

No. 07-290

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In The  
**Supreme Court of the United States**

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DISTRICT OF COLUMBIA and ADRIAN M. FENTY,  
MAYOR OF THE DISTRICT OF COLUMBIA,

*Petitioners,*

v.

DICK ANTHONY HELLER,

*Respondent.*

—◆—  
**On Writ Of Certiorari To The  
United States Court Of Appeals For  
The District Of Columbia Circuit**

—◆—  
**BRIEF FOR *AMICUS CURIAE* THE  
PRESIDENT *PRO TEMPORE* OF THE SENATE  
OF PENNSYLVANIA, JOSEPH B. SCARNATI, III,  
IN SUPPORT OF RESPONDENT**

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## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* the President *pro tempore* of the Senate of Pennsylvania, Joseph B. Scarnati, III, is the highest ranking constitutional officer of the Pennsylvania Senate elected by that body's members.<sup>1</sup> He is sworn to defend the United States and Pennsylvania Constitutions.

Since 1776 Pennsylvania's Constitution has guaranteed an individual right to bear arms in self-defense. Pennsylvanians enshrined this fundamental right in their Constitution after seeing firsthand the fatal consequences of relying solely on government to protect public safety. Before the American Revolution, the government of the Proprietors of Pennsylvania, influenced by Quaker ideals, refused to provide for the defense of the colony's citizens. The colonial government left citizens to their own resources to defend their settlements from marauders, even refusing to defend the colony from hostile forces during the French and Indian War.

Ever since the Proprietors' ouster, Pennsylvanians have safeguarded the right to bear arms in self-defense. The Commonwealth of Pennsylvania has legislation largely preempting local government from

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<sup>1</sup> Counsel of record for all parties consented and received notice at least 10 days prior to the due date of *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the office of the *amicus* made a monetary contribution intended to fund the preparation or submission of this brief.

adopting gun control measures. The Pennsylvania Supreme Court, emphasizing the constitutionally-preserved right of individuals to bear arms, upheld this legislation against challenges brought by cities seeking to impose local gun control.<sup>2</sup>

Pennsylvania's history informs any inquiry into the meaning of the Second Amendment of the United States Constitution, as the U.S. Court of Appeals for the District of Columbia Circuit recognized in the decision that is before the Court in this case. As the Circuit Court noted, Pennsylvania's history supports a conclusion that the Second Amendment protects an individual right to keep and bear arms for private purposes.

If this Court construes the Second Amendment to protect only a collective right of militias (as opposed to an individual right) to bear arms, Pennsylvania's longstanding constitutional recognition of an individual right to possess arms for self-defense will be at risk. Congress might be encouraged to enact, under the Commerce Clause or the Militia Clauses, or both, a statute prohibiting individual ownership of arms for private purposes. Such a statute would be inconsistent with Pennsylvania's constitutional provision recognizing an individual right to bear arms and might, under the Supremacy Clause, nullify Pennsylvania's provision. It is inconceivable that Pennsylvania would

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<sup>2</sup> See *Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996).

have ratified the federal Constitution, if such an eventuality had been foreseen.

As a legislative leader, *amicus* has reviewed proposals for gun control and has considered the data *pro* and *con*. The conclusion is inescapable: the right to bear arms in self-defense is as important today as ever. Reliance solely on government for protection from violence is worse than ineffective: it is dangerous. The more restrictions are imposed on the right of law-abiding citizens to have firearms, the more emboldened become the criminals, who are undeterred by any constraints. The President *pro tempore* submits this brief in support of Respondent.



### **SUMMARY OF ARGUMENT**

Pennsylvania's longstanding constitutional recognition of an individual right to bear arms in defense of self and state and its colonial and early state history inform any inquiry into the meaning of the Second Amendment. The impetus for adding the Bill of Rights to the Constitution came from the states, among which Pennsylvania was an important motivating force. The right to bear arms in self-defense is as important today as ever. The Second Amendment recognizes an individual, and fundamental, right to own a gun for self-defense.



## ARGUMENT

### I. PENNSYLVANIA'S CONSTITUTIONAL HISTORY SUPPORTS THE EXISTENCE OF AN INDIVIDUAL RIGHT TO BEAR ARMS IN SELF-DEFENSE

#### A. The Pennsylvania Constitution

The first Constitution of the Commonwealth of Pennsylvania, adopted in September 1776, provided in its “Declaration of the Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania” –

*That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.*

PA. CONST. decl. 13 (1776) (emphasis added).

A generation later, the Constitution of 1776 was supported by Pennsylvania’s “Constitutionalists” against efforts by the state’s Federalists to revise it to resemble the structure of the United States Constitution. The Federalists prevailed and gave Pennsylvania a new Constitution in 1790. Nevertheless, the new document not only preserved but strengthened the personal right to bear arms. The clause received its own section, which stated: “That the right of citizens to bear arms, in defence of themselves and the State, shall not be questioned.” PA. CONST. art. IX, §21 (1790). Those words appear in every subsequent

Pennsylvania Constitution. *See* PA. CONST. art. IX, §21 (1838); PA. CONST. art. I, §21 (1874); PA. CONST. art. I, §21 (1968).

Since 1776, the right to own a gun for defense of self, as well as defense of the Commonwealth, has been a constitutionally-recognized individual right. *See Ortiz v. Commonwealth*, 681 A.2d 152, 156 (Pa. 1996) (“ownership of firearms is constitutionally protected”).

## **B. Pennsylvania Colonial History**

### **1. Early Proprietorship**

The royal charter for Pennsylvania authorized Proprietor William Penn –

to Levy muster and traine all sorts of men of what condicion or wheresoever borne in the said p[ro]vince of Pensilvania for the time being and to make warr and pursue the enemies and Robbers aforesaid as well by Sea as by Land yea even without the Limits of the said p[ro]vince and by Gods assistance to vanquish and take them and being taken to put them to death by the Law of Warr or to save them att theire pleasure and to doe all and every other Act and thing which to the charge and office of a Captaine generall of any Army belongeth or hath accustomed to belong[.]

*I The Statutes at Large of Pennsylvania in the Time of William Penn, 1680-1700* at 115 (Gail McKnight

Beckman ed., 1976). Penn, however, did nothing to provide for the defense of the colony.

Penn was a leader in the Society of Friends, a religious denomination commonly known as the Quakers. Samuel J. Newland, *The Pennsylvania Militia: The Early Years, 1669-1792* at 5 (1997) (“Newland”); Philip S. Klein & Ari Hoogenboom, *A History of Pennsylvania* at 21 (2d ed. 1980) (“Klein”). The Quakers were pacifists, who refused to bear arms. See Newland at 6-7. Quaker beliefs would have important consequences for the peace and security of Pennsylvanians.

In 1689, the British Crown asked Pennsylvania to form a militia<sup>3</sup> and New York asked Pennsylvania

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<sup>3</sup> Laws providing for militias for defense were common in the colonies. Colonial militia laws typically required *all* able-bodied freemen in an age range of 16 to 60 to register (or be registered), provide themselves with arms and ammunition, gather occasionally for training, and serve when called. See, e.g., David E. Young, *The Founders’ View of the Right to Bear Arms* at Appendix II (2007) (“Young”) (describing various colonial militia laws from 1619 to the Revolution). This is what the colonists understood as a “well regulated” militia. Arms, however, were commonly kept and used by colonials in their day-to-day lives. See Robert Beverley, *The History and Present State of Virginia* at 269 (Louis B. Wright ed., The University of North Carolina Press 1947) (1705) (“The People [in Virginia] are very Skilful in the use of Fire-Arms, being all their Lives accustom’d to shoot in the Woods.”); Richard Frothingham, Jr., *History of the Siege of Boston* at 102-03 (2d ed. 1851) (commenting, with respect to gathering of “troops” from New England colonies: “But this ill-appointed army was not entirely unprepared for an encounter. . . . [T]he habitual use of the fowling-piece made these raw

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to provide men or funds to assist in defending against French and Indian attacks. Nathan Ross Kozuskanich, *For the Security and Protection of the Community: The Frontier and the Makings of Pennsylvania Constitutionalism* at 22-23 (2005) (unpublished Ph.D. dissertation, The Ohio State University) (on file with author) (“Kozuskanich”); Newland at 10. Both requests were refused. *Id.* For this, among other reasons, the Crown revoked Penn’s charter and installed a royal governor in Pennsylvania. Newland at 10-11; Joseph J. Kelley, Jr., *Pennsylvania: The Colonial Years 1681-1776* at 78 (1980) (“Kelley”). The royal governor proposed militia legislation, but Pennsylvania’s Assembly declined to affirm it. Newland at 11-12; Wayland F. Dunaway, *A History of Pennsylvania* at 45 (2d ed. 1948) (“Dunaway”).

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militia superior to veteran troops in aiming the musket. They were . . . mostly substantial farmers and mechanics, who had left their homes and pursuits, not for want of employment or to make war a trade, but because they were animated by a fresh enthusiasm for liberty.”); Robert H. Churchill, *Gun Ownership in Early America: A Survey of Manuscript Militia Returns*, 60 *William and Mary Quarterly* 615, 642 (3d Series) (2003) (“[I]t is clear that early Americans owned guns. They owned a lot of them. In 1779, as George Washington was once again lamenting the arrival of unarmed militiamen in his camp, there were ‘good guns’ sitting on the mantles of almost 40,000 Massachusetts militiamen. Most of these guns were probably longer or shorter or wider or thinner than Washington would have liked. Yet they were in all respects similar to the guns that had decimated four British regiments on the slopes of Breed’s Hill in 1775. North and east of Philadelphia, these guns were as ubiquitous as they were lethal.”).

In 1694, after convincing the King to return his proprietary charter, Penn appointed another proprietary governor. Kelley at 84; Dunaway at 45-46. Throughout the renewed Proprietorship, Pennsylvania lacked a militia, although it did not lack an armed citizenry.

## **2. Quaker Aversion to a Militia and Original Associator Movement**

The Pennsylvania Assembly was dominated by Quaker influence until 1756. During this period, attempts to pass a law creating a Pennsylvania militia were stifled. This eventually spurred formation of privately-armed voluntary fighting forces.

In 1702, when England and France were again at war, the French made a treaty with the Iroquois, the overlords of most Indian tribes in Eastern Pennsylvania. Newland at 13-14. Pennsylvania's governor believed, because of the treaty, that the Iroquois were a threat to Pennsylvania and asked the Assembly to create a militia. *Id.* at 14. The Assembly refused. *Id.*

In 1704, the governor again asked the Assembly for a militia to defend Pennsylvania, but again the Assembly declined. *Id.*

In 1736, when 300 armed Maryland citizens invaded Pennsylvania to claim Lancaster County for Maryland, there was no Pennsylvania militia to defend the colony. *Id.* at 19.

In 1744, with France and Spain at war with England, the governor stated his intent to raise troops and asked the Assembly to allocate arms and ammunition and to enact a militia law. Newland at 29-30. The Assembly denied all the requests. *Id.*

In July 1747, French privateers came up the Delaware River and landed at two plantations near New Castle, placing Philadelphia in danger of attack. *Id.* at 34. The Assembly still took no action. *Id.* at 34-35.

The Assembly's failure to protect Philadelphia was unacceptable to an emerging leader – Benjamin Franklin. Dismayed by the Assembly's failure, Franklin published a pamphlet under the pseudonym "A Tradesman of Philadelphia." Benjamin Franklin, *Plain Truth* (Nov. 14, 1747), reprinted in *II The Writings of Benjamin Franklin* at 336-53 (Albert Henry Smyth ed., 1905) ("Smyth"). Franklin argued that citizens should act on their own for protection, telling them:

But to refuse Defending one's self, or one's Country, is so unusual a Thing among Mankind, that possibly [the French] may not believe it, till by Experience they find, they can come higher and higher up our River, seize our Vessels, land and plunder our Plantations and Villages, and retire with their Booty unmolested.

*Id.* at 344. He wrote that "with very little Notice, the Rich may shift for themselves. . . . But most unhappily circumstanced indeed are we, the middling People,

the Tradesmen, Shopkeepers, and Farmers of this Province and City! We cannot all fly with our Families; and, if we could, how shall we subsist?" II Smyth at 346. Franklin encouraged exercising the right of self-defense:

The Way to secure Peace is to be prepared for War. They that are on their Guard, and appear ready to receive their Adversaries, are in much less Danger of being attack'd, than the supine, secure and negligent. We have yet a Winter before us, which may afford a good and almost sufficient Opportunity for this, if we seize and improve it with a becoming Vigour.

*Id.* at 352. Franklin estimated there were "at least (exclusive of the Quakers) 60,000 Fighting Men, acquainted with Fire Arms, many of them Hunters and Marksmen, hardy and bold" in Pennsylvania and potentially available for defense. *Id.* at 351. He promised:

if the Hints contained in this Paper are so happy as to meet with a suitable Disposition of Mind in his Countrymen and Fellow-Citizens, the Writer of it will, in a few Days, lay before them a Form of an ASSOCIATION for the Purposes herein mentioned, together with a practicable Scheme for raising the Money necessary for the Defence of our Trade, City, and Country, without laying a Burthen on any Man.

*Id.* at 352-53.

Franklin's plan for private citizens to form voluntary associations for self-defense received broad support. Kozuskanich at 29; Newland at 40. Under his plan, the associators organized themselves into companies. *The Pennsylvania Gazette* (Dec. 3, 1747) at 1 ("Gazette"). By 1749, there were 33 companies in Lancaster County, 26 in Chester County, 19 in Bucks County, 12 in the City of Philadelphia, and 8 in other areas of Philadelphia County. Kozuskanich at 29-30; Newland at 42. The movement generated a total of 10,000 volunteers. J. Paul Selsam, *The Pennsylvania Constitution of 1776* at 25 (1971) ("Selsam").

Each associator was to supply himself "with a good Firelock, Cartouch-Box, and at least twelve Charges of Powder and Ball, and as many of us as conveniently can, with a good Sword, Cutlafs or Hanger, to be kept always in our respective Dwellings, in Readinefs, and good Order." *Gazette* at 1. Franklin explained: "[T]he general Word *Firelock* is used (rather than *Mufket*, which is the Name of a particular kind of Gun) moft People having a Firelock of fome kind or other already in their Hands." *Id.* at 2.

These private associations did not limit themselves to small arms. In Philadelphia they purchased 39 cannon. Newland at 43. By April 1748, they had two batteries of artillery in Philadelphia. *Id.* at 43-44. In September 1750, Philadelphia was further fortified by the arrival of another 14 cannon purchased from England. *Id.* at 44.

As a result of private citizens' initiative, a defense for Pennsylvania finally existed. The associators used their own arms to defend themselves and their property from attack. Beginning in 1755, the defense would be tested.

### **3. Early Stages of French & Indian War**

By 1753 the French were building forts to secure the Ohio River Valley. Newland at 54-55; Klein at 64. Despite this, the Quaker-influenced Assembly did not respond, even when Proprietor Thomas Penn (William Penn's son) and his governor, James Hamilton, asked for a defense for western Pennsylvania. Newland at 59; Klein at 64.

In 1754, a new governor asked the Assembly to "put this Province into a posture of Defence by establishing a Militia (in doing which you will have a due Regard to scrupulous Consciences), that this plentiful Country, situate in the Middle of the British Colonies, may no longer remain open to the enemy." Letter from Robert Hunter Morris to the Provincial Assembly (Aug. 9, 1755), in *II Pennsylvania Archives: Papers of the Governors, 1747-1759* at 456-57 (George Edward Reed ed., 4th Series, 1900). The Assembly refused. Newland at 66-67. Pennsylvania's frontier inhabitants would need to rely on voluntary associations to defend themselves.

France, after initial military successes in the Ohio Valley, prompted its Indian allies to raid frontier

settlements. Newland at 70; Klein at 68. Associator companies that had sprung from Franklin's movement began to fight in places like Lancaster and Reading, but did not prevail. *See* Newland at 71-72.

#### 4. 1755 Militia Act

As the Indians attacked Pennsylvania's frontier, Franklin introduced a militia bill in the Assembly. Newland at 75; Klein at 69-70. On November 25, 1755, the bill passed when the Quakers split on their approach – the “principled” Quakers abstained from voting on it while the other Quakers voted with non-Quakers in favor of it. Newland at 75; Klein at 70.

The Act established a militia little different from the associators. Membership in the militia, like membership in an associator company, was voluntary and the militia had limited responsibilities. Act of November 25, 1755, *V The Statutes at Large of Pennsylvania from 1682-1801* at 197-201 (James T. Mitchell & Henry Flanders eds., 1896) (“Statutes at Large”). The primary difference was that, unlike the associators, the militia was government sanctioned. Newland at 76. However, the Crown vetoed the Act, because it was “calculated to exempt Persons from Militia Service [rather] than to encourage and prompt them.”<sup>4</sup> Russell F. Weigley, *The Colonial Militia, in*

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<sup>4</sup> Franklin, in a December 19, 1756 letter to Peter Collinson, distinguished a militia from provincial troops: provincial troops are “regularly inlisted to serve for a Term, and in the Pay of the  
(Continued on following page)

*The First Century: A History of the 28th Infantry Division* 17 at 25 (Uzal W. Ent & Robert Grant Crist eds., 1979) (internal quotation omitted).

A companion act, the Supply Act, had been passed on November 27, 1755. *See* Act of November 27, 1755, V Statutes at Large at 201-12. It called for funding, which was used for construction of forts on the Pennsylvania frontier and a full-time regiment to build the forts. *Id.* at 211 (§18); Newland at 85, 89. That regiment, which became known as the Provincial Regiment, is considered to be Pennsylvania's first official military force. Newland at 89.

### **5. End of French & Indian War, 1757 Militia Act, and Role of Pennsylvania's Earliest Official Fighting Forces**

After veto of the 1755 Militia Act, the French and Indian threat to Pennsylvania remained grave. Indians continued to attack settlements on the Pennsylvania frontier. Newland at 80; Klein at 70. Only associator companies were available to fight the

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Province; and do nothing but bear Arms like your Regulars[;]" while members of the militia

follow their respective Callings at home, muster only on certain Days to learn Discipline, and are to be ready in Case of Invasion etc. by any great Force but are of little Use in hunting Indians; and therefore all the Colonies, in such Wars hire Men for the purpose who are fitter for it, and make it their Business.

III Smyth at 355.



Indians. Newland at 80. Assistance then came from an independent commission created under the 1755 Supply Act, which allocated funds for Pennsylvania's defense. William A. Hunter, *Forts on the Pennsylvania Frontier, 1753-1758* at 197-98 (1960). Governor Morris asked the commission to assist in defending Pennsylvania by raising troops and building forts, and the commission, led by Franklin, successfully did so. Newland at 85-86. In 50 days, it organized a defense for certain frontier areas, including the area surrounding Easton. *Id.* Franklin, commissioned by the governor as a colonel, supervised the construction of four forts in the frontier region, recruited troops, and commissioned officers. *Id.* at 88; *see also* Kelley at 342-43. These efforts were instrumental in creating a defense for Philadelphia and Northampton Counties. Newland at 86-88.

Meanwhile, in 1756, as the Provincial Regiment began to construct the frontier forts required by the Supply Act, Quakers lost influence over the Assembly.<sup>5</sup> Klein at 70.

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<sup>5</sup> The British government proposed a bill that would compel all British and colonial holders of public office to swear an oath to support the government. Newland at 83-84. Quakers in England opposed the bill because, as their religion forbade swearing oaths, it would have made it impossible for a Quaker to hold political office in Britain or the colonies. *Id.* In compromise, British Quakers agreed to persuade the Assembly's Quaker members to resign their offices in exchange for the bill not being introduced. *Id.* By 1756's end, only a few Assembly members were Quakers. *See id.* at 84; Klein at 70.

On March 29, 1757, the Assembly passed Pennsylvania's second militia act. *See Act of March 29, 1757, V Statutes at Large at 609-35.* It required every Pennsylvania citizen who was "not conscientiously scrupling the use of arms" to serve in the Pennsylvania militia and be "sufficiently armed with one good musket, fuzee or other firelock well fixed, a cutlass, bayonet or tomahawk, a cartouch box, filled with twelve or more cartridges of powder, twelve or more sizable bullets, and three good flints."<sup>6</sup> *Id.* at 613.

After the French threat had faded, the threat from Indians continued. Newland at 103-04; Klein at 73. There were Indian attacks on frontier settlements in 1763. Newland at 104; Klein at 73. The then-commander of British forces in North America asked Pennsylvania's governor to provide the Crown with

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<sup>6</sup> The militia act facially relied on private ownership of arms. Private ownership and use of arms was so common in Pennsylvania, that certain non-defensive uses were prohibited for public safety. For example, a statute provided that a person could not –

shoot at, or kill with a fire-arm, any pigeon, dove, partridge, or other fowl, in the open streets of the city of Philadelphia, or in the gardens, orchards and inclosures, adjoining upon, and belonging to any of the dwelling-houses within the limits of the said city, or suburbs thereof, or any of the boroughs or towns within this province. . . .

Section VII of the Act of April 9, 1760, *General Laws of Pennsylvania, From the Year 1700, to October 1852* at 96 (James Dunlop ed., 3d ed. 1853) ("General Laws").

soldiers to respond to these attacks. Newland at 104. The Assembly's response was to introduce legislation that provided for 700 soldiers, not for the King's use, but to "guard their own homes." *Id.*

## **6. Strife During Interwar Years**

The period between the end of the French and Indian War in 1763 and the start of the Revolutionary War in 1774 was punctuated by conflicts with Indians along the Pennsylvania frontier, civil disorder within Pennsylvania, and claims by citizens of other colonies to land that Pennsylvanians likewise claimed. Newland at 109.

An infamous example concerns the "Paxton Boys." Following the French and Indian War, some citizens on Pennsylvania's frontier did not believe the government was adequately protecting them from Indians living nearby who had supported the French during the war. Kozuskanich at 103-04, 106; Newland at 111; Kelley at 489. In December 1763, Matthew Smith and other Paxton residents killed six Indians in Conestoga and then proceeded to a Lancaster home where fourteen Indians were being protected and killed them. Kozuskanich at 114-15, 117-18; Newland at 112; Klein at 74.

Many Pennsylvanians were outraged. Franklin immediately proposed that the Provincial Assembly enact a militia law to replace the expired 1757 act. Newland at 112. When the Assembly failed to do so, he sparked a new associator movement. *Id.* at 112-13.

The movement garnered the services of about 1,000 volunteer fighters who were prepared to defend and protect their city and homes from the Paxton Boys. *Id.* It was known that the Paxton Boys planned to attack Philadelphia to kill a group of Indians receiving protection there. Kozuskanich at 104; Newland at 113; Klein at 74. Franklin and others advanced to meet them and dissuaded them from attacking. Kozuskanich at 104; Newland at 113; Selsam at 41-42. The Paxton Boys' story illustrates again that Pennsylvanians protected themselves by using their own arms and banding together in privately organized units.

### **C. Revolutionary War Onset**

By 1774, as Pennsylvanians became increasingly opposed to oppressive British policies, various voluntary associator companies were created, revived, or bolstered.<sup>7</sup> Newland at 127. The Assembly also passed laws in 1775 authorizing and regulating the associators. *Id.* The Assembly gave the task of organizing the now officially-sanctioned associator companies to the

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<sup>7</sup> Contemporaneously, the Assembly again regulated non-defensive use of firearms, by a law providing that, for the prevention of "mischief" and "disturb[ances] [of] the public peace," a person could not wantonly and unreasonably "discharge and fire off any hand-gun, pistol or other fire-arms . . . to the disturbance of any of his majesty's subjects. . . ." on or around New Year's Eve. Section I of the Act of December 24, 1774, General Laws at 118-19.

Committees of Safety, which were county-level voluntary organizations. Kozuskanich at 316; Newland at 129.

On June 14, 1775, with the Revolutionary War underway, the Continental Congress called for riflemen to assist in the war effort. Newland at 136. Pennsylvania provided nine companies of associators known, collectively, as Thompson's Rifle Battalion. *Id.*; Kelley at 732; Dunaway at 154.

By the end of 1775, five more Pennsylvania battalions, comprised largely of associators, were organized for the war effort. Newland at 137. As the war progressed, many other associators were called to serve. About 4,500 Pennsylvania associators became part of the "Flying Camp," a pool of fighters created by the Continental Congress in July 1776 as a reserve for the Continental Army. *Id.* at 141; Klein at 89. Some of these associators fought under General George Washington against the British in New York and New Jersey. Newland at 142-43. As in prior periods, Pennsylvania's associators proved a valuable means of defense.

#### **D. Development of 1776 Constitution**

Elections for Pennsylvania's first constitutional convention were held July 8, 1776; many of those elected were affiliated with the associators. Kozuskanich at 30; Kelley at 764; Selsam at 146. Franklin was chosen president of the convention. Selsam at

147. A committee was established to write a declaration of rights for the constitution. *Id.* at 151.

The thirteenth of sixteen approved declarations in “A Declaration of the Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania” provided:

*That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.*

PA. CONST. decl. 13 (1776) (emphasis added). With its adoption, Pennsylvania’s long and proud history of the voluntary use of privately-owned arms for defense of self and state was manifested in the Commonwealth’s first constitution.<sup>8</sup>

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<sup>8</sup> The right was complemented by PA. CONST. §43 (1776), which provided, in pertinent part: “The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not enclosed.” This longstanding liberty has been enjoyed since at least Penn’s second frame of government. *See* I Statutes at Large at 344. In addition to recognizing an individual right to bear arms, the people gave the new government authority to rely on Pennsylvania’s citizens to provide a defense. PA. CONST. §5 (1776) provided for a militia:

The freemen of this commonwealth and their sons shall be trained and armed for its defence under such regulations, restrictions, and exceptions as the  
(Continued on following page)

### **E. Actions of Constitutional Government and Remainder of the Revolutionary War**

Acting under the 1776 Pennsylvania Constitution, the Assembly passed a militia act. Act of March 17, 1777, IX Statutes at Large at 75-94. The 1777 act required all white males, with some exceptions and exclusions, between the ages of 18 and 53 to serve in the Pennsylvania militia. *Id.* at 77 (§2). It organized the militia into county-based units and gave the executive council (also created by the 1776 Constitution) authority to call the militia into active service. *Id.* at 76 (§1), 81-82 (§10). A militia enrollee was to appear “to be exercised” at regular intervals and was to attend “with his arms and accoutrements in good order.” *Id.* at 79-80 (§7).

Pennsylvania’s citizen militia were expected to provide their own arms. The Act stipulated that “as soon as convenient,” arms and accoutrements for  $\frac{1}{4}$  of the militia enrollees were to be provided at state expense. *Id.* at 84 (§14). It is doubtful that it ever became “convenient” for the parsimonious counties to supply arms even partially for the militia. At least  $\frac{3}{4}$  of the militia, and probably all, provided their own arms.

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general assembly shall by law direct, preserving always to the people the right of choosing their colonels and all commissioned officers under that rank, in such manner and as often as by the said laws shall be directed.

Pennsylvania militia units fought in the Revolutionary War, assisting the Continental Army in fighting the British at the battles of Brandywine, Germantown, and Whitemarsh. Newland at 153. And, the Continental Army included many Pennsylvania associator units converted to national service between 1775-1777. *Id.* at 154. When the Revolutionary War ended in September 1783, approximately 60,000 men were in Pennsylvania's militia and approximately 2,210 Pennsylvania troops were serving in the field. *Id.* at 155.

Throughout the colonial and revolutionary periods, it is most likely that a household's firearms were handed down generation to generation. *See generally* James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 William and Mary Law Review 1777 (2002). The father's musket, pistol or rifle would be given to a son. It would have been unthinkable that a person could be deprived of the right to keep arms simply for being too old to bear them in a militia call-up.<sup>9</sup> Older citizens would keep arms in the home for self-defense, for hunting or for sport, as well as in trust for the next generation.

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<sup>9</sup> Frontier women would have relied on the right to keep and bear arms in self-defense just as much as the men did. When the men were away, someone needed to protect the homestead and family from marauders, animal and human.



## **F. Pennsylvania's Ratification of the U.S. Constitution and the Dissent of the Minority**

In 1787, after the frame of the future United States Constitution had been worked out, a number of delegates wanted to add a declaration that would identify what they perceived as the key inalienable rights of the people. Their request was defeated. *XIII The Documentary History of the Ratification of the Constitution* at 195-97 (John P. Kaminski & Gaspare J. Saladino eds., State Historical Society of Wisconsin 1981) ("Documentary History"). But their aspiration did not die.

The first ratification convention to meet was Pennsylvania's. Young at 97. The majority of delegates to Pennsylvania's ratifying convention were Federalists; the minority were Antifederalists. Paul E. Doutrich, *To Form a More Perfect Union: The Federal Constitution and Pennsylvania* at 17 (1986) ("Doutrich"). Prominent Federalists were James Wilson (a delegate to the Constitutional Convention) and Thomas McKean (Chief Justice of the Pennsylvania Supreme Court); prominent Antifederalists were John Smilie and Robert Whitehill. *Id.* The Federalists believed it unnecessary to include a bill of rights in the Constitution, because the powers granted to the federal government were specific and limited. The Antifederalists believed that without a bill of rights, the national government would be able to infringe upon individual rights. The debate was not over the existence of individual rights but over

whether it was necessary to list them in the federal Constitution, as the majority of the states had done in their state constitutions. Wilson stated the Federalist view:

[W]hen the attempt to enumerate [the rights of the people] is made, it must be remembered that if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted. So it must be with a bill of rights, and an omission in stating the powers granted to the government is not so dangerous as an omission in the recapitulating of the rights reserved by the people.

II Documentary History at 391. Smilie countered:

It seems however that the members of the [Constitutional] Convention were themselves convinced, in some degree, of the expediency and propriety of a bill of rights, for we find them expressly declaring that the writ of *habeas corpus* and the trial by jury in criminal cases shall not be suspended or infringed. How does this indeed agree with the maxim that whatever is not given is reserved? Does it not rather appear from the reservation of these two articles that every thing else, which is not specified, is included in the powers delegated to the government? This,

sir, must prove the necessity of a full and explicit declaration of rights. . . .<sup>10</sup>

*Id.* at 391-92. Whitehill added:

If indeed the Constitution itself so well defined the powers of the government that no mistake could arise, and we were well assured that our governors would always act right, then we might be satisfied without an explicit reservation of those rights with which the people ought not, and mean not to part. But, sir, we know that it is the nature of power to seek its own augmentation, and thus the loss of liberty is the necessary consequence of a loose or extravagant delegation of authority.

*Id.* at 393. Wilson agreed with Whitehill “that if our liberties will be insecure under this system of government, it will become our duty not to adopt, but to reject it[,]” but expressed his view that the system would “secure their liberties.” *Id.* at 400. McKean agreed with Wilson that inclusion of a bill of rights “might be accompanied with some inconveniency and danger if there was any defect in the attempt to enumerate the privileges of the people.” *Id.* at 412.

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<sup>10</sup> Smilie also had concerns that without a bill of rights Congress would be able to disarm the general U.S. population: “Congress may give us a select militia which will, in fact, be a standing army – or Congress, afraid of a general militia, may say there shall be no militia at all. [ ] When a select militia is formed; the people in general may be disarmed.” II Documentary History at 509.

On December 12, Whitehill proposed amendments and moved to adjourn the Convention for consideration of the amendments before the ratification vote. II Documentary History at 589, 597. The motion was defeated and the Convention voted 46-23 to ratify the Constitution. *Id.* at 589-91, 600. The proposed amendments were not included in the Convention's Journal, but on December 14 and 15 were printed in the *Pennsylvania Packet* and *Independent Gazetteer* and reprinted once in New York, New Jersey, and Maryland. *Id.* at 591 n.3. The text of the amendments reveals provisions recognizing various individual rights, including rights of conscience, freedom of religion, trial by jury, and against self-incrimination and warrantless searches. *See id.* at 597-99. The seventh proposed amendment concerned the right to bear arms:

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 power.

*Id.* at 597-98.

Twenty-one of the twenty-three delegates voting against ratification signed the Dissent of the Minority that was published on December 18 in the *Pennsylvania Packet* and, by February 9, 1788, had been reprinted in seven other publications. II Documentary History at 617.

The Dissent contained the proposed amendments and commentary related to the signatories' reasons for voting against ratification. It stressed the need for "a BILL OF RIGHTS ascertaining and fundamentally establishing those unalienable and personal rights of men," such as the personal right to bear arms, "without the full, free, and secure enjoyment of which there can be no liberty. . . ." *Id.* at 630. It opined that, under the Constitution as it then stood, "[t]he absolute unqualified command that Congress have over the militia may be made instrumental to the destruction of all liberty, both public and private; whether of a personal, civil, or religious nature." *Id.* at 638.

The desire for a bill of rights was not limited to Antifederalists in Pennsylvania. Pennsylvania's proposed bill of rights had influence in Massachusetts, New Hampshire, Virginia, New York, and North Carolina.

In Massachusetts, the lack of a bill of rights was a major topic of debate. *See* VI Documentary History at 1383-84. During the debate, Samuel Adams proposed a number of specific rights to be included in the recommendations for amendment:

[T]hat the said Constitution be never construed to authorize Congress, to infringe the just liberty of the press, or the rights of conscience; *or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms*; or to raise standing armies, unless when necessary for the defence of the United States . . . or to prevent the people from petitioning in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches & seizures of their persons, papers, or possessions.

*Id.* at 1453 (emphasis added); *see also id.* at 1490. It was believed that Adams used a copy of the Pennsylvania proposal to make these recommendations. *See* VII Documentary History at 1583-84.

While Adams' proposed bill of rights was not adopted in Massachusetts, three of his proposals were adopted by the New Hampshire convention as recommendations for amendments to be submitted to Congress, including that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." Young at 158, 148; XVII Documentary History at 35.

Virginia's ratifying convention was the first to adopt a bill of rights and other amendments to the Constitution for submission to Congress in connection with its ratification of the Constitution. 2 Bernard Schwartz, *The Bill of Rights: Documentary History* at 765 (Leon Friedman et al. eds., 1971) ("Schwartz").

Virginia's proposed bill of rights, similar to that of Pennsylvania's Dissenters and Adams, included a provision stating: "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." X Documentary History at 1553.

New York's ratification, on July 26, 1788, adopted the Constitution with recommended amendments, "in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration. . . ." XVIII Documentary History at 300. It included a provision stating: "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." *Id.*

North Carolina's initial ratifying convention declined to vote for or against ratification. Instead, it adopted a resolution recommending amendments to the Constitution that included those recommended by Virginia.<sup>11</sup> Young at 156.

Although rejected at the ratification convention, Pennsylvania's proposed bill of rights influenced other states to recommend similar rights to Congress.

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<sup>11</sup> North Carolina did not join in the government of the United States under the Constitution until 1789. It was not represented at the opening of the First Congress.

Ultimately, statements of rights initiated in Pennsylvania became fundamental components of the First and Second Amendments.

## II. SECOND AMENDMENT ADOPTION

The First Congress acted to honor the wishes of the substantial body of opinion in states like Pennsylvania that desired a bill of rights. James Madison moved for a committee to be appointed to consider constitutional amendments and then read what he proposed those amendments should be. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in *James Madison Writings* at 438 (Jack N. Rakove ed., The Library of America 1999). Madison explained that Congress needed to consider amendments to respect the public's wishes and to pave the way for a favorable reception to Congressional actions. *Id.* at 438-39. Specifically, Madison spoke to the need to consider a bill of rights:

It will be a desirable thing to 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 valiantly fought and honorably bled. And if there are amendments desired, of such a nature as will not injure the constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow citizens; the friends of the federal government will evince that spirit of deference and concession for which they have hitherto been distinguished.



It cannot be a secret to the gentlemen in this house, that, notwithstanding the ratification of this system of government by eleven of the thirteen United States, . . . there is a great number of our constituents who are dissatisfied with it. . . . There is a great body of the people falling under this description, who at present feel much inclined to join their support to the cause of federalism, if they were satisfied in this one point: We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution.

*Id.* at 439.

Among the amendments Madison described as “provisions for the security of rights” was: “*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 442. After debate (focused on the final clause), the version the House passed read:

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; but no one religiously scrupulous of bearing arms shall be compelled to render military service in person.

2 Schwartz at 1122. The Senate amended the provision to read as it does now: “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.” *Id.* at 1154. After a conference committee resolved the differences, the Senate and House approved the amendments for proposal to the states; and, on October 2, 1789, President Washington sent copies to the governors of the states for submission to their legislatures for ratification. *Id.* at 1164-65, 1171-73.

At the same time the Bill of Rights was before the Pennsylvania Assembly for ratification, a convention was drafting a new constitution for Pennsylvania. The Constitutional Convention met from November 24, 1789 through September 2, 1790; Pennsylvania’s Assembly ratified the amendments that became the federal Bill of Rights on March 10, 1790. Klein at 111; *Minutes of the Second Session of the Fourteenth General Assembly of the Commonwealth of Pennsylvania* at 177 (Hall and Sellers, 1790).

The delegates to Pennsylvania’s constitutional convention resolved early in their deliberations that the Declaration of Rights in the 1776 Constitution “requires alterations and amendments, in such manner as that the rights of the people, reserved and excepted out of the general powers of government, may be more accurately defined and secured.” *The Proceedings Relative to Calling the Conventions of 1776 and 1790* at 152 (John S. Wiestling & Francis R. Shrunck eds., 1825). Ultimately, the Declaration

became Article IX of the 1790 Constitution, with a preamble stating: “That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare – .” *Compare* PA. CONST. decl. 1-16 (1776) *with* PA. CONST. art. IX (1790). The right to bear arms clause was separated out and placed by itself in Art. IX, §21 and read (as it reads in substantially the same form today): “That the right of citizens to bear arms, in defence of themselves and the State, shall not be questioned.” PA. CONST. art. XI, §21 (1790); PA. CONST. art. I, §21 (1968).

Committee members drafting revisions to the Declaration included William Findley and James Wilson. As delegates to Pennsylvania’s ratification conference, Findley had vigorously opposed ratification of the federal Constitution for lack of a bill of rights, just as Wilson had supported it. II *Documentary History* at 35, 122, 323, 601; Klein at 111. At the time of the 1790 Pennsylvania constitutional convention, Wilson was a U.S. Supreme Court Justice. *I The Works of James Wilson* at xiii (James DeWitt Andrews ed., Callaghan and Company 1896) (“Wilson”); Klein at 109.

Wilson was intimately familiar with the federal and Pennsylvania bills of rights. In a lecture concerning criminal law, Wilson addressed the right of individuals

to personal safety.<sup>12</sup> His lecture shows that he believed the right to bear arms for self-defense is a natural and fundamental right:

Homicide is enjoined, when it is necessary for the defence of one's person or house. With regard to the [person], it is the great natural law of self-preservation, which, as we have seen,<sup>[13]</sup> cannot be repealed, or superseded, or suspended by any human institution. This law, however, is expressly recognized in the constitution of Pennsylvania. "The right of the citizens to bear arms in the defence of themselves shall not be questioned." This is one of our many renewals of the Saxon regulations. "They were bound . . . to keep arms for the preservation of the kingdom, and of their own persons."

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<sup>12</sup> In 1790 Wilson became the first law professor at the College of Philadelphia. I Wilson at xvii.

<sup>13</sup> In an earlier lecture addressing the natural law of self-preservation, Wilson stated:

The defence of one's self, justly called the primary law of nature, is not, nor can it be abrogated by any [law]. This principle of defence is not confined merely to the person; it extends to the liberty and the property of a man; it is not confined merely to his own person; it extends to the persons of all those, to whom he bears a peculiar relation – of his wife, of his parent, of his child, of his master, of his servant: nay, it extends to the person of every one, who is in danger; perhaps, to the liberty of every one, whose liberty is unjustly and forcibly attacked.

II Wilson at 335-36.

II Wilson at 404 (quoting PA. CONST. art. IX, §21 (1790) and Bacon on Government 40).

### **III. THE INDIVIDUAL RIGHT TO KEEP FIRE-ARMS FOR SELF-DEFENSE IS AS IMPORTANT TODAY AS EVER**

In Pennsylvania today, ownership of firearms is widespread. Hunting remains a major use of firearms in Penn's Woods, with over 884,000 deer licenses sold in the 2006-07 season. *See* 2006-2007 Pennsylvania Game Commission Financial Report, [www.pgc.state.pa.us/pgc/cwp/view.asp?a=523&q=173295](http://www.pgc.state.pa.us/pgc/cwp/view.asp?a=523&q=173295) (last visited Feb. 5, 2008). The right to bear arms in self-defense is also respected by Pennsylvania's concealed-carry law. *See* 18 Pa.C.S. §6109.

Self-defense is still needed, because the law enforcement agencies cannot be everywhere at once. Gun control has tended to disarm the law-abiding, while not impeding violent offenders.<sup>14</sup> Gun-control laws do not appear to prevent criminals from acquiring guns any more than drug laws have prevented

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<sup>14</sup> *See, e.g.*, Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide?*, 30 *Harvard Journal of Law & Public Policy* 649, 673 (2007) ("if firearms availability does matter, the data consistently show that the way it matters is that more guns equal *less* violent crime"); U.S. Department of Justice, Federal Bureau of Investigation, *Violent Encounters: Felonious Assaults on Our Nation's Law Enforcement Officers* at 60 (2006) ("The vast majority of the offenders obtained and disposed of their firearms illegally."). The data on this topic are too extensive to cite completely in this brief.

many of the same criminals from acquiring illegal narcotics.<sup>15</sup>

The existence of a substantial body of law-abiding citizens who possess their own firearms is still part of the Commonwealth's statutory scheme for defense. Pennsylvania's Military Code makes its National Guard the "organized militia," which is equipped by the government. However, the Code still provides for an "unorganized militia" of able-bodied citizens, aged 17½ to 55,<sup>16</sup> who can be called up by the Governor, as Commander in Chief, in an emergency. As the National Guard is increasingly sent to serve outside the Commonwealth, it would be short-sighted to assume that the unorganized citizen militia will never need to be called into service to deal with a major disaster or civil disorder. In such an extremity, citizens who keep and bear arms for their own defense may be expected to do so for public protection,

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<sup>15</sup> Even the United Kingdom, with strict laws and advantages of geography, has been unable to prevent importation of drugs and guns, including automatic weapons, by criminals. Crimes with firearms have been steadily increasing, as law-abiding British subjects have been disarmed. *See generally* Joyce Lee Malcolm, *Guns and Violence: The English Experience* (2002). Between 1997, when private ownership of guns was outlawed, and 2005, the United Kingdom experienced a more than 400% rise in crimes involving firearms. *See* Kathryn Coleman et al., *U.K. Home Office, Violent Crime Overview, Homicide and Gun Crime 2004/2005*, 02/06 U.K. Home Office Bulletin at 76 (Jan. 26, 2006).

<sup>16</sup> *See* 51 Pa.C.S. §301(a).

under supervision of officers appointed by the Governor.

#### **IV. THE SECOND AMENDMENT PROVIDES AN INDIVIDUAL, AND FUNDAMENTAL, RIGHT TO KEEP HANDGUNS AND OTHER FIREARMS FOR SELF-DEFENSE**

The United States exists under a written constitution. Although we cannot perfectly know the minds of those who adopted it, we must strive to give effect to what we best perceive as their understanding. If we do not make that effort, the concept of a written constitution is meaningless.

[A]s long as [the Constitution] continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States.

*South Carolina v. United States*, 199 U.S. 437, 449 (1905), *overruled on other grounds in Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (internal quotation omitted). To resolve a constitutional question “we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes.” *United States v. Classic*, 313 U.S. 299, 317-18 (1941).

The history that preceded the adoption of the Second Amendment leads inescapably to the conclusion that, in providing for “the right of the people to keep and bear arms,” the “meaning and intent [of the amendment] when it came from the hands of its framers” was to preserve and protect this basic interest. The Second Amendment protects an individual right to keep and bear arms for any legitimate purpose, not just for use in a state militia.

The individual right to bear arms for self-defense is fundamental. In the 18th and 19th centuries, it would not have ever been questioned, unlike some more recently acknowledged rights such as the fundamental right to interstate travel. Not only is the right to bear arms expressly enumerated in the Second Amendment, it is also, as much if not more than any other right, “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation omitted). The interest in private ownership and use of arms traces its lineage to the earliest days in colonial America, when many settlers, acting in a private capacity, used arms for self-defense, defense of their colonies, and hunting (all aspects of ordered liberty). Private ownership and use of arms remain prevalent today.

Because the right to bear arms is fundamental, any infringement by government must be narrowly tailored to serve a compelling interest. *See, e.g., Glucksberg*, 521 U.S. at 721; *San Antonio Indep. Sch.*



*Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).<sup>17</sup> The ordinances of the District of Columbia have not been shown to be “narrowly tailored,” much less to serve a “compelling interest.” Evidence that the ordinances have reduced violent crime in the District is lacking. Studies show that such ordinances hinder law-abiding citizens from self-defense against criminals, who will be as undeterred by these restrictions as they are by other laws.

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### CONCLUSION

*Amicus curiae* requests that this Court affirm the decision of the U.S. Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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<sup>17</sup> *Amicus* respectfully disagrees with the argument of the U.S. Solicitor General that mere “heightened scrutiny” is sufficient when a fundamental right is infringed.