

No. 14-1945

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

STEPHEN KOLBE, *et al.*,

PLAINTIFFS-APPELLANTS

v.

MARTIN J. O'MALLEY, *et al.*,

DEFENDANTS-APPELLEES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
No. 1:13-cv-02841-CCB (Hon. Catherine C. Blake)**

**AMICUS CURIAE BRIEF OF TRADITIONALIST YOUTH NETWORK,
LLC, IN SUPPORT OF APPELLANTS AND URGING REVERSAL**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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**STATEMENT OF IDENTITY AND INTEREST OF THE
TRADITIONALIST YOUTH NETWORK, LLC, AND AUTHORITY TO
FILE AND FED. R. APP. P. 29(c)(5) DISCLOSURES**

The Traditionalist Youth Network, LLC, is a limited liability company existing by and through the laws of the State of Michigan, and it is nationally recognized as a staunch advocate of traditionalism. Its members have engaged in political discourse and have promoted traditionalism by publishing commentary on the organization's website—www.TradYouth.org—, by organizing and participating in public demonstrations, and by being invited to and speaking at events organized by other similarly-minded organizations.

Even though the Traditionalist Youth Network, LLC, was only founded as recently as July of 2013, it has quickly become one of the fiercest defenders of traditional values in the United States of America—its members have appeared in televised national news stories and people throughout the country have expressed an interest in creating chapters of the organization in their own states.

In short, the Traditionalist Youth Network, LLC, is to the United States of America what *Génération Identitaire* is to France: it is an extremely active pro-European socio-political identity movement that was founded and is controlled by concerned and well-informed young activists.

As an organization that vigorously advocates traditionalism, the Traditionalist Youth Network, LLC, strongly opposes any attempt by

governmental actors to infringe upon the traditional right of our people to keep and bear arms.

The Traditionalist Youth Network, LLC, has been granted leave by the United States Court of Appeals for the Fourth Circuit to file this *amicus curiae* brief.

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This *amicus curiae* brief argues that when the prefatory clause of the Second Amendment to the United States Constitution and its text—“to keep and bear arms”—are taken into consideration, said Amendment prescribes a constitutional right for Americans to possess weapons of contemporary military grade, which is supported by textualist and originalist legal theories of judicial philosophy.

STATEMENT OF FACTS

Maryland enacted the Firearm Safety Act of 2013, which bans certain types of “assault” weapons and firearm components. Plaintiffs-Appellants brought an action to challenge the constitutionality of this law, and the district court ruled that the law is constitutional.

ARGUMENT

The Second Amendment to the United States Constitution should be understood to mean that American citizens are entitled by their citizenship to the right to keep and bear weapons that are contemporaneously in common use by the typical infantryman of the various branches of the United States Armed Forces. At the time of the writing of this brief, such weapons include—and are not limited to—fully-automatic rifles and submachine guns, hand grenades, shoulder-fired rocket and grenade launchers, and antipersonnel mines.¹

This argument is made through an “originalist” analysis of the Second Amendment, because this form of inquiry is truest to the spirit of our nation’s Constitution.²

The methodology by which the argument is made that American citizens should have the right to own military-grade weapons via the Second Amendment is straightforward through the use of the following axioms: the Second Amendment was adopted by the Founding Fathers to prescribe the right of individual American

¹ Brief for Second Amendment Foundation as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-570).

² David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588, 593 (2000) (“Most contemporary scholars, whether they call themselves ‘originalists’ or not, believe that constitutional meaning should be derived, at least in part, from the understandings of those who framed and ratified the constitutional text.”).

citizens “to serve in the military and keep military weaponry for such service”³; the prefatory clause of the Second Amendment implies that there is a correlation between bearing arms and the militia; Article 1, Section 8, Clause 15 of the Constitution states that the purpose of the militia is to combat tyranny—namely “Insurrection” and “Invasions”⁴—; and weapons of contemporary military grade—as are defined by that which is in widespread use by the infantry of the modern branches of the United States Armed Forces—would logically be needed for the implicit purpose of the militia: to fight against or to deter the establishment of tyranny. It will also be argued that the safety of the public will not be threatened as the proponents of gun control would have us believe if weapons of military grade proliferate.

I. THE DISTRICT COURT ERRED BY NOT USING STRICT SCRUTINY REVIEW AND FOR FAILING TO STRIKE DOWN MARYLAND’S BAN ON MILITARY-GRADE WEAPONS.

As stated *infra*, the right to keep and bear arms is a fundamental right listed in the Bill of Rights, and as such, laws that infringe upon said right should be subjected to strict scrutiny review. *See United States v. Booker*, 570 F. Supp. 2d 161, 163 (D. Me. 2008). Strict scrutiny is the most stringent standard of judicial review used by American courts and is used when a fundamental constitutional

³ Brief of Professors of Linguistics and English as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (N. 07-570).

⁴ U.S. Const. art. 1, sec. 8, cl. 15.

right is infringed upon. *Clark v. Jeter*, 486 U.S. 456 (1988). For a law to survive strict scrutiny, the law must be justified by a compelling governmental interest and it must be narrowly tailored to achieve that interest. *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

For the reasons set forth herein, Maryland's ban on certain classes of weapons does not survive strict scrutiny review and must be ruled unconstitutional.

A. The Right To Keep And Bear Arms.

In recent years, there has been much litigation over the Second Amendment, which states, "A well regulated Militia, being necessary to the security of the free State, the right of the people to keep and bear arms, shall not be infringed."⁵ In 2008, the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment prohibits the federal government from interfering with an American citizen's right to possess firearms⁶, and in 2010, the Supreme Court held in *McDonald v. Chicago* that the Fourteenth Amendment incorporates the Second Amendment against the States.⁷ Much of the arguments of the opinions of these cases are influenced by textualist and originalist judicial philosophies, which is best evidenced by the extent to which the justices use history and dictionaries to defend their positions.

⁵ U.S. Const. amend. II.

⁶ *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

⁷ *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).

The Second Amendment arguably prescribes the right of American citizens to personally own and possess weapons, because “the Second Amendment’s text recognizes a ‘right,’ not a ‘power,’ and guarantees that right to ‘the people’ and not ‘the States,’ it necessarily secures an individual right to keep and bear arms.”⁸ Also, “the terms ‘keep’ and ‘bear’ are actions that individuals do. States do not bear firearms.”⁹

From a textualist perspective, the Second Amendment prescribes the right for American citizens to specifically keep weapons of military grade. The prefatory clause of the Second Amendment—“A well regulated Militia, being necessary to the security of the free State”¹⁰—is vital to the understanding of it, because it stresses that the scope of the right that was codified by the Amendment includes weapons for militia-related purposes.¹¹ The importance of the prefatory clause must not be disregarded, because all the clauses of the Constitution are

⁸ Brief of the State of Tex. as Amici Curiae Supporting Respondent, *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

⁹ Brief for American Civil Rights Union as Amici Curiae Supporting Appellants, *Dist. of Columbia v. Parker*, 311 F. Supp. 2d 103 (D.D.C. 2004) (No. 04-7041).

¹⁰ U.S. Const. amend. II.

¹¹ *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2826 (2008) (Stevens, J., dissenting) (“It confirms that the Framers’ single-minded focus in crafting the constitutional guarantee ‘to keep and bear arms’ was on military uses of firearms, which they viewed in the context of service in state militias”).

intended to carry weight¹² and at the time the Constitution was ratified, to “bear arms” meant for one to carry weapons of military grade.¹³

Those adhering to the original meaning judicial philosophy are influenced by that which was believed by the typical layperson at the time a legal code was adopted, and when the Second Amendment was ratified, the contemporaneous Americans widely understood the text to mean that they had a right to keep and bear weapons of military grade.¹⁴

¹² *Id.* (“The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of the text. Such text should not be treated as mere surplusage, for ‘[t] cannot be presumed that any clause in the constitution is intended to be without effect.’ *Marbury v. Madison*, 5 U.S. 137 (1803).”).

¹³ *Id.* at 2828. (“The term ‘bear arms’ is a familiar idiom; when used unadorned by any additional words, its meaning is ‘to serve as a soldier, do military service, fight.’ 1 Oxford English Dictionary 634 (2d ed. 1989). It is derived from the Latin *arma ferre*, which, translated literally, means ‘to bear [ferre] war equipment [arma].’ Brief for Professors of Linguistics and English as Amici Curiae 19. One 18th-century dictionary defined ‘arms’ as ‘weapons of offence, or armour or defence,’ 1 S. Johnson, *A Dictionary of the English Language* (1755), and another contemporaneous source explained that ‘[b]y arms, we understand those instruments of offence generally made use of in war; such as firearms, swords, & c. By weapons, we more particularly mean instruments of other kinds (exclusion of fire-arms), made use of as offensive, on special occasions.’ 1 J. Trusler, *The Distinction Between Words Esteemed Synonymous in the English Language* 37 (1794).”); Brief for Professors of Linguistics and English as Amici Curiae Supporting Petitioners, *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (“In every instance . . . where the term ‘bear arms’ (or ‘bearing arms’ or ‘bear arms against’) is employed, without any additional modifying language attached, the term unquestionably is used in its idiomatic military sense.”).

¹⁴ Brief for Professors of Linguistics and English as Amici Curiae Supporting Petitioners, *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (“In the end, the final version of the Amendment reads: ‘A well regulated Militia, being necessary to the security of a Free State, the right of the people to keep and

From textualist and original meaning judicial perspectives, the Second Amendment should be interpreted to decree that the federal government cannot interfere with an American citizen's right to possess military-grade weaponry, and the original intent of the drafters of that Amendment and the Founding Fathers further illustrates this belief. Sam Adams¹⁵, Thomas Jefferson¹⁶, James Madison¹⁷,

bear Arms, shall not be infringed.' Most American readers in the federal period, including those without formal grammar study, would have had no trouble understanding that the Second Amendment's absolute construction functioned to make the Amendment effectively read: 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 infringed."); Brief for Heartland Institute as Amici Supporting the Appellant, *Dist. of Columbia v. Parker*, 311 F. Supp. 2d 103 (D.D.C. 2004) (No. 04-7041) ("The founding generation certainly viewed bearing arms as an individual right based upon both English common law and natural law, a right logically linked to the natural right of self-defense.' *Kasler v. Lockyer*, 23 Cal.4th 472, 505 (2000) (Brown, J., concurring). '[T]he history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training.' *Emerson*, 270 F.3d at 260.").

¹⁵ *Heller*, 128 S. Ct. at 2826 (Stevens, J., dissenting) ("[Sam Adams was] one of the foremost patriots behind the Revolution [and] proposed an amendment that Congress shall never 'prevent the people of the United States who are peaceable citizens from keeping their own arms.'").

¹⁶ Pratt, Larry. *On the Firing Line: Essays on the Defense of Liberty*. Franklin, Tennessee: Legacy Publishing, 2001. Pg. 13. ("[Thomas Jefferson once said,] 'The strongest reason for the people to retain the right to keep and bear arms is, as a last resort, to protect themselves against tyranny in government.'").

¹⁷ *Id.* ([James Madison, the author of the Second Amendment, stated in the *Federalist Papers Number 46*,] 'Besides, the advantages of being armed forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. The governments of Europe are afraid to trust the people with arms. If they did, the people would certainly shake off the yoke of tyranny, as America did.'").

George Mason¹⁸, Patrick Henry¹⁹, Alexander Hamilton²⁰, and George Washington²¹ have all been credited with opining that the Second Amendment prescribes the right to keep and bear military-grade weapons to the American citizenry.

B. The Original Purpose Of The Second Amendment.

The reason why the Founding Fathers of the United States and the drafters of the Second Amendment were overtly in support of widespread gun ownership by the American people is because they feared “that the federal government would disarm the people in order to impose rule through a standing army or select militia.

...”²² As was noted by the justices in the majority opinion in *Heller*, “It was

¹⁸ *Id.* (“[George Mason opined that the right of the people to keep and bear arms is essential:] ‘To disarm the people is the best and most effectual way to enslave them.’ [To Mason,] ‘the militia’ was defined as ‘the whole people, except for a few public officials.’”).

¹⁹ “Quotes on Firearms.” <<http://www.catb.org/~esr/guns/quotes.html>>. Accessed 17 October 2010. (“[Patrick Henry observed in a speech in 1788,] ‘The great object is, that every man be armed. Every one who is able may have a gun.’”).

²⁰ *Id.* (“[Alexander Hamilton opined in one of his submissions for the *Federalist Papers*,] ‘The best we can hope for concerning the people at large is that they be properly armed.’”).

²¹ *Id.* (“[George Washington stated,] ‘The very atmosphere of firearms anywhere and everywhere restrains evil interference – they deserve a place of honor with all that’s good.’”); Norris, Chuck. “The New Abortion, Part 3.” *World Net Daily*. <<http://www.wnd.com/index.php?pageId=151685>>. Accessed 17 October 2010. (“Washington also said with regards to the right to keep and bear arms,] ‘Firearms are second only to the Constitution in importance; they are the peoples’ liberty’s teeth.’”).

²² *Heller*, 128 S. Ct. at 2801.

understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.”²³

To drive the point home that the Second Amendment was originally understood to prescribe the right of the people to keep and bear contemporary military-grade weapons—which would logically be needed to “oppose an oppressive military force”—, David Yassky, a constitutional law scholar, wrote,

Imagine, then, that in 1792 the Second Congress had enacted a statute prohibiting possession of the most commonly used military weapon of the day, except among members of the army and a small “select militia” – a statute roughly analogous to the machine gun ban of today. It is hard to believe that even the most nationalist of the Federalists would have thought such a statute consistent with the Second Amendment.²⁴

Throughout the years, the right of the people to bear certain classes of weapons evolved as weapon technology improved, which further evinces the argument that the Second Amendment prescribes the right for the people to bear weapons of contemporary military grade. When the Second Amendment was ratified, the weapons that were used during that time period included muskets—complete with bayonet—and a small cache of ammunition—“in other words, the

²³ *Id.*

²⁴ Yassky at 624.

standard arms of the battlefield infantryman.”²⁵ Later, when weapon technology evolved and the rifle was born, it was understood by the American people that ownership of this weapon was a right pursuant to the Second Amendment— Senator Charles Sumner, who was instrumental in the ratification process of the Fourteenth Amendment that eventually incorporated the Second Amendment against the states, once declared with regards to attempts to “disarm ‘Free-Soilers’ in ‘Bloody Kansas’” that “[n]ever was [the rifle] more needed in just self-defense than now in Kansas.”²⁶

It was widely understood by the American people and judges as late as towards the end of the nineteenth century that the Second Amendment recognized the right of American citizens to keep weapons of military grade. Yassky observed with regards to the nineteenth century view of weapon rights, “Accordingly, nineteenth century judges had no trouble understanding that ‘the phrase “bear arms” . . . has a military sense, and no other A man in the pursuit of deer, elk and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had borne arms”²⁷ Also, in the Dred Scott case

²⁵ John-Peter Lund, *Do Federal Firearm Laws Violate the Second Amendment by Disarming the Militia?*, 10 Tex. Rev. Law & Pol. 469, 478 (2006).

²⁶ *McDonald*, 130 S. Ct. at 3038. (Quoting *The Crime Against Kansas: The Apologies for the Crime: The True Remedy, Speech of Hon. Charles Sumner in the Senate of the United States* 64-65 (1856)).

²⁷ Yassky at 619.

that was decided by the Supreme Court in 1857, the justices stated in their holding various rights that are reserved by the citizenry and one is pertinent: “Nor can Congress deny to the people the right to keep and bear arms.”²⁸ Later, when interpreting the meaning of the Second Amendment, the Supreme Court opined in *Presser v. Illinois* in 1886,

It is said that the object of the act of Congress is to provide for organizing, arming, and disciplining all the able-bodied male citizens of the States, respectively, between certain ages, that they may be ready at all times to respond to the call of the nation to enforce its laws, suppress insurrection, and repel invasion, and thereby avoid the necessity for maintaining a large standing army, which liberty can never be safe.²⁹

Being that weapons of contemporary military grade would be needed to “suppress insurrection” and “repel invasion,” one can only deduce from this dicta that the Second Amendment protects the right of the American people to keep and bear such weapons. The Framers of the Second Amendment and the Founding Fathers of our nation specifically wanted the American citizenry armed for the purpose of being able to support the states with their police powers and to fight against tyranny, which requires weapons that are of contemporary military grade. John-Peter Lund, a scholar of constitutional law, has even lambasted modern-day originalists for tending to shy away from the reality of the Second Amendment’s

²⁸ *Scott v. Sandford*, 60 U.S. 393, 450 (1857).

²⁹ *Presser v. Illinois*, 116 U.S. 252, 261 (1886).

true purpose: to protect the American people's right to possess military-grade weaponry. Said Lund,

In the spirit, and as the ultimate line of defense, of the entire Bill of Rights, the Second Amendment was ratified to preserve the right of the people to possess arms for the purpose of organizing themselves, as needed, into a fighting force which could preserve order or starve off tyranny and oppression, whether from enemies foreign or domestic. Originalists and conservatives cannot in good conscience simply wash away this fundamental premise behind the foremost of liberties that the Framers saw fit to preserve.³⁰

The gist of the Second Amendment is quite clear: the prefatory clause specifically states that the purpose of the Amendment is for promoting the institution of the militia, and since the Second Amendment protects the people's right to keep and bear arms for this purpose, "the weapons that were intended to come under the protection of the Amendment would have included (though not necessarily be limited to) those weapons with which the militia would be expected to be armed."³¹

C. How The Second Amendment Should Be Applied.

The prefatory clause of the Second Amendment states that the right to keep and bear arms is for the purpose of the militia, and Article 1, Section 8, Clause 15 of the Constitution explains the functions of the militia: "to execute the Laws of

³⁰ Lund at 506-07.

³¹ *Id.* at 478.

the Union, suppress Insurrections, and repel Invasions. . . .”³² As is noted by the National Rifle Association with regards to this, “Thus, the militia has a law enforcement function, a quasi law enforcement/quasi military function, and a military function. As a result, those firearms which are ‘arms’ within the meaning of the Second Amendment are those which could be used to fulfill any of these functions.”³³ This rationale was implicit in *United States v. Miller*:

United States v. Miller, 307 U.S. 174 (1939), suggests . . . namely that private citizens might have a right to possess weapons that are “part of the ordinary military equipment or [whose] use could contribute to the common defense.” *Id.* at 178. This test * * * implies that American citizens have a right to possess at least those weapons that an unaided individual can “bear” and that “could contribute to the common defense.” Today, this would include, at a minimum, the fully automatic rifles that are standard infantry issue, and probably also shoulder-fired rockets and grenades.

When *Miller* was decided, infantry were typically armed with the same sort of bolt-action rifles that civilians kept for use in everyday life, just as founding-era civilians commonly kept the same kind of weapons they would need if called for military duty.³⁴

Since *Miller* was decided by the Supreme Court in 1939, the Supreme Court reaffirmed its holding in *Lewis v. United States*, 445 U.S. 55 (1980), and never

³² U.S. Const. art. 1, sec. 8, cl. 15.

³³ National Rifle Association-Institute for Legislative Action, “Federal Court Cases Regarding the Second Amendment,” <<http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=52>>. Accessed 8 October 2010.

³⁴ Brief for Second Amendment Foundation as Amici Curiae Supporting Petitioner, *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

questioned it until 2008.³⁵ In *Lewis*, the Supreme Court reaffirmed the holding of *Miller* and reiterated its position: “the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia.’”³⁶ The Supreme Court justices did, however, raise the holding of *Miller* in their *Heller* majority opinion, and they did so in order to deconstruct the meaning of “in common use at the time.” Said the justices,

We may as well consider at this point . . . what types of weapons *Miller* permits. Read in isolation, *Miller*’s phrase “part of ordinary military equipment” could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act’s restrictions on machineguns (not challenged in *Miller*) might be unconstitutional. . . . The traditional militia was formed from a pool of men bringing arms “in common use at the time” for lawful purposes like self-defense. . . . Indeed, that is precisely the way in which the Second Amendment’s operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.³⁷

In his dissenting opinion in *Heller*, Justice Breyer noted the absurdity of the claim that that which is “in common use at the time” is decided not by what the

³⁵ Brief for Heartland Institute as Amici Supporting the Appellant, Dist. of Columbia v. Parker, 311 F. Supp. 2d 103 (D.D.C. 2004) (No. 04-7041).

³⁶ *Id.*

³⁷ *Heller*, 128 S. Ct. at 2815-16.

typical infantryman contemporaneously uses, but rather, by that which is widely used pursuant to the government's laws:

This definition conveniently excludes machineguns. . . . But what sense does this approach make? According to the majority's reasoning, if Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns . . . the Court will have to reverse course and find that the Second Amendment does, in fact, protect the individual . . . right to possess a machinegun. . . . In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit.³⁸

D. The Types Of Weapons Privileged By Right To Keep And Bear.

Being that the Second Amendment would rightfully be understood to prescribe the right of American citizens to possess military-grade weapons that are in common use by the United States Armed Forces, the question is begged, "What is today in common use by the United States military, which is determined by what the typical infantryman wields?" This question is echoed by what Judge Kleinfeld eloquently asked in his dissenting opinion in *Silveira v. Lockyer* in 2003: "What private possession of arms does carry a 'reasonable relationship to the preservation or efficiency of a well-regulated militia?'"³⁹ This should be the proper test by which it is determined what "arms" our people are privilege by right to keep and bear.

³⁸ *Id.* at 2869 (Breyer, J., dissenting).

³⁹ *Silveira v. Lockyer*, 328 F.3d 567, 587 (9th Cir. 2003) (Kleinfeld, J., dissenting).

Judge Kleinfeld observed that the learning of how to use any weapon that would contribute to the proficiency of an individual in using a weapon of contemporary military grade is protected by the Second Amendment.⁴⁰ This would mean that less sophisticated weapons—such as bolt-action rifles and revolvers—would be a right of the American people to own, because their use would contribute to the aptitude of one’s use of automatic rifles and semiautomatic pistols, respectively.

To their horror, the judges of the First Circuit Court of Appeals observed in 1942 that the Second Amendment, if adhered to through an originalist approach, would prevent Congress—and now the states, too, since *McDonald* incorporated the Second Amendment against the states by way of the Fourteenth Amendment—“from regulating the possession or use by private persons . . . of distinctly military arms, such as machine guns, trench mortars, [and] anti-tank or anti-aircraft guns. . . .”⁴¹ If this court is correct in alleging that these weapons are “military arms” that are widely used by the typical infantryman of our military, then these types of weapons would be privileged by right for individual American citizens to own via the Second Amendment.

⁴⁰ *Id.*

⁴¹ *Casey v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

The Sixth Circuit Court of Appeals held in 1976 that “9-millimeter submachine guns have been used by the military forces of the United States . . . [and] are part of the military equipment of the United States military . . . and that firearms of this general type, that is, submachine guns, do bear some relationship, to the preservation or efficiency of the military forces.”⁴² If the Sixth Circuit is correct in asserting that submachine guns are commonly used by the United States military, then this type of weapon should be privileged by right for individual American citizens to keep and bear via the Second Amendment.

In their amicus brief for *Heller*, the Gun Owners of America noted that semi- and fully- automatic rifles should fall within the protective sphere of the Second Amendment due to their widespread use by the United States military:

The difference between a semi-automatic rifle and a fully-automatic rifle is a technical matter. . . . Moreover . . . fully-automatic arms of the type currently used by the U.S. military easily could be found within the protective shield of the Second Amendment, either as “ordinary military equipment, or that its use could contribute to the common defense” (*Miller*, 307 U.S. 178), or as “a lineal descendant of . . . founding-era weapon(s) (*Parker*, 478 F.3d at 398).”⁴³

Lund observed in his law review article, *Do Federal Firearms Laws Violate the Second Amendment by Disarming the Militia?*, that the average American soldier is trained to use the M203 shoulder-fired grenade launcher, the M67

⁴² *United States v. Warin*, 530 F.2d 103, 104-05 (6th Cir. 1976).

⁴³ Brief for Gun Owners of America, Inc., as Amici Supporting the Petitioner, Dist. of Columbia v. *Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

fragmentation grenade, and the M18A1 antipersonnel mine.⁴⁴ If he is correct, then these types of weapons should be a right of the American people to possess. Lund overtly states, “[P]ossession of the grenade, the classic twentieth century infantryman’s weapon, arguably should also be unhampered by NFA [(“National Firearms Act”)] restrictions.”⁴⁵

In *Heller*, the justices wrote in the majority opinion that fully-automatic rifles would be permissible by right to own if the prefatory clause of the Second Amendment was taken into consideration as *Marbury v. Madison* would require⁴⁶: “It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause.”⁴⁷ It is respectfully submitted that it is high time for the Second Amendment to be reattached to its prefatory clause.

For the aforementioned reasons, if the Second Amendment was interpreted as it should be, then individual American citizens reserve the right to possess automatic rifles and submachine guns, hand grenades, shoulder-fired rocket and grenade launchers, antipersonnel mines, trench mortars, anti-aircraft and anti-tank guns, and all the precursors to these weapons that would contribute to the

⁴⁴ Lund at 499.

⁴⁵ *Id.* at 504.

⁴⁶ *Marbury v. Madison*, 5 U.S. 137 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect.”).

⁴⁷ *Heller*, 128 S. Ct. at 2817.

proficiency of their use of the contemporary weapons of military grade. This would be true until the next generation of military-grade weapons are developed and become widely adopted for use by the United States military—then American citizens would be able to keep and bear those weapons.

E. Public Policy Implications.

The most common argument that one could raise—via public policy grounds that are completely detached from natural and constitutional law and American history—to oppose the widespread ownership of military-grade weapons is that they are dangerous and will lead to deaths of pandemic proportions. This, however, is absurd and factually unsupported to think, because military-grade weapons are essentially not much more dangerous than are the fourteen million and twelve million firearms that were purchased by American citizens in 2009 and 2008, respectively.⁴⁸ In fact, the number of firearms purchased by American citizens in 2009 is greater than the number of infantrymen in the world's top twenty-one armies *combined*.⁴⁹

In 2009, half a million of the weapons sold to American citizens that year were of the AR-15 style, which “is basically the same kind of rifle that U.S.

⁴⁸ AmmoLand. “USA Gun Owners Buy 14 Million Plus Guns in 2009 – More Than 21 of the Worlds Standing Armies Combined.” <http://www.ammoland.com/2010/01/13/gun-owners-buy-14-million-plus-guns-in-2009/>. Accessed 19 September 2010.

⁴⁹ *Id.*

military forces use in the Middle East.”⁵⁰ Despite the proliferation of weapons—or perhaps because of it—the estimated rate of violent crimes in the United States dropped by 6.1 percent in 2009 when contrasted with 2008, and 2010 was the third consecutive year the Federal Bureau of Investigations reported that the number of annual violent crimes decreased.⁵¹ Judge Kozinski rightfully opined in his dissenting opinion in *Silveira* that it is a “delusion” to believe “that ordinary people are too careless and stupid to own guns. . . .”⁵²

Firearm bans do not reduce violent crime, and as such, the Firearm Safety Act of 2013 does not serve a compelling governmental purpose. “In 2004, the U.S. National Academy of Sciences released its evaluation from a review of 253 journal articles, 99 books, 43 government publications, and some original empirical research [and found that firearm bans do not reduce violent crimes].” Don Kates and Gary Mauser, *Would Banning Firearms Reduce Murder And Suicide? A Review Of International And Some Domestic Evidence*, 30 Harv. J.L. & Pub. Pol’y 649, 654 (2007) (citing Charles F. Wellford et al., Nat’l Research Counsel, *Firearms And Violence: A Critical Review*, 6-10 (2004)). “The same conclusion

⁵⁰ Andrew Molchan, “In 2009, over 500,000 AR15 type rifles will be manufactured and sold in the USA. Why?” <<http://www.gunslot.com/forum/2009-over-500000-ar15-type-rifles-will-be-manufactured-and-sold-usa-why>>. Accessed 20 November 2010.

⁵¹ “The Full Measure of Freedom.” America’s 1st Freedom. November 2010: Pg. 14.

⁵² *Silveira*, 328 F.3d at 569 (Kozinski, J., dissenting).

was reached in 2003 by the U.S. Centers for Disease Control's review of then extant studies." *Id.* (citing The Task Force on Community Preventative Servs., Ctrs., for Disease Control, *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, 52 *Mortality & Morbidity Wkly. Rep.* (RR-14 Recommendations & Rep.) 11, 16 (2003)).

In other countries where private ownership of contemporary military-grade weapons is common, crime does not flourish. In Switzerland an estimated fourteen percent of households have automatic rifles, which are permitted by Swiss law, and in Israel it is common for teenage conscripts "to walk the streets and frequent nightclubs bearing fully automatic rifles during their military service."⁵³ Lund questioned the baseless assertion that military-grade weapons are inherently dangerous: "why should the idea of fourteen million American households with an M16 or two in the closet, or American teens taking their AR15s out with them on a camping or hunting trip for the weekend be seen as a safety risk rather than an asset?"⁵⁴

The alternative to interpreting the Second Amendment to prescribe the right of the American people to keep weapons of military grade is arguably more

⁵³ Lund at 500.

⁵⁴ *Id.*

dangerous than an “honest originalist interpretation”⁵⁵ of it, because as Judge Kozinski opined,

The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.⁵⁶

CONCLUSION

For the reasons set forth *supra*, this Court should reverse the judgment of the district court or else our people will be unable to realize the purpose of the militia or to defend themselves from the more dangerous elements of the populace. *See The Color of Crime: Race, Crime and Justice in America*, New Century Foundation, 2005, available at <<http://www.colorofcrime.com/colorofcrime2005.html>>. When the Second Amendment’s text and prefatory clause are taken into consideration, it can only be concluded that the Amendment prescribes a right for American citizens to keep and bear weapons of contemporary military grade.

⁵⁵ *Id.* at 499.

⁵⁶ *Silveira*, 328 F.3d at 569 (Kozinski, J., dissenting).

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This is to certify that this *amicus curiae* brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,964 words, exclusive of the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

This brief has been prepared in a proportionally spaced typeface—Times New Roman 14-point font—by using Microsoft Word 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2014, the foregoing *Amicus Curiae* Brief of Traditionalist Youth Network, LLC, in Support of Appellants and Urging Reversal was filed electronically through the Court's CM/ECF system. Notice of this filing should be sent through said electronic filing program to the attorneys of record for the parties.

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