

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Case No. 1-03CV0213(EGS)

**BRIEF OF THE VIOLENCE POLICY CENTER AS *AMICUS CURIAE*  
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND  
OPPOSITION TO SUMMARY JUDGMENT**

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## INTEREST OF THE AMICUS CURIAE

The Violence Policy Center (“VPC”) is a national non-profit educational organization that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, grassroots advocates, and the general public. Among other public interest endeavors, the VPC examines the role of firearms in America, analyzes trends and patterns in firearms violence, and works to develop policies to reduce gun-related death and injury. Moreover, the VPC closely examines the policy justifications and empirical support for various types of gun control measures, including bans on the possession of handguns in the District of Columbia and elsewhere. See generally Josh Sugarmann, *EVERY HANDGUN IS AIMED AT YOU* (2001); <http://www.banhandgunsnow.org>. And as a non-profit organization with its principal office located in Washington, DC, the VPC has consistently opposed efforts to imperil the public health and safety of District residents and others by overturning the city’s strict gun laws.

Despite the heavy toll that firearms violence imposes on our nation – and specifically on the residents of the District of Columbia – several well-funded lobbying organizations have argued strenuously in recent years that the Second Amendment takes the subject of firearms regulation out of the arena of legislative action by creating a fundamental, individual right to possess and use firearms possession. See Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 8-10 (2000) (describing the link between gun rights organizations and recent Second Amendment scholarship endorsing an individual right perspective). The Justice Department’s decision to adopt this position – thereby rejecting its prior, longstanding interpretation of the Second Amendment – has contributed to a spate of recent litigation. Thus, the Cato Institute and the National Rifle Association (“NRA”) are each currently supporting competing law suits – of which this is one – seizing upon this “individual

right” interpretation of the Second Amendment to challenge the District of Columbia ordinance restricting private ownership of firearms.<sup>1</sup>

The VPC is an active participant in this ongoing debate over the meaning of the Second Amendment. The VPC has been the principal organization to publicize the many flaws with Attorney General Ashcroft’s interpretation of the Second Amendment.<sup>2</sup> The VPC monitors and participates in Second Amendment litigation around the country, and recently coauthored an *amicus curiae* brief, filed on behalf of leading scholars on gun policy and the Second Amendment, in a pending case in the United States Court of Appeals for the Ninth Circuit, *Nordyke v. King*, No. 99-17551, *available at* [http://www.appellate.net/briefs/Nordyke\\_Amicus.pdf](http://www.appellate.net/briefs/Nordyke_Amicus.pdf).

Thus, the VPC is well situated to present to this Court arguments demonstrating that plaintiffs’ interpretation of the Second Amendment neither keeps faith with the actual text of the Amendment nor can be squared with the historical record, which confirms that the Amendment was not intended to confer an individual right to possess and use firearms aside from citizen ser-

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<sup>1</sup> This case has been brought with the involvement of the Cato Institute, while *Seegars v. Ashcroft*, No 03-CV-00834-RGW, a similar lawsuit being heard by Judge Walton, was brought by individuals closely tied to the NRA. See Press Release, Cato Institute, Cato Experts: NRA, Sen. Hatch Try To Prevent Supreme Court From Hearing 2d Amendment Case (July 17, 2003), *available at* <http://www.cato.org/new/07-03/07-17-03r.html>. The *Parker* plaintiffs strongly opposed efforts at consolidating the two cases. See *ibid.*; *Pro-Gun Groups Split on Tactics: Cato Institute, NRA Quarrel Over Challenges To D.C. Law*, WASH. POST, July 21, 2003, at B5. This Court denied the motion to consolidation in an order dated July 8, 2003.

<sup>2</sup> See, e.g., Violence Policy Center, Shot Full of Holes: Deconstructing John Ashcroft’s Second Amendment App. A-1 (2001), *available at* <http://www.vpc.org/graphics/holes.pdf>, (detailing historical and legal errors and omissions in letter from Ashcroft to the NRA); Press Release, Violence Policy Center, VPC Exposes Ashcroft Second Amendment Letter To Be Error-Ridden Fraud (July 25, 2001), *available at* <http://www.vpc.org/press/hole/htm> (warning that official adoption of Ashcroft’s position by the Department of Justice in two *amicus* briefs would be relied upon by criminal defendants to challenge their charges and convictions on Second Amendment grounds); Letter from Andrew L. Frey, Esq., to Theodore B. Olson, Solicitor General (May 2, 2002), *available at* <http://www.vpc.org/graphics/olson.pdf> (urging the Department of Justice not to espouse the Ashcroft’s position before the Supreme Court).

vice in a militia. Therefore, the VPC submits this *amicus* brief to counter plaintiffs’ erroneous explanation of the text and history of the Second Amendment.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Amendment states that “[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 language of the initial clause strongly suggests that the Amendment is anchored in concerns regarding the militia and does not confer an individual right to keep and bear arms for purposes unrelated to the maintenance of a well-regulated militia. Nothing in the rest of the text, or in a comparison between language in the Amendment and other constitutional text, justifies disregard of the Militia Clause.<sup>3</sup>

Many prominent scholars have endorsed the militia-based view after careful analysis of the text and the historical context of the Amendment. See, e.g., Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99

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<sup>3</sup> Although this brief focuses on the merits of the Second Amendment issue, we note parenthetically that it is not the role of this Court to redetermine the merits. Even if plaintiffs’ historical interpretation or textual arguments had any validity, this Court must nonetheless grant the defendants’ motions to dismiss because the individual-right view is contrary to the longstanding interpretation of the Second Amendment by the Supreme Court and the D.C. Circuit finding the provision ineluctably tied to the protection of state militias. The Supreme Court expounded the militia-based interpretation of the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939), which found in the Amendment no individual right to keep and bear arms except as there is “some reasonable relationship to the preservation or efficiency of a well regulated militia.” *Id.* at 178. As the Court explained, the “obvious purpose” of the Second Amendment was to “assure the continuation and render possible the effectiveness of such [militia] forces,” and the text must therefore “be interpreted and applied with that end in view.” *Ibid.* See also *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir.), *cert. denied*, 528 U.S. 928 (1999); *Barron v. United States*, 818 A.2d 987, 994 n.7 (D.C. 2003) (citing *Sandidge v. United States*, 520 A.2d 1057 (D.C. 1987)).

MICH. L. REV. 588 (2000); Saul Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENTARY 221 (1999); Garry WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT (1999); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 376 n.318 (1998); Kenneth R. Bowling, “A Tub to the Whale”: *The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223 (1988); Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940); Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915).

To be sure, proponents of the individual-right approach<sup>4</sup> have weighed in on the Second Amendment debate with numerous articles arguing that a private right to own firearms was indeed a central concern of the Framers.<sup>5</sup> See, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1 (1981); Mem. of Pts. and Auths. in Supp. of Pls.’ Mot. for Summary Judgment (hereinafter “Mem.”) 7; Mem. of Pts. and Auths. in Opp. to Defs.’ Mot. to Dismiss Compl. (hereinafter “Opp.”) 10. To shore up their position, these authors

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<sup>4</sup> This might more aptly be termed the “general-use” approach, since the key question is not so much whether the right is individual as whether it extends beyond militia-related uses to general, personal uses such as self-protection, hunting, target shooting, etc.

<sup>5</sup> In recent years, individual-right scholars have touted the high number of articles that support their position – but the number of articles does not reflect the number of scholars that support that view. In fact, most historians dispute the individual-right view, “while there is virtual parity” among legal scholars of the Second Amendment when their scholarship is measured by the number of authors, as opposed to the number of articles. See Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 770 (2002); Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 367-368, 384 (2000).

rely upon a small set of historical references. However, as discussed below, a more objective sifting of the historical record shows that discussions regarding the Second Amendment were inextricably linked with Anti-Federalist concerns about ensuring that the state militia were well armed and well trained, and protected from destruction by the actions of a too-powerful federal government. It is only by quoting materials out of context and by “pepper[ing] their quotations with the tell-tale ellipses that invite critical readers to check what has been omitted” that individual right proponents can create the historical illusion of a population preoccupied with the private ownership of firearms. Rakove, *supra*, 76 CHI.-KENT L. REV. at 161.

For all the individual-right proponents’ sound and fury, nothing in Second Amendment history or law has been revealed that justifies their revisionist legal history. Moreover, this academic sparring has not replicated itself in the courts, where only one case in recent memory has found – and then only *in dictum* – an individual Second Amendment right. See *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002); see also Bogus, *supra*, 31 U.C. DAVIS L. REV. at 311.<sup>6</sup> Other courts have repeatedly rejected attempts by gun-rights advocates and criminal defendants to expand the reach of the Second Amendment to individual protection for private use. See, e.g., *United States v. Price*, 328 F.3d 958 (7th Cir. 2003); *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003); *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990); *United States v. Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988).

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<sup>6</sup> The decision in *Emerson* came just six months after Attorney General John Ashcroft sent a letter to the NRA, stating “that the text and the original intent of the Second Amendment *clearly* protect the right of individuals to keep and bear firearms.” Letter from John Ashcroft, Attorney General, to James Jay Baker, Executive Director, NRA Institute for Legislative Action (May 17, 2001) (emphasis added), *reprinted in* Nosanchuk, *supra*, 29 N. KY. L. REV. at 799-800. Despite the presumed clarity, no other court has adopted Attorney General Ashcroft’s interpretation of the Second Amendment. See *United States v. Price*, 328 F.3d 958, 961 (7th Cir. 2003) (noting that there would be no “need for such a lengthy discussion in *Emerson*” if the Ashcroft interpretation were “self evident”).

In sum, plaintiffs provide no legal justification for this Court, even were it free to do so, to abandon *Miller* and its progeny. A thorough review of the history makes clear that the Framers never intended the Second Amendment to provide an individual right to own arms for private use. Accordingly, this Court should grant the defendants' motions to dismiss.

## ARGUMENT

In their complaint, plaintiffs assert that the District of Columbia's gun control laws violate the Second Amendment because that provision protects individuals' rights to possess firearms for self-defense and other personal reasons – a right that may be restricted only to meet compelling needs.<sup>7</sup> See Compl. ¶¶ 12, 22, 24. However, as the District of Columbia explained

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<sup>7</sup> Without conceding there is any individual right to possess firearms, Defendants correctly note that even if a court were to find that the Second Amendment protects an individual right, this does not transform the Second Amendment right into a fundamental right, and rational basis review provides the applicable constitutional test. See Defs.' Rep. Br. to Pls.' Opp. to Defs.' Mot. to Dismiss the Compl. and Opp. to Pls.' Mot. for Summ. Judg. 12-16. The VPC notes, however, that Plaintiffs' reliance on a Second Amendment "right" to self defense presumes that handguns are effective tools for self defense, which they are not. In fact, handguns are rarely used to stop crimes or kill criminals. According to the FBI's UNIFORM CRIME REPORTS, in 2001, citizens used handguns to kill justifiably in self defense only 136 times. FBI, UNIFORM CRIME REPORTS 28 (2001). Given that there were 6,790 handgun homicides committed that year, *id.* at 23, it follows that only one of 50 handgun homicides occurred in justifiable self defense. Plaintiffs' claims regarding the non-fatal use of handguns for self defense are equally overstated. Plaintiffs cite, for example, the work of Professor Gary Kleck. Pls.' Rep. Br. to Pls.' Opp. to Defs.' Mot. to Dismiss the Compl. and Opp. to Pls.' Mot. for Summ. Judg. 19. Studies have found the self-defense numbers cited by Kleck to be grossly exaggerated. Professor David Hemenway of the Harvard School of Public Health analyzed one survey by Kleck conducted in 1995 and found that the survey design contained a huge overestimation bias and that their estimates were highly exaggerated. David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430-1445 (1997). Contrary to the millions of non-fatal self-defense gun uses claimed by Kleck and plaintiffs, an April 1994 Justice Department study (based on the National Crime Victimization Survey, which is second in scope only to the U.S. census) reveals that, on average, only about one percent (62,200) of all victims of violent crime claimed to have used a firearm of any type to defend themselves. Bureau of Justice Statistics, *Handgun Victimization, Firearm Self-Defense, and Firearm Theft: Guns and Crime*, CRIME DATA BRIEF 1, 2 (Apr. 1994). Another 20,300 reported using a firearm to defend their property during a theft, household burglary, or motor vehicle theft. *Id.* These statistics do not however reflect whether the gun was used successfully to stop

in its Memorandum in support of his Motion to Dismiss at 1-6, this argument is precluded by precedent from the Supreme Court and federal courts of appeals. Plaintiffs attempt a disorganized defense of their Second Amendment claim on textual and historical grounds (see Mem 19-33; Opp. 24-37), but neither text nor history provides any basis for their position.

**I. TEXTUAL ANALYSIS CONFIRMS THAT THE SECOND AMENDMENT PROTECTS A RIGHT TO KEEP AND BEAR ARMS FOR MILITIA PURPOSES, NOT AN INDIVIDUAL RIGHT TO OWN ARMS FOR PRIVATE SELF-DEFENSE OR OTHER PERSONAL USES.**

Plaintiffs seek to avoid the impact of the Supreme Court’s explicit ruling that the Second Amendment is about the militia, see *Miller*, 307 U.S. 174, by asserting that the militia are the people – or at least all physically capable men – all of whom are accorded the right to possess and use firearms. See Mem. 29-32; Opp. 34-36. As we show below, this is an insupportable misreading of the term “militia” as used in the Amendment. The gaps in plaintiffs’ textual interpretation are glaring, and their Summary Judgment and Opposition memoranda fail to provide this Court with any reason to reject long-established Supreme Court precedent.

**A. The Second Amendment Must Be Interpreted And Applied In Light Of The Stated Objective Of Its First Clause.**

In *Miller* the Supreme Court explained that the meaning of the Second Amendment’s right “to keep and bear arms” must be informed by the Amendment’s opening clause: “With obvious purpose to assure the continuation and render possible the effectiveness of [the militia] the declaration and guarantee of the Second Amendment were made. *It must be interpreted and applied with that end in view.*” *Id.* at 178 (emphasis added). In the wake of *Miller*, lower courts

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the crime. In addition, all self-defense uses were defined by survey respondents and therefore included perceived threats as well as legitimate threats. In comparison, the same Justice Department study found that offenders with handguns committed 931,000 violent crimes in 1992 alone. *Id.*

have consistently interpreted the amendment accordingly.<sup>8</sup> Even the Fifth Circuit, the only federal court of appeals to state *even in dictum* that the amendment protects an individual right, recognized that the prefatory clause must be given “its full and proper due.” *United States v. Emerson*, 270 F.3d 203, 233 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002).<sup>9</sup>

The traditional view of the preamble is that it “does more than simply state the amendment’s purpose of justification: it also helps shape and define the meaning of the substantive provision contained in the second clause, and thus of the amendment itself.” *Silveira v. Lockyer*, 312 F.3d 1052, 1075 (9th Cir. 2002). As the Ninth Circuit there concluded:

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<sup>8</sup> See, e.g., *United States v. Haney*, 264 F.3d 1161, 1165 (10th Cir. 2001) (“[W]e hold that a federal criminal gun-control law does not violate the Second Amendment unless it impairs the state’s ability to maintain a well-regulated militia. ***This is simply a straightforward reading of the text of the Second Amendment.***” (emphasis added)); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999) (“The link that the amendment draws between the ability ‘to keep and bear Arms’ and ‘[a] well regulated Militia’ suggests that the right protected is limited, one that inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia.”); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997) (“the amendment was intended to protect only the use or possession of weapons that is reasonably related to a militia actively maintained and trained by the states”); *Hickman v. Block*, 81 F.3d 98, 101-102 (9th Cir. 1996) (“The Amendment’s second clause declares that the goal is to preserve the security of ‘a free state;’ its first clause establishes the premise that well-regulated militia are necessary to this end. Thus it is only in furtherance of state security that ‘the right of the people to keep and bear arms’ is finally proclaimed.”) *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995) (“The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a ‘reasonable relationship to the preservation or efficiency of a well-regulated militia.’” (quoting *Miller*)); *United States v. Graves*, 554 F.2d 65, 66 n.2 (3d Cir. 1977) (“[T]he courts consistently have found no conflict between federal gun laws and the Second Amendment, narrowly construing the latter to guarantee the right to bear arms ***as a member of the militia.***” (emphasis added)); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (“[T]he Second Amendment right ‘to keep and bear Arms’ applies only to the right of the State to maintain a militia and not to the individual’s right to bear arms.”). For yet more examples, see Nosanchuk, *supra*, 29 N. KY. L. REV. at 723 n.120.

<sup>9</sup> Despite this acknowledgment, the Fifth Circuit essentially read all meaning out of the prefatory clause through its unprecedented interpretation of “militia” and “keep and bear arms.” *Emerson*, 270 F.3d at 233-236. It seems unlikely, however, that the *Miller* Court would have so stressed the importance of the prefatory clause if that clause, in fact, has no actual bearing on the meaning of the Amendment.

When the second clause is read in light of the first, so as to implement the policy set forth in the preamble, we believe that the most plausible construction of the Second Amendment is that it seeks to ensure the existence of effective state militias in which the people may exercise their right to bear arms, and forbids the federal government to interfere with such exercise.

*Ibid.* This approach, the court reasoned, is not only supported by the Amendment's structure and history, but "[m]ore important, it is the approach that the Supreme Court has specifically declared must be employed when seeking to determine the meaning of the Second Amendment."

*Ibid.*

Plaintiffs' analogies to the Constitution's Preamble and the preambular language of the Copyright Clause (Mem. 26; Opp. 31) are, as an initial matter, wholly unnecessary given that the Supreme Court has directly addressed the meaning of the Second Amendment's prefatory clause. The suggestion that "A well regulated Militia, being necessary to the security of a free State" is no more significant than the Constitution's Preamble or the preambular language of the Copyright Clause is squarely at odds with *Miller's* statement that the Second Amendment "must be interpreted and applied with that end in view." *Miller*, 307 U.S. at 178. Yet, even assuming of Plaintiffs' analogies, in the end their argument quite simply fails on its own terms.

Analogizing the Preamble's several generally stated reasons for the creation of the Constitution itself to the Second Amendment's single, specific justification for a single provision is simply unhelpful. Plaintiffs' argue that because the general Preamble to the entire document does not impose substantive limitations on government actions, any language in preambular form would "carry little, if any, weight." Mem. 29 n.13; Opp. 34 n.11. Significantly, however, when interpreting the preambular language of the Copyright Clause in *Eldred v. Ashcroft*, 123 S. Ct. 769, 785-787 (2003), the Supreme Court did not once refer to the Constitution's Preamble.

If there is any lesson to be drawn from comparing the two provisions, it supports a view of the Second Amendment as a militia-based provision. Although Plaintiffs correctly point out that the Constitution’s Preamble is not a “source of any substantive power,” Mem. 26 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905)), the militia-based nature of the Second Amendment’s does not necessitate a view of the prefatory clause as a “source of ... power.” Rather, under this approach — and binding Supreme Court precedent — the clause provides a source of interpretive guidance that informs the right it prefaces.<sup>10</sup> If the Constitution’s Preamble informs the interpretation of the Constitution, the much closer nexus between the Second Amendment’s prefatory clause and the right to keep and bear arms requires that the clause be accorded substantial weight in the Amendment’s interpretation. See Dorf, *supra*, 76 CHI-KENT L. REV. at 301. Thus, properly understood, the traditional interpretation of the Constitution’s Preamble provides no support for Plaintiffs’ attempts to read the Second Amendment’s prefatory clause out of the Constitution.

Plaintiffs’ analogy to the Copyright Clause likewise falls wide of the mark for at least four reasons. First, the issue in that case concerned the scope of *Congress*’ power under the Copyright Clause, to enact a copyright extension for existing works. *Eldred* stated that “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives,” and Congress’ legislative extension of copyright protection “promotes the Progress of Science” as provided for in that provision’s preamble. 123 S. Ct. at 785.

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<sup>10</sup> To illustrate, in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 & n.31 (1995), the Court referred to the “We the People” language of the Preamble to show that the Constitution and federal government drew authority directly from the people, who were, therefore, entitled to directly elect their chosen congressional representatives free from any additional candidate qualifications imposed by the States.

Because the Copyright Clause consists both of an affirmative grant of power as well as a limitation on that power, the Court properly was concerned with the scope of Congress's affirmative power. By contrast, the Second Amendment is a negative command that bestows no comparable positive grant of lawmaking authority. Therefore, it is for the courts to delimit the scope of the limitation imposed by the Amendment. This is precisely what the Court did in *Miller*, plainly holding that the Second Amendment "must be interpreted and applied with [its objective] in view." *Miller*, 307 U.S. at 178. Whatever superficial appeal Plaintiffs' analogy might hold, their argument is squarely foreclosed by Supreme Court precedent and by the essential differences between the two provisions.

Second, not all prefatory clauses are created equal. Although *Jacobson* denies that the Constitution's Preamble is a "source of any substantive power" and *Eldred* construes the effect of the Copyright Clause's preambular language on Congress's legislative power, both analyses were specific to the provision being interpreted. Neither decision makes any broad pronouncements regarding interpretation of all constitutional prefatory clauses or even suggests that all such clauses should be given identical effect. Indeed, although Plaintiffs rely heavily on *Eldred*, *Eldred* itself never mentions the Second Amendment or the Preamble. Plaintiffs' argument that *Eldred's* interpretation of the **Copyright Clause** in Article I, Section 8 of the Constitution somehow overruled *Miller's* interpretation of the **Second Amendment** in the Bill of Rights represents an instance of far-fetched and highly inventive constitutional interpretation.

In addition, the contention that the Militia Clause is merely prefatory is belied by the fact that the Clause was placed second in Madison's original draft. His original proposal read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing

arms, shall be compelled to render military service in person.” See Rakove, *supra*, 76 CHI.-KENT L. REV. at 120. Madison’s proposal, like the final text of the Amendment, emphasizes the centrality of militia service to the right conferred by the Second Amendment. The Militia Clause was not originally, nor is there evidence that it later became, a non-binding prefatory clause of the kind at issue in *Eldred* in the final version of the Second Amendment.

Third, even if analysis of preambular language in *Eldred* were applicable to the task of construing the Second Amendment, when Supreme Court precedent “appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Thus, *Eldred* Court never so much as hints that it is demarcating a methodology for textual interpretation of preambular language outside the context of the Copyright Clause, such that *Miller*’s holding no longer stands.

Fourth, the implications of the analogy, if carried to their logical conclusion, are highly problematic. Whereas the *Eldred* Court simply deferred to Congress’s exercise of a specifically enumerated power, Plaintiffs’ theory would seem to require courts to defer to individuals’ judgments regarding the scope of their own Second Amendment right to keep and bear arms.<sup>11</sup> That

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<sup>11</sup> Plaintiffs state:

*Eldred*’s lesson for the Second Amendment is clear. If the “progress” limitation in the Copyright and Patent Clause cannot effectively limit Congress’s power to create a system of copyrights and patents, neither may a conceptualized ideal of a “well-regulated militia” restrain “the people” from exercising their “right to keep and bear arms,” which “shall not be infringed.” \* \* \* At most, *Eldred* stands for the proposition that that the preambular language of the Copyright and Patent Clause establishes a highly-deferential test, which all but the most unjustifiable patent and copyright laws would fail. The fundamental rights secured by the Second Amendment are due no less protection.

is, Plaintiffs draw no distinction between deference to Congress and deference to the individual. However, not even the Free Exercise Clause of the First Amendment permits an individual to define the scope of his right and thus “become a law unto himself.” *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)). Therefore, *Eldred’s* deference to Congress is best understood not as a broad determination that all constitutional prefatory clauses lack substantive effect, but rather as an exemplar of the deference generally accorded the congressional exercise of Article I, § 8 powers.<sup>12</sup>

In short, the few opinions discussing the Copyright Clause or Preamble on which Plaintiffs rely say absolutely nothing about the Second Amendment or constitutional prefatory clauses in general, and Plaintiffs cite no opinion that has discovered the tenuous connections they find between these seemingly unrelated constitutional provisions. Furthermore, even to the extent that Plaintiffs’ analogies may be informative, they provide no support for Plaintiffs’ contention that courts must defer to individuals’ judgments regarding the scope of their own right to keep and bear arms. At the end of the day, Plaintiffs’ extended discussion of the Copyright Clause and Preamble seems largely intended to divert this Court’s attention away from the fact that *Miller* squarely held that the Second Amendment’s “obvious purpose [was] to assure the con-

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Mem. 28-29; Opp. 33-34.

<sup>12</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) (Under the Commerce Clause, “Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.”); *Helvering v. Davis*, 301 U.S. 619, 640-641 (1937) (Spending Clause “discretion \* \* \* is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. ‘When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.’ Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times.” (quoting *United States v. Butler*, 297 U.S. 1, 67 (1936))).

tinuation and render possible the effectiveness” of state militia and that the Amendment “must be interpreted and applied with that end in view.” *Miller*, 307 U.S. at 178.

Thus, the Second Amendment by its very terms must be interpreted to be about the protection of a “well regulated Militia.” As we next discuss, this limitation precludes plaintiffs’ individual-right interpretation of the Amendment.

**B. “Militia” As Used In The Second Amendment And Elsewhere In The Constitution Refers To An Organized Military Unit Under State Control.**

Plaintiffs repeatedly insist that the “people” referred to in the Second Amendment are the same “people” referred to elsewhere in the Bill of Rights. See Mem. 31-32; Opp. 35-36.<sup>13</sup> They implicitly assume, however, that this interpretive approach applies only to the word “people.” As the Pulitzer-Prize winning scholar Jack Rakove has explained, the textual argument plaintiffs attempt requires one to presume that “people” should be “defined intratextually, by reference to its use in other amendments,” but that “‘militia’ leaps beyond the proverbial four corners of the

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<sup>13</sup> Plaintiffs rely on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), which reads in relevant part:

“[T]he people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. The language of these Amendments contrasts with the words “person” and “accused” used in the Fifth and Sixth Amendments regulating procedure in criminal cases.

*Id.* at 265. Plaintiffs, however, wholly misunderstand the implications of *Verdugo-Urquidez*. Even assuming that the meaning of “people” is constant, “bear arms” still refers to the use of arms in a military sense, and the amendment still must be interpreted with the objective of its prefatory clause in view. Thus, it may well be that the *same “people”* do have *a right to use arms as part of an organized state militia*. See *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) (rejecting an individual-right argument based on *Verdugo-Urquidez*).

document, and is parsed in terms of a historically contingent definition of what the militia has been and must presumably evermore be.” Rakove, *supra*, 76 CHI.-KENT L. REV. at 124. Such unprincipled reasoning has been criticized as the “most striking defect in the textualist component of the individual rights interpretation” (*id.* at 123) and squarely rejected by courts. See, *e.g.*, *Silveira*, 312 F.3d 1070 (“That same interpretive principle is unquestionably applicable when we construe the word ‘militia.’”). Thus, if “people” is to be given a consistent meaning throughout the Bill of Rights, so too must “militia”; to interpret the amendment otherwise would be to apply inconsistent interpretive principles to two words *within the same sentence*.<sup>14</sup>

Interpreting the term “militia” as it is used in the Constitution itself, it becomes evident that the term refers to a military unit, and thus that the reference to the “people” in the Second Amendment does not mean that the Amendment is designed to protect the right of individuals to possess arms for personal use; nor is it the case that the terms “militia” and “people” are interchangeable.

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<sup>14</sup> In fact, the word “people” does not have a consistent meaning in the Constitution itself. For instance, the “people” who, according to the Preamble, joined to improve the Union by adopting the Constitution are plainly a collective construct, not a set of individuals. In addition, the Ninth and Tenth Amendments also contain the word “people” and neither has been interpreted as protecting an individual right. In the First Amendment, the right of the individual to freedom of speech is protected without mentioning the word “people” at all. And, Article I, Section 2 of the Constitution provides that the House of Representatives are to be “chosen by \*\*\* the People of the several States.” However, the clause makes clear that the “people” consists of a smaller set of “Electors.” On the other hand, because houses and papers were personal possessions, the Fourth Amendment makes sense only if the “people” to whom it refers are individuals. The lesson is that the word, which was used at the time variously to refer to individuals or to the community, takes its meaning from its context. See Rakove, *supra*, 76 CHI.-KENT L. REV. at 119 n.38 (“it is not frivolous to suggest that the single word people has different valances in different provisions of the Bill of Rights”). In the Second Amendment, that context includes the “militia,” which, as we show in text, had a consistent meaning as an organized force jointly governed and provisioned by the state and federal governments.

For example, the Fifth Amendment declares that “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” Here, the phrase “cases arising \* \* \* in the Militia” strongly suggests an organized unit, not simply a collection of individuals exercising purely personal rights. See *Silveira*, 312 F.3d at 1071. The parallel use of “militia,” “the land \* \* \* forces,” and the “naval forces” further underscores that the word refers to a state-organized military unit.

The use of “militia” in Article I also suggests that the Framers were referencing a military unit. The “Militia Clause” grants Congress the powers:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

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, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

U.S. CONST. art. I, § 8, cl. 15-16. “The fact that the militias may be ‘called forth’ by the federal government only in appropriate circumstances underscores their status as state institutions.” *Silveira*, 312 F.3d at 1070. And the second of the clauses “treats the militia as an entity that Congress has the legislative responsibility for ‘organizing, arming, and disciplining,’” and thus “leave[s] the extent of the militia open to congressional discretion.” Rakove, *supra*, 76 CHI.-KENT L. REV. at 125. Indeed, the Supreme Court has held that this “provision is explicit that the Congress shall have the responsibility for organizing, arming, and disciplining the Militia (now the National Guard), with certain responsibilities being reserved to the respective States.” *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973); see also *Maryland ex rel. Levin v. United States*, 381 U.S.

41 (1965) (“The National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution.”). In short, “any reader of Article I, Section 8 would find it hard to deny that the text there considers the militia not as an unorganized mass of the citizenry but as an institution subject to close legislative regulation.” Rakove, *supra*, 76 CHI.-KENT L. REV. at 126.

Finally, Article II, Section 2 states that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” Here again, parallel reference to “the Army and Navy and \* \* \* the Militia” makes it manifest that the Framers were referring to a military unit in this instance. See *Silveira*, 312 F.3d at 1070; *Haney*, 264 F.3d at 1165.

That “militia” refers to a military unit and not the people at large is further evidenced by the term’s context within the Second Amendment itself: “A *well regulated* Militia being necessary to *the security of a free State* \* \* \*.” U.S. CONST. amend. II (emphasis added). “What the drafters of the amendment thought ‘necessary to the security of a free State was not an ‘unregulated’ mob of armed individuals \* \* \*. To the contrary, ‘well regulated’ confirms that ‘militia’ can only reasonably be construed as referring to a military force established and controlled by a governmental entity.” *Silveira*, 312 F.3d at 1072; see also *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997) (“[B]ecause the Constitution protects only the possession or use of guns reasonably related to a ‘well regulated militia,’ membership in the broad segment of the population [subject to militia service] is constitutionally insignificant.”). Furthermore, reference to the “security of a free State” clearly implies that the Framers intended “militia” “to refer only to governmental militias that are actively maintained and used for the common defense.” *Wright*, 117 F.3d at 1273. Plaintiffs’ argument, in contrast, would require interpreting the amendment as a “well regulated” *people* “being necessary to the security of a free State.” Thus,

even looking only to the Second Amendment, the best understanding of “militia” is that the term refers to an organized military unit.

Finally, Congress’s statutory definitions of the “militia” illustrate that the militia’s membership is subject to change under Congress’s Article I power to “organiz[e] \* \* \* the Militia.” U.S. CONST. art. I, § 8, cl. 16.<sup>15</sup> This makes sense only if the militia is a military unit. Whereas membership in a military unit may, of course, be altered by statute, Congress certainly could not alter the constitutional definition of “the people.” *Cf. Dickerson v. United States*, 530 U.S. 428, 437 (2000) (“Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”). Thus, Congress retains the power to determine who will be subject to duty in the militia and has, in fact, done so. The Second Amendment imposes limits on Congress’s interference with these state militias, nothing more.

**C. The Right To Keep And Bear Arms Is A Right To Use Arms In Military Service As Part Of A State-Organized Militia.**

Plaintiffs’ interpretation of the phrase “keep and bear arms” (Mem. 32-33; Opp. 36-37) is as misguided as their attempt to redefine the meaning of “militia.” In fact, the phrase fails to demonstrate that the Second Amendment was designed to protect the right of individuals to possess firearms for self-protection or other personal uses. See Dorf, *supra*, 76 CHI.-KENT L. REV. at 303 (“Although the Second Amendment must be interpreted in light of its prefatory clause, even standing alone the Amendment’s second clause does not support an individual right to bear arms.”).

As the Ninth Circuit explained, it is “highly significant \* \* \* that the second clause does not purport to protect the right to ‘possess’ or ‘own’ arms, but rather to ‘keep and bear’ arms.

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<sup>15</sup> See, e.g. 10 U.S.C. § 311 (militia “consists of” members of the National Guard and male citizens ages seventeen to forty-five).

The choice of words is important because the phrase ‘bear arms’ is a phrase that customarily relates to a military function.” *Silveira*, 312 F.3d at 1052. In fact, based on a survey of documents from the founding era, Professor Dorf has shown that “[o]verwhelmingly, the term had a military connotation.” Dorf, *supra*, 76 CHI.-KENT L. REV. at 314; see also WILLS, A NECESSARY EVIL, at 64 (“the whole context of the amendment was always military”). Indeed, the *Miller* Court cited a Tennessee Supreme Court case that confirms that the phrase “bear arms” means to take up arms “in a military sense.” See *Aymette v. State*, 21 Tenn. 154, 161 (1840) (“A man in the pursuit of deer, elk and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms*, much less could it be said, that a private citizen *bears arms*, because he has a dirk or pistol concealed under his clothes, or a spear in a cane.”). Moreover – as we explain in greater detail below (at 11) – Madison’s first draft of the amendment included “an exemption from ‘bearing arms’ for the ‘religiously scrupulous.’” *Silveira*, 312 F.3d at 1073. Of course, if “bear arms” meant simply to possess arms, such an exemption would be unnecessary because the “religiously scrupulous” simply would have chosen not to possess arms. Because “bearing” arms was understood to mean carrying arms *in military service*, Madison offered the exemption to ensure that conscientious objectors were never forced into military service. Given this historical background of the term and the Amendment, there is simply no reason to believe that “bear arms” means anything other than to use arms in a military sense.

Nor does the addition of the word “keep” alter the basic character of the right. Mem. 33; Opp. 37. Initially, it seems “unlikely that the drafters intended the term ‘keep’ to be broader in scope than the term ‘bear.’” *Silveira*, 312 F.3d at 1074. Rather, the traditional interpretation of the amendment is that the words “keep and bear” must be read together as are, for example, “necessary and proper” or “cruel and unusual.” See, e.g., Dorf, *supra*, 76 CHI.-KENT L. REV at

317; *Silveira*, 312 F.3d at 1074 (finding “considerable merit” in this interpretation). Another historian has concluded that inclusion of the word “keep” is most likely attributable to British troops’ interference with the *colonies*’ attempts to “keep” arms. See Paul Finkelman, “*A Well Regulated Militia*”: *The Second Amendment in Historical Perspective*, 76 CHI.-KEN L. REV. 195, 204 (2000). In any event, as the Ninth Circuit concluded, the right “to keep \* \* \* arms” is useful only insofar as it enables one to exercise the right “to bear arms.” See *Silveira*, 312 F.3d at 1074. Therefore, the right “to keep \* \* \* arms” includes the keeping of arms only in connection with militia service and “in no way undercuts the strong implication that the right granted by the second clause relates to the performance of a military function, and not to the indiscriminate possession of weapons for personal use.” *Ibid.*

Thus, a careful textual reading of the Second Amendment demonstrates that the Amendment is designed to protect the state militias, not to protect the rights of individuals to possess arms for hunting, self defense, or otherwise. As we next demonstrate, the historical record confirms this interpretation.

## **II. THE HISTORICAL RECORD CONFIRMS THAT THE PURPOSE OF THE SECOND AMENDMENT WAS TO ENSURE THE PRESERVATION OF THE STATE MILITIAS, NOT TO CONFER AN INDIVIDUAL RIGHT TO OWN FIREARMS FOR PRIVATE SERVICE.**

When placed in historical context, it becomes clear that the Framers intended that the Amendment confer a collective right to resist tyranny through the militia, rather than an individual right to possess firearms for self-defense, to secure a right of revolution, or for any other purpose. Even a few examples reveal that plaintiffs’ historical argument is otherwise (see Mem. 19-25; Opp. 24-30) full of holes and essentially ignores the political and social events that influenced the Framers.

**A. The English Antecedents To The Second Amendment Do Not Support An Individual-Right Or General-Use Interpretation Of The Amendment.**

Before turning to the domestic history of the Second Amendment, it is useful to consider its English antecedents, which everyone agrees profoundly influenced the Framers. See *Robertson v. Baldwin*, 165 U.S. 275, 281-282 (1897). Although proponents of the individual right view argue that the Declaration of Rights of 1689, the major precursor to the Bill of Rights, established such a right (see, e.g., JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994)), that view has been soundly rejected. See, e.g., Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27 (2000); Bogus, *supra*, 31 U.C. DAVIS L. REV. at 377.

Following the ouster of James II, Parliament declared the throne vacant and negotiated limits on royal power – the Declaration of Rights – in which James’s successor, William of Orange, acquiesced. *Id.* at 379. The Declaration of Rights did not concentrate on individuals but instead outlined the relationship between Parliament and Crown. See *id.* at 378 n.330; Schwoerer, *supra*, 76 CHI.-KENT L. REV. at 27. Indeed, Parliament itself recognized that the Declaration of Rights granted no new rights to the English people. See Bogus, *supra*, 31 U.C. DAVIS L. REV. at 378, 408 n.330 (quoting 2 MACAULAY’S HISTORY OF ENGLAND 377-378 (1906)). Thus, during the debates over the Declaration of Rights, no one complained that individuals were unable to keep arms for personal use. See Schwoerer, *supra*, 76 CHI.-KENT L. REV. at 32.

In fact, any such idea would have seemed strange, given that Parliament itself regulated personal ownership of arms both before and after the Declaration of Rights. See Robert Haraway *et al.*, *The Inconvenient Militia Clause of The Second Amendment: Why the Supreme Court Declines to Resolve the Debate over the Right to Bear Arms*, 16 ST. JOHN’S J. LEGAL COMMENT. 41, 74-75 (2002) (collecting statutes). Indeed, within five years of approving the

Declaration of Rights, during the debates over the English Game Act of 1693, Parliament considered and rejected out of hand a provision that would have allowed Protestants to keep arms in their homes. See Schworer, *supra*, 76 CHI.-KENT L. REV. at 50-51.

Thus, the Framers inherited an English legacy that does not support an individual-right interpretation of the Second Amendment. Rather, the issues in England that led to the Declaration of Rights were about the relationship between government bodies and the risks of standing armies – exactly the issues that the militia-based Second Amendment was designed to address.

**B. The Domestic History Of The Second Amendment Does Not Support An Individual Right To Possess Firearms.**

Turning to the domestic history of the Second Amendment, plaintiffs argue that a collective view of that Amendment was essentially unknown to the Framers. See Mem. 19-25; Opp. at 24-30 . But it is plaintiffs’ history that is revisionist. The events that preceded the Bill of Rights do not suggest that the Framers were focused on an individual right to possess arms for private use. Rather, the events reflect the ongoing tension between the Anti-Federalist desire to protect the interests of states through local militias and the Federalist goal of achieving a strong nation protected by a national army. Criticisms of the effectiveness of the militia arising from the experience of the Revolutionary War, and fear of slave revolts from the slave-owning states,<sup>16</sup> provided the context in which the Framers acted. As the resulting language of the Second Amendment reflects, they focused on a desire to protect the “security of a free State” by ensuring the availability of firearms to the “well regulated Militia” of the several states.

The debate over the Second Amendment’s passage demonstrates that the Framers did not act to ensure individual rights. The unamended Constitution contemplated a national and state

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<sup>16</sup> See Bogus, *supra*, 31 U.C. DAVIS L. REV. at 328-344 (discussing Southern concern that disarming the militia would leave States unprotected in the event of slave revolts).

defense system. It provided for a national army controlled by the Executive and Legislative branches and a system of state militias that were subject to Congressional regulation, which included the power to arm and train the militia. See U.S. CONST. art. I, § 8. The Anti-Federalists objected that these provisions, like many others of the unamended Constitution, created an overly powerful national government; in particular, they voiced concern that, absent some type of constitutional restraint, the federal government might eliminate the state militias and replace them with the standing federal army that the Constitution authorized Congress to create – a concept the Anti-Federalists abhorred (see Hardaway, *supra*, 16 ST. JOHN’S J. LEGAL COMMENT. at 76-77).

For example, in the debates between George Mason – an Anti-Federalist who distrusted the standing army – and James Madison, Mason voiced the Anti-Federalists’ fear that under the unamended Constitution the national government would disarm the militia by failing to support it financially, while simultaneously divesting the states of authority to do so. See Rakove, *supra*, 76 CHI.-KENT L. REV. at 138-140 (quoting from the exchange between Mason and Madison found in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1270-1273 (Kaminiski & Saladino eds., 1993)).<sup>17</sup> States would then have no defense against a tyrant. “[M]any Framers believed that a president would be easily tempted to use a standing army promiscuously in pursuit of empire and personal glory, thus bankrupting the nation and placing it at military risk.” Yassky, *supra*, 99 Mich. L. Rev. at 603. As illustrated by many states’ refusal to provide militia in response to the Crown’s call during the Seven Years War, state militia could serve as an important check on the national government’s power. *Ibid.* Thus, the Anti-

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<sup>17</sup> It is this debate that caused Mason to make the statement – “Who are the militia” – repeatedly cited in its truncated form by proponents of the individual right view. For a broader analysis of Mason’s statements see Rakove, *supra*, 76 CHI.-KENT L. REV. at 136-137.

Federalists preferred that the viability of the militia be the responsibility of the state governments, not the national government. See Finkelman, *supra*, 76 CHI.-KENT L. REV. at 225.

On the other hand, the Federalists stressed the need for a strong constitution that provided for national defense. Their experience in the Revolutionary War, where the militias too often proved an unreliable force, taught them that a professional army would be necessary to defend against any threat from Europe. Yassky, *supra*, 99 MICH. L. REV. at 604. And, in light of the inability of state and local militias to quickly put down Shays' Rebellion, the Federalists argued that Congress must have the power to intervene and suppress a rebellion within a state. See Rakove, *supra*, 76 CHI.-KENT L. REV. at 196 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18 (Farrand ed., rev. ed. 1996)); Hardaway, *supra*, 16 ST. JOHN'S J. LEGAL COMMENT. at 85-86. What these debates show is that Federalist and Anti-Federalist alike assumed that the key issue was the control and arming of the militia. Thus, in FEDERALIST NO. 46, Madison addressed Anti-Federalist fears of a military dictatorship:

[I]t would not be going too far to say, that the State Governments with the people on their side would be able to repel the danger [of a standing federal army] \* \* \* opposed [to which would be] a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, ***fighting for their common liberties, and united and conducted by governments possessing their affections and confidence.*** It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

FEDERALIST NO. 46 (James Madison) (emphasis added).<sup>18</sup>

In the end, the Federalists made several concessions to assuage the Anti-Federalists' concerns. First, in Article I, Section 8 of the Constitution itself, although Congress was given au-

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<sup>18</sup> Surprisingly, plaintiffs point to FEDERALIST NO. 46 to argue that Madison supported an individual right to bear arms. See Mem. 20-21: Opp. 25-26. However, as the full passage demonstrates, FEDERALIST NO. 46 merely explains that the *state militia* will serve as a check on a strong national army. See Finkelman, *supra*, 76 CHI.-KENT L. REV. at 224.

thority to “organize, arm and discipline” the militia, the States retained authority to train it and appoint its officers. In addition, under the same clause, the States retained operational control over the militia except during those periods in which the federal government had called upon the militia to enforce the laws of the United States, suppress insurrections, or repel invasions. Finally, a concern raised during various state ratification conventions was that the Constitution did not require the federal government to arm the militia, nor did it expressly authorize the states to do so. Finkelman, *supra*, 76 CHI.-KENT L. REV at 233-234. The Federalists readily concurred that the states should have broad authority to arm and train their militia. *Ibid.* The proposal to reaffirm by constitutional amendment the states’ control over their respective militias was not controversial.

While there were stylistic changes, such as switching the order of the clauses, the only substantive aspect of Madison’s proposed text that was rejected was the clause pertaining to conscientious objectors, which ultimately was deleted. Congressman Elbridge Gerry – the strongest Anti-Federalist voice in Congress – focused his concern squarely on the potential threat to the militia, famously stating: “What, sir, is the use of a militia? It is to prevent establishment of a standing army, the bane of liberty. Now it must be evident, that under this provision, together with their other powers, congress could take such measures with respect to a militia, as making a standing army necessary.” See Yassky, *supra*, 99 MICH. L. REV at 609-610. Had Gerry been concerned that the federal government would disarm individuals, not the militia, he would certainly have addressed this issue in his remarks, but instead he focused entirely on the militia. *Ibid.* Congress also substituted the phrase “free State” for “free Country” to emphasize the central role of the militia in protecting the autonomy of the States. *Ibid.* Finally, although the

House draft of the Second Amendment included the phrase “composed of the body of the people” after the word “militia” in the first half of the amendment, the Senate deleted that language.

These changes were not merely stylistic. See, e.g., Rakove, *supra*, 76 CHI.-KENT L. REV. at 124-125 (arguing that the Senate’s deletion of the phrase “composed of the body of the people” was a substantive part of the ongoing debate between Federalists and Anti-Federalists). Had Madison intended the Amendment to protect an individual right to possess arms for personal use, there were clear alternatives. For example, Sam Adams of Massachusetts recommended that the amendment state that Congress should never “prevent the people of the United States, who are peaceable citizens from keeping their own arms.” Similarly, New Hampshire proposed an amendment that stated that “Congress shall never disarm any citizen unless such as are or have been in Actual Rebellion.” See Hardaway, *supra*, 16 ST. JOHN’S J. LEGAL COMMENT. at 94 n.216. And a minority proposal from Pennsylvania stated “[t]hat 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.” *Ibid.* (emphasis added).

Plaintiffs’ reliance on these proposals suffers from a fatal defect: Madison and the other Framers *rejected* them. By focusing on rejected text, and ignoring the political climate surrounding the adoption of the Amendment, plaintiffs effectively read the Second Amendment as though it were written by the *losers* in the great struggle over the Constitution. See Finkelman, *supra*, 76 CHI.-KENT L. REV. at 206-209.

Moreover, by selecting bits and pieces of history that fail to reflect the central concerns animating the adoption of the Second Amendment, plaintiffs promote a version of history told by “Second Amendment originalists [who] have created something akin to an alternative history

science fiction fantasy, stories about parallel historical universes in which the South won the Civil War or the American Revolution never happened.” See Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIS. REV. (forthcoming 2004). For example, plaintiffs act as if gun regulation is a modern innovation, but early Americans accepted the notion that groups of citizens could be disarmed without infringing state constitutions. Pennsylvania, through the Test Acts of 1776, disarmed those who refused to take a loyalty oath. See Cornell, *supra*, 16 CONST. COMMENT. at 231-232. And, as scholars have shown, early state governments also monitored gun ownership and regulated weapons storage. See Saul Cornell, “Don’t Know Much About History” *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 672-674 (2002).<sup>19</sup>

Similarly, leading Federalists and Anti-Federalists alike denounced the Whiskey Rebellion and the Carlisle Riot where local mobs took up arms in order to challenge what they perceived to be a despotic national government. See Cornell, 16 CONST. COMMENT. at 238-245. Rather than herald these events as a legitimate exercise of their Second Amendment rights, elite Anti-Federalists condemned such anarchy – they “placed their faith in the state militias, not mobs, as the appropriate check on despotism.” *Id.* at 237. Thus, while revolution might have been accepted as a natural right, it was not a constitutional right. And it certainly did not contemplate a private right to be armed for self-protection, hunting, or target-practice wholly unrelated to the military.

## CONCLUSION

For the foregoing reasons, this Court should grant the defendants’ motions to dismiss.

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<sup>19</sup> See, e.g., 1838 Tenn. Pub. Acts. ch. 137; (outlawing “Bowie knives” and “Arkansas tooth-picks” to protect society from dangerous, concealed weapons); 1837 Ala. Acts 11 (same); 1837 Ga. Laws 90 (outlawing dangerous weapons, including concealed Bowie knives and pistols).

Respectfully Submitted.

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