No. 07-290

IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA AND MAYOR ADRIAN F. FENTY,
Petitioners,
v.
DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

Brief of *Amicus Curiae* Foundation for Moral Law, In Support of Respondent

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QUESTION PRESENTED FOR REVIEW

1. Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violated the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law, Inc.[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the Godly principles of law upon which this country was founded. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has directly assisted, or filed *amicus* briefs, in several cases concerning religious freedom, the sanctity of life, and others that implicate the fundamental freedoms enshrined in our Bill of Rights.

The Foundation has an interest in this case because it believes that our God-given freedom starts with the natural right of self-defense, a right recognized by the Second Amendment's protection of the individual ownership and use of firearms. Fundamental principles of our constitutional system are at stake in this case. Only the original understanding of the Second Amendment will yield a proper result in this case, and the need for

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[1] *Amicus curiae* Foundation for Moral Law, Inc., files this brief with consent from both Petitioners and Respondent. Counsel of record for all parties received notice at least 10 days prior to the due date of the Foundation's intention to file this brief. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

constitutional fidelity drives the Foundation's legal advocacy. This brief primarily focuses on the history and text of the Second Amendment and how those support Respondent's case.

SUMMARY OF ARGUMENT

The text is paramount in constitutional interpretation. Properly interpreting the text requires reading it with an eye toward what it meant by common understanding at the time of its enactment. This requires placing the text in its historical context. It is especially important to carry out this method of interpretation where the Second Amendment is concerned because its concepts and language are so historically dependent.

The code provisions at issue in this case[2] essentially place a complete ban on the private ownership of handguns in the District of Columbia. Their sustainability relies upon the notion that the Second Amendment does not protect an individual right to own and use handguns in a responsible fashion. However, a review of the history and text of the amendment shows that denying that the Second Amendment recognizes such a right "requires almost herculean indifference to every kind of evidence." Don B. Kates, Jr., "Minimalist Interpretation of the Second Amendment," *in The Bill of Rights: Original Meaning and Current Understanding*, at 130 (Eugene Hickock, Jr. ed., 1991). A reasonable reading of the Second Amendment requires that these code provisions be

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[2] D.C. Code §§ 7-2502.02(a)(4), 22-450(a), and 7-2507.02.

declared contrary to "the right of the people to keep and bear arms." U.S. Const. amend II.

The court of appeals below understood this and consequently correctly concluded that the code provisions at issue violate the Second Amendment. This Court should affirm the erudite and well-reasoned opinion of the court below.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE D.C. HANDGUN PROVISIONS SHOULD BE DECIDED ACCORDING TO THE UNALTERED TEXT OF THE SECOND AMENDMENT.

James Madison once wrote that, "As a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison*, at 228 (Philip R. Fendall, ed., 1865). This is almost axiomatic when dealing with any legal instrument, let alone a constitution. "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). A textual reading of the Constitution, Madison said, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

As important as a textual reading is for any constitutional interpretation, its necessity is heightened where the text obviously employs language and ideas peculiar to the time in which it was written. "In expounding the Constitution . . . , every word must

have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). Such is the case with the Second Amendment, which includes phrases such as "a well-regulated militia" and "to keep and bear arms" that were ubiquitous at the time of the amendment's enactment but have since fallen into disuse.[3] A recovery of the amendment's proper meaning requires placing this text in its historical context. The context eases any apparent tension between the mention of "a well-regulated militia" and the idea of an individual right to own firearms.

The tension, which has become palpable with the split among circuits as to the meaning of the Second Amendment, stems from there being two general ways to read the text of the amendment. The first reads it as granting a *collective* states' right; the second reads it as recognizing an *individual* right.

The first interpretation understands the point of the amendment to be maintenance of "[a] well-regulated militia," with "the right to keep and bear arms" being dependent upon the states' need for such

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[3] Textual analysis is made all the more essential in this case by the dearth of precedents from this Court on the meaning of the Second Amendment. The only case of any import is *United States v. Miller*, 307 U.S. 174 (1939), in which this Court upheld the National Firearms Act against a challenge by a defendant indicted under the act for possession of a sawed-off shotgun. However, *Miller* made no "attempt to define, or otherwise construe, the substantive right protected by the Second Amendment." *Printz v. United States*, 521 U.S. 898, 939 n.1 (1997) (Thomas, J., concurring).

militias. *See, e.g.*, *United States v. Napier,* 233 F.3d 394, 404 (6th Cir. 2000); *United States v. Hancock*, 231 F.3d 557, 565-66 (9th Cir. 2000). With the advent of the modern structure of the United States military and the National Guard, this interpretation effectively renders the Second Amendment a dead-letter. The survival of the code provisions at issue depends upon the plausibility of this narrow reading of the amendment.

The second interpretation of the amendment understands the point of the amendment to be protecting an individual "right to keep and bear arms," with the militia language serving as a prefatory explanation of why such a right is necessary. *See, e.g., Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007); *United States v. Emerson*, 270 F.3d 203, 32 (5th Cir. 2001). The code provisions at issue fail to pass constitutional muster under this reading of the Second Amendment.

The lenses of history and text reveal that the true concerns behind the amendment were the people's fear of government tyranny and their ability to combat such tyranny through the possession and wielding of firearms, meaning that this second interpretation is the proper way to read the Second Amendment. Therefore, this Court should strike down the D.C. code provisions as violations of "the right of the people to keep and bear arms."

II. THE HISTORY BEHIND THE SECOND AMENDMENT REVEALS A HEALTHY AMERICAN FEAR OF GOVERNMENT TYRANNY AND THE NEED FOR SELF-DEFENSE THROUGH THE BEARING OF ARMS.

A. The right to keep and bear arms in English history

The history behind the Second Amendment began—as did so many others—in England, which had a long history of private arms ownership. In the twelfth century, Henry II required all freemen to possess arms, and Henry III required "every subject ages fifteen to fifty, including even landless farmers, to own a weapon other than a knife. Crown officers periodically inspected subjects to be certain that they were properly armed." Leonard Levy, *Origins of the Bill of Rights* 136 (1999). Private arms ownership continued until 1671 when Parliament enacted a gaming statute that restricted arms ownership to the wealthy. In 1686, James II, who favored Catholic subjects, "infuriated Protestants by banning their firearms." *Id.* at 137.

Thus, it was hardly surprising that when James II was deposed three years later, the Bill of Rights enacted by Parliament provided "[t]hat the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law." English Bill of Rights (Dec. 16, 1689), *reprinted in* 5 *The Founders' Constitution* 210 (Phillip Kurland & Ralph Lerner eds., 1987). England's population was 98 percent Protestant at the time, so the provision granted a nearly universal right to possess personal defense weaponry over which the king had no control.

As its language discusses "subjects" and "their defense," the provision leaves no doubt that the English right was considered to be an individual one.

Three-quarters of a century later, Sir William Blackstone described this right in his *Commentaries on the Laws of England* as the "right of the [citizens] . . . of having arms for their defense," which flowed from "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." W. Blackstone, I *Commentaries on the Laws of England* 139 (U. Chi. Facsimile Ed. 1979) (1765). Though the right appears to have been on solid footing at the time Blackstone summarized the law, by the turn of the century it had been severely curtailed. St. George Tucker, in his American edition of Blackstone's *Commentaries*, observed in 1803 that, "In England, the people have been disarmed, generally, under the specious pretext of preserving the game." This was done by interpreting the words "suitable to their conditions" in the English Bill provision "to authorize the prohibition of keeping a gun or other engine for the destruction of game, ... So that not one man in five hundred can keep a gun in his house without being subject to a penalty." St. George Tucker, *View of the Constitution of the United States* 239 (Clyde Wilson ed., Liberty Fund 1999) (1803).

United States Supreme Court Justice Joseph Story similarly noted in his 1833 *Commentaries on the Constitution of the United States* that "under various pretences the effect of this [arms] provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege." J. Story,

III *Commentaries on the Constitution of the United States*, § 1891 (1833).

B. The right to keep and bear arms in early American history

Well aware of England's history concerning the right to bear arms, Americans did not wish to see the deterioration of the right to bear arms repeated in this country. In fact, they had experienced the British penchant for disarming the people firsthand during the War for Independence. The battles that began the war, at Lexington and Concord in Massachusetts, occurred because British General Thomas Gage ordered a detachment of troops to march to Concord and seize a reserve of gunpowder and cannon said to be in the town. *See* Thomas Fleming, *Liberty: The American Revolution* 105-06 (1997). Three days after "the shot heard 'round the world," General Gage tricked the people of Boston into turning in their arms, an "open violation of honour" that was complained about in the *Declaration of the Causes and Necessity of Taking Up Arms* approved by the Second Continental Congress on July 6, 1775. *See* Stephen P. Halbrook, "The Original Understanding of the Second Amendment," *in The Bill of Rights: Original Meaning and Current Understanding*, at 118-120 (Eugene Hickock, Jr. ed., 1991); *Declaration of the Causes and Necessity of Taking Up Arms* (July 6, 1775), *reprinted in Documentary Source Book of American History: 1606-1913*, at 181 (William MacDonald ed., 1923).

Representative Elbridge Gerry referenced these events in the Congressional debate concerning the Second Amendment when he noted,

> Whenever government mean[s] to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the eastward.

E. Gerry, Discussion on draft of the Second Amendment, *Congressional Register* (August 17, 1789) *as reprinted in The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins (CBR)*, at 186 (Neil H. Cogan ed., 1997).

The colonies' first-hand hand experiences with British forces in the course of the Revolutionary War undoubtedly prompted the inclusion of arms provisions in their new state constitutions. Some of these provisions, such as the one in the Virginia Declaration of Rights of 1776, emphasized the role of the militia in protecting freedom: "[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; . . . ." Virginia Declaration of Rights, Art. XIII (1776). Others, such as Pennsylvania's provision, focused more on the use of arms generally: "[T]he people have a right to bear arms for the defense of themselves and the state; . . ." Pennsylvania Declaration of Rights, Art. XIII (1776). Pennsylvania was the first state to use the phrase "right to bear arms," and at the time it did not even have a state militia. *See* Levy, at 135. The Massachusetts Constitution of 1780 was the first state constitution to employ the conjunctive phrase "to keep and bear arms," combining the individual and communal

aspects of the right: "The people have a right to keep and to bear arms for the common defence." Mass. Const. Part I, Art. XVII (1780).

C. The right to keep and bear arms in the debate on the Constitution

During the debate over the ratification of the Constitution, a common charge from those who came against the proposed new government was that it would dominate the state governments through the force of its power and be capable of tyrannizing the people. *See, e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 648 (1989) (explaining that during the founding era there existed "a well-justified concern about political corruption and consequent government tyranny"). James Madison attempted to assuage these fears in *Federalist No. 46* by listing several reasons the people needed to feel no fear concerning the federal government. Among those reasons, he noted that

> [b]esides *the advantage of being armed, which the Americans possess over the people of almost every other nation*, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

The Federalist No. 46 (James Madison), at 247 (Carey & McClellan eds., 2001) (emphasis added).

Noah Webster similarly tried to allay these fears of federal power in a pro-Constitution pamphlet by matter-of-factly stating: "The supreme power in

America cannot enforce unjust laws by the sword; *because the whole body of the people are armed*, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States." N. Webster, "An Examination of the Leading Principles of the Federal Constitution," (1787) *reprinted in* 1 *The Debate on the Constitution*, at 155 (Bernard Bailyn ed., 1993) (emphasis added).

While these assurances rested on the incontestable point that most American citizens owned personal firearms, this fact and the implication of self-defense which flowed from it were not enough to convince the Constitution's critics. One such critic, writing under the pen name "Common Sense," complained that "the chief power will be in Congress, and that what is to be left of our government is plain, because a citizen may be deprived of the privilege of keeping arms for his own defence, he may have his property taken without a trial by jury." "Common Sense," *New York Daily Advertiser* (April 21, 1788). The deprivation of arms was unacceptable because, as stalwart Anti-Federalist Richard Henry Lee intoned in one of his "Federal Farmer" letters, [T]to preserve liberty, it is essential that the whole body of the people always possess arms, ..." Richard Henry Lee, Letter XVIII (January 25, 1788), *in An Additional Number of Letters From the Federal Farmer to The Republican* 170 (1788).

These Anti-Federalist sentiments were echoed in the state ratifying conventions by those who opposed the Constitution. George Mason was the father of the Virginia Bill of Rights and a Constitutional Convention delegate who refused to sign the final document in part because of its lack of a Bill of Rights. In the Virginia Ratifying Convention, he expressed his

belief that "divine providence has given to every individual the means of self-defense" and that "disarm[ing] the people [is] the best and most effectual way to enslave them." G. Mason, Virginia Ratifying Convention (June 14, 1788), *as reprinted in CBR*, at 193-94. Given the importance of this right, he wondered aloud, "Why should we not provide against the danger . . . ?" *Id.* Vocal critic of the Constitution Patrick Henry agreed with Mason, rehearsing what the point would be of having an amendment on the topic: "The great object is that every man be armed. . . . Everyone who is able may have a gun . . . ." P. Henry, Virginia Ratifying Convention (June 14, 1788), *as reprinted in CBR*, at 198.

Anti-Federalist concerns found their official expression in the proposals for additions to the Constitution made by the ratifying conventions. Five of the eight states whose convention majority or minority submitted proposals related to arms included the statement that "the people have a right to keep and bear arms," and all five separated the statement from any mention of the militia. *See CBR*, at 181-82. Extending the language of their state constitution, the Pennsylvania minority's proposal left out the word "keep" but otherwise constituted the most broadly worded proposal:

> 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; . . .

The Pennsylvania Minority of the Pennsylvania Ratification Convention (Dec. 12, 1787), *reprinted in CBR*, at 182 (emphasis added).

The New Hampshire majority and the Maryland minority proposals did not include any variation of this, by then common, phraseology. However, the New Hampshire provision's wording even more dramatically emphasized the individual nature of the right, stating that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."[4] New Hampshire State Ratification Convention Proposal (June 21, 1788), *reprinted in CBR*, at 181.

D. James Madison and the right to keep and bear arms

This background of English and Revolutionary War history, state constitutional provisions, Anti-Federalist angst, and suggestions from state ratifying conventions shaped both James Madison's proposal for an arms-bearing provision in the Constitution and the debate which produced the final wording of the Second Amendment. Madison hoped that his proposals would "render [the Constitution] as acceptable to the whole of the people of the United States, as it has been found acceptable to a majority of them," so he was well aware of the document's perceived shortcomings. J. Madison, Speech on the floor of the House of Representatives regarding Amendments to the Constitution (June 8, 1789), *reprinted in* 5 *The Founders' Constitution*, at 24. He wished "to

[4] The Maryland ratification minority's provision concerned conscientious objectors. *See CBR,* at 181.

extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they so valiantly fought and honorably bled." *Id.* Alleviating these apprehensions goes to the heart of the Second Amendment's purpose: preserving the right of self-defense against the perceived dangers created by the newly-formed federal government.

Madison's arms-bearing proposal provided: "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.* Several points about the proposal warrant notice.

First, following the lead of many of the state ratifying conventions, Madison placed "the right of the people to keep and bear arms" at the beginning of the proposed amendment, indicating that he thought this was the main subject of the proposal.

Second, Madison wanted to insert this amendment—as well as his versions of what became the First, Third, Fourth, Fifth, Sixth, and Eighth amendments—"in article I, Section 9, between clauses 3 and 4" of the Constitution, that is, immediately after the guarantee of the writ of habeas corpus and the prohibitions on bills of attainder and *ex post facto* laws. *Id.* at 25. These represent the few individual rights provisions in the body of the Constitution. Madison believed that his arms-bearing proposal was similar enough in kind to these individual rights provisions to propose listing it with them.

Third, in the course of the drafting of the amendment, Congress dropped the portion of the proposal related to exempting those "religiously scrupulous of bearing arms." The legislative history indicates that this was done because some congressmen believed such exemptions should be carried out through ordinary legislation rather than in the Constitution. *See Daily Advertiser* (August 18, 1789), *reprinted in CBR*, at 171. However, at least one member of the House of Representatives, New Jersey's Elias Boudinot, expressed the opinion that leaving the religious scruples clause out made it possible to read the amendment as having "an intention in the General Government to compel all citizens to bear arms." Debate in the House of Representatives, Amendments to the Constitution (August 20, 1789), *reprinted in Founders' Constitution*, at 211. Thus, far from there being a doubt about the *right* to bear arms, there was a fear that individuals would be *compelled* to bear arms by the amendment.

Initial public reaction to Madison's proposals, which were reprinted in newspapers throughout the nation, was sparse but positive. Staunch Federalist Tench Coxe, writing a missive in favor of the proposals a mere ten days after they were proposed, explained what he perceived to be the purpose behind the arms-bearing provision:

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article in *their right to keep and bear their private arms*.

Tench Coxe, "Remarks on the First Part of the Amendments to the Federal Constitution," *Philadelphia Federal Gazette*, June 18, 1789, at 2, *quoted in* Halbrook, at 126 (emphasis added). Coxe noted the familiar fear of tyrannical government and cited the amendment's "confirmation" of an individual right to bear "private arms" as the remedy to the possible perversion of power. Coxe's "Remarks" were reprinted in other papers[5] and no contemporary took up a pen to refute his interpretation.

III. THE TEXT OF THE SECOND AMENDMENT RECOGNIZES AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS.

While the final wording of the amendment differed from Madison's proposal, the meaning Coxe gleaned from Madison's version remained unchanged through the drafting process. The focus remained squarely on checking government power via a personal right to keep and bear arms.

In its final form, the Second Amendment would be listed separate from the Constitution in the collection of amendments known as "the Bill of Rights." 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. The *Statutes at Large* version of the amendment leaves out the first and last commas, *see* 1 *The Public Statutes at Large of the*

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[5] *New York Packet*, June 23, 1789, at 2; *Boston Massachusetts Centinel*, July 4, 1789, at 1.

United States of America 97 (R. Peters ed., 1848), *as reprinted in CBR* at 181, indicating that the second comma was grammatically necessary to set off the two major parts of the amendment, while the other commas represented grammatical quirks of the time.

Reading the amendment sans its superfluous commas—"[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"—more cleanly illustrates a second, weightier point of grammar. The clause containing the militia language is a dependent clause, while the arms-bearing language is located in the independent clause—as it was in Madison's proposed, but differently ordered, version. This means that the arms-bearing language can stand on its own as a sentence, but the "well regulated militia" language only forms a complete thought if coupled with the main focus of the compound sentence—the "right to keep and bear arms."

The sentence structure confirms what the history behind the amendment indicates:

> The plain language of the amendment, without attenuate inferences therefrom, shows that the function of the subordinate clause was not to qualify the right, but instead *to show why it must be protected. The right exists independent of the existence of the militia*. If this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized.

United States v. Emerson, 46 F. Supp.2d 598, 600 (N.D. Tex. 1999) (emphasis added).[6]

A. The "militia" clause

The words chosen by Congress for the final draft of the amendment fortify the conclusion that the Second Amendment countenances an individual, rather than collective, right to possess and use firearms. As it was understood at the time of the amendment's drafting and adoption, the term "militia" "was understood to be every individual citizen rather than just the army or the organized military." David Barton, *The Second Amendment: Preserving the Inalienable Right of Individual Self-Protection* 32 (2000).

> Nowadays, it is quite common to speak loosely of the National Guard as 'the state militia,' but two hundred years ago, any band of paid, semiprofessional, part-time volunteers, like today's Guard, would have been called a 'select corps' or 'select militia'—and viewed in many quarters as little better than a standing army.

Akhil Reed Amar, *The Bill of Rights* 51 (1998). Simply put, the "militia" was "the people."[7] Indeed, one of the

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[6] *See also*, Levy, *Origins*, at 135:

> The very language of the amendment is evidence that the right is a personal one, for it is not subordinated to the militia clause. Rather the right is an independent one, altogether separate from the maintenance of a militia. Militias were possible only because the people were armed and possessed the right to be armed. The right does not depend on whether militias exist.

[7] The modifier "well regulated" in front of "militia" does not change this idea of the militia into that of a military body. State constitutions such as those of Delaware and Virginia employed

first modifications made to Madison's proposed amendment changed the pertinent part of this text to: "A well regulated militia, *composed of the body of the People*, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, ..." House Consideration (August 17, 1789), *reprinted in CBR*, at 170 (emphasis added). This language was later eliminated, no doubt because it was viewed to be redundant.

Moreover, certain clauses in the body of the Constitution obviate against reading the amendment as recognizing a right to bear arms only for a militia body like the National Guard. Article I, section 8, clause 16 of the Constitution states that Congress has the power to provide for "organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the service of the United States, ..." Why would Congress and the states which ratified the Constitution worry about protecting the right of the organized militia to be armed when clause 16 already provided for it?

Even more troublesome for this reading is the immediately preceding clause, which gives Congress the power to "call[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const., Art. I, § 8, cl. 15. As the Anti-Federalist complaints about the Constitution and Federalist responses to them indicate, the Second

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this same phrase "a well regulated militia" in their arms-bearing provisions, and they had no bodies equivalent to a semi-professional corps like the National Guard. *See* Virginia Declaration of Rights, Art. XIII (1776), Delaware Declaration of Rights, § 18 (1776).

Amendment was designed to dispel the fear that this clause would allow Congress to disarm the citizenry and abuse their rights. If the Second Amendment merely protected the right of the organized militia to possess arms, then it protected nothing since Congress could constitutionally commandeer that militia to do its bidding under clause 15. It is no exaggeration to say that the collectivist reading causes the Second Amendment to mean exactly the opposite of its historical purpose.[8]

To put the focus of the Second Amendment on militias rather than the right to bear arms is to read its preamble as its point. Writing a century after the amendment's adoption in his widely read general treatise on constitutional law, Judge Thomas Cooley clarified that point:

> It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia: but this would be an interpretation not warranted by the intent. . . . [I]f the right were limited to those enrolled [in the militia], the purpose of this guarantee might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government to have

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[8] "If all it meant was the right to be a solider or serve in the military, whether in the militia or the army, it would hardly be a cherished right and would never have reached constitutional status in the Bill of Rights." Levy, *supra* note 6, at 134-35.

> a well-regulated militia; for to bear arms implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; . . . .

T.M. Cooley, *General Principles of Constitutional Law* 282 (Weisman pub. 1998) (1891).[9] Simply put, the preamble provided a reason for the personal right to bear arms, but it did not limit or control that right. The preamble sets up what follows, but the right itself stands alone.

Even if maintenance of some kind of militia force was the primary reason for ensuring that the people were armed, the purpose of the militia was to defend "the people" against government tyranny via a standing army. Thus, the *purpose* of the amendment is ensuring that the people could not be disarmed by the government, not preservation of the militia; the militia is a means while an armed citizenry is the

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[9] Cooley's reading was not a new one for constitutional law scholars. Sixty years earlier, Federalist William Rawle wrote in his *A View of the Constitution of the United States* that

> [T]he militia form the palladium of the country. They are ready to repel invasion, suppress insurrection, and preserve the good order and peace of government. . . . The *corollary*, from the first position, is that *the right of the people to keep and bear arms shall not be infringed*. The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people.

William Rawle, *A View of the Constitution of the United States* 125-26 (1829) (first emphasis added).

end.[10] In other words, a distinction must be made between motive and purpose. One *motive* behind the amendment was to ensure continuation of the citizen militia. The *purpose* of the amendment was recognition of a personal right to bear arms.

B. "[T]he people" to whom the right belongs

According to its text, the central focus of the Second Amendment—"the right" which "shall not be infringed"—belongs to "the people," not to the states. "[T]he people" is a term of art also employed in the First, Fourth, Ninth, and Tenth Amendments. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). The text of the Tenth Amendment[11] plainly shows that "the people" and "the states" are not one and the same; "when the Constitution means 'states' it says so." Amar, *The Bill of Rights*, at 51. "[A]s used throughout the Constitution, 'the people' have 'rights' and 'powers,' but federal and state governments only have 'powers' or 'authority', never 'rights.'" *Emerson*, 270 F.3d at 228. This Court has never held that the use of the term "the people" in other amendments renders the rights protected in those amendments collective rights rather than individual ones. It is illogical to hold otherwise for the Second Amendment

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[10] As President George Washington remarked to Congress, "A free people ought . . . to be armed." G. Washington, First Annual Meeting Message to Congress (January 8, 1790).

[11] "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*." U.S. Const. amend. X (emphasis added).

when nothing in its language dictates such a drastic difference from the rest of the Bill of Rights.

The right belongs to "the people" not because it is a collective right ensuring the proper equipping of organized militias, but rather because it is a right held by the people *vis-à-vis* the government. The founding generation felt that individual arms ownership deterred government usurpation of the people's rights. As Justice Story put it in his *Commentaries* in 1833:

> The *right of the citizens* to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Story, *Commentaries,* at § 1890 (emphasis added).

C. "[T]o keep and bear arms"

Further evidence supporting the view that the Second Amendment protects an individual right to gun ownership is found in the language "to keep and bear arms." Petitioners cling to this language, claiming that it was used exclusively in the military context during the founding era.[12] *See* Petitioner's Brief, at 16. This would be a compelling argument if it was true, but it is easily refuted both by the language of amendment and several ready examples from the time of its framing.

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[12] *See* Richard Uviller & William G. Merkel, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent* 35 (2002); Garry Wills, *Why We Have No Right To Keep and Bear Arms*, *The New York Review of Books*, at 62 (Sept. 21, 1995).

To begin with, the amendment does not just say "the right . . . to bear arms"; it says "the right . . . *to keep* and bear arms." (Emphasis added). Keeping arms has a distinctly individualistic denotation. This is most readily seen in the Massachusetts' minority's proposed amendment on this subject, which provided in pertinent part: "[T]hat the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from *keeping their own arms*." Massachusetts Minority of the Massachusetts Ratifying Convention, February 6, 1788 *reprinted in CBR*, at 181 (emphasis added). "[T]o keep . . . arms" is used in the ordinary sense of possession or ownership of arms.

Similarly, to "bear arms" has the plain meaning of "carrying" weapons for use. Noah Webster's 1828 *American Dictionary of the English Language* lists 20 definitions of "bear," the second of which is "to carry," while none of the rest give a military use for the term.[13] *See* N. Webster, *American Dictionary of the English Language*, available at http://1828.mshaffer.com/ (last visited February 7, 2008).

State ratifying convention proposals on this subject employed the phrase "to bear arms" in non-military contexts as well. For example, the aforementioned

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[13] The definition closest to Petitioners' meaning is Webster's third definition: "To wear; to bear as a mark of authority or distinction; as, to bear a sword, a badge, a name; to bear arms in a coat." Yet, bearing a weapon as a sign of rank is hardly the same thing as bearing a weapon as a soldier in battle.

Pennsylvania minority's proposal[14] provided, in pertinent part: "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*; . . . ." The Pennsylvania Minority of the Pennsylvania Ratification Convention (Dec. 12, 1787), *in CBR*, at 182.[15] Moreover, the right-to-arms proposals made by New York, North Carolina, Virginia, and Rhode Island did not expressly limit the right to "the common defense" or "the defense of the state."[16] *See CBR*, at 181-82.

There is even direct evidence that Madison was familiar with bearing arms language being used in non-military contexts. Madison presented "A Bill for the Preservation of Deer" on behalf of Thomas Jefferson in the Virginia legislature in 1785. The bill prohibited the hunting of deer under certain circumstances, and concluded by commanding:

> . . . and if, within twelve months after the date of the recognizance he shall *bear a gun out of his*

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[14] *See* discussion *supra* pp. 13-14.

[15] It was not just a minority of Pennsylvanians who understood the phrase this way, as the Pennsylvania Constitutions of both 1776 and 1790 used it in the same manner. *See CBR*, at 184: Pennsylvania Declaration of Rights, Art. XIII (1776) ("That the people have a right *to bear arms for the defense of themselves* and the state; . . . ."); Pennsylvania Constitution, Art. IX, § 21 (1790) ("That the right of citizens *to bear arms, in defense of themselves* and the state, shall not be questioned."). The Vermont Constitution of 1777 contained language identical to that found in the Pennsylvania Constitution of 1776. *See* Vt. Const., ch. I, art. XV.

[16] The Massachusetts Constitution did qualify the right in this way. *See* Massachusetts Const., Part I, Art. XVII (1780).

> *inclosed ground, unless whilst performing military duty*, it shall be deemed a breach of the recognizance, and be good cause to bind him a new, and every such *bearing of a gun* shall be a breach of the new recognizance and cause him to be bound again.

Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?* 83 Tex. L. Rev. 237, 244 (2004), *quoting* 2 *The Papers of Thomas Jefferson* 443, 444 (Julian P. Boyd ed. 1950) (emphasis added).

The bill employs the more specific phrase "bear a gun," but this only heightens the fact that it is explicitly used in a non-military sense. "Bear[ing] arms" broadens the types of weapons covered; it does not change the context of the uses for such weapons. Especially when one considers the other language in the amendment, the conclusion is inescapable that the phrase "to keep and bear arms" carried a non-military meaning in the Second Amendment at the time of its adoption.

D. The text and reasonable restrictions

Despite, or perhaps because of, the overwhelming evidence that a textual reading of the Second Amendment guarantees an individual right to possess and use firearms, Petitioners contend that, if the Second Amendment applies in this case, the code provisions at issue are "reasonable regulations of guns." *See* Petitioners' Brief, at 42.

However, as the court below acknowledged, the issue in this case is not about "reasonable restrictions." *Parker*, 478 F.3d at 399. The Second

Amendment explicitly states that the right to keep and bear arms "shall not be infringed." There may be some laws regulating arms that may be passed without "infring[ing]" on the right to keep and bear arms.[17] But the Court need not concern itself with what is a reasonable or unreasonable regulation in this case. The provisions at issue are not mere "regulations," but an outright ban on personal firearms in the District of Columbia. If *anything* qualifies as an infringement on the right to keep and bear arms, these gun laws must fall into that category because they prevent virtually any exercise of the individual "right of the people" protected by the Second Amendment.

[17] As the court below observed, "Indeed, the right to keep and bear arms—which we have explained pre-existed, and therefore was preserved by, the Second Amendment—was subject to restrictions at common law." *Parker*, 478 F.3d at 399.

CONCLUSION

For the reasons stated, this Honorable Court should affirm the decision of the District of Columbia Court of Appeals and invalidate the D.C. code provisions at issue as blatant violations of the Second Amendment.

Respectfully submitted,

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