

No. 05-4170

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.

On Writ of Certiorari to the Twelfth Circuit Court of Appeals

BRIEF FOR THE RESPONDENT

September 19, 2007

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QUESTIONS PRESENTED

- 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.

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STATEMENT OF THE CASE

Petitioner Josh Hull is a resident of Browning, Florabama. Respondent is Adam Humphries, Florabama's Attorney General, whose office refused to allow the Petitioner to bring a handgun into the state under FLORABAMA CODE § 9-19.02. Petitioner urges this Court to declare Florabama's statute unconstitutional and violative of an individual's Second Amendment right to bear arms.

Over the last three decades, Florabama's demographics have drastically changed. The state now comprises of three large metropolitan areas centered around the cities of Tallaloosa, Birlando, and Browning. The once rural areas have been deserted out of fears related to urban gangs. In the last two decades, Tallalossa and Birlando encountered a significant rise in gun violence, primarily related to handguns. Out of both concern for the state's rising level of violence and for fear that the state's gangs would continue to increase and to move north towards Browning, Florabama enacted FLORABAMA CODE § 9-19.02. The provision bars the registration and licensing of handguns (with an exception for retired police officers) while allowing rifles, shotguns, and other firearms to be registered. Florabama does not have a state constitutional provision similar to the Second Amendment.

Petitioner moved to Browning, Florabama from Virginia. In Virginia, he owned a state-registered Glock 17 .40 Caliber handgun. Upon moving to Florabama, he inquired with the office of Florabama's Attorney General regarding a permit to bring his handgun from Virginia. Relying on FLORABAMA CODE § 9-19.02, Respondent informed Petitioner that no procedure existed to bring a handgun into Florabama because its possession was illegal. Petitioner left his firearm at his parents' residence in Virginia.

However, following two home burglaries, Petitioner now seeks to retrieve his handgun from Virginia and keep it in his home in Browning for self-defense. Petitioner does not assert the right to carry his weapon outside of his home.

Petitioner filed suit under 42 U.S.C. § 1983 against Respondent to declare Florabama's statute unconstitutional and to enjoin Respondent from applying section 9-19.02 (a)(6) against him. In the district court, Judge Smithenwesson granted Petitioner's declaratory and injunctive relief. *Hull v. Humphries*, 380 F. Supp. 2d 1 (N.D. Florabama 2004). By doing so, the court declined to follow the majority of circuit courts upholding the collective rights model. *Id.* at 4–5, 24. The court found unpersuasive Humphries' argument that the Second Amendment does not bestow any rights on individuals except, perhaps, when an individual serves in an organized militia. *Id.* at 24.

On appeal to the Twelfth Circuit, the three-judge panel held that the district court erred in recognizing an individual right to bear arms. *Hull v. Humphries*, 987 F.3d 1, 16 (12th Cir. 2006). Citing other circuits, as well as Supreme Court precedent, the court denied the existence of any right to bear arms absent a connection to militia service. *Id.* at 7–12, 16. The court also concluded that "*Miller* stands against the idea of an 'individual right' to bear arms." *Id.* at 7 (referencing *United States v. Miller*, 307 U.S. 174, 178 (1939)). Specifically, the Twelfth Circuit held that "the Second Amendment guarantees a collective [right]." *Id.* at 12. Furthermore, finding Florabama's statute to be a reasonable regulation of the Second Amendment right, the court returned the case to the state court for consideration. *Id.* at 14–16.

This Court granted Josh Hull's petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

The Second Amendment does not confer an individual with a constitutional right to bear a handgun for personal defense. The text of the Amendment, the Framers' intent and judicial precedent all indicate the protection of a collective right to bear arms. Because Petitioner is not a member of a militia, his weapon possession does not qualify for protection.

Furthermore, to qualify for protection, this Court has determined that a weapon must be a "part of the ordinary military equipment" or "contribute to the common defense." *United States v. Miller*, 307 U.S. 174, 178 (1939). Petitioner's handgun is not a military arm nor does Petitioner's intended use of the weapon demonstrate a contribution to the common defense.

Because there is no individual right to bear arms, much less the arms in question, Florabama's statute must only pass a rational basis test for it to survive constitutional questioning. As a response to the violence caused by handguns in the state, Florabama easily shows that its law is rationally related to a legitimate governmental purpose. In addition, the statute is a "reasonable restriction" on the Second Amendment right. Section 9-19.02 does not infringe upon the protections of the Second Amendment.

ARGUMENT

I. THE SECOND AMENDMENT DOES NOT ENDOW AN INDIVIDUAL WITH A CONSTITUTIONAL RIGHT TO BEAR A HANDGUN FOR PERSONAL DEFENSE

A. The Text of the Second Amendment Does Not Confer an Individual with a Constitutional Right to Bear a Handgun for Personal Defense

1. The Prefatory Phrase of the Second Amendment Declares the Amendment's Purpose to Guarantee the Right to Bear Arms Only in the Military Context

The Second Amendment states: "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 Amendment consists of two phrases: prefatory (from the beginning to the second comma) and operative (from the second comma to the end). Yet, Petitioner argues that the Framers' decision to include the prefatory phrase was merely stylistic and coincidental. However, because "[e]very word [in the Constitution] appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood[.]" *Holmes v. Jennison*, 39 U.S. 540, 570–71 (1840), it is unlikely that the Framers would have included the prefatory phrase as mere verbiage. Rather, the prefatory phrase provides the rationale behind the operative phrase—a right to bear arms is limited to participation in a militia.

Petitioner argues that the text of the Second Amendment confers an individual right to bear arms by focusing on the amendment's operative phrase. *E.g.*, *Hull v. Humphries*, 380 F. Supp. 2d 1, 5 (N.D. Florida 2004). By doing this, the Petitioner essentially ignores the preamble to the amendment, suggesting that the first thirteen words "might as well have been written in invisible ink." *Hull v. Humphries*, 987 F.3d 1, 5 (12th Cir. 2006) (citations omitted). This reading is erroneous, as the Court has demonstrated in prior cases. In *United States v. Miller*, 307 U.S. 174 (1939), a case considering the constitutionality of the National Firearms Act, the Court interpreted the prefatory and operative clauses of the Second Amendment in union. Highlighting the close relationship between bearing arms and the military, the Court

stated: "The defense and safety of the commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty." *Id.* at 181. Thus, relying on the holding in *Miller*, the Court must similarly read the two phrases of the amendment in tandem.

Taken together, the prefatory phrase puts a gloss over the operative phrase. The Amendment does not confer an individual right to bear arms but rather protects the private possession of weapons only in connection with the performance of civic duties as part of a well regulated militia. *E.g.*, *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002); *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. Hale*, 978 F.2d 1016, 1019–20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977). This idea is commonly known as the "collective right" or "sophisticated collective right" model. *Hull*, 987 F.3d at 2–4. Without an individual right to bear arms, the Petitioner cannot succeed on this constitutional claim, and Florabama's gun control statute does not violate the Constitution.

2. The Word "Militia" in the Second Amendment Does Not Support an Individual Right to Bear a Handgun

Petitioner argues that even if the Court considers the prefatory clause in conjunction with the operative phrase, the Court should nevertheless find the Florabama statute to be unconstitutional as applied because the Petitioner falls into a broad definition of "militia." *Hull v. Humphries*, 380 F. Supp. 2d 1, 11 (N.D. Florabama 2004).

However, Petitioner's argument fails for two reasons. First, the text of the Second Amendment, the Constitution itself, and Supreme Court precedent all point to a narrow

definition of militia—as an organized and regulated body of citizens—one that does not include an individual possessing a gun for private use. Second, even if this Court accepts Petitioner’s over-inclusive definition of an unorganized militia, his argument fails because he ignores that even unorganized militias possess guns only for the common defense. Petitioner does not claim a Second Amendment right to bear his handgun to defend his state but rather confines his constitutional analysis to the walls of his home.

A militia is an organized body of citizens that protects the interests of the state; it does not exist unless subject to state discipline and leadership. The words "well regulated" modify "militia" and suggest something more than a populace of all able-bodied men. The Petitioner’s neglect of "well regulated" violates the *Holmes* principle that every word in the Constitution has meaning. *Holmes v. Jennison*, 39 U.S. 540, 570–71 (1840).

The Constitution itself supports this definition. In Article I, Section 8, the Constitution grants Congress with the power: "To provide for organizing, arming, and disciplining, the Militia, . . . reserving to the States . . . the Authority of training the Militia." U.S. CONST. art. I, § 8. Here, the Framers inscribed the militia with certain qualities—organized, armed and ready to provide for the common defense. *Id.* Clearly, the militia cannot be unorganized.

The Second Militia Act also supports Respondent’s definition of an organized militia; the leadership and procedural aspects for enrollment testify to its organizational capacity. Second Militia Act, 1 Stat. 271 (1792). The statute provides that "every free able-bodied white male citizen . . . [shall be] *enrolled* in the militia, by the captain or commanding officer of the company [who] . . . shall without delay notify such citizen of said enrollment." *Id.* This portion of the Militia Act contemplates citizens actually participating in an organized outfit with a

commanding officer. Thus, the militia must be some kind of structured hierarchal system with communication between citizen-soldiers and the commanding officers.

Furthermore, in *Miller*, the Supreme Court described the militia as follows: "[T]he Militia comprised [of] all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.'" *United States v. Miller*, 307 U.S. 174, 179 (1939). A militia therefore cannot be a singular person in his house armed with a gun for self-defense. Because of this narrow definition, Petitioner does not fall within this category of a civilian force organized by the state. Petitioner does not dispute this fact. Thus, outside the definition of militia, Petitioner does not have a right to bear arms.

Even if the militia includes all able-bodied men (thus encompassing the Petitioner), the definition also requires that this body of men act in concert for the common defense. *Id.* However, the Petitioner does not do this. He does not intend to use his handgun for the common defense of the state—the Petitioner does not even claim a right to bear his handgun outside the confines of his home. *Hull*, 380 F. Supp. 2d at 2.

Moreover, courts have held that even general membership in the unorganized militia, as defined by 10 U.S.C. § 311 (2006), does not automatically grant Second Amendment protection. In *United States v. Rybar*, 103 F.3d 273, 285 (3d Cir. 1996), the Third Circuit failed to find a constitutional infringement of Second Amendment rights for an individual in an unorganized militia. *Id.* at 286. To receive constitutional protection of a firearm, the defendant also needed to establish a reasonable relationship between the weapon and the militia. *Id.* Rybar failed to demonstrate that his machine gun warranted this protection. *Id.*; see also *United States v. Wright*, 117 F.3d 1265, 1273–74 (11th Cir. 1997).

Similarly here, although it stretches the imagination to classify Petitioner in the unorganized militia, membership alone is not sufficient to garner Second Amendment protection. Rather, the Petitioner needs to meet the additional burden of showing a reasonable relationship between his handgun and the militia. Petitioner simply cannot meet this burden because he asserts the right to the handgun for self-preservation purposes and not for civic military duties of state defense. Petitioner's argument that he has a constitutional right to bear arms as part of the militia fails.

3. The Word "People" in the Second Amendment Does Not Suggest an Individual Right to Bear a Handgun

Petitioner argues that the word "people" in the amendment necessarily implies an individual right to bear arms because "people" in other provisions of the Bill of Rights protects individual interests. *Hull v. Humphries*, 380 F. Supp. 2d 1, 5 (N.D. Florida 2004). This argument, however, neglects other provisions in the Constitution.

The Framers used "people" to refer to a collective body rather than to refer to an individual right. For example, the Preamble to the Constitution begins, "We the people of the United States" U.S. CONST. pmbl. Furthermore, in other places, when the Constitution intended to grant an individual right, it used "any person" or similar phrases. The Fourteenth Amendment, granting individuals due process, states, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

Petitioner relies upon *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), where the Court discusses "people" in the First, Second, Fourth, Ninth, and Tenth Amendments. Petitioner suggests that the Court's silence on the Second Amendment's collective right implies that no such right exists. *Hull v. Humphries*, 380 F. Supp. 2d at 6. However, this judicial mind-reading is inaccurate because *Verdugo-Urquidez* centered on whether non-citizens on foreign soil constituted the "people" in the Fourth Amendment. *Verdugo-Urquidez*, 484 U.S. at 265. Because of this limited determination, the Supreme Court had no reason to comment on whether the Second Amendment was a collective or individual right.

"People" in the context of the Second Amendment does not apply to individuals, but rather includes a collective set involved in the militia. As such, there is no individual right in "the people," and the Florabama statute is not unconstitutional.

4. The Phrase "Keep and Bear" Should be Read as Purely Military Language, Refuting Individual Right to Bear a Handgun

Petitioner argues that "keep and bear" is not military language—that there are numerous references to "bear arms" as a private right to self-defense. *Hull v. Humphries*, 380 F. Supp. 2d 1, 8 (N.D. Florabama 2004). Not only are Petitioner's references *state* constitutional provisions giving individuals a private right to bear arms for self-preservation, *United States v. Emerson*, 270 F.3d 203, 230 n.29 (5th Cir. 2001), but history indicates that the terms refers to the military.

James Madison's original draft of the Second Amendment included a conscientious objector phrase. THE COMPLETE BILL OF RIGHTS 169 (Neil H. Cogan ed., 1997). The deleted Second Amendment phrase excused those conscientious objectors, who had scruples against

soldiering but did not object to hunting, from "bearing arms" and being forced "to render service in person." *Id.* If bearing arms only meant carrying arms, the phrase would not have been used to protect anti-military objectors.

Thus, keeping and bearing arms clearly incorporate a military context. As such, the Petitioner is not in the militia and therefore does not have a right to his handgun.

5. The Word "Arms" Refers to Historically Military Arms and a Handgun Does Not Fall in this Category

Petitioner argues that "arms" in the Second Amendment extends to handguns. *Hull v. Humphries*, 380 F. Supp. 2d 1, 19 (N.D. Florida 2004). However, *United States v. Miller*, 307 U.S. 174 (1939), makes clear that only certain types of weaponry will receive Second Amendment protection—those whose use or possession has some reasonable relationship to the preservation or efficiency of a well regulated militia. *Id.* at 178.

Additionally, it can be argued that handguns, even if they could be found to relate to present day militia work, were never considered "arms" within the definition of the Second Amendment. According to the Militia Act of 1792, weaponry other than muskets or firelocks would not have satisfied militiamen's outfit obligations. *Hull*, 380 F. Supp. 2d at 21. True, pistols were used by officers at the same time but, today the courts state that, in light of *Miller*, "We do not consider individually owned handguns to be military weapons." *Quilici v. Village of Morton Grove*, 695 F. 2d 261, 270 n.8 (7th Cir. 1982).

For the past sixty-nine years, this Court has refused to disturb its holding in *Miller*, thus suggesting that the types of weapons protected under the Second Amendment must be those used

for the militia. Therefore, the Court must conclude that because handguns are not normally part of the militia weaponry, Petitioner does not fall within "arms" in the Second Amendment.

B. The Framers Intended the Second Amendment to Protect the States from Federal Encroachment, Not to Guarantee an Individual Right to Bear Arms

Petitioner largely ignores that the Framers' intent in drafting the Second Amendment was to check potential federal encroachment. *Hull v. Humphries*, 987 F.3d 1, 13 (N.D. Florida 2004). This intent is crucial to understanding whether an individual right to bear arms exists. Contrary to the Petitioner's claims, the history of the amendment is dispositive on the issue.

In the First Congress, Madison proposed the language of the Second Amendment's well regulated militia as the "best security of a free country." David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 610 (2000). Specifically, the Drafters were concerned with the freedom of the states under the control of a federal government and its national army. The Constitutional Convention feared that the national standing army would pose a threat to individual liberty and sovereignty of the states. *Perpich v. Dep't of Def.*, 496 U.S. 334, 340 (1990). Because of this distrust for the national army, the Framers constructed the Second Amendment as an adequate counterweight to protect the states. *United States v. Miller*, 307 U.S. 174, 179 (1939). To appease the Anti-Federalists who had this suspicion of the federal government, the Federalists offered the Second Amendment's preamble.

In light of the legislative history, this Court should not find the existence of an individual right to bear arms. The *Miller* Court expounded on the military purpose of the Second Amendment which, besides Article I, Sec. 8, is the only militia clause in the Constitution. *Id.*

Because Article I grants Congress with the power to call forth, organize, and arm the militia, the Court read the Second Amendment and Article I as being of one purpose, inextricably intertwined. *Id.* The Court stated that it was "with obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made." *Id.* at 178. Considering both provisions in tandem, *Miller* concludes that the right of the people to keep and bear arms must be related to the militia—whose continued vitality the Founders saw as necessary to safeguard the individual states.

C. No Constitutional Right to Bear a Handgun Has Been Granted Through Judicial Precedent

Petitioner claims the Second Amendment grants an individual right to keep and bear arms. Yet, in its leading case on the Second Amendment, the Supreme Court refused to uphold a Second Amendment objection to prosecution under a law regulating firearms. *United States v. Miller*, 307 U.S. 174, 178 (1939).

Referring to a shotgun with a barrel less than eighteen inches long, the Court concluded that the Second Amendment does not guarantee the right to keep and bear such an instrument. *Id.* In *Miller*, the Court further stated that "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." *Id.* Moreover, the Court placed the burden on the party asserting the right, holding that absent a showing that the possession of the 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."

Id. Thus, because Petitioner's Glock 17 is not a part of ordinary military equipment and because his use of it will not "contribute to the common defense," *id.*, he has no right to it under Supreme Court precedent.

Although Petitioner may claim that *Miller* could be read to protect individual possession of those weapons useful to militia service, it in no way compels this reading. More importantly, the Supreme Court has not read *Miller* to imply anything resembling an individual right to firearms possession. On one of the two occasions the Court has had to upset the holding in *Miller*, it refused to do so. Instead, the Court relied on *Miller* to state that a statute criminalizing possession of a firearm by a convicted felon did not "trench upon any constitutionally protected liberties." *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980). Earlier, the Court dismissed an appeal, for want of a federal question, in which a state court held that the Second Amendment did not confer a right to bear arms unrelated to militia service. *Burton v. Sills*, 394 U.S. 812, 812 (1969). Together, these rulings indicate that not only is the right to keep and bear arms not an individual right, but that any right to bear arms must be related to actual participation in a militia.

Precedent demonstrating such a collective right to bear arms is not limited to these three Supreme Court cases. For example, in *Love v. Pepersack*, 47 F.3d 120 (4th Cir. 1995), the court stated that since the *Miller* decision, "the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than an individual, right." *Id.* at 124. *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), posited, "[W]e cannot conclude that the Second Amendment protects the individual possession of military weapons." *Id.* at 1019. In fact, "with the exception of the Fifth Circuit, the courts of appeals have consistently concluded that individuals have no fundamental constitutional right to possess a firearm." *United States v. Cole*, 276 F. Supp. 2d 146, 151–52 (D.D.C. 2003).

Petitioner relies on *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). Yet, as we have shown above, almost all precedent lies against his position and "[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*." *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478–79 (1987). However, *Emerson* is weak not only as an outlier decision, but because it ignored prior Fifth Circuit decisions in making its ruling and also because its support of the individual rights model comes in dicta.

Therefore, the Court should refuse to find that the Second Amendment endows an individual with a constitutional right to bear a handgun for personal defense.

II. FLORABAMA CODE § 9-19.02 DOES NOT INFRINGE UPON THE PROTECTIONS OF THE SECOND AMENDMENT

A. The Second Amendment is Not Incorporated Through the Fourteenth Amendment to Apply to the States

The Florabama Code does not infringe on the protections of the Second Amendment because any restrictions on limiting the right to bear arms applies only to the federal government. The Second Amendment has not been incorporated by the Fourteenth Amendment. *Presser v. Illinois*, 116 U.S. 252, 265 (1886) ("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."). Thus, regardless of whether the right to bear arms is a collective or an individual right, any limitation on a restriction of the right applies only to the federal government and *not* to the states. *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").

Yet, Petitioner argues that these cases were decided before the Court's modern incorporation doctrine. However, by refusing to hear cases on the issue since the incorporation debate, the Court has twice declined to reconsider its position on the incorporation of the Second Amendment. *Quilici v. Village of Morton Grove*, 464 U.S. 863, 863 (1983); *Burton v. Sills*, 394 U.S. 812, 812 (1969). Thus, as the "Second Amendment does not apply to the states," *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir. 1995), Florabama can regulate arms within its state so long as the restriction survives the rational basis test.

B. FLORABAMA CODE § 9-19.02 Survives Rational Basis Review

Under rational basis review, a court will uphold a statute if the law bears a "rational relationship to a legitimate governmental purpose." *Tennessee v. Lane*, 541 U.S. 509, 522 (2004). Section 9-19.02 of the Florabama Code meets this test. Here the "legitimate governmental purpose," *id.*, is to reduce the level of violence in the state. This purpose of safety, law, and order is very high, and the danger of unregulated firearms is very real on account of the significant rise in gun violence in the last twenty years. This purpose is legitimate because the state legislature "reasonably determine[d]" that handguns do not contribute to public security but instead endanger it. *Hull v. Humphries*, 987 F.3d 1, 15 (12th Cir. 2006).

The law is also rationally related to this governmental purpose. Petitioner argues that banning the registration of handguns is overbroad. Conversely, Petitioner argues that section 9-19.02 is arbitrary and capricious in choosing to generally outlaw handguns if the stated purpose

is to "address the rising level of violence." *Id.* at 1. However, the standard that must be reached is rational basis which survives challenges of overbreadth or lack of narrow tailoring. In addition, the government explains that the significant rise in gun violence is primarily related to handguns. Handguns are exactly the type of harmful weapon that endanger public safety—between 1993 and 2001, handguns were used in 87% of the annual average of 847,000 violent crimes. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 194820, WEAPON USE AND VIOLENT CRIME 3 (2003). By choosing to limit handgun possession, the state is rationally addressing its stated problem.

Finally, even the *Emerson* court, while embracing the individual rights approach in dicta, held that the gun control statute at issue in that case was not an unconstitutional infringement of the right bear arms under the Second Amendment because it was a reasonable, "narrowly tailored" exception. *United States v. Emerson*, 270 F.3d 203, 261–62 (5th Cir. 2001). Having a lower standard to surpass than the one articulated in *Emerson*, the Florabama statute passes the rational basis test, and therefore does not infringe upon the protection of the Second Amendment.

C. Even if the Second Amendment Could be Found to Protect and Individual Right to Bear Arms, the State Can Still "Reasonably Restrict" that Right

Even if the Second Amendment could be found to protect an individual right to bear arms, it is still subject to a state's "reasonable restrictions." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Because this statute reasonably regulates the Second Amendment right to bear arms, be that right collective or individual, section 9-19.02 cannot be deemed to infringe upon the protections of the Second Amendment.

A right to weapons has never been "treated as anything like an absolute right," *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), and the Bill of Rights is "subject to certain well-recognized exceptions." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). For example, it is reasonable to prohibit the "carrying of concealed weapons," *id.* at 281–82, or to deprive convicted felons of their right to keep and bear arms. *See Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980). Additionally, under the reasonable regulation standard, courts may uphold a "ban on discrete categories of firearms, such as handguns. . . ." *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 273 (Ill. 1984).

Part I, subpart 5 above proved that handguns are not considered "arms" within the meaning of the Second Amendment. Also, handguns have been used in the majority of the violent gang acts in the state. *Hull v. Humphries*, 987 F.3d 1, 1 (12th Cir. 2006). Thus, because "state legislatures may reasonably determine which weapons undermine the common defense because they threaten the public security," *id.* at 15, rather than serve to protect it, it is reasonable that Florabama would wish to prohibit the use of handguns. The large-scale problem of violence in society, which includes gun violence, overwhelms Petitioner's interest in self-defense in the home.

Petitioner argues that Florabama gun control laws irrationally prevent only law-abiding citizens from owning handguns because a black market for handguns exists in the state. *Hull v. Humphries*, 380 F. Supp. 2d 1, 23 n.12 (N.D. Florabama 2004). Yet, regardless of whether or not this is true, it does not diminish the fact that reasonable restrictions, like the kind found in section 9-19.02, do not infringe on the Second Amendment. Subsequently, Petitioner argues that the prohibition on registering handguns frustrates the Second Amendment. While we have already discussed the right to bear arms is a collective right, and thus affords no blanket right to

individual possession of firearms, section 9-19.02 allows registration of other weapons while also permitting handgun possession in such a way as to contribute to public security. This fact is underscored by the exception for "currently assigned or retired law enforcement officer[s]" FLORABAMA CODE § 9-19.02 (a)(6). Police officers are given the right to register handguns because they actually contribute to the common defense, unlike Petitioner in his desire to have "functional firearms" in his home.

Furthermore, by requiring a showing that possessing the weapon could "contribute to the common defense" or that it "has some reasonable relationship to the preservation or efficiency of a well-regulated militia," *United States v. Miller*, 307 U.S. 174, 178 (1939), the Court placed the burden on the party asserting the right to show that the statute infringes on Second Amendment protections. This burden implies that legislative choices are presumptively reasonable.

In sum, while restrictions such as those under section 9-19.02 are permissible because they are reasonable, even under a narrow reading of *Miller*, which would theoretically protect those weapons that have "some reasonable relationship to the preservation or efficiency of a well-regulated militia," *Miller*, 307 U.S. at 178, a handgun, like the kind at issue here, would not be protected from regulation. Section 9-19.02 of the Florabama Code therefore does not infringe upon the protections of the Second Amendment.

CONCLUSION

For the foregoing reasons, the Respondent requests that this Honorable Court affirm the decision of the Twelfth Circuit.