No. 07-290

IN THE
Supreme Court of the United States

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

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

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

BRIEF FOR AMICI CURIAE DISABLED VETERANS FOR SELF-DEFENSE AND KESTRA CHILDERS IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE[1]

Amicus Disabled Veterans for Self-Defense is an unincorporated association of disabled veterans, most of whom flew combat missions in the Air Force, Marine Corps, or Navy, over Vietnam. Most of these were shot down, captured, and held as prisoners of war (POWs) for as long as seven years and ten months. All of the POWs are rated as 70% disabled or higher by the Department of Veterans Affairs; most are 100%. The disabilities of the POWs were, for the most, incurred as a result of torture. Two, Col. George "Bud" Day, and Col. Leo Thorsness, were awarded the Congressional Medal of Honor after repatriation. All of the POWs have received at least one award of the Purple Heart. As a result of their own disabilities, the members of Disabled Vets are aware of the vulnerability of disabled people. They would like the disabled of the District of Columbia to have the same security which they have in their homes.

Amica Curia Kestra Childers is a wheel chair bound woman who enjoys shooting and shares the concerns of the other Amici over the vulnerability of the elderly and disabled in the District of Columbia.

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[1] Pursuant to Supreme Court Rule 37.3(a), the amici curiae state that the parties have consented to the filing of this brief and have filed letters of consent in the office of the clerk. Counsel of Record for Petitioners and Respondent were notified, in writing, seven days prior to the filing of this brief, of the intent of Amici Curiae to file a brief in support of Respondent. Pursuant to Supreme Court Rule 37.6, the amici curiae state that no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Other than counsel for the amici curiae, the NRA Civil Rights Defense Fund has made a contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici believe that the Second Amendment protects an individual right. The Framers were influenced by moral philosophers who asserted that the right to self-defense was inalienable. The common law, at the time of the Revolution, held that the right of self-defense was inalienable, and that the right to have arms was necessary in order to protect this right. Decisions of this Court have supported the right to self-defense, including self-defense with arms. Finally, there are humanitarian and prudential reasons for the Second Amendment to be construed to protect an individual right.

ARGUMENT

I. Moral Authority.

In a study of the influence of English and European thinkers on the Framers, an author counted the number of authors who, between 1760 and 1805, were cited at least 16 times by the Framers.[2] Dutch jurist Hugo Grotius, number ten on the list, said that self-defense was ". . .the law of all known nations."[3] Montesquieu, the most frequently cited author, asked, "Who does not see that self-defense is a duty superior

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[2] Donald Lutz, *The Relative Influence of European Writers on Late Eighteenth Century America*, The American Political Science Review 78 (1984): 194, table 3.

[3] Hugo Grotius, *The Law of War and Peace,* Book One, Chap. III, §2 (Walter J. Black, Inc., Louise R. Loomis, trans., 1949) (1625).

to every precept?"[4] The right of self-defense was recognized in the laws given to Noah: "Whoso sheddeth man's blood, by man shall his blood be shed."[5]

The Roman jurist, Marcus Tullius Cicero, number eleven on the list, asserted that the right of self-defense is based upon natural law, which cannot be changed:

> True law is right reason in agreement with nature; it is the universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by Senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for

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[4] M. De Secondat, Baron De Montesquieu, *The Spirit of Laws*, Book XXVI, Chap. VII, at 173 (The Classics of Liberty Library, 1994) (1751).

[5] King James version, Genesis 9:6.

> he is the author of this law, its promulgator, and its enforcing judge.[6]

In his defense of T. Annius Milo, he said that there is an unwritten law which allows self-defense, a natural law:

> Therefore, o judges, this is not a written law, but a natural-law, which we have not learned, received by tradition, or read but have taken imbibed and extracted from nature herself, in which we were not instructed, but for which we were made, we are not taught but are imbued with it so that, if our life should be endangered by any snares, if by violence, and by weapons either of robbers or of enemies, every means of saving life would be honorable. *For the laws are silent, and inoperative, in contests with arms in hand, nor do the laws command that they be waited for when on him who might wish to wait for the enforcement of the laws . . .(a) great calamity or even death might be inflicted before the law could be enforced.* (*Emphasis added*)
>
> Although the law itself very wisely and in some measure tacitly gives the power of defending, which does not allow a man be killed, but forbids anyone to be with a weapon for the purpose of killing a man; so that as the cause for carrying a weapon, and not the weapon itself, is inquired into, he who made

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[6] Marcus Tullius Cicero, *III De Re Publica*, xxii, (Harvard University Press, Clinton Walker Keyes trans. 1977).

> use of a weapon for the purpose of defending himself would be judged to have had the weapon not for the purpose of killing a man.[7]

Grotius, like Cicero, based his work on natural law. Grotius says that under the law of nature self-defense is justified. Even though tribunals have been established, a tribunal may not be available if it would require a person to risk life or limb to wait before his cause may be heard by the tribunal, such as when he is under attack.[8]

John Locke, the third most cited thinker, after Montesquieu and Blackstone, also supports the right of self-defense because when one is violently attacked, reliance on the law could lead to injury or death, for which the law offers no remedy.[9]

Montesquieu echoes Grotius and Locke, that one may resort to self-defense when any reliance upon recourse to the law would lead to injury or death if the threat is immediate:

> Among citizens the right of natural defence does not imply a necessity of attacking. Instead of attacking they need only have recourse to proper tribunals. *They cannot*

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[7] M. Cicero, *Selected Orations*, "Pro T. Annius Milone,"(The Translation Publishing Co., Inc., F.H. Dewey, trans. 1961).

[8] *Id.*, Book Two, Chap. 1, §3.

[9] John Locke, *An Essay Concerning the True, Original, and End of Civil Government*, Chap. III, §19, at 179 (Classics of Liberty Library 1992)(1692).

> *therefore exercise this right of defence, but in sudden cases, when immediate death would be the consequence of waiting for the assistance of the laws.*[10] (Emphasis added).

The Italian philosopher Cesare Beccaria is number six on the list of most cited thinkers. He addressed the subject of laws forbidding arms:

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with impunity, and which, if strictly obeyed, would put an end to personal liberty – so dear to men, so dear to the enlightened legislator – and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than prevent than to prevent homicides, for an unarmed man may be attacked with greater

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[10] M. de Secondat, Baron de Montesquieu, *The Spirit of Laws*, Book X, Chap. II, at 165 (The Classics of Liberty Library, 1994) (1751).

> confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.[11]

II. Legal Authority – the Common Law.

In construing the Constitution, this Court has said:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Thirteen States, were born and brought up on the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when the came to put their conclusions in the form of fundamental law in a compact draft, they expressed the in terms of the common law, confident that they could be shortly and easily understood. *Ex parte Grossman*, 267 U.S. 87, 108-109 (1925).

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[11] Clayton E. Cramer, *For the Defense of Themselves and the State*, at 28 ((Praeger 1994), citing Cesare Beccaria, *On Crimes and Punishment*, 87-88 (Bobbs-Merrill Co., Henry Palolucci, trans. 1963)(1767).

The common law was learned from William Blackstone's *Commentaries on the Laws of England.* Professor Joyce Lee Malcolm had the following to say about the influence of Blackstone, whose influence was second only to Montesquieu, on the Framers:

> The first volume of William Blackstone's *Commentaries on the Laws of England* did not appear in Britain until 1765 and the fourth and last volume until 1769, yet nearly 2500 copies had been sold in America by the start of the American Revolution in 1775. Blackstone's work not only sold well but was regarded immediately as authoritative. Blackstone's views on the right of individuals to be armed are of importance, therefore, for penetrating the minds of the American Framers.[12]

Blackstone asserted that there are absolute rights. He defines these as the rights which one would have in a state of nature.[13] Blackstone recognized three absolute rights: personal security,[14] personal liberty[15] and private property.[16] He explains that the primary

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[12] Malcolm, *To Keep and Bear Arms*, supra, note 20, at 141.

[13] I, William Blackstone, *Commentaries on the Laws of England*, 119 (University of Chicago Press 1979) (1765-1769).

[14] *Id.*, at 125.

[15] *Id.*, at 130.

[16] *Id.*, at 134.

end of government is to secure these absolute rights of individuals.[17]

> The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.[18]

Blackstone says that the common law recognizes "auxiliary rights," which are rights which pertain to men because they are necessary to sustain those rights with which they are endowed by their Creator. These include" (1) the powers of parliament (i.e., the right to be represented),[19] (2) the limitation of the king's prerogatives (constitutionally limited government),[20] (3) access to the courts for justice,[21] (4) the right to petition the king for redress of grievances:[22]

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 Wm.& M. st. 2, c.2, and it is indeed a public allowance under due

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17 *Id.*, at 120.

18 *Id.*, at 130.

19 *Id.*, at 136.

20 *Id.*, at 137.

21 *Id.*

22 *Id.*, at 138.

> restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[23]

Here Blackstone refers to a provision in a law passed shortly after William and Mary came to the throne in 1688 as a result of the "glorious" revolution. The English Bill of Rights was passed to restore the natural rights of Englishmen which had been taken away by the Stuart kings, natural rights which are "the birthright of the people of England."[24] These rights include the right to arms for self-defense:

> That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law. . .[25]

Blackstone says that the common law recognizes that an immediate threat cannot wait for legal redress:

> For the law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. *It considers that the future process of law is by no means an adequate remedy for injuries accompanied by*

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[23] *Id.* at 139.

[24] *Id.*, at 124.

[25] 1 W.&M. st. 2, c.2

> *force; since it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose on violence with another. Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.*[26] (*Emphasis added*).

The moral authorities most frequently cited by the Framers asserted that there is a law of nature which permits one to save his life at the expense of the life of an unlawful attacker if the threat is immediate. The common law agreed. At the time of the ratification of the Bill of Rights, the states were still under the common law. Lawyers, including those who drafted the Bill of Rights, were instructed in the common law by Blackstone. Blackstone taught that the common law regarded the right to life as an absolute right which no law could extinguish, and that there was an auxiliary right necessary to assure that the right to life could be enjoyed, i.e., the right to arms.

One Justice of this Court, in a dissenting opinion, said of our common law heritage:

> The freedom of thought, of speech, and of the press; the right to bear arms; exemption from military dictation; security of the person and of the home; the right to a speedy and public trial by jury; protection against oppressive bail and cruel punishment, are, together with

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[26] III *Commentaries,* 3-4.

exemption from self-incrimination, the essential and inseparable features of English liberty. *Brown v. Walker*, 161 U.S. 591, 635-636 (1896), Justice Field, dissenting.

III. Independence.

Prior to the American Revolution, the First Continental Congress, on October 14, 1774, passed a Declaration of Rights which is similar in style to the English Bill of Rights. Included in the declaration was a list of 10 resolutions in which the Congress asserted that the inhabitants of the colonies were entitled to be governed by the English common law and by English statutes in effect at the time, which included the English Bill of Rights.[27] The English Bill of Rights included a right to arms for self-defense. Certainly, the right to keep functional firearms, including

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[27] It is interesting to note that the Resolution against standing armies in the colonies is almost identical with the provision against the same in the English Bill of Rights:

> That the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law (English Bill of Rights, immediately preceding the provision on the right to arms).
>
> That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law. (The ninth unanimous Resolution in the Declaration of Rights).

handguns, in the home, was protected under the common law.[28]

On July 6, 1775, after Lexington and Concord, after General Gage had declared martial law in Boston on June 12 of that year, Congress issued the Declaration of the Causes and Necessity of Their Taking Up Arms. In the Declaration the Congress states, as one of the reasons for taking up arms, that Gage had disarmed the people of Boston and seized their weapons.[29] Finally, one year after the Declaration of Causes, the Continental Congress concluded that it was forced to declare independence.

It would seem strange if the authors of the Bill of Rights were to insist upon protecting other rights against government interference yet exclude from that protection the auxiliary right which is necessary to protect the most fundamental of all rights, the right to life. Recall that the confiscation of private arms was

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[28] Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U. L. Rev. 177, at n. 104. (1982). The authors noted that keeping a gun in the home is a "liberty which was allowed by the common law." *Rex v. Gardiner*, 95 Eng. Rep. 386, 388 (K.B. 1738)

"[T]he mere having a gun was no offense ... for a man may keep a gun for the defense of his house and family ..." *Mallock v. Eastley*, 87 Eng. Rep. 1370, 1374 (K.B. 1744). "[A] gun may be kept for the defense of a man's house." *Wingfield v. Stratford*, 96 Eng. Rep. 787. (K.B. 1752).

[29] 1,778 muskets, 973 bayonets, 634 pistols and 38 blunderbusses were seized. See, Richard Frothingham, *History of the Siege of Boston*, (3rd ed. Little, Brown and Company 1872).

listed as one of the causes for taking up arms against the Crown. Recall that the Declaration of Right asserted that we are entitled to the protection of the laws of England, including the right to arms for self-defense, which was declared to be our birthright which was restored by act of parliament. Would they have written such amendments to protect against oppressive government, having recently experienced oppressive government, without protecting the auxiliary right which is necessary to protect the one right without which no other right may be enjoyed? Of course, as we have said, contemporary thinkers believed that this right had been secured in the Second Amendment.

At the time Madison wrote the Second Amendment, there was a right of the people to keep and bear arms for self-defense. This right was believed, by the Framers, to be a right inalienable. Every word of the Constitution, and the articles of amendment, was written, approved, and ratified by men who believed this.

IV. The Right of Self-Defense.

Judge Isaac C. Parker was U.S. District Judge for the Western District of Arkansas.[30] The jurisdiction of this court was not the Western part of the state of Arkansas, but the territory that is now the state of

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[30] The information on Judge Parker came from David Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 Am.J. of Crim. Law 294 (2000).

Oklahoma which at that time was Indian territory. From 1893 to1896 there were 12 self-defense cases decided in the United States Supreme Court, 11 of these from the court of Judge Parker. In one of the cases Judge Parker was affirmed, and in ten cases he was reversed. All of these were cases in which the defendant had been sentenced to death. Of those who were retried, not one resulted in capital punishment, with some being acquitted entirely. There were several principles established in these cases: flight from the scene of the crime may not be taken as evidence of guilt, *Alberty v. United States*, 162 US 499 (1896); it is not unreasonable, in the face of credible threats, to arm oneself, *Gourko v. United States*, 153 US 183 (1894); *Thompson v. United States*, 155 US 271 (1894); *Beard v. United States*, 158 US 550 (1895); when a defendant uses deadly force, the fact that he had received credible threats is relevant and should be admitted in evidence, *Wallace v. United States*, 162 US 466 (1896).

This line of cases finally led to a decision in 1921 in which Justice Oliver Wendell Holmes famously stated:

> Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in

> immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not succeeded the bounds of lawful self defence. That has been the decision of this Court. *Beard v. United States*, 158 U.S. 550, 559 (1895). Detached reflection cannot be demanded in the presence of an uplifted knife (italics added). Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him. *Brown v. United States*, 256 US 335, 343 (1921), citing Rowe v. United States, 164 U.S. 546, 558 (1896).

The right of self-defense is so fundamental that it has been asserted as a defense in prosecution of a felon in possession of a firearm, in violation of 18 U.S.C. §922(g). In every Federal Circuit where the issue has been considered, it has been approved. *United States v. Leahy,* 473 F.3d 401, 409 (CA1 2007); *United States v. Agard*, 605 F.2d 665, 667 (CA2 1979); *United States v. Paolello,* 951 F.2d 537, 540-41 (CA3 1991); *United States v. Mooney,* 497 F.3d 397, 403 (CA4 2007); *United States v. Panter*, 688 F2d. 268, 271 (CA5 1982); *United States v.. Singleton*, 902 F.2d 471, 472 (CA6 1990); *United States v. Gomez*, 92 F.3d 770, 774-775 (CA9 1996); *United States v. Vigil*, 743 F.2d 751, 756 (CA10 1984); *United States v. Deleveaux*, 205 F.3d 1292, 1297 (CA11 2000).

VI. 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.

A. The Collective Right Interpretation is Wrong.

If, as Appellants assert, the Second Amendment was written to protect the right of the states to have a militia, that raises interesting questions. One must surmise that with the legal talent present at the founding, someone would have noticed that the amendment only prevents the Federal Government from interfering with state militias by interfering with the arming of same. Surely someone would conclude that a clever mind, determined to achieve an end, would find that if only one road were blocked, another way could be found to arrive at the promised land. Wouldn't the amendment be more effective if it merely forbid interference with the militias?

The application of the collective rights interpretation could lead to unanticipated results. If the purpose of the Second Amendment is to protect state militias from being interfered with or abolished by the federal government, what does this say about federal gun laws?[31]

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[31] For a discussion of this prospect, see see G.H. Reynolds & D.B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 Wm. & Mary L. Rev. 1737 (1995).

The National Firearms Act (NFA)[32] imposes a tax upon the manufacturer and transfer of certain classes of firearms, including machine guns and other weapons useful for military purposes. In the one case in which there was a challenge to the NFA based on the Second Amendment, the defendant had been discharged in the lower court after asserting that possession of a short-barreled shotgun was protected by the Second Amendment. The Supreme Court observed that there was no evidence in the record that a short-barreled shotgun had military utility:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *United States v. Miller*, 307 US 174, 177 (1939).

Does this mean that if military utility can be established for a weapon it would not be covered by the National Firearms Act? When the authorities in the State of Maryland attempted to tax the Bank of the United States, which had been incorporated by

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[32] 26 U.S.C. §5801, et seq.

Congress, the Supreme Court made the following observation:

> The power of congress to create, and of course, to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. *M'Cullock v. Maryland*, 17 US 316 (1819).

If, as the collective right theorists assert, the states are to have the power to create and continue their militias, the purpose of the amendment would be defeated if the federal government were able to tax the articles which individuals must furnish for themselves if they are to serve in the militia. After all, this author is aware of no state militia that furnishes the necessary equipment to every able-bodied citizen. Now, as at the time of the founding, a member of the militia would be required to furnish his own firearm.

One may also ask, if the Supreme Court were to decide for the collective rights interpretation, will the Treasury Department be required to return the taxes that have been collected since the enactment of the NFA? Will federal courts be required to grant petitions for habeas corpus by individuals who have been convicted of violation of federal firearms laws?

But the Supreme Court has already decided that the tax is valid, *Sonzinsky v. United States*, 300 US 506 (1937). Does that mean that the Court has inclined toward an individual right interpretation?

It has also been argued that the militia system has fallen into disuse and the provisions of the Amendment have no current application.[33] While mindful that there are those who disfavor foreign citations, an apt rejoinder is to be found in the decision of an English Court:

> The *(English, ed.)* Bill of Rights still remains unrepealed, and *no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying an infringement of its provision. Bowles v. Bank of England*, 1 Ch. 57, 84-85 (1913) (*emphasis added*).

The militia is not gone. The United States Code, at 10 U.S.C. §311, still defines the unorganized militia as all able bodied males between the ages of 17 and 45 who are not members of the National Guard or Naval Militia. The militia has been called out as recently as World War II. When the National Guard was called up and shipped overseas, the governor of Maryland activated the militia to guard critical infrastructure and to prepare the meet a possible invasion. "Before the end of 1943, 15,000 'Maryland Minute Men,' as these men were designated, manned home guard stations."[34] Militia were activated in neighboring Virginia as well. In both cases the militia members were required to supply their own arms and their own

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[33] Dennis Henigan, *The Right to Be Armed: A Constitutional Illusion*, S. F. Barrister, Dec. 1989.

[34] Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U. L. Rev. 177, 197 (1982).

ammunition.[35] Given the threat of terrorism, no longer theoretical, it is not inconceivable that state militias may be called out in the event of a catastrophe. The militia has not fallen into desuetude.

It is also argued that the prefatory language regarding a militia, restricts the meaning of the operative clause. One researcher has found that at the time of the Bill of Rights, up until Rhode Island's Constitution of 1842, there were dozens of constitutional provisions with a prefatory clause justifying the operative clause.[36] In each case, he points out that the prefatory language does not restrict the operative clause.

B. The Second Amendment Protects an Individual Right.

1. Contemporaries thought that the Second Amendment Protected an Individual Right.

This was the understanding of every competent authority at the time of the ratification of the Bill of Rights and thereafter, until sometime in the mid Twentieth Century. It was the understanding of the 1st Congress. This Court has said of the 1st Congress:

> It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution,

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[35] *Id.*, at 198.

[36] Eugene Volokh, *The Commonplace Second Amendment,* 73 N.Y.U. L. Rev., no. 3, 793 (1998). The provisions are found in the Appendix, pp. 814-821.

> led also in the organization of the government under it. It was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument. This construction was followed by the legislative department and the executive department continuously for 73 years, and this, although the matter in the heat of political differences between the executive and the Senate in President Jackson's time, was the subject of bitter controversy, as we have seen. *This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution, when the Framers of our government and Framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.* (*Emphasis added*, ed.). *Powell v. McCormack*, 395 U.S. 486, 547 (1969).[37]

While it was the 2nd Congress, not the 1st, during debate of the passage of the Militia Act of 1792, there

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[37] See, also, *Stuart v. Laird*, 1 Cranch, 299, 309; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 351; *Cohen v. Virginia*, 6 Wheat. 264, 420; *Prigg v. Pennsylvania*, 16 Pet. 544, 621 (10 L. Ed. 1060); *Cooley v. Board of Wardens, etc.*, 12 How. 299, 315; *Burrow-Giles Lithographing Company v. Sarony*, 111 U.S. 53,57; *Ames v. Kansas*, 111 U.S. 449, 463-469; *The Laura*, 114 U.S. 411, 416; *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297: *McPherson v. Blacker*, 146 U.S. 1, 28; *Knowlton v. Moore*, 178 U.S. 41, 56; *Fairbank v. United States*, 181 U.S. 283, 308; *Ex parte Grossman*, 267 U.S. 87, 118.

was a suggestion that people unable to afford their own arms be provided arms by the government. This was opposed because it would give the federal government the ability to disarm those whom it had armed. When the bill finally passed, on May 8, 1792, it provided that every able bodied white male had to provide himself a "good musket or firelock."[38]

2. The Colonial Experience Gave The Framers Cause to Protect an Individual Right.

In *Boyd v. United States*, 116 U.S. 616 (1886) the issue was an order, issued by a U.S. District Court, that appellant produce certain papers which, if they contained information which the customs officials believed that they contained, would tend to incriminate the appellant. A statute required precisely that. This Court found that the statute under which the papers were ordered to be produced was unconstitutional. In its decision this Court made a digression to discuss the leading case on search and seizure among the English speaking people, *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765). In that decision Lord Camden ruled that general warrants, which were issued by the Secretary of State and named neither the place to be searched nor the things to be found, were illegal. Justice Bradley explained the reason for the decision:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes

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[38] Stephen P. Halbrook, *That Every Man Be Armed*, fn. 160 (University of New Mexico Press, 1984).

> the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment. *Boyd, supra*, at 630.

Justice Bradley expressed the opinion that the Fourth and Fifth Amendments were written with the full knowledge of the *Entick* decision and that the Entick language could be reliably used to define the reasonableness of a search and seizure. Thus, he opines that the authors of those amendments could not have agreed to the law in question in Boyd:

> The struggles against arbitrary power in which they had been engaged for more than 20 years would have been too deeply engraved in their memories to have allowed them to approve such insidious disguises of the old grievance which they had so deeply abhorred.[39]

If the writs of assistance were in the minds of the Framers of the Bill of Rights when they wrote the Fourth and Fifth Amendments, one might think that the confiscation of firearms by General Gage was also in their minds. One notes that in the Declaration of the Causes and Necessity of Their Taking Up Arms the Continental Congress listed Gage's confiscation of arms as one of the causes, but not the writs of assistance, oppressive though they were.

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[39] *Id.*

Nor was Gage's action the only move to disarm colonists. Stephen Halbrook recalls that as early as 1671, Governor Berkely of Virginia, pursuant to the Game Act,[40] began attempting to disarm Virginians. This continued after the suppression of Bacon's Rebellion of 1676, until the abdication and flight of James II and the advent of William and Mary.[41] Halbrook reports that by the mid 1770's there were numerous newspaper accounts of the seizure of arms, especially arms in American ships arriving from other countries.[42] Using Justice Bradley's reasoning, these grievances, the seizures of arms, including an attempt 100 years before the Revolution, should have been in the minds of the Framers as well.

Amici believe that the fifth auxiliary right is protected in the Second Amendment. Remember that the Second Amendment was written by men whose sixth most frequently cited thinker, Beccaria, had argued passionately for an individual right to arms. As noted above, the courts of the United States have recognized a right to self-defense, including self-defense with arms. At the time the Amendment was drafted there was a right of the people to keep and bear arms in all of the states, with exceptions for slaves, Indians, and freedmen in some jurisdictions. If the collective right interpretation is correct, that means that there were two rights of the people, the one that everyone enjoyed as an auxiliary right of one

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[40] 22 Car.II c. 25 (1670).

[41] Halbrook, *That Every Man Be Armed*, at pp. 55-57.

[42] *Id.*, at 63.

subject to the common law, and the right to have arms while serving in the militia. One might well ask why Madison did not specify which one he meant if there were two.

CONCLUSION

This Court Should Affirm the Judgment of the Court of Appeals for the D.C. Circuit. Amici realize that the language of the Second Amendment can be construed in two ways. However, Amici believe that this Court should affirm the judgment of the Circuit Court for several reasons.

Affirming the judgment would construe the Second Amendment to protect an individual right. If there was any authority, contemporaneous with the ratification of the Bill of Rights which did not believe that this was the intent of James Madison when he wrote it, of the Congress when they offered it for ratification, or the states when they ratified it, we have not found it.

The rights of Englishmen under the common law are protected in the Constitution and the Bill of Rights. The three absolute rights are protected in the due process clauses of the Fifth and Fourteenth Amendments. The first auxiliary right is protected in Article I of the Constitution. The second auxiliary right is protected by the Tenth Amendment. The third auxiliary right is protected by Article III of the Constitution and by the First, Fourth, Fifth, Sixth, Seventh and Eighth Amendments. The fourth auxiliary right is protected by the First Amendment. Where is the fifth auxiliary right? This Court has observed that ". . . the rights of life and personal

liberty are natural rights of man." *United States v. Cruikshank*, 92 U.S. 542, 543 (1875). Not one of the rights which were so carefully protected in the Bill of Rights could be enjoyed unless one's life were first preserved. The confiscation of privately owned firearms in Boston was listed, in the Declaration of July 6, 1775, as one of the causes impelling us to take up arms. Would such men, under such circumstances, have left the fifth auxiliary right unprotected? All contemporary authorities appear to have thought not. They thought that it was protected in the Second Amendment.[43]

Affirming the judgment would change very little in America. Most Americans who are not part of the organized militia already have the right to keep and bear functional firearms, including handguns, in their homes. The decision we seek from this Court would merely strengthen the protection of this right.

However, for residents of the District of Columbia, and any other jurisdiction which prohibits private ownership of handguns, it will make a large difference in a number of ways. First, the current situation

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[43] See, e.g., 1 Wiilliam Blackstone, *Commentaries on the Laws of England*, 300, 2 Blackstone, at 143, notes 40,41 (St. George Tucker, ed., Lawbook Exchange, Ltd., 1996)(1803) 143, nn. 40,41; William Rawle, *A View of the Constitution,* at 110 (Walter D. Kennedy and James R. Kennedy, eds , Land & Land Publishing,1993) (1825); Joseph Story, *On the Constitution of the United States*, §§450,451(Classics of Liberty Library, 1994) (1840); Thomas M. Cooley, *The General Principles of Consitutional Law in the United States of America*, Chap. XIV, sect. IV (Andrew C. McLaughlin, ed.,Little, Brown and Company, 1898).

creates a safety hazard which the District Government appears not to have considered.

As noted above, in every federal Circuit in which a convicted felon sought to offer a defense of justification for possession of a firearm in violation of 18 U.S.C. §922(g), it has been recognized. In the Fourth Circuit, for example, in *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989), the Court established a four prong test for justification in the face of such charges. The defendant must produce evidence which would allow the factfinder to conclude that he (1) was under unlawful and present threat of death or serious bodily injury; (2) did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and (4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm. These are, essentially, the same criteria which one who is not a prohibited person would have to show to justify shooting a dangerous attacker.

As things stand now, a District resident may keep a rifle or shotgun in his home. It would be unlawful to keep one's firearm fully assembled and loaded, but the government may not check to see if one is complying with the requirements of D.C. Code §7-2507.02 without probable cause. The District authorities will never know that one is in violation unless one actually shoots an intruder in self-defense. In that case, if the shooting is justified, one must assume that the violation of the D.C. Code will also meet the criteria for justification.

While this means that a D.C. resident would run very little risk of prosecution for keeping a loaded rifle in his home, society would be much better off if he could keep a loaded handgun instead:

> Consider penetration: even the .44 magnum, the most powerful of all handguns, penetrates no more than thirteen inches in wood, while revolvers in the far more commonly owned .32 to .38 calibers range from two to seven inches in penetration.[44]

The reason for the difference in penetration is relative velocity. A 158 grain bullet from a .38 special revolver will leave the muzzle at 755 feet per second.[45] A 150 grain bullet from a .30-06 hunting rifle, will leave the muzzle at 2920 feet per second.[46] The relative dangers are obvious, a handgun would be much better suited for home defense.

The District of Columbia is a densely populated urban environment.[47] A rifle or shotgun is much more likely to have an accidental discharge as a handgun for

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[44] Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 262 (1983), citing D.Grennell & M. Willliams, Law Enforcement Handguns Digest 194-195 (1972) as to handgun penetration and Lattimer & Lattimer, *The Kennedy-Connally Single Bullet Theory*, 50 Intl. Surgery 524-525 (1968).

[45] *NRA Firearms Fact Book*, 262 (National Rifle Association, 3rd. ed, 1989).

[46] *Id.*, at 265.

[47] http://quickfacts.census.gov/qfd/states/11000.html

a number of reasons. But assume that there is a justified shooting. The problem of over penetration still endangers innocents with a rifle far more than with a handgun. Further, a rifle or shotgun would be awkward to use for home defense because of the size. If awkward for a healthy person, it may approach impossible in a confined space for a person who is bound to a wheel chair.

If District residents were permitted to have functional handguns in their homes, it is unlikely that this would lead to an increase in violent crime. The people who are inclined to commit violent crimes already have handguns. To see how honest people in the District will respond to having the right to keep and bear a functional handgun in their homes, we can look at jurisdictions in which there is a state constitutional right to arms for self-defense.

The constitutions of New Hampshire,[48] South Dakota[49] and Vermont[50] each protects a right to have arms for self-defense. During the five years 2002-2006, according to the F.B.I. UNIIFORM CRIME REPORTS, there were 208 homicides in these states.[51] Their combined population, as of July 1, 2007, was 2,733,296. During that same period the District of

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[48] New Hampshire Constitution, Article 2-a.

[49] South Dakota Constitution, Article VI, § 24.

[50] Vermont Constitution, Ch. I, art. 16.

[51] http://www.fbi.gov/ucr/ucr.htm

Columbia, population 588,292, had 1,099 homicides.[52] The rate per 100,000 population during this five year period, for the three states, was 1.54. For the District of Columbia, it was 38. One might safely conclude that if the honest people living in the District were allowed to have functional firearms, including handguns, in their homes, this would be unlikely to increase the rate of violent crime. One speculates that the prediction of Cesare Beccaria, cited above, that disarming the honest emboldens the dishonest, might be proven to be correct.

There are, in the District of Columbia, people who are elderly or disabled, as are many members of the Amici, Disabled Vets, as well as Amica Kestra Childers. A affirmation of the judgment would be a great help to give security to those of diminished physical capacity. On their behalf, Amici ask:

> *Suppose a strong and vigorous man strikes me with his fist, and I am a poor fellow who cannot stand up to him with a fist. May I defend myself with a sword?*[53]

For the reasons presented, Amici pray that this Court will affirm the judgment of the Circuit Court.

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[52] *Id.*

[53] Giovanni Da Legnano, *De Bello, De Represealiis et De Duello*, (Thomas Erskine Holland ed., James Leslie Brierly, trans. William S. Hein 1995 (1360), quoted by David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self Defense*, BYU Journal of Public Law (Forthcoming 2007).

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