

**Washington and Lee University School of Law**  
**John W. Davis Appellate Advocacy Moot Court Competition, Fall 2007**

The state of Florabama has encountered a large shift in population density over the last three decades. Once a quiet farm state, Florabama is now comprised primarily of three large metropolitan areas, each centered around one of the now heavily populated cities of Tallaloosa, Birlando, and Browning. What little rural area still exists in Florabama has been deserted for the most part out of fears related to the urban gangs.

Metropolitan Tallaloosa, the southern-most city, encountered a significant rise in gun violence, primarily related to handguns, about twenty years ago. Ten years ago, gun violence reached similar high levels in metropolitan Birlando, located just north of Tallaloosa. Out of both concern for the state's rising level of violence and fear that the state's gangs, a significant force in the state's violence, would continue to move north towards Browning, Florabama enacted FLORABAMA CODE § 9-19.02, which generally bars the registration of handguns (with an exception for retired police officers).

Josh Hull is a resident of the city of Browning, in the State of Florabama. He wishes to keep a handgun in his home for self-defense; however, if he possesses a handgun, he will be in violation of Florabama state law, which prohibits their possession. Hull recently moved to Florabama from the state of Virginia, where he owned a Glock 22 .40 Caliber handgun, which was registered and permitted under Virginia's laws regulating the possession of firearms.

Upon moving to the state of Florabama, he inquired with the office of Florabama's Attorney General regarding a permit to bring his handgun from Virginia and was informed that no procedure existed to bring his handgun to Florabama because their possession was illegal. Defendant therefore left his firearm at his parents' residence in Virginia. In refusing his request, Adam Humphries, Florabama's Attorney General, explicitly relied on FLORABAMA CODE § 9-19.02.

Hull's apartment was burglarized twice in the year after he moved to Browning. Accordingly, seeks to retrieve his Glock Model 22 .40 Cal. handgun from Virginia and bring it to Browning for the stated purpose of defending himself and his family. He raised a Second Amendment challenge to FLORABAMA CODE § 9-19.02 in the Federal District Court for the Northern District of Florabama at Browning. The State of Florabama does not have any state constitutional provision similar to the Second Amendment under the Federal Constitution.

Hull filed suit under 42 U.S.C. § 1983 against Adam Humphries, Florabama's Attorney General, asking the district court to both declare the statute unconstitutional and enjoin Humphries from applying § 9-19.02 (a)(6) against him. Essentially, Hull claims a right to possess what he describes as "functional firearms," by which he means ones that could be "readily accessible to be used effectively when necessary" for self-defense in the home. He is not asserting a right to carry such weapons outside his home. Nor is he challenging Florabama's authority per se to require the registration of firearms.

Judge Smithenwesson, agreeing with Hull's reasoning and analysis, granted both the requested declaratory and injunctive relief. The Court rejected Humphries' argument that the Second Amendment ("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") does not bestow any rights on individuals except, perhaps, when an individual serves in an organized militia such as today's National Guard.

Attorney General Humphries appealed the decision of the district court to the Court of Appeals for the Twelfth Circuit. A three-judge panel of Chief Judge Price and Judges Kaur and Morrison, in a 3-0 opinion by C.J. Price, held that the district court had erred in finding that the Second Amendment guaranteed an individual right to bear arms. The Twelfth Circuit instead cited the abundance of case law from the other circuits denying any right to bear arms absent a connection to militia service, and accordingly denied the relief requested by Hull. The circuit court also disagreed with the district court over whether the state of Florabama's regulations of the possession of firearms was a reasonable restriction permissible under the Second Amendment regardless of the nature of the right protected by the Second Amendment.

The United States Supreme Court has granted certiorari in this case and oral argument is set for the October 2007 term. Two issues are to be decided: Whether the right to bear arms protected by the Second Amendment endows an individual with a constitutional right to bear a handgun for personal defense and, once the nature of this right is decided, whether FLORABAMA CODE § 9-19.02 infringes upon such right.

STATE OF FLORABAMA OFFICIAL CODE  
TITLE 9. HEALTH AND SAFETY.  
SUBTITLE G. PUBLIC SAFETY.  
CHAPTER 19. FIREARMS CONTROL.  
+ UNIT A. FIREARMS CONTROL REGULATIONS.

**§ 9-19.02. Certain firearms prohibited from registration.**

(a) The Attorney General of the State of Florabama shall not issue a registration certificate for any:

- (1) Firearm capable of fully-automatic fire;
- (2) Shotgun having a barrel less than eighteen (18) inches in length;
- (3) Shotgun capable of semi-automatic fire equipped with a feeding device of more than six (6) rounds;
- (4) Rifle with a barrel less than sixteen (16) inches in length;
- (5) Firearm with a rifled barrel the interior of which exceeds ½ inch in diameter (.50 caliber); or
- (6) Any handgun, except that the handgun provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm only during the employee's duty hours or to any currently assigned or retired law enforcement officer of a municipality within the State of Florabama.

Title 5. Criminal Offenses and Penalties  
Subtitle E. Regulation and Possession of Weapons  
Chapter 2. Weapons and Possession of Weapons

**§ 5-0205. Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty**

No person shall carry either openly or concealed on or about their person, a pistol, without a valid registration certificate issued the Attorney General of the State of Florabama. Whoever violates this section shall be punished by a fine of not more than \$1,000 or imprisonment for not more than 1 year, or both.

United States District Court for the  
District of Northern Florabama at  
Browning.

Josh HULL, Plaintiff,

v.

Adam HUMPHRIES, Attorney General  
of the State of Florabama, Defendant.

No. 04 cv 00317.

February 17, 2004, Filed.

Before:  
SMITHENWESSON, District Judge

## **I. Background**

The state of Florabama has encountered a large shift in population density over the last three decades. Once a quiet farm state, Florabama is now comprised primarily of three large metropolitan areas, each centered around one of the now heavily populated cities of Tallaloosa, Birlando, and Browning. What little rural area still exists in Florabama has been deserted for the most part out of fears related to the urban gangs.

Metropolitan Tallaloosa, the southern-most city, encountered a significant rise in gun violence, primarily related to handguns, about twenty years ago. Ten years ago, gun violence reached similar high levels in metropolitan Birlando, located just north of Tallaloosa. Out of both concern with the state's rising level of violence and fear that the state's gangs, a significant force in the state's violence, would continue to move north towards Browning, Florabama enacted

FLORABAMA CODE § 9-19.02, which generally bars the registration of handguns (with an exception for retired police officers).

Plaintiff Hull is a resident of the city of Browning, in the State of Florabama. He wishes to keep a handgun in his home for self-defense; however, if he possesses a handgun, he will be in violation of Florabama state law, which prohibits their possession. Hull recently moved to Florabama from the state of Virginia, where he owned a Glock 22 .40 Caliber handgun, which was registered and permitted under Virginia's laws regulating the possession of firearms.

Upon moving to the state of Florabama, he inquired with the office of Florabama's Attorney General regarding a permit to bring his handgun from Virginia and was informed that no procedure existed to bring his handgun to Florabama because their possession was illegal. Plaintiff therefore left his firearm at his parents' residence in Virginia.

Hull's apartment was burglarized twice in the year after he moved to Browning. Accordingly, he seeks to retrieve his Glock Model 22 .40 Cal. handgun from Virginia and bring it to Browning for the stated purpose of defending himself and his family. Plaintiff now raises a Second Amendment challenge to FLORABAMA CODE § 9-19.02. The State of Florabama does not have any state constitutional provision similar to the Second Amendment under the Federal Constitution.

## II. Legal Analysis

Plaintiff has filed suit under 42 U.S.C. § 1983, asking this Court to both declare the statute unconstitutional and enjoin Adam Humphries, the Attorney General of the State of Florabama, from applying § 9-19.02 (a)(6) against Plaintiff. Because this Court agrees with his reasoning and analysis, both the requested declaratory and injunctive relief shall be granted.

Defendant argues that the Second Amendment ("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") does not bestow any rights on individuals except, perhaps, when an individual serves in an organized militia such as today's National Guard.

Hull wants to possess a handgun in his home for self-defense. Hull applied for and was denied a registration certificate to own a handgun. Defendant, in refusing his request, explicitly relied on FLORABAMA CODE § 9-19.02.

Essentially, Hull claims a right to possess what he describes as "functional firearms," by which he means ones that could be "readily accessible to be used effectively when necessary" for self-defense in the home. He is not asserting a right to carry such weapons outside his home. Nor is he challenging Florabama's authority per se to require the registration of firearms.

Defendant counters that the Second Amendment, at most, protects an

individual's right to "bear arms for service in the Militia." (Defendant does not refer to the word "keep" in the Second Amendment.) And, by the term "Militia," Defendant concludes the Second Amendment referred to an organized military body--such as a National Guard unit.

## III

The Second Amendment provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

U.S. CONST. amend. II.

The provision's second comma divides the Amendment into two phrases; the first is prefatory, and the second operative. Plaintiff's argument is focused on his reading of the Second Amendment's operative phrase. According to Plaintiff, the Amendment's language flat out guarantees an individual right "to keep and bear Arms." Plaintiff concedes that the prefatory phrase expresses a civic purpose, but argues that this purpose, while it may inform the meaning of the ambiguous term "Arms," does not qualify the right guaranteed by the operative portion of the Amendment.

Defendant argues that the prefatory phrase declares the Amendment's only purpose--to shield the state militias from federal encroachment--and that the operative phrase, even when read in isolation, speaks solely to military affairs and guarantees a civic, rather than an individual, right. In other words,

according to Defendant, the operative phrase is not just limited by the prefatory phrase, but instead both clauses share an explicitly civic character. Defendant claims that the Second Amendment protects the private possession of weapons only in connection with the performance of civic duties as part of a well-regulated citizens' militia organized for the security of a free state. Individuals may be able to enforce the Second Amendment right, but only if the law in question "will impair their participation in common defense and law enforcement when called to serve in the militia." But because Defendant reads "a well regulated Militia" to signify only the organized militias of the founding era--institutions that Defendant implicitly argues are no longer in existence today--invocation of the Second Amendment right is conditioned upon service in a defunct institution. Tellingly, Defendant did not suggest what sort of law, if any, would violate the Second Amendment today--in fact, Defendant's brief asserts that it would be constitutional for the State to ban all firearms outright. In short, the Defendant's position appears to be that the Second Amendment is a dead letter.

Defendant claims that the Second Amendment was written in response to fears that the new federal government would disarm the state militias by preventing men from bearing arms while in actual militia service, or by preventing them from keeping arms at home in preparation for such service. Thus the Amendment should be understood to check federal power to regulate firearms only when federal legislation was directed at the abolition of state militias, because the Amendment's exclusive

concern was the preservation of those entities. At first blush, it seems passing strange that the able lawyers and statesmen in the First Congress (including James Madison) would have expressed a sole concern for state militias with the language of the Second Amendment. Surely there was a more direct locution, such as "Congress shall make no law disarming the state militias" or "States have a right to a well-regulated militia."

Defendant's argument--as strained as it seems--is hardly an isolated view. In the Second Amendment debate, there are two camps. On one side are the "collective right" theorists who argue that the Amendment protects only a right of the various state governments to preserve and arm their militias. So understood, the right amounts to an expression of militant federalism, prohibiting the federal government from denuding the states of their armed fighting forces. On the other side of the debate are those who argue that the Second Amendment protects a right of individuals to possess arms for private use. To these individual right theorists, the Amendment guarantees personal liberty analogous to the First Amendment's protection of free speech, or the Fourth Amendment's right to be free from unreasonable searches and seizures. However, some "enterprising" scholars purport to occupy a middle ground between the individual and collective right models.

The most prominent "in-between" theory developed by academics has been named the "sophisticated collective right"

model.<sup>1</sup> The sophisticated collective right label describes several variations on the collective right theme. All versions of this model share two traits: They (1) acknowledge individuals could, theoretically, raise Second Amendment claims against the federal government, but (2) define the Second Amendment as a purely civic provision that offers no protection for the private use and ownership of arms.

Defendant advances this sort of theory and suggests that the ability of individuals to raise Second Amendment claims serves to distinguish it from the pure collective right model. But when seen in terms of its practical consequences, the fact that individuals have standing to invoke the Second Amendment is a distinction without a difference. But *cf. Emerson*, 270 F.3d at 218-21 (treating the sophisticated collective right model as distinct from the collective right theory). Both the collective and sophisticated collective theories assert that the Second Amendment was written for the exclusive purpose of preserving state militias, and both theories deny that individuals *qua* individuals can avail themselves of the Second Amendment today. The latter point is true either because, as Defendant appears to argue, the "Militia" is no longer in existence, or, as others argue, because the militia's modern analogue, the National Guard, is

fully equipped by the federal government, creating no need for individual ownership of firearms. It appears that for all its nuance, the sophisticated collective right model amounts to the old collective right theory giving a tip of the hat to the problematic (because ostensibly individual) text of the Second Amendment.

Federal district courts are divided between these competing interpretations. Federal appellate courts have largely adopted the collective right model.<sup>2</sup> Only the Fifth Circuit has interpreted the Second Amendment to protect an individual right.<sup>3</sup> State appellate courts, whose interpretations of the U.S.

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<sup>2</sup> See *Silveira*, 312 F.3d at 1092; *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1273-74 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916, 921-23 (1st Cir. 1942).

Defendant cites a decision in the Second Circuit, *United States v. Toner*, 728 F.2d 115 (2d Cir. 1984), as holding that the Second Amendment protects only a right related to "civic purposes." Defendant's reliance on this case is plainly wrong. In *Toner*, the court stated only that the Second Amendment right was not "fundamental." *Id.* at 128. The opinion in no way addressed the question whether the Second Amendment requires that use and possession of a weapon be for civic purposes. The Defendant cannot point to any Second Circuit decision that directly addresses the collective versus individual nature of the Second Amendment right. See *Silveira*, 312 F.3d at 1063 n.11 (noting that the Second Circuit had yet to decide nature of Second Amendment right).

<sup>3</sup> *Emerson*, 270 F.3d at 264-65.

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<sup>1</sup> See *United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004); *United States v. Price*, 328 F.3d 958, 961 (7th Cir. 2003); *United States v. Emerson*, 270 F.3d 203, 219 (5th Cir. 2001); *Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 218 (D.D.C. 2004); see also ROBERT J. COTTRILL & RAYMOND T. DIAMOND, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1003-04 (1995).

Constitution are no less authoritative than those of federal courts outside the Twelfth Circuit, offer a more balanced picture.<sup>4</sup> And the United States Department of Justice has recently adopted the individual right model. *See* Op. Off. of Legal Counsel, "Whether the Second Amendment Secures an Individual Right" (2004) *available at* <http://www.usdoj.gov/olc/secondamendment2.pdf>. The great legal treatises of the nineteenth century support the individual right interpretation, *see* *Silveira v. Lockyer*, 328 F.3d 567, 583-85 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing *en banc*); *Emerson*, 270 F.3d at 236, 255-59, as does Professor Laurence Tribe's

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<sup>4</sup> Of the state appellate courts that have examined the question, at least seven have held that the Second Amendment protects an individual right, *see* *Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. Ct. App. 1988); *Brewer v. Ky.*, 206 S.W.3d 343, 347 & n.5 (Ky. 2006); *La. v. Blanchard*, 776 So. 2d 1165, 1168 (La. 2001); *Mont. v. Nickerson*, 247 P.2d 188, 192 (Mont. 1952); *Stillwell v. Stillwell*, 2001 WL 862620, at \*4 (Tenn. Ct. App. July 30, 2001); *Tenn. v. Anderson*, 2000 WL 122218, at \*7 n.3 (Tenn. Crim. App. Jan. 26, 2000); *Wash. v. Williams*, 148 P.3d 993, 998 (Wash. 2006); *Rohrbaugh v. W. Va.*, 607 S.E.2d 404, 412 (W. Va. 2004), whereas at least ten state appellate courts have endorsed the collective right position, *see* *United States v. Sandidge*, 520 A.2d 1057, 1058 (D.C. 1987); *Mass. v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980); *Harris v. Nev.*, 432 P.2d 929, 930 (Nev. 1967); *Burton v. Sills*, 248 A.2d 521, 526 (N.J. 1968); *In re Cassidy*, 268 A.D. 282 (N.Y. App. Div. 1944); *N.C. v. Fennell*, 382 S.E.2d 231, 232 (N.C. Ct. App. 1989); *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976); *Masters v. Tex.*, 653 S.W.2d 944, 945 (Tex. App. 1983); *Utah v. Vlacil*, 645 P.2d 677, 679 (Utah 1982); *see also* *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 269 (Ill. 1984) (stating in dicta that Second Amendment protects collective right).

leading treatise on constitutional law.<sup>5</sup> Because there is no direct precedent--either in this court or the Supreme Court--that provides a square holding on the question, this Court will first look to the text of the Amendment.

## A

The Second Amendment's operative phrase states: "the right of the people to keep and bear Arms shall not be infringed." Plaintiff contends that "the right of the people" clearly contemplates an individual right and that "keep and bear Arms" necessarily implies private use and ownership. Defendant's primary argument is that "keep and bear Arms" is best read in a military sense, and, as a consequence, the entire operative clause should be understood as granting only a collective right. Defendant also argues that "the right of the people" is ambiguous as to whether the right protects civic or private ownership and use of weapons.

In determining whether the Second Amendment's guarantee is an individual one, or some sort of collective right, the most important word is the one the drafters chose to describe the holders of the right--"the people." That term is found in the First, Second, Fourth, Ninth, and Tenth Amendments. It has never been doubted that these provisions were designed to protect the interests of individuals against governmental

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<sup>5</sup> *See* 1 LAURENCE TRIBE, *AMERICAN CONST. LAW* 902 & n.221 (3d ed. 2000). Professor Tribe was not always of this view. *See* SANFORD LEVINSON, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 640 (1989) (critiquing Tribe's earlier collective right position).



intrusion, interference, or usurpation. I also note that the Tenth Amendment-- "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"-- indicates that the authors of the Bill of Rights were perfectly capable of distinguishing between "the people," on the one hand, and "the states," on the other. The natural reading of "the right of the people" in the Second Amendment would accord with usage elsewhere in the Bill of Rights.

Defendant's argument, on the other hand, reads "the people" to mean some subset of individuals such as "the organized militia" or "the people who are engaged in militia service," or perhaps not any individuals at all--e.g., "the states." See *Emerson*, 270 F.3d at 227. These strained interpretations of "the people" simply cannot be squared with the uniform construction of our other Bill of Rights provisions. Indeed, the Supreme Court has endorsed a uniform reading of "the people" across the Bill of Rights. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court looked specifically at the Constitution and Bill of Rights' use of "people" in the course of holding that the Fourth Amendment did not protect the rights of non-citizens on foreign soil:

"[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S.

CONST. Amend. I; Art. I, § 2, cl. 1. While this textual exegesis is by no means conclusive, it suggests that "the 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.

*Id.* at 265. It seems unlikely that the Supreme Court would have lumped these provisions together without comment if it were of the view that the Second Amendment protects only a collective right. The Court's discussion certainly indicates--if it does not definitively determine--that "the people" in the Second Amendment should not be regarded as somehow restricted to a small subset of "the people" meriting protection under the other Amendments' use of that same term.

In sum, the phrase "the right of the people," when read intratextually and in light of Supreme Court precedent, leads this Court to conclude that the right in question is individual. This proposition is true even though "the people" at the time of the founding was not as inclusive a concept as "the people" today. See ROBERT E. SHALLOPE, *To Keep and Bear Arms in the Early Republic*, 16 CONST. COMMENT. 269, 280-81 (1999). To the extent that non-whites, women, and the propertyless were excluded from the protections afforded to "the people," the Equal Protection Clause of the Fourteenth Amendment is understood to have corrected that initial constitutional shortcoming.

The wording of the operative clause also indicates that the right to “keep and bear arms” was not *created* by government, but rather *preserved* by it. See THOMAS B. MCAFFEE & MICHAEL J. QUINLAN, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 890 (1997). Hence, the Amendment acknowledges “the right . . . to keep and bear Arms,” a right that predated the Constitution like “the freedom of speech.” Because the right to arms existed prior to the formation of the new government, see *Robertson v. Baldwin*, 165 U.S. 275, 280 (1897) (describing the origin of the Bill of Rights in English law), the Second Amendment only guarantees that the right “shall not be infringed.” Thomas Cooley, in his influential treatise, observed that the Second Amendment had its origins in the struggle with the Stuart monarchs in late-seventeenth-century England. See THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONST. LAW IN THE U.S. OF AMERICA* 270-72 (Rothman & Co. 1981) (1880).<sup>6</sup>

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<sup>6</sup> Indeed, England’s Bill of Rights of 1689 guaranteed “[t]hat the Subjects, which are Protestants, may have Arms for their Defence, suitable to their conditions, as allowed by law.” 1 W. & M., Sess. 2, c. 2. Here too, however, the right was not newly created, but rather recognized as part of the common law tradition. The ancient origin of the right in England was affirmed almost a century later, in the aftermath of the anti-Catholic Gordon riots of 1780, when the Recorder of London, who was the foremost legal advisor to the city as well as the chief judge of the Old Bailey, gave the following opinion on the legality of private organizations armed for defense against rioters:

The right of His majesty’s Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and

To determine what interests this pre-existing right protected, this Court looks to the lawful, private purposes for which people of the time owned and used arms. The correspondence and political dialogue of the founding era indicate that arms were kept for lawful use in self-defense and hunting. See *Emerson*, 270 F.3d at 251-55 (collecting historical materials); ROBERT E. SHALLOPE, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 602-14 (1982); see also PA. CONST. § 43 (Sept. 28, 1776) (“The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not enclosed . . .”).

The pre-existing right to keep and bear arms was premised on the commonplace assumption that individuals would use them for these private purposes, in addition to whatever militia service they would be obligated to perform for the

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undeniable. It seems, indeed, to be considered, by the ancient laws of the Kingdom, not only as a right, but as a duty; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right which every Protestant most unquestionably possesses, individually, may, and in many cases must, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.

*Opinion on the Legality of the London Military Foot Association*, reprinted in WILLIAM BLIZZARD, *DESULTORY REFLECTIONS ON POLICE* 59-60 (1785). For further examination of the Second Amendment’s English origins, see generally JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* (1994).

state. The premise that private arms would be used for self-defense accords with Blackstone's observation, which had influenced thinking in the American colonies, that the people's right to arms was auxiliary to the natural right of self-preservation. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES \*136, \*139; *see also* *Silveira*, 328 F.3d at 583-85 (Kleinfeld, J.); *Kasler v. Lockyer*, 2 P.3d 581, 602 (Cal. 2000) (Brown, J., concurring). The right of self-preservation, in turn, was understood as the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government. *See* *Silveira*, 328 F.3d at 583-85 (Kleinfeld, J.); *see also id.* at 569-70 (Kozinski, J., dissenting from the denial of rehearing *en banc*); *Kasler*, 2 P.3d at 605 (Brown, J., concurring).<sup>7</sup>

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<sup>7</sup> The importance of the private right of self-defense is hardly surprising when one remembers that most Americans lacked a professional police force until the middle of the nineteenth century, *see* LEVINSON, *supra*, at 646 & n.46, and that many Americans lived in backcountry such as the Northwest Territory.

With respect to the right to defend oneself against tyranny and oppression, some have argued that the Second Amendment is utterly irrelevant because the arms it protects, even if commonly owned, would be of no use when opposed to the arsenal of the modern state. But as Judge Kozinski has noted, incidents such as the Warsaw ghetto uprising of 1943 provide rather dramatic evidence to the contrary. *See* *Silveira*, 328 F.3d at 569-70 (dissenting from the denial of rehearing *en banc*). The deterrent effect of a well-armed populace is surely more important than the probability of overall success in a full-out armed conflict. Thus could Madison write to the people of New York in 1788:

Notwithstanding the military establishments in the several kingdoms of Europe, which are

When viewing the Bill of Rights as a whole, the setting of the Second Amendment reinforces its individual nature. The Bill of Rights was almost entirely a declaration of individual rights, and the Second Amendment's inclusion therein strongly indicates that it, too, was intended to protect personal liberty. The collective right advocates ask this Court to imagine that the First Congress situated a *sui generis* states' right among a catalogue of cherished individual liberties without comment. This Court cannot believe the canon of construction known as *noscitur a sociis* applies here. Just as an ambiguous statutory term is read in light of its context, any supposed ambiguities in the Second Amendment are read in light of its context. Every other provision of the Bill of Rights, excepting the Tenth, which speaks explicitly about the allocation of governmental power, protects rights enjoyed by citizens in their individual capacity. The Second Amendment would be an inexplicable aberration if it were not read to protect individual rights as well.

Defendant insists that the phrase "keep and bear Arms" should be read as purely military language, and thus indicative of a civic, rather than private, guarantee. The term "bear Arms" is obviously susceptible to a military construction. But it is not accurate to construe it exclusively so. First, the word "bear" in

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carried as far as public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone they would not be able to shake off their yokes.

THE FEDERALIST NO. 46, at 299-300 (James Madison) (Clinton Rossiter ed., 1961).

this context is simply a more formal synonym for "carry," i.e., "Beware of Greeks bearing gifts." The Oxford English Dictionary and the original Webster's list the primary meaning of "bear" as "to support" or "to carry." See *Silveira*, 328 F.3d at 573 (Kleinfeld, J.). Dr. Johnson's Dictionary--which the Supreme Court often relies upon to ascertain the founding-era understanding of text, see, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003)--is in accord. The first three definitions for "bear" are "to carry as a burden," "to convey or carry," and "to carry as a mark of authority." See JOHNSON'S AND WALKER'S ENGLISH DICTIONARIES COMBINED 126 (J.E. Worcester ed., 1830) [hereinafter Johnson].

Historical usage, as gleaned from the O.E.D. and Webster's, supports the notion that "bear arms" was sometimes used as an idiom signifying the use of weaponry in conjunction with military service. However, these sources also confirm that the idiomatic usage was not absolute. *Silveira*, 328 F.3d at 573 (Kleinfeld, J.); *Emerson*, 270 F.3d at 229-32. Just as it is clear that the phrase "to bear arms" was in common use as a byword for soldiering in the founding era, see, e.g., GARY WILLS, *To Keep and Bear Arms*, N.Y. REV. OF BOOKS, Sept. 21, 1995, at 62-73, it is equally evident from a survey of late eighteenth- and early nineteenth-century state constitutional provisions that the public understanding of "bear Arms" also encompassed the carrying of arms for private purposes such as self-defense. See *Emerson*, 270 F.3d at 230 n.29 (collecting state constitutional provisions referring to the people's right to "bear arms in defense of themselves and the

State" among other formulations). Thus, it would hardly have been unusual for a writer at the time (or now) to have said that, after an attack on a house by thieves, the men set out to find them "bearing arms."

Defendant relies heavily on the use of "bearing arms" in a conscientious objector clause that formed part of Madison's initial draft of the Second Amendment. The purpose of this clause, which was later dropped from the Amendment's text, was to excuse those "religiously scrupulous of bearing arms" from being forced "to render military service in person." THE COMPLETE BILL OF RIGHTS 169 (Neil H. Cogan ed., 1997). Defendant argues that the conscientious objector clause thus equates "bearing arms" with military service. The Quakers, Mennonites, and other pacifist sects that were to benefit by the conscientious objector clause had scruples against soldiering, but not necessarily hunting, which, like soldiering, involved the carrying of arms. And if "bearing arms" only meant "carrying arms," it is argued, the phrase would not have been used in the conscientious objector clause because Quakers were not religiously scrupulous of carrying arms generally; it was carrying arms for militant purposes that the Friends truly abhorred (although many Quakers certainly frowned on hunting as the wanton infliction of cruelty upon animals). See THOMAS CLARKSON, A PORTRAITURE OF QUAKERISM, VOL. I. That Madison's conscientious objector clause appears to use "bearing arms" in a strictly military sense does at least suggest that "bear Arms" in the Second Amendment's operative clause includes the carrying of

arms for military purposes. However, there are too many instances of "bear arms" in reference to private use to conclude that the drafters intended only a military sense.

In addition to the state constitutional provisions collected in *Emerson*, there is the following statement in the report issued by the dissenting delegates at the Pennsylvania ratification convention:

That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game . . . .

THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PA. TO THEIR CONSTITUENTS, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 145, 151 (Herbert J. Storing ed., 1981). These dissenting Antifederalists, writing in December 1787, were clearly using "bear arms" to include uses of weaponry outside the militia setting--e.g., one may "bear arms . . . for the purpose of killing game."<sup>8</sup>

It should also be noted that at least three current members (and one former member) of the Supreme Court have read "bear Arms" in the Second

Amendment to have meaning beyond mere soldiering: "Surely a most familiar meaning [of 'carries a firearm'] is, as the Constitution's Second Amendment ('keep and bear Arms') and Black's Law Dictionary . . . 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.'"

*Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting, joined by Rehnquist, C.J., Scalia, J., and Souter, J.) (emphasis in original). Based on the foregoing, this Court concludes that the operative clause includes a private meaning for "bear Arms."

In contrast to the collective right theorists' extensive efforts to tease out the meaning of "bear," the conjoined, preceding verb "keep" has been almost entirely neglected. In that tradition, Defendant offers a cursory and largely dismissive analysis of the verb. Defendant appears to claim that "keep and bear" is a unitary term and that the individual word "keep" should be given no independent significance. This suggestion is somewhat surprising in light of Defendant's statement, earlier in his brief, that when interpreting constitutional text "every word must have its due force, and appropriate meaning; . . . no word was unnecessarily used or needlessly added." Def.'s Br. at 23 (quoting *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840)). Even if "keep" and "bear" are not read as a unitary term, Defendant claims, the meaning of "keep" cannot be broader than "bear" because the Second Amendment only protects the use of

<sup>8</sup> To be sure, collective right theorists have correctly observed that the Pennsylvania dissenters were not speaking for anyone but themselves--that is, they lost in their attempt to defeat ratification of the Constitution, and lacked the clout to have their suggested amendments sent to the First Congress, unlike the Antifederalist delegates in other state conventions. See JACK N. RAKOVE, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 134-35 (2000). But that the dissenting delegates were political losers does not undercut their status as competent users of late-eighteenth-century English.

arms in the course of militia service. *Id.* at 26-27. But this proposition assumes its conclusion, and is unpersuasive.

One authority cited by Defendant has attempted to equate "keep" with "keep up," a term that had been used in phrases such as "keep up a standing army" or, as in the Articles of Confederation, "every state shall keep up a well regulated and disciplined militia . . . ." See WILLS, *supra*, at 66. The argument that "keep" as used in "the right of the people to keep . . . Arms" shares a military meaning with "keep up" as used in "every state shall keep up a well regulated militia" runs contrary to normal usage, syntax, and common sense. Such views are likely advanced because the plain meaning of "keep" strikes a mortal blow to the collective right theory. Turning again to Dr. Johnson's Dictionary, the first three definitions of "keep" are "to retain; not to lose," "to have in custody," "to preserve; not to let go." JOHNSON, *supra*, at 540. "Keep" is a straightforward term that implies ownership or possession of a functioning weapon by an individual for private use. *Emerson*, 270 F.3d at 231 & n.31; *accord Silveira*, 328 F.3d at 573-74 (Kleinfeld, J.). The term "bear arms," when viewed in isolation, might be thought ambiguous; it could have a military cast. But since "the people" and "keep" have obvious individual and private meanings, those words resolve any supposed ambiguity in the term "bear arms."

\* \* \*

The parties generally agree that the prefatory phrase declares the Second Amendment's civic purpose--i.e.,

insuring the continuance of the militia system--and only disagree over whether that purpose was exclusive. The parties do attribute dramatically different meanings to "a well regulated Militia." Plaintiffs argue that the militia referenced in the Second Amendment's prefatory phrase was "practically synonymous" with "the people" referenced in the operative phrase. Defendant advances a much more limited definition. According to Defendant, the militia was a body of adult men regulated and organized by state law as a civilian fighting force. The crucial distinction between the parties' views then goes to the nature of the militia: Plaintiff claims no organization was required, whereas Defendant claims a militia did not exist unless it was subject to state discipline and leadership. As already noted, Defendant claims that "the Framers' militia has faded into insignificance."

The parties draw on *United States v. Miller*, 307 U.S. 174 (1939), to support their differing definitions. *Miller*, a rare Second Amendment precedent in the Supreme Court, described the militia in the following terms:

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.

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of

approved commentators. These show plainly enough 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.

*Id.* at 178-79.

Defendant claims that *Miller's* historical account of the "Militia" supports its position. Yet according to *Miller*, the militia included "all males physically capable of acting in concert for the common defence" who were "enrolled for military discipline." And *Miller's* expansive definition of the militia--qualitatively different from Defendant's concept--is in accord with the second Militia Act of 1792, passed by the Second Congress.<sup>9</sup> Act of May 8, 1792, ch. XXXIII, 1 Stat. 271. Of course, many of the members of the Second Congress were also members of the First, which had drafted the Bill of Rights. But more importantly, they were conversant with the common understanding of both the First Congress and the ratifying state legislatures as to what was meant by "Militia" in the Second Amendment. The second Militia

Act placed specific and extensive requirements on the citizens who were to constitute the militia:

Be it enacted . . . [t]hat each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be *enrolled* in the militia, by the captain or commanding officer of the company, within whose bounds such citizen shall reside, and that within twelve months after the passing of this Act. And . . . every such captain or commanding officer of a company . . . shall without delay notify such citizen of the said enrollment . . . . That every citizen, so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear so armed, accoutred and provided, when called out to exercise, or into service.

*Id.* (emphasis added).<sup>10</sup>

<sup>9</sup> The second Militia Act was passed on May 8, 1792. On May 2, 1792, Congress had enacted a Militia Act "providing for the authority of the President to call out the Militia." Act of May 2, 1792, ch. XXVIII, 1 Stat. 264. The first Militia Act gave the President power to call forth the Militia in cases of invasion by a foreign nation or Indian tribe, and also in cases of internal rebellion. If the militia of the state wherein the rebellion was taking place either was unable to suppress it or refused to be called up, the first Militia Act gave the President authority to use militia from other states.

<sup>10</sup> Congress enacted this provision pursuant to its Article I, Section 8 powers over the militia: "The Congress shall have 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, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress . . . ." U.S. CONST. art. I, § 8.

The reader will note that the Act's first requirement is that the "free able-bodied white male" population between eighteen and forty-five enroll in the militia. Enrollment was quite distinct from the various other regulations prescribed by Congress, which included the type of weaponry members of the militia must own. Becoming "enrolled" in the militia appears to have involved providing one's name and whereabouts to a local militia officer--somewhat analogous to our nation's current practice of requiring young men to register under the Selective Service Act. *Silveira*, 328 F.3d at 578 (Kleinfeld, J.). Thus, when read in light of the second Militia Act, *Miller* defines the militia as having only two primary characteristics: It consisted of all free, white, able-bodied men of a certain age who had given their names to the local militia officers as eligible for militia service. Contrary to Defendant's view, there was no organizational condition precedent to the existence of the "Militia." Congress went on in the second Militia Act to prescribe a number of rules for organizing the militia. But the militia itself was the raw material from which an organized fighting force was to be created. Thus, the second Militia Act reads:

And be it further enacted, *That out of the militia enrolled as is herein directed*, there shall be formed for each battalion at least one company of grenadiers, light infantry or riflemen; and that to each division there shall be at least one company of artillery, and one troop of horse: There shall be to each company of artillery, one captain, two lieutenants, four sergeants, four corporals, six gunners, six bombardiers, one drummer, and one fifer.

*Id.* at 272 (emphasis added).

The crucial point is that the existence of the militia preceded its organization by Congress, and it preceded the implementation of Congress's organizing plan by the states. Defendant's definition of the militia is just too narrow. The militia was a large segment of the population--not quite synonymous with "the people," as appellants contend--but certainly not the organized "divisions, brigades, regiments, battalions, and companies" mentioned in the second Militia Act. *Id.* at 272.

The current congressional definition of the "Militia" accords with original usage: "The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard." 10 U.S.C. § 311. The statute then distinguishes between the "organized militia," which consists of the National Guard and Naval Militia, and the "unorganized militia," which consists of every member of the militia who is not a member of the National Guard or Naval Militia. *Id.* Just as in the 1792 enactment, Congress defined the militia broadly, and, more explicitly than in its founding-era counterpart, Congress provided that a large portion of the militia would remain unorganized. Florabama has a similar structure for its own militia: "Every able-bodied male citizen resident within Florabama, of the age of 18 years and under the age of 45 years, excepting . . . idiots, lunatics, common drunkards, vagabonds, paupers, and persons convicted of any infamous



crime, shall be enrolled in the militia."  
FLORABAMA CODE § 59-378.

Defendant argues that the modifier "well regulated" means that "[t]he militia was not individuals acting on their own; one cannot be a one-person militia."

Although the Defendant correctly states that that the militia was a collective body designed to act in concert, Defendant wrongly claims that the use of "well regulated" in the constitutional text somehow turns the popular militia embodied in the 1792 Act into a "select" militia that consisted of semi-professional soldiers like our current National Guard. Contemporaneous legislation once again provides guidance in reading ambiguous constitutional text. *See Silveira*, 328 F.3d at 579-80 (Kleinfeld, J.).

The second Militia Act provides a detailed list of directions to both individuals and states, which indicates what the drafters of the Second Amendment contemplated as a "well regulated Militia." The second Militia Act requires that eligible citizens enroll in the militia and, within six months, arm themselves accordingly. Subsequent to enrollment, arming oneself became the first duty of all militiamen. *See id.* at 581 (Kleinfeld, J.). The Act goes on to require of the states that the militiamen be notified of their enrollment; that within one year, the states pass laws to arrange the militia into divisions, brigades, regiments, battalions, and companies, as well as appoint various militia officers; that there be an Adjutant General appointed in each state to distribute all orders for the Commander in Chief of the State to the several corps, and so on.

The statute thus makes clear that these requirements were independent of each other, i.e., militiamen were obligated to arm themselves regardless of the organization provided by the states, and the states were obligated to organize the militia, regardless of whether individuals had armed themselves in accordance with the statute. These dual requirements--that citizens were properly supplied with arms and subject to organization by the states (as distinct from actually organized)—are a clear indication of what the authors of the Second Amendment contemplated as a "well regulated Militia."

Another aspect of "well regulated" implicit in the second Militia Act is the exclusion of certain persons from militia service. For instance, the Act exempts from militia duty "the Vice President of the United States, [executive branch officers and judges], Congressmen, custom house officers, . . . post officers, . . . all Ferrymen employed at any ferry on the post road, . . . all pilots, all mariners actually employed in the sea service of any citizen or merchant within the United States; and all persons who now are or may be hereafter exempted by the laws of the respective states." Act of May 8, 1792, ch. XXXIII, 1 Stat. 271. Thus, even after the founding-era militia became "well regulated," it did not lose its popular character. The militia still included the majority of adult men (albeit, at the time, "free able-bodied white male[s]"), who were to arm themselves, and whom the states were expected to organize into fighting units. Quite unlike today's National Guard, participation was widespread and mandatory.

As the foregoing makes clear, the "well regulated Militia" was not an elite or select body. *See Silveira*, 328 F.3d at 577-78 (Kleinfeld, J.). While some of the founding fathers, including George Washington and Alexander Hamilton, favored such organizations over a popular militia, *see* THE ORIGIN OF THE SECOND AMENDMENT at xlvii (David E. Young ed., 2d ed. 1995), the Second Congress unambiguously required popular participation. The important point is that the popular nature of the militia is consistent with an individual right to keep and bear arms: Preserving an individual right was the best way to ensure that the militia could serve when called.

\* \* \*

Defendant argues that even if one reads the operative phrase in isolation, it supports the collective right interpretation of the Second Amendment. Alternatively, Defendant contends that the operative phrase should not, in fact, be read in isolation, and that it is imbued with the civic character of the prefatory phrase when the Amendment is read, correctly, as two interactive clauses. Defendant points to the singular nature of the Second Amendment's preamble as an indication that the operative phrase must be restricted or conditioned in some way by the prefatory language. *Compare* EUGENE VOLOKH, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998), *with* MICHAEL C. DORF, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000). However, the structure of the Second Amendment turns out to be not so unusual when one examines state

constitutional provisions guaranteeing rights or restricting governmental power. It was quite common for prefatory language to state a principle of good government that was narrower than the operative language used to achieve it. VOLOKH, *supra*, at 801-07.

The Second Amendment was similarly structured. The prefatory language announcing the desirability of a well-regulated militia--even bearing in mind the breadth of the concept of a militia--is narrower than the guarantee of an individual right to keep and bear arms. The Amendment does not protect "the right of militiamen to keep and bear arms," but rather "the right of the people." The operative phrase, properly read, protects the ownership and use of weaponry beyond that needed to preserve the state militias. Again, it should be pointed out that if the competent drafters of the Second Amendment had meant the right to be limited to the protection of state militias, it is hard to imagine that they would have chosen the language they did. Thus, it is an expression of the drafters' view that the people possessed a natural right to keep and bear arms, and that the preservation of the militia was the right's most salient political benefit--and thus the most appropriate to express in a political document.

That the Amendment's civic purpose was placed in a preamble makes perfect sense given the then-recent ratification controversy, wherein Antifederalist opponents of the 1787 Constitution agitated for greater assurance that the militia system would remain robust so that standing armies, which were thought by many at the time to be the bane of

liberty, would not be necessary. *See* BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 338-60 (Enlarged ed., 1992). The Federalists, who dominated the First Congress, offered the Second Amendment's preamble to palliate Antifederalist concerns about the continued existence of the popular militia. But neither the Federalists nor the Antifederalists thought the federal government had the power to disarm the people. This is evident from the ratification debates, where the Federalists relied on the existence of an armed populace to deflect Antifederalist criticism that a strong federal government would lead to oppression and tyranny. Antifederalists acknowledged the argument, but insisted that an armed populace was not enough, and that the existence of a popular militia should also be guaranteed. *Compare* THE FEDERALIST Nos. 8, 28, 59 (Alexander Hamilton), No. 46 (James Madison) (arguing that an armed populace constitutes a check on the potential abuses of the federal government) *with* MELANCTON SMITH [Federal Farmer], *OBSERVATIONS TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATE CONVENTION, AND TO SEVERAL ESSENTIAL AND NECESSARY ALTERATIONS IN IT* (Nov. 8, 1787), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT, *supra*, at 89, 91 (despite the fact that the "yeomanry of the country . . . possess arms" for defense, the federal government could undermine the regular militia and render the armed populace of no importance).

To be sure, as Defendant argues, the *Miller* Court did draw upon the prefatory

phrase to interpret the term "Arms" in the operative phrase. Interpreting "Arms" in light of the Second Amendment's militia purpose makes sense because "Arms" is an open-ended term that appears but once in the Constitution and Bill of Rights. But *Miller* does not command that the sensible constitutional text such as "the right of the people" be limited in a manner inconsistent with other constitutional provisions. Similarly, the Second Amendment's use of "keep" does not need to be recast in artificially military terms in order to conform to *Miller*.

When interpreting the text of a constitutional amendment it is common for courts to look for guidance in the proceedings of the Congress that authored the provision. Unfortunately, the Second Amendment's drafting history is relatively scant and inconclusive. *Emerson*, 270 F.3d at 245-51. The recorded debates in the First Congress do not reference the operative clause, a likely indication that the drafters took its individual guarantee as rather uncontroversial. There is certainly nothing in this history to substantiate the strained reading of the Second Amendment offered by Defendant.

## B

There is no unequivocal precedent that dictates the outcome of this case. This Court has never decided whether the Second Amendment protects an individual or collective right to keep and bear arms. The Supreme Court has not decided this issue either. *See Fraternal Order of Police v. United States (F.O.P. II)*, 335 U.S. App. D.C. 359, 173 F.3d

898, 906 (D.C. Cir. 1999). The leading Second Amendment case in the Supreme Court is *Miller*. While *Miller* provides the best guide, the Supreme Court's other statements on the Second Amendment warrant mention.

In *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the Court asserted the applicability of the Bill of Rights to the territories in the following terms:

[N]o one . . . will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances . . . [n]or can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding . . . . These powers . . . in relation to rights of person . . . are, in express and positive terms, denied to the General Government.

*Id.* at 450 (emphasis added). Although *Dred Scott* is as infamous as it was erroneous in holding that African-Americans are not citizens, this passage expresses the view, albeit in passing, that the Second Amendment contains a personal right. It is included among other individual rights, such as the right to trial by jury and the privilege against self-incrimination. The other Second Amendment cases of the mid-nineteenth century did not touch upon the individual versus collective nature of the Amendment's guarantee.<sup>11</sup>

<sup>11</sup> The Second Amendment is one of the few Bill of Rights provisions that has not yet been held to be incorporated through the Fourteenth Amendment. Some commentators suggest that a

In *Robertson v. Baldwin*, 165 U.S. 275 (1897), the Court addressed the scope of the term "involuntary servitude" in the Thirteenth Amendment. In discussing limitations inherent in that constitutional provision, the Court said the following:

The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the "Bill of Rights," 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. . . .

Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; *the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons*; the provision that no person shall be twice put in jeopardy (article 5) does not prevent a second trial, if upon

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battle over incorporation stands between the Amendment and any right enforceable against state legislation. See, e.g., GIL GRANTMORE, *The Phages of American Law*, 36 U.C. Davis. L. Rev. 455, 474-75 (2003). The problem of exegesis posed by the First Amendment, "Congress shall make no law . . . ." is that somehow the prohibition against federal laws has to be extended to state laws. The Second Amendment says that "the right of the people . . . shall not be infringed," without limiting this protection of "the people's" right to protection against the federal government, so there is no verbal barrier to incorporation as there was with the First Amendment. Since it is plain that the First and Fourth amendments, also protecting rights of "the people," are incorporated against the states, it is hard to discern any sound reason why the right of "the people" in the Second Amendment would not be similarly incorporated.

the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion; nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment.

165 U.S. at 281-82 (emphasis added). Just as in *Dred Scott*, the Second Amendment right is mentioned in a catalogue of other well-known individual right provisions, and, in the Supreme Court's thin Second Amendment jurisprudence, *Robertson* has the virtue of straightforwardly suggesting one permissible form of regulatory limitation on the right to keep and bear arms. The decision does not discuss whether the right is individual or collective. Still, *Robertson* tends to cut against any version of the collective right argument. If the right to keep and bear arms offered no protection to individuals, the Court would not likely pick as a noteworthy exception to the right a prohibition on concealed weapons. The individual nature of the permitted regulation suggests that the underlying right, too, concerned personal ownership of firearms.

Few decisions of Second Amendment relevance arose in the early decades of the twentieth century. Then came *Miller*, the Supreme Court's most thorough analysis of the Second Amendment to date, and a decision that both sides of the current gun control debate have claimed as their own. This Court agrees with the *Emerson* court (and the dissenting judges in the Ninth Circuit) that *Miller* does not lend support to the collective right model. See *Silveira*, 328 F.3d at

586-87 (Kleinfeld, J.); *Emerson*, 270 F.3d at 226-27. Nor does it support Defendant's quasi-collective position. Although *Miller* did not explicitly accept the individual right position, the decision implicitly assumes that interpretation.

*Miller* involved a Second Amendment challenge by criminal defendants to section 11 of the National Firearms Act (then codified at 26 U.S.C. §§ 1132 *et seq.*), which prohibited interstate transportation of certain firearms without a registration or stamped order. The defendants had been indicted for transporting a short-barreled shotgun from Oklahoma to Arkansas in contravention of the Act. The district court sustained defendants' demurrer challenging their indictment on Second Amendment grounds. The government appealed. The defendants submitted no brief and made no appearance in the Supreme Court. *Miller*, 307 U.S. at 175-77. Hearing the case on direct appeal, the Court reversed and remanded. *Id.* at 183.

On the question whether the Second Amendment protects an individual or collective right, the Court's opinion in *Miller* is most notable for what it omits. The government's first argument in *Miller* was the collective right interpretation of the Second Amendment. It is significant that the Court did not decide the case on this, the government's primary argument. *Emerson*, 270 F.3d at 222. Rather, the Court followed the logic of the government's secondary position, which was that a short-barreled shotgun was not within the scope of the term "Arms" in the Second Amendment:

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, I 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. *Aymette*, 21 Tenn. 154, 2 Humphreys (Tenn.) 154, 158.

*Miller*, 307 U.S. at 178 (emphasis added). The quotation makes apparent that the Court was focused only on what arms are protected by the Second Amendment, *see Emerson*, 270 F.3d at 224, and not the collective or individual nature of the right. If the *Miller* Court intended to endorse the government's first argument, i.e., the collective right view, it would have undoubtedly pointed out that the two defendants were not affiliated with a state militia or other local military organization. *Id.*

To be sure, the *Miller* Court linked the Second Amendment's language to the Constitution's militia phrase: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces [i.e., the militia] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." 307 U.S. at 178. This Court takes the "declaration and guarantee" referred to by the *Miller* Court to mean the Second Amendment's prefatory clause (which declares the necessity of a "well regulated Militia") and its operative clause (which

guarantees the preservation of a right) respectively.

Defendant incorrectly reads this passage as recognizing a limitation on the Second Amendment right based on the individual's connection (or lack thereof) to an organized functioning militia. As already discussed, the *Miller* court was examining the relationship between the weapon in question--a short-barreled shotgun--and the preservation of the militia system, which was the Amendment's politically relevant purpose. The term "Arms" was quite indefinite, but it would have been peculiar, to say the least, if it were designed to ensure that people had an individual right to keep weapons capable of mass destruction--e.g., cannons. Thus the *Miller* Court limited the term "Arms"--interpreting it in a manner consistent with the Amendment's underlying civic purpose. Only "Arms" whose "use or possession . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia," *id.* at 177, would qualify for protection.

Essential, then, to understanding what weapons qualify as Second Amendment "Arms" is an awareness of how the founding-era militia functioned. The Court explained its understanding of what the Framers had in mind when they spoke of the militia in the terms discussed above. The members of the militia were to be "civilians primarily, soldiers on occasion." *Id.* at 179. When called up by either the state or the federal government, "these men were expected to appear *bearing arms supplied by themselves and of the kind in*

*common use at the time.*" *Id.* (emphasis added).

\* \* \*

As noted above, the "Militia" was vast, including all free, white, able-bodied men who were properly enrolled with a local militia officer. By contrast, the Ninth Circuit has recently (and this Court thinks wrongly) read "Militia" to mean a "state-created and state-organized fighting force" that excludes the unorganized populace. *Silveira*, 312 F.3d at 1069. As Judge Kleinfeld noted, the Ninth Circuit's decision entirely ignores *Miller's* controlling definition of the militia. 328 F.3d at 578 (dissenting from denial of rehearing *en banc*). The Ninth Circuit's interpretation of "Militia" also fails to account for the second Militia Act of 1792, *id.* at 578-82. *Miller's* definition of the "Militia," then, offers further support for the individual right interpretation of the Second Amendment. Attempting to draw a line between the ownership and use of "Arms" for private purposes and the ownership and use of "Arms" for militia purposes would have been an extremely silly exercise on the part of the First Congress if indeed the very survival of the militia depended on men who would bring their commonplace, private arms with them to muster. A ban on the use and ownership of weapons for private purposes, if allowed, would undoubtedly have had a deleterious, if not catastrophic, effect on the readiness of the militia for action. It is difficult to see how one could believe that the First Congress, when crafting the Second Amendment, would have engaged in drawing such a foolish and impractical distinction, and the *Miller* Court recognized as much.

To summarize, this Court concludes that the Second Amendment protects an individual right to keep and bear arms. That right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad). In addition, the right to keep and bear arms had the important and salutary civic purpose of helping to preserve the citizen militia. The civic purpose was also a political expedient for the Federalists in the First Congress as it served, in part, to placate their Antifederalist opponents. The individual right facilitated militia service by ensuring that citizens would not be barred from keeping the arms they would need when called forth for militia duty. Despite the importance of the Second Amendment's civic purpose, however, the activities it protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.

#### IV

An alternative argument Defendant presents is that, even if the Second Amendment protects an individual right, it does not bar the State's regulation, indeed its virtual prohibition, of handgun ownership.

Defendant contends that modern handguns are not the sort of weapons covered by the Second Amendment. But

Defendant's claim runs afoul of *Miller's* discussion of "Arms." The *Miller* Court concluded that the defendants, who did not appear in the Supreme Court, provided no showing that short-barreled (or sawed-off) shotguns--banned by federal statute--bore "some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178. However, the Court also observed that militiamen were expected to bring their private arms with them when called up for service. Those weapons would be "of the kind in common use at the time." *Id.* at 179. There can be no question that most handguns (those in common use) fit that description then and now. *See Emerson*, 270 F.3d at 227 n.22 (assuming that a Beretta pistol passed the *Miller* test).

By the terms of the second Militia Act of 1792, all militiamen were given six months from the date of their enrollment to outfit themselves with "a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good *rifle*, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder . . . ." Act of May 8, 1792, ch. XXXIII, 1 Stat. 271 (emphasis added).

Commissioned officers had somewhat more onerous requirements. The Act demanded that, in addition to the foregoing, they "shall severally be armed with a sword or hanger and esponton . . . ." *Id.* at 271-72. Still further demands were placed on the artillery officers, who

were to be "armed with a sword or hanger, a fusee, bayonet and belt, with a cartridge-box to contain twelve cartridges . . . ." *Id.* at 272. But commissioned cavalry officers and dragoons had to assume an even greater expense, perhaps due to the fact that these were volunteer positions reserved for the well-off. The cavalry officers were required to procure "good horses of at least fourteen hands and a half high, and to be armed with a sword and pair of pistols, the holsters of which to be covered with bearskin caps." The dragoon had it even worse, being required to furnish himself "a serviceable horse, at least fourteen hands and a half high, a good saddle, bridle, mailpillion and valise, holsters, and a breast-plate and crupper, a pair of boots and spurs, a pair of *pistols*, a sabre, and a cartouch-box, to contain twelve cartridges for pistols." *Id.* at 272 (emphasis added).

These items were not mere antiques to be hung above the mantle. Immediately following the list of required weapons purchases, the Act provided that militiamen "shall appear so *armed*, accoutred and provided, when called out to exercise, or into service . . . ." *Id.* (emphasis added). The statute even planned phased-in upgrades in the quality of the militia's firearms: "[F]rom and after five years from the passing of this act, all muskets for arming the militia as herein required, shall be of bores sufficient for balls of the eighteenth part of a pound." *Id.* at 271-72.

It follows that the weapons described in the Act were in "common use" at the time, particularly when one considers the



widespread nature of militia duty. Included among these militia weapons were long guns (i.e., muskets and rifles) and pistols. Moreover, the Act distinguishes between the weapons citizens were required to furnish themselves and those that were to be supplied by the government. For instance, with respect to an artillery private (or "matross"), the Act provides that he should "furnish himself with all the equipments of a private in the infantry, until proper ordnance and field artillery is provided." *Id.* at 272. The Act required militiamen to acquire weapons that were in common circulation and that individual men would be able to employ, such as muskets, rifles, pistols, sabres, hangers, etc., but not cumbersome, expensive, or rare equipment such as cannons. The outfitting requirements of the second Militia Act list precisely those weapons that would have satisfied the two prongs of the *Miller* arms test. They bore a "reasonable relationship to the preservation or efficiency of a well regulated militia," because they were the very arms needed for militia service. And by the terms of the Act, they were to be personally owned and "of the kind in common use at the time."

The modern handgun--and for that matter the rifle and long-barreled shotgun--is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon, and it passes *Miller's* standards. Pistols certainly bear "some reasonable relationship to the preservation or efficiency of a well regulated militia." They are also in "common use" today, and probably far more so than in 1789. Nevertheless, it has been suggested by some that only

colonial-era firearms (e.g., single-shot pistols) are covered by the Second Amendment. But just as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversation from a "search," the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 31-41 (2001) (applying Fourth Amendment standards to thermal imaging search).

That is not to suggest that the government is absolutely barred from regulating the use and ownership of pistols. The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech . . ."). Indeed, the right to keep and bear arms--which pre-existed, and therefore was preserved by, the Second Amendment--was subject to restrictions at common law. These are the sort of reasonable regulations contemplated by the drafters of the Second Amendment. For instance, it is presumably reasonable "to prohibit the carrying of weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror . . . ." *N.C. v. Kerner*, 107 S.E. 222, 225 (N.C. 1921). The United States Supreme Court has observed that prohibiting the carrying of

concealed weapons does not offend the Second Amendment. *Robertson*, 165 U.S. at 281-82. Similarly, the Court also appears to have held that convicted felons may be deprived of their right to keep and bear arms. *See Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (citing *Miller*, 307 U.S. at 178). These regulations promote the government's interest in public safety consistent with the common law tradition. Just as importantly, however, they do not impair the core conduct upon which the right was premised.

Reasonable restrictions also might be thought consistent with a "well regulated Militia." The registration of firearms gives the government information as to how many people would be armed for militia service if called up. Reasonable firearm proficiency testing would both promote public safety and produce better candidates for military service. Personal characteristics, such as insanity or felonious conduct, that make gun ownership dangerous to society also make someone unsuitable for service in the militia. *Cf.* FLORABAMA CODE § 59-378 (excluding "idiots, lunatics, common drunkards, vagabonds, paupers, and persons convicted of any infamous crime" from militia duty). On the other hand, it does not follow that a person who is unsuitable for militia service has no right to keep and bear arms. A physically disabled person, for instance, might not be able to participate in even the most rudimentary organized militia. But this person would still have the right to keep and bear arms, just as men over the age of forty-five and women would have that right, even though our nation has traditionally excluded them from membership in the militia. The right is

broader than its civic purpose. *See VOLOKH, supra*, at 801-07.<sup>12</sup>

FLORABAMA CODE § 9-19.02<sup>13</sup> prohibits the registration of a pistol.<sup>14</sup> Defendant contends that since it only bans one type of firearm, "residents still have access to hundreds more," and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. This argument is unpersuasive. It could be similarly contended that all firearms may be banned so long as sabers were permitted.

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<sup>12</sup> Of course, Florabama's virtual ban on handgun ownership is not based on any militia purpose. It is justified solely as a measure to protect public safety. As *amici* point out, and as Florabama judges are well aware, the black market for handguns in the State is so strong that handguns are readily available (probably at little premium) to criminals. It is asserted, therefore, that the Florabama gun control laws irrationally prevent only law abiding citizens from owning handguns. It is unnecessary to consider that point, for I think the State's laws impermissibly deny Second Amendment rights.

<sup>13</sup> The relevant text of the provision reads as follows:

(a) A registration certificate shall not be issued for any:

...

(6) Any handgun, except that the handgun provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm only during the employee's duty hours or to any currently assigned or retired law enforcement officer of a municipality within the State of Florabama.

FLORABAMA CODE § 9-19.02.

<sup>14</sup> Although not relevant here, there is also an exception to the registration restriction for retired police officers. *See* FLORABAMA CODE § 9-19.02.

Once it is determined that handguns are "Arms" referred to in the Second Amendment, it is not open to Florabama to ban them. *See Kerner*, 107 S.E. at 225 ("To exclude all pistols . . . is not a regulation, but a prohibition, of . . . 'arms' which the people are entitled to bear."). Indeed, the pistol is the most preferred firearm in the nation to "keep" and use for protection of one's home and family. *See GARY KLECK & MARC GERTZ, Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 182-83 (1995). The Second Amendment's premise is that guns would be kept by citizens for self-protection (and hunting).

## V

For the foregoing reasons, since there are no material questions of fact in dispute, summary judgment is granted to Hull consistent with the prayer for relief contained in his complaint.

United States Court of Appeals for the  
Twelfth Circuit.

Josh HULL, *Plaintiff-Appellee*,

v.

Adam HUMPHRIES, Attorney General  
of the State of Florabama, *Defendant-  
Appellant*.

No. 05-4170.

Argued Oct 14, 2006.  
Decided Nov. 11, 2006.

Appeal from the United States District  
Court for the District of Northern  
Florabama at Browning

No. 04 cv 00317

Before: MORRISON and KAUR,  
Circuit Judges, and PRICE, Senior  
Circuit Judge.

PRICE, Senior Circuit Judge:

### **I. Background**

The Federal District Court for the Northern District of Florabama considered a challenge to a Florabama statute allowing rifles, shotguns, and other firearms to be registered but prohibiting registration and licensing of most pistols. The state of Florabama has encountered a large shift in population density over the last three decades. Once a quiet farm state, Florabama is now comprised primarily of three large metropolitan areas, each centered around

one of the now heavily populated cities of Tallaloosa, Birlando, and Browning. What little rural area still exists in Florabama has been deserted for the most part out of fears related to the urban gangs.

Metropolitan Tallaloosa, the southern-most city, encountered a significant rise in gun violence, primarily related to handguns, about twenty years ago. Ten years ago, gun violence reached similar high levels in metropolitan Birlando, located just north of Tallaloosa. Out of both concern for the state's rising level of violence and fear that the state's gangs, a significant force in the state's violence, would continue to move north towards Browning, Florabama enacted FLORABAMA CODE § 9-19.02, which generally bars the registration of handguns (with an exception for retired police officers).

Plaintiff Hull is a resident of the city of Browning, in the State of Florabama. He wishes to keep a handgun in his home for self-defense; however, if he possesses a handgun he will be in violation of FLORABAMA CODE § 9-19.02 (a)(6), prohibiting their possession. Hull recently moved to Florabama from the state of Virginia, where he owned a Glock 22 .40 Caliber handgun which was registered and permitted under Virginia's laws regulating the possession of firearms.

Upon moving to the state of Florabama, he inquired with the office of Florabama's Attorney General regarding a permit to bring his handgun from Virginia and was informed that no procedure existed to bring his handgun to Florabama because their possession

was illegal. Plaintiff therefore left his firearm at his parent's residence in Virginia. However, after having his apartment burglarized twice in the year after he moved to Browning, Hull wishes to retrieve his personal handgun and .40 caliber ammunition from his parents' residence in Virginia and bring it to Browning for the stated purpose of defending himself and his family.

Appellee Hull filed suit in the Federal District Court for the Northern District of Florabama under 42 U.S.C. § 1983, asking the court to both declare § 9-19.02 (a)(6) unconstitutional and enjoin Adam Humphries, the Attorney General of the State of Florabama, from applying § 9-19.02 (a)(6) against Appellee. The district judge, agreeing with Appellee's reasoning and analysis, granted the requested relief.

We now review the district court's decision on petition by appellant, Adam Humphries, Attorney General of the State of Florabama. Appellant challenges the holding of the district court, which upheld appellee's challenge by finding an individual right to bear arms for self-defense guaranteed in the text and history of the Second Amendment. Appellant argues that the district court's holding both was incorrect and ignored the overwhelming weight of precedent to the contrary. Appellant urges this court to find instead that the Second Amendment refers to the bearing of arms only in the context of a well-regulated Militia, and that it was never intended to provide an individual citizen any personal right to bear arms. Appellant's brief states that since Mr. Hull has not made any showing that his possession or use of a handgun has some

reasonable relationship to the preservation or efficiency of a well-regulated Militia, his case falls outside the protections of the Second Amendment. Furthermore, appellant argues that under any reading of the Second Amendment's precise dimensions, the Amendment does not prohibit the States from placing reasonable regulations on lethal weapons. Therefore, even if we were to find an individual right guaranteed in the Second Amendment, appellant asks the Court to reverse the district court and hold the statute constitutional.

We agree with the reasoning and analysis contained in Attorney General Humphries's brief and grant the request for reversal. The district court's statement that the Second Amendment provides for an individual right is clearly erroneous based on the case law. We find that the collective nature of the protections guaranteed by the Second Amendment make it far different from those guaranteed by, for example, the First and Fourth Amendments. Therefore, the challenged statute will escape strict scrutiny review. The state's interest in public safety being so high, and the danger of unregulated firearms being so grave, this court will instead look for a rational basis in the provisions of the Florabama statute when no core constitutional protections are in danger of violation.

## II. Overview of Second Amendment Models

The district court held that the Second Amendment recognizes the right of individual citizens to own and possess

firearms, and declared section 9-19.02 of the Florabama Code unconstitutional on its face. *Hull v. Humphries*, 380 F.Supp.2d 1 (N.D. Florabama 2004). The government's appellate brief opines that *stare decisis* requires us to reverse the district court's embrace of the "individual rights" model in favor of a "state/collective rights" or "sophisticated collective rights" model. A basic review of the three basic Second Amendment models into which the jurisprudence and legal commentary divide is first required.

A. *The "State Rights" vs. "Collective Rights" Models*

The first model, known as the "state rights" or "collective rights" model, states that the Second Amendment has nothing to do with the rights of individuals directly; it merely recognizes the right of states to arm and maintain a Militia. See *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992) ("Considering this history, we cannot conclude that the Second Amendment protects the individual possession of military weapons.")<sup>1</sup>

B. *The "Individual Rights" Model*

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<sup>1</sup> Some proponents of the "state/collective rights" model would go further and argue that the Second Amendment only guarantees that the federal government will not do anything to infringe upon the rights of the states to maintain Militia. The states, however, being the beneficiaries of the Second Amendment, not its target, may regulate the bearing of arms as they see fit. The power to arm can also imply a power to disarm. See *Love v. Pepersack*, 47 F.3d 120, 122-124 (4th Cir. 1995) ("The Second Amendment does not apply to the states").

The second model is the "individual rights" model, which claims that the Second Amendment recognizes the right of each individual to keep and bear arms. This is the view advanced by the Fifth Circuit's *dicta* in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001); and, relying on *Emerson's dicta*, the view advanced by the district court in this case. While the "individual rights" model may not have seen much success in the courtroom, it has a large following in the academic community. See SCOTT BURSAR, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEXAS L. REV. 1125 (1996); ROBERT J. COTTRILL & RAYMOND T. DIAMOND, *The Fifth Auxiliary Right*, 104 YALE L.J. (1995); STEPHEN P. HALBROOK, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); SANFORD LEVINSON, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); STEPHEN P. HALBROOK, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 LAW & CONTEMP. PROBS. 151 (1986); DON B. KATES, JR., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983). While the "individual rights" model is popular in academia, it is lonely in precedent. The Fifth Circuit in *Emerson* stands alone in endorsing this model.

C. *The "Sophisticated Collective Rights" Model*

The third model falls somewhere between the first and second models, and is commonly referred to as the "sophisticated collective rights" model.

This model, like the ‘individual rights’ model, states that a limited individual right exists in the Second Amendment; however, this individual right to bear arms can only be exercised by members of a functioning, organized state militia who bear the arms only incidental to their participating in the organized militia's activities. In this respect it is akin to the “state”/“collective” rights model. According to the “sophisticated collective rights” model, not only does the individual right to keep arms apply only to members of such a militia, but then only if the federal or state governments fail to arm them. *See Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942) (concluding that the Second Amendment was not infringed because there was no evidence that the defendant “was or ever had been a member of any military organization or that his use of the weapon . . . was in preparation for a military career” and the evidence showed he was “on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated militia.”); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (holding that Rybar's membership in the general, unorganized militia established by 10 U.S.C. § 311(a) did not cause his possession of a machine gun to be so connected with militia activity that the Second Amendment applied); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977) (addressing the argument that because state law defined militia to include all able-bodied males, defendant's individual possession of a machine gun preserved the effectiveness of the militia).<sup>2</sup>

<sup>2</sup> While the majorities in *Cases*, *Rybar* and

We now turn to the question of whether the district court erred when it joined the *Emerson* court in adopting the “individual rights” model as the basis of its construction of the Second Amendment in this circuit.

### III. Precedent

#### A. Supreme Court Analysis of the Second Amendment Right

When a question of constitutional interpretation arises, it is the role of the United States Supreme Court to provide the final answer to that question. When the Court has already provided the answer in the prior case law, that determination is binding upon all the lower courts of the nation, regardless of whether they are of the states or federal. Our analysis therefore begins with the U.S. Supreme Court's prior decisions. Before we can properly analyze these prior Second Amendment decisions, however, we need to examine the words the Court based its interpretation upon:

The Second Amendment provides:

A well-regulated Militia, being necessary to the security of a free State, the right of the

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*Oakes* were not explicit about whether they were adopting the “states' rights” model or the “sophisticated collective rights” view, their opinions never state that there is no right of the individual to bear arms, and therefore would seem to indicate that if a legitimate connection to Militia service been demonstrated, then an individual right would have been upheld. *Cases* and *Rybar* are therefore different from *Hale* and *Pepersack*, where the courts specifically denied any “individual right.”

people to keep and bear arms, shall not be infringed.

U.S. CONST. amend. II.

Article I, Section 8 of the Constitution, Clauses 15–16, provides:

The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

U.S. CONST. art. I, § 8, cls. 15–16.

In declaring Florabama’s challenged firearms ordinance unconstitutional, the district court looked to the words above and read them to mean that the Second Amendment establishes an individual right to keep and bear arms, which the court then went on to hold included handguns. The district court arrived at this holding via its analysis of the words of the Second Amendment’s guarantee clause, the portion which states that “the right of the people to keep and bear Arms, shall not be infringed.” The district court held that by these words the framers intended to endow each of “the people” of the new republic with an individual right analogous to those guaranteed in other portions of the Bill of Rights, such as the First and Fourth Amendments, and that this individual right “shall not be infringed.” *Hull*, 380 F.Supp.2d at 1. The district court denied that this right was intended to be

restricted by the prefatory clause, “A well regulated Militia, being necessary to the security of a free State.” We disagree. Plaintiff discards almost half of the Second Amendment. Under that reading, the first thirteen words “might as well have been written in invisible ink.” L.A. POWE, JR., *Guns, Words and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1336 (1997). In concluding that the Second Amendment grants an individual right to all Americans, the court below misread both judicial precedent and our nation’s history.

The district court acknowledges in its opinion that it is the role of the United States Supreme Court to interpret the Constitution. The U.S. Supreme Court, however, has not delved deeply into a direct Second Amendment challenge since its 1939 decision in *United States v. Miller*, 307 U.S. 174 (1939). In *Miller*, the federal district court had dismissed *Miller*’s indictment under federal law for unlawfully transporting in interstate commerce an unregistered “sawed-off” shotgun. While the district court in *Miller* took only three paragraphs to reach its conclusion, Judge Ragon laid the decision basically on the same grounds as the district court here, finding that the federal statute was “in contravention of the Second Amendment to the Constitution.” *United States v. Miller*, 26 F.Supp. 1002, 1003 (1939) (Ragon, J.).

The U.S. Supreme Court granted *certiorari* in *Miller* and held on appeal that:

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.

The Court went on to explain the nature and purpose of the Militia in the time when the Second Amendment was enacted. "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." *Id.* at 179. As noted by the district court, these citizen soldiers were expected to appear bearing arms, which they supplied themselves, in the event the Militia was called into service. *Id.*

The Court in *Miller* noted that, as originally adopted, the U.S. Constitution reserved to the states "the Authority of training the Militia according to the discipline prescribed by Congress." *Id.* (citing U.S. Const. art. 1, § 8). The *Miller* Court read the Second Amendment and Article I, § 8 of the Constitution as being of one purpose and inextricably related, reasoning that it was "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Id.* By these words, the Court emphatically declared that both the

"declaration" and "guarantee" of the Second Amendment "must be interpreted and applied" together and in the context of Article I, Section 8 of the Constitution. *Id.* Construing the two clauses together, and in light of their meaning under Article I, Section 8, *Miller* concludes that the right of the people to keep and bear arms must relate to the Militia, whose continued vitality the founders saw necessary to safeguard the individual States.

The sixty-seven years since the U.S. Supreme Court decided *Miller* have spawned some debate surrounding whether *Miller* should be construed as interpreting the Second Amendment to guarantee either a collective right of the states to arm the Militia, a limited individual right to bear arms as a member of a state Militia, or an individual right to bear arms for non-Militia use, as asserted by the district court. Thankfully, this Court is not required to wade into a full analysis such as that conducted by the district court; the crushing weight of adverse precedent is more than the "individual rights" model can bear. It is the role of the Supreme Court alone to interpret the Constitution, and the Court has already spoken on this individual vs. collective right question, both through its holding in *Miller* and through its declining to make any further statement on this hot-button issue for the almost seven decades since.<sup>3</sup> Every circuit that has

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<sup>3</sup> The Supreme Court has twice been presented with the opportunity to re-examine *Miller* and has twice refused to upset its holding. In *Lewis v. United States*, the Court concluded that a statute that criminalizes possession of a firearm by a convicted felon "[did not] trench on any constitutionally protected liberties." 445 U.S. 55,

taken up this question, with the exception of *Emerson's dicta*, has arrived at the same conclusion we do: *Miller* stands against the idea of an “individual right” to bear arms.

This Court reads *Miller* to reject the idea of an individual right to bear arms separate and apart from their Militia use. Until the Supreme Court revisits this issue, *Miller's* reading of the Second Amendment is the one we are obliged to follow.<sup>4</sup> No amount of reasoning or historical analysis on the part of any court will hold water when faced with the fact that the Supreme Court has already answered the question of whether the Second Amendment grants an individual right, and in *Miller* has answered that question in the negative.

The district court suggests that *Miller*, by finding no reasonable relation between Militia service and a sawed-off

shotgun, may simply have proposed a test to distinguish weapons “covered” by the Second Amendment from weapons “not covered” by the Second Amendment. The district goes to great lengths to distinguish the facts of this case from *Miller*, making much of the fact that handguns were not at issue in *Miller* and that handguns could perhaps be part of the weaponry required by a citizen-soldier. While the district court's arguments are not without merit, if the Supreme Court truly thought that *Miller* was being read to stand for a proposition much broader than the Court intended, it surely would have taken one of the opportunities it has had in the last sixty-seven years to grant *certiorari* and correct the misunderstanding. This Court thus refuses to accept the district court's reading of *Miller*.

*Miller* stands today as the primary case in any discussion of Second Amendment precedent. It was not, however, the first time the Court had taken on a Second Amendment question. One nineteenth-century Supreme Court precedent, *United States v. Cruikshank*, 92 U.S. 542 (1875), is included in almost every discussion of the Second Amendment. In that case, several criminal defendants challenged their convictions under the Enforcement Act of 1870 making it unlawful to threaten or intimidate “any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.” *Cruikshank*, 92 U.S. at 548 (quoting 16 Stat. 141). In setting aside their convictions, the Supreme Court declared;

[The right to bear arms for any lawful

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65 n. 8 (1980) (citing *Miller* and three lower court cases rejecting Second Amendment challenges). Further, the Court dismissed an appeal in which a 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). Had the Court thought that the Second Amendment created an individual right that was being infringed, the Court could not have reached these conclusions.

<sup>4</sup> See *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478-79 (1987) (“The rule of law depends in large part on adherence to the doctrine of *stare decisis*”); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (“As one of the inferior federal courts subject to the Supreme Court's precedents, we have neither the license nor the inclination to engage in such freewheeling presumptuousness.” (responding to argument that *Miller* is “wrong in its superficial (and one-sided) analysis of the Second Amendment”)).

purpose] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.

*Id.* at 553.

This language does not conflict with *Miller* because it does not define the right as individual or collective, but simply recognizes that whatever the right granted by the Second Amendment, it cannot be infringed by the federal government. More interesting, and more appropriate to the instant set of facts, is a nineteenth-century case *Miller* cites, *Presser v. Illinois*, 116 U.S. 252 (1886). There, the Court upheld state legislation against a Second Amendment challenge, relying on *Cruikshank*'s holding that the Second Amendment constrains the national government only. The Court then included the following language:

[T]he states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, *so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.*

*Id.* at 584 (emphasis added).

This reinforces our reading of *Miller* as a guarantee of a collective right only, based solely in the maintenance of a citizen Militia. Aged as it may be, the United States Supreme Court's precedent, as made clear in *Cruikshank* and *Miller*, is unmistakable in denying

an individual right to bear arms for personal defense.

### *B. Other Circuit Courts' Analyses of the Second Amendment Right*

Plaintiff relies primarily on the Fifth Circuit's decision in *Emerson*, discussed above, to support the contention that the Second Amendment establishes a fundamental individual right to bear arms, regardless of membership or service in an organized Militia. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). Chief Justice Roberts noted the isolated position occupied by the Fifth Circuit in *Emerson* when he was a Judge on the D.C. Circuit in 2003. In denying a Motion to Dismiss by a criminal defendant charged with possession of a firearm by a convicted felon, then Judge Roberts concluded that "... with the exception of the Fifth Circuit, the courts of appeals have consistently held that individuals have no fundamental constitutional right to possess a firearm." *United States v. Cole*, 276 F.Supp.2d 146, 151–52 (2003). In *Emerson*, the Fifth Circuit held that the ban on carrying a pistol while subject to a restraining order was reasonable. *Emerson*, 270 F.3d at 260. While this holding does not seem to be one favorable to the individual rights camp, the two-judge majority went on, in a thought-provoking opinion that the concurring third judge correctly labeled as *dicta*, to conclude that the Second Amendment guarantees an individual's right to keep and bear arms not solely to enable him to be called on as needed by a state to resist oppression and tyranny by the federal government as part of a well-regulated Militia for self-defense,

but also for the individual's use in game hunting and defense of his property, so long as the weapons are not of a type that have no conceivable application in the context of a state Militia. *Emerson*, 270 F.3d at 260 (citing *Miller*). In so writing, the two-judge majority recognized that it stood alone among all the Circuits in recognizing an individual right to bear arms under the Second Amendment and conceded that *Miller* did not go so far as to adopt this view. *Id.* at 218–20, 227 (and opposing cases cited therein). The third judge, who concurred in the result, wrote primarily for the purpose of criticizing the majority's Second Amendment analysis as irrelevant *dicta* because finding the existence of an individual right to bear arms was unnecessary to the court's decision, stating:

I choose not to join Section V, which concludes that the right to keep and bear arms under the Second Amendment is an individual right, because it is *dicta* and is therefore not binding on us or on any other court. The determination whether the rights bestowed by the Second Amendment are collective or individual is entirely unnecessary to resolve this case and has no bearing on the judgment we dictate by this opinion.

*Id.* at 272 (Parker, J., concurring).

Judge Parker also found the majority's 84 pages of *dicta* troubling for another reason. "As federal judges it is our special charge to avoid constitutional questions when the outcome of the case does not turn on how we answer." *Id.* In support of this criticism of the majority's opinion, Judge Parker's concurrence went on to cite *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101 (1944)

("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); *Walton v. Alexander*, 20 F.3d 1350, 1356 (5th Cir. 1994) (Garwood, J., concurring specially) ("It is settled that courts have a strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration."). By deciding a constitutional question when under any construction the challenged provision must be sustained, the *Emerson* majority committed error. *O'Connor v. Nevada*, 27 F.3d 357, 361 (9th Cir. 1994); *Bullock v. Minnesota*, 611 F.2d 258, 260 (8th Cir. 1979). In holding that the statute was not infirm as to *Emerson*, and at the same time finding an individual right to gun ownership, the *Emerson* majority departed from these sound precepts of judicial restraint.

Interestingly, in finding an individual right to bear arms, the *Emerson* majority not only ignored the precepts of judicial restraint, but also ignored prior Fifth Circuit decisions.<sup>5</sup> Almost thirty years earlier, the Fifth Circuit was twice presented with cases claiming that an individual's right to bear arms under the Second Amendment had been violated. In both cases, the Fifth Circuit upheld

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<sup>5</sup> This change in position by the Fifth Circuit is troubling in light of the Fifth Circuit's rule that a subsequent panel is precluded from disregarding the holding of an earlier panel unless it is changed by an en banc decision or by a decision of the United States Supreme Court. See *United States v. McFarland*, 264 F.3d 557, 559 (5th Cir.2001); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 425-26 (5th Cir.1987).

the defendants' convictions. Applying *Miller* correctly, these earlier Fifth Circuit opinions held that possession of firearms by the defendants had no relationship to the “preservation or efficiency of a well-regulated Militia” and that, lacking this Militia connection, the Second Amendment did not guarantee the defendants’ individual right to possess firearms. *United States v. Williams*, 446 F.2d 486, 487 (5th Cir. 1971); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971). The two-judge majority brushed *Williams* and *Johnson* aside without any real attempt to distinguish them, instead relegating them to a mere footnote, stating incorrectly that the cases “do no more than apply *Miller* to virtually identical facts.” *Emerson*, 270 F.3d at 227 n. 21. In light of this fact, we do not place a great deal of reliance on the stability of *Emerson* even within the Fifth Circuit, and the district court’s use of it as persuasive precedent in this circuit is misplaced.

As mentioned above, no federal circuit save the Fifth has read *Miller* to find that the Second Amendment guarantees an individual and fundamental right to bear arms outside of membership in an organized Militia. The opinions on this question are many and unmistakable in their holdings. See *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) (*en banc*) (court found no need to proceed with an in-depth *Miller* analysis of the Second Amendment challenge in light of the lack of evidence presented regarding the relationship of defendants with any Militia; defendant “never indicates how restrictions ... would have a material impact on the Militia.”); *Thomas v.*

*Members of 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.”); *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942) (“[T]here is no evidence that the appellant was or ever had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career.”); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (noting gun possession is not a fundamental right); *United States v. Graves*, 554 F.2d 65, 66 n. 2 (3d Cir. 1977) (*dicta*) (*Miller* is controlling on the individual rights question); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (“[T]he *Miller* Court assigned no special importance to the character of the weapon itself, but instead demanded a reasonable relationship between its ‘possession or use’ and militia-related activity.”); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) (“The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a ‘reasonable relationship to the preservation or efficiency of a well-regulated militia.’”) (quoting *Miller*, 307 U.S. at 178); *United States v. Napier*, 233 F.3d 394, 403 (6th Cir. 2000) (established precedent dictates that the Second Amendment does not guarantee an individual right to bear arms); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (finding that the Second Amendment right applies only to state Militias; therefore, “there can be no serious claim to any express constitutional right of an individual to possess a firearm.”); *United States v.*

*Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (“[T]he Second Amendment right ‘to keep and bear Arms’ applies only to the right of the State to maintain a militia and not to the individual’s right to bear arms . . . .”); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 (7th Cir. 1999) (The Second Amendment “establishes no right to possess a firearm apart from the role possession . . . might play in maintaining a state Militia.”); *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988) (recognizing no plausible claim that challenged statute “would impair any state Militia”); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) (“Whether the ‘right to bear arms’ for militia purposes is ‘individual’ or ‘collective’ in nature is irrelevant where, as here, the individual’s possession of arms is not related to the preservation or efficiency of a militia.”); *United States v. Hinostroza*, 297 F.3d 924, 927 (9th Cir. 2002); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (“The purpose of the second amendment as stated by the Supreme Court in *United States v. Miller* . . . was to preserve the effectiveness and assure the continuation of the state militia. The Court stated that the amendment must be interpreted and applied with that purpose in view.”); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997) (“[T]he *Miller* Court understood the Second Amendment to protect only the possession or use of weapons that is reasonably related to a militia actively maintained and trained by the states.”).

Faced with this overwhelming weight of Circuit Court opinions interpreting *Miller* to hold that the Second Amendment’s declaratory clause modifies the guarantee clause and

therefore denies an individual right to bear arms outside the context of service in the Militia, plaintiff argues that although the Supreme Court used the correct interpretation of the term “Militia” when deciding *Miller*, the definition of “Militia” used by most courts today is too narrow. Rather than meaning a small group of people organized by the state to take arms against a tyrannical federal government, plaintiff claims that the “Militia” referred to in *Miller* was understood at the time to include all able-bodied men between the ages of 18 and 45. This represented a large cross-section of the population who would be expected to act for the common defense if called upon. Plaintiff argues that because the Framers were largely suspicious of standing armies and any large, organized military force, they could not have intended for only state-trained Militia to have the right to bear arms. Plaintiff further argues that the Second Amendment could not be construed as a right of the states to arm a Militia because that would be in conflict with the Constitution, which states that Congress has the power “to provide for . . . arming . . . the Militia.” U.S. CONST. art. I, § 8, cl. 16.

The plaintiff is incorrect in stating that the circuit court holdings listed above each affirmed the “state right” model by using an overly narrow interpretation of “Militia.” While some of the circuit courts’ opinions did not touch on their interpretation of what it means to comprise a “Militia,” and it is possible that they may have used a quite narrow definition, the Eleventh Circuit considered the reading of *Miller* to include the broad definition of Militia

advocated by the Plaintiff, and nonetheless concluded that *Miller* “strongly suggests that only Militias actively maintained and trained by the states can satisfy the ‘well regulated Militia’ requirement of the Second Amendment.” *Wright*, 117 F.3d at 1272.

We agree with the Eleventh Circuit’s opinion in *Wright* rejecting the idea that a “well-regulated Militia” means each able-bodied person separate and apart from his or her enrollment or association with a Militia. As the persuasive body of precedent above and the plain meaning of the Second Amendment make clear, a Militia must not be a free-for-all. Rather, a Militia must be a “well-regulated” fighting force, implying, at the very least, some semblance of organization at the state or local level.<sup>6</sup>

Plaintiff also argues that implicit in the case law is the idea that if the vast majority of “ordinary citizens” are prohibited from owning handguns, as they are under the Florabama gun control laws, that in itself would have a material impact on the Militia. We see no need to proceed with an in-depth

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<sup>6</sup> The Framers included the words “well-regulated” for that purpose. See *Wright v. United States*, 302 U.S. 583, 588 (1938) (“[E]very 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. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.”)

analysis of this concern because plaintiff has not asserted membership in or relationship with any Militia, regardless of how one defines the Militia or how the lack of a handgun might impede one’s ability to participate in one.

We side squarely with those Circuits that reject *Emerson's* narrow construction of *Miller*, and hold that the Second Amendment guarantees a collective rather than an individual right. The Second Amendment only protects a state’s right to raise and regulate a Militia by prohibiting Congress from enacting legislation that will interfere with that right. In sum, the right to keep and bear arms is not a right conferred upon the people in their capacity as individual citizens by the federal constitution.

#### IV. Historical Analysis of the Second Amendment

The legislative history of the Second Amendment also supports the interpretation of the right to bear arms as belonging to the states, not to individual citizens. In the First Congress, James Madison proposed language that a well-regulated militia was “the best security of a free country.” DAVID YASSKY, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L.REV. 588, 610 (2000) (citing *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 12 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991)). After the proposal was submitted to an eleven-member House of Representatives committee (including Madison), however, “country” was

changed to “State.” *Id.* “Anti-Federalist Elbridge Gerry explained that changing the language to “necessary to the security of a free State” emphasized the primacy of the state militia over the federal standing army: “A well-regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one.” *Id.* (quoting *The Congressional Register*, August 17, 1789).

Indeed, in light of the meaning of “State” as used throughout the Constitution, *see supra* p. 5, and the care the drafters are presumed to have taken in selecting specific language, *see Holmes v. Jennison*, 39 U.S. 540, 570–71 (1840) (“Every word [in the Constitution] appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.”), the change plainly suggests that the drafters intended to clarify that the right established in the Second Amendment was intended to protect the “free[dom]” of the “State[s]” of the Union rather than the “country.”

The Second Amendment was drafted in response to the perceived threat to the “free[dom]” of the “State[s]” posed by a national standing army controlled by the federal government. *See, e.g., Emerson*, 270 F.3d at 237–40, 259; *Silveira v. Lockyer*, 312 F.3d 1052, 1076 (9th Cir. 2002). In *Miller*, the Supreme Court explained that “[t]he sentiment of the time [of the Amendment’s drafting] strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia” composed of men who “were expected to appear bearing arms supplied by themselves.” *Miller*,

307 U.S. at 179. Indeed, at the time of the Constitutional Convention, “there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States.” *Perpich v. Dep’t of Defense*, 496 U.S. 334, 340 (1990). The Second Amendment, then, “aimed” to secure a military balance of power between the States on the one hand and the federal government on the other.

The Second Amendment was included in the Bill of Rights to ensure that the people would have the ability to defend themselves against a potentially oppressive federal government, which had just been given the authority to maintain a national standing army in Article I of the Constitution. In his efforts to convince the people of the advantages of the Constitution in *The Federalist Papers*, James Madison noted that although the federal government had a standing army, the people would have the use of militias, stating:

Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger . . . Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.



THE FEDERALIST NO. 46, at 267 (Clinton Rossiter ed., 1961).

When adopted, the Bill of Rights protected individuals only against the federal government. *See, e.g., Barron v. City of Baltimore*, 32 U.S. 243, 247 (1833). Under the “incorporation” doctrine, however, “many of the rights guaranteed by the first eight Amendments to the Constitution have been held [by the Supreme Court] to be protected against state action by the Due Process Clause of the Fourteenth Amendment.” *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (Sixth Amendment right to jury trial in criminal case protected against state action); *see also Benton v. Maryland*, 395 U.S. 784, 795 (1969) (“Once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, the same constitutional standards apply against both the State and Federal Governments.”). But the Supreme Court has never held that the Second Amendment has been incorporated. *See United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (“[The Second Amendment] is one of the amendments that has no other effect than to restrict the powers of the national government . . .”); *see also Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir. 1995) (“The Second Amendment does not apply to the states.”) (citing *Cruikshank*); *Cases v. United States*, 131 F.2d 916, 921–22 (1st Cir. 1942) (“Whatever rights . . . the people may have [under the Second Amendment] depend upon local legislation; the only function of the Second Amendment being to prevent the federal government and the federal government only from infringing that right.”) (citing *Cruikshank*). Thus, the

Amendment does not apply to gun laws enacted by States such as Florabama. Because the Second Amendment was specifically included by the drafters of the Bill of Rights to protect the states against a potentially oppressive federal government, it would make little sense to incorporate the Amendment.

## V. The Second Amendment Right is Subject to Reasonable Regulation

Whatever the nature or history of the Second Amendment right, be it collective or individual, it is a right subject to reasonable regulation. The historical debate, therefore, over the nature of the right is misplaced. In the final analysis, whether the right to keep and bear arms is collective or individual is of no legal consequence. It is a right subject to reasonable regulation.<sup>7</sup> If plaintiff had an individual Second Amendment right that could have been successfully asserted as a defense against the charge of violating Section 9-19.02, then the issue would be cloaked

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<sup>7</sup> A right to weapons possession has never been absolute. *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897), held that the Bill of rights is “subject to certain well-recognized exceptions, arising from the necessities of the case.” Thus, the Second Amendment “is not infringed by laws prohibiting the carrying of concealed weapons.” *Id.* In *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980), the Court held that a law prohibiting gun possession by felons trenched on no liberty protected by the Second Amendment. Under the common law, the right to bear weapons “was never treated as anything like an absolute right.” *United States v. Tot*, 131 F. 2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

with legal significance. As it stands, it makes no difference. Section 9-19.02 is simply another example of a reasonable restriction on whatever right is contained in the Second Amendment. In the exercise of police powers and power over Militia, legislatures may reasonably determine which weapons do not contribute to public security. Prohibiting one type of weapon, while freely allowing access to hundreds more, does not frustrate the Second Amendment's core purposes.<sup>8</sup>

To return to *Miller*, it is important to note that the U.S. Supreme Court placed the burden on the defendants, holding that absent a showing that “possession or use” of such a weapon “could contribute to the common defense” or “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 such a weapon.” *Miller*, 307 U.S. at 178.

*Miller's* placement of the burden of proof on criminal defendants—and, by logical extension, civil plaintiffs—to demonstrate that the legislature exceeded its constitutional powers when it designated a type of weapon as not

contributing to the common defense and the preservation or efficiency of the militia, fairly implies that those legislative choices are presumptively reasonable. Massachusetts, New York, and Virginia post-colonial laws cited in *Miller*, 307 U.S. at 180–182, required Militia members to produce muskets or rifles of specified lengths, traditional military long-arms. The 1792 Militia Act, enacted by the Second Congress after adoption of the Second Amendment, required men subject to Militia duty to arm themselves with muskets or firelocks. Act of May 8, 1792, ch. 33, § 1 (1 Stat. 271). Weaponry other than that specified by the legislature would not have satisfied Militia obligations.

It follows that state legislatures may reasonably determine which weapons undermine the common defense because they threaten the public security rather than serving to protect it. A legislature in an urban jurisdiction, for example, may reasonably determine that pistols are more harmful to public security because of their predominant use in urban crime than they are helpful in the common defense and the efficiency of its Militia. That is especially so for pistols, weapons with no strong historical tie to common defense or the militia, but weapons very commonly associated with crime. Between 1993 and 2001 handguns were used in 87% of the annual average of 847,000 violent crimes. DOJ Bureau of Justice Statistics, “*Weapon Use and Violent Crime*,” NCJ 194820, at 3 (Sept. 2003).

As of 1789, pistols were not normally associated with militia service, other than by officers. See *Miller*, 307 U.S. at

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<sup>8</sup> Florabama's laws do not frustrate the purpose of the Second Amendment because they do not “disarm” the citizenry. Laws such as Florabama's “do not seek to ban all firearms, but seek only to prohibit a narrow type of weaponry . . . or to regulate gun ownership . . . Such measures are plainly constitutional.” 1 L.H. TRIBE, AMERICAN CONST. LAW (3d ed. 2000) 902. The District's laws thus survive facial scrutiny even when the Second Amendment is incorrectly construed to recognize a right to keep weapons for purely personal use.

180–182; W. MOORE, *WEAPONS OF THE AMERICAN REVOLUTION* 7 (1964); G. WILLS, *NECESSARY EVIL* 30–31 (1999). As noted by the court in *Quilici v. Village of Morton Grove*, 695 F. 2d 261, 270 n.8 (7th Cir. 1982), in light of *Miller*, “we do not consider individually owned handguns to be military weapons.” See *United States v. Parker*, 362 F. 3d 1279, 1284 (10th Cir. 2004) (revolver); *Love v. Pepersack*, 47 F. 3d 120, 124 (4th Cir. 1995) (handgun); *Sklar v. Byrne*, 727 F. 2d 633, 637 (7th Cir. 1984) (upholding handgun ban under Illinois constitution). In short, even if *Miller* is read narrowly, Florabama's restrictions on handgun possession do not violate the Second Amendment because Florabama's legislature could reasonably determine, as part of its power to regulate the Militia, that handguns should not be deemed “Arms” necessary to the preservation of Florabama's Militia. Plenty of other arms more suitable to military service remain available to serve the Militia's needs.

### III. Conclusion

We reject the notion that there is an individual right to bear arms separate and apart from service in the Militia. Therefore, because this plaintiff has not asserted membership in the Militia, he has no viable claim under the Second Amendment of the United States Constitution.

While the district court's opinion is well considered and raises many thought-provoking and historically interesting arguments for finding an individual right, our hands are tied in this matter. We would be in error to overlook sixty-five years of Supreme Court precedent and the near unanimity of circuit court case law rejecting an individual right to bear arms when that right is not in furtherance of Militia service. As was noted by Fifth Circuit Judge Robert M. Parker, concurring in *Emerson*, the isolated precedent cited in plaintiff's brief, “The fact that the 84 pages of *dicta* contained in [the majority opinion] are interesting, scholarly, and well written does not change the fact that they . . . amount to at best an advisory treatise on this long-running debate.” *Emerson*, 270 F.3d at 272. (Parker, J., concurring).

While this opinion responds to some of the arguments raised below, our decision rests simply on the unmistakable precedent contradicting the appellee and the proponents of the individual rights model. In accordance with that precedent, we have no option but to reject the notion that the Second Amendment guarantees an individual's right to bear arms absent a substantial nexus between that individual and the states' ability to maintain a Militia. The judgment of the district court is therefore reversed and Mr. Hull's case, now lacking the constitutional basis upon which federal jurisdiction was granted, is to be returned for consideration by the state courts of Florabama.

IN THE  
**SUPREME COURT OF THE UNITED STATES,**

OCTOBER TERM, 2007

JOSH HULL,

*Petitioner,*

v.

ADAM HUMPHRIES, ATTORNEY GENERAL FOR THE STATE OF FLORABAMA,

*Respondent.*

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On Writ of Certiorari to the Twelfth Circuit Court of Appeals,  
*Hull v. Humphries*, 987 F.3d 1 (12th Cir. 2006).

Before: ROBERTS, C.J. and STEVENS, SCALIA, KENNEDY, SOUTER, THOMAS,  
GINSBURG, BREYER, and ALITO, J.J.

**ORDER**

The petition for writ of certiorari is hereby GRANTED limited to the following questions:

- I. Whether the right to bear arms protected by the Second Amendment endows an individual with a constitutional right to bear a handgun for personal defense.
- II. Whether FLORABAMA CODE § 9-19.02 infringes upon the protections of the Second Amendment.

Probable jurisdiction is noted and a total of one half hour allotted for oral argument. The briefs of both parties are to be filed with the Clerk of the Court on or before 11:59 a.m. on **Wednesday, September 19, 2007**. The case is set for oral argument in the October 2007 term of this Court.