No. 04-7041

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, DICK ANTHONY HELLER, TOM G. PALMER, GILLIAN ST. LAWRENCE, TRACEY AMBEAU, and GEORGE LYON,

Appellants,

v.

DISTRICT OF COLUMBIA and ANTHONY WILLIAMS,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. CIV. A. 03-0213-EGS)

APPELLANTS' BRIEF

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Certificate As To Parties, Rulings, And Related Cases

A. Parties and Amici

The parties in the District Court below were plaintiffs Shelly Parker, Dick Heller, Tom G. Palmer, Tracey Ambeau, Gillian St. Lawrence, and George Lyon; and defendants District of Columbia and Anthony Williams. All parties below are parties before this Court in this appeal.

Amici below for the appellants were the Heartland Institute and the American Civil Rights Union. *Amici* below for the appellees were the Violence Policy Center and the Brady Center to Prevent Gun Violence.

Amici on appeal for the appellants are the Heartland Institute, the American Civil Rights Union, the Second Amendment Foundation, the Citizens' Committee for the Right to Keep and Bear Arms, the Madison Society, Keep and Bear Arms Corp., the Congress of Racial Equality, the State of Texas, and the National Rifle Association Civil Rights Defense Fund.

Amici on appeal for the appellees are the Violence Policy Center, the Brady Center to Prevent Gun Violence, and Ernest McGill.

B. Rulings Under Review

The rulings under review are contained within the District Court's Memorandum Opinion and Order issued March 31, 2004, per the Hon. Emmet G.

Sullivan, granting defendants' Motion to Dismiss, denying as moot plaintiffs' Motion for Summary Judgment, and directing that judgment be entered for defendants. The District Court's opinion is published at Parker v. District of Columbia, 311 F. Supp. 2d 103 (D.D.C. 2004). The rulings under review, and judgment being appealed, are set forth in the Joint Appendix at pp. 46-62.

C. Related Cases

The case on review has not previously been before this or any other court apart from the original proceeding in the United States District Court. Counsel is not aware of any related cases now pending before this or any other court.

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APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants ("Plaintiffs") seek declaratory and injunctive relief barring enforcement of various District of Columbia statutes as unconstitutional. The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343.

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1291. The District Court issued an opinion and order granting Defendants-Appellees' ("Defendants") motion to dismiss, denying Plaintiffs' motion for summary judgment, and directing entry of judgment for Defendants on March 31, 2004. JA 46. Final Judgment for Defendants was entered the same day. JA 62. Plaintiffs timely filed their Notice of Appeal on April 6, 2004. The appeal is from a final order and judgment that disposed of all parties' claims.

STATEMENT OF ISSUES

1. Does the District of Columbia's total ban on the possession of handguns acquired after 1976 and the possession of functional long guns in the home violate citizens' right to "keep and bear arms" under the Second Amendment to the U.S. Constitution?

2. Do individuals who have been personally threatened with prosecution by government officials if they act on their sincere and undisputed intent to possess currently prohibited firearms have standing to maintain a pre-enforcement challenge to that prohibition in federal court?

CONSTITUTION AND STATUTES

An addendum contains the following:

U.S. Const. amend. II; D.C. Code §§ 7-2501.01(12), 7-2502.01, 7-2502.02, 7-2507.02, 7-2507.06, 22-4504, 22-4515.

STATEMENT OF THE CASE

For over a quarter-century, the District of Columbia has forbidden citizens from possessing functional firearms within their homes. Handguns not registered prior to 1976 cannot be lawfully possessed within the city, D.C. Code §§ 7-2502.01(a), 7-2502.02(a), and all lawfully registered long guns (*i.e.*, shotguns and rifles) must be kept unloaded and either disassembled or bound by a trigger lock, with no exception that would permit a citizen to assemble or unlock the weapon for otherwise lawful home self-defense. D.C. Code § 7-2507.02. Even the movement of lawfully possessed pre-1976 handguns from room to room within one's home is forbidden without the pistol license that everyone – including Defendants – acknowledges is unobtainable. D.C. Code § 22-4504(a).

Plaintiffs seek to establish that the Second Amendment to the United States Constitution secures them an individual right to keep functional firearms, including handguns, within their homes, unrelated to service in any organized militia.

It is not the object of this litigation to engage in a policy debate over the merits of gun control. While policy questions might be relevant in evaluating the constitutionality of ordinary measures seeking to strike a reasonable balance between the explicit right of citizens to "keep and bear arms" and legitimate governmental goals of promoting safety and order, this is not such a case. If the Second Amendment guarantees any individual rights whatsoever, the District's total prohibition on the home possession of handguns and functional long guns by law-abiding adults cannot stand.

During oral argument below, the District Court *sua sponte* explored the issue of Plaintiffs' standing to bring the lawsuit. In response to a direct question from the District Court, Defendants confirmed that should any Plaintiffs violate the challenged laws, they would be prosecuted. The District Court reached the merits of Plaintiffs' claims, and held that the Second Amendment does not secure any individual rights to keep and bear arms. The District Court granted

Defendants' motion to dismiss and denied as moot Plaintiffs' motion for summary judgment.

This Court subsequently denied Defendants' motions to summarily affirm the decision below or remand with instructions to dismiss the case on standing grounds, and granted Plaintiffs' motions to have the case proceed on the merits. The Court instructed the parties to brief the merits of Plaintiffs' Second Amendment claims, as well as the issue of standing.

STATEMENT OF FACTS

At the time this litigation commenced, Plaintiff Shelly Parker resided in a high-crime Northeast Washington, D.C. neighborhood. Her anti-drug civic activism attracted threats to Parker from drug dealers interested in preserving the status quo. Parker is thus highly motivated to keep a handgun at home in the event the criminals plaguing her former neighborhood make good on their threats. JA 20-21.[1]

Defendants are comfortable entrusting Plaintiff Dick Heller with a handgun, but only while he is on duty as a District of Columbia Special Police Officer. Heller is allowed to carry a loaded handgun in defense of the federal judiciary at

[1]The threats against her prompted Parker to move to the Shaw neighborhood, but her new surroundings are neither far from the presence of violent crime, nor from those who seek to visit such violence upon her.

the Thurgood Marshall Federal Judicial Center on Capitol Hill, but when he returns to his Southeast Washington home, Defendants insist he be disarmed. Heller lawfully owns various firearms located outside the city, including handguns, which he wishes to keep at home in a functional condition. JA 22-23. Heller attempted to register a handgun for home possession, but was refused in accordance with Defendants' total prohibition on private handgun possession. JA 32.

A gay man, Plaintiff Tom Palmer has used a handgun to successfully defend himself against a hate crime. JA 24. Like Heller, Palmer and Plaintiff George Lyon are experienced with firearms, and each own a variety of long guns and handguns that they intend to keep inside their District of Columbia homes in a functional state. JA 24-25, 30-31. Plaintiff Tracey Ambeau intends to obtain a handgun for home defense, as a long gun would be too cumbersome for her to operate. JA 28-29.

Plaintiff Gillian St. Lawrence keeps a lawfully registered shotgun in her Washington, D.C. home. As required by law, the gun is not operable and would not be useful in case of need. St. Lawrence has no objection to a requirement that the gun be stored securely when not in use, but believes her intent to render the

gun operable for self-defense in case of need should not make her a criminal. JA 26-27.

Plaintiffs have good reason to fear arrest, prosecution, incarceration, and fine should they act on their sincere desire to possess functional firearms within their homes. D.C. Code § 7-2502.01(a) provides that "no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm." Although registration certificates are available for certain long guns, D.C. Code § 7-2502.02(a) provides in pertinent part, "A registration certificate shall not be issued for a . . . (4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976." "'Pistol' means any firearm originally designed to be fired by use of a single hand." D.C. Code § 7-2501.01(12). Defendants thereby maintain a complete ban on the home possession of handguns not registered prior to September 24, 1976.

D.C. Code § 7-2507.02 provides in pertinent part:

> [E]ach registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

Accordingly, Defendants prohibit the possession and use of lawfully owned firearms for self-defense within the home, even in instances when armed self-defense would be lawful by other means under District of Columbia law.

Even the movement of a handgun from one location to another on one's property carries a criminal penalty. Former D.C. Code § 22-3204 provided that those moving a gun within their dwelling, business, or possessed land were exempt from the licensing requirement for carrying a handgun. However, Defendants now actively enforce D.C. Code § 22-4504, which provides that carrying a handgun without a license in one's home, business, or on one's land is unlawful – even if the handgun is legally registered. "It is common knowledge . . . that with very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable." Bsharah v. United States, 646 A.2d 993, 996 n.12 (D.C. 1994).

A first violation of the ban on the possession of handguns or other functional firearms within the home is punishable as a misdemeanor by a fine of up to $1,000, imprisonment of up to one year, or both. D.C. Code § 7-2507.06.

Defendants concede that these laws are zealously enforced. For example, Plaintiffs filed a motion for summary judgment with thirty-four separate assertions of undisputed material facts, the last of which stated that "Defendants actively

enforce D.C. Code §§ 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02, and 22-4504." JA 19. Defendants did not contest this assertion. JA 33-36. The District Court was thus free to treat this as admitted. D.C. LCvR 7.1(h), 56.1. Likewise, Defendants did not dispute the fact that carry permits are unobtainable. JA 19 (undisputed material fact no. 32).

Defendants have trumpeted their vigorous enforcement of the challenged laws. For example, Defendant Mayor Williams and Police Chief Charles Ramsey held a "town hall" meeting concerning these laws, attended by Plaintiffs Parker, Heller, and St. Lawrence. Williams called the gun ban a "core law" of the city, part of its "fundamental core culture." In response to a complaint by an Advisory Neighborhood Commissioner that criminals arrested with guns quickly re-appear on the streets with new guns, Mayor Williams stated, in part, "we need tougher enforcement." JA 83, 85, 87.

Police Chief Ramsey called the challenged laws "good solid laws," and warned, "if we relax our gun laws . . . we are opening the floodgates . . . for unintended [bad] consequences." Ramsey added that 2,000 guns were confiscated in each of the past two years, and his department confiscated 1,400 guns in the first half of 2005. JA 84, 86, 88.

Defendants have repeatedly confirmed that they would prosecute Plaintiffs for violation of the challenged laws if Plaintiffs were to possess handguns or other functional firearms within their homes. At oral argument, the District Court clearly expressed its understanding that Plaintiffs would be prosecuted for violating the challenged statutes:

> MR. GURA: . . . We can resolve this [standing] question very easily if opposing counsel would tell us that the city has no plans to enforce this law, that my clients are free to possess firearms.
>
> THE COURT: I can probably answer that question for the city.

JA 64.

But the District Court did not have to answer the question for the city – its counsel did:

> THE COURT: . . . The city is not going to essentially grant immunity to these people. If they go out and take steps to possess firearms, they'll be prosecuted, I assume. They're not going to get a free ride because they're a plaintiff in this case, are they?
>
> MS. MULLEN: No, and I think that Your Honor is correct, but I don't think *the fact that if, in fact, they break the law and we would enforce the law that they're breaking*, that that necessarily confers automatic standing on them in this case. . .

JA 66-67 (emphasis added). Plaintiffs Heller, St. Lawrence, and Lyon were

present in the courtroom to hear the city's attorney confirm that they would be prosecuted were they to act on their present intention to exercise their constitutional rights.

Apparently believing, erroneously, that standing could be defeated so long as Plaintiffs had not yet broken the law, Defendants confirmed to this Court that "*if* they [Plaintiffs] break a law, the District would normally enforce it." (Def.-App. Opp. & Mot., 2/23/05, p. 3 (emphasis original).)

The *Washington Times*'s front page carried an article about this lawsuit two days after it was filed, quoting the Mayor's official spokesperson and the District's Deputy Mayor for Public Safety and Justice. The pair reiterated Defendants' zealous commitment to enforcing the District's gun bans and expressed their belief that Plaintiffs would pose a danger to themselves and to others, including children, "which is not what we want." Jon Ward, "Residents Challenge District's Gun Ban," *Washington Times*, February 12, 2003, p. A1.

Taken together, the Defendants' in-court threats (both verbal and written), that they would prosecute Plaintiffs for violating the laws; their summary judgment admissions regarding their zealous enforcement of the challenged laws; and the various proclamations to same effect communicated to Plaintiffs and others by the District's Mayor, Deputy Mayor, Police Chief, and Spokesperson,

strongly validate and reinforce Plaintiffs' "actual and well founded fear that the law would be enforced against them" should they choose to exercise what they believe are their constitutional rights. Virginia v. Am. Booksellers' Ass'n, 484 U.S. 383, 393 (1988).

SUMMARY OF ARGUMENT

Plaintiffs plainly possess the three elements of standing necessary to bring this action: (1) the challenged laws implicate a constitutionally protected zone of interest, (2) Plaintiffs' intent to violate the law is uncontested, and (3) in contrast to the sparse factual record of Seegars v. Ashcroft, 396 F.3d 1248 (D.C. Cir. 2005), Plaintiffs have established receiving actual, specific threats of prosecution.

There is nothing speculative or hypothetical about this lawsuit. If Plaintiffs exercise their constitutional rights, Defendants will prosecute them.

Turning to the merits, this Court recently observed, "the Supreme Court's guidance has been notoriously scant" regarding the Second Amendment. Fraternal Order of Police v. United States ("FOP II"), 173 F.3d 898, 906 (D.C. Cir. 1999). Lower federal courts are presently divided on the question of whether the Second Amendment guarantees a personal right to keep and bear arms[2]; a so-called

[2]United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

"collective right" of the states to arm the militia[3]; or a hybrid "sophisticated collective right," by which individuals enjoy a right to keep and bear arms, but only in service of the state.[4] For much of the mid-twentieth century, versions of the "collective rights" theories were summarily adopted by federal courts with little or no analysis of constitutional text, history, or structure.

But as this Court has recognized, "[a]nalysis of the character of the Second Amendment right has recently burgeoned." Fraternal Order of Police v. United States ("FOP I"), 152 F.3d 998, 1002 (D.C. Cir. 1998) (citations omitted). As courts and scholars have finally begun to apply meaningful, non-cursory, analysis to the Second Amendment, the trend strongly favors the "individual rights" model

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[3]Love v. Pepersack, 47 F.3d 120 (4th Cir. 1995); United States v. Warin, 530 F.2d 103 (6th Cir. 1976); Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999); Hickman v. Block, 81 F.3d 98 (9th Cir. 1996); Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002); but see Nordyke v. King, 319 F.3d 1185, 1191 (9th Cir. 2003) ("if we were writing on a blank slate, we may be inclined to follow the [individual rights] approach"); Nordyke, at 1192 n.4 (Silveira "unpersuasive" and improper dicta); Nordyke, at 1192-98 (Gould, J., concurring) (Hickman wrongly decided); United States v. Gomez, 92 F.3d 770, 774 n.7 (9th Cir. 1996) (Kozinski, J.) ("The Second Amendment embodies the right to defend oneself and one's home against physical attack") (citation omitted).

[4]Cases v. United States, 131 F.2d 916 (1st Cir. 1942); United States v. Rybar, 103 F.3d 273 (3d Cir. 1996); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992); United States v. Oakes, 564 F.2d 384 (10th Cir. 1977); United States v. Wright, 117 F.3d 1265 (11th Cir. 1997), vacated in part, 133 F.3d 1412 (11th Cir. 1998).

long ago embraced in state courts.[5] In the wake of an impressive array of scholarship from across the ideological spectrum,[6] the Fifth Circuit became the first federal appellate court to thoroughly examine the text and history of the Second Amendment. Based on its exhaustive analysis, the Fifth Circuit concluded that the Framers of the Bill of Rights intended to, and textually did, guarantee in the Second Amendment an individual right to keep and bear arms, unrelated to militia service. United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

As early as 1875, the federal government adopted the litigating position that the Second Amendment secures an individual right to keep and bear arms. United States v. Cruikshank, 92 U.S. 542 (1875). Emerson's "individual rights" model is

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[5]State v. Nickerson, 126 Mont. 157, 166 (1952); In re Brickey, 8 Idaho 597 (1902); State v. Chandler, 5 La. Ann. 489 (1850): Nunn v. State, 1 Ga. 243 (1846); see also Kasler v. Lockyer, 23 Cal.4th 472, 505 (2000) (Brown, J., concurring); contra State v. Buzzard, 4 Ark. 18 (1842); Sandidge v. United States, 520 A.2d 1057 (D.C. 1987); Burton v. Sills, 53 N.J. 86 (1968); Commonwealth v. Davis, 369 Mass. 886 (1976); Harris v. State, 83 Nev. 404 (1967); see also State v. Dawson, 272 N.C. 535, 546 (1968) (Second Amendment secures collective as well as individual rights).

[6]See, e.g. William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L. J. 1236 (1994); Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193 (1992); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L. J. 637 (1989); Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U.L. Rev. 793 (1998).

now the position of the United States.[7] Most recently, an extended, scholarly memorandum opinion for the Attorney General concluded that "The Second Amendment secures a right of individuals generally, not a right of States or a right restricted to persons serving in militias." Steven Bradbury, Howard Nielson, Jr., and Kevin Marshall, *Whether the Second Amendment Secures an Individual Right*, http://www.usdoj.gov/olc/secondamendment2.htm (Aug. 24, 2004).

Although the nature of Second Amendment rights is a question of first impression in this circuit, this Court's opinions in FOP I, *supra*, 152 F.3d 998 and FOP II, *supra*, 173 F.3d 898, express a clear openness to the individual rights model. In FOP I, this Court explicitly avoided the question of whether the Second Amendment guarantees an individual right, but on rehearing in FOP II, analyzed a Second Amendment challenge in a manner consistent with the individual rights position.[8]

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[7]See *Opposition to Petition for Certiorari in United States v. Emerson*, No. 01-8780, at 19 n.3, and Appendix A thereto, *Memorandum From The Attorney General To All United States Attorneys, Re: United States v. Emerson*, http://www.usdoj.gov/osg/ briefs/2001/0responses/2001-8780.resp.pdf (Nov. 9, 2001).

[8]The District of Columbia Court of Appeals is ensconced in the "collective rights" camp. Sandidge, *supra*, 520 A.2d 1057. However, Sandidge is not binding authority, as interpretation of the federal constitution is not a "state law" matter. D.C. Code § 11-101. "[T]he Court Reform Act unequivocally distributed the 'judicial power in the District of Columbia' between the federal courts and the

Considered analysis of the history, text, and structure of the Second Amendment, as well as of the Constitution as a whole, makes clear that citizens enjoy an individual right to keep and bear personal firearms outside the context of military service. The Supreme Court's only direct Second Amendment precedent, United States v. Miller, 307 U.S. 174 (1939), presumes the individual rights model, while other cases reflect the commonsense assumption that the Second Amendment, like other Bill of Rights provisions, guarantees individual rights.

The Amendment's preamble, like other prefatory language in the Constitution, cannot be construed to negate the Amendment's operative clause. The "collective rights" theories are incompatible not only with the Second Amendment's text, but conflict with the clear weight of history as well as the plain text of various other constitutional provisions. But rather than engage the relevant text, history, and precedent, the District Court's analysis rejecting Plaintiffs' claims was limited primarily to observing that the Supreme Court has not reversed the courts that have adopted the contrary viewpoint.

District of Columbia courts, allotting to each its own sphere and making neither subservient to the other." M.A.P. v. Ryan, 285 A.2d 310, 313 (D.C. 1971) (footnote omitted). Defendants must not violate the federal constitution as interpreted by the local Article III court, even if the "state" court would approve of their conduct. District of Columbia residents enjoy a fundamental right to access *Article III* courts for the resolution of constitutional claims. O'Donoghue v. United States, 289 U.S. 516 (1933) .

To recognize the constitutional right is to decide for Plaintiffs. This Court need not decide whether the Second Amendment guarantees a "fundamental" right entitled to the protection of strict scrutiny,[9] a nonfundamental right subject to rational basis review, or some other class of right entitled to an intermediate level of protection. Plaintiffs do not challenge laws imposing any particular regulation on their Second Amendment rights. Plaintiffs challenge a complete ban on the possession of *any* functional firearm within their homes.

Whatever else the government may do with respect to gun ownership, a total prohibition of functional firearms within the homes of peaceful, law-abiding citizens – including a ban on the ownership of a handgun, the quintessential personal firearm – is flatly inconsistent with the Second Amendment's guarantee of a right to keep and bear arms.

There being no factual dispute as to either Plaintiffs' intent to exercise their constitutional rights or to Defendants' vigorous enforcement of that prohibition, the Court should reverse the decision below and remand with instructions to grant Plaintiffs' motion for summary judgment.

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[9]"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938) (citations omitted).

ARGUMENT

All issues are questions of law, subject to a *de novo* standard of review.

Consol. Edison Co. of New York v. Bodman, 445 F.3d 438 (D.C. Cir. 2006).

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFFS HAVE STANDING TO MAINTAIN THIS ACTION.

A. Defendants' Failure To Assert A Standing Defense Until Prompted To Do So By The District Court Casts Doubt On The Merits Of The Standing Argument.

Defendants failed to question Plaintiffs' standing until prompted to do so by the District Court during oral argument. Had the District Court not raised the issue, Defendants would not have addressed it themselves:

> THE COURT: You didn't raise [standing] as a basis for your motion to dismiss.
>
> MS. MULLEN: No, we did not. . . .

JA 65.

> THE COURT: When were you planning to raise it? Had I not raised it, were you going to raise it today?
>
> MS. MULLEN: No, I was not planning on raising it today.
>
> THE COURT: When were you going to raise it? On appeal?
>
> MS. MULLEN: The issue was raised in the Seegars case *as it applied to the U.S.* We didn't raise it in the Parker case . . . it's not anything that we have presented to the Court thus far. . .

JA 66 (emphasis added).

THE COURT: I'm curious. Had I not raised the issue, were you going to raise it this morning?

MS. MULLEN: No, I had not intended on raising it this morning.

JA 77.

Defendants' *amici* likewise failed to raise standing in their voluminous briefing:

THE COURT: I don't recall if you, in your brief, address the issue of standing or not. I don't recall.

MR. NOSANCHUK: We did not address the issue of standing.

* * *

THE COURT: Everyone recognizes on this side there's no standing, but no one raised it. I find it mystifying.

MR. NOSANCHUK: Right. Well, Your Honor, we would, obviously, be happy to submit supplemental briefing.

THE COURT: No. I was just asking questions. I'm not trying to signal my opinion that there's not standing. It was just a legitimate question to ask. So I hope I'm not sending the wrong signals to everyone that there's no standing here. But, I mean, constitutional scholars and lawyers of long standing and no one raised it? Don't turn your head away. I mean, if I hadn't raised it, it was not going to be raised?

JA 79.

It is self-evident why Defendants and their *amici* never thought to raise a standing defense: they knew it lacked merit. Even before responding to Plaintiffs' complaint, Defendants had proclaimed on the front page of the *Washington Times* that Plaintiffs were a threat to public safety who should expect no quarter from the city's zealous prosecution efforts. On summary judgment, Defendants admitted that the laws are zealously enforced. And during oral argument, they candidly confirmed that Plaintiffs would be prosecuted if they violated the challenged laws. Thus, it presumably never occurred to Defendants to assert a standing defense because they had every intention to prosecute the Plaintiffs should they exercise their right to keep and bear arms.

B. Defendants Have Specifically And Personally Threatened Plaintiffs With Prosecution Should They Act On Their Sincere Intent To Engage In Proscribed Conduct; Accordingly, Plaintiffs Have Standing To Pursue Their Second Amendment Claims.

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Seegars, 396 F.3d at 1251 (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)) (other citations omitted).

In Seegars, this Court accepted that "the conduct that plaintiffs would engage in is at least arguably affected with a constitutional interest," Seegars, 396 F.3d at 1254, and accepted the "assurance of [plaintiffs'] conditional intent to commit acts that would violate the law," Seegars, 396 F.3d at 1255, but nonetheless found plaintiffs lacked standing because they "allege[d] no prior threats against them or any characteristics indicating an especially high probability of enforcement against them." Id.

Seegars acknowledged that assessing the credibility of a prosecutorial threat is no simple matter. In requiring plaintiffs to show more than "a conventional background expectation that the government will enforce the law," Seegars, 396 F.3d at 1253, this Court also made clear that actual threats against specific plaintiffs are not the minimum threshold for standing – they are the polar extreme by which standing is obviously present.

> [T]he severity of the required threat is independent of the doctrinal hook. Unfortunately the adjective "credible" says little or nothing about the requisite level of probability of enforcement, and clarity prevails only at the poles. If the threat is imagined or wholly speculative, the dispute does not present a justiciable case or controversy. Evidence that the challenged law is rarely if ever enforced, for example, may be enough to defeat an assertion that a credible threat exists. By contrast, actual threats of arrest made against a specific plaintiff are generally enough to support standing as long as circumstances haven't dramatically changed.

Seegars, 396 F.3d at 1252 (citing Steffel v. Thompson, 415 U.S. 452, 459 (1974)) (other citations omitted).

The unambiguous statements in this case, in open court and to the media, concerning what Defendants would – not might, but *would* – do to these specific Plaintiffs were they to violate the challenged laws, go far beyond anything contained in the Seegars record. Defendants' threats against Plaintiffs are "actual" and "specific," Seegars, 396 F.3d at 1252. One can hardly imagine a more specific threat of prosecution than the threat conveyed in a front page newspaper article quoting Defendant Mayor's spokesperson and the Deputy Mayor – except, perhaps, for opposing counsel's admission, in response to the District Court's specific query, that Plaintiffs could expect "no" immunity from prosecution, and it is a "fact that if, in fact, they break the law . . . we would enforce the law that they're breaking." JA 66-67. This threat was repeated, albeit with the mild qualifier "normally," on page five of Defendants' February 23, 2005 submission to this Court.

It is for future cases to clarify where, in the space Seegars left between a generalized grievance and an actual, specific threat of prosecution, standing in pre-enforcement challenges begins taking form. In this case, "clarity prevails . . . at the pole[]." Seegars, 396 F.3d at 1252. Having been advised by Defendants of

their intent to prosecute Plaintiffs, the District Court correctly concluded it had no choice but to reach the merits of the case.

II. THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECTS AN INDIVIDUAL'S RIGHT TO KEEP AND BEAR ARMS, EVEN WHILE NOT ENGAGED IN STATE SERVICE.

Justice Story argued that "[t]he right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic." 3 Joseph Story, *Commentaries on the Constitution*, p. 746 (1833). An examination of the Second Amendment's history, text, and structure, separately and within the context of the Constitution as a whole, confirms "that it protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as [an ordinary] pistol . . . that are suitable as personal, individual weapons and are not of the general kind or type excluded by Miller." United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001) (citing United States v. Miller, 307 U.S. 174 (1939)). Professor Tribe agreed in his treatise:

> Perhaps the most accurate conclusion one can reach with any confidence is that the core meaning of the Second Amendment is . . . to arm "We the People" so that ordinary citizens can participate in the collective defense of their community and their state. But it does so not through directly protecting a right on the part of states or other collectivities . . . Rather, *the amendment achieves its central purpose by assuring that the federal*

> *government may not disarm individual citizens without some unusually strong justification* consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes . . . a right that directly limits action by Congress or by the Executive Branch . . . .

1 Laurence Tribe, *American Constitutional Law*, n.221 at 902 (3d ed. 2000) (emphasis added).

A. The Supreme Court Has Repeatedly Suggested That the Second Amendment Secures an Individual Right.

The Supreme Court has never decided whether "the right of the people" protected by Second Amendment inheres in individuals or is rather, as some suggest, "collective." Contrary to well-circulated myth, however, the Supreme Court's only direct examination of the Second Amendment apparently supports the individual rights model. Miller, 307 U.S. at 174.

Miller raised a Second Amendment challenge to his indictment under the National Firearms Act for possession of an untaxed sawed-off shotgun. Rather than focus on the nature of the substantive right claimed by Miller, the Supreme Court focused on the sawed-off shotgun to which Miller claimed a right.

Miller began by noting that among the powers of Congress lie certain prerogatives regarding "the Militia." U.S. Const. art. I, sec. 8, cl. 15 ("to provide for calling forth the Militia to execute the Laws of the Union, suppress

Insurrections and repel Invasions"); U.S. Const. art. I, sec. 8, cl. 16 ("to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . ."). As the Second Amendment contains a prefatory justification clause providing, "A well regulated Militia being necessary to the security of a free state," U.S. Const. amend. II, Miller reasoned that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." Miller, 307 U.S. at 178.

"With that end in view," the Supreme Court next set out to define "the militia," concluding that "militia" referred simply to members of the public capable of bearing arms in defense of the government if called upon to do so:

> 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*.

Miller, 307 U.S. at 178-79 (emphasis added). Reviewing "the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators," the Supreme Court determined

> that the 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, 307 U.S. at 179 (emphasis added). The "militia system . . . implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence." Miller, 307 U.S. at 179-80 (citation omitted).

As the Fifth Circuit explained in Emerson, the Supreme Court's treatment of the issue in Miller indicates that the militia "referred to the generality of the civilian male inhabitants . . . and to their personally keeping their own arms, and not merely to individuals during the time (if any) they might be actively engaged in actual military service or only to those who were members of special or select units." Emerson, 270 F.3d at 226.

The Miller defendants' membership in the constitutional "Militia" was unquestioned. "Had the lack of [militia] membership or engagement been a ground of the decision in Miller, the Court's opinion would obviously have made mention of it. But it did not." Emerson, 270 F.3d at 224 (footnote omitted). Rather, the case turned on whether the sawed-off shot gun in question was a weapon in ordinary use suitable for such common defense:

> 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.

Miller, 307 U.S. at 178 (emphasis added) (citation omitted).

Miller's expansive definition of "militia" as comprising private individuals capable of acting for the common defense and "expected to appear bearing arms supplied by themselves and of the kind in common use," Miller, 307 U.S. at 179, has never been questioned by the Supreme Court. In referencing the case, subsequent Supreme Court opinions confirmed that Miller merely set forth a test for whether a particular weapon is covered by the Second Amendment. Printz v. United States, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring); see also Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (Miller held that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'")

In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), the Supreme Court was called upon to define "the people" entitled to the Fourth Amendment's protection against unreasonable searches and seizures:

> "[T]he people" protected by the Fourth Amendment, and by the First *and Second Amendments*, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Verdugo-Urquidez, 494 U.S. at 265 (citation omitted) (emphasis added); see also Patton v. United States, 281 U.S. 276, 298 (1930) ("The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*."), overruled on other grounds, Williams v. Florida, 399 U.S. 78 (1970).

Likewise, the infamous Dred Scott case argued no Southern state would have adopted a constitution obligating it to respect privileges and immunities of citizenship held by African-Americans, including "the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went*." Scott v. Sandford, 60 U.S. 393, 417 (1857) (emphasis added).

The Supreme Court has never described the explicit protections of the Bill of Rights as being set forth only in the First and Third through Eighth Amendments. Rather, the Court has spoken favorably of

> the *personal rights* guarantied and secured by the *first eight* amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress

> of grievances, a right appertaining to each and all the people; *the right to keep and to bear arms* . . .

Duncan v. Louisiana, 391 U.S. 145, 166-67 (1968) (Black, J., concurring) (quoting statement of Sen. Howard, Cong. Globe, 39th Cong, 1st Sess., 2765-2766 (1866) (emphasis added)). "[L]iberty encompasses [] more than those rights already guaranteed *to the individual* against federal interference by the express provisions of the *first eight* Amendments." Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992) (emphasis added). Thus,

> [t]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on.

Casey, 505 U.S. at 848 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (emphasis added)); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (same).

Thus, although the "collective rights" theories find no support in Supreme Court precedent, the Supreme Court has long indicated that the right to keep and bear arms is no different from any other constitutional right: rights belonging to "the people" belong to *individuals*.

B. This Circuit Has Implicitly Adopted The Individual Rights Model Of The Second Amendment.

Two years before Emerson, this Court suggested acceptance of the Second Amendment as an individual right. Although FOP II, *supra*, 173 F.3d 898, did not explicitly adopt the individual rights model, its analysis of Miller is plainly inconsistent with any "collective rights" approach to the Second Amendment.

In the FOP I litigation, *supra*, 152 F.3d 998 and FOP II, *supra*, 173 F.3d 898, this Court considered a challenge by a police officers' organization to a law barring domestic violence misdemeanants from possessing government-issued firearms. The Court struck down the provision in FOP I as unconstitutionally irrational in violation of the Fifth Amendment's Due Process Clause, as domestic violence felons who had presumably committed more serious crimes were allowed to retain their firearms while in police service. In so doing, the court noted that "[d]espite the intriguing questions raised, we will not attempt to resolve the status of the Second Amendment right," because the misdemeanant-felon disparity appeared so patently irrational. FOP I, 152 F.3d at 1002. In FOP II, this Court reversed itself on reconsideration, but not before reaching the police officers' Second Amendment arguments and providing a Miller analysis consistent with the individual rights perspective.

This Court first observed that Miller may propose nothing more than what Plaintiffs claim it means – a test "to separate weapons covered by the [Second] amendment from uncovered weapons." FOP II, 173 F.3d at 906. Yet the FOP's failure to argue Miller's irrelevance to the question at hand led the court to "assume the [Miller] test's applicability." Id. The Court then faced the task of applying the Miller test to the challenged law:

> [W]e are not altogether clear what kind of "relationship" – or, to quote Miller more precisely, "reasonable relationship,"– is called for here . . . We suppose Miller would be met by evidence supporting a finding that the disputed rule would materially *impair* the effectiveness of a militia, though perhaps some other showing could suffice. We need not fix the exact form of the required relationship, however, because FOP has presented no evidence on the matter at all.

FOP II, 173 F.3d at 906 (citations omitted).

FOP's Second Amendment argument rested solely on the fact that "in 'most' states, police officers can be called into service as militia members." FOP II, 173 F.3d at 906. The Court found the argument unpersuasive because FOP failed to show that "police officers [are] any more susceptible to such service than ordinary citizens (or in some cases, than males between the ages of 17 and 45)." FOP II, 173 F.3d at 906. Moreover, FOP failed to show how barring police officers convicted of domestic violence misdemeanors from possessing firearms would "have a material impact on the militia." FOP II, 173 F.3d at 906.

In other words, a statute barring a limited class of individuals from owning firearms may not offend the Second Amendment.[10] Implicit in the Court's reasoning, however, is that if a rule could be shown to impair a significant portion of "ordinary citizens" from functioning as militia, that is, acting in armed concert for the common defense or in self-defense, or if a rule were to otherwise impair the effectiveness of a militia, it would violate the Second Amendment. Considering the Supreme Court's admonition that members of the public were "expected to appear bearing arms supplied by themselves," Miller, 307 U.S. at 179, when called upon to serve in the militia, it appears this Court would not approve of the statutes challenged herein.

Relying upon the historic "right of self defense and right of self-preservation," Abigail Alliance v. Von Eschenbach, ___ F.3d ___, 2006 U.S. App. LEXIS 10874, *26 (D.C. Cir., May 2, 2006), this Court recently found a substantive due process right of terminally ill patients to obtain drugs not fully approved by the FDA. If "[b]arring a terminally ill patient from the use of a potentially life-saving treatment impinges on this right of self-preservation . . . ," id., at *27, then surely barring a law-abiding citizen from possessing a functional

[10]Such restrictions on Second Amendment rights could be narrowly tailored to satisfy compelling governmental interests, e.g., barring children or felons from possessing guns.

firearm in her home likewise violates this right of self-preservation. Each law challenged here "impinges upon an individual liberty deeply rooted in our Nation's history and tradition of self-preservation." Id., at *45. Yet this Court was "mystified" by attempts to fashion a substantive due process right to arms, because the Second Amendment provides such rights textually. FOP II, 173 F.3d at 906. Abigail and FOP II cannot be reconciled with the collective rights view of the Second Amendment.

C. The Framers Clearly Intended That The Second Amendment Guarantee An Individual Right To Keep And Bear Arms.

"The founding generation certainly viewed bearing arms as an individual right based upon both English common law and natural law, a right logically linked to the natural right of self-defense." Kasler v. Lockyer, 23 Cal.4th 472, 505 (2000) (Brown, J., concurring). "[T]he history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training." Emerson, 270 F.3d at 260.

After the Constitution was submitted for ratification in 1787, its Anti-federalist opponents charged that the vast powers granted the federal government

over military affairs would allow Congress to destroy the militia through neglect or deliberate action, replacing it with a standing army designed to oppress the people. John Dewitt captured a key Anti-federalist fear when he predicted that, using its authority over the militia and its power to "To raise and support Armies," U.S. Const. art. I, sec. 8, cl. 12, Congress "may arm or disarm all or any part of the freemen of the United States, so that when their army is sufficiently numerous, they may put it out of the power of the freemen militia of America to assert and defend their liberties…." *The Antifederalist Papers*, 75 (M. Borden, ed. 1965).

The responses to such fears offered in the Federalist Papers show two things: (1) the Federalists, like the Anti-federalists, viewed the militia as consisting of all male citizens capable of bearing arms; and (2) the Federalists believed that widespread individual ownership of firearms would prevent the militia from being overpowered by any standing army, should the federal government ever become oppressive. Thus, in Federalist 29, Hamilton writes:

> [I]f circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens.

The Federalist No. 29, at 145 (Alexander Hamilton) (G. Carey, J. McClellan eds. 1990).

In *Federalist 46*, Madison echoed Hamilton's argument by pointing to "the advantage of being armed, which the Americans possess over the people of almost every other nation," and contrasting this situation with that of Europe, where "the governments are afraid to trust the people with arms." *The Federalist No. 46*, 244 (James Madison) (G. Carey, J. McClellan eds. 1990). In America, any threat represented by a standing army would find its counterweight in "a militia amounting to near half a million of citizens with arms in their hands…" Id.

Unwilling to accept the Federalists' assurance that the proposed Constitution contained no power that would allow the federal government to oppress the people, the Anti-federalists continued to oppose its adoption without, at a minimum, specific protections for individual rights. Due to their influence, five of the states that ratified the Constitution also sent demands for a Bill of Rights to Congress. All five demanded protection for the right to bear arms; and all five made plain that the right to be protected belonged to individuals, not state governments. New Hampshire's proposal provided that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion," language that unmistakably protects individual rights quite apart from any militia service. 1 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 326 (2d ed., 1836). Virginia's proposal, which served as

a model for Madison's draft, provided "That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defense of a free State." 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 658 (2nd ed., 1836). Thus, the language proposed by Virginia sets out the individual right and the preference for a militia in two unambiguously independent phrases, while at the same time making clear that the "militia" and the "people" are one and the same.

Having secured the Constitution's ratification, the Federalists were nonetheless mindful of the reservations with which the Constitution was ratified and the popular desire for a written declaration of rights. In his first inaugural address, President Washington signaled that a Bill of Rights might well be desirable, and would pose no threat to the young Constitution. Emerson, 270 F.3d at 244 (quoting President Washington, Inaugural Address, April 30, 1789) (citation omitted).

Accordingly, on June 8, 1789, then-Congressman James Madison proposed several amendments to the Constitution – including one that provided in pertinent part that "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 . . . ." That the amendment was designed to secure a personal right of the citizen rather than a collective right of the states is clear from Madison's notes for the speech introducing the amendments, "They [the proposed amendments] relate first to private rights," 12 *Papers of James Madison* 193-194 (C. Hobson et al., eds. 1979), and his initial proposal to place the amendment alongside other individual rights already protected by the Constitution in Article I, sec. 9 – following the habeas corpus privilege and the proscriptions against bills of attainder and *ex post facto* laws together with Madison's own proposed protections for speech, press, and assembly. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 169 (N. Cogan, ed., 1997).

Madison's colleagues clearly understood the amendment to protect an individual right. As Rep. Fisher Ames of Massachusetts described Madison's proposals, "The rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people." *Letter from Fisher Ames to George Richards Minot* (June 12, 1789) (excerpt reprinted in David Young, *The Origin of the Second Amendment* 668 (2nd ed. 1995)). The revised text of the amendment, as ratified, differs from Madison's draft (among other ways) by moving the hortatory language about the militia to a prefatory clause, or preamble: "A well regulated Militia, being necessary to the security of a free State . . . ."

At the time no tension appeared between the preamble and the operative clause protecting the right of the people to keep and bear arms. Its wording "made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free state, they guaranteed the people's right to possess those arms." Kates, *supra* n.6, 82 Mich. L. Rev. at 217-18.

Indeed, throughout the entire legislative record, from proposal of the amendment through ratification, no assertion of a "collective rights" view can be found. "If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis." Stephen Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 83 (1984).

Every notable constitutional commentator of the 19th Century understood the Second Amendment secures individual rights. Supreme Court Justice Joseph Story called the right protected by the amendment "a right of the citizens" and noted that "One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep

arms . . . ." Story, *A Familiar Exposition of the Constitution of the United States*, 264-265 (1842). St. George Tucker, the earliest prominent commentator on the Constitution, regarded the Second Amendment right as equivalent to Blackstone's "right of the subject," protecting "The right of self defence [which] is the first law of nature." 1 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, 143, 300 (1803). William Rawle, in his 1829 treatise, also affirmed the individual rights view, declaring that the amendment's wording was broad enough to protect the right from state infringement as well as federal:

> No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

William Rawle, *A View of the Constitution of the United States of America* 125-26 (Da Capo Press 1970) (2nd ed. 1829).

The "collective rights" model of the Second Amendment is clearly a revisionist phenomenon. The Framers, and all prominent scholars for whom the Framers were within living memory, envisioned the Second Amendment as securing an individual right.

D. The Text Of The Second Amendment Plainly Establishes That Individuals Have A Right To Keep And Bear Arms Independent Of State Service.

1. The Second Amendment's Preamble Does Not Limit The Rights Protected In The Operative Clause.

The "collective rights" interpretations of the Second Amendment depend entirely upon reading its explanatory preamble as a limit on the substantive right preserved in the amendment's operative clause. Apart from the contrary history discussed above, the argument fails as a matter of grammar, statutory construction, and precedent.

As a simple matter of English grammar, the Second Amendment's first clause is prefatory and explanatory; it does not modify the subject "right of the people." The ordinary grammatical rule is consistent with "longstanding and generally accepted principles of statutory construction, that, at least where the preamble and the operative portion of the statute may reasonably be read consistently with each other, the preamble may not properly support a reading of the operative portion which would plainly be at odds with what otherwise would be its clear meaning." Emerson, 270 F.3d at 233 n.32 (citations omitted).

That the Second Amendment's preamble cannot be read to eviscerate the substantive rights clause is also clear upon examining the manner in which the

Supreme Court has interpreted the other two constitutional preambles. With respect to the opening preamble, the Supreme Court has long held that "[a]lthough that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments." Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905). Plaintiffs are unaware of any case in which a court has interpreted the preamble as a limitation, enjoining governmental action as inconsistent with "establish[ing] justice," "insur[ing] domestic tranquility," "promot[ing] the general welfare," or "secur[ing] the Blessings of Liberty." U.S. Cost. pmbl.

The Copyright and Patent Clause preamble would arguably possess greater operative force than that of the Second Amendment, as it begins with "To," the infinitive that introduces most powers of Congress. If Congress has the powers "To lay taxes," U.S. Const. art. I, sec. 8, cl. 1, "To borrow Money," U.S. Const. art. I, sec. 8, cl. 2, and so on, then the power beginning, "To promote the Progress of Science and the useful Arts," U.S. Const. art. I, sec. 8, cl. 8, could stand alone absent the remainder of the Copyright and Patent Clause. In contrast, the Second Amendment's preamble would in isolation do no more than declare an ideal.

Still, courts have not barred Congress from issuing copyrights and patents that do not "promote the Progress of Science and Useful Arts." See, e.g. Schnapper v. Foley, 667 F.2d 102, 112 (D.C. Cir. 1981) ("Congress need not 'require that each copyrighted work be shown to promote the useful arts' . . .") (citation omitted).

In Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001), aff'd sub nom Eldred v. Ashcroft, 537 U.S. 186 (2003), plaintiffs asserted that Congress did not "Promote the Progress of Science and useful Arts" in lengthening the terms of pre-existing copyrights, because doing so provided no incentive to create new works. The plaintiffs argued that the phrase "limited Times, " U.S. Const. art. I, sec. 8, cl. 8, should be interpreted to reach "only as far as is justified by the preambular statement of purpose: If 50 years are enough to 'promote . . . Progress,' then a grant of 70 years is unconstitutional." Eldred, 239 F.3d 372, 377-78 (D.C. Cir. 2001).

This Court rejected that argument. The Supreme Court precedent marshaled in support of Eldred's argument "never suggests that the preamble informs its interpretation of the substantive grant of power to the Congress." Eldred, 239 F.3d at 378 (citation omitted).

The Supreme Court was only slightly more generous:

> [W]e have described the Copyright Clause as "both a grant of power and a limitation," and have said that "the *primary* objective of copyright" is "to promote the Progress of Science." The "constitutional command," . . . is that Congress, to the extent it enacts copyright laws at all, create a "system" that "promotes the Progress of Science."

Eldred, 537 U.S. at 212 (citations and footnote omitted) (emphasis added). Acknowledging that the Clause as a whole may act as a limitation, the Supreme Court gutted the effect of the preamble by confirming that promotion of the Progress of Science and useful Arts is not the power's sole objective. Moreover, "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." Id., (citations omitted). Congress had a rational basis for determining that the extension of existing copyright terms "promoted the Progress of Science." Ibid.

Eldred's lesson for the Second Amendment is clear. If the "Progress" limitation in the Copyright and Patent preamble cannot restrain Congress from creating a system that retroactively benefits existing copyrights, neither may a conceptualized ideal of a "well-regulated militia" restrain "the people" from exercising their "right to keep and bear arms," which "shall not be infringed." This is especially so considering the accepted principle that the powers of Congress "are few and defined," Lopez v. United States, 514 U.S. 549, 552 (1995) (quoting *The Federalist No. 45*, pp. 292-93 (C. Rossiter ed. 1961)), while rights of

the people include even those not enumerated in the founding document. U.S. Const. amend. IX. At most, the preambular language of the Copyright and Patent Clause establishes a highly-deferential test that all but the most unjustifiable patent and copyright laws would pass. The fundamental rights secured by the Second Amendment are entitled to no less protection than Congress's copyright and patent powers.

2. To The Extent The Preamble Serves As An Operative Guide, It Does Not Limit The Rights Of The People, As "Militia" Is Practically Synonymous With "The People."

Miller viewed the preamble as an interpretive guide, a common practice of statutory construction used in determining legislative intent. Yet even to this extent, the preamble cannot substantially limit the rights of the operative clause.

"Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 539 (1944). Consistent with this practice, Miller correctly gave the word "militia" its traditional definition as comprising all men capable of bearing arms, and reasoned that the Second Amendment protects the type of arms that such people – *private individuals* – could be expected to own and use for the common defense if called upon to do so.

Considering the persistent mischaracterization of the opinion, it bears repeating that Miller concluded "the militia" are not "troops" or "standing armies," but "civilians primarily . . . all males physically capable of acting in concert for the common defense . . . expected to appear bearing arms supplied by themselves and of the kind in common use at the time" if called for duty. Miller, 307 U.S. at 179.

Miller's "militia" definition is consistent with the Fifth Amendment's guarantee that individuals may only be charged with serious crimes "by presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. Const. amend. V. The Militia is obviously a concept apart from the army or navy, and its members are entitled to the protection of the grand jury when not actively defending against invasion or insurrection. The Supreme Court has recognized that the militia and the armed forces are different concepts. "Congress was authorized both to raise and support a national army and also to organize 'the Militia.'" Perpich v. Dept. of Defense, 496 U.S. 334, 340 (1990). Congress defines "the militia of the United States" as comprising all able-bodied males between the ages of 17 and 45, as well as male members of the National Guard up to age 64, who are or intend to become citizens; as well as female members of the National Guard. 10 U.S.C. § 311. Excluded from this definition of Militia, among

others, are "members of the armed forces, except members who are not on active duty." 10 U.S.C. § 312(a)(3).

Expanding on 10 U.S.C. § 311, Plaintiffs urge only one modification to Miller's definition of "Militia." In the years following Miller, the Supreme Court held that the Fifth Amendment's Due Process Clause guarantees the equal protection of the law vis-a-vis the federal government on par with the Equal Protection Clause of the Fourteenth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954). As women are now considered capable of acting in concert for the common defense, and equal heirs to the natural rights preserved in the Bill of Rights, Miller's concept of the militia should be read in light of the modern understanding of the Fifth Amendment to include female as well as male civilians. Allowing men, but not women, the right to keep and bear arms would not survive the heightened review to which gender-based distinctions are subjected. See, e.g. United States v. Virginia, 518 U.S. 515 (1996) (women entitled equal access to military education).

As Professor Akhil Amar concluded, "the militia is identical to the people . . . ." Akhil Amar, *The Bill of Rights* 51 (1998); see also Nordyke, 319 F.3d at 1195-96 (Gould, J., specially concurring). The two are synonyms. There

is, quite simply, no support for the contrary proposition that "militia" means "states" or "soldiers."

Plaintiffs raised these arguments in their pleadings below, and clarified, at oral argument, that they are as much members of the "Militia" described in the Constitution as was Mr. Miller, as is any other citizen. JA 69, 71-72. Indeed, at oral argument, Plaintiffs also noted they fall within the definition of the militia under D.C. Code § 49-401. JA 72.

The District Court acknowledged Plaintiffs' claim to Militia membership:

> THE COURT: Essentially, so the record is clear, Plaintiffs, indeed, contend to be members of a well-regulated militia as opposed to a state-sponsored militia –
>
> MR. GURA: Correct . . . They are members of the Militia. . .
>
> THE COURT: All right, I understand your argument.

JA 74. Thus, the District Court clearly erred in holding that "none of the Plaintiffs have asserted membership in the Militia." JA 61. Plaintiffs have always maintained that "Militia" was correctly defined in Miller in a manner that includes them.

3. "The People" Protected By The Second Amendment Are The Same People Protected Throughout The Bill Of Rights.

This point was clearly settled by the Supreme Court in United States v. Verdugo-Urquidez, *supra*, 494 U.S. 259. The Framers knew how to distinguish between the concepts of "people" and "states," doing so explicitly throughout the original Constitution and Bill of Rights. See, e.g. U.S. Const. amend. X ("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*.") (emphasis added). Indeed, the very phrase used to describe the Second Amendment's subject – "the right of the people" – also provides the subject of the First and Fourth Amendments. See also U.S. Const. amend IX ("rights . . . retained by the people.")

Moreover, as the Fifth Circuit noted, construing the Second Amendment as a right of the states to arm a militia "would be in substantial tension with Art. I, sec. 8, cl. 16 (Congress has the power 'To provide for ... arming ... the militia. . .')." Emerson, 270 F.3d at 227. And interpreting the Second Amendment as if it secured an individual right to keep and bear arms, but only while serving in the military, would be equally unpersuasive. Presumably if the states would conscript people into military units, members of such units would be armed. After all, "No

State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. Const. art. I, sec. 10, cl. 3. If congressional consent or emergency conditions allowed a state to raise an army or navy, there would be no need to guarantee the rights of soldiers and sailors to keep weapons.

4. "The Right To Keep And Bear Arms" Is The Right To Privately Possess And Carry Ordinary Firearms.

As discussed above, Miller set forth a test for determining which "arms" are protected by the Second Amendment: "ordinary military equipment" that could "contribute to the common defense," Miller, 307 U.S. at 178, and is of a type in common use that people may be expected to own. Miller, 307 U.S. at 179. That test cannot sensibly mean that the Second Amendment merely guarantees individuals sent to battle the right to carry a gun. Such an interpretation would

> *either* (1) contemplate actual military service . . . other than that which is ordered or directed by the government; *or* (2) construe the constitutional provision as saying no more than that the citizen has a right to do that which the state orders him to do and thus neither grants the citizen any right nor in any way restricts the power of the state.

Emerson, 270 F.3d at 232 n.30 (emphasis original). One may also imagine instances where military personnel are ordered to refrain from having weapons;

surely the Second Amendment would not guarantee a right to carry arms in derogation of contrary orders.

The questions thus naturally arise – what are the meanings of "keep" and "bear?" "Bearing" simply means carrying, without any necessary military connotation:

> Surely a most familiar meaning [of carrying a firearm] is, as the Constitution's Second Amendment ("keep and *bear* Arms") (emphasis added) and Black's Law Dictionary, at 214, indicate: "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."

Emerson, 270 F.3d at 232 (quoting Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

Neither does the verb "keep" necessarily carry a military connotation. "Though the terms are related, the distinct right to 'keep' arms is individual and a helpful antecedent to bearing arms in a militia." Nordyke, 319 F.3d at 1195 (Gould, J., specially concurring). "Keep" as used in the Second Amendment can relate only to an individual right. Emerson, 270 F.3d at 232 (considering "keep" separately from "bear"). After all, if citizens cannot "keep" guns, they cannot be "expected to appear bearing arms supplied by themselves and of the kind in common use at the time" if called for duty. Miller, 307 U.S. at 179. If a gun is

kept, but not borne upon the person, the gun is possessed in the sense that it is the subject of a person's dominion and control. Ordinarily, an object would be "kept" in the home or on possessed land.

E. The District Court Failed To Address Plaintiffs' Arguments.

The District Court conceded that "plaintiffs' arguments [concerning the meaning of Miller] are not without merit." JA 52. Yet without engaging their substance, it dismissed Plaintiffs' arguments because

> if the Supreme Court truly thought that Miller was being read to stand for a proposition much greater than the Court intended, it surely would have taken one of the opportunities it has had in the last sixty five years to grant *certiorari* and correct the misunderstanding. This Court is thus reluctant to accept plaintiffs' reading of Miller.

JA 52.

Respectfully, parties are entitled to have their arguments considered, even if the Supreme Court has not taken an opportunity to endorse their positions. Nor may denial of certiorari be construed as an endorsement of the lower court's opinion.

Indeed, Miller carries more precedential weight than any number of *certiorari* denials. Notably the District Court did not extend its logic to the denial

of *certiorari* in Emerson, a missed opportunity to *reject* Plaintiffs' claims.[11] Emerson v. United States, 536 U.S. 907 (2002).

Having rejected Plaintiffs' admittedly meritorious arguments regarding Miller – principally *because* the Supreme Court had not reviewed collective rights interpretations of that case – the District Court did little more than cite those interpretations as a basis for its holding. It did not analyze Miller itself, or those cases upon which it relied, most of which, in turn, contain virtually no discussion of Miller either.[12]

Similarly, the District Court approvingly cited Lewis, *supra*, 445 U.S. at 65 n.8, for the proposition "that a statute that criminalizes possession of a firearm by a convicted felon "'[did not] trench on any constitutionally protected liberties.'"

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[11]Consistent with this selective approach, the District Court placed unwarranted reliance on the Supreme Court's dismissal of a direct appeal in Burton v. Sills, 394 U.S. 812 (1969), a Second Amendment decision in the New Jersey Supreme Court. The Supreme Court is not obligated to hear any case outside its original jurisdiction; its refusal to do so is no comment on the opinion's merits.

[12]The District Court adopted two portions of the now-vacated opinion in Seegars v. Ashcroft, 297 F. Supp. 2d 201 (D.D.C. 2004): one citing various cases purportedly rejecting an individual right to arms under state constitutional provisions, but see *supra*, p. 13 n.5; and another listed conflicting modern circuit court opinions and concluded that "this debate, which has resulted in a circuit-split, is a prime subject for review by the Supreme Court." Seegars, 297 F. Supp. 2d at 228. Plaintiffs agree with the latter observation.

JA 51-52. Lewis does not elaborate, but Plaintiffs would not quarrel with the notions that felons may be disarmed without impairing the Militia's effectiveness, and that felons, by their criminal activities, forfeit any number of constitutional rights available to the law-abiding.

As for Emerson, the court below refused to engage the Fifth Circuit's reasoning, preferring to side with the concurring opinion's assertion that the majority opinion is largely *dicta*. Yet the District Court's opinion in Emerson held that the Second Amendment secures an individual right to keep and bear arms and dismissed the government's indictment on those grounds. Emerson v. United States, 46 F. Supp. 2d 598 (N.D. Tex. 1999), rev'd, 270 F.3d 203 (5th Cir. 2001). The Fifth Circuit, in reversing that outcome, necessarily reviewed the District Court's individual rights analysis. See Emerson, 270 F.3d at 265 n. 66.

III. THE POSSESSION OF ORDINARY HANDGUNS BY PRIVATE INDIVIDUALS IS PROTECTED BY THE SECOND AMENDMENT. D.C. CODE §§ 7-2502.02(a)(4) AND 22-4504 ARE THEREFORE UNCONSTITUTIONAL.

In theory, some sub-set of handguns might be designed that would fail the Miller test and be subject to prohibition. But in barring Plaintiffs from possessing *all* handguns, Defendants impermissibly infringe upon the constitutional right to keep and bear weapons in common use that are plainly suitable for lawful

behavior. If any outright weapons prohibition fails the Miller test, it is D.C. Code § 7-2502.02(a)(4), barring Plaintiffs from possessing ordinary handguns within their homes, and its close cousin, D.C. Code § 22-4504, barring the unlicensed movement of handguns within a home.

No court has seriously questioned whether a handgun, generally, is a Miller-protected arm "of the kind in common use" by the public, being either "ordinary military equipment or [such] that its use could contribute to the common defense." Miller, 307 U.S. at 178. Nor has any court applied Miller in the manner suggested by FOP II, yet concluded that an outright prohibition of handguns is compatible with an effective militia. FOP II, 173 F.3d at 906. Such a prohibition would quite clearly "materially impair" the efforts of civilians otherwise capable of bearing arms from maintaining order.

To the extent such questions were raised in Emerson, the Fifth Circuit had no difficulty disposing of them in a footnote. Concerned primarily with the question of whether the Second Amendment conferred an individual or "collective" right, the Miller analysis of the handgun in Emerson merited only the following observation:

> There is no contention here that the Beretta pistol possessed is a kind or type of weapon that is neither "any part of the ordinary military equipment" nor such "that its use could contribute to the common defense" within the

> language of Miller (nor that it is otherwise within the kind or type of weapon embraced in the government's second Miller argument, e.g., "weapons which can have no legitimate use in the hands of private individuals" so as to be categorically excluded from the scope of the Second Amendment under Miller's holding).

Emerson, 270 F.3d at 227 n.22.

Likewise, in adopting the collective rights theory "without further analysis or citation of authority," Emerson, 270 F.3d at 224, the First Circuit conceded that a .38 caliber revolver would not be proscribed under the Miller test, as such a handgun "may be capable of military use . . . at least familiarity with it might be regarded as of value in training a person to use a comparable weapon of military type and caliber." Cases v. United States, 131 F.2d at 922-23;[13] see also Quilici v. Village of Morton Grove, 695 F.2d 261, 266 (7th Cir. 1982) ("Handguns are

[13]Cases read Miller as being limited to its facts: "we do not feel that the Supreme Court in [Miller] was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go." Cases, 131 F.2d at 922. Yet the First Circuit refused to offer its own guide for interpreting the Second Amendment. "[I]t seems to us impossible to formulate any general test by which to determine the limits imposed by the Second Amendment but that each case under it, like cases under the due process clause, must be decided on its own facts and the line between what is and what is not a valid federal restriction pricked out by decided cases falling on one side or the other of the line." Id.

undisputedly the type of arms commonly used for recreation or the protection of person and property") (internal citations omitted).[14]

The District Court recognized the social utility of handguns. Delahanty v. Hinckley, 686 F. Supp. 920 (D.D.C. 1986), question certified, 845 F.2d 1069 (D.C. Cir. 1988), certified question answered, 564 A.2d 758 (D.C. 1989), aff'd, 900 F.2d 368 (D.C. Cir. 1990). In Delahanty, plaintiff police officer, injured in the assassination attempt on President Reagan, sued the manufacturer of Hinckley's handgun on a products liability theory, reasoning that the gun's inexpensive nature made it particularly attractive for criminal misuse.

The District Court rejected the argument as a matter of tort law, since the gun functioned properly. However, the District Court also observed that "the theory raises concerns which reach constitutional dimensions." Delahanty, 686 F. Supp. at 928. Apart from the irrational result of privileging plaintiffs shot by cheaper weapons, the Court recognized that many law-abiding citizens "must resort to the purchase of a cheap handgun" for legitimate self-defense. Id. The District Court was especially troubled by the implication of banning cheaper

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[14]Quilici held the Illinois Constitution permitted a municipality to ban handguns provided it did not ban all firearms. The Court did not reach the Second Amendment argument, as it held the Second Amendment was not incorporated by the Fourteenth Amendment as applicable to the states. Quilici, 695 F.2d at 270. Quilici's subsequent collective rights discussion is plainly *dicta*.

handguns as "ghetto guns," which would suggest acceptance of an unlawful disparate impact upon the rights of low-income and minority individuals. Delahanty, 686 F. Supp. at 929.

Defendants cannot carry their burden of establishing that a generic handgun is not in common use, has no legitimate use in the hands of individuals, cannot be used to provide for the common defense, and is not ordinary military equipment. It is within judicial notice that Defendants provide their police officers handguns; clearly, Defendants recognize that handguns are useful for lawful self-defense and maintaining public order. Indeed, Defendants see to it that plaintiff Heller is allowed a handgun, at least to maintain order within the confines of his workplace.

Handguns plainly pass the Miller test as weapons protected by the Second Amendment, the rights to which "shall not be infringed." U.S. Const. amend. II. D.C. Code § 7-2502.02(a)(4), barring Plaintiffs from obtaining handguns by forbidding the registration of such weapons, violates Plaintiffs' rights under the Second Amendment. It necessarily follows that D.C. Code § 22-4504 also violates the Second Amendment, at least to the extent it requires an unavailable license to move handguns within one's home. That restriction frustrates the keeping and bearing of constitutionally protected arms, equivalent to imposing an independent ban on such weapons. While Plaintiffs do not here challenge the application of

Section 22-4504 to public areas, it is notable that even obscene materials not otherwise protected by the First Amendment may be viewed in the privacy of one's home. Stanley v. Georgia, 394 U.S. 557 (1969). The exercise of Second Amendment rights within the home is entitled to no less protection. "The government bears a heavy burden when attempting to justify an expansion, as in gun control, of the 'limited circumstances' in which intrusion into the privacy of a home is permitted." Quilici, 695 F.2d at 280 (Coffey, J., dissenting).

Defendants' handgun ban also fails the D.C. Circuit's alternative Miller test set forth in FOP II, 173 F.3d at 906, in that it materially impairs the effectiveness of the militia. Shelly Parker and Tracey Ambeau require handguns to act in concert with others for the common defense. JA 21, 29. Dick Heller is more effective with a handgun than he might be with another type of firearm, JA 23; why else would Defendants supply him (and others) with a handgun for his policing duties? JA 22. Tom Palmer and George Lyon would also be more effective militia members had they the option of using handguns. JA 25, 31. None of this should be surprising; handguns are extremely practical for many lawful defensive uses.

IV. BECAUSE THE RIGHT TO KEEP AND BEAR ARMS IS A RIGHT TO KEEP AND BEAR FUNCTIONAL ARMS, D.C. CODE § 7-2507.02 IS UNCONSTITUTIONAL.

Plaintiffs submit that to the extent the Second Amendment guarantees the right to keep and bear arms, the right must extend to *functional* guns within their own homes. Just as the First Amendment guarantees more than the possession of blank newsprint and ink, the Second Amendment guarantees more than a right to possess metal and springs. And just as the First Amendment would not sanction an act mandating the capping of pens at all times, neither does the Second Amendment tolerate laws requiring, without meaningful exception, the disabling, locking, or disassembly of all guns. The right to keep and bear arms implies the right to keep and bear arms in such conditions that they are readily accessible to be used effectively when necessary.

D.C. Code § 7-2507.02 requires that all guns must be kept unloaded and either disassembled or bound by trigger lock at all times unless they are located in one's business or while a person is engaged in recreational shooting. Yet the District's self-defense law extends with equal force to a person's home. Gray v. United States, 589 A.2d 912, 916 (D.C. 1991) ("imminent danger" would have supported deadly force in self-defense inside home); Cooper v.United States, 512 A.2d 1002 (D.C. 1986) (assuming no duty to retreat when attacked inside home by

strangers, no "castle doctrine" against co-occupants). Clearly, a person's interest in defending against a home invasion far exceeds the interest in securing a business or recreation. "Surely nothing could be more fundamental to the 'concept of *ordered* liberty' than the basic right of an individual, within the confines of the criminal law, to protect his home and family from unlawful and dangerous intrusions." Quilici, 695 F.2d at 278 (Coffey, J., dissenting) (emphasis original).[15]

Plaintiffs would not object to properly tailored laws requiring the safe storage of firearms, provided the law permits the lawful use of the firearm within the home. But even the federal law barring felons from possessing firearms is understood to carry a justification exception. United States v. Gomez, *supra*, 92 F.3d 770; see also United States v. Mason, 233 F.3d 619, 622-23 (D.C. Cir. 2000). Certainly Plaintiffs have at least an equal interest in their fundamental constitutional rights as felons have in a necessity or justification defense.

Thus, while Section 7-2507.02 addresses an arguably appropriate area of regulation, it is unconstitutionally overbroad in its reach. The overbreadth is

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[15]Plaintiffs are mindful of the contrary opinion upholding the business-home distinction against an equal protection challenge in McIntosh v. Washington, 395 A.2d 744, 755 (D.C. 1978). McIntosh's reasoning is deeply wanting in various respects, but the opinion's primary flaw is that it failed to consider that a fundamental Second Amendment right was at stake.

especially troubling considering Defendants' aggressive prosecution of gun owners in cases of admittedly lawful self-defense. Chief Judge Ginsburg suggested that the risk of prosecution in such cases is "speculative," Seegars v. Gonzales , 413 F.3d 1, 2 (D.C. Cir. 2005) (Ginsburg, C.J, concurring), while Judge Williams suggested the risk was real. Seegars, 413 F.3d at 2-3 (Williams, J.). The Court ordered the instant Plaintiffs to file additional briefs in light of the outcome of the Seegars rehearing petition. As Plaintiffs demonstrated with reference to specific cases, Judge Williams's intuition is sadly correct: victims of home invasions who defend themselves with firearms *are* prosecuted for gun violations, even where the government does not question the legitimacy of using the firearm against the intruder. (Pl. Second Mot. To Issue Br. Schedule & Set Arg. on Merits, pp. 13-15).

The right to possess a non-functioning firearm within one's home is no right at all. Defendants must be enjoined from enforcing D.C. Code § 7-2507.02 in a manner inconsistent with Plaintiffs' Second Amendment rights.

CONCLUSION

The District Court correctly concluded that Defendants' belated standing defense lacks merit. In addition to the other threats, Defendants referred to the intent to prosecute Plaintiffs as "fact." It is pointless to argue the finer nuances of what those various statements intended to convey. If these statements did not communicate the sort of direct and specific threats of prosecution that, under Seegars, qualify as a "polar extreme" where "clarity prevails," they are certainly threatening enough. To deny as much is to deny the very possibility of pre-enforcement challenges to unconstitutional statutes.

Yet the District Court erred, as a matter of law, in upholding the regulations. Logic, history, the Constitutional text's plain meaning, and the weight of Supreme Court and circuit precedent all establish that the Second Amendment secures fundamental individual rights. At the absolute minimum, such rights guarantee a law-abiding citizen's ability to possess a functional firearm, including a basic handgun, within the home.

The opinion below should be reversed, with instructions to enter judgment for Plaintiffs on their motion for summary judgment.

Dated: June 1, 2006

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