulation defining the term "permanently alter" was arbitrary or capricious. Therefore, the court intends to deny the motion for summary adjudication of the fifth cause of action.

Finally, plaintiffs seek summary adjudication of their sixth cause of action, which alleges that defendants have engaged in a pattern of "misleading and inconsistent communications and actions" regarding the AWCA. However, the court notes that plaintiffs have stated that they intend to dismiss their claim as it relates to the allegedly confusing definition of the term "detachable magazine", so that portion of the complaint is no longer at issue. (See plaintiffs' reply, p. 1:22.)

Also, the plaintiffs' argument regarding the alleged inconsistency of allowing the Single Action Shooting Society (SASS) to import large capacity lever action rifles into the state for shooting competitions is now moot. Subsequent to the filing of the present suit, the Legislature enacted an exception to the law that exempts lever action rifles from the definition of "assault weapons." (See Penal Code § 12020(c)(25)(C).) Therefore, there is no need for the court to rule on the question of whether the defendants acted inconsistently in allowing the importation of lever action rifles into the state.

Plaintiffs also argue in the motion for summary adjudication that defendants have acted inconsistently with regard to Smith & Wesson's Walther P22 pistol, and in issuing assault weapons permits to gun dealers, and in making certain statements on its web page regarding removal of characteristics of a weapon. (See plaintiffs' points and authorities, pp. 18:7-19:22.) However, none of these allegedly inconsistent statements and actions are alleged in the first amended complaint. A motion for summary judgment can only address issues raised in the pleadings. (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98.) Therefore, the plaintiffs cannot obtain summary adjudication based on these alleged inconsistencies.

The only remaining ground alleged in the sixth cause of action is the plaintiffs' claim that the DOJ has issued inconsistent statements regarding whether the Browning BOSS and Springfield Armory Muzzle Break devices are "flash suppressors" within the meaning of the regulatory definition. The DOJ has issued letters stating that the devices are not flash suppressors, yet the plaintiffs contend that the devices do function to reduce flash from the shooter's field of vision, and therefore they are flash suppressors under the DOJ's definition.

Thus, plaintiffs conclude that the DOJ has taken a position that is inconsistent with their own regulations.

However, the plaintiffs' own expert states that the Springfield Muzzle Break and Browning BOSS "each has some unintended effect in redirecting some of the flash out of the shooter's field of vision (***albeit, these devices may also be redirecting as much or more flash back into the field of vision***)." (Guy decl., ¶ 39, emphasis added, see also Torrey Johnson decl., ¶ 31.) Thus, plaintiffs' expert apparently concedes that the devices may tend to direct at least as much flash back into the shooter's field of vision as they direct out of the field of vision, which would mean that they are not "flash suppressors" within the DOJ definition. This is consistent with the DOJ's conclusion that the devices are not flash suppressors.

Consequently, the plaintiffs have failed to meet their burden of producing evidence showing that the DOJ's determination that the Browning and Springfield devices are not flash suppressors was incorrect and inconsistent with the DOJ's definition. Consequently, the court intends to deny the motion for summary adjudication of the sixth cause of action.

Defendants' Motion: As discussed above with regard to plaintiffs' motion, the fundamental premise of plaintiffs' first cause of action is that there was already an established definition for the term "flash suppressor" in the industry, and that the DOJ unlawfully expanded this definition when it issued its regulation defining the term as a device that is "designed, intended, or that functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision." (11 CCR § 5469(b).)

However, the Legislative has granted the Attorney General broad authority to promulgate regulations that may be necessary and proper to carry out the purposes of the AWCA. (Penal Code § 12276.5(c).) Thus, the DOJ's regulations are entitled to great deference from the court. (*Dabis v. San Francisco Redevelopment Agency* (1975) 50 Cal.App.3d 704, 706.) "[J]udicial review is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether he has failed to follow the procedure and give the notices required by law." (*Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 605.)

Here, the evidence presented by defendants indicates that there was no unified definition of the term "flash suppressor" in use at the time the DOJ adopted its regulation. Definitions varied considerably, with some sources citing the design or intent of the device, and others relying on the actual effect that the device has to reduce flash. (See Chinn decl., ¶ 13, and Exhibit A to Chinn decl.) While plaintiffs attempt to raise a triable issue as to whether there was an established definition of the term, they do not dispute most of the sources cited by plaintiffs' expert. (See plaintiffs' response to undisputed facts 7-21.) Since

the many sources cited by defendants show considerable variation in the definition of the term "flash suppressor", plaintiffs cannot establish that there was only a single meaning for the term at the time the Legislature passed the AWCA.

Plaintiffs argue that, if there was no established definition for the term at the Legislature passed the AWCA, then the Legislature violated due process by enacting a statute that relies on a term with no established meaning. (*U.S. v. Cohen Grocery Co.* (1921) 255 U.S. 81.) However, in *Cohen*, the Supreme Court struck down a law that "made [it] unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." (*Id.* at 89.) The court found that the phrase "unjust or unreasonable rate or charge" was so vague that it failed to warn potential defendants of the exact conduct that was prohibited. Here, on the other hand, the term "flash suppressor", while apparently having no established single meaning, is still specific enough to place the public on notice of the kind of device that is prohibited, particularly after the regulation clarified the meaning of the term.

Next, plaintiffs argue that the term "suppressor" implies an intentional effect rather than an incidental one, and therefore the Legislature must have intended to limit the law to only devices that are designed or intended to suppress flash. However, plaintiffs point to no authority or definition that states that "suppression" must be intentional. Also, the language of the statute does not expressly state that a flash suppressor must be designed or intended to suppress flash. It merely describes the device as a "flash suppressor" without further explanation. (Penal Code § 12276.1(a)(1)(E).) The omission appears to be deliberate, since the Legislature clearly knows how to describe firearms devices according to their design or intent when it intends to make the design or intent of a device a limiting factor. (See Penal Code § 12020(c)(1)(B), (c)(1)(E), (c)(2)(E), (c)(4), (c)(9), and (c)(10).) Thus, the fact that the Legislature chose not to define the term "flash suppressor" by the design or intent of the device appears to indicate that the DOJ's interpretation was not incorrect.

Plaintiffs also argue that defendants' definition would lead to absurd results. For example, plaintiffs point out that longer barrels tend to reduce flash, and thus a long-barreled hunting rifle could be deemed an "assault weapon." However, the plaintiffs' argument ignores the fact that the DOJ definition of "flash suppressor" relates to a "device" that functions to reduce or redirect flash. (11 CCR § 5469(b).) To interpret the regulation to mean that a rifle barrel is itself a "device" that functions to reduce or redirect flash would stretch logic to the breaking point. Clearly, the regulation refers to a device that is attached to the barrel in some manner, rather than merely the length of the barrel itself.

It appears that plaintiffs' primary objection to defendants' regulatory definition is that it may cause some devices labeled as muzzle brakes or compensators to be deemed "flash suppressors" for the purposes of the AWCA.

Plaintiffs point to the Springfield Muzzle Break and the Browning BOSS as examples of such devices that would qualify as flash suppressors under the DOJ definition, even though they are allegedly not flash suppressors under common industry definitions. Again, however, plaintiffs assume that there is a single accepted definition of "flash suppressor" in the firearms industry. As discussed above, this does not appear to be the case.

In any event, defendants have stated that they do not consider the Springfield and Browning devices to be flash suppressors. (Chinn decl., ¶ 15.) Also, plaintiffs' own experts appear to admit that the Springfield and Browning devices redirect some flash out of the shooter's field of vision, but may also redirect as much or more flash back into the field of vision. (Johnson decl., ¶ 31, Guy decl., ¶ 39.) Thus, there does not appear to be any triable issue of material fact with regard to the question of whether the DOJ's definition of "flash suppressor" unlawfully expanded the term's meaning under the AWCA. Consequently, defendants are entitled to summary adjudication of the first cause of action.

Next, defendants seek summary adjudication of the second cause of action, which challenges the "flash suppressor" definition on the ground that it is unconstitutionally vague. Plaintiffs allege that it is impossible for an ordinary gun owner or law enforcement official to determine whether a device meets the definition of a "flash suppressor" because it would require complicated scientific testing. However, defendants contend that a gun owner can refer to the owner's manual of the weapon to determine if a device is a flash suppressor or not. (Chinn decl., ¶ 11.) An owner can also visually check the weapon to see if it has a device that might be likely to reduce or divert flash. (*Ibid.*) In addition, defendants note that the *mens rea* requirement of the AWCA would protect innocent gun owners from prosecution in cases where it would be difficult to determine whether a device is a flash suppressor. (*In re Jorge M., supra*, 23 Cal.4th at 886.) If the prosecution cannot show that a gun owner knew or reasonably should have known that a device functioned to reduce or redirect flash, then the owner would not be subject to prosecution.

However, it does appear that plaintiffs have raised triable issues of material fact regarding the question of whether a person of ordinary intelligence could determine that a device is a flash suppressor. Plaintiffs' experts state that it would require scientific test firing of a rifle to determine whether a device actually reduces or redirects flash. (Shain decl., ¶ 10.) Plaintiffs also contend that there is no way for an ordinary gun owner to visually determine whether a device reduces or redirects flash or not. (*Ibid.*) Scientific testing is also impractical for ordinary gun owners and even law enforcement officials because such testing would have to be done at night, would involve complicated photographic techniques, and there are no established standards for determining how much flash must be diverted or reduced in order to show that a device is a flash suppressor. (*Id.* at ¶¶ 11-15.) Other factors such as the type of sights

used, whether the weapon is fired from the shoulder or hip, the type of ammunition used, etc. may also affect the amount of flash. (*Id.* at ¶ 16.) Thus, plaintiffs have succeeded in raising some triable issues of material fact as to whether the definition of "flash suppressor" is so vague that an ordinary person cannot know what is prohibited. Consequently, the court intends to deny summary adjudication of the second cause of action.

Next, with regard to the motion for summary adjudication of the fifth cause of action, defendants argue that plaintiffs cannot show that the DOJ's failure to issue a regulation defining the term "permanently alter" renders the law impermissibly vague in all of its applications. (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 495.) The defendants are correct that the DOJ's decision not to issue a regulation is entitled to great deference.

> [I]n the absence of an express legislative command, the decision whether administrative regulations are necessary or appropriate is a matter entrusted to the discretion of the administrative agency. [Citation omitted.] The agency's decision, which is legislative in character, comes to the court with a strong presumption of correctness, and the court must defer to the agency's expertise unless its decision is arbitrary and capricious. [Citations.] As stated in *Tailfeather v. Board of Supervisors* (1996) 48 Cal. App. 4th 1223 [56 Cal. Rptr. 2d 255], an agency decision not to institute rulemaking should be overturned only in the rarest and most compelling circumstances. [Citation.] (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 503.)

Here, the defendants contend that the term "permanently alter" is sufficiently clear and unambiguous to require no further definition. As discussed above with regard to plaintiffs' motion, however, there appear to be triable issues of material fact regarding the issue of whether the DOJ's decision not to issue a definition was arbitrary and capricious. Plaintiffs point out that there is no way to "permanently" alter a magazine to prevent it from holding more than 10 rounds, since it is always possible to reverse any modification given enough time and resources. (Guy decl., ¶¶ 47-51, Helsey decl., ¶¶ 6-8.) The DOJ apparently agrees with plaintiffs' position here, since the DOJ originally intended to define "permanently alter" to mean "any irreversible change or modification." (Chinn decl., ¶ 17.) However, the DOJ withdrew the proposed regulation, apparently because it realized that no change or modification is truly irreversible. (*Ibid.*) The DOJ then decided that the term "permanently alter" was self-explanatory, and declined to issue any definition at all. (*Ibid.*)

Yet without some guidance from the DOJ, an ordinary gun owner would be left to take his or her chances that any alteration he or she makes to a magazine will not be sufficiently "permanent" to satisfy the law, and thus would be subject to prosecution. Plaintiffs have submitted declarations from several

gun owners who claim to face just such a dilemma. (Helsey decl., ¶¶ 4-8, Drenkowski decl, ¶¶ 3-5.) Since the DOJ has not issued any official regulation explaining the meaning of the term "permanently alter", gun owners have no way of interpreting the provision of the AWCA that was intended to permit an exception to the general rule against weapons having a magazine capable of holding more than 10 rounds. Thus, there appears to be at least a triable issue of fact with regard to the fifth cause of action, and the court cannot grant summary adjudication of that claim.

Defendants also move for summary adjudication of the sixth cause of action, which alleges various inconsistent statements and actions by the defendants. Plaintiffs have agreed to withdraw the second claim of the sixth cause of action, which concerns statements regarding the meaning of the phrase "detachable magazine". Therefore, it appears that the second sub-claim is moot. Also, the third sub-claim regarding the DOJ's decision to allow the SASS to import lever action rifles into the state is also moot, since the Legislature has amended the AWCA to specifically exempt lever action rifles. (Penal Code § 12020(c)(25)(C).)

Thus, the only remaining sub-claim is the first claim regarding the DOJ's statement that the Browning BOSS and Springfield Muzzle Break are not "flash suppressors" under the law. Plaintiffs have alleged that the DOJ's determination contradicts the DOJ's own definition of "flash suppressor" because the devices do function to reduce or redirect flash. Defendants claim, however, that they determined that the Springfield device was not a flash suppressor based on the determination of the ATF. (Chinn decl., ¶ 15 and Exhibit B thereto.) Defendants also claim that the Browning BOSS "redirects flash in a 360 degree arc around the barrel such that, on balance, it floods the shooter's field of vision with flash." (*Ibid.*)

However, defendants have not shown that the ATF's definition of "flash suppressor" is the same as California's definition. The letter from the ATF cited by defendants' expert does not explain what criteria the ATF used to determine whether the Springfield device was a flash suppressor, or what kind of testing the ATF performed. (Exhibit B to Chinn decl.) The letter merely states that "The sample was tested on a M1A type rifle and it was found that the device does not visibly suppress the flash of a .308 Winchester caliber cartridge fired through the device." (*Ibid.*) Without some indication of what definition of the term "flash suppressor" the ATF applied, however, there is no way to be certain that the ATF's determination was consistent with California, as opposed to federal, law. Thus, to the extent that Chinn's declaration relies on the ATF's testing and assessment of the Springfield device, it is without foundation and the court intends to sustain the plaintiff's objections to that portion of the declaration.

Also, there does not appear to be any basis for the defendants' statement that the Browning BOSS "floods the shooter's field of vision with flash."

Defendants have admitted that they do not conduct testing on the various devices. (Chinn decl, ¶ 9.) Thus, if the defendants did not conduct any kind of testing to make a determination of whether the device truly has the effect of suppressing flash, then the statement that the Browning device "floods the shooter's field of vision with flash" is unsupported. Therefore, the court intends to sustain the plaintiff's objection to the statement that the Browning device "floods the shooter's field of vision with flash" for lack of foundation. Without Chinn's statements, there is no support for defendants' motion with regard to the sixth cause of action, and the court must deny the motion for summary adjudication of the sixth cause of action.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **A.M. Simpson** (Judge's Initials) **on** **3-21-07** (Date).

Tentative Ruling

Re: **Kolehmainen v. Longs Drug Stores of Cal. Inc.**
Superior Court Case No. 05 CECG 03125 AMC

Hearing Date: Thurs., Mar. 22, 2006 (**Dept. 52**)

Motion: Defendant Longs Drug Stores of California Inc.'s UNOPPOSED Motion for Summary Judgment.

Tentative Ruling:

To GRANT. (CCP 437c.)

Explanation:

Defendant Longs presents a prima facie case that it granted Plaintiff Kolehmainen some 20 days of medical leave from 10/29/03 through 11/18/03, and then granted him additional leave through 1/9/04 and 1/20/04, for a total of 12 weeks of extended medical leave, consistent with its new 2003 absence policy. Plaintiff sent Longs a doctor's note indicating he would be unable to return to work until 2/13/04. But Longs had already notified Plaintiff of the new policy on 11/17/03 and on 1/12/04, Longs notified him that if he failed to return to work on 1/20/04, he would be terminated. Plaintiff admits that he received notice of the new policy. (Sep. Statement, Fact 24.)

Longs admits that prior to 11/17/03, it did permit 26 weeks of unpaid extended leave. But while Plaintiff was out on medical leave Longs shortened it to 12 weeks. Longs presents a prima facie case that Plaintiff was an at-will employee and that Longs was entitled to change its leave of absence policy, even without notice or cause. (Cf. DiGiacinto v. Ameriko-Omserv Corp. (1997) 59 Cal.App.4th 629, 636-639.)

Longs presents evidence sufficient to carry its initial burden of production. The burden shifts to Defendant to show that triable issue of material facts exist. (**Aguilar v. Atlantic Richfield** (2001) 25 Cal.4th 826, 850, 852.) But Plaintiff has filed no Opposition. Accordingly, the motion for summary judgment is granted.

Pursuant to CRC 391 (a) and CCP 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: AMC on March 21, 2007 .

(Judge's initials)

(Date)

Exhibit C

IN THE SUPREME COURT OF THE UNITED STATES

- x

DISTRICT OF COLUMBIA, :

ET AL., :

Petitioners :

v. : No. 07-290

DICK ANTHONY HELLER. :

- x

Washington, D.C.

Tuesday, March 18, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

WALTER DELLINGER, ESQ., Washington, D.C.; on behalf of the Petitioners.

GEN. PAUL D. CLEMENT, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf Of the United States, as amicus curiae, supporting the Petitioners.

ALAN GURA, ESQ., Alexandria, Va.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument today in Case 07-290, District of Columbia versus Heller.

Mr. Dellinger.

ORAL ARGUMENT OF WALTER DELLINGER

ON BEHALF OF THE PETITIONERS

MR. DELLINGER: Good morning, Mr. Chief Justice, and may it please the Court:

The Second Amendment was a direct response to concern over Article I, Section 8 of the Constitution, which gave the new national Congress the surprising, perhaps even the shocking, power to organize, arm, and presumably disarm the State militias. What is at issue this morning is the scope and nature of the individual right protected by the resulting amendment and the first text to consider is the phrase protecting a right to keep and bear arms. In the debates over the Second Amendment, every person who used the phrase "bear arms" used it to refer to the use of arms in connection with militia service and when Madison introduced the amendment in the first Congress, he exactly equated the phrase "bearing arms" with, quote, "rendering military service." We know this from the

inclusion in his draft of a clause exempting those with religious scruples. His clause says "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."

And even if the language of keeping and bearing arms were ambiguous, the amendment's first clause confirms that the right is militia-related.

CHIEF JUSTICE ROBERTS: If you're right, Mr. Dellinger, it's certainly an odd way in the Second Amendment to phrase the operative provision. If it is limited to State militias, why would they say "the right of the people"? In other words, why wouldn't they say "state militias have the right to keep arms"?

MR. DELLINGER: Mr. Chief Justice, I believe that the phrase "the people" and the phrase "the militia" were really in -- in sync with each other. You will see references in the debates of, the Federalist Farmer uses the phrase "the people are the militia, the militia are the people."

CHIEF JUSTICE ROBERTS: But if that's right, doesn't that cut against you? If the militia included all the people, doesn't the preamble that you rely on

not really restrict the right much at all? It includes all the people.

MR. DELLINGER: Yes, I do believe it includes all the people in the sense of Verdugo-Urquidez, all those who are part of the polity. What -- what defines the amendment is the scope and nature of the right that the people have. It's, it is a right to participate in the common defense and you have a right invocable in court if a Federal regulation interferes with your right to train for or whatever the militia has established. So that --

JUSTICE KENNEDY: One of the concerns, Mr. Dellinger, of the framers, was not to establish a practice of amending the Constitution and its important provisions, and it seems to me that there is an interpretation of the Second Amendment differing from that of the district court and in Miller and not advanced particularly in the red brief, but that conforms the two clauses and in effect delinks them. The first clause I submit can be read consistently with the purpose I've indicated of simply reaffirming the existence and the importance of the militia clause. Those were very important clauses. As you've indicated, they're in Article I and Article II. And so in effect the amendment says we reaffirm the right to have a

militia, we've established it, but in addition, there is a right to bear arms. Can you comment on that?

MR. DELLINGER: Yes.

JUSTICE KENNEDY: And this makes, it does -- I think you're write right in the brief to say that the preface shouldn't be extraneous. This means it's not extraneous. The Constitution reaffirms the rights, reaffirm several principles: The right of the people to peaceably assemble, the right to be secure in their homes, the Tenth Amendment reaffirms the rights, and this is simply a reaffirmation of the militia clause.

MR. DELLINGER: Justice Kennedy, I think any interpretation that delinks the two clauses as if they were dealing with related but nonetheless different subject matters has that to count against it, and what you don't see in the debates over the Second Amendment are references to, in those debates, the use of weapons for personal purposes. What you see is the clause that, that literally transposes to this: "Because a well regulated militia is necessary to the security of a free State, the right of the people to keep and bear arms shall not be" --

JUSTICE KENNEDY: Well the subject is "arms" in both clauses, as I've suggested is the common subject, and they're closely related.

MR. DELLINGER: I think, as this Court unanimously held in Miller, or at least noted in Miller -- I'll leave aside the debate. The court unanimously said in Miller that the Second Amendment must be interpreted in light of its obvious purpose to ensure the continuation and render possible the effectiveness of the military forces.

JUSTICE SCALIA: I don't see how there's any, any, any contradiction between reading the second clause as a -- as a personal guarantee and reading the first one as assuring the existence of a militia, not necessarily a State-managed militia because the militia that resisted the British was not State- managed. But why isn't it perfectly plausible, indeed reasonable, to assume that since the framers knew that the way militias were destroyed by tyrants in the past was not by passing a law against militias, but by taking away the people's weapons -- that was the way militias were destroyed. The two clauses go together beautifully: Since we need a militia, the right of the people to keep and bear arms shall not be infringed.

MR. DELLINGER: Yes, but once you assume that the clause is designed to protect the militia, it -- surely it's the militia that decides whether personal possession is necessary. I mean, Miller -- what makes

no sense is for Miller to require the arm to be militia-related if the right is not, and the key phrase is "bear arms." If people --

JUSTICE KENNEDY: Well, do you think the clause, the second clause, the operative clause, is related to something other than the militia?

MR. DELLINGER: No. I think --

JUSTICE KENNEDY: All right. Well, then --

MR. DELLINGER: -- the second clause, the phrase "keep and bear arms," when "bear arms" is referred to -- is referred to in a military context, that is so that even if you left aside --

JUSTICE KENNEDY: It had nothing to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?

MR. DELLINGER: That is not the discourse that is part of the Second Amendment. And when you read the debates, the congressional debates, the only use of the phrase "keep and bear arms" is a military phrase, and --

JUSTICE SCALIA: Blackstone thought it was important. Blackstone thought it was important. He thought the right of self-defense was inherent, and the framers were devoted to Blackstone. Joseph Story, the

first commentator on the Constitution and a member of this Court, thought it was a personal guarantee.

MR. DELLINGER: When Blackstone speaks of the personal guarantee, he describes it as one of the use of weapons, a common law right. And if we're constitutionalizing the Blackstonian common law right, he speaks of a right that is subject to due restrictions and applies to, quote "such weapons, such as are allowed by law." So Blackstone builds in the kind of reasonableness of the regulation that the District of Columbia has. Now, the --

CHIEF JUSTICE ROBERTS: Well, that may be true, but that concedes your main point that there is an individual right and gets to the separate question of whether the regulations at issue here are reasonable.

MR. DELLINGER: I don't dispute, Mr. Chief Justice, that the Second Amendment is positive law that a litigant can invoke in court if a State were to decide after recent events that it couldn't rely upon the Federal Government in natural disasters and wanted to have a State-only militia and wanted to have everybody trained in the use of a weapon, a Federal law that interfered with that would be a law that could be challenged in court by, by an individual. I mean, I think the better --

JUSTICE GINSBURG: Mr. Dellinger --

MR. DELLINGER: Yes.

JUSTICE GINSBURG: -- short of that, just to get your position clear, short of reactivating State militias, on your reading does the Second Amendment have any effect today as a restraint on legislation?

MR. DELLINGER: It would, Justice Ginsburg, if the State had a militia and had attributes of the militia contrary to a Federal law. And if it didn't --

JUSTICE GINSBURG: But it doesn't, as far as I know.

MR. DELLINGER: As far as I know, today it doesn't. And I'm not -- and the Respondents make that, that argument that the amendment is without a use. But you don't make up a new use for an amendment whose prohibitions aren't being violated. I mean --

JUSTICE ALITO: Your argument is that its purpose was to prevent the disarming of the organized militia, isn't that correct?

MR. DELLINGER: That is correct.

JUSTICE ALITO: And if that was the purpose, then how could they -- how could the Framers of the Second Amendment have thought that it would achieve that person, because Congress has virtually plenary power over the militia under the militia clauses?

MR. DELLINGER: That is because, I think, Justice Alito, that those who wanted to retake State authority over the militia didn't get everything they wanted. Madison actually did this somewhat reluctantly and wanted to maintain national control.

JUSTICE SCALIA: They got nothing at all, not everything they wanted. They got nothing at all. So long as it was up to the Federal Government to regulate the militia and to assure that they were armed, the Federal Government could, could disband the State militias.

MR. DELLINGER: Yes, but if -- well --

JUSTICE SCALIA: So what, what was the function served by the Second Amendment as far as the militia is concerned?

MR. DELLINGER: It is by no means clear that the Federal Government could abolish the State militia. It may be presupposed by the Article I, Section 8, clauses 15 and 16, and by the Second Amendment that the States may have a militia. That issue has been left open as to whether you could do that, and it can be called into Federal service but only in particular circumstances.

Now I think the better argument for the other side, if, if there is to be a militia relatedness

aspect of the Second Amendment, as we think clear from all of its terms, then Heller's proposed use of a handgun has no connection of any kind to the preservation or efficiency of a militia and therefore the case is over.

CHIEF JUSTICE ROBERTS: Well, but your reading of the militia clause, the militia clause specifically reserves concern rights to the States by its terms. And as I understand your reading, you would be saying the Second Amendment was designed to take away or expand upon the rights that are reserved, rather than simply guaranteeing what rights were understood to be implicit in the Constitution itself.

MR. DELLINGER: I'm not sure I followed the, the question exactly, but --

CHIEF JUSTICE ROBERTS: Well, the militia clause, Article I, Section 8, says certain rights are reserved to the States with respect to the militia. And yet you're telling us now that this was a very important right that ensured that they kept arms, but it wasn't listed in the rights that were reserved in the militia clause.

MR. DELLINGER: The debate over the militia clause -- what is shocking about the militia clauses is that this is a, a new national government that for the

first time has the power to create a standing army of professionals. The militia were people who came from the people themselves, put down their weapons of trade. The States were devoted to the ides of their militia of volunteers, and of all the powers granted to the Federal Government one of the most surprising was to say that Congress shall have the power to organize, arm, and discipline the militia and to -- even though the officers could be appointed by the State, the discipline had to be according to Congress. And this was -- this caused a tremendous negative reaction to the proposed Constitution.

JUSTICE KENNEDY: But the Second -- the Second Amendment doesn't repeal that. You don't take the position that Congress no longer has the power to organize, arm, and discipline the militia, do you?

MR. DELLINGER: No.

JUSTICE KENNEDY: So it was supplementing it. And my question is, the question before us, is how and to what extent did it supplement it. And in my view it supplemented it by saying there's a general right to bear arms quite without reference to the militia either way.

MR. DELLINGER: It restricted in our view the authority of the Federal Government to interfere

with the arming of the militia by the States. And the word that caused the most focus was to "arm" and that is to disarm.

Now, what I think is happening is that two different rights are being put together. One was a textual right to protect the militia. I think the better argument for the -- for the other side, for Mr. Heller, is that the amendment's purpose is militia protective, but it was overinclusive in the way that several of you have suggested, and that is that, as the court below said, preserving the individual right, presumably to have guns for personal use, was the best way to ensure that the militia could serve when called.

But that right, this right of personal liberty, the Blackstonian right, is an unregulated right to whatever arm, wherever kept, however you want to store it, and for the purposes an individual decides, that is a libertarian ideal. It's not the text of the Second Amendment, which is expressly about the security of the State; it's about well-regulated militias, not unregulated individual license, as is --

JUSTICE SOUTER: So what you are -- what you are saying is that the individual has a right to challenge a Federal law which in effect would disarm the militia and make it impossible for the militia to

perform those functions that militias function. Isn't that the nub of what you're saying?

MR. DELLINGER: Yes. That is correct.

JUSTICE SOUTER: Okay.

MR. DELLINGER: And if the Court --

JUSTICE STEVENS: May ask this question, Mr. Dellinger? To what extent do you think the similar provisions in State constitutions that were adopted more or less at the same time are relevant to our inquiry?

MR. DELLINGER: I think they are highly relevant to your inquiry because now 42 States have adopted constitutional provisions.

JUSTICE STEVENS: I'm not talking about those.

MR. DELLINGER: You're talking about at the time.

JUSTICE STEVENS: I'm talking about the contemporaneous actions of the States, before or at the time of the adoption of the Second Amendment.

MR. DELLINGER: I think that the -- the State amendments are generally written in different -- in different terms. If you're going to protect the kind of right that is -- that is being spoken of here, different from the militia right, the plain language to do it would be "Congress or the States shall pass no law

abridging the right of any person to possess weapons for personal use." And that's not the right that is created here.

One of the troublesome aspects of viewing this as a right of personal use is that that is the kind of fundamental liberty interest that would create a real potential for disruption. Once you unmoor it from -- or untether it from its connection to the protection of the State militia, you have the kind of right that could easily be restrictions on State and local governments and --

JUSTICE KENNEDY: Well, there's no question that the English struggled with how to work this. You couldn't conceal a gun and you also couldn't carry it, but yet you had a right to have it.

Let me ask you this: Do you think the Second Amendment is more restrictive or more expansive of the right than the English Bill of Rights in 1689?

MR. DELLINGER: I think it doesn't address the same subject matter as the English Bill of Rights. I think it's related to the use of weapons as part of the civic duty of participating in the common defense, and it's -- and it's -- it's --

JUSTICE KENNEDY: I think that would be more restrictive.

MR. DELLINGER: That -- that could well -- the answer then would be --

JUSTICE SOUTER: Well isn't it -- isn't it more restrictive in the sense that the English Bill of Rights was a guarantee against the crown, and it did not preclude Parliament from passing a statute that would regulate and perhaps limit --

MR. DELLINGER: Well --

JUSTICE SOUTER: Here there is some guarantee against what Congress can do.

MR. DELLINGER: Parliament could regulate. And Blackstone appears to approve of precisely the kinds of regulations here. Now --

JUSTICE STEVENS: The Bill of Rights only protected the rights of protestants.

MR. DELLINGER: This is correct.

JUSTICE STEVENS: And it was suitable to their conditions then as allowed by law, so it was -- it was a group right and much more limited.

MR. DELLINGER: I think that is -- that's correct.

JUSTICE SCALIA: And as I recall the legislation against Scottish highlanders and against -- against Roman Catholics did use the term -- forbade them to keep and bear arms, and they weren't just talking

about their joining militias; they were talking about whether they could have arms.

MR. DELLINGER: Well, the different kind of right that you're talking about, to take this to the question of -- of what the standard ought to be for applying this, even if this extended beyond a militia-based right, if it did, it sounds more like the part of an expansive public or personal -- an expansive personal liberty right, and if it -- if it is, I think you ought to consider the effect on the 42 States who have been getting along fine with State constitutional provisions that do expressly protect an individual right of -- of weapons for personal use, but in those States, they have adopted a reasonableness standard that has allowed them to sustain sensible regulation of dangerous weapons. And if you --

CHIEF JUSTICE ROBERTS: What is -- what is reasonable about a total ban on possession?

MR. DELLINGER: What is reasonable about a total ban on possession is that it's a ban only an the possession of one kind of weapon, of handguns, that's been considered especially -- especially dangerous. The --

CHIEF JUSTICE ROBERTS: So if you have a law that prohibits the possession of books, it's all right

if you allow the possession of newspapers?

MR. DELLINGER: No, it's not, and the difference is quite clear. If -- if you -- there is no limit to the public discourse. If there is an individual right to guns for personal use, it's to carry out a purpose, like protecting the home. You could not, for example, say that no one may have more than 50 books. But a law that said no one may possess more than 50 guns would -- would in fact be I think quite reasonable.

CHIEF JUSTICE ROBERTS: The regulation -- the regulation at issue here is not one that goes to the number of guns. It goes to the specific type. And I understood your argument to be in your brief that because rifles and shotguns are not banned to the staple extent as handguns, it's all right to ban handguns.

MR. DELLINGER: That is correct because there is no showing in this case that rifles and handguns are not fully satisfactory to carry out the purposes. And what -- and what the court below says about -- about the elimination of this --

JUSTICE KENNEDY: The purposes of what?

MR. DELLINGER: I'm sorry.

JUSTICE KENNEDY: You said there is no showing that rifles and handguns. I think you meant

rifles and other guns.

MR. DELLINGER: Yes, I'm sorry. Rifles and handguns.

JUSTICE KENNEDY: Is necessary for the purpose of what? What is the purpose?

MR. DELLINGER: The purpose -- if the purpose -- if we are shifting and if we assume for a moment arguendo that you believe this is a right unconnected to the militia, then the purpose would be, say, defense of the home. And where the government here, where the -- where the correct standard has been applied, which is where a State or the district has carefully balanced the considerations of gun ownership and public safety, has eliminated one weapon, the court below has an absolutist standard that cannot be sustained. The court below says that once it is determined that handguns are, quote, "arms," unquote, referred to in the Second Amendment, it is not open to the District to ban them. And that doesn't promote the security of a free State.

JUSTICE GINSBURG: But wasn't there a leeway for some weapon prohibition? Let me ask you, in relation to the States that do have guarantees of the right to possess a weapon at home: Do some of those States say there are certain kinds of guns that you

can't have, like machine guns?

MR. DELLINGER: Yes. And here what the opinion below would do instead -- would -- it's hard to see on the opinion below why machine guns or armor-piercing bullets or other dangerous weapons wouldn't be categorically protected --

JUSTICE BREYER: Could you go back to the --

MR. DELLINGER: -- in those States --

JUSTICE KENNEDY: If I could just have one follow-on on Justice Ginsburg real quick. Do those States -- Justice Ginsburg asked -- - that distinguish among weapons, State constitutional provisions do not do so?

MR. DELLINGER: No, it's not in the text of the State constitutional provision; it's in their --

JUSTICE GINSBURG: It's in interpretation.

MR. DELLINGER: -- reasonable application. And here, the question is how has the balance been struck? The District allows law-abiding citizens to have functioning firearms in the home. From the time it was introduced in 1976, it has been the consistent position that you're entitled to have a functioning firearm. At issue is the one type of weapon --

JUSTICE SCALIA: Mr. Dellinger, let's come back to your description of the opinion below as

allowing armor-piercing bullets and machine guns. I didn't read it that way. I thought the opinion below said it had to be the kind of weapon that was common for the people --

MR. DELLINGER: That is --

JUSTICE SCALIA: -- that is common for the people to have. And I don't know -- I don't know that a lot of people have machine guns or armor-piercing bullets. I think that's quite unusual. But having a pistol is not unusual.

MR. DELLINGER: The number of machine guns, I believe, is in excess of a hundred thousand that are out there now, that are --

JUSTICE SCALIA: How many people in the country?

MR. DELLINGER: Well, there are 300 million, but whether that's common or not, but the --

JUSTICE SCALIA: I don't think it's common.

MR. DELLINGER: But it's the -- the court protects weapons suitable for military use that are lineal descendants. I don't know why an improved bullet wouldn't be covered, unless you adopt the kind of reasonableness standard that we suggest, where you look to the fact that -- and I don't -- some people think machine guns are more dangerous than handguns -- they

shoot a lot of people at once -- but a handgun is concealable and movable. It can be taken into schools, into buses, into government office buildings, and that is the particular danger it poses in a densely populated urban area.

CHIEF JUSTICE ROBERTS: Well, I'm not sure that it's accurate to say the opinion below allowed those. The law that the opinion, the court below, was confronted with was a total ban, so that was the only law they considered.

If the District passes a ban on machine guns or whatever, then that law -- that law would be considered by the court and perhaps would be upheld as reasonable. But the only law they had before them was a total ban.

JUSTICE SCALIA: Or a law on the carrying of concealed weapons, which would include pistols, of course.

MR. DELLINGER: Let me fight back on the notion that it's a -- it's a total ban. It's not as if every kind of weapon is useful.

CHIEF JUSTICE ROBERTS: Are you allowed to carry the weapons that are allowed? I read the "carry clause" to apply without qualification. So while you say you might be able to have a shotgun in the home, you

can't carry it to get there.

MR. DELLINGER: No. You can -- you can with a proper license. The District has made it clear that there is no doubt that it interprets its laws to allow a functioning gun. And to say that something is a total ban when you own only one particular kind of weapon would apply to a machine gun if it were or came into common use and --

JUSTICE ALITO: But even if you have -- even if you have a rifle or a shotgun in your home, doesn't the code prevent you from loading it and unlocking it except when it's being used for lawful, recreational purposes within the District of Columbia? So even if you have the gun, under this code provision it doesn't seem as if you could use it for the defense of your home.

MR. DELLINGER: That is not the city's position, and we have no dispute with the other side on the point of what the right answer should be.

It is a universal or near universal rule of criminal law that there is a self-defense exception. It goes without saying. We have no argument whatsoever with the notion that you may load and have a weapon ready when you need to use it for self- defense.

I'm going to reserve the remainder of my

time for rebuttal.

CHIEF JUSTICE ROBERTS: Why don't you remain, Mr. Dellinger. We'll make sure you have rebuttal.

JUSTICE KENNEDY: Because I did interrupt Justice Breyer.

JUSTICE BREYER: I just wondered if you could say in a minute. One possibility is that the amendment gives nothing more than a right to the State to raise a militia. A second possibility is that it gives an individual right to a person, but for the purpose of allowing people to have guns to form a militia. Assume the second. If you assume the second, I wanted you to respond if you -- unless you have done so fully already, to what was the Chief Justice's question of why, on the second assumption, this ban on handguns, not the other part, of the District of Columbia, a total ban, why is that a reasonable regulation viewed in terms of the purposes as I described them?

MR. DELLINGER: It's a reasonable regulation for two kinds of reasons.

First, in order -- the amendment speaks of a well-regulated militia. Perhaps it's the case that having everybody have whatever gun they want of whatever

kind would advance a well- regulated militia, but perhaps not. But, in any event --

JUSTICE SCALIA: It means "well trained," doesn't it?

MR. DELLINGER: When you -- when you have one --

JUSTICE SCALIA: Doesn't "well regulated" mean "well trained"? It doesn't mean -- it doesn't mean "massively regulated." It means "well trained."

MR. DELLINGER: Well, every -- every phrase of the amendment, like "well regulated," "security of the State," is something different than a -- a libertarian right. Here you have, I think, a fully -- on this, particularly on a facial challenge, there is no showing that rifles and shotguns are not fully available for all of the purposes of defense.

There is no indication that the District militia is an entity that needs individuals to have their own handguns. You -- you -- there is a step that is -- that is missing here. The well-regulated militia is not necessarily about everyone having a gun. A militia may decide to organize -- be organized that way, in which case you would have a different notion.

But here, I think, when you come down to apply this case, if you look at about five factors, that

other weapons are allowed, important regulatory interests of these particularly dangerous weapons are -- is clearly a significant regulatory, and important regulatory, interest. In two respects this is removed from the core of the amendment. Even if it is not limited to militia service, even in the court below, no one doubts that that was, as the court below said, the most salient objective.

So this is in the penumbra or the periphery, not the core. It was undoubtedly aimed principally, if not exclusively, at national legislation which displaced the laws in all of the States, rural as well as urban.

Here you've got local legislation responsive to local needs, and this is local legislation in the seat of the government where Congress, which was created in order to protect the security of the national government, and where it would be extraordinary to assume that this is the one place that you're not going to incorporate it, the one area in the United States where no government, free of restrictions of the Second Amendment, could control dangerous weapons.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Dellinger.

General Clement.

ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE,
SUPPORTING THE PETITIONERS

GENERAL CLEMENT: Mr. Chief Justice, and may it please the Court:

The Second Amendment to the Constitution, as its text indicates, guarantees an individual right that does not depend on eligibility for or service in the militia.

JUSTICE STEVENS: May I ask you a preliminary question. Do you think it has the same meaning that it would have if it omitted the introductory clause referring to militia?

GENERAL CLEMENT: I don't think so, Justice Stevens, because we don't take the position that the preamble plays no role in interpreting the amendment. And we would point to this court's decision in Miller, for example, as an example of where the preamble can play a role in determining the scope --

JUSTICE STEVENS: So you think some weight should be given to the clause. And also, the other question I wanted to ask you is: Does the right to keep and bear arms define one or two rights?

GENERAL CLEMENT: Oh, I suppose it probably does define two rights that are closely related.

JUSTICE STEVENS: There's a right to keep arms and a right to bear arms?

GENERAL CLEMENT: I think that's the better view, and a number of State courts that have interpreted analogous provisions have distinguished between the two rights and looked at them differently.

And, obviously, the term "keep" is a word that I think is something of an embarrassment for an effort to try to imbue every term in the operative text with an exclusively military connotation because that is not one that really has an exclusive military connotation. As Justice Scalia pointed out, "keep" was precisely the word that authorities used in statutes designed specifically to disarm individuals.

JUSTICE GINSBURG: It doesn't means all. It doesn't mean -- "keep," on your reading, at least if it's consistent with Miller, keep and bear some arms, but not all arms.

GENERAL CLEMENT: Absolutely, Justice Ginsburg, and just -- I mean, to give you a clear example, we would take the position that the kind of plastic guns or guns that are specifically designed to evade metal detectors that are prohibited by Federal law are not "arms" within the meaning of the Second Amendment and are not protected at all.

And that would be the way we would say that you should analyze that provision of Federal law, as those are not even arms within the provisions of the Second Amendment.

I think to make the same argument about machine guns would be a much more difficult argument, to say the least, given that they are the standard-issue weapon for today's armed forces and the State-organized militia.

JUSTICE KENNEDY: So in your view this amendment has nothing to do with the right of people living in the wilderness to protect themselves, despite maybe an attempt by the Federal Government, which is what the Second Amendment applies to, to take away their weapons?

GENERAL CLEMENT: Well, Justice Kennedy, I wouldn't say that it has no application there. As I say, I think the term "arms," especially if Miller is going to continue to be the law, is influenced by the preamble. But the way we would look at it --

JUSTICE KENNEDY: I agree that Miller is consistent with what you've just said, but it seems to me Miller, which kind of ends abruptly as an opinion writing anyway, is just insufficient to subscribe -- to describe the interests that must have been foremost in

the framers' minds when they were concerned about guns being taken away from the people who needed them for their defense.

GENERAL CLEMENT: Well, Justice Kennedy, we would analyze it this way, which is we would say that probably the thing that was foremost in the framers' minds was a concern that the militia not be disarmed such that it would be maintained as a viable option to the standing army. But especially when you remember, as Justice Alito pointed out, that the Constitution in Article I, Section 8, clauses 15 and 16, the militia clauses, as unamended, gave the Federal power -- the Federal authorities virtually plenary authority to deal with the organization and regulation of the militia. The most obvious way that you could protect the militia --

JUSTICE STEVENS: Not plenary authority. Not plenary authority.

GENERAL CLEMENT: Except for that which is reserved in --

JUSTICE STEVENS: Who appoints the officers?

GENERAL CLEMENT: Yes -- no, absolutely. There is something reserved in clause 16.

But let me just say, if the Second Amendment had the meaning that the District of Columbia ascribes

to it, one would certainly think that James Madison, when he proposed the Second Amendment would have proposed it as an amendment to Article I, Section 8, clause 16.

He didn't. He proposed it as an amendment to Article I, Section 9, which encapsulates the individual rights to be free from bills of retainder and ex post facto clauses.

JUSTICE STEVENS: Do you think he was guided at all by the contemporaneous provisions in State constitutions?

MR. DELLINGER: I am sure he was influenced by that, although I think, honestly --

JUSTICE STEVENS: And how many of them protected an individual right? Just two, right?

GENERAL CLEMENT: I think -- I think Pennsylvania and Vermont are the ones that most obviously protected.

JUSTICE STEVENS: And the others quite clearly went in the other direction, did they not?

GENERAL CLEMENT: Well, I don't know about quite clearly. The textual indication in the State amendments that probably most obviously goes in the other direction is the phrase "keep and bear arms for the common defense." And, of course, there was a

proposal during the debate over the Second Amendment to add exactly those words to the Second Amendment, and that proposal was defeated, which does --

JUSTICE STEVENS: There was also a proposal to make it clear there was an individual right, which was also rejected.

GENERAL CLEMENT: I'm sorry, Justice Stevens. Which aspect of that did you have in mind?

JUSTICE STEVENS: The Pennsylvania proposal.

GENERAL CLEMENT: Oh, but I don't think that ever made it to the floor of the House or the Senate that I'm aware of. And I think that this happened at the actual Senate floor. There was a proposal to add the words "in the common defense," and that was rejected. I mean, but --

JUSTICE KENNEDY: You think Madison was guided by the experience and the expressions of the right in English law, including the Bill of Rights of 1689?

GENERAL CLEMENT: I do, Justice Kennedy, and I think in that regard it is telling that -- I mean, there are a variety of provisions in our Bill of Rights that were borrowed from the English Bill of Rights. Two very principal ones are the right to petition the government and the right to keep and bear arms. I don't

think it's an accident --

JUSTICE GINSBURG: If we're going back to the English Bill of Rights, it was always understood to be subject to the control and limitation and restriction of Parliament. And I don't think there's any doubt about that. And that's what we're talking about here, are legislative restrictions.

GENERAL CLEMENT: Well, Justice Ginsburg, I think you could say the same thing for every provision of the English Bill of Rights. And obviously, when those were translated over to our system you had to make adjustment for --

JUSTICE SOUTER: But isn't there one difference? Not every provision of the English Bill of Rights had an express reference to permission by law, which is a reference to parliamentary authority. So that there -- there -- there was a peculiar recognition of parliamentary legislative authority on this subject.

GENERAL CLEMENT: That's exactly right, Justice Souter. And the way I counted it, I only found three provisions in the English Bill of Rights that had a comparable reference to Parliament.

JUSTICE STEVENS: This provision has the additional limitation to "suitable to their conditions," and a large number of people were not permitted to have

arms.

GENERAL CLEMENT: Again, that is also true and is also relatively unique to this amendment. And if I get to the point in the argument where I talk about why we think that something less than strict scrutiny is appropriate, I think I would point precisely to those elements of the English Bill of Rights as being relevant.

But what I was about to say is I think what is highly relevant in considering the threshold question of whether there's an individual right here at all is that the parallel provisions in the English Bill of Rights that were borrowed over included the right to petition and the right to keep and bear arms. Both of those appear with specific parallel references to the people. They are both rights that are given to the people.

And as this Court has made clear in Verdugo-Urquidez, that's a reference that appears throughout the Bill of Rights as a reference to the entire citizenry.

JUSTICE SOUTER: May I go back to another point, which is to the same point, and that is consistent with your emphasis on the people was your emphasis a moment ago on the distinction between keeping

and bearing arms. The "keep" part sounds in your, in your mind at least, to speak of an individual right not necessarily limited by, by the exigencies of military service.

My question is, if that is correct and "keep" should be read as, in effect, an independent guarantee, then what is served by the phrase "and bear"? In other words, if the people can keep them and they have them there for use in the militia as well as to hunt deer, why do we -- why do we have to have a further reference in there to a right to bear as well as to keep arms? And my point is it sounds to me as though "keep and bear" forms one phrase rather than two. But I want to know what your answer is to that.

GENERAL CLEMENT: The way I would read it, Justice Souter, is that "keep" is really talking about private possession in the home. And the way that I would look at it is in order to exercise, for example, an opportunity to hunt, that you would need to bear the arms as well. And I would point you -- I think it's a useful point --

JUSTICE SOUTER: But wait a minute. You're not saying that if somebody goes hunting deer he is bearing arms, or are you?

GENERAL CLEMENT: I would say that and so

would Madison and so would Jefferson, I would submit. They use --

JUSTICE SOUTER: Somebody going out to -- in the eighteenth century, someone going out to hunt a deer would have thought of themselves as bearing arms? I mean, is that the way they talk?

GENERAL CLEMENT: Well, I will grant you this, that "bear arms" in its unmodified form is most naturally understood to have a military context. But I think the burden of the argument on the other side is to make it have an exclusively military context. And as a number of the briefs have pointed out, that's not borne out by the framing sources.

In one place, although it's not bearing arms, it's bearing a gun, I think it's highly relevant that Madison and Jefferson with respect to this hunting bill that Jefferson wrote and Madison proposed, specifically used in the hunting context the phrase "bear a gun," and so I do think in that context --

JUSTICE SOUTER: But it's "arms" that has the kind of the military -- the martial connotation, I would have thought.

JUSTICE SCALIA: Wasn't -- wasn't it the case that the banning of arms on the part of the Scottish highlanders and of Catholics in England used

the term, forbade them to "bear arms"? It didn't mean that could just not join militias; it meant they couldn't carry arms.

GENERAL CLEMENT: And again, I think various phrases were, were used. I also think that some of the disarmament provisions specifically used the word "keep." And so I think there is some independent meaning there, which is one point.

And then I do think that, even in the context of bearing arms, I will grant you that "arms" has a military connotation and I think Miller would certainly support that, but I don't think it's an exclusively military connotation.

JUSTICE STEVENS: Not only Miller, but the Massachusetts declaration. "The right to keep and bear arms for the common defense" is what is the normal reading of it.

GENERAL CLEMENT: Oh, absolutely. And I grant you if this, if the Second Amendment said "keep and bear arms for the common defense" this would be a different case. But --

JUSTICE STEVENS: --- the right to keep and bear -- I'm sorry. It's one right to keep and bear, not two rights, to keep and to bear.

GENERAL CLEMENT: Well, I mean it's -- it's

my friends from the District that are emphasizing that no word in the Constitution is surplusage. So I would say that in a context like this you might want to focus both on "keep" and on "bear arms."

JUSTICE SOUTER: And you want to talk about the standard, and your light's on.

(Laughter.)

GENERAL CLEMENT: Okay. I would like to talk about the standard and my light is indeed on, so let me do that.

I think there are several reasons why a standard as we suggest in our brief rather than strict scrutiny is an appropriate standard to be applied in evaluating these laws. I think first and foremost, as our colloquy earlier indicated, there is -- the right to bear arms was a preexisting right. The Second Amendment talks about "the right to bear arms," not just "a right to bear arms." And that preexisting always coexisted with reasonable regulations of firearms.

And as you pointed out, Justice Souter, to be sure when you're making the translation from the English Bill of Rights you always have to deal with parliamentary supremacy. But it is very striking that, as Justice Stevens said, the right was conditioned on the conditions, which I think meant what class you were,

and also subject expressly to the Parliament, the laws of Parliament.

JUSTICE SCALIA: The freedom of speech that was referred to in the Constitution was also "the" freedom of speech, which referred to the pre-existing freedom of speech. And there were indeed some restrictions on that such as libel that you were not allowed to do. And yet we've never held that simply because it was pre-existing and that there were some regulations upon it, that we would not use strict scrutiny. We certainly apply it to freedom of speech, don't we?

GENERAL CLEMENT: Justice Scalia, let me make two related points. One, even in the First Amendment context, this Court has recognized -- and I point you to the Court's opinion in Robertson against Baldwin, which makes this point as to both the First and the Second Amendment. This Court has recognized that there are certain pre-existing exceptions that are so well established that you don't really even view them as Second Amendment or First Amendment infringement.

JUSTICE SCALIA: Like libel.

GENERAL CLEMENT: Like libel, and I would say like laws barring felons from possessing handguns. I don't think --

JUSTICE KENNEDY: Or would you say like protecting yourself against intruders in the home?

GENERAL CLEMENT: Well, that gets to the self-defense component and I don't know that I ever got a chance to fully answer your question on that, Justice Kennedy, which is we would say, notwithstanding the fact that the preamble makes it clear that the preeminent motive was related to ensuring that the militia remained a viable option vis-a-vis the standing army, the operative text is not so limited. And I think in that regard it's worth emphasizing that the framers knew exactly how to condition a right on militia service, because they did it with respect to the grand jury clause, and they didn't do it with respect to the Second Amendment.

JUSTICE ALITO: If the amendment is intended at least, in part to protect the right to self-defense in the home, how could the District code provision survive under any standard of review where they totally ban the possession of the type of weapon that's most commonly used for self-defense, and even as to long guns and shotguns they require, at least what the code says without adding a supposed gloss that might be produced in a subsequent case, that even as to long guns and shotguns they have to be unloaded and disassembled or

locked at all times, even presumably if someone is breaking into the home?

GENERAL CLEMENT: Well, Justice Alito, let me answer the question in two parts if I can, because I think the analysis of the trigger lock provision may well be different than the analysis of the other provisions.

With respect to the trigger lock provision, we think that there is a substantial argument that once this Court clarifies what the constitutional standard is, that there ought to be an opportunity for the District of Columbia to urge its construction, which would allow for a relatively robust self-defense exception to the trigger lock provision. And this Court could very well, applying Ashwan to prevent -- principles allow for that kind of --

JUSTICE SCALIA: I don't understand that. What would that be -- that you can, if you have time, when you hear somebody crawling in your -- your bedroom window, you can run to your gun, unlock it, load it and then fire? Is that going to be the exception?

GENERAL CLEMENT: If that's going to be the exception, it could clearly be inadequate. And I think that -- I mean the District of Columbia can speak to this, but it seems to me that if, for example, the

police were executing a warrant at evening and had cause for doing it at evening and saw somebody with a loaded gun on their night stand, no children present without a trigger lock, it seems to me that that would be a good test case to decide whether or not their construction would provide for an exception to the trigger lock provision in that case.

JUSTICE GINSBURG: Can I interrupt for a minute?

GENERAL CLEMENT: If it did, I think then the statute might well be constitutional. If it didn't, in my view, it probably wouldn't be.

JUSTICE GINSBURG: There is a lot of talk about standards and stop words like strict scrutiny. Does it make a practical difference whether we take your standard or the strict scrutiny that was in the D.C. Circuit's opinion? And specifically there is a whole panoply of Federal laws restricting gun possession. Would any of them be jeopardized under your standard? And the same question with the District scrutiny, does it make any difference?

GENERAL CLEMENT: In our view it makes a world of difference, Justice Ginsburg, because we certainly take the position, as we have since consistently since 2001, that the Federal firearm

statutes can be defended as constitutional, and that would be consistent with this kind of intermediate scrutiny standard that we propose. If you apply strict scrutiny, I think that the result would be quite different, unfortunately.

CHIEF JUSTICE ROBERTS: Well, these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how these -- how this restriction and the scope of this right looks in relation to those?

I'm not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?

GENERAL CLEMENT: Well, Mr. Chief Justice,

let me say a couple of things about that, which is to say that if this Court were to decide this case and make conclusively clear that it really was focused very narrowly on this case and it was in some respects applying a sui generis test, we think that would be an improvement over the court of appeals opinion, which is subject to more than one reading, but as Justice Ginsburg's question just said, it's certainly susceptible to a reading that it embodies strict scrutiny. In fact --

JUSTICE GINSBURG: Well, it did. It said it's just like the First Amendment. First Amendment has exceptions, but strict scrutiny applies. It says strict scrutiny applies here too.

GENERAL CLEMENT: I --

JUSTICE SCALIA: But that opinion also, it didn't use the militia prologue to say it's only the kind of weapons that would be useful in militia, and that are commonly -- commonly held today. Is there any Federal exclusion of weapons that applies to weapons that are commonly held today? I don't know what you're worried about. Machine guns, what else? Armored bullets, what else?

GENERAL CLEMENT: Well, Justice Scalia, I think our principal concern based on the parts of the

court of appeals opinion that seemed to adopt a very categorical rule were with respect to machine guns, because I do think that it is difficult -- I don't want to foreclose the possibility of the Government, Federal Government making the argument some day -- but I think it is more than a little difficult to say that the one arm that's not protected by the Second Amendment is that which is the standard issue armament for the National Guard, and that's what the machine gun is.

CHIEF JUSTICE ROBERTS: But this law didn't involve a restriction on machine guns. It involved an absolute ban. It involved an absolute carry prohibition. Why would you think that the opinion striking down an absolute ban would also apply to a narrow one -- narrower one directed solely to machine guns?

GENERAL CLEMENT: I think, Mr. Chief Justice, why one might worry about that is one might read the language of page 53a of the opinion as reproduced in the petition appendix that says once it is an arm, then it is not open to the District to ban it.

Now, it seems to me that the District is not strictly a complete ban because it exempts pre-1976 handguns. The Federal ban on machine guns is not, strictly speaking, a ban, because it exempts pre --

pre-law machine guns, and there is something like 160,000 of those.

JUSTICE SCALIA: But that passage doesn't mean once it's an arm in the dictionary definition of arms. Once it's an arm in the specialized sense that the opinion referred to it, which is -- which is the type of a weapon that was used in militia, and it is -- it is nowadays commonly held.

GENERAL CLEMENT: Well --

JUSTICE SCALIA: If you read it that way, I don't see why you have a problem.

GENERAL CLEMENT: Well, I -- I hope that you read it that way. But I would also say that I think that whatever the definition that the lower court opinion employed, I do think it's going to be difficult over time to sustain the notion -- I mean, the Court of Appeals also talked about lineal descendants. And it does seem to me that, you know, just as this Court would apply the Fourth Amendment to something like heat imagery, I don't see why this Court wouldn't allow the Second Amendment to have the same kind of scope, and then I do think that reasonably machine guns come within the term "arms."

Now, if this Court wants to say that they don't -- I mean -- I mean -- we'd obviously welcome that

in our -- in our obligation to defend the constitutionality of acts of Congress.

The one other thing I would say is that this is an opinion that is susceptible of different readings. It's interesting that Respondents' amici have different characterizations of it. The Goldwater Institute calls it strict scrutiny; the State of Texas calls it reasonable -- reasonableness review.

CHIEF JUSTICE ROBERTS: Thank you, General.

GENERAL CLEMENT: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Gura.

ORAL ARGUMENT OF ALAN GURA,

ON BEHALF OF THE RESPONDENTS

MR. GURA: Thank you, Mr. Chief Justice, and may it please the Court:

All 50 states allow law-abiding citizens to defend themselves and their families in their homes with ordinary functional firearms including handguns. Now, I'd like to respond to one point that was raised lately by the General --

JUSTICE SCALIA: Talk a little slower; I'm not following you.

MR. GURA: Okay. I'd like to respond -- certainly, Justice Scalia. I'd like to respond to the point about the -- the District of Columbia's position

over the years with respect to the functional firearms ban.

The Petitioners have had two opportunities to urge courts to adopt this so-called self-defense exception which they construed in the amendment. The first opportunity came in 1978 in McIntosh versus Washington, where the petitioners urged the Court of Appeals of the District of Columbia to uphold the law because it was irrational in their view to prohibit self-defense in the home with firearms. They deemed it to be too dangerous, and this was a legitimate policy choice of the City Council, and they actually prevailed in that view.

The second opportunity that the Petitioners had to urge this sort of self-defense construction was actually in this case in the district court. We had a motion for summary judgment and we made certain factual allegations in this motion, and on page 70a of the joint appendix we see portions of our statement of undisputed material facts. Fact number 29, which was conceded by the District of Columbia, reads: The defendants prohibit the possession of lawfully owned firearms for self-defense within the home, even in instances when self-defense would be lawful by other means under District of Columbia law. The citation for that is a

functional firearms ban, and that point was conceded.

Certainly the idea that people can guess as to when it is that they might render the firearm operational is -- is not a one that the Court should accept, because a person who hears a noise, a person who perhaps is living in a neighborhood where there has been a spate of violent crimes, has no idea of when the District of Columbia would permit her to render the firearm operational. And, in fact, there is a prosecution history not under this specific provision, but certainly other under gun prohibition -- laws that we are challenging here today to prosecute people for the possession or for the carrying of a prohibited firearm even when the police ruled the shooting has been lawful self-defense.

JUSTICE BREYER: You're saying that this is unreasonable, and that really is my question because I'd like you to assume two things with me, which you probably don't agree with, and I may not agree with them, either.

(Laughter.)

JUSTICE BREYER: But I just want you to assume them for the purpose of the question. All right.

Assume that the -- that there is an individual right, but the purpose of that right is to

maintain a citizen army; call it a militia; that that's the basic purpose. So it informs what's reasonable and what isn't reasonable.

Assume -- and this is favorable to you but not as favorable as you'd like -- assume that we are going to decide whether something is proportionate or apply an intermediate standard in light of the purpose. All right.

Now, focus on the handgun ban. As I read these 80 briefs -- and they were very good, I mean really good and informative on both sides -- and I'm trying to boil down the statistics where there is disagreement, and roughly what I get -- and don't quarrel with this too much; it's very rough -- that 80,000 to 100,000 people every year in the United States are either killed or wounded in gun-related homicides or crimes or accidents or suicides, but suicide is more questionable. That's why I say 80,000 to 100,000.

In the District, I guess the number is somewhere around 200 to 300 dead; and maybe, if it's similar, 1,500 to 2,000 people wounded. All right.

Now, in light of that, why isn't a ban on handguns, while allowing the use of rifles and muskets, a reasonable or a proportionate response on behalf of the District of Columbia?

MR. GURA: Because, Your Honor, for the same reason it was offered by numerous military officers at the highest levels of the U.S. military in all branches of service writing in two briefs, they agree with us that the handgun ban serves to weaken America's military preparedness. Because when people have handguns -- handguns are military arms, they are not just civilian arms -- they are better prepared and able to use them. And, certainly, when they join the military forces, they are issued handguns.

And so if we assume that the sort of military purpose to the Second Amendment is an individual right, then the handgun ban, as noted by our military amici, would impede that.

JUSTICE BREYER: Well, I didn't read -- I read the two military briefs as focusing on the nature of the right, which was quite a pretty good argument there that the nature of the right is to maintain a citizen Army.

And to maintain that potential today, the closest we come is to say that there is a right for people to understand weapons, to know how to use them, to practice with them. And they can do that, you see, with their rifles. They can go to gun ranges, I guess, in neighboring States.

But does that make it unreasonable for a city with a very high crime rate, assuming that the objective is what the military people say, to keep us ready for the draft, if necessary, is it unreasonable for a city with that high crime rate to say no handguns here?

JUSTICE SCALIA: You want to say yes.

JUSTICE BREYER: Now, why?

JUSTICE SCALIA: That's your answer.

JUSTICE BREYER: Well, you want to say yes, that's correct, but I want to hear what the reasoning is because there is a big crime problem. I'm simply getting you to focus on that.

MR. GURA: The answer is yes, as Justice Scalia noted, and it's unreasonable, and it actually fails any standard of review that might be offered under such a construction of individual rights because proficiency with handguns, as recognized as a matter of judicial notice by the First Circuit in Cases back in 1942 -- that was a handgun case where the First Circuit examined the restriction on the carrying of the 30-caliber revolver. And the First Circuit accepted, as a matter of judicial notice, that proficiency in use and familiarity with the handgun at issue would be one that would further a militia purpose. And so --

JUSTICE STEVENS: Let me ask this question: In answering yes, do you attach any significance to the reference to the militia in the Second Amendment?

MR. GURA: Yes, I do, Your Honor.

JUSTICE STEVENS: You think that is -- to understand the amendment, you must pay some attention to the militia requirement?

MR. GURA: Yes, Your Honor, we must --

CHIEF JUSTICE ROBERTS: So a conscientious objector who likes to hunt deer for food, you would say, has no rights under the Second Amendment. He is not going to be part of the militia. He is not going to be part of the common defense, but he still wants to bear arms. You would say that he doesn't have any rights under this amendment?

MR. GURA: No, Your Honor. I think that the militia clause informs the purpose -- informs a purpose. It gives us some guidepost as to how we look at the Second Amendment, but it's not the exclusive purpose of the Second Amendment. Certainly, the Founders cared very much about --

JUSTICE GINSBURG: Is it a limitation? Is it any limitation on the legislature? Is the first clause any limitation on the legislature?

MR. GURA: It is a limitation to one extent,

Your Honor, the extent recognized in Miller where the Miller Court asked whether or not a particular type of arm that's at issue is one that people may individually possess. It looked to the militia clause and, therefore, adopted a militia purpose as one of the two prongs of Miller.

And so, certainly, if there were -- if the Court were to continue Miller -- and Miller was the only guidance that the lower court had, certainly, as to what arms are protected or unprotected by the Second Amendment. And yet --

JUSTICE STEVENS: If it limits the kinds of arms to be appropriate to a militia, why does it not also limit the kind of people who may have arms?

MR. GURA: It does not eliminate the kind of people, Your Honor, because the Second Amendment is the right of the people. And it would certainly be an odd right that we would have against the Congress, if Congress could then redefine people out of that right. Congress could tomorrow declare that nobody is in a militia, and then nobody would have the right against the government.

JUSTICE GINSBURG: If you were thinking of "the people," what those words meant when the Second Amendment was adopted, it was males between the ages of

what -- 17 and 45? People who were over 45 had no -- they didn't serve in the militia.

MR. GURA: Well, certainly, there were many people who were not eligible for militia duty, or not subject to militia service, who nevertheless were expected to, and oftentimes did, in fact, have guns.

JUSTICE SCALIA: Which shows that maybe you're being unrealistic in thinking that the second clause is not broader than the first. It's not at all uncommon for a legislative provision or a constitutional provision to go further than is necessary for the principal purpose involved.

The principal purpose here is the militia, but the -- but the second clause goes beyond the militia and says the right of the people to keep and bear arms.

Now, you may say the kind of arms is colored by the militia. But it speaks of the right of the people. So why not acknowledge that it's -- it's broader than the first clause?

MR. GURA: Well, we do acknowledge that, Your Honor.

JUSTICE SOUTER: Then why have the first clause? I mean what is it doing -- I mean what help is it going to be?

MR. GURA: Well, it was a way in which to

remind us -- the Framers certainly felt that a militia was very important to the preservation of liberty. The Framers had just fought a revolutionary war that relied heavily on militia forces, and so they wanted to honor that and remind us as to the purpose -- one purpose, not the exclusive purpose, but a purpose -- of preserving the right --

JUSTICE KENNEDY: Could it also be simply to reaffirm that the provisions in the main text of the Constitution remain intact?

MR. GURA: That's correct, Your Honor. In fact, that view was taken by William Raleigh in his 1828 treatise, view of the Constitution. Raleigh was, of course, a ratifier of the Second Amendment. He sat in the Pennsylvania Assembly in 1790. And if you look at his description of the Second Amendment, he bifurcates it. First, he discusses the militia clause, and he lavishes some qualified praise on it. And then --

JUSTICE KENNEDY: But you were about to tell us before the course of the questioning began about the other purposes that the amendment served. I'm -- I want to know whether or not, in your view, the operative clause of the amendment protects, or was designed to protect in an earlier time, the settler in the wilderness and his right to have a gun against some

conceivable Federal enactment which would prohibit him from having any guns?

MR. GURA: Oh, yes. Yes, Justice Kennedy. The right of the people to keep and bear arms was derived from Blackstone. It was derived from the common-law English right which the Founders wanted to expand.

In fact, the chapter in which Blackstone discusses this in his treatise, his fifth auxiliary right to arms, is entitled --

JUSTICE BREYER: That brings me back to the question because Blackstone describes it as a right to keep and bear arms "under law." And since he uses the words "under law," he clearly foresees reasonable regulation of that right. And so does the case not hinge on, even given all your views, on whether it is or is not a reasonable or slightly tougher standard thing to do to ban the handgun, while leaving you free to use other weapons?

I mean, I notice that the militia statute, the first one, spoke of people coming to report, in 1790, or whenever, with their rifles, with their muskets, but only the officers were to bring pistols. So that, to me, suggests they didn't see pistols as crucial even then, let alone now.

MR. GURA: Well, certainly they saw --

JUSTICE BREYER: What's your response to the question?

MR. GURA: Well, my response is that the government can ban arms that are not appropriate for civilian use. There is no question of that.

JUSTICE KENNEDY: That are not appropriate to --

MR. GURA: That are not appropriate to civilian use.

JUSTICE GINSBURG: For example?

MR. GURA: For example, I think machine guns: It's difficult to imagine a construction of Miller, or a construction of the lower court's opinion, that would sanction machine guns or the plastic, undetectable handguns that the Solicitor General spoke of.

The fact is that this Court's Miller test was the only guidance that we had below, and I think it was applied faithfully. Once a weapon is, first of all, an "arm" under the dictionary definition -- and Webster has a very useful one -- then you look to see whether it's an arm that is meant to be protected under the Second Amendment, and we apply the two-pronged Miller test. And usually one would imagine if an arm fails the

Miller test because it's not appropriate for common civilian applications --

JUSTICE GINSBURG: But why wouldn't the machine gun qualify? General Clement told us that's standard issue in the military.

MR. GURA: But it's not an arm of the type that people might be expected to possess commonly in ordinary use. That's the other aspect of Miller. Miller spoke about the militia as encompassing the notion that people would bring with them arms of the kind in common use supplied by themselves. And --

CHIEF JUSTICE ROBERTS: Is there any parallel --

JUSTICE GINSBURG: At this time -- I would just like to follow up on what you said, because if you were right that it was at that time, yes; but that's not what Miller says. It says that the gun in question there was not one that at this time -- this time, the time of the Miller decision -- has a reasonable relationship to the preservation or efficiency of a well-regulated militia. So it's talking about this time.

MR. GURA: That's correct. The time frame that the Court must address is always the present. The framers wished to preserve the right to keep and bear

arms. They wished to preserve the ability of people to act as militia, and so there was certainly no plan for, say, a technical obsolescence.

However, the fact is that Miller spoke very strongly about the fact that people were expected to bring arms supplied by themselves of the kind in common use at the time. So if in this time people do not have, or are not recognized by any court to have, a common application for, say, a machine gun or a rocket launcher or some other sort of --

CHIEF JUSTICE ROBERTS: Is there any parallel at the time that the amendment was adopted to the machine gun? In other words, I understand your point to be that, although that's useful in modern military service, it's not something civilians possess. Was there anything like that at the time of the adoption, or were the civilian arms exactly the same as the ones you'd use in the military?

MR. GURA: At the time that -- even at the time Miller was decided, the civilian arms were pretty much the sort that were used in the military. However, it's hard to imagine how a machine gun could be a "lineal descendent," to use the D.C. Circuit's wording, of anything that existed back in 1791, if we want to look to the framing era. Machine guns --

JUSTICE KENNEDY: It seems to me that Miller, as we're discussing it now, and the whole idea that the militia clause has a major effect in interpreting the operative clause is both overinclusive and underinclusive. I would have to agree with Justice Ginsburg that a machine gun is probably more related to the militia now than a pistol is. But that -- that seems to me to be allowing the militia clause to make no sense out of the operative clause in present-day circumstances.

MR. GURA: Your Honor, even within the militia understanding, the understanding of the militia was always that people would bring whatever they had with them in civilian life. So if a machine gun, even though it may be a wonderful --

JUSTICE KENNEDY: My point is: Why is that of any real relevance to the situation that faces the homeowner today?

MR. GURA: It's only of relevance if the Court wishes to continue reading the militia clause as informing the type of weapon which is protected.

JUSTICE KENNEDY: Well, you're being faithful to Miller. I suggest that Miller may be deficient.

MR. GURA: I agree with Your Honor, and

certainly in our brief we suggest that the militia emphasis of Miller is not useful as a limiting principle to the type of arms that may be -- that may be permitted. Because, on the one hand, there's a great deal of weaponry that might be wonderful for military duty but is not appropriate for common civilian use, which would not be protected even under the Miller test's first prong.

And, on the other hand, everything that civilians today might wish to have in ordinary common use -- handguns, rifles, and shotguns -- are militarily useful weapons.

So we de-emphasize the military aspects of Miller as being ultimately not very useful guidance for courts. And the better guidance would be to emphasize the commonsense rule that I think judges would have really no trouble applying, and we do this all the time in constitutional law: To simply make a decision as to whether or not whichever arm comes up at issue is an arm of the kind that you could really reasonably expect civilians to have.

JUSTICE BREYER: Why -- now, when say "keep" and "bear," I mean you are -- I think you're on to something here. Because you say let's use our common sense and see what would be the equivalent today. Fine.

If we know that at the time, in 1789, Massachusetts had a law that said you cannot keep loaded firearms in the house, right, and you have to keep all of the bullets and everything and all of the powder upstairs, why did they have that law? To stop fires because it's dangerous? They didn't have fire departments. Now we do -- or they weren't as good.

We now have police departments, and the crime wave might be said similar to what were fires then. And, therefore, applying the similar kind of thing, you say: Fine, just as you could keep pistols loaded but not -- not loaded. You had to keep powder upstairs because of the risk of fire. So today, roughly, you can say no handguns in the city because of the risk of crime.

Things change. But we give in both instances, then and now, leeway to the city and States to work out what's reasonable in light of their problems. Would that be a way of approaching it?

MR. GURA: The legislature has a great deal of leeway in regulating firearms. There is no dispute about that. However, I wouldn't draw a complete analogy between the Boston fire ordinances that Your Honor notes and the functional firearms ban.

First, even the Boston firearms ordinances

did not include handguns actually. At the time the word "firearm" was not understood to include pistols. General Gage's inventory of weapons seized from the Americans in Boston included some 1800 or so firearms and then 634 pistols. Nowhere in the Boston code do we see a prohibition on keeping loaded pistols in the home. And certainly the idea that -- that self-defense is a harm is one that is --

JUSTICE BREYER: Not self-defense being the harm. And I agree with you that this, the firearm analogy, floats up there, but it isn't going to decide this case, the Massachusetts statute. I agree with you about that.

What you've suddenly given me the idea of doing, which I'm testing, is to focus not just on what the kind of weapon is -- don't just look to see whether it's a cannon or a machine gun, but look to see what the purpose of this regulation is, and does it make sense in terms of having the possibility of people trained in firearms?

Let's look at those military briefs. Let's say that the generals have it right, there is some kind of right to keep trained in the use of firearms subject to regulation. We have regulation worried about crime, back to my first question.

MR. GURA: Well, back to Your Honor's first question, we don't agree that the military purpose is the exclusive purpose of the Second Amendment. And we also don't agree that it could be a reasonable regulation or under any standard of review to prohibit people from having functional firearms in their own home for purposes of self-defense.

JUSTICE SCALIA: You don't even agree that Massachusetts was subject to the Second Amendment.

MR. GURA: Well, originally it was not. But what we've seen with the Fourteenth Amendment, and we've seen --

JUSTICE SCALIA: But the time we're talking about, the firearms in the home ordinance, when was that?

MR. GURA: 1783 I believe was the statute.

JUSTICE STEVENS: How do you explain the fact that you include self-defense, but only two States, Pennsylvania and Vermont, did refer to self-defense as a permissible justification and all of the others referred to common defense or defense of the State, and in the Articles of Confederation and the Constitution itself there is no reference to self-defense?

MR. GURA: Your Honor, the State courts interpreting those provisions that you reference had a

different interpretation. For example, in 1895 Massachusetts --

JUSTICE STEVENS: 1895. I'm talking about contemporaneous with the adoption of the Second Amendment.

MR. GURA: Well, at the time we haven't seen State court decisions from exactly that era.

JUSTICE STEVENS: Just the text of the State constitutional provisions, two of them refer to self-defense. The rest refer only to common defense; is that not correct?

MR. GURA: On their literal text, yes. But judges did not interpret them that way, for example in North Carolina --

JUSTICE STEVENS: I understand that judicial interpretation sometimes is controlling and sometimes is not. But the text itself does draw a distinction, just as the Second Amendment does. It doesn't mention self-defense.

MR. GURA: While it might not mention self-defense, it was clear that the demands that the States made at the ratifying conventions were for an individual right, and Madison was interested in --

JUSTICE STEVENS: Well, if you look at the individual rights I suppose you start back in 1689, the

Declaration of Rights in England. And the seventh provision that they talked about said that: "The subjects which are protestants may have arms for their defense suitable to their conditions and as allowed by law." Now do you think the term "suitable to their conditions" limited the number of people who had access to arms for self-defense?

MR. GURA: It was in England, but that was criticized by the framers. St. George Tucker's edition of Blackstone --

JUSTICE STEVENS: So you think that the Second Amendment is a departure from the provision in the Declaration of Rights in England?

MR. GURA: It's quite clearly an expansion upon it.

JUSTICE STEVENS: So that's not really your -- you would not confine the right the way the English did then.

MR. GURA: I think the common law of England is a guide, and it's always a useful guide because that's where the -- where we -- where we look to, to interpret --

JUSTICE SCALIA: It's useful for such purposes as what "keep and bear arms" means and things of that sort.

MR. GURA: It certainly is, Your Honor. And it's also useful to see how --

JUSTICE SCALIA: They certainly didn't want to preserve the kind of militia that America had, which was a militia separate from the state, separate from the government, which enabled the revolt against the British.

MR. GURA: That's correct, Your Honor.

JUSTICE SOUTER: Is there any -- is there any record evidence that the anti-Federalist objections to the Constitution that ultimately resulted in the Second Amendment were premised on any failure to recognize an individual right of self-defense or hunting or whatnot, as distinct from being premised on concern about the power of the national government and the militia clauses in Article 1?

MR. GURA: Yes, Justice Souter. If we look to, for example, the -- the demands of the Pennsylvania minority, the anti-Federalists there were extremely influential. They couched their demands in unmistakably self-defense terms. In fact, they added a provision --

JUSTICE SOUTER: No, but they didn't -- they didn't limit it to self-defense. I mean, what provoked it, as I understand it, was concern about the militia clauses, and here I mean you're certainly correct. I

agree with you. Pennsylvania went beyond that. It was -- it was one of three States, as I understand, that did go beyond it. But the provocation for getting into the subject, as I understand it, was, in each instance including Pennsylvania, concern over the national government's power over militias under Article 1.

MR. GURA: Justice Souter, we wouldn't see the history that way. Certainly there is agreement that the militia clauses in the Constitution were controversial. And there were separate amendments that were proposed and always rejected that would have addressed that explicitly. In fact, if we look at Virginia's proposals, it's agreed by the Petitioners that Virginia was the model for the Bill of Rights and specifically, of course, for the Second Amendment.

We saw one set of proposed amendments from Virginia entitled Bill of Rights, and the Second Amendment language comes from paragraph 17 of that Bill of Rights. And then we see a list of other amendments, and then we have the 11th proposed amendment, which speaks exactly to the -- reverting control over the militia back to the -- back to the States.

Now, there is no reason to suppose that Virginia would have made the same demand twice, that they would have, like all the other demands, it had

separate "keep and bear arms" provisions and separate militia provisions, that people were being duplicative for no reason. The fact is that the militia concerns were heard and they were voted down, and the Second Amendment concerns were the ones that the Federalists were easily agreeable to because the right to keep and bear arms by individuals was not controversial, it would not have altered the structure of our Constitution, and so those were agreed to quite readily.

CHIEF JUSTICE ROBERTS: Why isn't the trigger-lock provisions that are at issue here, why aren't they similar to the various provisions that Justice Breyer mentioned like the gunpowder restriction? In other words, for reasons of domestic safety, they said you can't store the gunpowder anywhere but on the top floor. Why isn't the modern trigger-lock provision similar to those?

MR. GURA: Well, it's not similar because the modern trigger-lock provisions are aimed squarely at self-defense in the home. There is no risk today that the kind of powder we use --

CHIEF JUSTICE ROBERTS: Well, there is always a risk that the children will get up and grab the firearm and use it for some purpose other than what the Second Amendment was designed to protect.

MR. GURA: Oddly enough, a child can access a firearm stored consistently with the District's law, that is, a firearm which is disassembled and unloaded, nothing would prevent a child --

CHIEF JUSTICE ROBERTS: Well, right. But, I mean, you don't necessarily expect a young child to be able to reassemble the pistol.

MR. GURA: That's true, Your Honor. However, better safe storage approach is the one used by the majority of jurisdictions, I believe, that do have such laws, which is to require safe storage, for example, in a safe. And that is a reasonable limitation. It's a strict scrutiny limitation. Whatever standard of view we may wish to apply, I think, would encompass a safe storage provision.

But this is not a safe storage provision because we have specific exceptions that allow you to actually use the firearm in recreational shooting and also in a place of business. And we have litigation history from Washington, D.C., that tells us that we are not supposed to have an operable firearm for purposes of self-defense because they simply do not trust people to defend themselves in our home. And -- and self-defense is the heart of the Second Amendment right. That is what Blackstone was getting at when he spoke of the

fifth auxiliary right to arms, because it protected the right of personal preservation.

JUSTICE STEVENS: You say that the right of self-defense was the heart of the Second Amendment, in your view. Strangely that some provisions suggested that and were not accepted by the authors of the Second Amendment.

MR. GURA: Which provisions were those, Justice Stevens?

JUSTICE STEVENS: Pennsylvania.

MR. GURA: Well, Pennsylvania's provision was certainly influential. Remember, Madison was trying to mollify the anti-Federalists' concerns. The Second Amendment is clearly addressed to Pennsylvania and New Hampshire and New York and all these other States that were demanding a right to keep and bear arms, and there was always understood to be an individual right because that is the way in which the right that was violated by the British in the war of revolution that occurred not too long ago. And --

I'm finished.

JUSTICE BREYER: Thinking of your exchange with the Chief Justice and think of the trigger lock in your view and what the question was, do you want -- I don't know how well trigger locks work or not -- but do

you want thousands of judges all over the United States to be deciding that kind of question rather than the city councils and the legislatures that have decided it in the context of passing laws? I mean, isn't there an issue here and a problem with respect to having courts make the kinds of decisions about who is right or not in that trigger-lock argument?

MR. GURA: When a fundamental right is at stake, there is a role for judicial review, Your Honor. We are not going to see a thousand judges review such laws because Washington, D.C.'s is the only example of it.

JUSTICE GINSBURG: If it's a fundamental right, what about licensing? One piece -- we've talked about trigger locks, we've talked about the ban on handguns, but there is also a requirement that there be a license for possession of a handgun. Assuming you're right on the first question, that you couldn't flatly ban handguns, what about a requirement that you obtain a license to carry -- to have a handgun?

MR. GURA: Justice Ginsburg, that would depend on the licensing law itself. We don't have a problem with the concept of licensing so long as it's done --

JUSTICE GINSBURG: What about this very law?

If you take out the ban -- there is a law on the books. It's one of the ones that you challenged. It's section 22-4504(a). Wouldn't that be okay -- would that be okay? It says that you have to have a license to carry.

MR. GURA: So long as the licensing law is not enforced in an arbitrary and capricious manner, so long as there are some hopefully objective standards and hopefully some process for --

JUSTICE GINSBURG: It just says -- it says you have to get a license if you want to possess a gun. What kind of standard? It just says you have to have a license.

MR. GURA: Well, the government could set reasonable standards for that, Your Honor. The government could require, for example, knowledge of the State's use of force laws. They can require some sort of vision test. They could require, perhaps, demonstrated competency. And those are the types of things that we sometimes see; background checks, of course. Those are going to be reasonable licensing requirements.

However, if the license requirement is we only wanted to give licenses to people who look a certain way or depends on how we feel or if the licensing office is only open Thursdays at 3:00 in the

morning -- I mean, it all depends on the implementation. And --

CHIEF JUSTICE ROBERTS: What about -- what about age limits -- you've got to be over 18 or you've got to be over 21 to get a license?

MR. GURA: Well, certainly the age-of-majority issue is -- is an appropriate one. I don't think there is a problem with requiring a majority age 18 and then 21 for --

CHIEF JUSTICE ROBERTS: Is the age limit necessarily the same nationwide? Maybe 16 in Wyoming makes more sense but 21 in the District.

MR. GURA: Courts would have to examine those at some point. The government would have to look at the circumstances it confronted and enact, up to some point, an age limit. I think it would be very difficult to have an age limit that goes beyond 21, because that's the majority age for most things in the United States. And, in fact, we have the voting rights cases from the late '60s where --

JUSTICE STEVENS: May I ask this question? Are you, in effect, reading the amendment to say that the right shall not be unreasonably infringed instead of shall not be infringed?

MR. GURA: There is that inherent aspect to

every right in the Constitution.

JUSTICE STEVENS: So we can -- consistent with your view, we can simply read this: "It shall not be unreasonably infringed"?

MR. GURA: Well, yes, Your Honor, to some extent, except the word "unreasonable" is the one that troubles us because we don't know what this unreasonable standard looks like.

JUSTICE SCALIA: You wouldn't put it that way. You would just say it is not being infringed if reasonable limitations are placed upon it.

MR. GURA: That's another way to look at it, Your Honor. Certainly --

CHIEF JUSTICE ROBERTS: -- you would define "reasonable" in light of the restrictions that existed at the time the amendment was adopted.

MR. GURA: Those restrictions --

CHIEF JUSTICE ROBERTS: You know, you can't take it into the marketplace was one restriction. So that would be -- we are talking about lineal descendents of the arms but presumably there are lineal descendents of the restrictions as well.

MR. GURA: Framing our practices would inform the kind of restrictions that would be accepted. But even beyond that, they also inform the contours of

the right. In the Fifth Circuit, for example, we have the Emerson decision now for seven years, and the way that that court has examined the Second Amendment when they get these felon and possession bans and drug addict and possession challenges, what they say is, these people simply are outside the right, as historically understood in our country. And that's a very important aspect to remember, that the Second Amendment is part of our common law tradition, and we look to framing our practices in traditional understandings of that right to see both the reasonableness of the restrictions that are available as well as the contours.

JUSTICE SOUTER: Can we also look to current conditions like current crime statistics?

MR. GURA: To some extent, Your Honor, but we have certainly --

JUSTICE SOUTER: Well, can they consider the extent of the murder rate in Washington, D.C., using handguns?

MR. GURA: If we were to consider the extent of the murder rate with handguns, the law would not survive any type of review, Your Honor.

JUSTICE SCALIA: All the more reason to allow a homeowner to have a handgun.

MR. GURA: Absolutely, Your Honor.

JUSTICE BREYER: Whose judgment is that to --

JUSTICE SOUTER: The question is whether they may consider those statistics, and I take it your answer is yes?

MR. GURA: Well, those statistics might be considered in some way, the fact is that at some point there is a role for judicial review. And you can't just grab at statistics -- and some of the statistics that were used here are very weak, and studies that have been rejected by the National Academy of Sciences repeatedly. I mean, we don't really have -- it's hard to say that those laws --

JUSTICE SOUTER: But I think -- I don't want you to misunderstand my question. My question is that by looking to the statistics, I'm not suggesting that there is only sort of one reasonable response to them. I want to know whether -- whether the policymakers may look to them; and I take it your answer is yes?

MR. GURA: To some degree, yes, policymakers have to be informed by what's going on in order to make policy. However, there are constitutional limitations enforced by courts that are going to limit those policies. And when you have a ban which bans 40 percent of all weapons that are the type of weapons used by

civilians, 80 percent of all self-defense occurs with handguns; when you have that kind of ban, functional firearms ban, these are extreme measures --

JUSTICE SOUTER: They may be. I just want to make sure you're not making the argument that because there was not a comparable homicide rate, or for that matter, a comparable need for self-defense from handgun use in 1792, that there -- 1790 -- that therefore, the statistics of today may not be considered? You're not making that argument?

MR. GURA: No, Your Honor, the fact is that we can always debate these things, but the object of the Bill of Rights is to remove certain judgments from the legislature, because we can make policy arguments, normative arguments about many provisions of the Constitution. But to make those arguments and say, well, we've decided as a matter of policy that the right to keep and bear arms is no longer a good idea and, therefore, we are going to have restrictions that violate that stricture in the Bill of Rights, that shouldn't pass judicial review. At some point you have to go to Article 5 if you think that the Constitution is impractical.

JUSTICE KENNEDY: But Just to be clear -- and I don't want to misstate your position, but my

understanding, I at least inferred that you would consider it reasonable to ban shipment of machine guns and sawed-off shotguns in interstate commerce?

MR. GURA: Yes, Your Honor.

JUSTICE STEVENS: And how about a State university wants to ban students having arms in the dormitory?

MR. GURA: Certainly that creates some sort of an evidentiary record. Conceivably that --

JUSTICE STEVENS: That's the bare fact. That's what -- a State regulation prohibits students from having arms on campus.

MR. GURA: We would have to do --

JUSTICE STEVENS: You'd have to think about that.

MR. GURA: -- some fact finding. It's something that might be doable, but again, that's so far from what we have here. We have here a ban on all guns, for all people, in all homes, at all times in the Nation's capital. That questionably is too broad and too sweeping under any level of review.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Gura.

Mr. Dellinger, 10 minutes.

REBUTTAL ARGUMENT OF WALTER DELLINGER,

ON BEHALF OF THE PETITIONERS

MR. DELLINGER: Mr. Chief Justice, I want to address first why this law is reasonable and should be sustained, and why the judgement below has to be reversed, however, whatever position you take on the theories of the amendment. And in defending the eminent reasonableness and careful balance of this law, I need to start with the trigger law, about which Justice Alito asked.

CHIEF JUSTICE ROBERTS: Well, before you start with it, how many minutes does it take to remove a trigger lock and load a gun? Because both the gun has to be unloaded; it has to have a trigger lock under the District laws.

MR. DELLINGER: Those are alternatives, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: No, disassembled --

MR. DELLINGER: Just a trigger lock.

CHIEF JUSTICE ROBERTS: In either case it has to be unloaded, correct?

MR. DELLINGER: There are some versions of the trigger lock that allow you to put the trigger lock on and then load the gun. But the piece that goes in the trigger mechanism, even someone as clumsy as I could remove it and effect it --

CHIEF JUSTICE ROBERTS: Well, the law, as I understand it, says that the gun has to be unloaded. So under your hypothetical, I assume that would violate the District's law if the gun is still loaded.

MR. DELLINGER: You know, it's a question of where you put the parenthesis. I read that as disassembled and unloaded or under a trigger lock, and that's the, that's the way the District --

CHIEF JUSTICE ROBERTS: So how long does it take? If your interpretation is correct, how long does it take to remove the trigger lock and make the gun operable.

MR. DELLINGER: You -- you place a trigger lock on and it has -- the version I have, a few -- you can buy them at 17th Street Hardware -- has a code, like a three-digit code. You turn to the code and you pull it apart. That's all it takes. Even -- it took me 3 seconds.

JUSTICE SCALIA: You turn on, you turn on the lamp next to your bed so you can -- you can turn the knob at 3-22-95, and so somebody --

MR. DELLINGER: Well --

CHIEF JUSTICE ROBERTS: Is it like that? Is it a numerical code?

MR. DELLINGER: Yes, you can have one with a

numerical code.

CHIEF JUSTICE ROBERTS: So then you turn on the lamp, you pick up your reading glasses --

(Laughter.)

MR. DELLINGER: Let me tell you. That's right. Let me tell you why at the end of the day this doesn't -- this doesn't matter, for two reasons. The lesson --

CHIEF JUSTICE ROBERTS: It may not matter, but I'd like some idea about how long it takes.

MR. DELLINGER: It took me 3 seconds. I'm not kidding. It's -- it's not that difficult to do it. That was in daylight.

The other version is just a loop that goes through the chamber with a simple key. You have the key and put it together. Now, of course if you're going -- if you want to have your weapon loaded and assembled, that's a different matter.

But here's where I want to address the trigger lock. Here's why it doesn't matter for the handgun law. The District believes that what is important here is the ban on handguns. And it also believes that you're entitled to have a functional, usable weapon for self-defense in the home, and that's why this is a very proportionate law.

CHIEF JUSTICE ROBERTS: Well, if proportionate, in other words you're saying your interest is allowing self-defense in the home --

MR. DELLINGER: Yes.

CHIEF JUSTICE ROBERTS: Does it really make sense to say the best self-defense arm is a rifle, as opposed to a pistol?

MR. DELLINGER: It is -- there has been no showing here that a rifle or a shotgun is inadequate for the purposes of self-defense in this facial challenge.

JUSTICE ALITO: Is there anything to show that the District Council ever considered the issue of self-defense? That -- because they banned handguns and they had this provision on the trigger lock which -- and the issue -- my question with the trigger lock doesn't have to do with whether trigger locks are generally a good idea. It's whether you're ever allowed to take it off for purposes of defense. There's no -- is there anything to show that the -- that the council actually considered what sort of weapon is appropriate for self-defense?

MR. DELLINGER: There are decisions in the District of Columbia about the right of self-defense that apply to this. But here's the most important point. It cannot affect the validity of the handgun

law. If you disagree with us that my statements are not sufficient to say that we believe that the law should be read, given the self-defense compulsion, to allow whatever use makes it functional, if you don't agree with that and if you think there's a controversy on this point, because we believe you should have a functional firearm available in the home of law-abiding citizens who wish one, if we are wrong about that and the trigger lock is invalid, that has no effect on the handgun ban.

That is to say, the trigger lock applies to all weapons. If it's valid and it means what they say it does, none of the weapons would work. We don't need a handgun; it's unusable. If it's invalid or if it has the construction we believe, it cannot possibly affect the handgun law. If you strike down the trigger lock law, you're throwing us in the briar patch where we think it's where we're happy to be if all we have to do is to make clear in the trigger lock law what we have said here today, that it's, it's available for self-defense.

CHIEF JUSTICE ROBERTS: It's a related point. Do you understand the ban -- the carry ban to apply if you carry the firearm from one room in the house to another?

MR. DELLINGER: That only applies if it's --

if it's unregistered. Now, you can't register a handgun, you can't carry a handgun, but that's because its both -- its possession is prohibited. That is to say you can't carry marijuana or heroin from one room to the other either, because you can't use it at all, I think.

CHIEF JUSTICE ROBERTS: Why is the -- why is the D.C. law phrased in those terms? In other words, if you can't have a handgun at all, why do you have a separate provision saying that you can't carry it anywhere?

MR. DELLINGER: Well, it's -- it's -- the carry provision, you cannot carry unregistered firearms. That's just a general requirement, that firearms be registered. You're not allowed to register handguns is the mechanism by which they are prohibited.

Now, here is -- to address your question about why a ban is unreasonable, the one thing we know the Second Amendment is not about is it's not about the interest of collectors. Some people collect guns the way they do stamps, and if that were what the amendment were about then prohibiting someone from having a particular type of gun would prevent them from completing the set. But the notion --

CHIEF JUSTICE ROBERTS: Why isn't that

covered by the provision that you have the right to keep arms?

MR. DELLINGER: Well, the word "keep" would encompass -- "keep" can encompass every use of an arm, and that's why it provides no limit at all, unless you read it in combination with "keep and bear" and that in combination with "well-regulated militia."

JUSTICE SCALIA: You mean you can't have any more arms than you would need to take with you to the militia? You can't have a -- you can't have a -- you know, a turkey gun and a duck gun and a 30.06 and a 270 and -- you know, different -- different hunting guns for different --

MR. DELLINGER: Well --

JUSTICE SCALIA: You can't do that? I mean a State could say you don't --

MR. DELLINGER: Of course you could do that.

JUSTICE SCALIA: You can have to have a 12 gauge and that's it.

MR. DELLINGER: And like the District that allows that, as every State does. There are --

JUSTICE KENNEDY: I -- at least to me the question is, what would be the constitutional basis for insisting on Justice Scalia's suggestion that you need a number of guns? You have argued, it seems to me, that

the District or a government could prohibit just what he said, unless you needed one to take to the militia.

MR. DELLINGER: I do not know why that would pass the reasonableness scrutiny, but this law would because a powerful, overwhelming case could be made that you're eliminating the one type of weapon -- this law is -- is designed only for the weapon that is concealable and movable, that can be taken into schools and onto the Metro, can be easily stolen and transmitted among --

JUSTICE KENNEDY: I'm asking about the constitutional standard you apply to a hypothetical statute which would prohibit the guns Justice Scalia described. What is your position as to the validity of such a hypothetical law?

MR. DELLINGER: You would apply this standard. You would ask whether the ban is one that's carefully balanced considerations of gun ownership and public safety. I don't see how, once we are in the land where you -- where there is a right, there is a far weaker case if there is any need for public safety to -- to limit the number of guns one has. Here there is an overwhelming case and we are talking about local legislation.

I know, Justice Kennedy, that you would be concerned about a national government which sets a

single standard for rural and urban areas, for East and West, North and South. Here you have legislation that is adopted by a group of citizens in the District, operating under the authority of Congress, but it is local legislation. And if it's still good law, that States and local governments across the country can strike these balances, as they have, it would be deeply ironic to preclude the District of Columbia as being the only place that could enact legislation free of the strictures of the Second Amendment.

And when you ask about the statistics, what is critical here is not to apply the kind of categorical standard the court below did or a kind of strict scrutiny that would strike this law down. This is an area, unlike areas where government regulation is presumptively illegitimate, this text contemplates regulation of inherently dangerous weapons. And where the battle -- the great battle over methodology, to which Justice Breyer replied, in these briefs -- indicates that this is the kind of right -- where you have disputes among experts, it's a kind of right where even if you recognize it, deference needs to be given to the legislative resolution rather than have courts try to decide how best to resolve the statistical and methodological debates.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Dellinger.

The case is submitted.

(Whereupon, at 11:43 a.m., the case in the above-entitled matter was submitted.)

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Exhibit D

No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA ET AL.,

Petitioners,

v.

DICK HELLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF THE INTERNATIONAL LAW ENFORCEMENT EDUCATORS AND TRAINERS ASSOCIATION (ILEETA), THE INTERNATIONAL ASSOCIATION OF LAW ENFORCEMENT FIREARMS INSTRUCTORS (IALEFI), MARYLAND STATE LODGE, FRATERNAL ORDER OF POLICE, SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION, 29 ELECTED CALIFORNIA DISTRICT ATTORNEYS, SAN FRANCISCO VETERAN POLICE OFFICERS ASSOCIATION, LONG BEACH POLICE OFFICERS ASSOCIATION, TEXAS POLICE CHIEFS ASSOCIATION, TEXAS MUNICIPAL POLICE ASSOCIATION, NEW YORK STATE ASSOCIATION OF AUXILIARY POLICE, MENDOCINO COUNTY, CALIF., SHERIFF THOMAS D. ALLMAN, OREGON STATE REP. ANDY OLSON, NATIONAL POLICE DEFENSE FOUNDATION, LAW ENFORCEMENT ALLIANCE OF AMERICA, AND THE INDEPENDENCE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF THE *AMICI CURIAE*

Amici are district attorneys, police organizations, and other persons concerned with protecting the public safety benefits of citizens possessing handguns for self-defense in the home.[1]

International Law Enforcement Educators and Trainers Association

The International Law Enforcement Educators and Trainers Association (ILEETA) is a professional association of 4,000 persons who provide training to law enforcement in the proper use of firearms, and on many other subjects.

ILEETA is participating because police recruits who already have personal civilian experience using handguns are better trainable to use handguns safely and proficiently as police officers.

29 California District Attorneys

The elected California District Attorneys in this brief represent populous counties such as Orange,

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received written notice in December of intent to file this brief. No counsel for a party authored the brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. The NRA Civil Rights Defense Fund has made contributions to the Independence Institute that have been used in part to fund the preparation of this brief.

Alameda, Fresno, and San Bernadino, as well as mid-sized and rural counties.

Southern States Police Benevolent Association

The Southern States Police Benevolent Association (SSPBA) consists of more than 20,000 law enforcement employees in 12 southeastern states. SSPBA's polling shows that its members strongly support the Second Amendment.

The interests of additional *amici* are described in Appendix C.

SUMMARY OF ARGUMENT

Before the enactment of the handgun ban, fewer than ½ of 1% of guns seized by police in the District had been lawfully registered. Accordingly, the bans on ownership of registered handguns and on home self-defense by law-abiding people have virtually nothing to do with the legitimate government interest in crime control.

To the contrary, the handgun and self-defense bans are criminogenic.

Guns save lives. In the hands of law-abiding citizens, guns provide very substantial public safety benefits. In all 50 states—but not in the District—it is lawful to use firearms for defense against home invaders. The legal ownership of firearms for home defense is an important reason why the American

rate of home invasion burglaries is far lower than in countries which prohibit or discourage home handgun defense.

By drastically reducing the rate of confrontational home invasions, the deterrent effect of U.S. home defensive gun ownership greatly reduces the assault rate (since there are many fewer confrontations) and thereby reduces the total U.S. violent crime rate by about 9%.

Numerous surveys show that firearms are used (usually without a shot needing to be fired) for self-defense at least 97,000 times a year, and probably several hundred thousand times a year.

The anti-crime effects of citizen handgun ownership provide enormous benefits to law enforcement, because there are fewer home invasion emergencies requiring an immediate police response, and because the substantial reductions in rates of burglary, assault, and other crimes allow the police and district attorneys to concentrate more resources on other cases and on deterrence.

Lawful civilian handgun ownership improves police training, by providing a larger body of recruits who are experienced in handgun safety and accuracy, as well as providing civilian experts whose ideas are adopted by police trainers.

Ordinary law-abiding citizens are not too hot-tempered or accident-prone to possess firearms safely for home defense.

Especially for home defense in an urban area, long guns are inadequate substitutes for handguns. Handguns are safer for victims, for families, and for the community as a whole.

This Court's precedents point to the unconstitutionality of the handgun ban.

ARGUMENT

In December 1976, the law-abiding citizens of Washington, D.C., were re-registering their handguns at police headquarters. Most police were appalled at the imminent ban:

> "We don't appreciate being heels," Clark[2] said, pointing out the pain it takes to tell an elderly widow who is living alone "that even though your husband bought the gun legally and registered it properly, you can't keep it. Why that makes an innocent citizen a crook."
>
> It was a theme heard often in D.C. today, and surprisingly, *it seems to gall policemen more than anybody else.*
>
> "You're not controlling guns, you're controlling people," said Sgt. Jimmy King, a veteran robbery squad investigator.

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[2] Officer David Clark, one of two officers in charge of registration for the Gun Control Section of the D.C. police.

> *"Honest citizens, the little old lady who's not hurting anybody anyway is the real victim.* We're not stopping these bums killing each other, us, or committing armed robberies." ...
>
> Like most officers, King believes the court is the real answer.
>
> "The court is not enforcing the laws we already have on the books," he said, explaining:
>
> "There's a law on the books today which allows a five-year additional sentence for any crime committed while armed, but it's not enforced."
>
> *King's sentiments were echoed throughout police headquarters and by officers on the streets.*
>
> "I don't know why they bother to make new laws, they don't enforce the old ones," said Fourth District Officer Andrew Way as he wrote a parking ticket yesterday.

Earl Byrd, *D.C.'s Gun Registration,* WASH. STAR, Dec. 2, 1976 (emphasis added).

The notion that most police support handgun prohibition is false.[3] Police critics of the D.C. ban

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[3] *See, e.g.*, David Griffith, *Shooting Straight: The Majority of Cops Believe Citizens Should Have the Right to Own Handguns* POLICE, Mar. 2007, at 10, http://www.policemag.com/Articles/2007/03/Editorial.aspx; *Officers Emphatically Say "No"*

(Continued on following page)

have included D.C. Police Chief Maurice Turner (who was muzzled by Mayor Marion Barry), former Police Chief Charles Ramsey, and union leaders at the city jail who testified in favor of a repeal bill. Tom Sherwood, *Should the District Lift Its Freeze on Handguns?* WASH. POST, July 23, 1982; *Ramsey shifts stand on gun ban*, WASH. TIMES, Nov. 11, 2007. Inaccurate claims that "the police" support D.C.'s draconian laws alienate the public from the police.

Amici have no fears that upholding the rights of law-abiding citizens to possess handguns and other functional defensive firearms in their homes will endanger law enforcement officers.[4] Police in the District are killed at a rate about six times higher than the national rate, a statistic that hardly suggests that the

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to Gun Control, POLICE, Mar. 2007, at 14 (both articles reporting results of a survey conducted by the magazine); *Police Views on Gun Control,* AUSTIN AMERICAN-STATESMAN, Oct. 4, 1993, at A8 (1993 poll by the Southern States Police Benevolent Association shows that 90% of southern police feel that the Constitution protects the right of individuals to keep and bear arms); *Funny You Should Ask,* POLICE, Apr. 1993, at 56 (85% of police believe civilian gun ownership increases public safety); *The Law Enforcement Technology Gun Control Survey*, L.ENFORCEMENT TECH., July/Aug. 1991, at 14-15 ("75% do not favor gun control legislation ... with street officers opposing it by as much as 85%").

[4] *Cf.* David Mustard, *The Impact of Gun Laws on Police Deaths*, 44 J.L. & ECON. 635 (2001) (allowing licensed, trained citizens to carry concealed handguns in public places does not increase police officer deaths, and may reduce police deaths).

District's ban on law-abiding citizens protecting their homes has helped protect the police.[5]

I. The Efficacy and Social Benefits of Armed Self-Defense

Police carry handguns on duty and keep those guns for home protection for an obvious reason: the guns are essential, life-saving tools for protecting themselves, their families, and their communities. *See* James Jacobs, *Exceptions to a General Prohibition on Handgun Possession: Do They Swallow Up the Rule?* 49 L.& CONTEMP. PROBS. 6 (1986)(carefully analyzed, almost all the rationales for allowing police and security guards to possess handguns show that prohibition of handguns for other persons is illogical). Ample empirical evidence demonstrates that the home possession of firearms by law-abiding citizens also contributes substantially to public safety.

A. Burglary

The only national study of how frequently firearms are used against burglaries was conducted by the Centers for Disease Control and Prevention (CDC). In 1994, random digit dialing phone calls were

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[5] The District has approximately 0.2% of the national population (2000 census), but accounts for 1.2% of police officers murdered. *See* FBI, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 2006, table 1, *available at* http://www.fbi.gov/ucr/killed/2006/table1.html (cumulative data for 1997-2006).

made throughout the United States, resulting in 5,238 interviews. The interviewees were asked about use of a firearm in a burglary situation during the previous 12 months. Extrapolating the polling sample to the national population, the researchers estimated that in the previous 12 months, there were approximately 1,896,842 incidents in which a householder retrieved a firearm but did not see an intruder. There were an estimated 503,481 incidents in which the armed householder *did* see the burglar, and 497,646 incidents in which the burglar was scared away by the firearm. Robert Ikeda et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 VIOLENCE & VICTIMS 363 (1997).

Only 13% of U.S. residential burglaries are attempted against occupied homes. U.S. Bureau of Justice Statistics, *Household Burglary*, BJS BULL. at 4 (1985). Criminologists attribute the prevalence of daytime burglary to burglars' fear of confronting an armed occupant; burglars report that they avoid late-night home invasions because, "That's the way you get yourself shot." GEORGE RENGERT & JOHN WASILCHICK, SUBURBAN BURGLARY: A TALE OF TWO SUBURBS 33 (2ded. 2000)(study of Delaware County, Penn., and Greenwich, Conn.); *see also* JOHN CONKLIN, ROBBERY AND THE CRIMINAL JUSTICE SYSTEM 85 (1972)(study of Massachusetts inmates, reporting that some gave up burglary because of "the risk of being trapped in the house by the police or an armed occupant.").

The most thorough study of burglary patterns was a St. Louis survey of 105 currently active burglars. The authors observed, "One of the most serious risks faced by residential burglars is the possibility of being injured or killed by occupants of a target. Many of the offenders we spoke to reported that this was far and away their greatest fear." As a result, most burglars tried to avoid entry when an occupant might be home. RICHARD WRIGHT & SCOTT DECKER, BURGLARS ON THE JOB: STREETLIFE AND RESIDENTIAL BREAK-INS 112-13 (1994).

Burglars in other nations behave differently.

A 1982 British survey found 59% of attempted burglaries involved an occupied home. Pat Mayhew, *Residential Burglary: A Comparison of the United States, Canada and England and Wales* (Nat'l Inst. of Just., 1987). The *Wall Street Journal* reported:

> Compared with London, New York is downright safe in one category: burglary. In London, where many homes have been burglarized half a dozen times, and where psychologists specialize in treating children traumatized by such thefts, the rate is nearly twice as high as in the Big Apple. And burglars here increasingly prefer striking when occupants are home, since alarms and locks

tend to be disengaged and intruders have little to fear from unarmed residents.[6]

In the Netherlands, 48% of residential burglaries involved an occupied home. Richard Block, *The Impact of Victimization, Rates and Patterns: A Comparison of the Netherlands and the United States*, in VICTIMIZATION AND FEAR OF CRIME: WORLD PERSPECTIVES 26 tbl. 3-5 (Richard Block ed., 1984). In the Republic of Ireland (which, along with England, is one of the few European nations where handguns are banned), criminologists report that burglars have little reluctance about attacking an occupied residence. *See* Claire Nee & Maxwell Taylor, *Residential Burglary in the Republic of Ireland*, in WHOSE LAW AND ORDER? ASPECTS OF CRIME AND SOCIAL CONTROL IN IRISH SOCIETY 143 (Mike Tomlinson et al. eds., 1988). In Toronto, where handguns are legal but rare, 44% of home burglaries take place when the victim is home. *See* IRWIN WALLER & NORMAN OKHIRO, BURGLARY: THE VICTIM AND THE PUBLIC 31 (1978).

An American burglar's risk of being shot while invading an occupied home is greater than his risk of going to prison. Presuming that the risk of prison

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[6] Kevin Heilliker, *Pistol-Whipped: As Gun Crimes Rise, Britain Is Considering Cutting Legal Arsenal*, WALL ST.J., Apr. 19, 1994, at A1.

deters some potential burglars, the risk of armed defenders would deter even more.[7]

Florida State University criminologist Gary Kleck's book *Point Blank: Guns and Violence in America* won the highest honor awarded by the American Society of Criminology: the Michael Hindelang Book Award "for the greatest contribution to criminology in a three-year period." In the book Kleck detailed an important secondary consequence of the deterrence of home invasion. Suppose that the percentage of "hot" (occupied residence) burglaries rose from current American levels (around 13%) to a level similar to other nations (around 45%). Knowing how often a hot burglary turns into an assault, we can predict that an increase in hot burglaries to the levels of other nations would result in 545,713 more assaults every year. This by itself would raise the American violent crime rate 9.4%. GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 140 (1991).

Put another way, the American violent crime rate is significantly lower than it would otherwise be, because American burglars are so much less likely to enter an occupied home. Given that the average cost

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[7] JAMES WRIGHT, PETER ROSSI, & KATHLEEN DALY, UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA 139-40 (1983) (Nat'l Inst. of Just. study); *see also* Gary Kleck, *Crime Control Through the Private Use of Armed Force*, 35 SOC. PROBS. 1, 12, 15-16 (1988).

of an assault, in 2006 dollars, is $12,032,[8] the annual cost savings from reduced assault amounts to more than six billion dollars ($6,566,018,816).

Interestingly, because burglars do not know *which* homes have a gun, people who do not own guns enjoy substantial free-rider benefits because of the deterrent effect from the homes that do keep arms.[9]

B. Deterrence

Intending to build the case for comprehensive federal gun restrictions, the Carter administration awarded a major National Institute of Justice (NIJ) research grant in 1978 to University of Massachusetts sociology professor James Wright and his colleagues Peter Rossi and Kathleen Daly. Wright had already editorialized in favor of much stricter controls. Rossi would later become president of the American Sociology Association. Daly would later win her own Hindelang Award, for her feminist perspectives on criminology.

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[8] *See* Ted Miller et al., *Victims Costs and Consequences* 9 (Nat'l Inst. of Just., NCJ 155282, 1996), http://www.ncjrs.gov/pdffiles/victcost.pdf (the 1996 figures were multiplied by 1.28, to account for 1996-2006 increases in the Consumer Price Index).

[9] David Kopel, *Lawyers, Guns, and Burglars,* 43 ARIZ. L.REV. 345, 363-66 (2001). For more, *see* Philip Cook & Jens Ludwig, *Guns & Burglary* and David Kopel, *Comment*, both in EVALUATING GUN POLICY (Jens Ludwig & Philip Cook eds., 2003)(pro/con analysis of guns/burglary relationship).

When the NIJ authors rigorously examined the data, they found no persuasive evidence in favor of banning handguns or self-defense. Notably, the D.C. bans had not reduced crime. JAMES WRIGHT, PETER ROSSI & KATHLEEN DALY, UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 294-96 (1983)(critiquing two previous studies, one of them by the U.S. Conference of Mayors; presumably the critiques were persuasive, since neither the USCM brief nor any other of Petitioners' *amici* cite the studies).

Wright and Rossi produced another study for the National Institute of Justice. Interviewing felony prisoners in 11 prisons in 10 states, Wright and Rossi discovered that:

- 34% of the felons reported personally having been "scared off, shot at, wounded or captured by an armed victim."
- 8% said the experience had occurred "many times."
- 69% reported that the experience had happened to another criminal whom they knew personally.
- 39% had personally decided not to commit a crime because they thought the victim might have a gun.
- 56% said that a criminal would not attack a potential victim who was known to be armed.
- 74% agreed with the statement that "One reason burglars avoid houses

> where people are at home is that they fear being shot."

JAMES WRIGHT & PETER ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 146, 155 (expanded ed. 1994).

Notably, "the highest concern about confronting an armed victim was registered by felons from states with the greatest relative number of privately owned firearms." *Id.* at 151. The authors concluded "the major effects of partial or total handgun bans would fall more on the shoulders of the ordinary gun-owning public than on the felonious gun abuser of the sort studied here....[I]t is therefore also possible that one side consequence of such measures would be some loss of the crime-thwarting effects of civilian firearms ownership." *Id.* at 237.

C. The Frequency of Defensive Gun Use

There have been 13 major surveys regarding the frequency of defensive gun use (DGU) in the modern United States. The surveys range from a low of 760,000 annually to a high of three million. The more recent studies are much more methodologically sophisticated. *See* App. 1-3.

In contrast, much lower annual estimates come from the National Crime Victimization Survey (NCVS), a poll using in-person home interviews conducted by the Census Bureau in conjunction with the Department of Justice. The NCVS for 1992-2005

would suggest about 97,000 DGUs annually, with 75,000 DGUs in 2005, the last year for which data are available. *See* App. 4-6.

A criticism of the NCVS figure is that it is too low because the NCVS never directly asks about DGUs, but instead asks open-ended questions about how the victim responded. Because the NCVS first asks if the respondent has been a victim of a crime, the NCVS results exclude people who answer "no" because, thanks to successful armed self-defense, they do not consider themselves "victims." Further, the NCVS only asks about some crimes, and not the full scope of crimes from which a DGU might ensue. *See*, *e.g.*, GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 152-54 (1997).

Gary Kleck and Mark Gertz conducted an especially thorough survey in 1993, with stringent safeguards to weed out respondents who might misdescribe a DGU story. Kleck and Gertz found a midpoint estimate of 2.5 million DGUs annually. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun,* 86 J.CRIM.L. & CRIMINOLOGY 150 (1995).

The Kleck/Gertz survey found that 80% of defensive uses involved handguns, and that 76% of defensive uses do not involve firing the weapon, but merely brandishing it to scare away an attacker. *Id.* at 175.

Marvin Wolfgang, "the most influential criminologist"[10] in the English-speaking world, and an ardent supporter of gun prohibition, reviewed Kleck's findings. Wolfgang wrote that he could find no methodological flaw, nor any other reason to doubt the correctness of Kleck's figure:

> I am as strong a gun-control advocate as can be found among the criminologists in this country....I would eliminate all guns from the civilian population and maybe even from the police. I hate guns....Nonetheless, the methodological soundness of the current Kleck and Gertz study is clear....
>
> ....
>
> The Kleck and Gertz study impresses me for the caution the authors exercise and the elaborate nuances they examine methodologically. I do not like their conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well.

Marvin Wolfgang, *A Tribute to a View I Have Opposed,* 86 J.CRIM.L. & CRIMINOLOGY 188, 191-92 (1995).

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[10] Ellen Cohn & David Farrington, *Who Are the Most Influential Criminologists in the English-Speaking World?* 34 BRIT.J. CRIMINOLOGY 204 (1994) (based on citations in top journals). Dr. Wolfgang was also President of the American Society of Criminology, and President of the American Academy of Political and Social Science. His research was cited in *Furman v. Georgia*, 408 U.S. 238, 250 n.15 (1972)(Douglas, J., concurring).

Philip Cook of Duke and Jens Ludwig of Georgetown were skeptical of Kleck's results, and so they conducted their own survey for the Police Foundation. That survey produced an estimate of 1.46 million DGUs.[11]

The National Opinion Research Center (NORC) argues that the figures from Kleck are probably too high, and from the NCVS too low; NORC estimates the actual annual DGU figure to be somewhere in the range of 256,500 to 1,210,000. Tom Smith, *A Call for a Truce in the DGU War*, 87 J.CRIM.L. & CRIMINOLOGY 1462 (1997).

This Court need not resolve the particulars of the debate among the social scientists. All social science research shows that defensive gun use is frequent in the United States.

D. Natural Experiments

In October 1966, the Orlando Police Department began conducting highly-publicized firearms safety training for women, after observing that many women were arming themselves in response to a

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[11] PHILIP COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY OF FIREARMS OWNERSHIP AND USE 62-63 (1996). Cook and Ludwig argue that their own study produced implausibly high numbers, and they prefer the NCVS estimate. *Id.* at 68-75. For a response, *see* Gary Kleck, *Has the gun deterrence hypothesis been discredited?* 10 J.FIREARMS & PUB. POL'Y 65 (1998), http://saf.org/kleck1998.pdf.

dramatic increase in sexual assaults in the area. Orlando rapes fell by 88% from 1966 to 1967. Burglary fell by 25%. Not one of the 2,500 trained women actually ended up firing her weapon; the deterrent effect of the publicity sufficed. As Gary Kleck and David Bordua note: "It cannot be claimed that this was merely part of a general downward trend in rape, since the national rate was increasing at the time. No other U.S. city with a population over 100,000 experienced so large a percentage decrease in the number of rapes from 1966 to 1967...."[12] That same year, rape increased by 5% in Florida and by 7% nationally.[13]

In March 1982, the Atlanta exurb of Kennesaw passed an ordinance requiring all residents (with exceptions, including conscientious objectors) to keep

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[12] Gary Kleck & David Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 L. & POL'Y Q. 271, 284 (1983); Gary Kleck, *Policy Lessons from Recent Gun Control Research*, 49 J.L. & CONTEMP. PROBS. 35, 47 (1986).

[13] *See* Don Kates, *The Value of Civilian Handgun Possession As a Deterrent to Crime or Defense Against Crime*, 18 AM.J.CRIM.L. 113, 153 (1991).

One article argued that the drop in Orlando rapes was statistically insignificant, being within the range of possibly normal fluctuations. David McDowall et al., *General Deterrence through Civilian Gun Ownership*, 29 CRIMINOLOGY 541 (1991). However, the authors' statistical model was such that even if gun-based deterrence had entirely eliminated rape in Orlando, the model would have declared the result to be statistically insignificant. KLECK, TARGETING GUNS, at 181.

firearms in their homes.[14] House burglaries fell from 65 per year to 26, and to 11 the following year.[15]

E. 911 Is Insufficient

America's police officers work very hard to rescue crime victims as rapidly as possible. But it is simply impossible for the police to arrive quickly enough to prevent all victims from being injured by violent predators. For example:

- In Washington, D.C., in 2003, the average police response time for highest-priority emergency calls was 8 minutes and 25 seconds.[16]
- In Salt Lake City, 911 callers are frequently put on hold.[17]
- The average response time for Priority One calls (defined as life-threatening emergencies)

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[14] *Town to Celebrate Mandatory Arms*, N.Y. TIMES, Apr. 11, 1987, at 6.

[15] Kleck, 35 SOC. PROBS. at 13-15. The McDowall article (*supra* n.13) reports that there was no statistically significant change in the Kennesaw burglary rate. But the article improperly combined household burglaries (which did decline substantially) with other forms of burglary, such as unoccupied businesses. KLECK, POINT BLANK, at 136-38.

[16] *Ramsey defends 911 response*, WASH. TIMES, May 11, 2004, at A1.

[17] Debbie Dujanovic, *911 Nightmare Uncovered in Investigative Report*, KSL.com, Nov. 1, 2007, http://www.ksl.com/?nid=148&sid=2077061.

in Atlanta and its three surrounding counties is 11.1 minutes.[18]

- In Los Angeles, the average emergency response time is 10.5 minutes.[19]
- In New York City it is 7.2 minutes for crimes in progress.[20]
- The *New York Times* reported that in Nassau County in 2003, 11% of 911 callers got a prerecorded message and soothing music, rather than a human operator.[21]
- The average response time for crime in progress calls in Rochester, New York, was 14 minutes, 31 seconds.[22]
- In Philadelphia the time for Priority One calls is just under 7 minutes.[23]

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[18] *911 Response Times: An I-Team Investigation*, FOX 5 ATLANTA, http://www.fox5atlanta.com/iteam/911.html.

[19] *LA police average over 10 minutes in responding to 911 calls*, A.P. wire, July 1, 2003; *see also Cop Response Slows*, L.A. DAILY NEWS, July 22, 2001 (median of 8 minutes, 30 seconds; average of 12.1 minutes).

[20] *Mayor Bloomberg Releases Fiscal 2005 Mayor's Management Report*, US STATES NEWS, Sept. 12, 2005.

[21] *Nassau 911 Callers Are Being Put on Hold*, N.Y. TIMES, Sept. 14, 2003.

[22] Tim Macaluso, *POLICE: East side response times too slow?* CITY NEWSPAPER, June 20, 2007, http://www.rochestercitynewspaper.com/news/blog/POLICE%3A+East+side+response+times+too+slow+/.

[23] Howard Goodman, *A System Geared To Preventing 'Another Polec'*, PHIL. INQUIRER, Aug. 3, 1998, at A1.

- The average in St. Petersburg, Florida, for Priority One (again, defined as "life-threatening") is 7 minutes, 5 seconds.[24]

Note that the above times are how long it takes the police to arrive after being dispatched. The times do *not* include the time that the caller waits for the 911 operator to pick up, and then talks with the operator.

Petitioners' law requiring crime victims to depend entirely on 911 ignores the fact that any criminal in control of a crime scene will not permit his victim to call the police, and that the neighbors may be unaware of the crime in progress. In contrast, when the victim of a home invasion has a handgun, the victim can prevent the criminal from gaining control of the scene, and the victim can use her free hand to dial 911.

F. Self-Defense Does Not Make Victims Worse Off

It is sometimes claimed that a victim resists with a gun will have the weapon taken away, or that resistance will enrage the criminal into a fatal attack. Yet data from the National Crime Victimization Survey show that a victim's weapon is taken by the attacker in, at most, one percent of cases in which the victim uses a weapon. *See* KLECK, TARGETING GUNS, at

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[24] Leanora Minai, *Is that enough?* ST. PETERSBURG TIMES, Apr. 7, 2002, at 1B.

168-69. Data from the National Crime Victimization Survey and other sources also show that "There is no sound empirical evidence that resistance does provoke fatal attacks."[25] Nor does resistance with a firearm increase the chance of victim injury.[26] Instead, "The use of a gun by the victim significantly reduces her chance of being injured...."[27]

G. Law Enforcement Benefits of Citizen Self-Defense

A very important reason why most police officers join a public safety department, or why lawyers join a prosecutor's office, is that they care deeply about public safety. Accordingly, when armed citizens deter

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[25] Gary Kleck & Jongyeon Tark, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes,* 42 CRIMINOLOGY 861, 903 (2005).

[26] Kleck, 35 SOC. PROBS. at 7-9; Gary Kleck & Miriam DeLone, *Victim Resistance and Offender Weapon Effects in Robbery*, 9 J.QUANTITATIVE CRIMINOLOGY 55, 73-77 (1993)(study of all NCVS robbery data from 1979-85; most effective form of resistance, both for thwarting the crime, and for reducing the chance of victim injury, is resistance with a gun); Kleck & Gertz, 86 J.CRIM.L. & CRIMINOLOGY at 174-75; William Wells, *The Nature and Circumstances of Defense Gun Use: A Content Analysis of Interpersonal Conflict Situations Involving Criminal Offenders,* 19 JUST.Q. 127, 152 (2002).

[27] Lawrence Southwick, *Self-Defense with Guns: The Consequences*, 28 J.CRIM. JUST. 351, 362, 367 (2000)(NCVS robbery data, pertaining to situations where the robber has a non-gun weapon; if the robber has a gun, or has no weapon, victim gun possession did not seem to affect injury rates. If 10% more victims had guns, serious victim injury would fall 3-5%).

or thwart crime, citizens are helping to create the safe society to which the police and prosecutors have dedicated their careers.

The important deterrent effect of armed citizens—particularly in reducing hot burglaries and the assaults and rapes that often result from hot burglaries—substantially reduces the number of emergencies to which police must respond. Consequently, the police have more resources available for other emergencies, and for investigative and preventive work. District Attorneys benefit from having fewer crimes to prosecute, so that they can devote greater attention to other cases.

Further, the lawful availability of handguns for citizens provides the police with a much larger pool of recruits who have experience with handgun safety, and who have learned some basics (or developed proficiency) in handgun accuracy.

Significantly, many police firearms instructors are civilians. Many innovations in police firearms training have been created by civilian trainers, who themselves train police officers and police instructors. Civilian experts have more time to dedicate to the subject than do almost all police instructors—because many police instructors do not train full-time, and those that do must teach a variety of subjects. Civilian Jeff Cooper's "The Modern Technique" is the foundation for defensive handgun instruction for an enormous number of departments. *See* JEFF COOPER, PRINCIPLES OF PERSONAL DEFENSE (rev.ed. 2007); *see*

also JOHN FARNAM, THE FARNAM METHOD OF DEFENSIVE HANDGUNNING (2ded. 2005).

In short, law-abiding armed citizens play a substantial role in the core governmental function of protecting public safety. Their role is a modern example of how the main clause of the Second Amendment (protecting negative liberty, by prohibiting citizen disarmament) reinforces the introductory clause (affirming the active liberty of citizen participation in public security). *Cf.* STEPHEN BREYER, ACTIVE LIBERTY (2005); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 137 n.13 (1997)("police officers being necessary to law and order, the right of the people to carry handguns shall not be infringed").

II. The Invidious Conflation of Law-Abiding Gun Owners with Incipient Murderers

Petitioners' prohibitions are now and always have been based on invidious prejudice that the law-abiding citizens of the District are incipient murderers.

For example, Petitioners darkly warn that the possession of handguns will lead to homicides even by people who are "generally law-abiding and responsible." Pet. Br. 51. Likewise, the enactment of the bans was supported by "findings" claiming that "firearms are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities. Most murders are committed by previously law-abiding citizens, in situations where

spontaneous violence is generated by anger, passion, or intoxication, and where the killer and victims are acquainted. Twenty-five percent of these murders are within families." David A. Clarke, Chairperson of the Committee on the Judiciary and Criminal Law, *Bill No. 1-164, the "Firearms Control act of 1975"*, Apr. 21, 1976, at 5.

To see the error of Petitioners' aspersions on the law-abiding citizens of the District, one need only look at District's own data. Pursuant to a local law that took effect in 1969, all lawfully-owned firearms in the District had to be registered.

Before the bans, fewer than 0.5% of D.C. crime guns were registered to D.C. residents. Paul Valentine, *Mayor Signs Stringent Gun Control Measure*, WASH. POST, July 24, 1976, at E1, E3 (Police Chief Maurice "Cullinane acknowledged at the Mayor's press conference that less than 0.5 per cent of the guns seized by police last year were registered. There are about 60,000 registered weapons in the city.").

Regulatory excess aimed at the last 10% of a problem has been described as "tunnel vision" which "imposes high costs without achieving additional safety benefits." STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 11 (1992). The D.C. prohibition is even worse, for it targets only 0.5% of the problem, at a great cost in reduced public safety.

The law-abiding gun owners of the District were not the cause of the District's crime problems. That an infinitesimal number of registered gun owners did

misuse their guns does not justify barring all law-abiding persons from owning functional firearms, just as the fact that an infinitesimal number of police misuse their guns does not justify disarming all of the police. *Cf. Romer v. Evans*, 517 U.S. 620, 632 (1996)(law "seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests."); *Cleburne v. Cleburne Living Center*, 472 U.S. 432 (1985)(law based on irrational prejudice).

Likewise, the fact that law-abiding citizens and police officers are sometimes the victims of gun thefts does not justify banning either group from possessing functional guns. The problem of gun theft could be addressed by a narrowly tailored law, such as a requirement that guns be locked up when no one is home. The law review article (co-authored by the counsel of record of this brief) that Petitioners cite to dispute the efficacy of gun lock laws actually says that gun owners resist locking laws *if* the laws interfere with self-defense. Pet. Br. 54, citing Cynthia Leonardatos, David Kopel, & Paul Blackman, *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 CONN. L.REV. 157 (2001).

Petitioners implicitly claim that a typical citizen of the District who can pass a criminal records and mental records background check (such as the National Instant Check System) is at serious risk of committing murder. It is hard to imagine how such a population could be considered fit for home rule.

Amici (which include many Maryland and Virginia police officers) reject Petitioners' dire and suspicious attitude toward the law-abiding citizens of the District of Columbia.

The large majority of murderers have prior criminal records; thus, Petitioners' premise for the bans—the "finding" that "Most murders are committed by previously law-abiding citizens"—is indisputably false, and therefore irrational. The truth is that "Homicide offenders are likely to commit their murders in the course of long criminal careers consisting primarily of nonviolent crimes but including larger than normal proportions of violent crimes." David Kennedy & Anthony Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 HOMICIDE STUD. 263, 276 (1998).[28] For example:

- A *New York Times* study of the murders in that city in 2003-05 found "More than 90 percent of the killers had criminal records...."[29]
- In 1989, the *New York Times* reported that in Washington, D.C., almost all the murderers

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[28] The article's analysis of 1988 national data on homicide in 33 large cities showed that 54% of killers had a prior adult criminal record, 2% had a juvenile record only; no information was available on 25% and 20% did not have criminal records; so 74% of killers for whom records were available had a prior criminal record.

[29] Jo McGinty, *New York Killers, and those Killed, by the Numbers*, N.Y. TIMES, Apr. 28, 2006.

and victims were "involved in the drug trade."[30]

- In Lowell, Massachusetts, "Some 95% of homicide offenders" had been "arraigned at least once in Massachusetts courts" before they killed. "On average ... homicide offenders had been arraigned for 9 prior offenses...."[31]
- Of Illinois murderers in 2001, 43% had, within the last 10 years, an Illinois felony conviction and 72% had an Illinois arrest.[32]
- Baltimore police records show that 92% of 2006 murder suspects had criminal records.[33]
- A study of Minneapolis homicide offenders found that 73% had been arrested at least once by the Minneapolis Police Department, with an average number of 7.4 arrests.[34]

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[30] Richard Berke, *Capital Offers a Ripe Market to Drug Dealers*, N.Y. TIMES, Mar. 28, 1989, at 1, 6.

[31] Anthony Braga et al., *Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, Massachusetts*, 9 POLICE Q. 20, 29-31 (2006).

[32] Philip Cook et al., *Criminal Records of Homicide Offenders*, 294 JAMA 538 (2005).

[33] Gus Sentementes, *Patterns persist in city killings: Victims, suspects usually black men with long criminal histories*, BALT. SUN, Jan. 1, 2007.

[34] Kennedy & Braga, 2 HOMICIDE STUD. at 276, 283 (studying homicides perpetrated from Jan. 1, 1994 to May 24, 1997, and examining suspects' MPD arrest records from 1990 onward;

(Continued on following page)

- "The vast majority of persons involved in life threatening violence have a long criminal record with many prior contacts with the justice system." Delbert Elliott, *Life Threatening Violence is* Primarily *a Crime Problem*, 69 COLO. L.REV. 1081, 1093 (1998)(summarizing studies); *see also* Kennedy & Braga, 2 HOMICIDE STUD. at 267 (among the well-established "criminological axioms" of homicide is that a "relatively high proportion of victims and offenders have a prior criminal record (about two-thirds of offenders and half of victims)")(parenthetical in original).

A. Domestic Violence

The D.C. bans' false findings that "Most murders are committed by previously law-abiding citizens" were supported by the claim that there are many murders involving "arguments" or "where the killer and victims are acquainted" and that a quarter of such murders are "within families." Clarke, *supra* p. 25, at 5. The Council did not seem to realize that criminals too have acquaintances, relatives, homes, and arguments. In fact, the perpetrators of "argument" or "domestic" homicide are, like other homicide perpetrators, overwhelmingly persons with extensive criminal records (and who are therefore barred by federal law from possessing any firearm):

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the study did not examine records of arrests by other law enforcement).

- About 18% of homicides involve boyfriends/girlfriends, friends, or family members. It is misleading to combine these homicides with "acquaintance" homicides (which are about 28% of homicides), because the most common way that the "acquaintances" met was through "prior illegal transactions," such as drug dealing.[35]
- A Police Foundation study of Kansas City revealed that in 90% of homicides among family members, the police had been called to the home within the past two years. The median number of previous calls was five.[36]
- Another study found that 72% of domestic murderers had prior criminal history; 40% had been under restraining orders.[37]
- "A history of domestic violence was present in 95.8%" of the intra-family homicides studied.[38]

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[35] KLECK, TARGETING GUNS, at 236, analyzing data from US DOJ, *Murder Cases in 33 Large Urban Counties in the United States 1988*, http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/09907.xml, and FBI, *Supplementary Homicide Reports* (1995).

[36] MARIE WILT ET AL., DOMESTIC VIOLENCE AND THE POLICE 23 (1977).

[37] Linda Langford et al., *Criminal and Restraining Order Histories of Intimate Partner-Related Homicide Offenders in Massachusetts, 1991-95* in THE VARIETIES OF HOMICIDE AND ITS RESEARCH (FBI Academy, 2000), http://www.icpsr.umich.edu/HRWG/PDF/hrwg99.pdf.

[38] Paige Hall-Smith et al., *Partner Homicide in Context*, 2 HOMICIDE STUD. 400, 410 (1998).

Thus, "Homicides are likely to be part of a pattern of continuing violence—especially, but not exclusively, for domestic homicide."[39]

Significantly, many domestic shootings involve lawful self-defense. Data from Detroit, Houston, and Miami, showed very large majorities of wives who killed their husbands were not convicted, or even indicted, because they were "act[ing] in self-defense against husbands who are abusive to themselves, their children, or both." MARGO DALY & MARTIN WILSON, HOMICIDE 15, 199-200 (1988); *see also* Angela Browne, *Assault and Homicide at Home: When Battered Women Kill*, in 3 ADVANCES IN APPLIED SOCIAL PSYCHOLOGY 61 (Michael Saks & Leonard Saxe eds., 1986)(FBI data show that 4.8% of U.S. homicides are women killing a mate in self-defense). In a study of domestic violence victims in West Virginia shelters, "26.5% reported that they believed they would have to use a gun to protect themselves." MARGARET PHIPPS BROWN ET AL., THE ROLE OF FIREARMS IN DOMESTIC VIOLENCE 31 (2000).

There is no doubt that an abused woman is at much greater risk if her abuser has a gun. However, research shows *no* heightened risk to an abuse victim who lives apart from the abuser and who has her own gun. An abuser's being armed creates a 7.59 odds ratio for increased risk of femicide. Living alone and having a gun yields an odds ratio of 0.22, far below

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[39] Kennedy & Braga, 2 HOMICIDE STUD. at 267.

the 2.0 level necessary for statistical significance. Jacquelyn Campbell et al., *Risk Factors for Femicide in Abusive Relationships*, 93 AM.J.PUB. HEALTH 1089, 1090-92 (2003). Petitioners and their *amici* relentlessly cite variants of the first figure, but ignore the second figure.

Federal law bans the possession of any firearm by a person subject to a domestic violence restraining order, by any person convicted of a domestic violence misdemeanor, or of a felony, including non-violent felonies such as drug possession. 18 U.S.C. §922(g). The bans for domestic abusers are not overbroad, and therefore do not violate the right to arms. *See Oregon v. Hirsch*, 338 Or. 622, 114 P.3d 1104 (2005)(felon-in-possession law not overbroad); *Wisconsin v. Thomas*, 274 Wis.2d 513, 683 N.W.2d 497 (Wis.App. 2004)(same). Petitioners' law disarming abuse victims is overbroad. *See West Virginia* ex rel. *Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988)(gun restrictions may not be "overbroad" or "sweep unnecessarily broadly"); *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980)(ban on home possession of a protected arm is *per se* unconstitutional); *Junction City v. Mevis*, 226 Kan. 516, 601 P.2d 1145 (1979)(ban on weapons transport was "constitutionally overbroad," even though "city maintains that the courts should read additional exceptions into the act which are not specifically contained therein"); *Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972)("overbroad" restrictions on firearms possession and transport; a "legitimate and substantial" government "purpose cannot

be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

B. Juveniles

The instant case involves firearms ownership by law-abiding adults. Yet Petitioners and their *amici* cite statistics about gun misuse by juveniles.

The citations miss Justice Frankfurter's point that it is unconstitutional to infantilize the entire nation by restricting adults to possessing only items suitable for children. *Butler v. Michigan*, 352 U.S. 380 (1957)(rejecting the notion that literature for adults should be censored to protect children from seeing inappropriate materials). Besides, ordinary American teenagers are, like ordinary American adults, not incipient murderers. The vast majority of young murderers are, like their older counterparts, established criminals:

- A Los Angeles study showed that gangs had a role in 80% of all adolescent homicides.[40]

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[40] Off. of Juv. Just. & Delinq. Prev., *Report to Congress on Juvenile Violence Research* 14 (July 1999), www.ojjdp.ncjrs.org/pubs/jvr/contents.html.

- 57% of homicides perpetrated by male youths are committed in the course of another crime, such as robbery or rape.[41]
- A study of young murderers found that 89% had psychotic symptoms.[42]

C. Body Count Statistics

Petitioners and their *amici* cite various articles comparing the number of criminals killed by armed citizens with the number of deaths from gun misuse, and claim that since the former number is smaller than the latter, guns must be too dangerous for home defense.

Again, the comparison falsely combines two separate groups: law-abiding gun owners (who are disarmed by Petitioners' law) and illegal criminal gun owners (who are not, and who perpetrate the vast majority of murders).

More fundamentally, counting the number of criminal deaths is a very inappropriate measure of anticrime utility. *Amici* would strongly oppose making

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[41] Ann Loper & Dewey Cornell, *Homicide by Juvenile Girls*, 5 J.CHILD & FAM. STUD. 323, 326, 330 (1996)(also noting that males constitute 94% of juvenile homicide perpetrators).

[42] Wade Myers & Kerrilyn Scott, *Psychotic and Conduct Disorder Symptoms in Juvenile Murderers*, 2 HOMICIDE STUD. 160 (1998)(also noting prior studies showing young murderers to be distinguished by "neurological abnormalities," "criminally violent family members" and "gang membership").

the number of justifiable homicides into a positive metric for the performance of particular police forces or individual officers.

Besides, the survey evidence of defensive gun use (detailed in Part I) is unanimous that the large majority of DGUs consist only of brandishing a gun, rather than firing a shot, let alone a fatal one.

D. Accidents

One reason that the per capita death rate from firearms accidents has declined by 86% since 1948, while the per capita firearms supply has risen by 158% (*see* App. 12-13) is that handguns have replaced many long guns as the firearm kept in the home.[43] The gun accidental death rate for children has fallen even more sharply, by 91%. *See* App. 7-10. Handguns are more difficult for a small child to accidentally discharge than are long guns. The trigger on a rifle or shotgun is easier to pull than is the heavier trigger on a revolver or the slide on a self-loading pistol. Handguns

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[43] An additional reason for the 86% reduction in accidents may be expert-led safety programs, principally Project ChildSafe (created by the National Shooting Sports Foundation, funded in part by the DOJ, partnered with the National Lieutenant Governors Association, and promoted by local law enforcement)(www.projectchildsafe.org), and Eddie Eagle Gun Safety (created by the NRA, winner of two awards from the National Safety Council, and taught by police and sheriffs departments all over America)(www.nrahq.org/safety/eddie/awards.asp).

can be hidden from inquisitive children more easily than long guns can.

For all ages, the fatal gun accident rate is at an all-time low, even as the per capita gun supply is at an all-time high. The annual risk level for a fatal gun accident is 0.22 per 100,000 population—about the risk level for taking two airplane trips a year, or for a whooping cough vaccination. *See* App. 15 (2004 gun data); BREYER, BREAKING THE VICIOUS CIRCLE, at 5, 7 (AIRPLANE AND VACCINE DATA).

Swimming pools are involved in many more accidental child fatalities than are firearms. NATIONAL SAFETY COUNCIL, INJURY FACTS 2007, at 133, 144 (in 2003, there were 7 accidental firearms deaths for children aged under 5, and 49 for ages 5-14; for the combined age groups in that same year, there were 86 bathtub deaths, and 285 in swimming pools); STEVEN LEVITT & STEPHEN DUBNER, FREAKONOMICS 135-36 (rev.ed. 2006)(swimming pool accidents cause more deaths of children under 10 years than all forms of death by firearm combined. "The likelihood of death by pool (1 in 11,000) versus death by gun (1 in 1 million-plus) isn't even close.")(parentheticals in original).

To ban airplanes, swimming pools, or whooping cough vaccine based on a microscopic rate of fatal accidents would be absurd; the District's assertion of accidents as a reason for banning handguns or functional firearms cannot pass rational basis review.

The people who cause gun accidents tend to have high rates of "arrests, violence, alcohol abuse, highway crashes, and citations for moving traffic violations." Julian Waller & Elbert Whorton, *Unintentional Shootings, Highway Crashes, and Acts of Violence*, 5 ACCIDENT ANALYSIS & PREVENTION 351, 353 (1973). Unlike in 1973, many such people are now prevented from buying a gun by the National Instant Check System.

It is true, and trivial, that homes with guns have more gun accidents, just as homes with lawnmowers have more lawnmower accidents.

III. Long Guns Are Inadequate Substitutes

Mayor Fenty claims that "It is plainly relevant that the District allows residents to possess other perfectly effective firearms...."[44] To the contrary, the District's highest court has recognized that banning self-defense in the home is the intent of the gun lock statute, and has upheld that ban.[45] Moreover, handguns are often superior and safer for self-defense *especially* in urban environments. That is why 80% of

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[44] Adrian Fenty & Linda Singer, *Fighting for Our Handgun Ban*, WASH. POST, Sept. 4, 2007.

[45] *McIntosh v. Washington*, 395 A.2d 744, 755 (D.C. 1977)(noting the Council's finding that "that for each intruder stopped by a firearm there are four gun-related accidents within the home"—and thereby showing that elimination of self-defense against intruders was considered by the Council to be a price worth paying).

defensive uses of firearms are with handguns.[46] That is why almost all police officers use handguns when entering a building, and why so many police officers use handguns for defense of their homes and families when off-duty:

- A handgun is much easier to hold while phoning (or for police, radioing) for help.
- The ability to summon help while simultaneously keeping the gun pointed at the criminal reduces the chance that the home-owner or the police officer will have to shoot the criminal; it is preferable that criminals be captured rather than killed.
- Especially in a home, a long gun is harder to maneuver (e.g., around corners) and shoot, and, because of its length, is easier for a criminal to grab. Thus, handguns are far superior as defensive arms for use in small urban spaces such as apartments.
- For persons who have relatively weak upper body strength (such as the elderly, or small persons, or some women), a handgun is much easier to hold, control, and aim accurately.

The reason that handguns have been called "equalizers"[47] is that they are the best tool for a person to

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[46] Kleck & Gertz, 86 J.CRIM.L. & CRIMINOLOGY, at 175.

[47] "Be not afraid of any man,
No matter what his size.
When danger threatens, call on me
And I will equalize."

(Continued on following page)

defend herself against larger or more numerous attackers, especially in a close-range setting such as the home.

IV. The Handgun and Self-Defense Bans Violate Precedent and Original Intent

While strict scrutiny is the appropriate standard of review for most gun controls, it unnecessary here, for this Court's own precedents indicate the unconstitutionality of a handgun ban.

Robertson v. Baldwin declared "the carrying of concealed weapons" (presumably, handguns and knives) to be an exception to the Second Amendment. 165 U.S. 275, 281-82 (1897). The exception proves the rule: that a ban on all handguns in the home violates the Second Amendment. Similarly, Justice Holmes' opinion in *Patsone v. Pennsylvania* upheld a state statute against legal aliens possessing long guns for hunting, because the statute "does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defence." 232 U.S. 138, 143 (1914).

Petitioners' extreme and unusual law is well outside the constitutional mainstream. *Cf. Lawrence v. Texas*, 539 U.S. 558 (2003)(only four states had the law at issue; here, only Chicago and a few of its

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Late 19th century advertisement for the Equalizer, a Colt handgun (which is now antique, but banned in the District).

suburbs ban handguns, and even they do not outlaw home self-defense with long guns); *Romer v. Evans* 517 U.S. 620 (1996)(emphasizing extreme, unique nature of the law); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (unusual statute "forbidding the use" of a lawful product in the home).

St. George Tucker—the leading legal scholar of the Early Republic, on whom this Court has relied many times for original intent—used an example of a law like the one at bar to illustrate the necessity of judicial review. 1 WILLIAM BLACKSTONE, COMMENTARIES, App. at 289 (St. George Tucker ed., Lawbook Exch., 1996)(1803)(arguing that the Necessary and Proper clause barred disarming citizens, because disarmament could never be necessary or proper). He further stated that self-defense is part of the Second Amendment: "This may be considered as the true palladium of liberty....The right of self defence is the first law of nature." *Id.* at vol. 1, App. at 300. Justice Story later adopted the "true palladium" image of the Second Amendment in his own treatise. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 607 (2ded. 1851).

In a passage ignored by Petitioners' *amici* historians, Tucker wrote: "The right of the people to keep and bear arms shall not be infringed. Amendments to C. U.S. Art. 4, and this without any qualification as to their condition or degree, as is the case in the British government." *Id.* at vol. 2, 143 n.40. (The right to

arms was originally the fourth of 12 amendments Congress proposed to the people.)

Like all 19th century commentators, Tucker recognized the Second Amendment as an individual right belonging to all citizens, and including the right to possess arms for self-defense. *See* David Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L.REV. 1359.

In 1846, the Supreme Court of Georgia held that a ban on handguns violated the Second Amendment, but that restrictions on concealed carry did not. *Nunn v. Georgia*, 1 Ga. 243 (1846); *see also* Jason Mazzone, *The Bill of Rights in Early State Courts*, 92 MINN. L.REV. 1 (2007)(observing that post-*Barron*, many state courts still applied the Bill of Rights to state laws, and several did so with the Second Amendment); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1203-17 (1992)(*Nunn* was one of several state opinions which provided the intellectual foundation for the Fourteenth Amendment).

The District has a legitimate interest in a screening system, such as the National Instant Check System, for purchasers of firearms. However, banning handguns and home defense because of invidious prejudice

amounts to unconstitutionally piling "inference upon inference"[48] and "prophylaxis upon prophylaxis."[49]

CONCLUSION

"I don't intend to run this government around the moment of survival," declared D.C. Councilman David A. Clarke, chairman of the committee that created the handgun and self-defense ban.[50] The Second Amendment forbids banning the tools of survival. Petitioners' dangerous laws deprive the public and law enforcement of the life-saving, crime-reducing effects of gun ownership which are apparent in the 50 states.

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[48] *Gonzales v. Raich*, 545 U.S. 1, 35 (2005)(Scalia, J., concurring); *Sabri v. United States*, 541 U.S. 600, 608 (2004); *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Mathews v. Lucas*, 427 U.S. 495, 522 (1976)(Stevens, J., dissenting); *Anderson v. United States*, 417 U.S. 211 (1974); *Ingram v. United States*, 360 U.S. 672, 680 (1959); *Pereira v. United States*, 347 U.S. 1, 15 (1954)(Minton, J., concurring and dissenting); *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943); *United States v. Classic*, 313 U.S. 299, 332 (1941)(Douglas, J., dissenting); *United States v. Ross*, 92 U.S. 281, 282 (1875).

[49] *Fed. Election Comm'n v. Wis. Right to Life*, ___ U.S. ___, 127 S.Ct. 2652, 2673 (2007).

[50] Daniel Greene, *The Case for Owning a Gun*, THE WASHINGTONIAN, Mar. 1985.

The decision below should be affirmed.

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APPENDIX

APPENDIX A
Self-Defense Data

1. The 13 studies of the frequency of defensive gun use

Survey	Field	Bordua	DMI one	DMI two
Area	Calif.	Illinois	U.S.	U.S.
Year of interviews	1976	1977	1978	1978
Gun type covered	Handgun	All	All	All
Recall period	Ever/1 yr./ 2 yrs.	Ever	Ever	Ever
Exclude uses against animals?	No	No	No	Yes
Exclude military/ police uses?	Yes	No	Yes	Yes
DGU question refers to	Self	Self	Househld.	Househld.
% who used gun	8.6/1.4/3[a]	5.0	15	7
% who fired gun	2.9	n.a.	6	n.a.
Implied annual # of DGUs[b]	3,052,717	1,414,544	2,141,512	1,098,409

Survey	**Hart**	**Ohio**	**Mauser**	**Gallup**	**Gallup**
Area	U.S.	Ohio	U.S.	U.S.	U.S.
Year of interview	1981	1982	1990	1991	1993
Gun type covered	Handgun	Handgun	All	All	All
Recall period	5 year	Ever	5 year	Ever	Ever
Exclude uses against animals?	Yes	No	Yes	No	No
Exclude military/police uses?	Yes	No	Yes	No	Yes
DGU question refers to	Household	Self	Household	Self	Self
% who used gun	4	6.5	3.79	8	11
% who fired gun	n.a.	2.6	n.a.	n.a.	n.a.
Implied annual # of DGUs[b]	1,797,461	771,043	1,487,342	777,153	1,621,377

Survey	Kleck & Gertz	L.A. Times	Tarranc	Police Foundation
Area	U.S.	U.S.	U.S.	U.S.
Year of interviews	1993	1994	1994	1994
Gun type covered	All	All	All	All
Recall period	1 year	Ever	5 year	1 year
Excluded uses against animals?	Yes	No	Yes	Yes
Excluded military/ police uses?	Yes	Yes	Yes	Yes
DGU question refers to	Self	Self	Self/Household	Self
% who used gun	1.326	8[c]	1/2[d]	1.44
% who fired gun	0.63	n.a.	n.a.	0.70
Implied annual # of DGUs[b]	2,549,862	3,609,682	764,036	1,460,000

Defensive Gun Use Surveys are from GARY KLECK, TARGETING GUNS (1997), chapter 5; PHILIP COOK & JENS LUDWIG, GUNS IN AMERICA 62-63 (1996)

Notes to Table:

1.4% in past year, 3% in past two years, 8.6% ever.

Estimated annual number of DGUs of guns of all types against humans, excluding uses connected with military or police duties.

Covered only uses outside the home.

1% of respondents, 2% of households.

2. National Crime Victim Survey calculations

Most of the NCVS data are not published in a narrative format. Instead, they are available for researchers at the website of the Inter-University Consortium for Political and Social Research (ICPSR), http://www.icpsr.umich.edu/.

The NCVS data for 1992-2005 suggest 97,000 defensive gun uses annually during that period. The figure is based on "National Crime Victimization Survey, 1992-2005: Concatenated Incident-Level File." (Available at: http://search.icpsr.umich.edu/NACJD/query.html?nh=500&rq=0&col=abstract&op0=%2B&rf=3&tx0=national+crime+victimization+survey&fl0=title%3A&ty0=p&ty1=w&op1=%2B&fl1=archive%3A&tx1=NACJD).

Tabulate V4144. Self-protective action: Attacked offender with gun

	Frequency	Percent	Cumulative
No	29,906	17.53	17.53
Yes	83	0.05	17.58
Out of Universe	140,639	82.42	100
Total	170,628		100

Tabulate V4147, Self-protective action: Threatened offender with gun

	Frequency	Percent	Cumulative
No	29,708	17.41	17.41
Yes	281	0.16	17.58
Out of Universe	140,639	82.42	100
Total	170,628		100

The combined tabulations suggest a DGU rate of 1.2% for violent crimes. The NCVS average crime rate per 1,000 US population over the age of 12 in 1992-2005 was 35.8. The average population of the US between 1992 and 2005 was 275,768,380. Of that population, 82% was over the age of 12. So:

Multiply total US population by .82 = 226,130,072 (population over age 12)
Divide by 1,000 = 226,130.072 (over-12 population in thousands)
Multiply by 35.8 = 8,095,457 (number of annual violent crimes)
Multiply by 1.2% (NCVS rate of DGUs for 1992-2005) = 97,145 (average annual DGUs)

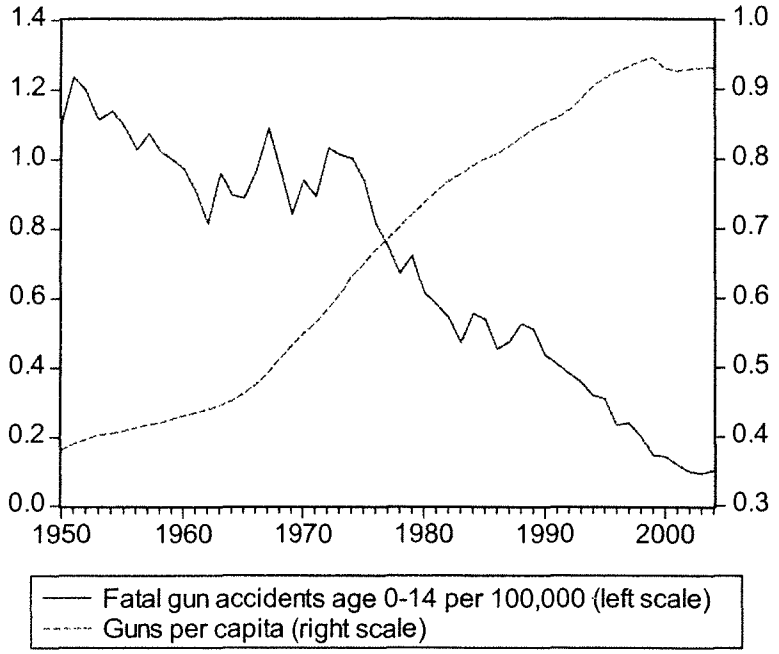
Sources :
Population:
http://www.fbi.gov/ucr/cius2006/data/table_01.html
Percent of the population over 12:
http://www.census.gov/prod/2001pubs/c2kbr01-12.pdf
NCVS violent crime rate per 1,000 persons over age 12
http://www.ojp.usdoj.gov/bjs/glance/tables/viortrdtab.htm

The data for 2005 suggest 74,695 DGUs that year. Calculations are as follows:

US Population in 2005: 296,410,404
Subtract 20% = 237,128,323 (population over age 12)
Divide by 1,000 = 237,128.404 (over-12 population in thousands)
Multiply by 21 (the NCVS 2005 violent crime rate per thousand persons over the age of 12) = 4,979,695 (number of violent crimes in 2005)
Multiply by 1.5% (NCVS rate of DGUs for 2005) = 74,695 (DGUs in 2005).

APPENDIX B
Accident Data

1. Child gun fatality rate compared to guns per capita, 1950-2004



Important note: There is a magnitude difference of 100,000 between the left and right scales. The right scale measures a single gun; it begins with less than .4 guns per American in 1950, and ends with more than .9 guns per American in 2004. The scale on the left is fatal accidents per 100,000 persons aged 14 or under. The youth fatal gun accident rate declines by 91%, from 1.1 fatalities per 100,000 youths in 1950, to about 0.1 per 100,000 youths in 2004.

Sources: Fatal gun accidents from Centers for Disease Control, *Compressed Mortality File*, http://wonder.cdc.gov/mortSQL.html.
Guns per capita from GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 96-97 (1997), and Bureau of Alcohol, Tobacco, Firearms & Explosives, *Annual Firearms Manufacture and Export Report*, http://www.atf.gov/firearms/stats/index.htm.

Data Table for the Chart

Year	**Fatal gun accidents for ages 14 & under**	**Population under 14**	**Fatal accidents per 100,000 children**	**Guns per capita**
1950	451	40,853,299	1.10	0.38
1951	520	42,064,604	1.24	0.39
1952	519	43,376,761	1.20	0.40
1953	498	44,759,194	1.11	0.40
1954	527	46,265,590	1.14	0.40
1955	522	47,866,820	1.09	0.41
1956	508	49,448,548	1.03	0.41
1957	549	51,079,515	1.07	0.42
1958	538	52,698,698	1.02	0.42
1959	542	54,345,325	1.00	0.43
1960	544	55,971,292	0.97	0.43
1961	507	56,045,549	0.90	0.43
1962	456	56,018,882	0.81	0.44
1963	538	55,946,055	0.96	0.44

1964	500	55,835,037	0.90	0.45
1965	494	55,618,888	0.89	0.46
1966	535	55,287,117	0.97	0.48
1967	598	54,889,988	1.09	0.49
1968	527	54,491,901	0.97	0.51
1969	455	54,088,773	0.84	0.53
1970	506	53,802,863	0.94	0.55
1971	481	53,834,598	0.89	0.57
1972	554	53,699,935	1.03	0.58
1973	541	53,450,214	1.01	0.61
1974	532	53,162,742	1.00	0.63
1975	495	52,894,592	0.94	0.65
1976	428	52,604,523	0.81	0.67
1977	392	52,325,064	0.75	0.69
1978	349	52,059,828	0.67	0.70
1979	372	51,523,398	0.72	0.72
1980	316	51,368,905	0.62	0.74
1981	298	51,275,045	0.58	0.76
1982	279	51,367,319	0.54	0.77
1983	243	51,458,409	0.47	0.78
1984	287	51,580,345	0.56	0.79
1985	278	51,615,831	0.54	0.80
1986	234	51,592,128	0.45	0.81
1987	247	51,965,425	0.48	0.82
1988	277	52,603,938	0.53	0.83
1989	273	53,404,219	0.51	0.84

1990	236	54,065,132	0.44	0.85
1991	227	55,352,258	0.41	0.86
1992	216	56,297,147	0.38	0.87
1993	205	57,202,683	0.36	0.89
1994	185	57,918,481	0.32	0.91
1995	181	58,379,928	0.31	0.92
1996	138	58,850,406	0.23	0.93
1997	142	59,217,153	0.24	0.93
1998	121	59,659,176	0.20	0.94
1999	88	59,955,368	0.15	0.95
2000	86	60,253,375	0.14	0.93
2001	72	60,434,835	0.12	0.93
2002	60	60,646,433	0.10	0.93
2003	56	60,737,916	0.09	0.93
2004	63	60,821,996	0.10	0.93

Before 1950, mortalities from child firearm accidents were combined with all non-motor vehicle accidents, so reliable firearm-only data before 1950 were not available.

Caveat: The guns per capita figure in this Table and the next Table are based on manufacturer data recorded by the BATFE, then modified to account for net imports and exports. The data do not account for the home manufacture of firearms (which is generally legal for personal use, but not for sale). Nor do they account for guns which are seized by the police and then destroyed. (Many seized guns are re-sold by the police to licensed manufacturers or gun dealers, and

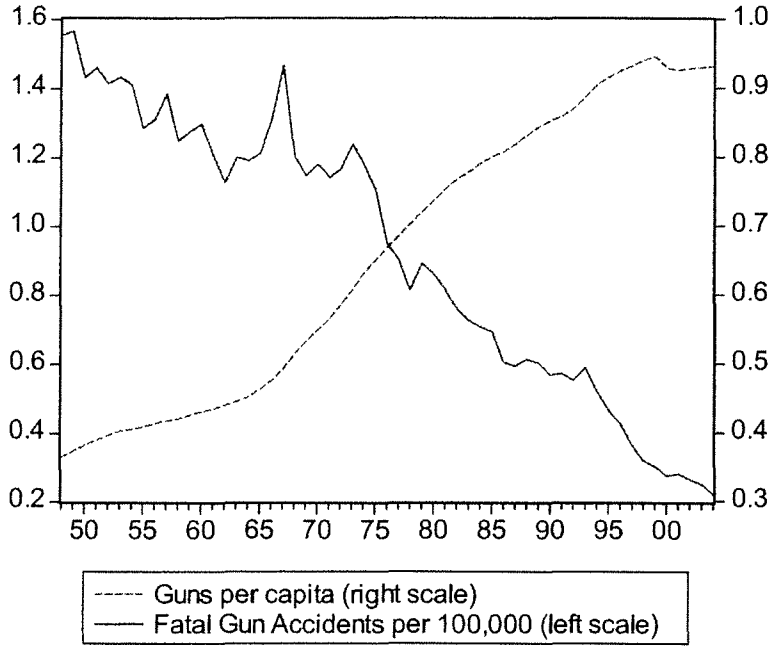
thereafter re-sold to ordinary buyers.) Nor do the data account for guns that become dysfunctional due to rust or wear and tear. There are no general studies on the subject. However, unless a gun is exposed to a moist climate for an extended time, is neglected, and then rusts, guns can remain functional for centuries. A heavily-used target competition gun might eventually need to have the barrel or a spring replaced in order to retain optimal accuracy, but in general, guns may be one of the most durable consumer products in existence. Over the last few decades, an increasingly large fraction of guns (such as pistols from Glock, or Smith & Wesson) have been partially made from plastic polymers, and such guns appear to be even more durable.

Even if one made an arbitrary assumption that no gun lasts for longer than 50 years (or 40 years, or 30 years), the revised data would still show an increase in guns per capita being accompanied by an enormous decline in accidents. A 1994 study by the Police Foundation estimated that there were 192 million privately-owned guns in the United States—lower than the 235 million estimate in the table below, but broadly consistent with the evidence of a large increase in the U.S. gun supply in the past half-century. *See* PHILIP COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY OF FIREARMS OWNERSHIP AND USE 13 (1996).

The Small Arms Survey, an international research organization affiliated with the Graduate Institute of International Studies, Geneva, Switzerland, reports that estimates of the current U.S.

civilian gun supply range from 250 million to 290 million, while the Survey's own methodology suggests a supply of about 317 million (for a U.S. population of about 300 million). SMALL ARMS SURVEY 2007, at 59 (Eric G. Berman et al. eds., 2007). These estimates are generally compatible with the per-capita figures presented in the Data Table below, with 273 million guns as of 2004.

2. Fatal gun accident rate compared to the number of guns per capita, 1948-2004



Again, the left and right scales differ by a magnitude of 100,000. The right scale (ownership) is guns per person. In 1948 there were .36 guns per person. (That

is, about one gun for every three Americans.) By 2004, there was nearly one gun for every American. The left scale (accidents) is per 100,000 persons. In 1948, there were 1.6 fatal gun accidents per 100,000 persons. By 2004, the rate had fallen by 86%, so that there were .22 fatal accidents per 100,000 persons.

Sources: fatal gun accidents from Centers for Disease Control, *Compressed Mortality File*, http://wonder.cdc.gov/mortSQL.html, and GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 323-24 (1997).
The gun supply figures are from GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 96-97 (1997), and Bureau of Alcohol, Tobacco, Firearms & Explosives, *Annual Firearms Manufacture and Export Report*, http://www.atf.gov/firearms/stats/index.htm.

Data Table for the Chart

Year	**Total gun stock**	**Fatal gun acdnts.**	**Popul. (in 1000s)**	**Guns per capita**	**Fatal gun acdnts. per 100,000 persons**
1948	53,203,031	2,270	146,091	0.36	1.55
1949	55,406,460	2,326	148,666	0.37	1.56
1950	57,902,081	2,174	151,871	0.38	1.43
1951	59,988,664	2,247	153,970	0.39	1.46
1952	61,946,315	2,210	156,369	0.40	1.41
1953	63,945,235	2,277	158,946	0.40	1.43

1954	65,558,052	2,281	161,881	0.40	1.41
1955	67,387,135	2,120	165,058	0.41	1.28
1956	69,435,933	2,202	168,078	0.41	1.31
1957	71,416,509	2,369	171,178	0.42	1.38
1958	73,163,450	2,172	174,153	0.42	1.25
1959	75,338,188	2,258	177,136	0.43	1.27
1960	77,501,065	2,334	179,972	0.43	1.30
1961	79,536,616	2,204	182,976	0.43	1.20
1962	81,602,984	2,092	185,739	0.44	1.13
1963	83,834,808	2,263	188,434	0.44	1.20
1964	86,357,701	2,275	191,085	0.45	1.19
1965	89,478,922	2,344	193,457	0.46	1.21
1966	93,000,989	2,558	195,499	0.48	1.31
1967	97,087,751	2,896	197,375	0.49	1.47
1968	102,302,251	2,394	199,312	0.51	1.20
1969	107,111,820	2,309	201,298	0.53	1.15
1970	111,917,733	2,406	203,798.7	0.55	1.18
1971	116,928,781	2,360	206,817.5	0.57	1.14
1972	122,304,980	2,442	209,274.9	0.58	1.17
1973	128,016,673	2,618	211,349.2	0.61	1.24
1974	134,587,281	2,513	213,333.6	0.63	1.18
1975	139,915,125	2,380	215,456.6	0.65	1.10
1976	145,650,789	2,059	217,553.9	0.67	0.95
1977	150,748,000	1,982	219,760.9	0.69	0.90
1978	156,164,518	1,806	222,098.2	0.70	0.81
1979	161,888,861	2,004	224,568.6	0.72	0.89

1980	167,681,587	1,955	227,224.7	0.74	0.86
1981	173,262,755	1,871	229,465.7	0.76	0.82
1982	178,218,890	1,756	231,664.4	0.77	0.76
1983	182,273,263	1,695	233,792.0	0.78	0.73
1984	186,683,867	1,668	235,824.9	0.79	0.71
1985	190,658,136	1,649	237,923.7	0.80	0.69
1986	194,182,072	1,452	240,132.8	0.81	0.60
1987	198,526,508	1,440	242,288.9	0.82	0.59
1988	203,306,821	1,501	244,499.0	0.83	0.61
1989	208,489,609	1,489	246,819.2	0.84	0.60
1990	212,823,547	1,416	249,438.7	0.85	0.57
1991	216,695,946	1,441	252,127.4	0.86	0.57
1992	222,067,343	1,409	254,994.5	0.87	0.55
1993	228,660,966	1,521	257,746.1	0.89	0.59
1994	235,604,001	1,356	260,289.2	0.91	0.52
1995	240,770,928	1,225	262,764.9	0.92	0.47
1996	245,379,137	1,134	265,189.8	0.93	0.43
1997	249,748,101	981	267,743.6	0.93	0.37
1998	254,199,406	866	270,248.0	0.94	0.32
1999	257,991,026	824	272,690.8	0.95	0.30
2000	261,592,676	776	281,421.9	0.93	0.28
2001	264,360,377	802	285,317.6	0.93	0.28
2002	267,556,289	762	287,973.9	0.93	0.26
2003	270,695,992	730	290,809.8	0.93	0.25
2004	273,643,000	649	293,655.4	0.93	0.22

APPENDIX C

Statement of Interest of Additional *Amici*

Maryland State Lodge, Fraternal Order of Police

Founded in 1967, the Maryland State Lodge of the Fraternal Order of Police is the largest organization of rank and file law enforcement officers in Maryland, comprising 19,198 members and 68 subordinate lodges. The Maryland FOP's mission is to support the interests of law enforcement and public safety.

San Francisco Veteran Police Officers Association

San Francisco Veteran Police Officers Association (SFVPOA) represents retired San Francisco officers. SFPVOA members and their families need to be able to defend themselves from the criminals they have arrested throughout their careers, and SFPVOA recognizes the self-defense needs of all law-abiding citizens. The SFVPOA participated in the lawsuit that overturned a handgun ban in San Francisco. *Fiscal v. City & County of San Francisco*, ___ Cal. Rptr. 3d ___, 2008 WL 81550 (Cal. Ct. App. 2008).

Long Beach Police Officers Association

The Long Beach Police Officers Association represents members in the police officer, corporal,

sergeant and lieutenant ranks, who police the 35th-largest city in the United States.

Texas Police Chiefs Association

The Texas Police Chiefs Association was founded in 1958 to promote, encourage and advance the professional development of Chiefs of Police and senior police management personnel throughout the State of Texas. TCPA represents over 600 law enforcement executives in Texas.

Texas Municipal Police Association

Founded in 1950 to promote professionalism in law enforcement, the Texas Municipal Police Association represents 14,000 officers. TMPA provides law enforcement training in a wide variety of subjects, with special emphasis on bringing courses to rural departments that cannot afford to send officers to big cities for classes.

New York State Association of Auxiliary Police

The New York State Association of Auxiliary Police represents uniformed police volunteers in 55 police departments throughout New York State. Auxiliary police in New York date back to 1932; their status was formalized by the statewide Defense Emergency Act of 1951.

Alpine County, California, District Attorney Will Richmond

Will Richmond previously served as District Attorney for Tulare County, and as Deputy Chief Assistant U.S. Attorney for Eastern District of California. He was appointed Alpine County District Attorney in 2002, and then elected to the position.

Amador County, California, District Attorney District Attorney Todd Reibe

First elected in 1999, Todd Reibe was re-elected in 2002 and 2006.

Butte County, California, District Attorney Michael Ramsey

Michael Ramsey has served as a prosecutor for 29 years, and as Butte County District Attorney for over 20 years. During his administration the department has instituted 17 special prosecution units and investigative programs.

Colusa County, California, District Attorney John Poyner

John Poyner was first elected District Attorney in 1986, and has been re-elected ever since. He is California District Attorneys Association President-Elect for 2007-2008.

Del Norte County, California, District Attorney Michael D. Reise

Michael D. Reise was elected to his first term in 2002, and re-elected in 2006.

El Dorado County, California, District Attorney Vern Pierson

As a career prosecutor, Vern Pierson has served as a vertical prosecutor for domestic violence and sexual assault. He helped create the *Field Guide* used by thousands of California police officers, and he is the author of the annually-updated *California Evidence Pocketbook*. He teaches trial advocacy and the laws of evidence to California prosecutors. Since 1999, he has served on the committee that provides the annual legal revisions for Peace Officers Standards and Training (P.O.S.T.).

Fresno County, California, District Attorney Elizabeth A. Egan

Elizabeth Egan was elected in 2002. She heads one the of the largest prosecutorial agencies in California.

Glenn County, California, District Attorney Robert Holzapfel

Robert Holazpfel was first elected District Attorney of Glenn County in 1990 and was re-elected 1994, 1998, 2002, and 2006.

Imperial County, California, District Attorney Gilbert Otero

Gilbert Otero as first elected in 1992, and is currently serving his fourth term. He is Past President of the California District Attorneys Association.

Kern County, California, District Attorney Edward Jagels

Edward Jagels was first elected District Attorney of Kern County in 1983, at the age of 33. He is a Past President of the California District Attorneys Association. He has served on the Governor's Law Enforcement Steering Committee, the Attorney General's Policy Council on Violence Prevention, and was co-author and campaign chair of the Crime Victims Justice Reform Act (Prop. 115).

Kings County, California, District Attorney Ron Calhoun

Ron Calhoun was first elected in 1999, and is currently serving his third term.

Madera County District Attorney Ernest J. LiCalsi

Ernest J. LiCalsi was first elected in 1992. He is an Adjunct Professor at California State University, Fresno, where he teaches Criminal Legal Process and Advanced Criminal Legal Process for the Department of Criminology.

Mariposa County, California, District Attorney Robert H. Brown

Former Naval Commander Robert H. Brown began his career as a lawyer after retiring from the U.S. Navy. He has been a prosecutor since 1985, and was elected District Attorney in 2002 and re-elected in 2006.

Mendocino County, California, Sheriff Thomas D. Allman

Thomas Allman has been a law enforcement officer since 1981. He has served in a variety of assignments, including undercover narcotics work targeting methamphetamine. He was elected Sheriff in 2006.

Merced County, California, District Attorney Larry Morse

Larry Morse joined the District Attorney's office in 1993, and was elected District Attorney in 2006. He was named Prosecutor of the Year by A Women's Place of Merced County and by the Central Valley Arson Investigators Association.

Modoc County, California, District Attorney Gary Woolverton

After more than 30 years in private practice, specializing in workman's compensation, Gary Woolverton was elected District Attorney in 2006.

Mono County, California, District Attorney George Booth

George Booth has worked as both a criminal defense attorney and Deputy District Attorney and Assistant District Attorney for Mono County. He has been in the District Attorney's Office for 18 years.

Orange County, California District Attorney, Tony Rackauckas

Before being elected District Attorney, Tony Rackauckas had served as Presiding Judge of the Appellate Department of the Superior Court, and before that as a judge of the Superior Court and the Municipal Court. He was elected District Attorney in 1998, and re-elected in 2002 and 2006. During his time in office, gang membership has decreased by 8,500 members, a reduction of 45 percent. There are 55 fewer gangs.

Placer County, California, District Attorney Brad Fenocchio

Brad Fenocchio joined Placer County District Attorney's office in 1985, and was first elected District Attorney in 1994. He received the Rural and Medium County Outstanding Prosecutor of the Year Award for the State of California in 2003; the National Association of Counties 2003 Achievement Award presented to the Placer County District Attorney's Office for its innovative Community Agency Multidisciplinary Elder Team; and the Attorney General's Distinguished

Service Award for Elder Abuse Prosecution presented by California Attorney General's Office in 2003.

San Bernadino, California, District Attorney Michael Ramos

Michael Ramos was elected 2002 and re-elected in 2006. In 2004 he was appointed to California Victim Compensation and Government Claims Board, and was elected to the California District Attorneys Association Board of Directors. He was given the Latino of the Year Award in 1999, by the Redlands Northside Impact Committee.

Santa Barbara County, California, District Attorney Christie Stanley

Christie Stanley joined the Santa Barbara County District Attorney's office in 1980. In 1984 she was recognized as "Deputy District Attorney of the Year." She was elected in 2006.

Shasta County, California, District Attorney Gerald C. Benito

Shasta County, California, District Attorney Gerald C. Benito Gerald C. Benito was first elected District Attorney in 2003.

Sierra County, California, District Attorney Larry Allen

Larry Allen was elected District Attorney/Public Administrator of Sierra County on March 5, 2002 and took office as the County's 37th District Attorney on January 6, 2003.

Siskiyou County, California, District Attorney J. Kirk Andrus

J. Kirk Andrus was appointed District Attorney in 2005, and was elected in 2006. He is the youngest District Attorney in California.

Solano County, Calif., District Attorney David W. Paulson

Before joining the District Attorney's Office in 1977, David W. Paulson had served as a military trial judge and as an appellate military judge on the Navy's highest court, the Navy-Marine Corps Court of Criminal Appeals.

He was appointed District Attorney by the Board of Supervisors in 1993, elected in 1994, and re-elected in 1998, 2002, and 2006. He is a Past President (2004-2005) of the California District Attorneys Association (CDAA), and served as CDAA Director in 1995-1997.

He is also a Past President (2005-2006) of the Board of Directors of the Institute for the Advancement of Criminal Justice (IACJ), and currently serves

as the Editor-in-Chief of *The Journal of the Institute for the Advancement of Criminal Justice*. Mr. Paulson was recently appointed Chair of the Board of Advisors for the new LL.M. in Prosecutorial Science program at Chapman University School of Law.

Sutter County, California, District Attorney Carl V. Adams

Carl V. Adams is the senior elected District Attorney in California. He was first elected in 1982, and has been re-elected six times after that. He serves on the Board of the California District Attorneys Association.

Tehama County, California, District Attorney Gregg Cohen

Gregg Cohen was first elected in 1998, and is serving his 3rd term. He served on the California District Attorneys Association Board of Directors in 2005 and 2006, as Vice-Chairman of Rural Counties in 2007, and also served on the Corrections and Parole Committee. His prior experiences includes service in the Criminal Division of the San Diego City Attorney's Office, the Shasta County District Attorney's Office, in the U.S. Attorney's Office in San Diego, and in private firms specializing in toxic tort litigation.

Trinity County, California, District Attorney Michael Harper

Michael Harper was elected in 2006. Prior to taking office he was Deputy District Attorney in Trinity County from 2001-2007, and has worked as a prosecutor for 15 years.

Tulare County, California, District Attorney Phil Cline

Phil Cline began his career as a prosecutor in 1978 with the Tulare County District Attorney's Office. Before being appointed District Attorney in 1992, he had specialized for seven years in homicide cases. He was first elected in 1994. He created Tulare County's Rural Crime Program, the first of its kind in the nation. He is a Past President of the Tulare County Police Chiefs Association.

Ventura County, California, District Attorney Gregory Totten

Gregory Totten was first elected in 2002, and was re-elected in 2006. He has been named the Ventura County Kiwanis "Law Enforcement Officer of the Year." He serves on the Board of Directors of the California District Attorneys Association

Rep. Andy Olson

Oregon State Rep. Olson is Vice-chair of the Human Services and Women's Wellness Committee,

and also the Deputy Republican Leader. Before joining the legislature, he was a Lieutenant in the Oregon State Police, where he served for 29 years.

National Police Defense Foundation (NPDF)

The National Police Defense Foundation (NPDF) is a non-profit organization of over 100,000 members and supporters dedicated to protecting and defending law enforcement. The NPDF offers free medical support services to all law enforcement personnel who experience a job-related illness and disability. NPDF also provides legal support for police officers who are the victims of fabricated allegations, or of retaliation for whistle-blowing. NPDF's "Safe Cop" program was recognized by Congress in 1995; the program offers a $10,000 reward for public information leading to the arrest and conviction of any person who shoots a law enforcement officer. Safe Cop produced the information that led to the arrest and conviction of the murderers of Orange, New Jersey, Police Officer Joyce Carnegie and of Deputy Sheriff Paul Rein of the Broward County Sheriff's Department. The State Troopers Coalition of the National Police Defense Foundation was established to address the needs of state troopers nationwide. More than 60 law enforcement organizations are affiliated with NPDF.

Law Enforcement Alliance of America

Founded in 1991, the Law Enforcement Alliance of America (LEAA) has 75,000 members and supporters; they are law enforcement officers, crime victims, and concerned citizens. LEAA's focus is public education on effective crime control policies.

Independence Institute

Founded in 1985, the Independence Institute is a nonpartisan, nonprofit public policy research organization dedicated to providing information to concerned citizens, government officials, and public opinion leaders. It is based in Golden, Colorado.

Independence Institute staff have written or coauthored scores of law review and other scholarly articles on the gun issue, and several books, including the only law school textbook on the subject: ANDREW MCCLURG, DAVID B. KOPEL & BRANNON P. DENNING, GUN CONTROL AND GUN RIGHTS (NYU Press, 2002). The Institute's work has been cited in over 400 law review articles.

International Association of Law Enforcement Firearms Instructors

The International Association of Law Enforcement Firearms Instructors (IALEFI) is the world's largest association of police firearms instructors. Founded in 1981, IALEFI conducts national and regional training conferences for instructors. IALEFI

comprises over 10,000 members, approximately ninety percent of whom are active, non-retired instructors. IALEFI instructors include members of every federal law enforcement agency, and every branch of the U.S. military. Most IALEFI members are Americans, with Canadians comprising the largest group from the 15 other nations also having members. IALEFI publishes a quarterly magazine, *The Firearms Instructor*, and also publishes various manuals, including *Firearms Training Standards for Law Enforcement Personnel* and the *Standards & Practices Reference Guide for Law Enforcement Firearms Instructors.* IALEFI strongly supports the right of law-abiding citizens to own handguns for self-defense, and is particularly cognizant of how widespread civilian handgun ownership leads to better police firearms training, as described in Part I.G. of this Brief.

Exhibit E

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April 18, 2008

Mr. Mark Beckington
Deputy Attorney General
Government Law Section
California Department of Justice
300 South Spring St., Ste. 1702
Los Angeles, CA 90013
VIA FAX (213) 897-1071 & EMAIL

Re: Hunt, et al. v. State of California, et al.
County of Fresno, Superior Court Case No: 01CECG03182

Dear Mr. Beckington:

The purpose of this letter is to provide notice of the Ex Parte Application for Continuance of Trial, or in the Alternative Request for Temporary Stay of Proceedings Pending the United States Supreme Court's Ruling in *District of Columbia V. Heller*, Slip No. 07-290; Memorandum of Points and Authorities in Support Thereof; Declaration of Jason a Davis in Support Thereof; Exhibits "A-F" The Ex Parte Application will be heard on Tuesday, April 22, 2008, at 3:20 p.m. or as soon thereafter as it may be heard in department 97C of the Fresno Superior Court Civil Courthouse located at 2317 Tuolumne Street, Fresno, CA 93712.

Our office will provide your office with a copy of the Ex Parte Application via email by the close of business today. Additionally our office will personally serve a copy of the Ex Parte Application on your office on Monday, April 21, 2008.

Please do not hesitate to contact me if you have any questions or concerns. You can also reach me by email at jdavis@tmllp.com.

Sincerely,
TRUTANICH • MICHEL, LLP

Jason A. Davis

JAD/ca

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FAX TRANSMITTAL SHEET

TO: Mr. Mark Beckington

FAX NO: (213) 897-1071

TEL. NO: (213) 897-1096

FROM: Jason A Davis

DATE: April 18, 2008

RE: **EXPARTE NOTICE**
Hunt et al., v. State of California et al.,

THIS FAX CONTAINS COVER PAGE PLUS __1__ PAGES. IF YOU DO NOT RECEIVE ALL PAGES PLEASE CONTACT Claudia Ayala AT (562) 216-4444.

SPECIAL INSTRUCTIONS

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Transmitted please find our ExParte Notice for Tuesday, April 22, 2008, at 3:20 p.m.

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Exhibit F

*375 U.S. App. D.C. 140; 478 F.3d 370, *;*
*2007 U.S. App. LEXIS 5519, **

SHELLY PARKER, ET AL., APPELLANTS v. DISTRICT OF COLUMBIA AND ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA, APPELLEES

No. 04-7041

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

375 U.S. App. D.C. 140; 478 F.3d 370; 2007 U.S. App. LEXIS 5519

December 7, 2006, Argued
March 9, 2007, Decided

SUBSEQUENT HISTORY: Rehearing, en banc, denied by Parker v. District of Columbia, 2007 U.S. App. LEXIS 11029 (D.C. Cir., May 8, 2007)
Stay granted by Parker v. District of Columbia, 2007 U.S. App. LEXIS 12467 (D.C. Cir., May 24, 2007)
US Supreme Court certiorari granted by Dist. of Columbia v. Heller, 2007 U.S. LEXIS 12324 (U.S., Nov. 20, 2007)

PRIOR HISTORY: [1]** Appeal from the United States District Court for the District of Columbia. (No. 03cv00213).
Parker v. District of Columbia, 311 F. Supp. 2d 103, 2004 U.S. Dist. LEXIS 5268 (D.D.C., 2004)

DISPOSITION: The appellate court held that only one resident, a special police officer had standing. The district court's judgment was reversed and the case was remanded with an order to grant summary judgment to the special police officer.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant District of Columbia (District) residents challenged appellee District's gun laws, D.C. Code §§ 7-2502.02(a)(4), 7-2507.02, 22-4504 (insofar as § 22-4504 prevented carrying a pistol in a registrant's home). The United States District Court for the District of Columbia dismissed the complaint, holding that the Second Amendment bestowed no individual rights except, perhaps, when serving in an organized militia such as the National Guard.

OVERVIEW: There were no allegations the residents were singled out for prosecution and nothing showed they were punished for their challenges. Only one resident, a police officer, had applied for and been denied a handgun registration. Only he had an injury independent of prospective enforcement, and an injury to which the pre-enforcement standing requirements did not apply. Since D.C. Code §§ 7-2507.02, 22-4504, amounted to further conditions on his registration, he had standing. Handgun registration was not completely prohibited. "The right of the people," in the Second Amendment, when read intratextually and in light of United States Supreme Court precedent, led to the conclusion that the right was individual. All other Bill of Rights provisions, excepting the Tenth Amendment, protected rights citizens enjoyed in their individual capacity. The Second Amendment's operative clause included a private meaning for "bear Arms." D.C. Code § 7-2507.02 would reduce a pistol to being useless. It, like the bar on carrying a pistol in the home under D.C. Code § 22-4504, amounted to a complete unconstitutional prohibition on the lawful use of handguns for self-defense.

OUTCOME: The appellate court held that only one resident, a special police officer had standing. The district court's judgment was reversed and the case was remanded with an order to grant summary judgment to the special police officer.

CORE TERMS: militia, arm, bear arms, firearm, weapon, individual's right, military, pistol, handgun, regulated, federal government, gun, civic, standing army, ownership, armed, carrying, Militia Act, registration, preservation, prefatory, guard, license, bearing arms, self-defense, drafters, pre-enforcement, infringed, territory, enrolled

LEXISNEXIS® HEADNOTES - Hide

Civil Procedure > Justiciability > Standing > Injury in Fact
Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms

HN1 The injury-in-fact requirement should be applied uniformly over the First and Second Amendments. More Like This Headnote

Civil Procedure > Justiciability > Standing > Injury in Fact
Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements
Governments > Local Governments > Licenses
Governments > State & Territorial Governments > Licenses

HN2 Courts have consistently treated a license or permit denial pursuant to a state or federal administrative scheme as a U.S. Const. art. III injury. The interests injured by an adverse licensing determination may be interests protected at common

law, or they may be created by statute. And of course, a licensing decision can also trench upon constitutionally protected interests, which will also give rise to art. III injury. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Justiciability > Standing > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview
HN3 When considering whether a plaintiff has U.S. Const. art. III standing, a federal court must assume arguendo the merits of his or her legal claim. Indeed, in reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims. This is no less true when the merits involve the scope of a constitutional protection. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Justiciability > Standing > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview
HN4 Federal courts may choose any ground to deny jurisdiction, e.g., U.S. Const. art. III standing, prudential standing, or subject matter jurisdiction. There is no hierarchy which obliges a court to decide art. III standing issues before other jurisdictional questions. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN5 See U.S. Const. amend. II.

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN6 U.S. Const. amend. II's second comma divides the Second Amendment into two clauses; the first is prefatory, and the second operative. More Like This Headnote

Constitutional Law > Bill of Rights > General Overview
HN7 The United States Supreme Court has endorsed a uniform reading of "the people" across the Bill of Rights. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Congressional Duties & Powers > Reserved Powers
Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
HN8 "The people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with the United States to be considered part of that community. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN9 The Second Amendment's phrase "the right of the people," when read intratextually and in light of United States Supreme Court precedent, leads the United States Court of Appeals for the District of Columbia Circuit to conclude that the right in question is individual. This proposition is true even though "the people" at the time of the founding was not as inclusive a concept as "the people" today. To the extent that non-whites, women, and the propertyless were excluded from the protections afforded to "the people," the Equal Protection Clause of the Fourteenth Amendment is understood to have corrected that initial constitutional shortcoming. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN10 Because the right to arms existed prior to the formation of the new government, the Second Amendment only guarantees that the right "shall not be infringed." More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN11 To determine what interests the pre-existing right to arms protected, a court looks to the lawful, private purposes for which people of the time owned and used arms. The correspondence and political dialogue of the founding era indicate that arms were kept for lawful use in self-defense and hunting. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Congressional Duties & Powers > Reserved Powers
Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN12 Just as a court would read an ambiguous statutory term in light of its context, a court should read any supposed ambiguities in the Second Amendment in light of its context. Every other provision of the Bill of Rights, excepting the Tenth Amendment, which speaks explicitly about the allocation of governmental power, protects rights enjoyed by citizens in their individual capacity. The Second Amendment would be an inexplicable aberration if it were not read to protect individual rights as well. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN13 Just as it is clear that the phrase "to bear arms" was in common use as a byword for soldiering in the founding era, it is equally evident from a survey of late eighteenth- and early nineteenth-century state constitutional provisions that the public understanding of "bear Arms," as used in the Second Amendment, also encompassed the carrying of arms for private purposes such as self-defense. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN14 The operative clause of the Second Amendment includes a private meaning for "bear Arms." More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN15 "Keep," as used in the Second Amendment is a straightforward term that implies ownership or possession of a

functioning weapon by an individual for private use. More Like This Headnote

Military & Veterans Law > Defense Powers > General Overview
Military & Veterans Law > Servicemembers > U.S. National Guard
HN16 See 10 U.S.C.S. § 311.

Military & Veterans Law > Defense Powers > General Overview
Military & Veterans Law > Servicemembers > U.S. National Guard
HN17 10 U.S.C.S. § 311 distinguishes between the "organized militia," which consists of the National Guard and Naval Militia, and the "unorganized militia," which consists of every member of the militia who is not a member of the National Guard or Naval Militia. Congress defined the militia broadly, and, more explicitly than in its founding-era counterpart, Congress provided that a large portion of the militia would remain unorganized. More Like This Headnote

Governments > Local Governments > Police Power
Military & Veterans Law > General Overview
HN18 See D.C. Code § 49-401.

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN19 The "well regulated Militia" referenced in the Second Amendment was not an elite or select body. The popular nature of the militia is consistent with an individual right to keep and bear arms: preserving an individual right was the best way to ensure that the militia could serve when called. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN20 The Second Amendment's prefatory language announcing the desirability of a well-regulated militia--even bearing in mind the breadth of the concept of a militia--is narrower than the guarantee of an individual right to keep and bear arms. The Second Amendment does not protect "the right of militiamen to keep and bear arms," but rather "the right of the people." The operative clause, properly read, protects the ownership and use of weaponry beyond that needed to preserve the state militias. If the competent drafters of the Second Amendment had meant the right to be limited to the protection of state militias, it is hard to imagine that they would have chosen the language they did. It is therefore an expression of the drafters' view that the people possessed a natural right to keep and bear arms, and that the preservation of the militia was the right's most salient political benefit--and thus the most appropriate to express in a political document. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Rights Law > Section 1983 Actions > Elements > Color of State Law > General Overview
Constitutional Law > Congressional Duties & Powers > District of Columbia & Federal Property
Constitutional Law > Bill of Rights > State Application
Governments > Federal Government > General Overview
HN21 The District of Columbia is a Federal District, ultimately controlled by Congress. Although subject to 42 U.S.C.S. § 1983 suits by federal law, An Act to Permit Civil Suits Under § 1983 Against Any Person Acting Under Color of Any Law or Custom of the District of Columbia, Pub. L. No. 96-170, 93 Stat. 1284 (1979), the District of Columbia is directly constrained by the entire Bill of Rights, without need for the intermediary of incorporation. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN22 The Second Amendment protects an individual right to keep and bear arms. Despite the importance of the Second Amendment's civic purpose, however, the activities it protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Congressional Duties & Powers > District of Columbia & Federal Property
Constitutional Law > Bill of Rights > General Overview
HN23 The United States Supreme Court has unambiguously held that the United States Constitution and Bill of Rights are in effect in the District of Columbia. The mere cession of the District of Columbia to the federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN24 With "a free State," as used in the Second Amendment, the United States Court of Appeals for the District of Columbia Circuit understands the framers to have been referring to republican government generally. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Congressional Duties & Powers > Reserved Powers
Constitutional Law > Bill of Rights > General Overview
HN25 The Tenth Amendment does not limit "the people" to state citizens. Rather, the Tenth Amendment reserves powers to "the States respectively, or to the people." No case holds that "the people," as used in the Tenth Amendment, are distinct from "the people" referred to elsewhere in the Bill of Rights. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom
Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
HN26 The modern handgun--and for that matter the rifle and long-barreled shotgun--is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon, and it passes the standards for what sort of weapons covered by the Second Amendment. just as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, e.g., radio and television, and the Fourth

Amendment protects telephonic conversation from a "search," the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Time, Place & Manner
Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN27 The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
HN28 Handguns are "Arms" referred to in the Second Amendment. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
Criminal Law & Procedure > Criminal Offenses > Weapons > Licenses > Holders > General Overview
HN29 Just as the District of Columbia may not flatly ban the keeping of a handgun in the home, obviously it may not prevent it from being moved throughout one's house. Such a restriction would negate the lawful use upon which the Second Amendment right was premised--i.e., self-defense. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms
Criminal Law & Procedure > Criminal Offenses > Weapons > Licenses > Holders > General Overview
HN30 D.C. Code § 7-2507.02 would reduce a pistol to a useless hunk of "metal and springs." Section 7-2507.02, like the bar on carrying a pistol within the home under D.C. Code § 22-4504 and a companion provision, D.C. Code § 22-4506, amounts to a complete prohibition on the lawful use of handguns for self-defense. As such, it is unconstitutional. More Like This Headnote

COUNSEL: Alan Gura argued the cause for appellants. With him on the briefs were Robert A. Levy and Clark M. Neily, III.

Greg Abbott, Attorney General, Attorney General's Office of State of Texas, R. Ted Cruz, Solicitor General, Troy King, Attorney General, Attorney General's Office of State of Alabama, Mike Beebe, Attorney General, Attorney General's Office of the State of Arkansas, John W. Suthers, Attorney General, Attorney General's Office of the State of Colorado, Charles J. Crist, Jr., Attorney General, Attorney General's Office of the State of Florida, Thurbert E. Baker, Attorney General, Attorney General's Office of the State of Georgia, Michael A. Cox, Attorney General, Attorney General's Office of the State of Michigan, Mike Hatch, Attorney General, Attorney General's Office of the State of Minnesota, Jon Bruning, Attorney General, Attorney General's Office of the State of Nebraska, Wayne Stenehjem, Attorney General, Attorney General's Office of the State of North Dakota, Jim Petro, Attorney General, Attorney General's Office of the State of Ohio, Mark L. Shurtleff, Attorney General, **[**2]** Attorney General's Office of the State of Utah, and Patrick J. Crank, Attorney General, Attorney General's Office of the State of Wyoming, were on the brief for amici curiae States of Texas, et. al. in support of appellants.

Don B. Kates and Daniel D. Polsby were on the brief for amici curiae Professors Frederick Bieber, et al. and organization amici curiae Second Amendment Foundation, et al.

Stefan Bijan Tahmassebi was on the brief for amicus curiae Congress of Racial Equality, Inc. in support of appellants seeking reversal.

Peter J. Ferrara was on the brief for amicus curiae American Civil Rights Union in support of appellants.

Robert Dowlut was on the brief for amicus curiae National Rifle Association Civil Rights Defense Fund in support of appellants seeking reversal.

Todd S. Kim, Solicitor General, Office of Attorney General for the District of Columbia, argued the cause for appellees. With him on the brief were Robert J. Spagnoletti, Attorney General, Edward E. Schwab, Deputy Solicitor General, and Lutz Alexander Prager, Assistant Attorney General.

Ernest McGill, Pro se, was on the brief for amicus curiae Ernest McGill in support of appellees.

Thomas **[**3]** F. Reilly, Attorney General, Attorney General's Office of Commonwealth of Massachusetts, Glenn S. Kaplan, Assistant Attorney General, Lawrence G. Walden, Attorney General, Attorney General's Office of the State of Idaho, J. Joseph Curran, Jr., Attorney General, Attorney General's Office of the State of Maryland, Zulima V. Farber, Attorney General, Attorney General's Office of the State of New Jersey, were on the brief for amici curiae Commonwealth of Massachusetts, et al. in support of appellee. John Hogrogian, Attorney, Corporation Counsel's Office of City of New York, and Benna Ruth Solomon, Deputy Coporation Counsel, Office of The Corporation Counsel of the City of Chicago, entered appearances.

Andrew L. Frey, David M. Gossett, Danny Y. Chou, Deputy City Attorney, Office of the City Attorney of the City and County of San Francisco, and John A. Valentine, were on the brief for amici curiae The Brady Center to Prevent Gun Violence, et al. in support of appellees. Eric J. Mogilnicki entered an appearance.

JUDGES: Before: HENDERSON and GRIFFITH, Circuit Judges, and SILBERMAN, Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge SILBERMAN. Dissenting opinion filed by Circuit Judge HENDERSON.

OPINION BY: SILBERMAN

OPINION

[4]** **[*373]** SILBERMAN, *Senior Circuit Judge*: Appellants contest the district court's dismissal of their complaint alleging that the District of Columbia's gun control laws violate their Second Amendment rights. The court held that the Second Amendment ("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") does not bestow any rights on individuals except, perhaps, when an individual serves in an organized militia such as today's National Guard. We reverse.

I

Appellants, six residents of the District, challenge D.C. Code § 7-2502.02(a)(4), which generally bars the registration of handguns (with an exception for retired D.C. police officers); D.C. Code § 22-4504, which prohibits carrying a pistol without a license, insofar as that provision would prevent a registrant from moving a gun from one room to another within his or her home; and D.C. Code § 7-2507.02, requiring that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device. Shelly Parker, Tracey Ambeau, Tom **[**5]** G. Palmer, and George Lyon want to possess handguns in their respective homes for self-defense. Gillian St. Lawrence owns a registered shotgun, but wishes to keep it assembled and unhindered by a trigger lock or similar device. Finally, Dick Heller, who is a District of Columbia special police **[*374]** officer permitted to carry a handgun on duty as a guard at the Federal Judicial Center, wishes to possess one at his home. Heller applied for and was denied a registration certificate to own a handgun. The District, in refusing his request, explicitly relied on D.C. Code § 7-2502.02(a)(4).

Essentially, the appellants claim a right to possess what they describe as "functional firearms," by which they mean ones that could be "readily accessible to be used effectively when necessary" for self-defense in the home. They are not asserting a right to carry such weapons outside their homes. Nor are they challenging the District's authority *per se* to require the registration of firearms.

Appellants sought declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202, and 42 U.S.C. § 1983, **[**6]** but the court below granted the District's motion to dismiss on the grounds that the Second Amendment, at most, protects an individual's right to "*bear* arms for service in the Militia." (The court did not refer to the word "keep" in the Second Amendment.) And, by "Militia," the court concluded the Second Amendment referred to an organized military body--such as a National Guard unit.

II

After the proceedings before the district judge, we decided *Seegars v. Ashcroft*, 364 U.S. App. D.C. 512, 396 F.3d 1248 (D.C. Cir. 2005). We held that plaintiffs bringing a pre-enforcement challenge to the District's gun laws had not yet suffered an injury-in-fact and, therefore, they lacked constitutional standing. Although plaintiffs expressed an intention to violate the District's gun control laws, prosecution was not imminent. We thought ourselves bound by our prior decision in *Navegar, Inc. v. United States*, 322 U.S. App. D.C. 288, 103 F.3d 994 (D.C. Cir. 1997), to conclude that the District's general threat to prosecute violations of its gun laws did not constitute an Article III injury. *Navegar* involved a pre-enforcement challenge by a gun manufacturer **[**7]** to certain provisions of the Violent Crime Control and Law Enforcement Act of 1994, which prohibited the manufacture (and possession) of semiautomatic assault weapons. We held then that the manufacturers whose products the statute listed *eo nomine* had standing to challenge the law in question because the effect of the statute was to single out individual firearms purveyors for prosecution. *Id.* at 999. However, manufacturers whose products were described solely by their characteristics had no pre-enforcement standing because the threat of prosecution was shared among the (presumably) many gun manufacturers whose products fit the statutory description, and, moreover, it was not clear how these descriptive portions of the statute would be enforced. *Id.* at 1001.

In *Navegar*, then, the "factor . . . most significant in our analysis" was "the statute's own identification of particular products manufactured only by appellants" because that indicated a "special priority" for preventing specified parties from engaging in a particular type of conduct. *Id.* Extending *Navegar*'s logic to *Seegars*, we said the *Seegars* plaintiffs were required to show that the District **[**8]** had singled them out for prosecution, as had been the case with at least one of the manufacturer plaintiffs in *Navegar*. Since the *Seegars* plaintiffs could show nothing more than a general threat of prosecution by the District, we held their feared injury insufficiently imminent to support Article III standing. 396 F.3d at 1255-56.

We recognized in *Seegars* that our analysis in *Navegar* was in tension with the Supreme Court's treatment of a pre-enforcement challenge to a criminal statute that allegedly threatened constitutional rights. *See id.* (citing *Babbitt v. United* **[*375]** *Farm Workers Nat'l Union*, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)). In *United Farm Workers*, the Supreme Court addressed the subject of pre-enforcement challenges in general terms:

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

442 U.S. at 298 (quoting *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973)). **[**9]** The unqualified language of *United Farm Workers* would seem to encompass the claims raised by the *Seegars* plaintiffs, as well as the appellants here. Appellants' assertions of Article III standing also find support in the Supreme Court's decision in *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988), which allowed a pre-enforcement challenge to a Virginia statute criminalizing the display of certain types of sexually explicit material for commercial purposes. In that case, the Court held it sufficient for plaintiffs to allege "an actual and well-founded fear that the law will be enforced against them," *id.* at 393, without any additional requirement that the challenged statute single out particular plaintiffs by name. [1] In both *United Farm Workers* and *American Booksellers*, the Supreme Court took a far more relaxed stance on pre-enforcement challenges than *Navegar* and *Seegars* permit. Nevertheless, unless and until this court en banc overrules these recent precedents, we must be faithful to *Seegars* just as the majority in *Seegars* was faithful to *Navegar*.

FOOTNOTES

1 Of course, *American Booksellers* can be distinguished from *Navegar*, *Seegars*, and the present case, on the ground that the constitutional challenge at issue there implicated the First (as opposed to the Second) Amendment. The *American Booksellers* Court was concerned that Virginia's statute might chill speech without any prosecution ever taking place, 484 U.S. at 393, thereby creating a wrong without remedy if pre-enforcement standing were denied. But in deciding whether to privilege one amendment to the U.S. Constitution over another in assessing injury-in-fact, we note the statement of our dissenting colleague in *Seegars*: "I know of no hierarchy of Bill of Rights protections that dictates different standing analysis." 396 F.3d at 1257 (Sentelle, J., dissenting). The *Seegars* majority, although it felt constrained by *Navegar* to reach a different result, tacitly agreed with Judge Sentelle's assessment that HN1↑the injury-in-fact requirement should be applied uniformly over the First and Second Amendments (and presumably all other constitutionally protected rights). *Id.* at 1254.

[10]** Applying *Navegar-Seegars* to the standing question in this case, we are obliged to look for an allegation that appellants here have been singled out or uniquely targeted by the D.C. government for prosecution. No such allegation has been made; with one exception, appellants stand in a position almost identical to the *Seegars* plaintiffs. Appellants attempt to distinguish their situation from that of the *Seegars* plaintiffs by pointing to "actual" and "specific" threats, Appellants' Br. at 21, lodged against appellants by D.C. during the course of the district court litigation. But this is insufficient. None of the statements cited by appellants expresses a "special priority" for preventing *these* appellants from violating the gun laws, or a particular interest in punishing *them* for having done so. Rather, the District appears to be expressing a sentiment ubiquitous among stable governments the world over, to wit, scofflaws will be punished.

The noteworthy distinction in this case--a distinction mentioned in appellants' complaint and pressed by them on **[*376]** appeal--is that appellant Heller has applied for and been denied a registration certificate to own a handgun, a fact **[**11]** not present in *Seegars*. The denial of the gun license is significant; it constitutes an injury independent of the District's prospective enforcement of its gun laws, and an injury to which the stringent requirements for pre-enforcement standing under *Navegar* and *Seegars* would not apply. Since D.C. Code § 22-4504 (prohibition against carrying a pistol without a license) and D.C. Code § 7-2507.02 (disassembly/trigger lock requirement) would amount to further conditions on the certificate Heller desires, Heller's standing to pursue the license denial would subsume these other claims too.

This is not a new proposition. HN2 We have consistently treated a license or permit denial pursuant to a state or federal administrative scheme as an Article III injury. *See, e.g.*, *Cassell v. F.C.C.*, 332 U.S. App. D.C. 156, 154 F.3d 478 (D.C. Cir. 1998) (reviewing denial of license application to operate private land mobile radio service); *Wilkett v. I.C.C.*, 228 U.S. App. D.C. 350, 710 F.2d 861 (D.C. Cir. 1983) (reviewing denial of application for expanded trucking license); *see also City of Bedford v. F.E.R.C.*, 231 U.S. App. D.C. 126, 718 F.2d 1164, 1168 (D.C. Cir. 1983) **[**12]** (describing wrongful denial of a preliminary hydroelectric permit as an injury warranting review). The interests injured by an adverse licensing determination may be interests protected at common law, or they may be created by statute. And of course, a licensing decision can also trench upon constitutionally protected interests, *see, e.g.*, *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 339 U.S. App. D.C. 127, 198 F.3d 874 (D.C. Cir. 1999) (reviewing District of Columbia's denial of a building permit under the Takings Clause); *Berger v. Bd. of Psychologist Exam'rs*, 172 U.S. App. D.C. 396, 521 F.2d 1056 (D.C. Cir. 1975) (reviewing District of Columbia's denial of a license to practice psychology under the Due Process Clause), which will also give rise to Article III injury.

At oral argument, counsel for the District maintained that we should not view this as a licensing case for standing purposes because D.C.'s firearm registration system amounts to a complete prohibition on handgun ownership. The District argues that we must analyze appellants' standing exclusively under our pre-enforcement precedents, *Seegars* and *Navegar*. We **[**13]** disagree on both counts. The District does not *completely* prohibit handgun registration. *See* D.C. Code § 7-2502.02(a)(4) (allowing certificates for pistols already registered in the District prior to 1976); D.C. Code § 7-2502.02(b) (excluding retired police officers of the Metropolitan Police Department from the ban on pistol registration). Had Heller been a retired police officer, presumably the District would have granted him a registration certificate. The same would be true if Heller had attempted to register a long gun, as opposed to a handgun. In any event, Heller has invoked his rights under the Second Amendment to challenge the statutory classifications used to bar his ownership of a handgun under D.C. law, and the formal process of application and denial, however routine, makes the injury to Heller's alleged constitutional interest concrete and particular. He is not asserting that his injury is only a threatened prosecution, nor is he claiming only a general right to handgun ownership; he is asserting a right to a registration certificate, the denial of which is his distinct injury.

We note that the Ninth Circuit **[**14]** has recently dealt with a Second Amendment claim by first extensively analyzing that provision, determining that it does not provide an individual right, and then, and only then, concluding that the plaintiff lacked standing to challenge a California statute restricting the possession, use, and transfer of assault weapons. *See Silveira v. Lockyer*, 312 F.3d 1052, 1066-67 & n.18 **[*377]** (9th Cir. 2003). We think such an approach is doctrinally quite unsound. The Supreme Court has made clear that HN3 when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim. *See Warth v. Seldin*, 422 U.S. 490, 501-02, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (assuming factual allegations and legal theory of complaint for purposes of standing analysis). We have repeatedly recognized that proposition. *See Waukesha v. E.P.A.*, 355 U.S. App. D.C. 100, 320 F.3d 228, 235 (D.C. Cir. 2003); *Am. Fed'n of Gov't Employees, AFL-CIO v. Pierce*, 225 U.S. App. D.C. 61, 697 F.2d 303, 305 (D.C. Cir. 1982). "Indeed, in reviewing the standing question, the court must be careful not to decide the questions **[**15]** on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Waukesha*, 320 F.3d at 235 (citing *Warth*, 422 U.S. at 502). This is no less true when, as here, the merits involve the scope of a constitutional protection.

Still, we have not always been so clear on this point. Although we recognized in *Claybrook v. Slater*, 324 U.S. App. D.C. 145, 111 F.3d 904 (D.C. Cir. 1997), that it was not necessary for a plaintiff to demonstrate that he or she would prevail on the merits in order to have Article III standing, the rest of our discussion seems somewhat in tension with that proposition. We did recognize that in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), when the Supreme Court used the phrase "legally protected interest" as an element of injury-in-fact, it made clear it was referring only to a "cognizable interest." *Claybrook*, 111 F.3d at 906-07. The Court in *Lujan* concluded that plaintiffs had a "cognizable interest" in observing animal species without considering whether the plaintiffs **[**16]** had a legal *right* to do so. *Id.* (citing *Lujan*, 504 U.S. at 562-63). We think it plain the *Lujan* Court did not mean to suggest a return to the old "legal right" theory of standing rejected in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153-54, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970), because it cited *Warth*, *inter alia*, as precedent for the sentence which included the phrase "legally protected interest." *Lujan*, 504 U.S. at 560. Rather, the cognizable interest to which the Court referred would distinguish, to pick one example, a desire to observe certain aspects of the environment from a generalized wish to see the Constitution and laws obeyed. Indeed, in *Judicial Watch, Inc. v. United States Senate*, 369 U.S. App. D.C. 42, 432 F.3d 359 (D.C. Cir. 2005), Judge Williams wrote an extensive concurring opinion (not inconsistent with the majority opinion) in which he persuasively explains that the term "legally protected interest," as used in *Lujan*, could not have been intended to deviate from *Warth*'s general proposition that we assume the merits when evaluating standing. **[**17]** *Id.* at 363-66.

In *Claybrook*, we went on to say, quite inconsistently, that "if the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue." *Claybrook*, 111 F.3d at 907. We concluded that plaintiff lacked standing, however, because the government agency in that case had unfettered discretion to take the action it did, and therefore there was "no law to apply." *Id.* at 908. Thus the decision in *Claybrook* was actually based on a separate jurisdictional ground--reviewability under the Administrative Procedure Act--and HN4 federal courts may choose any ground to deny jurisdiction, e.g., Article III standing, prudential standing, or

subject matter jurisdiction. *See Judicial Watch*, 432 F.3d at 366 (Williams, J., concurring) (noting that *Claybrook* is hard to classify as a standing opinion). There is no hierarchy which obliges a court to decide Article III standing **[*378]** issues before other jurisdictional questions. *In re Papandreou*, 329 U.S. App. D.C. 210, 139 F.3d 247, 255-56 (D.C. Cir. 1998). Therefore, we do not read *Claybrook* to stand for the proposition, *contra Warth*, that we must evaluate **[**18]** the existence *vel non* of appellants' Second Amendment claim as a standing question. [2]

FOOTNOTES

2 Admittedly, in *Taylor v. F.D.I.C.*, 328 U.S. App. D.C. 52, 132 F.3d 753, 767 (D.C. Cir. 1997), we observed that the causation requirement of standing could coincide with the causal element in a cause of action. *But cf. id.* at 770 (Rogers, J., concurring). Whether that was correct or not, we concluded that even in that unique situation, not present here, we had discretion to decide the case on the merits or on standing grounds. *Id.* at 767-68.

In sum, we conclude that Heller has standing to raise his § 1983 challenge to specific provisions of the District's gun control laws.

III

As we noted, the Second Amendment provides:

> HN5 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.

U.S. CONST. amend. II.

HN6 The provision's second comma divides the Amendment into two clauses; the first is prefatory, **[**19]** and the second operative. Appellants' argument is focused on their reading of the Second Amendment's operative clause. According to appellants, the Amendment's language flat out guarantees an individual right "to keep and bear Arms." Appellants concede that the prefatory clause expresses a civic purpose, but argue that this purpose, while it may inform the meaning of an ambiguous term like "Arms," does not qualify the right guaranteed by the operative portion of the Amendment.

The District of Columbia argues that the prefatory clause declares the Amendment's only purpose--to shield the state militias from federal encroachment--and that the operative clause, even when read in isolation, speaks solely to military affairs and guarantees a civic, rather than an individual, right. In other words, according to the District, the operative clause is not just limited by the prefatory clause, but instead both clauses share an explicitly civic character. The District claims that the Second Amendment "protects private possession of weapons *only* in connection with performance of civic duties as part of a well-regulated citizens militia organized for the security of a free state." Individuals **[**20]** may be able to enforce the Second Amendment right, but only if the law in question "will impair their participation in common defense and law enforcement when called to serve in the militia." But because the District reads "a well regulated Militia" to signify only the organized militias of the founding era--institutions that the District implicitly argues are no longer in existence today--invocation of the Second Amendment right is conditioned upon service in a defunct institution. Tellingly, we think, the District did not suggest what sort of law, if any, would violate the Second Amendment today--in fact, at oral argument, appellees' counsel asserted that it would be constitutional for the District to ban all firearms outright. In short, we take the District's position to be that the Second Amendment is a dead letter.

We are told by the District that the Second Amendment was written in response to fears that the new federal government would disarm the state militias by preventing men from bearing arms while in actual militia service, or by preventing them from keeping arms at home in preparation for such service. Thus the Amendment should be understood to check federal power to **[**21]** regulate firearms only when **[*379]** federal legislation was directed at the abolition of state militias, because the Amendment's *exclusive* concern was the preservation of those entities. At first blush, it seems passing strange that the able lawyers and statesmen in the First Congress (including James Madison) would have expressed a sole concern for state militias with the language of the Second Amendment. Surely there was a more direct locution, such as "Congress shall make no law disarming the state militias" or "States have a right to a well-regulated militia."

The District's argument--as strained as it seems to us--is hardly an isolated view. In the Second Amendment debate, there are two camps. On one side are the collective right theorists who argue that the Amendment protects only a right of the various state governments to preserve and arm their militias. So understood, the right amounts to an expression of militant federalism, prohibiting the federal government from denuding the states of their armed fighting forces. On the other side of the debate are those who argue that the Second Amendment protects a right of individuals to possess arms for private use. To these individual **[**22]** right theorists, the Amendment guarantees personal liberty analogous to the First Amendment's protection of free speech, or the Fourth Amendment's right to be free from unreasonable searches and seizures. However, some entrepreneurial scholars purport to occupy a middle ground between the individual and collective right models.

The most prominent in-between theory developed by academics has been named the "sophisticated collective right" model. [3] The sophisticated collective right label describes several variations on the collective right theme. All versions of this model share two traits: They (1) acknowledge individuals could, theoretically, raise Second Amendment claims against the federal government, but (2) define the Second Amendment as a purely civic provision that offers no protection for the private use and ownership of arms.

FOOTNOTES

3 *See United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004); *United States v. Price*, 328 F.3d 958, 961 (7th Cir. 2003); *United States v. Emerson*, 270 F.3d 203, 219 (5th Cir. 2001); *Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 218 (D.D.C. 2004); *see also* Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1003-04 (1995).

[23]** The District advances this sort of theory and suggests that the ability of individuals to raise Second Amendment claims serves to distinguish it from the pure collective right model. But when seen in terms of its practical consequences, the fact that individuals have standing to invoke the Second Amendment is, in our view, a distinction without a difference. *But cf. United States v.*

Emerson, 270 F.3d 203, 218-21 (5th Cir. 2001) (treating the sophisticated collective right model as distinct from the collective right theory). Both the collective and sophisticated collective theories assert that the Second Amendment was written for the exclusive purpose of preserving state militias, and both theories deny that individuals *qua* individuals can avail themselves of the Second Amendment today. The latter point is true either because, as the District appears to argue, the "Militia" is no longer in existence, or, as others argue, because the militia's modern analogue, the National Guard, is fully equipped by the federal government, creating no need for individual ownership of firearms. It appears to us that for all its nuance, the sophisticated collective right model amounts **[**24]** to the old collective right theory giving a tip of the hat to the problematic (because ostensibly individual) text of the Second Amendment.

[*380] The lower courts are divided between these competing interpretations. Federal appellate courts have largely adopted the collective right model. [4] Only the Fifth Circuit has interpreted the Second Amendment to protect an individual right. [5] State appellate courts, whose interpretations of the U.S. Constitution are no less authoritative than those of our sister circuits, offer a more balanced picture. [6] And the United States Department of Justice has recently adopted the individual right model. *See* Op. Off. of Legal Counsel, "Whether the Second Amendment Secures an Individual Right" (2004) *available at* http://www.usdoj.gov/olc/secondamendment2.pdf; *see also* Memorandum from John Ashcroft, Attorney General, to All United States' Attorneys (Nov. 9, 2001), *reprinted in* Br. for the United States in Opposition at 26, *Emerson*, 536 U.S. 907, 122 S. Ct. 2362, 153 L. Ed. 2d 184 (No. 01-8780). The great legal treatises of the nineteenth century support the individual right interpretation, *see Silveira v. Lockyer*, 328 F.3d 567, 583-85 (9th Cir. 2003) **[**25]** (Kleinfeld, J., dissenting from denial of rehearing en banc); *Emerson*, 270 F.3d at 236, 255-59, as does Professor Laurence Tribe's leading treatise on constitutional law. [7] Because we have no direct precedent-- **[*381]** either in this court or the Supreme Court--that provides us with a square holding on the question, we turn first to the text of the Amendment.

FOOTNOTES

[4] *See Silveira*, 312 F.3d at 1092; *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1273-74 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916, 921-23 (1st Cir. 1942).

The District cites a decision in the Second Circuit, *United States v. Toner*, 728 F.2d 115 (2d Cir. 1984), as holding that the **[*382]** Second Amendment protects only a right related to "civic purposes." The District's reliance on this case is plainly wrong. In *Toner*, the court stated only that the Second Amendment right was not "fundamental." *Id.* at 128. The opinion in no way addressed the question whether the Second Amendment requires that use and possession of a weapon be for civic purposes. We are not aware of any Second Circuit decision that directly addresses the collective versus individual nature of the Second Amendment right. *See Silveira*, 312 F.3d at 1063 n.11 (noting that only the Second and D.C. Circuits had yet to decide nature of Second Amendment right). **[**26]**

[5] *Emerson*, 270 F.3d at 264-65.

[6] Of the state appellate courts that have examined the question, at least seven have held that the Second Amendment protects an individual right, *see Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. Ct. App. 1988); *Brewer v. Commonwealth*, 206 S.W.3d 343, 347 & n.5 (Ky. 2006); *State v. Blanchard*, 776 So. 2d 1165, 1168 (La. 2001); *State v. Nickerson*, 126 Mont. 157, 247 P.2d 188, 192 (Mont. 1952); *Stillwell v. Stillwell*, 2001 Tenn. App. LEXIS 562, 2001 WL 862620, at *4 (Tenn. Ct. App. July 30, 2001); *State v. Anderson*, 2000 Tenn. Crim. App. LEXIS 60, 2000 WL 122218, at *7 n.3 (Tenn. Crim. App. Jan. 26, 2000); *State v. Williams*, 158 Wn.2d 904, 148 P.3d 993, 998 (Wash. 2006); *Rohrbaugh v. State*, 216 W. Va. 298, 607 S.E.2d 404, 412 (W. Va. 2004), whereas at least ten state appellate courts (including the District of Columbia) have endorsed the collective right position, *see United States v. Sandidge*, 520 A.2d 1057, 1058 (D.C. 1987); *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E.2d 847, 850 (Mass. 1976); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980); *Harris v. State*, 83 Nev. 404, 432 P.2d 929, 930 (Nev. 1967); *Burton v. Sills*, 53 N.J. 86, 248 A.2d 521, 526 (N.J. 1968); *In re Cassidy*, 268 A.D. 282, 51 N.Y.S.2d 202, 205 (N.Y. App. Div. 1944); *State v. Fennell*, 95 N.C. App. 140, 382 S.E.2d 231, 232 (N.C. Ct. App. 1989); *Mosher v. City of Dayton*, 48 Ohio St. 2d 243, 358 N.E.2d 540, 543 (Ohio 1976); *Masters v. State*, 653 S.W.2d 944, 945 (Tex. App. 1983); *State v. Vlacil*, 645 P.2d 677, 679 (Utah 1982); *see also Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 470 N.E.2d 266, 269, 83 Ill. Dec. 308 (Ill. 1984) (stating in dicta that Second Amendment protects collective right). **[**27]**

[7] *See* 1 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 902 & n.221 (3d ed. 2000). Professor Tribe was not always of this view. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 640 (1989) (critiquing Tribe's earlier collective right position).

A

We start by considering the competing claims about the meaning of the Second Amendment's operative clause: "the right of the people to keep and bear Arms shall not be infringed." Appellants contend that "the right of the people" clearly contemplates an individual right and that "keep and bear Arms" necessarily implies private use and ownership. The District's primary argument is that "keep and bear Arms" is best read in a military sense, and, as a consequence, the entire operative clause should be understood as granting only a collective right. The District also argues that "the right of the people" is ambiguous as to whether the right protects civic or private ownership and use of weapons.

In determining whether the Second Amendment's guarantee is an individual one, or some sort of collective right, **[**28]** the most important word is the one the drafters chose to describe the holders of the right--"the people." That term is found in the First, Second, Fourth, Ninth, and Tenth Amendments. It has never been doubted that these provisions were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation. We also note that the Tenth Amendment--"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people"--indicates that the authors of the Bill of Rights were perfectly capable of distinguishing between "the people," on the one hand, and "the states," on the other. The natural reading of "the right of the people" in the Second Amendment would accord with usage elsewhere in the Bill of Rights.

The District's argument, on the other hand, asks us to read "the people" to mean some subset of individuals such as "the organized militia" or "the people who are engaged in militia service," or perhaps not any individuals at all--e.g., "the states." *See* Emerson, 270 F.3d at 227. These strained interpretations of "the people" simply cannot **[**29]** be squared with the uniform construction of our other Bill of Rights provisions. Indeed, HN7 the Supreme Court has recently endorsed a uniform reading of "the people" across the Bill of Rights. In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990), the Court looked specifically at the Constitution and Bill of Rights' use of "people" in the course of holding that the Fourth Amendment did not protect the rights of non-citizens on foreign soil:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." *See also* U.S. CONST., amdt. 1; Art. I, § 2, cl. 1. While this textual exegesis is by no means conclusive, it suggests that HN8 "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to **[**30]** a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Id. at 265. It seems unlikely that the Supreme Court would have lumped these provisions together without comment if it were of the view that the Second Amendment protects only a collective right. The Court's discussion certainly indicates--if it does not definitively determine--that we should not regard "the people" in the Second Amendment as somehow restricted to a small subset of "the people" meriting protection under the other Amendments' use of that same term.

In sum, HN9 the phrase "the right of the people," when read intratextually and in light of Supreme Court precedent, leads us to conclude that the right in question is individual. This proposition is true even though "the people" at the time of the founding was not as inclusive a concept as "the people" today. *See* Robert E. Shallope, *To Keep and Bear Arms in the Early Republic*, 16 CONST. COMMENT. 269, 280-81 (1999). To the extent that non-whites, women, and the propertyless were excluded from the protections afforded **[**31]** to "the people," the Equal Protection Clause of the Fourteenth Amendment is understood to have corrected that initial constitutional shortcoming.

The wording of the operative clause also indicates that the right to keep and bear arms was not created by government, but rather preserved by it. *See* Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 890 (1997). Hence, the Amendment acknowledges "*the* right . . . to keep and bear Arms," a right that pre-existed the Constitution like " *the* freedom of speech." HN10 Because the right to arms existed prior to the formation of the new government, *see Robertson v. Baldwin*, 165 U.S. 275, 280, 17 S. Ct. 326, 41 L. Ed. 715 (1897) (describing the origin of the Bill of Rights in English law), the Second Amendment only guarantees that the right "shall not be infringed." Thomas Cooley, in his influential treatise, observed that the Second Amendment had its origins in the struggle with the Stuart monarchs in late-seventeenth-century England. *See* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES **[**32]** OF AMERICA 270-72 (Rothman & Co. 1981) (1880). [8]

FOOTNOTES

[8] Indeed, England's Bill of Rights of 1689 guaranteed "[t]hat the Subjects, which are Protestants, may have Arms for their Defence, suitable to their conditions, as allowed by law." 1 W. & M., Sess. 2, c. 2. Here too, however, the right was not newly created, but rather recognized as part of the common law tradition. The ancient origin of the right in England was affirmed almost a century later, in the aftermath of the anti-Catholic Gordon riots of 1780, when the Recorder of London, who was the foremost legal advisor to the city as well as the chief judge of the Old Bailey, gave the following opinion on the legality of private organizations armed for defense against rioters:

> The right of His majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of the Kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right which every Protestant most unquestionably possesses, individually, may, and in many cases must, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.

Opinion on the Legality of the London Military Foot Association, *reprinted in* WILLIAM BLIZZARD, DESULTORY REFLECTIONS ON POLICE 59-60 (1785). For further examination of the Second Amendment's English origins, see generally JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS (1994).

[33]** HN11 To determine what interests this pre-existing right protected, we look to the lawful, private purposes for which people of the time owned and used arms. The correspondence and political dialogue of **[*383]** the founding era indicate that arms were kept for lawful use in self-defense and hunting. *See* Emerson, 270 F.3d at 251-55 (collecting historical materials); Robert E. Shallope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 602-14 (1982); *see also* PA. CONST. sec. 43 (Sept. 28, 1776) ("The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not enclosed . . . .").

The pre-existing right to keep and bear arms was premised on the commonplace assumption that individuals would use them for these private purposes, in addition to whatever militia service they would be obligated to perform for the state. The premise that private arms would be used for self-defense accords with Blackstone's observation, which had influenced thinking in the American colonies, that the people's right to arms was auxiliary to the natural right of self-preservation. *See* WILLIAM BLACKSTONE, **[**34]** 1 COMMENTARIES *136, *139; *see also Silveira*, 328 F.3d at 583-85 (Kleinfeld, J.); *Kasler v. Lockyer*, 23 Cal. 4th 472, 97 Cal. Rptr. 2d 334, 2 P.3d 581, 602 (Cal. 2000) (Brown, J., concurring). The right of self-preservation, in turn, was understood as the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government. *See Silveira*, 328 F.3d at 583-85 (Kleinfeld, J.); *see also id.* at 569-70 (Kozinski, J., dissenting from the denial of rehearing en banc); *Kasler*, 2 P.3d at 605 (Brown, J., concurring). [9]

FOOTNOTES

9 The importance of the private right of self-defense is hardly surprising when one remembers that most Americans lacked a professional police force until the middle of the nineteenth century, *see* Levinson, *supra*, at 646 & n.46, and that many Americans lived in backcountry such as the Northwest Territory.

With respect to the right to defend oneself against tyranny and oppression, some have argued that the Second Amendment is utterly irrelevant because the arms it protects, even if commonly owned, would be of no use when opposed to the arsenal of the modern state. But as Judge Kozinski has noted, incidents such as the Warsaw ghetto uprising of 1943 provide rather dramatic evidence to the contrary. *See Silveira*, 328 F.3d at 569-70 (dissenting from the denial of rehearing en banc). The deterrent effect of a well-armed populace is surely more important than the probability of overall success in a full-out armed conflict. Thus could Madison write to the people of New York in 1788:

> Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone they would not be able to shake off their yokes.

THE FEDERALIST NO. 46, at 299-300 (James Madison) (Clinton Rossiter ed., 1961).

[35]** When we look at the Bill of Rights as a whole, the setting of the Second Amendment reinforces its individual nature. The Bill of Rights was almost entirely a declaration of individual rights, and the Second Amendment's inclusion therein strongly indicates that it, too, was intended to protect personal liberty. The collective right advocates ask us to imagine that the First Congress situated a *sui generis* states' right among a catalogue of cherished individual liberties without comment. We believe the canon of construction known as *noscitur a sociis* applies here. HN12 Just as we would read an ambiguous statutory term in light of its context, we should read any supposed ambiguities in the Second Amendment in light of *its* context. Every other provision of the Bill of Rights, excepting the Tenth, which speaks explicitly about the allocation of governmental power, protects rights enjoyed by citizens in their individual capacity. The Second Amendment would be an inexplicable aberration if it were not read to protect individual rights as well.

[*384] The District insists that the phrase "keep and bear Arms" should be read as purely military language, and thus indicative of a civic, rather **[**36]** than private, guarantee. The term "bear Arms" is obviously susceptible to a military construction. But it is not accurate to construe it exclusively so. First, the word "bear" in this context is simply a more formal synonym for "carry," i.e., "Beware of Greeks bearing gifts." The *Oxford English Dictionary* and the original *Webster's* list the primary meaning of "bear" as "to support" or "to carry." *See Silveira*, 328 F.3d at 573 (Kleinfeld, J.). Dr. Johnson's *Dictionary*--which the Supreme Court often relies upon to ascertain the founding-era understanding of text, *see, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 199, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003)--is in accord. The first three definitions for "bear" are "to carry as a burden," "to convey or carry," and "to carry as a mark of authority." *See* JOHNSON'S AND WALKER'S ENGLISH DICTIONARIES COMBINED 126 (J.E. Worcester ed., 1830) [hereinafter Johnson].

Historical usage, as gleaned from the *O.E.D.* and *Webster's*, supports the notion that "bear arms" was sometimes used as an idiom signifying the use of weaponry in conjunction with military service. However, these sources also confirm that **[**37]** the idiomatic usage was not absolute. *Silveira*, 328 F.3d at 573 (Kleinfeld, J.); *Emerson*, 270 F.3d at 229-32. HN13 Just as it is clear that the phrase "to bear arms" was in common use as a byword for soldiering in the founding era, *see, e.g.*, Gary Wills, *To Keep and Bear Arms*, N.Y. REV. OF BOOKS, Sept. 21, 1995, at 62-73, it is equally evident from a survey of late eighteenth- and early nineteenth-century state constitutional provisions that the public understanding of "bear Arms" also encompassed the carrying of arms for private purposes such as self-defense. *See Emerson*, 270 F.3d at 230 n.29 (collecting state constitutional provisions referring to the people's right to "bear arms in defence of themselves and the State" among other formulations). Thus, it would hardly have been unusual for a writer at the time (or now) to have said that, after an attack on a house by thieves, the men set out to find them "bearing arms."

The District relies heavily on the use of "bearing arms" in a conscientious objector clause that formed part of Madison's initial draft of the Second Amendment. The purpose of this clause, which was later dropped **[**38]** from the Amendment's text, was to excuse those "religiously scrupulous of bearing arms" from being forced "to render military service in person." THE COMPLETE BILL OF RIGHTS 169 (Neil H. Cogan ed. 1997). The District argues that the conscientious objector clause thus equates "bearing arms" with military service. The Quakers, Mennonites, and other pacifist sects that were to benefit by the conscientious objector clause had scruples against soldiering, but not necessarily hunting, which, like soldiering, involved the *carrying* of arms. And if "bearing arms" only meant "carrying arms," it is argued, the phrase would not have been used in the conscientious objector clause because Quakers were not religiously scrupulous of carrying arms generally; it was carrying arms *for militant purposes* that the Friends truly abhorred (although many Quakers certainly frowned on hunting as the wanton infliction of cruelty upon animals). *See* THOMAS CLARKSON, A PORTRAITURE OF QUAKERISM, VOL. I. That Madison's conscientious objector clause appears to use "bearing arms" in a strictly military sense does at least suggest that "bear Arms" in the Second Amendment's operative clause includes the carrying **[**39]** of arms for military purposes. However, there are too many instances of "bear arms" indicating private use to conclude that the drafters intended only a military sense.

[*385] In addition to the state constitutional provisions collected in *Emerson*, there is the following statement in the report issued by the dissenting delegates at the Pennsylvania ratification convention:

> That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game . . . .

THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 145, 151 (Herbert J. Storing ed., 1981). These dissenting Antifederalists, writing in December 1787, were clearly using "bear arms" to include uses of weaponry outside the militia setting--e.g., one may "bear arms . . . for the purpose of killing game." 10

FOOTNOTES

10 To be sure, collective right theorists have correctly observed that the Pennsylvania dissenters were not speaking for anyone but themselves--that is, they lost in their attempt to defeat ratification of the Constitution, and lacked the clout to have their suggested amendments sent to the First Congress, unlike the Antifederalist delegates in other state conventions. *See* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 134-35 (2000). But that the dissenting delegates were political losers does not undercut their status as competent users of late-eighteenth-century English.

[40]** We also note that at least three current members (and one former member) of the Supreme Court have read "bear Arms" in the Second Amendment to have meaning beyond mere soldiering: "Surely a most familiar meaning [of 'carries a firearm'] is, as the Constitution's Second Amendment ('keep and *bear* Arms') and Black's Law Dictionary . . . indicate: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Muscarello v. United States*, 524 U.S. 125, 143, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998) (Ginsburg, J., dissenting, joined by Rehnquist, C.J., Scalia, J., and Souter, J.) (emphasis in original). Based on the foregoing, we think [HN14] the operative clause includes a private meaning for "bear Arms."

In contrast to the collective right theorists' extensive efforts to tease out the meaning of "bear," the conjoined, *preceding* verb "keep" has been almost entirely neglected. In that tradition, the District offers a cursory and largely dismissive analysis of the verb. The District appears to claim that "keep and bear" is a unitary term and that **[**41]** the individual word "keep" should be given no independent significance. This suggestion is somewhat risible in light of the District's admonishment, earlier in its brief, that when interpreting constitutional text "every word must have its due force, and appropriate meaning; . . . no word was unnecessarily used or needlessly added." Appellees' Br. at 23 (quoting *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71, 10 L. Ed. 579 (1840)). Even if "keep" and "bear" are not read as a unitary term, we are told, the meaning of "keep" cannot be broader than "bear" because the Second Amendment only protects the use of arms in the course of militia service. *Id.* at 26-27. But this proposition assumes its conclusion, and we do not take it seriously.

One authority cited by the District has attempted to equate "keep" with "keep up," a term that had been used in phrases such as "keep up a standing army" or, as in the Articles of Confederation, "every state shall keep up a well regulated and disciplined militia . . . ." *See* Wills, *supra*, at 66. The argument that "keep" as used in "the right of the people to keep . . . Arms" shares a military meaning with **[*386]** "keep up" as **[**42]** used in "every state shall keep *up* a well regulated militia" mocks usage, syntax, and common sense. Such outlandish views are likely advanced because the plain meaning of "keep" strikes a mortal blow to the collective right theory. Turning again to Dr. Johnson's *Dictionary*, we see that the first three definitions of "keep" are "to retain; not to lose," "to have in custody," "to preserve; not to let go." Johnson, *supra*, at 540. We think [HN15] "keep" is a straightforward term that implies ownership or possession of a functioning weapon by an individual for private use. *Emerson*, 270 F.3d at 231 & n.31; *accord Silveira*, 328 F.3d at 573-74 (Kleinfeld, J.). The term "bear arms," when viewed in isolation, might be thought ambiguous; it could have a military cast. But since "the people" and "keep" have obvious individual and private meanings, we think those words resolve any supposed ambiguity in the term "bear arms."

* * *

The parties generally agree that the prefatory clause, to which we now turn, declares the Second Amendment's civic purpose--i.e., insuring the continuance of the militia system--and only disagree over whether that purpose was exclusive. **[**43]** The parties do attribute dramatically different meanings to "a well regulated Militia." Appellants argue that the militia referenced in the Second Amendment's prefatory clause was "practically synonymous" with "the people" referenced in the operative clause. The District advances a much more limited definition. According to the District, the militia was a body of adult men regulated and organized by state law as a civilian fighting force. The crucial distinction between the parties' views then goes to the nature of the militia: Appellants claim no organization was required, whereas the District claims a militia did not exist unless it was subject to state discipline and leadership. As we have already noted, the District claims that "the Framers' militia has faded into insignificance."

The parties draw on *United States v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939), to support their differing definitions. *Miller*, a rare Second Amendment precedent in the Supreme Court, the holding of which we discuss below, described the militia in the following terms:

> The Militia which the States were expected to maintain and train is set in contrast with Troops which they **[**44]** were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia--civilians primarily, soldiers on occasion.
>
> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Id. at 178-79.

The District claims that *Miller*'s historical account of the "Militia" supports its position. Yet according to *Miller*, the militia included " *all males physically capable of acting in concert for the common defence*" who were " *enrolled for military discipline*." And *Miller*'s expansive definition of the militia--qualitatively different from **[**45]** the District's concept--is in accord with the second Militia Act of 1792, passed **[*387]** by the Second Congress. [11] Act of May 8, 1792, ch. XXXIII, 1 Stat. 271. Of course, many of the members of the Second Congress were also members of the First, which had drafted the Bill of Rights. But more importantly, they were conversant with the common understanding of both the First Congress and the ratifying state legislatures as to what was meant by "Militia" in the Second Amendment. The second Militia Act placed specific and extensive requirements on the citizens who were to constitute the militia:

> Be it enacted . . . [t]hat each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be *enrolled* in the militia, by the captain or commanding officer of the company, within whose bounds such citizen shall reside, and that within twelve months after the passing of this Act. And . . . every such captain

> or commanding officer of a company . . . shall without delay notify such citizen of the said enrollment **[**46]** . . . . That every citizen, so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear so armed, accoutred and provided, when called out to exercise, or into service.

Id. (emphasis added). [12]

FOOTNOTES

[11] The second Militia Act was passed on May 8, 1792. On May 2, 1792, Congress had enacted a Militia Act "providing for the authority of the President to call out the Militia." Act of May 2, 1792, ch. XXVIII, 1 Stat. 264. The first Militia Act gave the President power to call forth the Militia in cases of invasion by a foreign nation or Indian tribe, and also in cases of internal rebellion. If the militia of the state wherein the rebellion was taking place either was unable to suppress it or refused to be called up, the first Militia Act gave the President authority to use militia from other states. **[**47]**

[12] Congress enacted this provision pursuant to its Article I, Section 8 powers over the militia: "The Congress shall have the power . . . [t]o 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 . . . ." U.S. CONST., art. I., sec. 8.

The reader will note that the Act's first requirement is that the "free able-bodied white male" population between eighteen and forty-five *enroll* in the militia. And enrollment was quite distinct from the various other regulations prescribed by Congress, which included the type of weaponry members of the militia must own. Becoming "enrolled" in the militia appears to have involved providing one's name and whereabouts to a local militia officer--somewhat analogous to our nation's current practice of requiring young men to register under the Selective Service Act. *Silveira*, 328 F.3d at 578 **[**48]** (Kleinfeld, J.). Thus when read in light of the second Militia Act, *Miller* defines the militia as having only two primary characteristics: It was all free, white, able-bodied men of a certain age who had given their names to the local militia officers as eligible for militia service. Contrary to the District's view, there was no organizational condition precedent to the existence of the "Militia." **[*388]** Congress went on in the second Militia Act to prescribe a number of rules for organizing the militia. But the militia itself was the raw material from which an organized fighting force was to be created. Thus, the second Militia Act reads:

> And be it further enacted, That *out of the militia enrolled as is herein directed*, there shall be formed for each battalion at least one company of grenadiers, light infantry or riflemen; and that to each division there shall be at least one company of artillery, and one troop of horse: There shall be to each company of artillery, one captain, two lieutenants, four sergeants, four corporals, six gunners, six bombardiers, one drummer, and one fifer.

Id. at 272 (emphasis added).

The crucial point is that the existence of the **[**49]** militia preceded its organization by Congress, and it preceded the implementation of Congress's organizing plan by the states. The District's definition of the militia is just too narrow. The militia was a large segment of the population--not quite synonymous with "the people," as appellants contend--but certainly not the organized "divisions, brigades, **[*389]** regiments, battalions, and companies" mentioned in the second Militia Act. *Id.* at 272.

The current congressional definition of the "Militia" accords with original usage: HN16 "The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard." HN17 10 U.S.C. § 311. The statute then distinguishes between the "organized militia," which consists of the National Guard and Naval Militia, and the "unorganized militia," which consists of every member of the militia who is not a member of the National Guard or Naval Militia. *Id.* Just as in the 1792 enactment, Congress defined the militia broadly, **[**50]** and, more explicitly than in its founding-era counterpart, Congress provided that a large portion of the militia would remain unorganized. The District has a similar structure for its own militia: HN18 "Every able-bodied male citizen resident within the District of Columbia, of the age of 18 years and under the age of 45 years, excepting . . . idiots, lunatics, common drunkards, vagabonds, paupers, and persons convicted of any infamous crime, shall be enrolled in the militia." D.C. Code § 49-401.

The District argues that the modifier "well regulated" means that "[t]he militia was not individuals acting on their own; one cannot be a one-person militia." We quite agree that the militia was a collective body designed to act in concert. But we disagree with the District that the use of "well regulated" in the constitutional text somehow turns the popular militia embodied in the 1792 Act into a "select" militia that consisted of semi-professional soldiers like our current National Guard. Contemporaneous legislation once again provides us with guidance in reading ambiguous constitutional text. *See* Op. at 30; *see also Silveira*, 328 F.3d at 579-80 **[**51]** (Kleinfeld, J.).

The second Militia Act provides a detailed list of directions to both individuals and states that we take as an indication of what the drafters of the Second Amendment contemplated as a "well regulated Militia." It will be recalled, the second Militia Act requires that eligible citizens enroll in the militia and, within six months, arm themselves accordingly. Subsequent to enrollment, arming oneself became the first duty of all militiamen. *See Silveira*, 328 F.3d at 581 (Kleinfeld, J.). The Act goes on to require of the states that the militiamen be notified of their enrollment; that within one year, the states pass laws to arrange the militia into divisions, brigades, regiments, battalions, and companies, as well as appoint various militia officers; that there be an Adjutant General appointed in each state to distribute all orders for the Commander in Chief of the State to the several corps, and so on.

The statute thus makes clear that these requirements were independent of each other, i.e., militiamen were obligated to arm themselves regardless of the organization provided by the states, and the states were obligated to organize the militia, regardless **[**52]** of whether individuals had armed themselves in accordance with the statute. We take these dual requirements--that citizens were properly supplied with arms and *subject* to organization by the states (as distinct from actually organized)--to be a

clear indication of what the authors of the Second Amendment contemplated as a "well regulated Militia."

Another aspect of "well regulated" implicit in the second Militia Act is the exclusion of certain persons from military service. For instance, the Act exempts from militia duty "the Vice President of the United States, [executive branch officers and judges], Congressmen, custom house officers, . . . post officers, . . . all Ferrymen employed at any ferry on the post road, . . . all pilots, all mariners actually employed in the sea service of any citizen or merchant within the United States; and all persons who now are or may be hereafter exempted by the laws of the respective states." Act of May 8, 1792, ch. XXXIII, 1 Stat. 271. Thus, even after the founding-era militia became "well regulated," it did not lose its popular character. The militia still included the majority of adult men (albeit, at the time, "free able-bodied white male[s]"), **[**53]** who were to arm themselves, and whom the states were expected to organize into fighting units. Quite unlike today's National Guard, participation was widespread and mandatory.

As the foregoing makes clear, HN19 the "well regulated Militia" was not an elite or select body. *See* Silveira, 328 F.3d at 577-78 (Kleinfeld, J.). While some of the founding fathers, including George Washington and Alexander Hamilton, favored such organizations over a popular militia, *see* THE ORIGIN OF THE SECOND AMENDMENT at xlvii (David E. Young ed., 2d ed. 1995), the Second Congress unambiguously required popular participation. The important point, of course, is that the popular nature of the militia is consistent with an individual right to keep and bear arms: Preserving an individual right was the best way to ensure that the militia could serve when called.

* * *

As we observed, the District argues that *even if* one reads the operative clause in isolation, it supports the collective right interpretation of the Second Amendment. Alternatively, the District contends that the operative clause should not, in fact, be read in isolation, and that it is imbued with the civic character of the **[**54]** prefatory clause when the Amendment is read, correctly, as two interactive clauses. The District points to the singular nature of the Second Amendment's preamble as an indication that the operative clause must be restricted or conditioned in some way by the prefatory language. *Compare* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998), *with* Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000). However, the structure of the Second Amendment turns out to be not so unusual when we examine state constitutional provisions guaranteeing rights or restricting governmental power. It was quite common for prefatory language to state a principle of good government that was narrower than the operative language used to achieve it. Volokh, *supra*, at 801-07.

[*390] We think the Second Amendment was similarly structured. HN20 The prefatory language announcing the desirability of a well-regulated militia--even bearing in mind the breadth of the concept of a militia--is narrower than the guarantee of an individual right to keep and bear arms. The Amendment does not protect "the right of militiamen to **[**55]** keep and bear arms," but rather "the right of the people." The operative clause, properly read, protects the ownership and use of weaponry beyond that needed to preserve the state militias. Again, we point out that if the competent drafters of the Second Amendment had meant the right to be limited to the protection of state militias, it is hard to imagine that they would have chosen the language they did. We therefore take it as an expression of the drafters' view that the people possessed a natural right to keep and bear arms, and that the preservation of the militia was the right's most salient political benefit--and thus the most appropriate to express in a political document.

That the Amendment's civic purpose was placed in a preamble makes perfect sense given the then--recent ratification controversy, wherein Antifederalist opponents of the 1787 Constitution agitated for greater assurance that the militia system would remain robust so that standing armies, which were thought by many at the time to be the bane of liberty, would not be necessary. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 338-60 (Enlarged ed. 1992). The Federalists who dominated **[**56]** the First Congress offered the Second Amendment's preamble to palliate Antifederalist concerns about the continued existence of the popular militia. But neither the Federalists nor the Antifederalists thought the federal government had the power to *disarm* the people. This is evident from the ratification debates, where the Federalists relied on the existence of an armed populace to deflect Antifederalist criticism that a strong federal government would lead to oppression and tyranny. Antifederalists acknowledged the argument, but insisted that an armed populace was not enough, and that the existence of a popular militia should also be guaranteed. *Compare* THE FEDERALIST Nos. 8, 28, 59 (Alexander Hamilton), No. 46 (James Madison) (arguing that an armed populace constitutes a check on the potential abuses of the federal government) *with* MELANCTON SMITH [Federal Farmer], OBSERVATIONS TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATE CONVENTION, AND TO SEVERAL ESSENTIAL AND NECESSARY ALTERATIONS IN IT (Nov. 8, 1787), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT, *supra*, at 89, 91 (despite the fact that the "yeomanry of the country . . . possess **[**57]** arms" for defense, the federal government could undermine the regular militia and render the armed populace of no importance).

To be sure, as the District argues, the *Miller* Court did draw upon the prefatory clause to interpret the term "Arms" in the operative clause. As we note below, interpreting "Arms" in light of the Second Amendment's militia purpose makes sense because "Arms" is an open-ended term that appears but once in the Constitution and Bill of Rights. But *Miller* does not command that we limit perfectly sensible constitutional text such as "the right of the people" in a manner inconsistent with other constitutional provisions. Similarly, the Second Amendment's use of "keep" does not need to be recast in artificially military terms in order to conform to *Miller*.

We note that when interpreting the text of a constitutional amendment it is common for courts to look for guidance in the proceedings of the Congress that authored the provision. Unfortunately, the Second Amendment's drafting history is relatively **[*391]** scant and inconclusive. *Emerson*, 270 F.3d at 245-51. The recorded debates in the First Congress do not reference the operative clause, a **[**58]** likely indication that the drafters took its individual guarantee as rather uncontroversial. There is certainly nothing in this history to substantiate the strained reading of the Second Amendment offered by the District.

B

We have noted that there is no unequivocal precedent that dictates the outcome of this case. This Court has never decided whether the Second Amendment protects an individual or collective right to keep and bear arms. On one occasion we anticipated an argument about the scope of the Second Amendment, but because the issue had not been properly raised by appellants, we assumed the applicability of the collective right interpretation then urged by the federal government. *Fraternal Order of Police v. United States (F.O.P. II)*, 335 U.S. App. D.C. 359, 173 F.3d 898, 906 (D.C. Cir. 1999). The Supreme Court has not decided this issue either. *See id.* As we have said, the leading Second Amendment case in the Supreme Court is *United States v. Miller*. While *Miller* is our best guide, the Supreme Court's other statements on the Second Amendment warrant mention.

In *Dred Scott v. Sandford*, 60 U.S. 393, 15 L. Ed. 691 (1857), the Court asserted the applicability **[**59]** of the Bill of Rights to the

territories in the following terms:

> [N]o one . . . will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances . . . *[n]or can Congress deny to the people the right to keep and bear arms*, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding . . . . These powers . . . in relation to rights of person . . . are, in express and positive terms, denied to the General Government.

Id. at 450 (emphasis added). Although *Dred Scott* is as infamous as it was erroneous in holding that African-Americans are not citizens, this passage expresses the view, albeit in passing, that the Second Amendment contains a personal right. It is included among other individual rights, such as the right to trial by jury and the privilege against self-incrimination. The other Second Amendment cases of the mid-nineteenth century did not touch **[**60]** upon the individual versus collective nature of the Amendment's guarantee. [13]

FOOTNOTES

13 In *United States v. Cruikshank*, 92 U.S. 542, 551, 23 L. Ed. 588 (1876), and *Presser v. Illinois*, 116 U.S. 252, 264-66, 6 S. Ct. 580, 29 L. Ed. 615 (1886), the Court held that the Second Amendment constrained only federal government action and did not apply to the actions of state governments. This holding was reiterated in *Maxwell v. Dow*, 176 U.S. 581, 597, 20 S. Ct. 448, 44 L. Ed. 597 (1900), and *Twining v. New Jersey*, 211 U.S. 78, 98, 29 S. Ct. 14, 53 L. Ed. 97 (1908). Indeed, the Second Amendment is one of the few Bill of Rights provisions that has not yet been held to be incorporated through the Fourteenth Amendment. While the status of the Second Amendment within the twentieth-century incorporation debate is a matter of importance for the many challenges to state gun control laws, it is an issue that we need not decide. HN21 The District of Columbia is a Federal District, ultimately controlled by Congress. Although subject to § 1983 suits by federal law, *see* An Act to Permit Civil Suits Under [42 U.S.C. § 1983] Against Any Person Acting Under Color of Any Law or Custom of the District of Columbia, Pub. L. No. 96-170, 93 Stat. 1284 (1979), the District is directly constrained by the entire Bill of Rights, without need for the intermediary of incorporation. *See, e.g.*, *Pernell v. Southall Realty*, 416 U.S. 363, 369-80, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974) (applying Seventh Amendment to local legislation for the District).

[61]** **[*392]** In *Robertson v. Baldwin*, 165 U.S. 275, 17 S. Ct. 326, 41 L. Ed. 715 (1897), the Court addressed the scope of the term "involuntary servitude" in the Thirteenth Amendment. In discussing limitations inherent in that constitutional provision, the Court said the following:

> The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the "Bill of Rights," were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. . . .
>
> Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; *the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons*; the provision that no person shall be twice put in jeopardy (article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or **[**62]** if the verdict was set aside upon the defendant's motion; nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment.

165 U.S. at 281-82 (emphasis added). Just as in *Dred Scott*, the Second Amendment right is mentioned in a catalogue of other well-known individual right provisions, and, in the Supreme Court's thin Second Amendment jurisprudence, *Robertson* has the virtue of straightforwardly suggesting one permissible form of regulatory limitation on the right to keep and bear arms. The decision does not discuss whether the right is individual or collective. Still, *Robertson* tends to cut against any version of the collective right argument. If the right to keep and bear arms offered no protection to individuals, the Court would not likely pick as a noteworthy exception to the right a prohibition on concealed weapons. The individual nature of the permitted regulation suggests that the underlying right, too, concerned personal ownership of firearms.

Few decisions of Second Amendment relevance **[**63]** arose in the early decades of the twentieth century. Then came *Miller*, the Supreme Court's most thorough analysis of the Second Amendment to date, and a decision that both sides of the current gun control debate have claimed as their own. We agree with the *Emerson* court (and the dissenting judges in the Ninth Circuit) that *Miller* does not lend support to the collective right model. *See Silveira*, 328 F.3d at 586-87 (Kleinfeld, J.); *Emerson*, 270 F.3d at 226-27. Nor does it support the District's quasi-collective position. Although *Miller* did not explicitly accept the individual right position, the decision implicitly assumes that interpretation.

Miller involved a Second Amendment challenge by criminal defendants to section 11 of the National Firearms Act (then codified at 26 U.S.C. §§ 1132 *et seq.*), which prohibited interstate transportation of certain firearms without a registration or stamped order. The defendants had been indicted for transporting a short-barreled shotgun from Oklahoma to Arkansas in contravention of the Act. The district court sustained defendants' demurrer challenging their indictment **[**64]** on Second Amendment grounds. The government appealed. The defendants submitted no brief and made no appearance in the Supreme **[*393]** Court. *Miller*, 307 U.S. at 175-77. Hearing the case on direct appeal, the Court reversed and remanded. *Id.* at 183.

On the question whether the Second Amendment protects an individual or collective right, the Court's opinion in *Miller* is most notable for what it omits. The government's first argument in its *Miller* brief was that "the right secured by [the Second Amendment] to the people to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state." Appellant's Br. at 15, 307 U.S. 704 (No. 696). This is a version of the collective right model. Like the Fifth Circuit, we think it is significant that the Court did not decide the case on this, the government's primary argument. *Emerson*, 270 F.3d at 222. Rather, the Court followed the logic of the government's secondary position, which was that a short-barreled **[**65]** shotgun was not within the scope of the

term "Arms" in the Second Amendment.

The government had argued that even those courts that had adopted an individual right theory of the Second Amendment [14] had held that the term "Arms," as used in both the Federal and various state constitutions, referred "only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals." Appellant's Br. at 18, 307 U.S. 704 (No. 696). The government then proceeded to quote at length from a Tennessee state court case interpreting "Arms" in the Tennessee Bill of Rights to mean weapons "such as are usually employed in civilized warfare, and that constitute the ordinary military equipment." *Id.* (quoting *Aymette v. State*, 21 Tenn. (1 Hum.) 154, 157 (1840)). The government's weapons-based argument provided the *Miller* Court with an alternative means to uphold the National Firearms Act even if the Court disagreed with the government's collective right argument. The *Miller* Court's holding is based on the government's alternative position:

> In the absence of any evidence tending **[**66]** to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State*, 21 Tenn. 154, 2 Humphreys (Tenn.) 154, 158.

Miller, 307 U.S. at 178 (emphasis added). The quotation makes apparent that the Court was focused only on what arms are protected by the Second Amendment, *see Emerson*, 270 F.3d at 224, and not the collective or individual nature of the right. If the *Miller* Court intended to endorse the government's first argument, i.e., the collective right view, it would have undoubtedly pointed out that the two defendants were not affiliated with a state militia or other local military organization. *Id.*

FOOTNOTES

[14] Here the brief for the United States cites two state court decisions interpreting state constitutional provisions: *People v. Brown*, 253 Mich. 537, 235 N.W. 245 (1931); *State v. Duke*, 42 Tex. 455 (1875). *See* Appellant's Br. at 18, 307 U.S. 704 (No. 696).

[67]** To be sure, the *Miller* Court linked the Second Amendment's language to the Constitution's **[*394]** militia clause: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces [i.e., the militia] 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. We take the "declaration and guarantee" referred to by the *Miller* Court to mean the Second Amendment's prefatory clause (which declares the necessity of a "well regulated Militia") and its operative clause (which guarantees the preservation of a right) respectively.

The District would have us read this passage as recognizing a limitation on the Second Amendment right based on the *individual*'s connection (or lack thereof) to an organized functioning militia. We disagree. As already discussed, the *Miller* court was examining the relationship between the *weapon* in question--a short-barreled shotgun--and the preservation of the militia system, which was the Amendment's politically relevant purpose. The term "Arms" was quite indefinite, but it would have been peculiar, to say the least, if **[**68]** it were designed to ensure that people had an individual right to keep weapons capable of mass destruction--e.g., cannons. Thus the *Miller* Court limited the term "Arms"--interpreting it in a manner consistent with the Amendment's underlying civic purpose. Only "Arms" whose "use or possession . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia," *id.* at 177, would qualify for protection.

Essential, then, to understanding what weapons qualify as Second Amendment "Arms" is an awareness of how the founding-era militia functioned. The Court explained its understanding of what the Framers had in mind when they spoke of the militia in terms we have discussed above. The members of the militia were to be "civilians primarily, soldiers on occasion." *Id.* at 179. When called up by either the state or the federal government, "these men were expected to appear *bearing arms supplied by themselves and of the kind in common use at the time*." *Id.* (emphasis added).

As we noted above, the "Militia" was vast, including all free, white, able-bodied men who were properly enrolled with a local militia officer. **[**69]** By contrast, the Ninth Circuit has recently (and we think erroneously) read "Militia" to mean a "state-created and state-organized fighting force" that excludes the unorganized populace. *Silveira*, 312 F.3d at 1069. As Judge Kleinfeld noted, the Ninth Circuit's decision entirely ignores *Miller*'s controlling definition of the militia. 328 F.3d at 578 (dissenting from denial of rehearing en banc). The Ninth Circuit's interpretation of "Militia" also fails to account for the second Militia Act of 1792, *id.* at 578-82, as well as local *federal* militia units such as those provided for by the Northwest Ordinance, *see* Act of Aug. 7, 1789, ch. VIII, 1 Stat. 50, or for the District of Columbia in 1803, Act of March 3, 1803, ch. XX, 2 Stat. 215.

Miller's definition of the "Militia," then, offers further support for the individual right interpretation of the Second Amendment. Attempting to draw a line between the ownership and use of "Arms" for *private* purposes and the ownership and use of "Arms" for *militia* purposes would have been an extremely silly exercise on the part of the First Congress if indeed the very survival of **[**70]** the militia depended on men who would bring their commonplace, *private* arms with them to muster. A ban on the use and ownership of weapons for private purposes, if allowed, would undoubtedly have had a deleterious, if not catastrophic, effect on the readiness of the militia for action. We do not see how one could believe that the First Congress, **[*395]** when crafting the Second Amendment, would have engaged in drawing such a foolish and impractical distinction, and we think the *Miller* Court recognized as much.

* * *

To summarize, we conclude that [HN22] the Second Amendment protects an individual right to keep and bear arms. That right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad). In addition, the right to keep and bear arms had the important and salutary civic purpose of helping to preserve the citizen militia. The civic purpose was also a political expedient for the Federalists in the First Congress as it served, in part, **[**71]** to placate their Antifederalist opponents. The individual right facilitated militia service by ensuring that citizens would not be barred from keeping the arms they would need when called forth for militia duty. Despite the importance of the Second Amendment's civic purpose, however, the activities it protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On April 18, 2008, I served the foregoing document(s) described as

EX PARTE APPLICATION FOR CONTINUANCE OF TRIAL OR IN THE ALTERNATIVE REQUEST FOR TEMPORARY STAY OF PROCEEDINGS PENDING THE UNITED STATES SUPREME COURT'S RULING IN *DISTRICT OF COLUMBIA V. HELLER*, SLIP NO. 07-290; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF JASON A DAVIS IN SUPPORT THEREOF; EXHIBITS "A-F"

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Mr. Mark Beckington
Deputy Attorney General
Government Law Section
California Department of Justice
300 South Spring St., Ste. 1702
Los Angeles, CA 90013

___ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U. S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

__X__ (VIA FACSIMILE & EMAIL TRANSMISSION) As follows: The facsimile machine I used complies with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, copies of which is attached to this declaration on Friday, April 18, 2008.

__X__ (PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee on Monday April 21, 2008.

__X__ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

__ (FEDERAL) I declare that I am employed in the office of the member of the bar of this court at whose direction the service was made.

CLAUDIA AYALA

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