No. 20-843

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE &
PISTOL ASSOCIATION, INC., *et al.*,

Petitioners,

v.

KEVIN P. BRUEN, IN HIS OFFICIAL
CAPACITY AS SUPERINTENDENT OF
NEW YORK STATE POLICE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICANS AGAINST GUN VIOLENCE IN SUPPORT OF RESPONDENTS

ANTHONY SCHOENBERG
PATRICK LOI
Counsel of Record
FARELLA BRAUN + MARTEL LLP
235 Montgomery Street, 17th Floor
San Francisco CA 94104
(415) 954-4400
ploi@fbm.com

Counsel for Amicus Curiae
Americans Against Gun Violence

307525

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Page

Page

Statutes & Other Authorities

Cited Authorities

Page

Page

I. INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Americans Against Gun Violence ("AAGunV") is a nonprofit organization whose principal purpose is to advocate for definitive measures to reduce the rates of firearm-related deaths and injuries to levels at or below the rates seen in peer countries. AAGunV offers this brief to provide the Court with additional information and context regarding the development of the individual rights view of the Second Amendment and the reasons the Court should overrule *District of Columbia v. Heller*, 554 U.S. 570 (2008) and decide this appeal in favor of Respondents.

II. BACKGROUND

The text of the Second Amendment provides: "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.

Over the course of U.S. history, courts universally understood this language to provide only a limited, collective right to possess firearms to the extent necessary to maintain effective state militias (the "collective rights" view) rather than a broad, individual right to possess

1. All parties have provided written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the undersigned counsel hereby certifies that no party's counsel or other person authored the brief in whole or in part or contributed money intended to fund preparing or submitting the brief, and no person or entity other than AAGunV, its members, and its counsel made a monetary contribution to the preparation or submission of the brief.

and use firearms for personal purposes unconnected with militia service (the "individual rights" view). This was because the phrase "A well regulated Militia being necessary to the security of a free State," (the "Militia Clause") was interpreted as setting out the purpose and scope of the protection granted in the phrase "the right of the people to keep and bear Arms, shall not be infringed" (the "Arms Clause").

This Court twice found that this was the proper way to construe the Second Amendment. In *United States v. Miller*, 307 U.S. 174, 176 (1939), it considered the scope of the Second Amendment when criminal defendants asserted that a federal gun control law restricting the transport of sawed-off shotguns violated their Second Amendment rights. The Court found that the "guarantee of the Second Amendment [was] made" with the "obvious purpose to assure the continuation and render possible the effectiveness of [the Militia]," and accordingly, the Second Amendment did not protect firearm possession or use that did not further this purpose. *Id.* at 178 ("In the absence of any evidence tending to show that possession or use of [the prohibited gun at issue] 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 such an instrument."). Forty years later, in *Lewis v. United States*, 445 U.S. 55, 65 n. 8 (1980), the Court reaffirmed that the Second Amendment does not confer an individual right to own firearms for personal use. *Id.* (explaining that 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.'").

With the exception of one outlier, every federal circuit court to consider the issue applied *Miller* to hold that the Second Amendment does not protect the right to possess and use guns for private, civilian purposes.[2] Prior to *Heller*, the Ninth Circuit conducted a detailed analysis of the Second Amendment in *Silveira v. Lockyer*, 312 F.3d 1052, 1087 (9th Cir. 2002), examining both the language of the provision and the historical record informing its adoption, and it concluded that "the collective rights view, rather than the individual rights models, reflects the proper interpretation of the Second Amendment."

While the collective rights view was the law applied by courts at every level, the individual rights view was fabricated over the course of decades through the efforts of pro-gun special interests. Saul Cornell, *"Half Cocked": The Persistence of Anachronism and Presentism in the*

---

2. *See, e.g.*, *United States v. Haney*, 264 F.3d 1161, 1164-1166 (10th Cir. 2001); *United States v. Napier*, 233 F.3d 394, 402-404 (6th Cir. 2000); *Gillespie v. Indianapolis*, 185 F.3d 693, 710-711 (7th Cir. 1999); *United States v. Scanio*, No. 97-1584, 1998 WL 802060, *2 (2d Cir. Nov. 12, 1998) (unpublished opinion); *United States v. Wright*, 117 F.3d 1265, 1271-1274 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 285-286 (3d Cir. 1996); *Hickman v. Block*, 81 F.3d 98, 100-103 (9th Cir. 1996); *United States v. Hale*, 978 F.2d 1016, 1018-1020 (8th Cir. 1992); *Thomas v. Members of City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (*per curiam*); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (*per curiam*); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971). In the one outlier case, *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), the Fifth Circuit adopted the individual rights view of the Second Amendment, but subsequent Court of Appeals decisions declined to follow *Emerson*. *See Silveira v. Lockyer*, 312 F.3d 1052, 1060-66 (9th Cir. 2002); *United States v. Parker*, 362 F.3d 1279, 1283-84 (10th Cir. 2004).

Academic Debate Over the Second Amendment, 106 J. Crim. L. & Criminology 203, 205-206 (2016) (explaining that "the 'individual rights' view articulated in *Heller* . . . was largely an invented historical tradition. Gun rights advocates both within and outside of the legal academy worked assiduously to create this revisionist history of the Second Amendment and deployed it effectively in *Heller* . . ."). Until the latter part of the 20th century, the individual rights view was non-existent. Michael Waldman, *How the NRA Rewrote the Second Amendment*, POLITICO Magazine (May 19, 2014), https://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856/ (last visited September 15, 2021) ("From 1888, when law review articles were first indexed, through 1959, every single one on the Second Amendment concluded it did not guarantee an individual right to own a gun."). However, that changed in the late 1970's when the gun lobby began channeling substantial money toward the idea that the Second Amendment protected an individual right to firearms. *Id.* (explaining that "a squad of attorneys and professors began to churn out law review submissions, dozens of them, at a prodigious rate" with "[f]unds—much of them from the [National Rifle Association]—flow[ing] freely.") *see also* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. REV. 309, 317 (1998) (explaining that "the gun lobby pursued an aggressive campaign to build a body of favorable literature" and an "arm of the National Rifle Association [] dispensed sizable grants to encourage writing that favored the individual rights model . . .").

Through this campaign of misinformation, the gun lobby sought to create a mistaken understanding of the law in hopes of ultimately fostering a shift in the

law itself. Over time, the popular understanding of the Second Amendment among Americans gradually shifted to the individual rights view even though that view was completely divorced from how the Second Amendment was interpreted by the courts. *See* Waldman, *supra* ("In 1959, according to a Gallup poll, 60 percent of Americans favored banning handguns; that dropped to 41 percent by 1975 and 24 percent in 2012. By early 2008, according to Gallup, 73 percent of Americans believed the Second Amendment 'guaranteed the rights of Americans to own guns' outside the militia.").

Supreme Court justices recognized even while it was happening that pro-gun special interests were attempting to manufacture constitutional protection for the individual use of firearms. *See Adams v. Williams*, 407 U.S. 143, 150 (1972) (Douglas, J. dissenting) (recognizing that "[t]here is no reason why all pistols should not be barred to everyone except the police" but at the same time a "powerful lobby dins into the ears of our citizenry that [pistol purchases] are constitutional rights protected by the Second Amendment . . . "). The gun lobby's misrepresentation of the Second Amendment was so contrary to history, established law, and the amendment's own language that, in 1991, former Chief Justice Warren Burger called it "one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime." Warren E. Burger, PBS NewsHour, December 16, 1991.

In 2008, the gun lobby's decades-long effort came to a head when the Supreme Court issued its decision in *Heller*. Despite the preexisting judicial consensus that the Militia Clause limited constitutional protection for firearm use to

the militia context, the *Heller* majority opinion rejected the collective rights view and held ***for the first time*** that the Second Amendment protects an individual right to possess firearms in the home for self-defense[3] unrelated to service in a well regulated militia. *Heller*, 554 U.S. at 635. Since that time, it has only become more clear that the collective rights view is the correct one, and the individual rights view cannot be squared with the language or intent of the Second Amendment. For that reason, the Court should take this opportunity to overrule *Heller* and return to the collective rights view that governed for the vast majority of American history.

III. SUMMARY OF THE ARGUMENT

In holding that the Second Amendment grants an individual right to firearms unconnected with service in a militia, the majority opinion in *Heller* minimized the language of the Militia Clause which expressly ties the right to "keep and bear Arms" to the need for a "well regulated Militia." It reasoned that the Militia Clause only indicated the reason for adopting the Arms Clause and did not limit the grant of the Arms Clause. *Heller*, 554 U.S. at 578, 599-600. As to the Arms Clause, the

3. Note that, while we refer throughout to *Heller's* holding that the Second Amendment protects the individual right to possess firearms in the home for self-defense, the notion that handgun possession in the home confers a net protective benefit is a myth that has been dispelled by, among other things, empirical evidence that was presented to the Court in *Heller*. *See, e.g.*, Brief of the American Academy of Pediatrics *et al*, *District of Columbia v. Heller*, 2008 WL 157189 (U.S.); Brief for American Public Health Association *et al*, *District of Columbia v. Heller*, 2008 WL 157191 (U.S.).

Heller majority opinion determined that the actual right granted by the Arms Clause included the individual right to use firearms for self-defense in the home because the phrase "keep and bear Arms" (1) referred to individual firearm use and not just collective militaristic use, and (2) was intended to codify what was purportedly a widely-understood, preexisting right to use firearms in this way. *Id.* at 581-95.

These propositions are not sufficiently supported for the following reasons: (1) the tenets of constitutional interpretation do not permit disregarding the Militia Clause; (2) historical research consistently shows that both "keep arms" and "bear arms" had a military connotation during the founding era; (3) there is no evidence that the Second Amendment was intended to codify a preexisting right or that such a right even existed; (4) the drafting history of the Second Amendment demonstrates that the drafters did not intend for it to protect the individual, personal use of firearms; and (5) the Second Amendment's description of the right to keep and bear arms as belonging to "the people" does not establish that it provides an individual right because that phrase is used elsewhere in the Constitution to refer to collective rights as well as to rights limited to a subset of people.

The collective rights view is the only interpretation that gives effect to the language and history of the Second Amendment, and neither the language of the Second Amendment nor its history provide sufficient support for the individual rights view. Accordingly, the Court should overrule *Heller* and decide this appeal in favor of Respondents.

IV. ARGUMENT

A. *Heller*'s conclusion that the Second Amendment protects an individual right to keep and bear arms unrelated to service in a well regulated Militia is inconsistent with the language and history of the Second Amendment.

1. *Heller*'s reasoning did not give effect to the Second Amendment's Militia Clause.

Under *Miller* and the many decisions that followed it, the courts have held for almost all of U.S. history that, consistent with the Militia Clause, the Second Amendment provided only for a collective right to possess and use firearms in connection with militia service. The *Heller* majority recognized that this language had to have some reasonable relationship to the right granted in the Arms Clause. *Id.* at 577 ("Logic demands that there be a link between the stated purpose and the command."). However, its ultimate conclusion eschewed any reasonable relationship. Instead, it determined that the Arms Clause granted an individual right to use firearms unconnected to the militia, despite the contrary language in the Militia Clause, because the Militia Clause states the reason for adopting the Arms Clause without having any effect on the protections granted within it. *See id.* at 599 (reasoning that "[t]he [Militia Clause] does not suggest that preserving the militia was the only reason Americans valued the ancient right" and the "threat that the Federal Government would destroy the citizens' militia by taking away their arms" was merely the "reason that right—unlike some other English rights—was codified in a written Constitution.").

The Militia Clause cannot be so easily cast aside. As an initial matter, this interpretation is unreasonable because it would mean that the right conferred was exponentially more far-reaching than the purported justification. Moreover, the *Heller* majority opinion's determination that the Militia Clause merely explains why the individual right to firearms was being codified while other English rights were not would mean that the drafters felt compelled to explain the difference between this right and the excluded rights even though the Constitution makes no mention of those excluded rights. It is unreasonable to assume that the Militia Clause was intended only to answer a question the Constitution does not present.

However, this reading of the Militia Clause suffers from an even more fundamental problem. In its view, the scope of the Second Amendment's protection would be exactly the same regardless of whether the Militia Clause was included or not. Such a reading is contrary to the foundational principle that no language of the Constitution should be rendered superfluous. *See Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect . . ."); *Myers v. United States*, 272 U.S. 52, 151 (1926) ("[R]eal effect should be given to all the words [the Constitution] uses."); *Prout v. Starr*, 188 U.S. 537, 544 (1903) ("It is one of the important functions of this court to so interpret the various provisions and limitations in the organic law of the Union that each and all of them shall be respected and observed.").

Heller's interpretation thus improperly reads the Militia Clause out of the Second Amendment altogether. In order to give effect to all the language of the Second

Amendment, it must be construed, as it always had been, to protect only a collective right to firearms.

2. Even disregarding the Militia Clause, the Arms Clause itself only extends to military contexts.

The *Heller* majority opinion's interpretation of the text of the Second Amendment started from the premise that "[t]he Constitution was written to be understood by the voters, its words and phrases were used in their normal and ordinary as distinguished from their technical meaning." *Heller*, 554 U.S. at 576 (citing *United States v. Sprague*, 282 U.S. 716, 731 (1931).). Under that approach, any proper construction of the Second Amendment requires that its language be interpreted in accordance with how it would have normally been understood during the founding era. However, as explained below, overwhelming evidence demonstrates that, during that time, the phrases "keep arms" and "bear arms" were understood to refer to the collective use of firearms in a military context. Therefore, even if it was permissible to fully disregard the Militia Clause, the Arms Clause itself only grants protection for the collective, military use of firearms.

In holding that the phrase "keep and bear Arms" does not refer only to the possession and use of firearms in a military context, the *Heller* majority opinion found that there was little evidence of how this phrase would have been understood but that there were some contemporaneous instances of a nonmilitary meaning. It found that the "the phrase 'keep arms' was not prevalent in the written documents of the founding period that we have found," but determined that the "few examples," all favored "the

right to 'keep Arms' as an individual right unconnected with militia service." *Id.* at 582. As to "bear arms," it acknowledged that federal legal sources use the phrase "bear arms" in a military context but found that this is because those sources would "have little occasion to use it *except* in discussions about the standing army and the militia" and that other legal and non-legal sources did use that phrase in nonmilitary contexts. *Id.* at 587-88 (emphasis in original). Based on what it found to be a lack of evidence to the contrary, the *Heller* majority opinion held that the Second Amendment "conferred an individual right to keep and bear arms." *Id.* at 595.

This determination was inconsistent with the evidence presented at the time, and to the extent there was any remaining doubt, it has been eliminated by more recent developments that have made even more clear that "keep and bear Arms" refers to the possession and use of firearms in a collective, military context.

a. The *Heller* majority opinion did not give sufficient weight to substantial evidence that the phrase "bear arms" had a military connotation.

The *Heller* majority opinion discounted extensive evidence presented to it in 2008, which indicated that "bear arms" had a distinctly military meaning. In an amicus brief submitted in *Heller*, a group of English and Linguistics professors explained:

> The term "bear arms" is an idiom that means to serve as a soldier, do military service, fight. To "bear arms against" means "to be engaged

> in hostilities with." The word "arms" itself has an overwhelmingly military meaning, referring to weapons of offense or armor of defense. In every instance we have found 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. It is only where additional language is tacked on, either to bend the idiom by specifying a particular type of fighting or to break the idiom by adding incompatible language, that the meaning of "bear arms" deviates. In the Second Amendment, the term is employed in its natural, unadorned state and, therefore, one must conclude, was used idiomatically to refer to military service.

Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners, *District of Columbia v. Heller*, 2008 WL 157194 (U.S.), at *4.

The Ninth Circuit reached the same conclusion in *Silveira* where it found that "[h]istorical research shows that the use of the term 'bear arms' generally referred to the carrying of arms in military service—not the private use of arms for personal purposes." 312 F.3d at 1072. In making that determination, it set out a litany of historical decisions demonstrating that this continued to be the understanding of this phrase throughout the 19th century. *See English v. State*, 35 Tex. 473, 476 (1872) ("The word 'arms' in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or

soldier, and the word is used in its military sense."); *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891) ("[I]n regard to the kind of arms referred to in the [Second A]mendment, it must be held to refer to the weapons of warfare to be used by the militia . . ."). Most notably, an 1840 decision by the Tennessee Supreme Court found that the phrase "bear arms" does not encompass personal use for, for example, hunting. *Aymette v. State*, 21 Tenn. 154, 161 (1840) ("A man in 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 . . .").

b. New empirical methods for studying founding-era English usage further demonstrate that the phrase "keep and bear Arms" refers to collective, military firearm use.

Recent advances in the research on this issue have further bolstered the conclusion that the Arms Clause provides only for collective, military firearm use. In particular, the field of corpus linguistics has given scholars a neutral, data-driven lens through which to examine the historical use of the phrases "keep arms" and "bear arms." That discipline studies "language based on examples of 'real life' language use." Tony McEnery & Andrew Wilson, *Corpus Linguistics: An Introduction*, 1 (2d ed. 2001). This is to say that it focuses on the contemporaneous and ordinary language use that the *Heller* majority opinion acknowledged should guide the interpretation of the Second Amendment.

This study is done by analyzing a 'corpus' (or 'corpora' plural) which is a "searchable body of texts used to

determine meaning through language usage." James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 Yale L.J. Forum 21, 24 (2016). Through the use of these data sets, researchers are able to gather information about "which meanings were possible at a given time, and what their relative distribution and frequency were." Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, The Panorama (Aug. 3, 2018).

Since *Heller* was decided, the development of two corpora at Brigham Young University has shed substantially more light on what it meant to "keep arms" or "bear arms" during the founding era. The Corpus of Founding Era American English ("COFEA") includes over 120,000 texts and 154 million words from primary sources from between 1760 and 1799. The Corpus of Early Modern English ("COEME") includes 40,000 texts and nearly 1.3 billion words from sources dating back to 1475.

Studies analyzing this wealth of data with these objective methods have found that the phrase "bear arms" in the Second Amendment has a collective connotation, typically referring to "the act of soldiering and the use of weapons in war." Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 Hastings Const. L.Q. 509, 513 (2019); LaCroix, *supra*. A survey of both legal and non-legal texts in COFEA and COEME from the founding era determined that they "almost always use *bear arms* in an unambiguously military sense." Baron, *supra*, at 510-11 (emphasis in original). An examination of almost 1,000 uses of "bear arms" in "seventeenth- and eighteen-century English and American texts" found that

"roughly 900 separate occurrences of *bear arms* before and during the founding era refer to war, soldiering, or other forms of armed action by a group rather than an individual." *Id.* at 510 (emphasis in original). In contrast, "[n]on-military uses of *bear arms* in reference to hunting or personal self-defense are not just rare, they are almost nonexistent." *Id.* (emphasis in original).

An examination of uses of "keep arms" similarly concluded that, in founding-era sources, it "almost always appears in a military context." *Id.* at 513. Between COEME and COFEA, there were a total of twenty-six occurrences of "keep arms" excluding duplicates and one instance where "keep" was used to mean "prevent," "as in 'to keep arms from somebody.'" *Id.* Of those twenty-six occurrences, twenty-five "refer[red] to weapons for use in the military or the militia," and one was ambiguous. *Id.*

Together, these authorities demonstrate that the Arms Clause, even in isolation, would not have been understood at its adoption to confer an individual right to firearms unconnected with militia service. The *Heller* majority opinion read it to afford this right based on a lack of clear evidence to the contrary, but the analyses that have since been conducted based on much larger samples of contemporaneous sources show that both "keep arms" and "bear arms" had a distinctly military connotation. Therefore, even if the Militia Clause is disregarded, the Second Amendment, at most, protects the possession and use of firearms in a collective, military context.

3. There is no evidence that the Second Amendment was understood to codify a preexisting right to bear arms.

The *Heller* majority opinion found that the Second Amendment was intended to "codif[y] a right inherited from our English ancestors." *Heller*, 554 U.S. at 599 (quotations omitted). However, the historical record does not support that the Second Amendment intended to codify a preexisting individual right to firearms or that a general right to do so was understood to exist at the time the Second Amendment was adopted.

First, none of the language in the Second Amendment can be read as conveying an intent to codify a preexisting individual right to possess and use firearms for self-defense. The Arms Clause states only that "the right of the people to keep and bear Arms, shall not be infringed." The *Heller* majority opinion reasoned that the language "shall not be infringed" "implicitly recognizes the pre-existence of the right . . ." *Id.* at 592. However, taking that for granted, it leaves the question of what right is purportedly being codified. The only right referenced in the text is the right to "keep and bear Arms." As discussed, that phase was understood to refer to the use of firearms in a military context. When that meaning is applied, the only preexisting right that the Second Amendment purports to codify, if any, is the collective military use of firearms. Therefore, even if there was a preexisting individual right to possess and use firearms for self-defense, the language of the Second Amendment does not incorporate it.

Moreover, the existence of that right prior to the adoption of the Second Amendment is itself not supported by the historical record. The *Heller* majority opinion's finding that there was such a right was based on a provision in the English Bill of Rights which stated "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." *Id.* at 593. This was far from an individual right for all citizens to have and use firearms in self-defense. Even the *Heller* majority opinion recognized that it was a "right not available to the whole population, given that it was restricted to Protestants, and like all English rights it was held only against the Crown, not Parliament." *Id.*

Nonetheless, the *Heller* majority opinion stated that "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." *Id.* Historically, that statement is inaccurate. Indeed, another source relied upon by the *Heller* majority opinion, George Tucker's Blackstone Commentaries from the year 1803, makes that clear. The *Heller* majority opinion cited portions of that text as purported evidence that founding-era scholars interpreted the Second Amendment as protecting an individual right unconnected with militia service. *Id.* at 606. However, while George Tucker commented in that text that the right to possess firearms for self-defense was purportedly the "palladium of liberty," he went on to explain that, although the English Bill of Rights might seem to prohibit disarmament of the people at first glance, it had been construed to ***only*** protect gun ownership rights for a narrow subset of English subjects.[4] He stated:

---

4. St. George Tucker and Sir William Blackstone, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United*

> True it is, their bill of rights seems at first view to counteract this policy [of disarming the people] : but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.

Id.

This authority which the *Heller* majority opinion considered reliable in its analysis firmly demonstrates that founding-era Americans could not have inherited any belief from the English that there was a universal, individual right to possess and use firearms for self-defense. Even as to English subjects at that time, the English Bill of Rights was understood to provide only token protection for individual gun use such that all but a few could be prohibited from keeping a gun in their home. The preexisting right found to have been inherited from the English did not exist even in England.[5] Therefore,

---

States, and of the Commonwealth of Virginia : With an Appendix to Each Volume, Containing Short Tracts Upon Such Subjects as Appeared Necessary to Form a Connected View of the Laws of Virginia as a Member of the Federal Union, Volume First, Part First, Appendix, Note D: View of the Constitution of the United States, 300 (1996).

5. The current state of gun regulation in Great Britain further demonstrates that the English Bill of Rights never provided a broad right to individual gun use. The English Bill

the evidence that the *Heller* majority opinion was based upon does not support that the Second Amendment was understood to incorporate any right broader than exactly what it specifies—the right to possess and use firearms in connection with militia service.

4. The drafters knowingly declined to include language in the Second Amendment that would have provided for an individual right to use firearms for self-defense.

While the Second Amendment was being drafted, the drafters had the option of including language from state proposals or previously-adopted state constitutions that referred specifically to the use of firearms for defense.

---

of Rights remains in effect today. *See, e.g.*, *R v. Secretary of State for Exiting the European Union* [2017] UKSC 5, (appeal taken from N. Ir.) (2017 United Kingdom Supreme Court case citing the English Bill of Rights). But that fact did not present any obstacle to the UK Parliament's adoption of a complete ban on handguns in 1998. Michael J. North, *Gun Control in Great Britain after the Dublane Shootings*, *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis*, 185-193, 191 (2013). Although that handgun ban faced opposition by gun enthusiasts, *see id* at 190-91, the primary reports leading up to its adoption did not so much as reference the English Bill of Rights as an impediment. *See generally* Lord Douglas Cullen, *The Public Inquiry into the Shootings at Dunblane Primary School on 13 March 1996* (1996), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/276631/3386.pdf (last visited September 15, 2021); *The Public Inquiry into the Shootings at Dunblane Primary School on March 13, 1996: The Government Response* (1996), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/276636/3392.pdf (last visited September 15, 2021).

They chose not to do so and instead focused the text of the Second Amendment on the importance of the militia and the preservation of the use of arms in that capacity. Their decision not to incorporate the language that others had proposed or used to extend protection to individual firearm use for self-defense is evidence that they did not intend the Second Amendment to extend that far.

At the first Federal Congress, three states, Virginia, North Carolina, and New York, sent proposals for amendments to the Constitution which addressed protecting the institution of the militia from the new federal Government. *Heller*, 554 U.S. at 655 (Stevens, J. dissenting). Each focused on the dangers posed by standing armies and the importance of preserving state militias. *Id.* The Virginia proposal was the most influential on what became the Second Amendment. It read:

> 17th. That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power . . .
>
> 19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.

Id. at 656 (Stevens, J. dissenting) (citations omitted).

This proposal expressly provided protection for firearm use only in connection with the militia. In addition to explaining that the protection for firearm use was based on the importance of preventing standing armies from overreaching, the latter portion of the proposal provides that those with religious reservations against "bearing arms" could be exempted from doing so if they paid someone to serve in their place. Consistent with the empirical research discussed above, that exemption further demonstrates that the phrase "bearing arms" in the context of the Second Amendment referred to the collective, militaristic use of firearms. *Id.* at 661 (Stevens, J. dissenting) (explaining that, based on this exemption, the phrase "bear arms" had to be understood as "unequivocally and exclusively military" because "[t]he State simply does not compel its citizens to carry arms for the purpose of . . . self-defense.").[6]

---

6. North Carolina adopted the Virginia proposal as its own, and New York made its own proposal that used substantially similar language. *Id.* at 656 (Stevens, J. dissenting). The New York proposal read:

> That the people have a right to keep and bear Arms; that a well regulated Militia, including the body of the People capable of bearing Arms, is the proper, natural, and safe defence of a free State .... That standing Armies, in time of Peace, are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be kept under strict Subordination to the civil Power.

Id. at 657 (Stevens, J. dissenting) (citation omitted).

Additionally, there were several other states that did not send proposed amendments to Congress but where a minority of delegates advocated for related amendments. *Id.* at 656-57 (Stevens, J. dissenting). Most notably, a minority of delegates from Pennsylvania signed a proposal that, in contrast to the Virginia proposal, explicitly protected the use of firearms for self-defense and hunting. The Pennsylvania proposal read:

> 7. That the people have a right to bear arms for **the defense of themselves** and their own State, or the United States, or **for the purpose of killing game**; and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to, and be governed by the civil powers.

Id. at 658 (Stevens, J. dissenting) (emphasis added) (citation omitted).

With all of this language available to him, James Madison, the primary drafter of the Second Amendment, chose not to include any of the language that had been proposed to provide protection for the use of firearms for self-defense or hunting. *See id.* at 659 (Stevens, J. dissenting). Instead, his first draft of the Second Amendment took the substance of the militia-focused Virginia proposal and revised it to more concisely read: "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." *Id.* at 659-60 (Stevens, J. dissenting). The clause exempting "religiously scrupulous" persons was eventually removed due to concerns that Congress would be able to circumvent the amendment's protection and disarm the militias by defining "religiously scrupulous" broadly. *See id.* at 660 (Stevens, J. dissenting) (explaining that arguments in the House of Representatives reflected concern that "Congress 'can declare who are those religiously scrupulous, and prevent them from bearing arms.'") (citation omitted). What remained was a streamlined version of the language that had been proposed by Virginia specifically to prohibit the disarmament of the militia. While the drafters had the opportunity to provide constitutional protection for the individual use of firearms, they chose not to do so.

In disregarding this intentional word choice, the *Heller* majority opinion reasoned that any reliance on the drafting history is "dubious" when "interpret[ing] a text that was widely understood to codify a pre-existing right" and concluded that the version of the Second Amendment that was ultimately adopted merely codified that individual right. *See id.* at 603-04. However, the notion that there was such a "pre-existing right" is, as discussed, a historical fiction. Moreover, in arguing that preexisting state constitutions supported the individual rights view, the *Heller* majority opinion also failed to give weight to the distinct language of the Second Amendment. It pointed to Pennsylvania's Declaration of Rights of 1776 which stated "That the people have a right to bear arms *for the defence of themselves* and the state . . ." and Vermont's 1777 constitution which had substantially the same language.

Id. at 600-01 (emphasis added by court). It asserted that these "analogous arms-bearing rights" "confirmed" that its adoption of the individual rights view was correct, but it ignored the crucial distinction—the drafters of the Second Amendment chose different language. *Id.* at 600-01. The language that the *Heller* majority opinion emphasized in those state constitutions is nowhere to be found in the Second Amendment.

The drafters of the Second Amendment chose its language carefully. They granted a specific right using terms that were understood at the time to refer to the collective, militaristic use of firearms and explained that this grant was made in order to protect the militia as an institution. While the drafters easily could have incorporated language to protect the individual use of firearms if that was their intent, they did not do so. The Second Amendment says what it says, and its actual language and intent must be given effect.

5. The Second Amendment's reference to the right to keep and bear arms as a right of "the people" does not establish that it was an individual right belonging to every person.

Petitioners assert that, by describing the right to keep and bear arms as belonging to "the people," the Second Amendment provides ***all*** people with the right to carry firearms in public without meaningful regulation. In doing so, they are seeking to extend the *Heller* majority opinion's improper determination that the use of the phrase "the people" indicated that the right conferred by the Second Amendment was an individual right rather than a

collective right. Contrary to these conclusions, the use of "the people" elsewhere in the Constitution demonstrates that its use in the Second Amendment does not indicate, let alone establish, that the right to keep and bear arms is an individual right.

First, the *Heller* majority opinion improperly found that the use of "the people" in the Second Amendment supported the notion that the right to keep and bear arms is an individual right because that phrase was purportedly used in connection with individual rights in the First Amendment and the Fourth Amendment. *Id.* at 579. That proposition is incorrect in that the First Amendment refers to "the people" only in the context of the right to assembly which could only be considered a collective right. *Id.* at 644-46 (Stevens, J. dissenting). Just as the First Amendment provides that "the people" have a right to "assemble" which can only be exercised as part of a group, the Second Amendment provides that "the people" have a right to keep and bear arms only as part of a militia.

Second, the *Heller* majority opinion improperly construed "the people" broadly to mean "all members of the political community" and found that reading the right to keep and bear arms as limited to the organized militia was inconsistent with that definition. *Id.* at 579-81. It reasoned that, insofar as the militia at the time of the founding was limited to able-bodied males of certain ages, limiting the specified right to that subset of individuals was incompatible with the notion that it belonged to "all members of the political community." *Id.* at 580-81. However, not only is that reasoning internally inconsistent with the *Heller* majority opinion's conclusion

that the right to keep and bear arms extends only to the subset of people who are "law-abiding responsible citizens," the Constitution makes clear elsewhere that the drafters can and did use "the people" to refer to subsets of individuals. By providing in Article I that the House of Representatives shall be chosen by "the People of the several States," the Constitution delegated that power to the states which had different voting practices. *The Meaning(s) of "The People" in the Constitution*, 126 Harv. L. Rev. 1078, 1091 (2013). The result was that, in practice, "the People" here "largely meant property-owning white adult males" and also "meant different things in different states." *Id*. This is to say that, at the founding, the notion that a right belonged to "the people" was not inconsistent with the right only being afforded to a subset of people such as those making up the militia. In fact, during the founding era, gun ownership itself was limited to persons meeting specific criteria. *Id.* at 1093 ("At the time of the Founding, the right to bear arms was limited to certain adult male citizens and those individuals who swore allegiance to the state…The Founding generation had a racialized, gendered, and class-stratified understanding of persons permitted to own guns. This generation also disarmed certain white males, including felons and British loyalists . . .").

The fact that the Second Amendment's right to keep and bear arms belongs to "the people" did not provide any support for the *Heller* majority opinion's adoption of the individual rights view, and it does not provide any basis now for holding that all people must be permitted to carry firearms in public.

B. The Court should overrule *Heller*.

This Court has acknowledged that it will overturn a past decision if "there are strong grounds" and that doing so is particularly appropriate when interpreting the Constitution. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018); *see also Agostini v. Felton*, 521 U.S. 203, 236 (1997) (explaining that stare decisis "is at its weakest when we interpret the Constitution because [the Supreme Court's] interpretation can be altered only by constitutional amendment or by overruling prior decisions."). Factors the Court has found should be considered when making this determination include (1) "the [precedent's] consistency with other related decisions, (2) "the quality of [the precedent's] reasoning," (3) "developments since the decision was handed down," (4) "the workability of the rule it established," and (5) "reliance on the decision." *Janus*, 138 S. Ct. at 2478-79.

Based on these factors, it is both necessary and appropriate to overturn *Heller*. That decision's adoption of the individual rights view was a complete departure from how the Second Amendment had been understood and applied from the founding to the modern era. The majority opinion's reasoning did not justify that departure. It was based on the mistaken premise that there was a preexisting individual right to keep and bear arms that was inherited from the English and imported into the Second Amendment. The evidence available at that time demonstrated that the English had no such right, and even if they did, the drafters never intended to adopt it. The developments in linguistic research since that time have only further reinforced that the language the drafters chose for the Second Amendment did not provide for an

individual right to use firearms in self-defense. That right is simply nowhere to be found in the Second Amendment.

Moreover, as states have attempted to combat the gun-related injuries and mass shootings that have come to plague American society, *Heller*'s rule has proved to be an unworkable impediment. Its adoption of the individual rights view created a constitutional obstacle where none previously existed and provided the gun lobby with the ability to bring constitutional challenges to block or, at the least, impede the enactment of any significant limitation on firearms. The pending appeal, which seeks to strike a down a longstanding regulatory scheme that places reasonable restrictions on individuals' ability to carry guns public, is only one example of how the gun lobby has sought and will continue to seek to expand *Heller's* holding and exacerbate its effects. Having succeeded in using misinformation to change the recognized scope of the Second Amendment, the gun lobby is continuing on a campaign to misapply the Second Amendment and eliminate any meaningful gun regulations whatsoever. *See, e.g.*, *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020) (review pending) (holding that, under *Heller*, a law was not even allowed to limit the permissible number of bullets in a magazine even though it did not restrict the use or possession of any gun).

The urgency of the need to overrule *Heller's* unsupported adoption of the individual rights view cannot be overstated. The number of American civilians killed annually with guns has been rising steadily since the 2008 *Heller* decision and is now at a historic high of approximately 40,000 per year. *See Fatal Injury Data | WISQARS | Injury Center | CDC*, Centers for Disease

Control and Prevention, http://www.cdc.gov/injury/wisqars/fatal.html (last visited September 15, 2021). The U.S. rate of gun-related deaths is ten times higher than the average rate for peer countries. Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010*, 129(3) Am J Med 266 (2016). The U.S. homicide rate is seven times higher than the average for peer countries, driven by a gun-related homicide rate that is 25 times higher. *Id.* Since 1968, the number of American civilians that have died of gunshot wounds is greater than the number of American soldiers that have been killed in combat by any means in all the wars in which the U.S. has ever been involved. Lois K. Lee et al., *Firearm Laws and Firearm Homicides: A Systematic Review*, JAMA Intern. Med. (2017). Even with much of the country on lockdown, unofficial data indicates that 2020 was the worst year in U.S. history for gun violence, with more than 44,000 gun-related deaths. Reis Thebault and Danielle Rindler, *Shootings never stopped during the pandemic: 2020 was the deadliest gun violence year in decades*, The Washington Post (March 23, 2021), https://www.washingtonpost.com/nation/2021/03/23/2020-shootings/ (last visited September 15, 2021).

The issue before the Court is, quite literally, a matter of life and death. The Petitioners' position is based on entirely on the unsupported ruling in *Heller*, and accordingly, this appeal should be decided in favor of Respondents. However, this is only one instance of the broader harm being caused by the *Heller* decision. With every day that *Heller* is allowed to prevent or delay effective gun regulation, more American lives are lost in preventable deaths. The Court should act now to overrule *Heller* and give American legislatures back the means necessary to stem the nation's gun crisis.

V. CONCLUSION

For the foregoing reasons, AAGunV respectfully requests that this Court overrule its decision in *Heller*, decide this appeal in favor of Respondents, and affirm the decision of the Second Circuit.

Dated: September 21, 2021

Respectfully submitted,

ANTHONY SCHOENBERG
PATRICK LOI
Counsel of Record
FARELLA BRAUN + MARTEL LLP
235 Montgomery Street, 17th Floor
San Francisco CA 94104
(415) 954-4400
ploi@fbm.com

Counsel for Amicus Curiae
Americans Against Gun Violence