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STATEMENT OF INTEREST OF *AMICI CURIAE*

The *amici* submitting this brief, who are described in greater detail in the Appendix, consist of eleven national law enforcement organizations and the Center to Prevent Handgun Violence. The law enforcement *amici*, taken together, represent hundreds of thousands of law enforcement officers who face the daily threat of handgun violence and who rely upon gun control laws in the ongoing war against violent crime. All of the *amici* are committed to preventing handgun violence and to keeping prohibited persons from possessing handguns and other weapons. The gun control laws of the United States provide law enforcement with a valuable tool in this effort.

Both parties, through counsel, have consented to *amici*'s submission of this brief.

INTRODUCTION

As former Solicitor General Erwin Griswold has noted, the meaning of the Second Amendment to the U.S. Constitution^{1/} is “perhaps the most well-settled proposition in American constitutional law.”^{2/} Sixty years ago, the U.S. Supreme Court held in *United States v. Miller*, 307 U.S. 174 (1939), that the Second Amendment was designed to protect only the ability of the states to maintain a well-regulated militia. Since *Miller*, every federal court that has considered the issue — including this Court — has rejected the contention that the Second Amendment confers a right to firearm possession unrelated to militia service.

Notwithstanding this settled case law, the court below held that the Second Amendment entitled Timothy Joe Emerson — a man with no relation to a “well-regulated militia” and who was subject to a restraining order requiring him not to come near his wife or her daughter — to possess the firearm of his choice. Federal law prohibits persons who are subject to a domestic violence restraining order from possessing weapons. Emerson was indicted for possession of a firearm

^{1/} “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.

^{2/} Erwin N. Griswold, *Phantom Second Amendment “Rights,”* Wash. Post, Nov. 4, 1990, at C7.

while subject to a restraining order after an incident in which he allegedly threatened his estranged wife with a Beretta pistol and pointed it at her child. By dismissing the indictment as violative of the Second Amendment, the district court ruled that Emerson’s right to a gun trumped federal law designed to prevent domestic violence.

NCE \d4} The lower court’s notion that the Second Amendment prevents the federal government from prohibiting individuals subject to domestic violence restraining orders from possessing guns is wholly unsupported in precedent, history, or common sense.^{1/} The district court’s opinion not only is fundamentally flawed in its interpretation and reasoning but also creates a

^{3/} Many of the law review articles on which the district court heavily relies may reflect agendas beyond scholarship. *See, e.g.*, Richard B. Schmitt, *Whose Right?*, *Wall Street J.*, May 25, 1999, at A1 (“[The NRA] has been bankrolling Second Amendment–friendly research in the hope of changing the legal landscape”); *id.* (noting that district court “cited the growing body of scholarly work that the NRA has helped fund”). In any event, an impressive array of commentators has weighed in on the other side, pointing out the case law and history the former group of writers has virtually ignored. *See, e.g.*, Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 *U.C. Davis L. Rev.* 309, 317 n.34 (1998) (citing articles).

dangerous precedent that, if left unchecked, threatens the welfare of this country's citizens. Its decision cannot be permitted to stand.

ARGUMENT

THE DISTRICT COURT'S DECISION IS AT ODDS WITH EVERY OTHER FEDERAL COURT TO HAVE CONSIDERED THE ISSUE.

- A. The Supreme Court Established in *United States v. Miller* that the Second Amendment Does Not Confer a Right to Bear Arms Unrelated to Militia Service.**

Every federal court that has been faced with a Second Amendment challenge — except the district court below — has recognized that *United States v. Miller*, 307 U.S. 174 (1939), represents the authoritative interpretation of the Second Amendment. In *Miller*, the defendants challenged their indictment under section 11 of the National Firearms Act as a violation of the Second Amendment. Although they were successful in the district court, the Supreme Court unanimously rejected their contention. Stating that the “obvious purpose” of the Amendment was “to assure the continuation and render possible the effectiveness” of the state militia, the Court held that the Amendment “*must* be interpreted and applied with that end in view.” *Id.* at 178 (emphasis added).^{4/} With this principle in mind, the Court then noted that, historically, militia members were expected to supply their own arms “when called for service” to “[t]he militia which the States were expected to maintain and train.” *Id.* at 178-79.^{5/} Thus, the Court clearly

^{4/} The United States had made the identical point in its brief:

Indeed, the very language of the Second Amendment discloses that this right has reference only to the keeping and bearing of arms by the people as members of the state militia or other similar military organization provided for by law.

Brief for United States at 4-5, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696).

^{5/} The fact that militia members are no longer required to supply their own arms when reporting for service has depleted the Second Amendment of most of its vitality. As with the Third Amendment — which, *inter alia*, prohibits the quartering of soldiers in peacetime in

viewed the right to “keep and bear arms” in the Second Amendment as referring only to the means by which the state militia were to be armed.^{1/} Because the *Miller* defendants had not made any showing that their “possession or use” of a shotgun had “some reasonable relation to the preservation or efficiency of a well regulated militia,” *id.* at 178, they could claim no protection under the Second Amendment.

any house “without the consent of the owner” — the courts have seen no need to create new meaning for the Second Amendment to restore this vitality. (Indeed, the Third Amendment has been at issue in only one reported case, *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982).) And, in fact, the Second Amendment remains relevant today because the rights it protects are held by the National Guard.

^{6/} Law review articles discussing *Miller* soon after it was announced interpreted it similarly. *See, e.g.*, Recent Decisions, 38 Mich. L. Rev. 403, 404 (1940) (constitutional right to bear arms exists “as a necessity to the existence of a well regulated militia. . . . Today the state supplies the weapons and this necessity for the citizen bearing arms no longer exists.”); Recent Cases, 8 Geo. Wash. L. Rev. 230, 231 (1939-40) (“The Second Amendment plainly states that its object is to preserve to the states their security and freedom by means of a well regulated militia. The individual rights are auxiliary.”).

The Supreme Court has twice reaffirmed its holding in *Miller*. In *Lewis v. United States*, 445 U.S. 55 (1980), the Court considered, *inter alia*, whether 18 U.S.C. § 1202(a)(1), which criminalizes possession of a firearm by a convicted felon, could survive an equal protection challenge. If the statute had infringed a fundamental right, the Court would have been required to analyze the statute’s constitutionality using strict scrutiny, under which the statute would have to be narrowly tailored to fit a compelling interest to survive review. *See, e.g., Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996). Instead, the Court used rational-basis review, noting that the legislative restriction at issue “[did not] trench upon any constitutionally protected liberties.” *Id.* at 65 n.8 (citing *Miller* and three lower court cases rejecting Second Amendment challenges). This conclusion would have been impossible to reach if *Miller* were not regarded by the Court itself as standing for the proposition that the Second Amendment does

not create a fundamental right to possess a firearm.^{1/} Similarly, the Court dismissed the appeal in *Burton v. Sills*, 248 A.2d 521 (N.J. 1968), in which the state court held that the Second Amendment did not confer a right to bear arms unrelated to militia service, for “want of a substantial federal question.” *Burton v. Sills*, 394 U.S. 812 (1969). This dismissal would not have been appropriate if the Court felt that *Miller*’s interpretation of the Second Amendment was open to question.^{1/}

^{1/} This Circuit has similarly recognized that gun possession is not a fundamental right. *See, e.g., Rodriguez v. INS*, 9 F.3d 408, 414 (5th Cir. 1993) (statute permitting deportation of alien convicted of possessing sawed-off shotgun “does not employ a suspect classification or impinge upon fundamental rights”); *United States v. Giles*, 640 F.2d 621, 625 (5th Cir. 1981) (agreeing with Sixth Circuit decision that “receiving firearms shipped in interstate commerce is not a basic constitutional right”) (internal quotation omitted). Even the court below seemed to recognize that the Second Amendment does not create a fundamental right — and therefore that rational-basis review is appropriate — when it held that the statute at issue, 18 U.S.C. § 922(g)(8), could have survived review if “a reasonable nexus between gun possession and the threat of violence” had been demonstrated. *United States v. Emerson*, 46 F. Supp. 2d 598, 611 (N.D. Tex. 1999).

^{8/} This interpretation of the Second Amendment is entirely consonant with the Supreme Court’s long-standing corollary view that the Amendment acts as a constraint only on the federal government and not on the states. *See, e.g., United States v. Cruikshank*, 92 U.S. 542, 553 (1875); *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886); *see also Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 729 (9th Cir. 1992); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982) (Second Amendment not incorporated through Fourteenth Amendment). Since the Second Amendment was intended to preserve the state’s ability to maintain a well-regulated militia, it is logical that the Second Amendment would function as a constraint only on the federal government.

In short, the Supreme Court established the scope of the Second Amendment in *Miller* and has seen no need to revisit the issue since. The district court's conclusion that "*Miller* did not answer the crucial question of whether the Second Amendment embodies an individual or collective right to bear arms," *United States v. Emerson*, 46 F. Supp. 2d 598, 608 (N.D. Tex. 1999), is simply wrong. Whether labeled "individual" or "collective," the right, according to *Miller*, is inextricably connected to service in the organized state militia.

B. The District Court's Opinion Is Premised on a Misreading of *Miller*.

Despite the unchanged position of the Supreme Court since 1939, the district court reaches a contrary holding by fundamentally misreading *Miller*.^{1/} Contrary to the district court's assertion that *Miller*'s holding was based on the lack of evidence relating "a sawed-off shotgun" to the "preservation or efficiency of a well regulated militia," *Emerson*, 46 F. Supp. 2d at 608, "the *Miller* Court assigned no special importance to the character of the weapon." *United States v. Rybar*, 103 F.3d 273, 285-86 (3d Cir. 1996). Instead, the Supreme Court made clear that its holding was based on the lack of evidence relating "*possession or use*" of a sawed-off shotgun to the "preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178 (emphasis added). In other words, the Court considered not only whether the weapon in question was of a type used by the military but also whether *the defendant's possession or use* of that weapon had any relation to participation in an organized state militia. The district court's characterization of *Miller* as a case in which the Court "simply chose a very narrow way to rule," *Emerson*, 46 F. Supp. 2d at 608, results from its ignoring the key words "possession or use" in the *Miller* Court's opinion. The district

^{2/} One other federal court has already declined to follow the new trail blazed by the court below, dismissing a defendant's reliance on *Emerson* as "misplaced" in light of *Miller* and Fourth Circuit precedent. See *United States v. Henson*, Crim. No. 2:99-00068, 1999 WL 412803, at *1 (S.D. W. Va. June 14, 1999).

court's opinion reflects no evidence that Emerson's possession of a weapon can satisfy the proper test.

The district court's misreading leads it to conclude erroneously that *Miller* leaves open the possibility that the Second Amendment provides an individual right to possess any weapon that "clearly ha[s] a potential military use." *Id.* The district court persists in this conclusion even after noting the support this misreading would give to "some of the most extreme anti-gun control arguments; for example, that the individual citizen has a right to keep and bear bazookas, rocket launchers, and other armaments that are clearly used for modern warfare, including, of course, assault weapons." *Id.*^{10/} No other court has adopted such an apocalyptic reading of *Miller*. Rather, as noted below, the federal courts have uniformly focused on the "reasonable relationship" between an individual's *possession or use* of a weapon and the effective operation of a militia. *See, e.g., Rybar*, 103 F.3d at 285-86. Indeed, because "[al]most any lethal weapon has a

^{10/} At the time the Second Amendment was drafted, American troops used flintlock muskets that were slow to load (not more than three or four shots per minute in the very best conditions) and usually inaccurate except at close range. Using such weapons effectively required deploying men in a single, cohesive body, usually in rigid linear formations. Thus, the "arms" the Framers had in mind were of the type that had value only when used by large numbers of disciplined troops, not by individuals acting alone. *See* Martin Van Creveld, *Technology and War* 85, 92-94, 167 (1991); Hans Delbruck, 4 *The Dawn of Modern Warfare* (W. J. Renfroe, Jr., trans.) 272-73, 285-87 (1985).

potential military use,” *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992), such an interpretation can be the only logical choice.

C. All Other Federal Courts, Including this Circuit, Have Interpreted *Miller* as Rejecting a Right to Bear Arms Unrelated to Militia Service.

Although the district court acknowledges that “several other federal courts” have rejected the argument that the Second Amendment establishes an individual right to gun possession, *Emerson*, 46 F. Supp. 2d at 607, it fails to note that this Circuit has held likewise. In two cases, *United States v. Johnson*, 441 F.2d 1134 (5th Cir. 1971), and *United States v. Williams*, 446 F.2d 486 (5th Cir. 1971), this Circuit, citing *Miller*, rejected out of hand the defendants’ Second Amendment challenges to their conviction for unlawful possession of a firearm. *See Johnson*, 441 F.2d at 1136 (defendant’s constitutional argument “misconstrues the Second Amendment”); *Williams*, 446 F.2d at 487 (defendant’s constitutional argument was “answered adversely to appellant’s contention” in *Miller*). And in *United States v. Broussard*, 80 F.3d 1025 (5th Cir. 1996), this Court, noting the defendant’s concession that the Second Amendment, “which concerns possession of weapons for a well-organized militia,” was inapplicable, refused to “discover or declare a new constitutional right to possess weapons under the Ninth Amendment.” *Id.* at 1041. Thus, the district court’s conclusion that “[w]hether

the Second Amendment recognizes an individual right to keep and bear arms is an issue of first impression within the Fifth Circuit,” *Emerson*, 46 F. Supp. 2d at 600, is simply incorrect.

The district courts in this Circuit — apart from the court below — have likewise respected *Miller*’s authority. In *Vietnamese Fishermen’s Association v. Knights of the Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982), the court held that enjoining the activities of a paramilitary affiliate of the Ku Klux Klan would not implicate the Second Amendment. Because the “express language” of the Amendment prohibits only interference with militia “organized by the State,” the court held, “the Second Amendment does not imply any general constitutional right for individuals to bear arms and form private armies.” *Id.* at 210 (citing *Miller*). Similarly, the court in *In re Brown*, 189 B.R. 653 (Bankr. M.D. La. 1995), refused to grant a debtor a statutory bankruptcy exemption for “arms and military accoutrements” to cover his personal weapon collection. In holding that “arms” necessarily referred to weapons used for military purposes, the court noted that *Miller* established that the Second Amendment “was intended to provide for the right to maintain a well-regulated state militia . . . and did not refer to or extend a right to persons to keep and bear arms for their person.” *Id.*

at 665. No court in this Circuit — other than the district court below — has reached a different conclusion.

In addition, no appellate court has accepted the argument that the Second Amendment guarantees an individual right. *See, e.g., Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (“Established case law makes clear that the federal Constitution grants appellant no right to carry a concealed handgun.”); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (gun possession not a fundamental right); *United States v. Graves*, 554 F.2d 65, 66 n.2 (3d Cir. 1977) (dicta) (*Miller* controlling on individual rights question); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) (Second Amendment “does not confer an absolute individual right to bear any type of firearm”); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (because Second Amendment right applies only to state militias, “there can be no serious claim to any express constitutional right of an individual to possess a firearm”); *Gillespie v. City of Indianapolis*, No. 98-2691, 1999 WL 463577, at *14 (7th Cir. July 9, 1999) (Second Amendment “establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia”) (upholding 18 U.S.C. § 922(g)(9)); *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir.

1988) (no plausible claim that challenged statute “would impair any state militia”); *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996) (Second Amendment “is a right held by the states, and does not protect the possession of a weapon by a private citizen”); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (individual right to gun possession “has long been rejected”); *see also United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir.) (Second Amendment limited to “the possession or use of weapons that is reasonably related to a militia actively maintained and trained by the states”), *cert. denied*, 118 S. Ct. 584 (1997);^{11/} *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) (no evidence presented on statute’s “material impact on the militia”).^{12/}

^{11/} Although the court did not explicitly reach the individual right issue, the Eleventh Circuit is also bound by this Circuit’s decisions in *Johnson* and *Miller*. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of former Fifth Circuit handed down prior to October 1, 1981).

^{12/} The federal district courts and the state courts that have considered the issue are

In short, the federal courts are unanimous: The Second Amendment does not create an individual right to bear arms unrelated to service in a state-organized militia.

**THE DISTRICT COURT'S DECISION IGNORES THE HISTORY
BEHIND THE CREATION OF THE SECOND AMENDMENT.**

Even if the mandatory authority of *Miller* is disregarded, an original analysis of the language and history of the Second Amendment commands the same result: The Amendment does not confer an individual right to gun possession unrelated to militia service.

also in agreement. *See, e.g., National Ass'n of Gov't Employees, Inc. v. Barrett*, 968 F. Supp. 1564, 1573 (N.D. Ga. 1997), *aff'd*, 155 F.3d 1276 (11th Cir. 1998); *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1317 (E.D.N.Y. 1996); *In re Evans*, 57 Cal. Rptr. 2d 314, 319 (Cal. Ct. App. 1996); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 166 (Ohio 1993); *State v. Rupp*, 282 N.W.2d 125, 130 (Iowa 1979); *Burton*, 248 A.2d at 526.

A. The District Court Misconstrues the History of the Drafting of the Second Amendment.

It is a fundamental principle of constitutional interpretation that one must give effect to every word of the passage being interpreted. *See, e.g., Wright v. United States*, 302 U.S. 583, 588 (1938) (“In expounding the Constitution of the United States . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.”) (internal quotation omitted). This principle applies with equal force here. Unlike the other amendments in the Bill of Rights, the Second Amendment contains an introductory clause that provides clear contextual and interpretive guidance:

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.

nt., amend. II (emphasis added). This clause cannot be considered mere surplusage, leaving “the right of the people to keep and bear arms” unmodified. Rather, as the Court explained in *Miller*, the Amendment “*must* be interpreted and applied” in light of this clause, which makes clear that the “obvious purpose” of the Amendment is “to assure the continuation and render possible the effectiveness” of the militia. *Miller*, 307 U.S. at 178 (emphasis added). A plain reading of the

Amendment — including the introductory clause — demonstrates that “the right of the people to keep and bear arms” exists only to support the “well regulated militia” necessary to maintain “the security of a free State.” *See, e.g., Hickman*, 81 F.3d at 102 (“[In light of the introductory clause], it is only in furtherance of state security that ‘the right of the people to keep and bear arms’ is finally proclaimed.”). Thus, a correct interpretation of the Amendment must rely, in the first instance, on the common understanding of “militia.”^{13/}

^{13/} Other words used in the Amendment also mandate a holding contrary to the one proffered by the district court below. The term “well regulated,” for example, strongly militates against any interpretation that the right referred to is distinct from government-sponsored activity. *See, e.g., Dyche English Dictionary* (1794) (defining “regulate” as meaning “to put in order, to adju[s]t by rule, to govern, to direct”). Moreover, the reference to a right to “bear arms” clearly connotes a military context — “[o]ne does not bear arms against a rabbit.” Garry Wills, *To Keep and Bear Arms*, N.Y. Rev. of Books, Sept. 21, 1995; *see also Aymette v. State*, 21 Tenn. 154, 161 (1840) (“A man in the pursuit of deer, elk, and buffaloes might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms . . .*”); *Dyche English Dictionary* (1794) (defining arms as “all manner of warlike instruments”).

The Framers understood “militia” to refer to an organized, state-sponsored group of individuals acting in the common defense. Article I, section 8, of the Constitution granted Congress the power “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States,” U.S. Const. art I, § 8, cl. 16, a grant of power that necessarily implies governmental organization.

Contemporaneous dictionary definitions of “militia,” moreover, speak in terms of organized, governmental groups drawn from the residents of an area. *See, e.g., Bailey English Dictionary* (1759) (defining “militia” as “a certain number of the inhabitants of a city or country, formed into companies and regiments, for the defence of it”); *Webster’s Dictionary* (1828) (defining “militia” as “the able bodied men organized into companies, regiments and brigades, with officers of all grades, and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations”).

In addition, statements made contemporaneously with the drafting of the Amendment speak of participation in the militia in terms that are compatible only with the concept of a militia as a governmental organization. Alexander Hamilton, for example, questioned in Federalist 24 whether the militia would

“submit to be dragged from their occupations and families to perform that most disagreeable duty in time of profound peace.” *The Federalist* No. 24 (Alexander Hamilton), at 207 (Benjamin Fletcher Wright ed. 1961). In *Federalist* 29, Hamilton acknowledged that a truly “well-regulated militia” would require frequent “military exercises and evolutions.” *Id.* No. 29 (Alexander Hamilton), at 228-29. James Madison, similarly, described a militia as a group of citizens “united and conducted by governments possessing their affections and confidence.” *Id.* No. 46 (James Madison), at 334. Luther Martin, in his letter to the Maryland legislature on the 1787 Convention, suggested that if the states’ control of their militia were completely ceded to Congress, the citizenry might actually be grateful, “as thereby they would be freed from the burdens of militia duties, and left to their own private occupations and pleasures.” Luther Martin’s Letter to the Maryland Legislature, in 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 371-72 (Jonathan Eliot ed., 1836; rpt. 1941) [hereinafter *Debates*].^{14/} And in the 1790 congressional debate on the Militia Bill, it was noted that “[t]he burden of militia duty lies

^{14/} Luther further noted that the militia was “the only defence and protection which the state can have for the security of their rights against arbitrary encroachments of the general government” and advised that the states “would respectively best know the situation and circumstance of their citizens, and the regulations that would be necessary and sufficient to effect a well-regulated militia in each.” 1 *Debates* 371-72.

equally upon all persons.” 4 *Debates* 423 (statement of Mr. Williamson). These statements — describing participation in the militia as “well-regulated” and as a “duty” — can be reconciled only with an understanding of a “militia” as a regulated, governmental unit acting in collective defense of the state.^{1/}

The conclusion that the Second Amendment was intended to provide for state-organized defense — a group of individuals acting with collective authority — is further supported by the reason for the Amendment’s existence. The newly drafted Constitution created a national government with previously untested powers. The Bill of Rights, of which the Second Amendment is a part, was thus designed to amend the Constitution “in order to prevent misconstruction or abuse of its powers.” Resolution of the First Congress, March 4, 1789, in 1 *Debates* 338. The debates among the states reflected a fear that giving Congress power over the militia would enable Congress not simply to regulate the militia but also

^{15/} The district court errs in equating a *duty* to bear arms as a *right* to do so. See *Emerson*, 46 F. Supp. 2d at 602-03. A historical state-imposed duty to possess and to bear arms does not mean that the state could not impose gun control, should it so choose. In fact, as described below, the statutory and documentary history reveals a consistent pattern of gun regulation.

to disarm it completely, leaving the states at the whim of the federal government.

In this sense, the state militias were thought to function as the “bulwarks of our liberties,” Statement by Gov. Randolph, *in 3 Debates* 400, and thus were properly preserved in the Bill of Rights as the mechanism by which the limitation on the federal government might be enforced.

Early drafts of the Amendment further confirm its purpose as preserving the ability of the states to defend themselves against an overreaching federal government. As originally proposed by Madison in the House in June 1789, the amendment was clearly directed at preserving organized militia:

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.

Complete Bill of Rights 169 (Neil H. Cogan ed., 1997). The provision for a conscientious objector exemption to militia duty — a provision that would be irrelevant if the Amendment were intended to guarantee a right to weapon possession unrelated to militia service — was a key component of the version of the Amendment that

passed the House. *See id.* at 170 (House Committee of Eleven Report, July 28, 1979); *id.* at 173 (H. Res. Aug. 24, 1789).^{16/}

The district court below acknowledges that the concept of a militia must guide the interpretation of the Second Amendment. *See Emerson*, 46 F. Supp. 2d at 602-07. But the district court misinterprets the historical record by basing its holding almost entirely on an equation of the “militia” with the public generally, and concluding from that equation that the Framers must have intended that the right to bear arms belong to individual members of the citizenry. *Id.* at 604. But the fact that the militia was *drawn* from the general population — in other words, that

^{16/} Although the religious exemption was eventually dropped from the Amendment, *see The Complete Bill of Rights, supra*, at 176 (S. Res. Sept. 21, 1789), there is no reason to believe this was due to a change in the purpose of the Amendment. The Senate debates are absent from the historical record, but debate over the religious exemption in the House suggests that opposition to the exemption was motivated by a desire to leave exemptions from militia duty to the discretion of the individual state governments. *See, e.g., id.* at 187 (“Mr. Benson [m]oved to have the words ‘But no person religiously scrupulous shall be compelled to bear arms’ struck out. He would always leave it to the benevolence of the legislature No man can claim this indulgence of right.”).

many citizens were eligible for membership — is entirely different from saying that the militia should simply be indiscriminately equated with the population at large. The district court’s failure to understand this distinction is well illustrated by its reliance on a statement by George Mason: “Who are the militia? They consist now of the whole people.” *Id.* What the district court overlooks, however, is that Mason’s discussion continues:

If that paper on the table gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor; but they may be confined to the lower and middle classes of the people, granting exclusion to the higher classes of the people. . . . Under the present government, all ranks of people are subject to militia duty.

25 425-26. Mason’s concern, quite clearly, was that if Congress were permitted full control over the militia, it might grant exemption from military service to federal elites, rather than distributing militia “duty” among the people generally. No such concern would be implicated if the Second Amendment conferred a right to bear arms wholly unrelated to militia service.^{17/}

^{17/} Indeed, the district court ultimately acknowledges this point. *See Emerson*, 46 F. Supp. 2d at 604 (“Because all were members of the militia, all enjoyed the right to individually bear arms *to serve therein*.”) (emphasis added).

The district court’s reliance on Patrick Henry also undermines its holding. Henry, as the court noted, did state that “[t]he great object is, that every man be armed,” *Emerson*, 46 F. Supp. 2d at 605. But Henry went on to note, as the district court neglects to mention:

But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress without limitation or bounds, how will your militia be armed?

2s 386. When Henry’s statement is read in context, it is clear that his goal that “every man be armed” was directed toward a successful *state militia* (in which each militia member had the use of a gun) — not toward arming members of the public for their individual needs. Thus, the district court’s false syllogism — that because the militia was understood as being drawn from the people generally, the Second Amendment accords an individual right to bear arms — is equivalent to stating that because juries are drawn from the people generally, the Seventh Amendment (“the right of trial by jury shall be preserved”) accords citizens the right to independently form a jury and judge the guilt or innocence of their fellow citizens. *See* Akhil Reed Amar, *Second Thoughts*, *The New Republic*, July 12,

1999; Garry Wills, *supra* (“[A]t no time preceding the passage of the Second Amendment could any man be considered a militia member just by picking up his gun and proclaiming himself one.”). Clearly, neither conclusion is correct.

The dangers that are likely to arise from affirmance of the district court’s view that any citizen can declare himself a militia member are demonstrated by the *Vietnamese Fishermen’s Association* case, cited *supra*. In that case, the “Texas Emergency Reserve,” the paramilitary arm of the Ku Klux Klan, attempted to gain the protections of the Second Amendment for their armed harassment of Vietnamese fisherman (including hanging a fisherman in effigy during a “boat parade”) by claiming that the group constituted a militia. The court wisely rejected this contention, noting that “the Second Amendment does not imply any general constitutional right for individuals to bear arms and form private armies.” 543 F. Supp. at 210. If the Second Amendment is interpreted as conferring a right to “keep and bear arms” wholly unrelated to participation in a *state-sponsored* militia, however, there is no logical basis to prevent members of the KKK or any other group from “bearing arms” in paramilitary activities to prepare for their eventual use against the government or other perceived enemies. Indeed, under the district court’s theory, any group claiming to be a militia would be entitled to gun possession, even if the group’s goal was to arm itself against the

government (including the state-sponsored militia). Clearly the Framers did not intend an interpretation of the Second Amendment that would encourage the destruction of the constitutional government they had just created.^{1/}

B. The District Court Ignores the History of Gun Control that Preceded the Second Amendment.

The district court similarly misinterprets the history of firearm regulation that preceded the drafting of the Second Amendment — history that necessarily provides guidance on the scope of the Amendment. It is undisputed that the Second Amendment was — like the other portions of the Bill of Rights — intended simply to restrain the power of the federal government against the states. In other words, the Amendment did not itself *create* any rights; rather, it merely prohibited the federal government from infringing whatever rights were already in existence. As the Court held in *Robertson v. Baldwin*, 165 U.S. 275 (1897), the law is “perfectly well settled” that the Bill of Rights

^{18/} Indeed, the Framers explicitly provided that such insurrection was not to be tolerated. *See* U.S. Const. art. I, § 8, cl. 15 (granting Congress power to call out the militia to “suppress Insurrections”); *id.* art. III, § 3, cl. 1 (defining treason against the United States).

were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. *In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus . . . the right of the people to keep and bear arms (art[icle] 2) is not infringed by laws prohibiting the carrying of concealed weapons*

1-82 (emphasis added). By declaring that “the right of the people to keep and bear arms shall not be infringed,” the Second Amendment does not create a right; it limits abridgment of whatever right already existed. Thus, it is impossible to consider the scope of the right mentioned in the Second Amendment without reference to the law existing at the time the Amendment was enacted.

Contrary to the court’s conclusion that the English Bill of Rights (1689) “codif[ied] the individual right to bear arms,” *Emerson*, 46 F. Supp. 2d at 602, English tradition was not one of unfettered possession. *See, e.g., Burton*, 248 A.2d at 526 (“The common law did not recognize any absolute right to keep and bear arms”); 1 Bernard Schwartz, *The Bill of Rights: A Documentary*

History 43 (1971) (“that the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law”) (quoting English Bill of Rights); Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607–1794*, 16 *Law. & Hist. Rev.* 567, 571 (1998) (“Within weeks of the completion of the Bill of Rights, Parliament voted to disarm Catholics . . . [and later passed] the militia acts that granted the lords lieutenant the power to disarm anyone whenever they considered it necessary for public peace.”); P.B. Munsche, *Gentlemen and Poachers: The English Game Laws 1671–1831* 12 (1981) (Game Act of 1671 authorized seizure of all guns kept on a manor by those who failed to meet property qualifications for hunting). In short, the perceived needs of the country trumped any individual right to firearm possession.

In keeping with the tradition of its English ancestry, this country also regulated gun possession both before and after the American Revolution. In the mid-eighteenth century, Maryland forbade ownership of guns by Catholics and seized the weapons of any eligible male who refused to serve in the militia. *See Archives of Maryland* 52:448-74 (William H. Browne et al. eds., 1885-96). Colonial legislatures from New Hampshire to South Carolina imposed communal storage of firearms and permitted them to be removed only in times of crisis or

for muster day. See Harold L. Peterson, *Arms and Armor in Colonial America 1526–1783* 321-335 (1956). Even during the American Revolution, Connecticut and North Carolina impressed firearms without hesitation. See J. H. Trumbull et al., eds., *The Public Records of the Colony of Connecticut Prior to the Union with New Haven Colony* (1850-59); Walter Clark, ed., *The State Records of North Carolina* (1901-03). Consistently, individual gun possession yielded to collective needs.

Ignoring this long tradition, the district court has invented an absolute right of individuals to possess arms. The historical record demonstrates that such a right has never been part of the history of this country.

CONCLUSION

For the foregoing reasons, *amici* request that the Court reverse the judgment of the district court and hold that the Second Amendment does not establish a right to bear arms apart from participation in an organized state militia.

Respectfully submitted,

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APPENDIX
DESCRIPTION OF *AMICI CURIAE*

The Center to Prevent Handgun Violence, chaired by Sarah Brady, is a non-profit organization working to reduce handgun deaths and injuries through education, research, and legal advocacy. The Center's Legal Action Project, through direct assistance to victims of gun violence and *amicus curiae* filings, advocates legal principles that will reduce gun violence.

The Federal Law Enforcement Officers Association is the nation's largest organization representing federal law enforcement officers and criminal investigators.

The Hispanic American Police Command Officers Association represents 1,500 command law enforcement officers and affiliates from municipal police departments, county sheriffs, and state and federal agencies.

The International Association of Chiefs of Police is the largest organization of police executives and line officers in the world. It represents more than 17,000 members in 112 countries.

The International Brotherhood of Police Organizations (IBPO) is an affiliate of the Service Employees International Union and is the largest police union in the AFL-CIO. IBPO represents over 50,000 officers.

The Legal Community Against Gun Violence is dedicated to reducing gun violence through public education, litigation, and legislative advocacy.

The Major Cities Chiefs (MCC) is composed of police executives representing the largest cities in the United States. MCC provides a unique forum for urban police chiefs to discuss common problems, share information, and develop strategies.

The National Association of Police Organizations represents 4,000 law enforcement organizations, with over 220,000 sworn law enforcement officers, 3,000 retired officers, and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

The National Black Police Association represents approximately 35,000 individual members and more than 140 chapters. Through its chapters, it serves as a national network for the training and education of all police officers and the community.

The National Organization of Black Law Enforcement Executives represents 3,500 members nationwide, primarily police chiefs, command-level officers and criminal justice educators.

The Police Executive Research Forum (PERF) is a national association of progressive law enforcement officials who are dedicated to advancing innovative policing practices through research, leadership and debate. PERF's police executive members serve more than 50 percent of the nation's population.

The Police Foundation is an organization dedicated to supporting innovation and improvement in policing. It conducts research in police behavior, policy and procedure, and works to transfer to local agencies the best new information about effective police practices.

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, the brief contains 6,493 words.
2. The brief has been prepared in proportionally spaced typeface using WordPerfect 6.1 in Times New Roman, 14 point.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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