No. 07-290

IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENT

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON, SR.
JACQUELINE M. SCHAFFER
CARLY F. GAMMILL
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890
Counsel for Amicus Curiae

QUESTION PRESENTED

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

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INTEREST OF AMICUS[1]

Amicus, the American Center for Law and Justice (ACLJ), is a public interest legal and educational organization committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues, with a particular emphasis on the First Amendment.[2] The proper resolution of this case is a matter of substantial concern to the ACLJ because it concerns proper application of the Bill of Rights, including the First Amendment, to conduct of the federal government and its delegatees.

Petitioner's argument, that legislative acts of the District of Columbia Council, which are purely local in nature, are not subject to constitutional scrutiny under the Bill of Rights, ignores the reality that the Council is a creation of the federal Congress acting only pursuant to authority delegated by Congress. More importantly, if Petitioner's assertion were

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[1] The parties in this case have consented to the filing of this brief upon receipt of the required seven (7) days' notice of ACLJ's intent to file. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

[2] *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

accepted, both Congress and the Council would be free to trample the constitutional rights of United States citizens who reside in the District. Indeed, under the District's rationale, there would be no impediment to the Council's establishing of an official church within the District. Nor would such body be prohibited from passing a law banning demonstrations from the streets and sidewalks of the District, or from arresting demonstrators whose message is distasteful to the government. Since the adoption of the federal Constitution, such actions have been understood by all to be prohibited to the federal government, as they would undoubtedly interfere with fundamental rights of the people, yet if Petitioner is successful here, citizens of the District – the seat of the federal government tasked with ensuring the continued enjoyment of these fundamental rights – would be the one group of United States citizens denied such rights. The Council, when legislating for the District, may not disregard the guarantees secured in the Bill of Rights.

SUMMARY OF ARGUMENT

When members of the founding generation ratified the United States Constitution, ceding specific enumerated powers to the federal government, they included the Bill of Rights. The amendments contained therein serve to ensure that the federal government, in the exercise of its

enumerated powers, does not act in a manner that would infringe the fundamental rights of the people. Thus, although Article I of the Constitution vests Congress with plenary power to legislate for the District of Columbia, the subsequent adoption of the Bill of Rights, including the Second Amendment, prohibits Congress from exercising this authority in contravention of the right of United States citizens to keep and bear arms.

Just as Congress may not pass laws for the District that infringe the constitutional rights of United States citizens residing therein, neither may the District of Columbia Council do so. Such authority is limited by the guarantees of the Bill of Rights, including the Second Amendment right of the people to keep and bear arms.

The Second Amendment itself expressly preserves the individual right of the American people to keep and bear arms for private purposes. An understanding of the underlying purpose for the Bill of Rights, the Constitution, and even the institution of American government itself reveals this fact. The Founding Fathers believed that every human being is endowed with certain "inalienable rights" and that the establishment of good government was necessary to the preservation of such pre-existing rights. Based on this premise, American government, with its attendant Constitution and Bill of Rights, was established. Thus, by virtue of the Second

Amendment's placement within the Bill of Rights, one must necessarily conclude that the Second Amendment was drafted with the purpose of preserving an individual right, namely, the right to keep and bear arms.

A textual analysis of the Second Amendment also reveals this specific purpose of preserving individual rights. When understood in light of their actual meanings and connotations at the time of the Founding, the words and phrases appearing in the text of the Second Amendment clearly demonstrate that the drafters intended for it to codify and thus expressly secure the right of individual citizens to keep and bear arms for private uses. The Second Amendment was drafted to achieve a specific purpose related to establishing good government: to ensure the security of a "free States" — a phrase with a distinct meaning at the time of the Founding. The drafters believed that the most effective way to guarantee this security was to ensure the presence of a well-regulated Militia. As used in the Second Amendment, the term "Militia" referred to a body comprised of self-armed citizens, as opposed to soldiers. As such, to ensure the presence of a well-regulated Militia — as the best means of achieving the ultimate end of ensuring the security of a "free State" — the drafters expressly protected the right of individual citizens — "the people" — to arm themselves.

ARGUMENT

I. THE BILL OF RIGHTS, INCLUDING THE SECOND AMENDMENT RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS, BINDS BOTH CONGRESS AND THE DISTRICT COUNCIL.

Article I, § 8, cl. 17 of the Constitution provides that "The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States . . ." The "Seat of Government Clause," vests Congress with legislative power to act for what is now the District of Columbia. Although congressional power over the District pursuant to this clause is "plenary," *Palmore v. United States*, 411 U.S. 389, 397 (1973), a complete understanding of this provision, in context of the entirety of the Constitution, yields the conclusion that the guarantees within the Bill of Rights protect all citizens residing within the United States and likewise restrain the legislative power of Congress at all times.

A. Whether legislating nationally or merely locally for the District of Columbia, Congress is at all times subject to the constitutional restraints imposed upon it by the Bill of Rights.

The scope of Congress's "exclusive" legislative power over the District of Columbia was a question of considerable discussion among the Founders. Concerns were raised that this power might allow Congress to "set at defiance the laws of the surrounding states" such that the District might "become the sanctuary of the blackest crimes." Debate in Virginia Ratifying Convention, June 16, 1788, Elliot 3:89, 430-36 (remarks of Mr. George Mason). More specifically, and consistent with the founding generation's distrust of governmental institutions, the fear was expressed that "if an attempt should be made to establish tyranny over the people, here are ten miles square where the greatest offender may meet protection." *Id.*

Responses to these and related concerns indicate that the people were of two minds regarding the breadth of Congress's legislative power over the District. Some held the belief that such a grant of "exclusive" authority vested Congress "with supreme power of legislation, paramount to the constitution and laws of the states . . . " *Id.* (remarks of Mr. Henry); *see also* Debate in North Carolina Ratifying Convention, July 30, 1788, Elliott 4:209, 219-20

(remarks of Mr. Lenoir). Others, however, expressed the understanding that "this clause does not give Congress power to impede the operation of any part of the Constitution, or to make any regulation that may affect the interests of the citizens of the Union at large." Debate in Virginia Ratifying Convention, June 16, 1788, Elliot 3:89, 430-36 (remarks of Mr. Pendleton); *see also* Debate in North Carolina Ratifying Convention, July 30, 1788, Elliott 4:209, 219-20 (remarks of Messrs. Spaight and Iredell). The language of Article I, § 8, cl. 17, it was explained, was merely intended to subject the District to the sole legislative authority of *Congress*, "as opposed to the legislative power of that state where [the District] shall be." *Id.* (remarks of Mr. Pendleton).

Although this question may have been unsettled at the time of the nation's Founding, the overwhelming weight of subsequent case law indicates acceptance of the latter view. This Court has expressly adopted the understanding that rather than granting some form of extra-constitutional congressional power, "the word 'exclusive' was employed to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states." *District of Columbia v. Thompson*, 346 U.S. 100, 109 (1953) (citing The Federalist, No. 43; 3 Elliot's Debates (2d ed. 1876), pp. 432-33; 2 Story, Commentaries on the Constitution of the United States (4th ed. 1873),

§ 1218). Congressional authority over the District of Columbia, pursuant to Article I, § 8, cl. 17, is therefore undoubtedly plenary, and "includes all of the legislative powers which a state may exercise over its affairs." *Berman v. Parker*, 348 U.S. 26, 31 (1954).

Congress, however, is merely "*akin* to a state legislature," *McClough v. United States*, 520 A.2d 285, 288 (D.C. App. 1987) (emphasis added) – but does not actually *become* one – when legislating for the District. Whether acting in this capacity, or enacting national legislation, therefore, Congress is at all times constitutionally accountable for its conduct through application of the Bill of Rights. *See, e.g.,* 3 Story, Commentaries on the Constitution of the United States (1833), § 1221 ("The power of congress to exercise exclusive jurisdiction over [the District] is conferred on that body, as the legislature of the Union; and cannot be exercised in any other character").

Under Petitioner's reasoning, that "[l]aws limited to the District . . . whether passed by Congress or the Council . . . do not implicate the Second Amendment" because they "raise no federalism type concerns," Pet. Br., at 35, both Congress and the Council would be free to legislate in violation of any of the Bill of Rights, so long as such laws infringe only the rights of those United States citizens residing within the District. This Court has expressly recognized,

however, that while "the power of Congress under [Article I, § 8,] Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers . . . in the context of national legislation enacted under other powers delegated to it under Art. I, § 8," *Palmore*, 411 U.S. at 397-98 (1973), "[t]here is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may lawfully be deprived of the benefit of any of the constitutional guarantees of life, liberty, and property . . ." *O'Donoghue v. United States*, 289 U.S. 516, 540 (1933) (quoting *Callan v. Wilson*, 127 U.S. 540, 550 (1888)).

Specifically regarding the Second Amendment, this Court has expressly acknowledged that it "is a limitation . . . upon the power of Congress and the National government . . ." *Presser v. Illinois*, 116 U.S. 252, 265 (1886). No exception was made for congressional enactments pursuant to the Seat of Government power, or any other enumerated power of Congress. Writing for the Court in *Downes v. Bidwell*, Justice Brown stated it this way:

> This District had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can

> never be taken backward. . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution. . . . If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly by carving out the District what it could not do directly. The District still remained a part of the United States, protected by the Constitution.

182 U.S. 244, 260-61 (1901).

That Congress remains at all times constrained by constitutional limitations, including the Second Amendment, even when legislating solely for the District, could not be more plain given this Court's longstanding and consistent history of scrutinizing such legislative acts for compliance with the provisions of the Bill of Rights – without question or comment as to the propriety of doing so. For example, in *Bauman v. Ross*, the Court scrutinized under the Fifth Amendment a congressional act applicable only to the District. 167 U.S. 548 (1897).

In an effort to create uniformity in the streets of the District, Congress authorized the Commissioners of the District, by way of a legislative act, to create a plan for such uniformity, to designate and take lands necessary to execute the plan, and thereafter to construct roads in accordance with the plan. *Id.* at 551-60.

The actual controversy arose because the act allowed the determination of just compensation to take into account any direct benefits accruing to portions of the landowner's property not taken, thereby decreasing in some cases the amount of compensation paid to the landowner. In analyzing (and upholding) the provisions of the enactment under the Fifth Amendment, the Court never once questioned the underlying proposition that such an act, though applicable only to the District, should be required to conform to constitutional restrictions on congressional authority. *See also Berman v. Parker*, 348 U.S. 26 (1954) (scrutinizing act of Congress effective only in the District under eminent domain provision of the Fifth Amendment without comment regarding the rationale for application of the Bill of Rights to purely local legislation); *Block v. Hirsh*, 256 U.S. 135 (1921) (applying Fifth Amendment to District of Columbia Rents statute).

Several years after this Court's decision in *Bauman*, the same issue surfaced again, this time as a result of the intervening case of *Norwood v. Baker*,

172 U.S. 269 (1898). In *Wight v. Davidson*, 181 U.S. 371 (1901), the appellant landowner successfully argued in the lower courts that the *Norwood* decision effectively overruled *Bauman*. The Court disagreed, however, explaining that in addition to the lower courts' misunderstanding of the actual holding of *Norwood*, that case was inapposite because it presented a question under the Fourteenth, rather than the Fifth, Amendment.

As the *Wight* Court clarified, "[i]n the present case is involved the constitutionality of an act of Congress regulating assessments on property in the District of Columbia, and in respect to which the jurisdiction of Congress, in matters municipal as well as political, is exclusive, and not controlled by the provisions of the Fourteenth Amendment." 181 U.S. at 384. Rather, the Court made explicit, "in the exercise of such legislative powers, Congress is subject to the provisions of the Fifth Amendment to the Constitution of the United States," *id.*, such that a decision "maintaining the validity of the acts of Congress relating to public improvements within the District of Columbia, is [not] to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling state legislation." *Id.*; *accord Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (expressly stating that "[t]he Fifth Amendment . . . is applicable in the District of Columbia," while "the Fourteenth Amendment . . .

applies only to the states"); *Shelley v. Kraemer*, 334 U.S. 1, 8 (1948) (recognizing that a suit "involv[ing] the enforcement of covenants on land located in the District of Columbia, could present no issues under the Fourteenth Amendment; for that Amendment by its terms applies only to the States").

More recently, in *Boos v. Barry*, the Court addressed a facial challenge, brought pursuant to the First Amendment, to a provision of the D.C. Code enacted by Congress. 485 U.S. 312 (1988). In an attempt to fulfill its obligation under international law to protect the dignity of foreign officials in the United States, Congress enacted D.C. Code § 22-1115 prohibiting "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" *Id.* at 315. Without addressing any threshold question of whether or why provisions of the Bill of Rights might apply to congressional action effective only within the District, the Court concluded the statute in question failed First Amendment scrutiny as it was not narrowly tailored to serve a compelling government interest. *Id.* at 324; *see also Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding a contract between the District of Columbia Commissioners and a private hospital run by members of a religious society, entered pursuant to an act of Congress, on the grounds that neither the agreement nor the

congressional act set "a precedent for the appropriation of the funds of the United States for the use and support of religious societies" in violation of the Establishment Clause of the First Amendment).

The foregoing decisions make unmistakably clear that even when acting solely pursuant to its authority under the Seat of Government Clause and enacting purely local legislation for the District, Congress operates in only one capacity and therefore remains at all times subject to the provisions of the Bill of Rights restricting the conduct of the federal government, including the Second Amendment.

B. The District of Columbia Council, exercising legislative authority pursuant to a delegation of power by Congress, is likewise bound by the guarantees of the Bill of Rights.

Although the Constitution expressly provides that Congress may legislate for the District, it does not prohibit Congress from delegating such authority to another body. In the District of Columbia Home Rule Act, P.L. 93-198, approved December 24, 1973 ("Home Rule Act"), Congress expressed its intent to, *inter alia*, "delegate certain legislative powers to the government of the District of Columbia." § 102(a). In recognition of the necessity of acting in a manner "consistent with the constitutional mandate" provided in the Seat of Government Clause, however, Congress asserted that its delegation of

legislative authority was "[s]ubject to the retention by Congress of the ultimate legislative authority over the nation's capital," *id.*, and expressly "reserve[d] the right, at any time, to exercise its constitutional authority as legislature for the District . . . ." § 601.

This Court recognized and upheld the right of Congress to make such a delegation of power in *District of Columbia v. Thompson*, explaining that

> there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, *subject of course to constitutional limitations to which all lawmaking is subservient* and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted.

346 U.S. 100, 109 (1953) (emphasis added). By virtue of Congress's exclusive legislative authority over the District, and its decision to delegate that authority to the District Council in the Home Rule Act, any legislative power possessed by the Council derives directly from Congress.

It is axiomatic that one may delegate only what authority he possesses and no more. *See, e.g., United States v. Bazzano*, 570 F.2d 1120, 1125 (3d. Cir. 1977) (citing Restatement (2d) Agency § 20 (1958)); *accord* Restatement (3d) Agency § 3.04 (2006). Through the Home Rule Act, Congress could

delegate to the Council no greater legislative authority than Congress itself has with regard to the District. Because Congress lacks the power to legislate in such a manner as to violate the constitutional rights of United States citizens residing within the District of Columbia, neither may the Council do so. Otherwise, contrary to the authority of this Court, Congress *could* "do indirectly . . . what it could not do directly." *Downes*, 182 U.S. at 261.

When this Court upheld the authority of Congress to delegate its legislative power, it made clear that the recipient of delegated authority is subject to the same restrictions as the delegating body. Analogizing congressional delegation of power to delegation of authority from a state government to a municipality, this Court explained that "the delegated power of municipalities is as broad as the police power of the state, *except as that power may be restricted by terms of the grant or by the state constitution*." *District of Columbia v. Thompson*, 346 U.S. at 109 (emphasis added). Just as a municipality legislating under delegated authority is subject to restrictions imposed upon the state by the state constitution, so the Council, legislating under delegated authority, is subject to restrictions imposed upon Congress by the federal Constitution, including the Bill of Rights. Consequently, the Council may not pass laws on any topic in violation

of the constitutional rights of citizens residing within the District, including the Second Amendment right to keep and bear arms.

II. THE SECOND AMENDMENT SECURES THE INHERENT, INDIVIDUAL AND PRIVATE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS.

The Second Amendment to the United States Constitution 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 (emphasis added). Stated as such, it is clear that the substantive effect of the Second Amendment is to secure and codify a pre-existing right of the American people to keep and bear arms. *See Presser v. Illinois*, 116 U.S. 252 (1886) (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)). Both the text and the context of the Second Amendment reveal that its drafters expressly intended to preserve the extant right of the American citizenry to keep and bear arms for private uses.

A. The Bill of Rights Secures Pre-Existing Individual Rights of the American People.

It is the cornerstone of American political philosophy that, as a human being, every individual possesses certain inalienable rights. Even a cursory glance at the text of the Founding documents reveals

a recurrent intention to preserve these "endowed" human rights. *See* Decl. of Independence paras. 1-3 (U.S. 1776); U.S. Const. pmbl. As demonstrated by the Founding documents, the Founding Fathers rejected the notion that retention of these endowed rights was conditioned on arbitrary qualifications such as age, social status or government authorization. *See* Decl. of Independence; U.S. Const. pmbl. The Framers recognized, however, that the enjoyment of these rights depended on the establishment of good government. Decl. of Independence paras. 2-3. Indeed, in the face of human nature, the pre-existing rights of the citizenry could not fully be enjoyed except in the presence of a governing institution dedicated to ensuring their security. Accordingly, the Founders established this rights-*securing* form of government, enunciating their purpose for doing so as follows:

> We hold these truths to be self-evident, that all men are created equal, that *they are endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty and the pursuit of Happiness.
>
> That *to secure these rights*, *Governments are instituted among Men*, deriving their just powers from the consent of the governed, That *whenever*

> *any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it*, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Decl. of Independence paras. 2-3. The Founders' intent to establish government for the purpose of codifying and securing the rights of the people is further evidenced in the Preamble to the United States Constitution:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and *secure the Blessings of Liberty to ourselves and our Posterity*, do ordain and establish this Constitution for the United States of America.

U.S. Const. pmbl.

Just as the United States Constitution was a substantive outgrowth of the Declaration of Independence, so the Bill of Rights was a substantive outgrowth of the Constitution; and, just as the Constitution sought to achieve the purpose for establishing government as articulated in the

Declaration of Independence, so the Bill of Rights sought to achieve that self-same purpose as articulated in both the Declaration of Independence and the Constitution. The Bill of Rights was added to the Constitution to more effectively achieve its underlying purpose of securing the endowed rights of the people. Opponents of the Constitution objected to its ratification on the bases that it did not effectively and completely secure the rights of the people, that it did not prohibit the establishment of tyrannical government, and that, as such, a bill of rights, enumerating and codifying the individual rights of private citizens, was essential to achieving the greater goal of securing those rights.[3] Elucidating this point, the Preamble to the Bill of Rights explains that the

> Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses [the Bill of Rights] should be added: And as extending the ground of public confidence in the Government, will *best*

[3] *The National Archives and Records Administration*, The Bill of Rights, at http://www.archives.gov/national-archives experience/charters/bill_of_rights.html (last visited Jan. 31, 2008).

> *ensure the beneficent ends of its institution*.

U.S. Const. amends. I-X pmbl. As expressly stated in both the Declaration of Independence and the Constitution, the "beneficent ends" of the institution of government is the preservation of endowed human rights. *See* Declaration of Independence para. 3; U.S. Const. pmbl. It is therefore apparent that the Bill of Rights was added to the Constitution in order to secure the individual rights inherently possessed by every human being.

A survey of the subsequent examination and analysis of the Bill of Rights similarly reveals that the amendments comprising it were designed to secure individual liberties against interference from the federal government. As Justice Harlan explained it, the "Bill of Rights, *designed to protect personal liberties*, was directed at rights against governmental authority." *United States v. Guest*, 383 U.S. 745, 771 (1966) (Harlan, J., concurring in part and dissenting in part) (emphasis added). In *McIntyre v. Ohio Elections Commission*, this Court declared that "the purpose behind the Bill of Rights, and of the First Amendment in particular[is] to protect unpopular *individuals* from retaliation – and their ideas from suppression – at the hand of an intolerant society." 514 U.S. 334, 357 (1995) (emphasis added). This Court has also maintained that "one might fairly say of the Bill of Rights in

general, and the Due Process Clause in particular, that they were designed *to protect the fragile values of a vulnerable citizenry . . .*" *Arnett*, 416 U.S. at 223 (citing *Fuentes v. Shevin*, 407 U.S. 67, 92 n.22 (1972)). In *Arnett*, this Court recognized two significant aspects of the Bill of Rights, which clearly attest to that document's direct correlation to the purpose for which American government was founded. First, the Bill of Rights was designed to *secure* rights, and as such, was intended to bulwark rights that pre-dated the Founding. Second, the rights secured by the Bill of Rights were both personal and individual to the American people. It is only logical that the guarantee provided by the Second Amendment, as part of the Bill of Rights, would possess these same characteristics.

A textual analysis of the Bill of Rights further supports the conclusion that its underlying purpose is to secure pre-existing individual liberties. The First Amendment, for example, protects the individual's freedoms of religion, speech, press, and assembly, and the right to petition the government. The Third Amendment follows suit by protecting the individual from being forced to house U.S. soldiers. The Fourth Amendment protects the individual against unreasonable searches and seizures. The Fifth, Sixth and Eighth Amendments protect the rights of individuals accused of crimes or other acts of wrongdoing. The Seventh Amendment ensures an

individual's right to a civil trial by jury. Importantly, the Ninth Amendment protects those rights which are "retained by the people" but *not* enumerated by the Constitution. The significance of the Ninth Amendment lies in the fact that it expressly reveals the drafters' belief that the rights protected by the Constitution, including the Bill of Rights, were pre-existing rights retained by the people. Finally, the Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." *See* U.S. Const. amends. I-X.

Each of the first nine amendments appearing in the Bill of Rights specifically secures rights retained by the individual. It would thus be illogical to construe one of these provisions, namely, the Second Amendment, as not similarly securing and codifying an individual right. In addition to recognizing the Second Amendment as securing individual rights based on its inclusion in the Bill of Rights as a whole, it is important to note that such interpretation is bolstered by the fact that it specifically appears "within a subset of the Bill of Rights amendments, the First through the Fourth, that relates most directly to personal freedoms (as opposed to judicial procedure regulating deprivation by the government of one's life, liberty, or property) . . ." U.S. Dep't of Justice: Office of Legal Counsel,

"Whether the Second Amendment Secures an Individual Right" (2004)[4] (hereinafter, "DOJ Memo").

The Bill of Rights was designed to protect individual liberties. A uniform interpretation of the Bill of Rights thus requires the Second Amendment to be properly construed as similarly protecting an individual right of the people: the right to keep and bear arms for private uses.

B. The Text of the Second Amendment Protects and Secures the Individual Right to Keep and Bear Arms for Private Uses.

The chief end of the Second Amendment is to ensure the security of a "free State." To understand the scope of what the drafters contemplated in formulating the Second Amendment, one must first understand what the drafters meant by the phrase "free State." "'[A] free State' was not understood as having to do with states' rights as such. Rather, it referred to preserving the liberty of the new country that the Constitution was establishing." Eugene Volokh, "Necessary to the Security of a Free State," 83 Notre Dame L. Rev. 1, 6 (Nov. 2007). Upon considering the writings of Blackstone, Montesquieu, James Madison and John Adams, one can conclude that, at the time of the Founding,

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[4] Available at http://www.usdoj.gov/olc/secondamendment2.pdf.

> "State" simply meant country; and "free" almost always meant free from despotism, rather than from some other country, and never from some larger entity in a federal structure. That is how the phrase was used in the sources that the Framers read. And there is no reason to think that the Framers departed from this well-established meaning, and used the phrase to mean something different from what it meant to Blackstone, Montesquieu, the Continental Congress, Madison, Adams, or others.

Id. In light of the Framers' understanding of a "free State," it is evident that they specifically intended for the Second Amendment to "preserv[e] the liberty of the new country that the Constitution was establishing." As such, the purpose of the Second Amendment is a direct outgrowth of the very purpose for which the United States government itself was established: to preserve the rights and liberties of the people.

Based on the practices of the day, the Framers understood that the most effective way to preserve the liberty of this newly established nation—a nation established by a Constitution expressly elevating individual rights—was to ensure the presence of a "well-regulated Militia." In this

particular context, "Militia" does not refer to standing armies, such as the United States military or the National Guard, as one might understand them today; at the time of the founding, "Militia" were "composed of the body of the people,"[5] and, as such, were entirely distinct from the regular armed forces of the United States. In *Miller v. United States*, the last instance in which this Court expressly considered the rights protected by the Second Amendment, the Court distinguished between the "Militia" and the military by explaining that

> The Militia which the States were expected to maintain and train is set *in contrast with Troops* which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—*civilians primarily*, soldiers on occasion.

310 U.S. 174, 178-79 (1939) (emphasis added). Indeed, "every citizen [was] required by Law to be a soldier" in the Militia "for the defence of our

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[5] *Amendments to the Constitution*, Annals of Congress, House of Representatives, 1st Congress, 1st Session, p. 778 (Aug. 17, 1789), *available at* http://memory.loc.gov/cgibin/ampage?collId=llac&fileName=001/llac001.db&recNum=390.

country." 1 *The Debate on the Constitution* 712 (Bernard Bailyn ed., 1993). And not only was every citizen required to enroll in the Militia, but every citizen was also required to arm himself. The *Miller* Court stated that, at the time of the Founding,

> [T]he Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.' And further, that ordinarily when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time.

Miller, 310 U.S. at 179 (emphasis added). A South Carolina state legislator once testified to the solidity of the citizen militia as one of the nation's defense mechanisms: "What European power will dare to attack us, when it is known that the *yeomanry of the country uniformly armed and disciplined*, may on any emergency be called out to our defence . . . ?" 1 *The Debate on the Constitution* at 507.

The texts of the various preliminary versions of the Second Amendment further support that a "well-regulated Militia" referred to a militia composed of the citizenry. James Madison introduced the first draft of the Second Amendment, recommending that

the clause be included as part of Article I, Section 9,[6] to the U.S. House of Representatives on June 8, 1789:

> 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.[7]

The House of Representatives, however, altered Madison's version of the amendment by placing the reference to "Militia" at the beginning of the clause:

> 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 person religiously scrupulous shall be compelled to bear arms.[8]

Thereafter, the Senate modified the language to

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[6] *See* William J. Michael, *Questioning the Necessity of Concealed Carry Laws*, 38 AKRON L. REV. 53, 62 (2005).

[7] James Madison, Annals of Congress, House of Representatives, 1st Congress, 1st Session, p. 451 (June 8, 1789), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=227.

[8] *Amendments to the Constitution*, Annals of Congress, House of Representatives, 1st Congress, 1st Session, p. 778 (Aug. 17, 1789), *available at* http://memory.loc.gov/cgi-in/ampage?collId=llac&fileName=001/llac001.db&recNum=390.

read, "A well regulated militia, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed."[9] Just days later, the Senate again changed the clause to read, "A well regulated militia being the security of a free state, the right of the people to keep and bear arms shall not be infringed."[10] The House ultimately passed the Senate version, with a minor addition of "necessary to" to the clause: "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."[11]

Just as the Framers understood that the best way to preserve the liberty of the country was to ensure the presence of a well-regulated militia, the Framers also understood that the most effective way to ensure the presence of a well-regulated militia was to *protect* the people's right to keep and bear arms in

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[9] Journal of the Senate of the United States of America, vol. 1, p. 71 (Sept. 1789), *available at* http://rs6.loc.gov/cgi-bin/ampage?collId=llsj&fileName=001/llsj001.db&recNum=68&itemLink=r%3Fammem%2Fhlaw%3A%40field%28DOCID%2B%40lit%28sj001133%29%29%230010075&linkText=1.

[10] Journal of the Senate of the United State of America, vol. 1, p. 77 (Sept. 1789), *available at* http://rs6.loc.gov/cgibin/ampage?collId=llsj&fileName=001/llsj001.db&recNum=74&itemLink=r?ammem/hlaw:@field(DOCID+@lit(sj001133))%230010075&linkText=1.

[11] Journal of the House of Representatives of the United States, vol. 1, p. 305 (1790), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=001/llhj001.db&recNum=302

order to *secure* it against the federal government. This notion was undoubtedly based on the practice of states, as showcased in *Miller*, which required private citizens to enroll in the militia and to provide their own arms. Understandably, if the government were permitted to infringe the ability of the people to arm themselves, this would clearly undermine the presence of the well-regulated citizen militia, which would, in turn, undermine the desired end of the Second Amendment: preserving the liberty of the newly established nation.

As highlighted by the text of the Second Amendment, the people's ability to arm themselves depends entirely on the protection of their inherent right to do so. Importantly, the Second Amendment expressly provides that the people's right to keep and bear arms shall not be *infringed*. In light of the American philosophy that all individuals are born with certain inalienable rights and that government is necessary to preserve those rights, it is clear from the text of the Second Amendment and its inclusion in the Bill of Rights that the Framers believed that one of these inalienable rights was the right to arm oneself.

The Framers' use of the Second Amendment to enumerate a "right of the people" clearly intimates that the right to keep and bear arms is both private and individual. Indeed, the Constitution never uses the word "right" to enumerate a liberty interest

belonging to entities, whether public or private, and a careful examination of the Constitution reveals that individuals possess "rights," whereas governmental entities possess "powers" or "authorities." DOJ Memo, at 11 (citing U.S. Const. art. I, § 1; art. I, § 8; art. II, § 1; art. III, § 1; amend. X).

Furthermore, "the people," as used in the Second Amendment, functions as a term of art in light of its use throughout the Founding documents. For instance, the Declaration of Independence states that "whenever any Form of Government becomes destructive of these ends [securing the people's inalienable rights] it is the Right of the People to alter or abolish it, and to institute new Government" to achieve such ends. Decl. of Independence para. 3. Among its many purposes, the Declaration of Independence specifically served as an indictment against King George III for "his invasions on the rights *of the people*." Decl. of Independence para. 9. The Preamble to the Constitution states that "We *the People* of the United States . . . do ordain and establish this Constitution . . . " U.S. Const. amends. I-X pmbl. As such, the Second Amendment's use of "the people" signifies that the right to keep and bear arms belongs to those who instituted and established the new government and its accompanying Constitution for the United States of America. Simply stated, the right to keep and bear arms

belongs to the people of the United States. Additionally, because government was established *by* "the people" (and for "the people"), it is illogical to interpret "the people" to mean "the government" or "the State." In light of its preservation of a right belonging to "the people," it is clear that the Second Amendment secures an individual's private and inherent right to keep and bear arms.

During the Founding era, it was understood that individuals possessed the inherent right to arm themselves for purposes of self-defense, defense of country, hunting and fowling. In *United States v. Emerson*, the Fifth Circuit Court of Appeals noted that some delegates to the Pennsylvania Convention to ratify the Constitution proposed an amendment expressly stating the full scope of the people's right to keep and 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 . . .

270 F.3d 203, 231 (5th Cir. 2001). Joseph Story explained that the right to keep and bear arms is essential to the people's right to overthrow an abusive government. 3 Story, Commentaries of the

Constitution of the United States, (1833) § 1890. Interestingly, it was the exercise of this latter right which specifically precipitated the drafting of the Declaration of Independence:

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

Id.

The Second Amendment, like the rest of its Bill of Rights counterparts, preserves individual rights. The Second Amendment would be flaccid indeed if its only purpose were to allow soldiers in the U.S. Military or the National Guard to keep their weapons at home. That narrow purpose does not comport with the whole of the Bill of Rights, as it would imply that the soldier's "right" to keep weapons at home would be based on his or her status as a soldier, rather than on his or her status as a human being. A true understanding of the political ideologies upon which this nation was built eliminates the possibility that the drafters haphazardly included in the Bill of Rights a clause intended to do anything but protect and secure

individual human rights. The Second Amendment expressly secures the right of individual citizens of the United States to keep and bear arms for private purposes.

CONCLUSION

This Court should affirm the decision below that the D.C. Code provisions at issue infringe the Second Amendment right of individuals to keep and bear arms.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON, SR.
JACQUELINE M. SCHAFFER
CARLY F. GAMMILL
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890
Counsel for Amicus Curiae

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