

No. 08-1521

IN THE
Supreme Court of the United States

OTIS McDONALD, *et al.*,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**BRIEF FOR THE NATIONAL SHOOTING SPORTS
FOUNDATION, INC. AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE*¹

The *amicus curiae* is the National Shooting Sports Foundation, Inc. (“the NSSF”), the trade association for the firearms, ammunition, hunting, and shooting sports industry. Formed in 1961, the NSSF is a Connecticut non-profit tax-exempt corporation with a membership of approximately 5,000 federally licensed firearms manufacturers, distributors, and retailers; companies manufacturing, distributing and selling shooting and hunting related goods and services; sportsmen’s organizations; public and private shooting ranges; gun clubs; publishers; and individuals. The NSSF’s mission is to promote, protect and preserve hunting and the shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and the shooting sports; reaffirming and strengthening its members’ commitment to the safe and responsible sale and use of their products; and promoting a political environment that is supportive of America’s traditional hunting and shooting heritage and Second Amendment freedoms.

The NSSF’s interest in this action derives principally from the fact that the NSSF’s federally licensed firearms manufacturer, distributor, and retailer members provide the lawful commerce in firearms that

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The Petitioners have received at least 7 days notice from the *amicus*, and the Respondents’ consent is being submitted herewith.

makes possible the exercise by the People of the pre-existing individual right enshrined in and protected by the Second Amendment. Members of the industry, for example, supply the United States armed forces and federal, state, and local law enforcement with the firearms they use to protect America's national security and keep our communities safe, and also supply hunters, sportsmen, and gun owners with the firearms they use for legitimate and lawful purposes, which include defense of their families, themselves and their homes. More generally, as a guardian of our nation's rich hunting and shooting heritage and traditions, the NSSF believes that any interpretation of the Second Amendment must be informed by that heritage – particularly the history of firearms in colonial America before and during ratification of the Second Amendment. Because that history demonstrates that the Second Amendment's individual right to "keep and bear arms" is "fundamental" within the meaning of Fourteenth Amendment jurisprudence, the NSSF submits this brief in support of Petitioners and urges this Court to reverse the decision of the United States Court of Appeals for the Seventh Circuit.

SUMMARY OF THE ARGUMENT

The Second Amendment to the Constitution provides that, "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. Whether the Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment turns on whether the right to keep and bear arms is "fundamental," or "deeply rooted in this Nation's history and traditions." *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

As this Court recognized in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008), the Second Amendment did not create a new right, but enshrined a right that had already existed. History makes clear that that pre-existing right was indeed fundamental and deeply rooted in our history. Firearms played an integral role in Americans' lives before and during ratification of the Constitution and the Bill of Rights. Personal ownership of firearms was, of course, often critical to survival in the 17th and 18th centuries (and long thereafter) – providing food before there were supermarkets and safety before there were police forces. More importantly, late 18th century Americans deemed firearms to be their principal protection against tyranny – first from the British crown and then from the new national government they were creating in the Constitution. Individual States also guaranteed these rights in various forms at the founding, in the aftermath of the Civil War, and thereafter, such that 44 States currently protect the right to bear arms. In light of this history, the fundamental character of the individual right to bear arms is self-evident.

ARGUMENT

In its landmark *Heller* opinion, this Court held that, “[b]y the time of the founding, the right to have arms had become fundamental for British subjects.” 128 S. Ct. at 2798. That right pre-existed our Constitution, *id.* at 2797, served as the basis for the Second Amendment, *id.* at 2797-99, and encompasses what the Court recognized as “the inherent right of self-defense,” *id.* at 2817.

In deciding whether the Second Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment, the Court must now determine whether the rights guaranteed by the Second Amendment are fundamental to our society – an inquiry that turns on whether the right is “necessary to an Anglo-American regime of ordered liberty,” *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968), and “deeply rooted in this Nation’s history and tradition,” *Glucksberg*, 521 U.S. at 720-21 (internal quotation marks and citation omitted). A review of the role of firearms in colonial society and our nation’s founding, the Framers’ notions of the right to keep and bear arms, and the subsequent recognition of the right by the States leads inescapably to the conclusion that the individual rights guaranteed by the Second Amendment are, indeed, “fundamental” and, therefore, apply to the States through the Due Process Clause of the Fourteenth Amendment.²

I. FIREARMS WERE A PRINCIPAL AND UBIQUITOUS TOOL OF SURVIVAL IN COLONIAL AMERICA

In the colonial era leading up to the drafting of the Constitution and Bill of Rights, firearms played a prominent role in America. No longer a privilege shared only by noblemen and the wealthy, as in Britain, firearms

² The NSSF agrees with Petitioners that this would also be an appropriate case in which to consider incorporation under the Fourteenth Amendment’s Privileges and Immunities Clause.

in America were an important means of assuring self-preservation for all classes.³ Firearms were commonly viewed as essential to protecting colonists from attacks by Native Americans, insurrections by slaves, and harm from wild animals. Firearms also proved superior to other weapons in hunting, for both food and trade, the vast numbers of wild game and fowl that inhabited the New World – so much so that Native Americans, when possible, abandoned their traditional weaponry for the new firearms.⁴

Although it is impossible to quantify with certainty the prevalence of firearms in colonial America, academicians have been able to extrapolate estimates from probate inventory reports and contemporary accounts of observers. One recent such study estimates firearms ownership in 1774 at over fifty percent, compared with roughly seventy-seven percent clothes ownership and thirty percent money and coin ownership.⁵ According to a review of over 5,000 probates from 1636 through 1810, “[a]pproximately 50-79% of itemized male inventories contained guns.”⁶ These are likely

³ See LEE KENNETT & JAMES LAVERNE ANDERSON, *THE GUN IN AMERICA* 41 (1975); ALEXANDER DECONDE, *GUN VIOLENCE IN AMERICA* 17 (2001).

⁴ KENNETT & ANDERSON, *supra* note 3, at 41-42, 51.

⁵ See James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 *WM. & MARY L. REV.* 1777, 1835-36 (2002).

⁶ *Id.* at 1838.

conservative estimates, and firearms ownership was likely substantially higher.⁷

Numerous observers of life in the colonies reported the commonplace use of firearms. An Anglican minister of the era, for example, noted that “the great quantities of game, the many kinds, and the great privileges of killing make the Americans the best marksman [*sic*] in the world.”⁸ Another commentator reported that “there is not a Man born in America that does not understand the Use of Firearms and that well. . . . It is almost the First thing they Purchase and take to all the New Settlements and in the Cities you can scarcely find a Lad of 12 years That [does not] go a Gunning.”⁹ Yet another noted: “[W]hen a boy was twelve ‘he then became a fort soldier, and had his port-hole assigned him. Hunting squirrels, turkeys, and raccoons, soon made him expert in the use of his gun.’”¹⁰ Even non-citizens had access to firearms. Slaves, for a time, in some areas had access to firearms for hunting, although armed slave insurrections subsequently led to the disarmament of slaves and, in some regions, freed blacks

⁷ The probate reports are admittedly incomplete and imperfect sources of information; however, as the authors explain, they tend to understate items possessed. For example, one would expect clothing to be reported on every probate, which it is not. *Id.* at 1836-37. It is also possible that firearms were passed on to others before death.

⁸ KENNETT & ANDERSON, *supra* note 3, at 42 (citation omitted).

⁹ *Id.* (citation omitted).

¹⁰ *Id.* (citation omitted).

as well.¹¹ Native Americans, dependent on firearms for food and defense, also came to possess significant quantities of firearms.¹²

Laws in effect in the colonies encouraged, even required, the carrying and use of firearms. Inhabitants in at least six colonies were required to carry firearms to church, public meetings, or while traveling, in order to repel sudden attacks by Native Americans.¹³ More ubiquitous, however, were “militia laws,” which appeared beginning in the mid-17th century and required colonists to bear arms in common defense against Native Americans and Britain’s European enemies.¹⁴ The militia laws generally required persons between specified ages (usually between sixteen and sixty) to bear arms, often at their own expense, and to provide arms for servants living within their households.¹⁵ Laws encouraging hunting emerged in order to hone marksmanship skills at private expense.¹⁶ By the time of the American Revolution, every colony had its own militia of private

¹¹ See CLAYTON E. CRAMER, *ARMED IN AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE* 33-36 (2006) (citing South Carolina laws and customs).

¹² See *id.* at 46-50; KENNETT & ANDERSON, *supra* note 3, at 51.

¹³ See CRAMER, *supra* note 11, at 9-11.

¹⁴ See, e.g., *id.* at 3-11.

¹⁵ See *id.* at 3-9 (describing various militia laws and exemptions from militia service).

¹⁶ See KENNETT & ANDERSON, *supra* note 3, at 46.

citizens,¹⁷ and firearms were ingrained in the American experience.¹⁸

¹⁷ See CRAMER, *supra* note 11, at 3.

¹⁸ The firearms-dependent society of late 18th century America, of course, gave birth to a vibrant firearms manufacturing industry. Today, the manufacture and sale of firearms in America remain in private hands. Indeed, as there is no government-owned arsenal, private manufacturers, most of whom are members of the NSSF, supply small arms used by the American military, law enforcement, and consumers. Because the Second Amendment protects an individual right to “keep and bear arms,” the commerce engaged in by those manufacturers that makes exercise of that right possible is also necessarily cloaked in some degree of Constitutional protection. *Cf. Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 866-867 (1982) (plurality opinion) (noting, in the context of First Amendment rights, that “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”) (emphasis in original); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (without the “peripheral rights” to distribute, receive, read, inquire, think, and teach, the specific rights of freedom of speech and press would be less secure).

Surely, the right to keep and bear arms becomes illusory if the means of exercising it are prohibited. In the same way that banning newspapers squelches freedom of speech and freedom of the press, prohibiting manufacturers from producing guns and shipping them in interstate commerce, and criminalizing the purchase and possession of guns by ordinary citizens, strips citizens of their Second Amendment rights.

II. THE BRITISH TRIED BUT FAILED TO DISARM THE COLONISTS DURING THE AMERICAN REVOLUTION

Colonial life entered a new phase in 1767, with the British Parliament's passage of the Townshend Acts. As the dispute between the colonies and the Crown escalated, the colonists' widespread possession of firearms quickly became an issue – and one that the colonists defended immediately.

A. At the Earliest Hostilities, Colonists Asserted Their Pre-Existing Individual Right to Keep and Bear Arms

The Townshend Acts imposed customs duties on items commonly imported into the colonies. This “taxation without representation” sparked outrage among many colonists, and led to petitions to the Crown and Parliament for redress. Because Boston was seen as the hotbed of civil unrest in the colonies, British General Thomas Gage was instructed to send military forces into the city.¹⁹ When riots then erupted in Boston in 1768, the British Ministry responded by seeking to disarm the inhabitants of Boston.²⁰

¹⁹ 2 THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY, 1763-1775, at 68-69 (Clarence E. Carter ed., Yale University Press 1931-33).

²⁰ See BOSTON GAZETTE, September 26, 1768, at 3, cols. 1-2 (reporting that the Ministry had instructed the Governor to disarm the people); VIRGINIA GAZETTE, October 27, 1768, at 2, col. 3 (same); MARYLAND GAZETTE (Annapolis), October 20, 1768, at 3, col. 1 (same); GEORGIA GAZETTE (Savannah), November 2, 1768, at 1, col. 1 (same).

Bostonians became alarmed, and passed a resolution advising every man to arm himself “in Case of Sudden Danger.”²¹ When King George III denounced this resolution as an illegal act, Samuel Adams defended the resolution by declaring that, as “subjects of England,” the Bostonians were “entitled . . . to the right of having and using arms for self-preservation and defence.” Adams argued that the right to bear arms constituted what British jurist William Blackstone had called “auxiliary subordinate rights, which serve principally as barriers to protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property.”²²

As tensions continued to rise, skirmishes between the colonists and the Redcoats culminated in the Boston Massacre on March 5, 1770. During the ensuing criminal trial of the British soldiers, both the prosecution and defense agreed that Bostonians had the right to arm themselves for self-defense.²³ Indeed, successfully representing the soldiers, John Adams asserted this right as follows: “Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to

²¹ BOSTON CHRONICLE, September 19, 1768, at 363, col. 2; *see also* BOSTON POST POST-BOY & ADVERTISER, September 19, 1768, at 1, col. 3; NEW YORK JOURNAL, OR GENERAL ADVERTISER, Supplement, September 24, 1768, at 1, col. 3.

²² 1 THE WRITINGS OF SAMUEL ADAMS 317-18 (Harry Alonzo Cushing ed., G.P. Putnam’s Sons 1904). Adams quoted *verbatim* from WILLIAM BLACKSTONE, 1 COMMENTARIES 140-41, 143-44.

²³ *See* STEPHEN P. HALBROOK, THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 23-25 (2008).

arm themselves at that time, for their defence, not for offence.”²⁴

B. Britain Tried to Subdue Boston by Disarming its Residents

Three years of relative calm thereafter came to an abrupt end on December 16, 1773, with the Boston Tea Party.²⁵ Parliament responded by, among other things, revoking the Massachusetts Province Charter; appointing General Gage as governor of Massachusetts, with authority to declare martial law and suppress rebellion by force; and establishing a Massachusetts Council appointed by the Crown.²⁶

The British were aware, however, that because Massachusetts residents were well-armed, the British would have great difficulty controlling them. In the words of Lord Percy:

What makes an insurrection here always
more formidable than in other places, is that

²⁴ JOHN ADAMS, 3 LEGAL PAPERS 248 (Belknap Press/Harvard Univ. Press 1965).

²⁵ Recently passed legislation had been designed to give the British East India Company a monopoly on the trade by suppressing the trade in Dutch tea and waiving import taxes on English tea. *See* HALBROOK, *supra* note 23, at 29.

²⁶ *See id.* at 29-30; DAVID RAMSAY, 1 THE HISTORY OF THE AMERICAN REVOLUTION 99 (R. Aitken 1789) *reprinted by* (Liberty Classics 1990); BERNHARD KNOLLENBERG, GROWTH OF THE AMERICAN REVOLUTION, 1766-1775, at 136-39 (Free Press 1975), *reprinted by* (Liberty Fund 2003).

there is a law of this Province, wh[ich] obliges every inhabitant to be furnished with a firelock, bayonet, & pretty considerable quantity of ammunition. Besides wh[ich] every township is obliged by the same law to have a large magazine of all kinds of military stores. They are, moreover, trained four times in each year, so that they do not make a despicable appearance as soldiers, tho' they were never yet known to behave themselves even decently in the field.²⁷

Accordingly, Lord Dartmouth, secretary of state for America, recommended that General Gage disarm the colonists.²⁸

General Gage agreed that disarmament would be prudent, but he knew it had to be implemented gradually because there were simply too many armed citizens.²⁹ After seizing the gunpowder at the Massachusetts powder houses³⁰ and banning the export of all arms and

²⁷ Percy to the Duke of Northumberland (his father), September 12, 1774, *in* HUGH PERCY, LETTERS OF HUGH EARL PERCY FROM BOSTON AND NEW YORK, 1774-1776, at 37-38 (Charles Knowles Bolton ed., Charles E. Goodspeed 1902).

²⁸ Dartmouth to Gage, October 17, 1774, in 2 CORRESPONDENCE OF GENERAL GAGE, *supra* note 19, at 175.

²⁹ Gage to Dartmouth, December 15, 1774, 1 CORRESPONDENCE OF GENERAL GAGE, *supra* note 19, at 387.

³⁰ See HALBROOK, *supra* note 23, at 32, 36-38.

ammunition into the colonies,³¹ he decided in 1775 to confiscate arms and ammunition directly from the citizens. One such search-and-seizure mission led to the first military engagements of the war, the Battles of Lexington and Concord.³²

Fearing rebellion at his back, General Gage then sought to disarm all inhabitants of Boston. On April 23, 1775, believing that colonists were hiding arms and ammunition, Gage promised a committee of Selectmen “that upon the inhabitants in general lodging their arms in Faneuil Hall, or any other convenient place, under the care of the selectmen, marked with the names of the respective owners, that all such inhabitants as are inclined, may depart from the town. . . . And that the arms aforesaid at a suitable time would be return’d to the owners.”³³ Acting on this promise, “the people

³¹ 5 Acts Privy Council 401, *reprinted in* CONNECTICUT COURANT, December 19, 1774, at 3, cols. 2-3. The decree was renewed from time to time until 1783. *See* JAMES TRUSLOW ADAMS, REVOLUTIONARY NEW ENGLAND 1691-1776, at 412 (Atlantic Monthly Press 1923).

³² *See* HALBROOK, *supra* note 23, at 73-74. In April of 1775, General Gage learned from informants that the Massachusetts colonists had hidden arms and ammunition at roughly thirty homes and farms in Concord. On April 18th, “[h]aving received Intelligence, that a Quantity of Ammunition, Provision, Artillery, Tents and small Arms, [had] been collected at Concord,” he ordered Lieutenant Colonel Francis Smith to “March with the Corps of Grenadiers and light Infantry, put under [his] Command, with the utmost expedition and Secrecy to Concord where [he would] seize and destroy” the munitions. KNOLLENBERG, *supra* note 26, at 231-32.

³³ Attested Copy of Proceedings Between Gage and Selectmen, April 23, 1775, *in* CONNECTICUT COURANT, July 17, 1775, at 4, col. 2.

delivered to the selectmen 1778 fire-arms [muskets], 634 pistols, 973 bayonets, and 38 blunderbusses [short-barreled shotguns].”³⁴ Having seized the weapons, however, General Gage then reneged on his promise to let the inhabitants leave. The Boston residents thus were held hostage in their own town.³⁵

On June 17, 1775, Bostonians fought the Battle of Bunker Hill. This proved to General Gage that his previous attempt at disarmament had been unsuccessful and led him on June 19, 1775, to renew his call for the colonists to surrender their arms, declaring “that all persons in whose possession any fire arms hereafter be found, will be deemed enemies to his majesty’s government.”³⁶ Stated otherwise, General Gage had declared the mere possession of arms and ammunition in Boston to be an act of treason.

Not surprisingly, colonists elsewhere feared that the disarmament of Boston was only the first step in a general plan to disarm all Americans. In his famed “liberty or death” speech to the Convention of Delegates of Virginia, for example, Patrick Henry proclaimed: “They tell us . . . that we are weak—unable to cope with so formidable an adversary. But when shall we be stronger? . . . Will it be when we are totally disarmed, and when a British guard shall be stationed in every

³⁴ RICHARD FROTHINGHAM, *HISTORY OF THE SIEGE OF BOSTON* 95 (Little, Brown, & Co. 1903).

³⁵ See HALBROOK, *supra* note 23, at 85-89.

³⁶ NEW YORK JOURNAL, August 31, 1775, at 1, col. 4. See also 2 AMERICAN ARCHIVES, 4th series, at 1027 (Force ed.).

house?”³⁷ Likewise, a New Hampshire patriot wrote: “Could [the Ministry] not have given up their Plan for enslaving America without seizing . . . all the Arms and Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies?”³⁸

This widespread fear of disarmament precipitated renewed calls for armed self-defense throughout the colonies.³⁹ Josiah Warren of the Massachusetts Provincial Congress, for example, recommended that New Yorkers secure their weapons for themselves or “within a few days you should behold these very materials improved in murdering you, and yourselves perishing for the want of them.”⁴⁰ The South Carolina General Committee, meanwhile, “recommended, to all persons, to provide themselves immediately, with at least twelve and a half pounds of powder, with a proportionate

³⁷ JOURNAL OF PROCEEDING OF CONVENTION HELD AT RICHMOND 34 (J. Dixon 1775); *see also* VIRGINIA GAZETTE, April 1, 1775, at 2, cols. 1-2.

³⁸ NEW HAMPSHIRE GAZETTE AND HISTORICAL CHRONICLE, January 13, 1775, at 1, col. 1, *reprinted in* 1 AMERICAN ARCHIVES (Washington, D.C. 1837-53), 4th series, at 1065 (Force ed.).

³⁹ *E.g.*, NEW YORK JOURNAL, May 4, 1775, at 2, col. 3 (New York); NEW YORK JOURNAL, May 11, 1775, at 1, cols. 2-3 (New Jersey); NORTH CAROLINA GAZETTE, July 14, 1775, at 1, col. 1 (South Carolina).

⁴⁰ 2 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK: 1775-1776-1777, at 10 (Thurlow Weed 1842).

quantity of bullets.”⁴¹ Typical of the entreaties was the message of the North Carolina contingent of the Continental Congress:

It is the Right of every English Subject to be prepared with Weapons for his Defense. We conjure you . . . to form yourselves into a Militia. . . . Carefully preserve the small quantity of Gunpowder which you have amongst you, it will be the last Resource when every other Means of Safety fails you; Great-Britain has cut you off from further supplies. . . .⁴²

Lest there be any doubt about how significantly the colonists viewed Britain’s attempts to disarm them, the Continental Congress included disarmament in its July 6, 1775 Declaration of Causes of Taking Up Arms. Drafted by Thomas Jefferson and John Dickinson, the Declaration stated, in relevant part:

The inhabitants of Boston being confined within that town by the General their Governor, and having, in order to procure their dismissal, entered into a treaty with him, it was stipulated that the said inhabitants having deposited their arms with their own magistrates, should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in

⁴¹ JOHN DRAYTON, 1 MEMOIRS OF THE AMERICAN REVOLUTION . . . AS RELATING TO SOUTH CAROLINA 166 (Charleston 1821).

⁴² NORTH CAROLINA GAZETTE (Newbern), July 7, 1775, at 2, col. 3.

open violation of honor, in defiance of the obligation of treaties, which even savage nations esteem sacred, the Governor ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind.⁴³

This Declaration was made known throughout the colonies,⁴⁴ making clear that Britain's policy of disarmament was one of the leading causes of the American Revolution.

III. BECAUSE THE SECOND AMENDMENT DERIVES FROM THE AMERICANS' REFUSAL TO BE DISARMED, IT PROTECTS A FUNDAMENTAL RIGHT OF THE INDIVIDUAL TO KEEP AND BEAR ARMS

Having successfully resisted disarmament, the Americans were able to defeat Great Britain in 1783. Suspicious of government, however, Americans of that era retained their fear of disarmament. Indeed, as Americans considered the ratification of a new Constitution, their refusal to permit disarmament led

⁴³ 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1779, at 151 (Worthington Chauncey Ford ed., Government Printing Office 1905).

⁴⁴ *E.g.*, CONNECTICUT COURANT, July 17, 1775, at 2, col. 1. *See also* HALBROOK, *supra* note 23, at 100-02.

directly to the inclusion of an individual right to bear arms in the Second Amendment of the Bill of Rights. As the discussions surrounding the Second Amendment demonstrate, while the expression of the right provoked substantial debate, the fundamental nature of an individual's right to keep and bear arms was an unspoken assumption. The Second Amendment did not create the fundamental individual right; it protected and enshrined it. *See Heller*, 128 S. Ct. at 2798.

Debate over the right to keep and bear arms was ignited when the Framers suggested standardizing militia training and weaponry, much as they had proposed standardizing currency and domestic and international trade. To promote uniformity and the interchangeability of firearms and ammunition across the various States, George Mason proposed a "militia clause," which would permit Congress to "make laws for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and authority of training the militia according to the discipline prescribed."⁴⁵

Despite the benign purpose of standardization, the militia clause generated numerous objections following the same theme: the Antifederalists opposed federalizing the militia because they feared it would give the central government power to disarm the people. Even George

⁴⁵ DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA . . . VOL. V. SUPPLEMENTARY TO ELLIOT'S DEBATES 464 (Jonathan Elliott ed., J.B. Lippincott 1845).

Mason himself, the Virginian Antifederalist who had proposed the militia clause, argued as follows:

Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man [Sir William Keith], who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia. . . . Why should we not provide against the danger of having our militia, our real and natural strength destroyed?⁴⁶

The Federalists dismissed these arguments as unfounded, because the militia comprised “the people” themselves, whom Congress had no power to disarm. In his pamphlet, *An Examination of the Leading Principles of the Federal Constitution*, for example, Noah Webster explained that, because the armed populace would remain sovereign, there was no need to fear a standing army:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce

⁴⁶ 3 DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 380 (Jonathan Elliot ed., J.B. Lippincott 1836).

unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.⁴⁷

And Tench Coxe, writing under the name “A Pennsylvanian,” made the same argument:

Who are the militia? are they not ourselves. Is it feared, then, that we shall turn our arms each man against our own bosom. Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American. . . . [T]he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people.⁴⁸

Finally, and perhaps most authoritatively, during the ratification process, James Madison wrote that “the advantage of being armed, which the Americans possess

⁴⁷ NOAH WEBSTER, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (Philadelphia 1787).

⁴⁸ PENNSYLVANIA GAZETTE, February 20, 1788, *reprinted in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1778-1780 (Merrill Jensen ed., State Historical Society of Wisconsin 1976) (microfilm supplement).

over the people of almost every other nation” formed “a barrier against the enterprises of ambition.”⁴⁹

Despite these basic differences over which governmental body should be permitted to “arm” the militia, however, both sides to the debate agreed that the government did not have the power to deprive the people of their fundamental right to keep and bear arms. Indeed, in 18th century America, it is difficult to conceive how anyone could have seriously advocated such a position.

Accordingly, the Antifederalists ensured that what became the Second Amendment – guaranteeing the pre-existing right of an individual to keep and bear arms – be included within the Bill of Rights.

IV. THE HISTORY OF THE RIGHT TO BEAR ARMS AMONG THE STATES CONFIRMS THE FUNDAMENTAL NATURE OF THAT RIGHT

As if to underscore the fundamental nature of the individual right to bear arms, the right has been protected at virtually every other stage of the development of our federal system.

For example, each of the original 13 States had deemed the right to bear arms fundamental, with several of them including the right in their State

⁴⁹ 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492-93 (John P. Kaminski *et al.* eds., State Historical Society of Wisconsin 1984).

constitutions.⁵⁰ Then, following the Civil War, the discourse surrounding ratification of the Fourteenth Amendment again reflected the fundamental nature of the right to bear arms and the need to protect it from State encroachment.⁵¹ Indeed, a primary purpose of the Fourteenth Amendment was to reverse the “Black Codes” of the South, which, among other things, deprived African Americans of their individual right to bear arms and, concomitantly, the right to defend themselves, their families and their homes. *See Heller*, 128 S. Ct. at 2809-10. As Jacob Howard explained in the Senate, referring to “the personal rights guaranteed and secured by the first eight amendments of the constitution” (among which he included the right to bear arms), “[t]he great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”⁵² So important is the individual right to keep and bear arms in our nation’s heritage that, today, 44 states guarantee the right to arms in their constitutions.⁵³

Throughout our nation’s history, the individual right to keep and bear arms has been integral to the protection of the inalienable rights to life, liberty and

⁵⁰ *See* HALBROOK, *supra* note 23, at 126-68.

⁵¹ *See* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, & THE RIGHT TO BEAR ARMS 1866-1876 (1998) chapters 1-4.

⁵² CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).

⁵³ Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193-205 (2006).

property. If the States were now free to eliminate that right, however, it would become meaningless. As the United States Court of Appeals for the Ninth Circuit properly held in *Nordyke v. King*, 563 F. 3d 439, 457 (9th Cir. 2009),

the right to keep and bear arms is “deeply rooted in this Nation’s history and tradition.” Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. It has long been regarded as the “true palladium of liberty.” Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.

This history proves strongly not only that the Second Amendment guarantees an individual right to “keep and bear arms,” but that that right was fundamental to the creation and protection of our country. Accordingly, this Court should reverse the decision below.

CONCLUSION

In accordance with the intent of the Framers that the Second Amendment protect a fundamental, individual right to “keep and bear arms,” this Court should reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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