No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD, et al.,

Petitioner,

—v.—

CITY OF CHICAGO, et al.,

Respondents.

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

BRIEF SUPPORTING RESPONDENTS OF *AMICUS CURIAE* EDUCATIONAL FUND TO STOP GUN VIOLENCE

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Educational Fund to Stop Gun Violence ("EFSGV") is an organization that seeks to secure freedom from gun violence through research, strategic engagement, and effective policy advocacy. EFSGV has a strong interest in stemming the tide of gun violence that threatens lives and our communities. EFSGV believes that the Second Amendment does not include an individual right to bear arms for insurrectionary purposes and that incorporating such a broad right would eviscerate the ability of States and municipalities to regulate firearms in any meaningful manner—even through laws that this Court has called "presumptively valid." EFSGV supports the City of Chicago's right to determine its own gun laws and believes that the Second Amendment should not be incorporated by the Fourteenth Amendment to apply to the States. If, however, the Court does hold that the Amendment is incorporated, EFSGV urges the Court to clarify that the scope of the right protected does not include an individual right to amass or use arms against the government.[1]

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[1] Pursuant to this Court's Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and that no person other than *Amicus's* counsel made such a contribution. Pursuant to this Court's Rule 37.3, this brief is filed with the parties' consent. Petitioner and the National Rifle Association of America, Inc. ("NRA") consented to the filing of *amicus* briefs conditioned on seven days written notice and Respondents consented conditioned on ten days written notice. Counsel for *Amicus* provided notice of intent to file this brief on December 10, 2009.

SUMMARY OF ARGUMENT

The Second Amendment should not be incorporated. *See generally* Chicago Resp'ts' Br.

But if it is, this Court should clarify that the Second Amendment protects the right to bear arms only for lawful purposes. *See D.C. v. Heller*, 128 S. Ct. 2783, 2813, 2815-16, 2816-17 (2008); *infra* Section II. Advocates for unfettered access to firearms argue that there exists in the Second Amendment an individual and constitutionally-protected right to keep and bear arms for the insurrectionary purpose of attacking so-called government "tyranny." *See infra* Section III. In *District of Columbia v. Heller*, the Court appears to suggest that the Second Amendment protects "the existence of a 'citizens' militia' " (*i.e.*, one that exists apart from the democratically-controlled State militia) "as a safeguard against tyranny." 128 S. Ct. at 2802; *see infra* Section III.A.2. This understanding of the Second Amendment's purpose and scope is historically erroneous, dangerous, and inconsistent with the Court's other decisions.

Contrary to the arguments advanced by insurrectionist *amici*, the Framers of the Constitution, and the thinkers who most influenced them, rejected the notion that the right to keep and bear arms included an individual right to insurrection. As James Madison declared in response to Shays' Rebellion in 1787, "[l]iberty may be endangered by the abuses of liberty as well as the abuses of power." Eric Foner, *Give Me Liberty! An American History* 219 (Norton & Co. 2006). With the need to maintain order and the rule of law at the forefront of their agenda, the Framers sought to increase the power and effectiveness of the State militia. The clear language of

the Constitution shows that the militia was intended to serve as the main body that would prevent individual insurrection and revolts. The Constitution, and the structure it created, was designed to create a government that could secure liberty, while at the same time provide for a peaceable mechanism for changing the system of government through the amendment process. As the eminent historian Gordon Wood put it: "Americans had in fact institutionalized and legitimized revolution. Thereafter, they believed, new knowledge about the nature of government could be converted into concrete form without resorting to violence . . . ." *See* Joshua Horwitz & Casey Anderson, *Guns*, *Democracy*, *and the Insurrectionist Idea* 109 (Univ. of Mich. Press 2009); *see infra* Sections III.A.1-2.

For the Framers, it was the "rule of law, not arms, [that] was the primary guarantee of life, liberty, and property." Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 34-35 (Oxford Univ. Press 2006). Accordingly, the text of the Constitution, contemporaneous State constitutional provisions, and case law all provide strong evidence that the Framers intended to strengthen the government as a means to quell, rather than foster, insurrections. Nothing in the history or language of the Second Amendment undermines that fact. *See infra* Sections III.A.1-5. This constitutional commitment to quell insurrection was reaffirmed by Lincoln and the Reconstruction Amendments following the South's attempt to secede from what it deemed government tyranny. *See infra* Section III.C.6-7.

In addition to being historically inaccurate, the insurrectionists' argument that there is an individual

right to amass or use arms against the government is incompatible with our existing constitutional order, national sovereignty, universally recognized principles of democracy, and public safety. *See infra* Section IV.

ARGUMENT

I. The Second Amendment Should Not Be Incorporated

Amicus agrees with and incorporates Respondents' argument that the Second Amendment is not incorporated by the Fourteenth Amendment to apply to the States. *See generally*, Chicago Resp'ts' Br. The Second Amendment is a guarantee directed at the *federal* government, and "properly understood, it is no limitation upon arms control by the states." Antonin Scalia, *A Matter of Interpretation*, *Federal Courts and the Law* 137 (Princeton Univ. Press 1997). Thus, "States [are] free to restrict or protect the right under their police powers." *Heller*, 128 S. Ct. at 2813 (explaining *U.S. v. Cruikshank*, 92 U.S. 542, 553 (1876)).

II. If the Second Amendment Is Incorporated, This Court Must Clarify That the Right Incorporated Does Not Include an Insurrectionary Component

In *Heller*, the Court held that the District of Columbia's prohibition on the possession of usable handguns in the home violated the Second Amendment. 128 S. Ct. at 2821-22. In so doing, the Court embarked upon the complex endeavor of illuminating the scope of the right to keep and bear arms. While the precise metes and bounds of this right will, no doubt, require fine-tuning in the years to

come, there can be little question today that the right is a limited one. *Id.* at 2799, 2816-17. "From Blackstone through the 19th-century, cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 2816. The Court, accordingly, instructed that "we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation." *Id.* at 2799 (emphasis added).

Nor can there be any doubt, on the basis of the Constitution's text and history, that an individual's right to keep and bear arms does not include any purported right to take up arms against the government. Indeed, it has long been settled that the Second Amendment protects the right to bear arms only "for a lawful purpose." *Id.* at 2813 (quoting *Cruikshank*, at 553); *Hamblen v. U.S.*, No. 09-5025, *5 (6th Cir. Dec. 30, 2009). Notwithstanding this irrefutable precept, insurrectionist *amici* advocate for a reading of the Second Amendment that protects armed conflict against government officials as a means of defending against so-called "official tyranny." *See*, *e.g.*, *Amicus* Br. of Rocky Mountain Gun Owners and Nat'l Ass'n for Gun Rights at 17-18 ("Rocky Mountain Gun Owners' Brief"). It is therefore crucial that the Court curb such dangerous advocacy by clarifying that the Second Amendment excludes any such purported right to insurrection.

In *Heller*, the Court recognized that the Second Amendment forbids the federal government from imposing an across-the-board prohibition on the possession of an operable handgun by a "law-abiding, responsible citizen[ ]" in his home for the lim-

ited "purpose of immediate self-defense." 128 S. Ct. at 2821-22. Although the Court extended the right to keep and bear arms to individuals, the Court stressed that this right protects only *lawful* conduct that properly falls within the confines of the rule of law. *See id.* at 2813 (describing "the right protected by the Second Amendment as 'bearing arms for a lawful purpose' ") (citing *Cruikshank*); *id.* at 2815-16 ("[T]he Second Amendment does not protect . . . weapons not typically possessed by *law-abiding* citizens for *lawful* purposes.") (citing *U.S. v. Miller*, 307 U.S. 174 (1939)) (emphasis added); *see also id.* at 2816-17 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms . . . .").

Glossing over this limitation, the NRA and insurrectionist *amici* have latched onto the Court's statement that "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Id.* at 2801. The NRA goes so far as to suggest that this statement provides the "fundamental link" between the right to bear arms and "*individual* liberty." NRA Br. at 31-32 (emphasis added); *but see Heller*, 128 S. Ct. at 2800-01 (resisting tyranny was merely one of the "many reasons why *the militia* was thought to be 'necessary' ") (emphasis added). The Court should correct this misapprehension before incorporating the Second Amendment because the failure to do so would eviscerate the State's police power.

III. The Second Amendment Does Not Protect a Right to Violent Confrontation Against the Government

Insurrectionists argue that the Second Amendment protects a right to keep and bear arms for the purpose of fighting government tyranny, either individually or in private groups apart from a State militia. *See generally*, Horwitz, *supra*. Private ownership of firearms, they argue, is a vital check against government overreaching, even in its most democratically accountable form. *See id.*; *see also* Horwitz & Anderson, *Taking Gun Rights Seriously: The Insurrectionist Idea and Its Consequences*, 1 Alb. Gov't L. Rev. 496 (2008). Thus, insurrectionists invoke the Second Amendment as a basis to rise up in arms against the very same institutions of government that the Constitution was intended to protect. *See* Horwitz, 1 Alb. Gov't L. Rev. at 502-04.

Not only do insurrectionists insist that firearms are "tools of political dissent [that] should be privately owned and unregistered,"[2] they also are dangerously vague as to what constitutes the "tyranny" justifying armed violence, who is a proper target of such uprisings, and who gets to make such decisions.[3] While our country has long rejected private

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[2] David B. Kopel, *Trust the People: The Case Against Gun Control*, CATO Policy Analysis No. 109 (July 11, 1988), at 25.

[3] For example, members of Shays' rebellion described their mission as "[s]uppressing a tyrannical government in the Massachusetts State." C.O. Parmenter, History of Pelham 373 (Carpenter & Morehouse 1898). In another example, when asked to explain increased ammunition sales, the head of the NRA stated, "I [ ] think that it's people worrying about [whether] they'll be attacked by politicians. They're suspicious, and justifiably so." David A. Fahrenthold & Fredrick Kunkle, *U.S. Sees Shortage of Ammunition*, Washington Post (Nov. 3, 2009).

insurrectionism (*see infra*, Section III.A), modern day proponents of this idea glorify the murder of law enforcement officers (and, collaterally, innocent bystanders and children) as a constitutionally-protected *right* in a fight against "tyranny."[4] The Rocky Mountain Gun Owners, for example, define "defense against tyranny" as the use of deadly force against law enforcement officers exercising a judicial warrant. Rocky Mountain Gun Owners' Br. at 17-18 (discussing Ruby Ridge); *Harris v. Roderick*, 126 F.3d 1189, 1193 (9th Cir. 1997) ("Marshals came . . . to serve an arrest warrant."). Another *amicus*, by contrast, identifies terrorism as a "modern type of tyranny." *See Amicus* Br. of Eagle Forum Educ. & Legal Defense at 12. In a world in which "tyranny" means many different things to many different people, it is of paramount importance that the Court choose its words carefully when discussing just what is, and what is not, protected by the Second Amendment.

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[4] Deeming the government "tyrannical," groups like the Tax Protest Movement, the White Supremacist Movement, the Sovereign Citizen Movement, and the so-called "militia" movement have all been prosecuted for plotting to blow up federal buildings or otherwise engaging in violent antigovernment activities. *See* Anti-Defamation League, Extremism in America, *available at* http://www.adl.org/learn/ext_us/default.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=1&item=0;http://www.splcenter.org/intel/intelreport/article.jsp?aid=197. For example, Timothy McVeigh's decision to bomb the Murrah Federal Building in Oklahoma City was motivated in part by a desire to avenge perceived government tyranny at Ruby Ridge, Idaho, and Waco, Texas. Lou Michel & Dan Herbeck, *American Terrorist: Timothy McVeigh and the Oklahoma City Bombing* 136-37, 285-86 (Harper Collins 2001).

A. History Demonstrates That the Second Amendment Does Not Include a Right to Keep or Bear Arms for Insurrection

As this Court recognized in *Heller*, "the Second Amendment is not unlimited" and indeed proscribes certain purposes. *Heller*, 128 S. Ct. at 2799, 2816. The historical record makes clear that the Second Amendment does not include a private right of insurrection, particularly where the constitutional order is functioning, where elections occur regularly, and where "the courts are open." *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 554, 572 (2004) (Scalia, J., dissenting) (recognizing "where the courts are open," Suspension Clause is in effect).

1. Pre-ratification History Demonstrates That the Right to Bear Arms Does Not Include a Right to Insurrection

Insurrectionist *amici* argue that the thinkers who influenced the Framers, "such as William Blackstone," believed that "the right to keep and bear arms is essential for the preservation of liberty." *See, e.g.*, *Amicus* Br. of Center for Constitutional Jurisprudence at 15-16. Insurrectionists' reliance on Blackstone, however, is misplaced. Blackstone rejected the notion that the people had an inherent right to possess arms for insurrection.

> It must be owned that Mr. Locke, and other theoretical writers, have held, that "there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for when such trust is abused, it is thereby for-

> feited, and devolves to those who gave it." But however just this conclusion may be in theory, we cannot adopt it, nor argue from it . . . . For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people, reduces all members to their original state of equality, and by annihilating the sovereign power repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual. So long as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.

1 William Blackstone, *Commentaries on the Laws of England* 157 (1765). Blackstone viewed any "right" that would allow individuals to decide for themselves if and when the exercise of armed force against the government is necessary as tantamount to a license for "anarchy," which would be as "fatal to civil liberty as tyranny itself." *Id.* at 244. In fact, Blackstone rejected as "extreme" any view that would "allow[ ] to every individual the right of determining th[e] expedience" of "proclaim[ing] . . . resistance [to the prince] necessary" "and of employing private force to resist even private oppression." *Id.*

Nor does Blackstone provide any support for the proposition that English common law provided an unqualified personal right to bear arms. His *Com-*

mentaries separated the civic and auxiliary right to bear arms from the personal right of self-defense. 1 Blackstone, *supra*, at 184-85. Blackstone's fifth auxiliary right "is that of having arms for their defence, suitable to their condition and degree, and such *as are allowed by law*." 1 Blackstone, *supra*, at 139. Likewise, Article VII of the English Bill of Rights states "[t]hat the Subjects which are Protestants may have Armes for their defence Suitable to their Conditions and *as allowed by law*." Bill of Rights, 1689, 1 W. & M., st. 2, c. 2 (Eng.) (emphasis added). "As allowed by law" qualifies the right of "Protestants [to] have Armes for their defence." Not surprisingly, this Court has recognized that the Second Amendment similarly limits the use of firearms for "lawful purposes." *Heller*, 128 S. Ct. at 2813, 2815-16.

2. The Framers' Constitutional Design Excludes Any Purported Right to Insurrection Against the States

Like Blackstone, the Framers similarly rejected the right of individuals or ad hoc groups to insurrection. The debates during the Constitutional Convention and the ratifying State conventions focused instead on concerns that centralized control of the nation's military posed a threat to the role of State militias. Horwitz, *supra*, at 100-01. Indeed, "Madison and his colleagues provided for an amendment dealing with the militia because most of the states that proposed amendments wanted some guarantee that Congress would not destroy their militias." *Id.* (citation omitted). It was therefore the militia, "united and conducted by governments possessing their affections and confidence," that was intended to balance the power of an oppressive standing army, even if the constitutional order were to break down. Fed-

eralist Papers, No. 46 (Madison). Accordingly, virtually every State enacted legislation to regulate its militia, typically subjugating its control under the governor. *See*, *e.g.*, Conn. Const. of 1818, art. I, § 18 ("The military shall, in all cases, and at all times, be in strict subordination to the civil power."); Ark. Const. of 1868, art. 12, § 3 ("The Governor shall be, Commander-in-Chief, and shall have power to call out the militia to execute the laws [and] suppress insurrection . . . ."); *see generally*, Samuel P. Huntington, *Civilian Control and the Constitution*, 50 Am. Pol. Sci. Rev. 676, 676-77 (1956). Contemporaneous State constitutions reflect this as well. *See infra*, Section III.A.4.

Contrary to the Framers' vision that *the States* were to serve as the guardians against any threat of tyrannical oppression, the Court in *Heller* referred without citation to a Second Amendment right intended to "assure the existence of a '*citizens*' militia' as a safeguard against tyranny." *Heller*, 128 S. Ct. at 2802 (emphasis added); *id.* at 2801 ("It was understood across the political spectrum [in 1788] that the [Second Amendment] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down."); *see also Heller* Oral Arg. Tr. at *7 (Scalia, J.) ("[T]he militia that resisted the British was not State-managed."); *id.* at *69 (referring to "the kind of militia that America had, which was a militia separate from the state, separate from the government, which enabled the revolt against the British"). Insofar as this statement can be read to suggest that an individual right to bear arms for insurrectionary purposes is inherent in the Second Amendment, it is unsupported by the historical record.

First, the revolutionary militia was not in fact composed of individuals who acted "separate from government:" "Colonists who bore arms did not act as isolated individuals, but rather acted collectively for the common defense, and did so within a clear set of legal structures." Cornell, *supra*, at 12-13; *see also* John R. Galvin, *The Minute Men: The First Fight: Myths & Realities of the American Revolution* (Pergamon-Brassey's Int'l Defense 1989) ("Many of the [Massachusetts] towns required their minute men to train twice a week . . . .' "); John W. Shy, *A People Numerous & Armed: Reflections on the Military Struggle for American Independence* 126 (Univ. of Mich. 1990) ("Towns, not individuals, decided to fight.").

Second, the Framers plainly did not envision ad hoc groups of armed individuals beyond State control (*i.e.*, a "citizens' militia") as a constitutional check on tyranny; they saw them as unruly mobs that must be quelled. *See* Cornell, *supra*, at 14 ("Without legal authority, a group of armed citizens acting on their own was little more than a riotous mob."). Rather, it was a "well regulated Militia" that they viewed as "necessary to the security of a free State." U.S. Const. amend. II.

Third, and in any event, the "militia" enshrined in the Constitution was intended to be an improvement upon the barely functioning militias that fought in the American Revolution. "Most responsible leaders of the federal government . . . understood that . . . the militia was an unreliable main defense force" and would be ineffective in defending the young country. C. Edward Skeen, *Citizen Soldiers in the War of 1812* 3-4 (Univ. Press of Kentucky 1999) (quoting George Washington, "[the militiamen] come

in, you cannot tell how; go, you cannot tell when, and act, you cannot tell where, consume your provisions, exhaust your stores, and leave you at last in a critical moment."); James K. Martin, *A Respectable Army: The Military Origins of the Republic, 1763-1789* 19 (1982) (quoting General James Wolfe, who described the militia as "the dirtiest most contemptible, cowardly dogs you can conceive. There is no depending on them in combat."); *Heller*, 128 S. Ct. at 2832 & n.17 (Stevens, J., dissenting). These persistent shortcomings led the Framers to employ federalism as a means of increasing the militia's effectiveness.[5]

The Framers believed that a constitutional government, rather than a right to insurrection, would be the protector of individual liberty. Indeed, it was the 1787 quelling of Shays' Rebellion, an armed insurrection by farmers seeking tax relief, that prompted George Washington to emerge from retirement to advocate for a stronger federal government. Leonard L. Richards, *Shays' Rebellion: The American Revolution's Final Battle* 1-4, 129-30 (Univ. of Penn. Press 2002). Those opposing Shays believed that, "[i]n a situation in which representative institutions and courts of law were functioning, the rule of law, not arms, was the primary guarantee of life, liberty, and property." Cornell, *supra*, at 34-35.

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[5] U.S. Const. art. I, § 8, cl. 16 ("The Congress shall have Power . . . 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 . . . ."); U.S. Const. art. II, § 2, cl. 1 ("The President shall be Commander in Chief . . . of the Militia of the several States . . . .").

The Framers understood the dangers of insurrectionism from their own experience, just as we do today. The lesson of such uprisings as Shays' Rebellion was that "the rebellion of a people against a government established by themselves is *not* justifiable, *even in an extreme case*, and can only result in dishonor to the state, and calamity and disgrace to those who participate in it." Josiah Holland, *History of Western Massachusetts* 299-300 (Springfield, Bowles & Co. 1855) (emphasis added). As James Madison stated, "[l]iberty may be endangered by the abuses of liberty as well as the abuses of power." Foner, *supra*, at 219. Examining the Constitution as a whole, it is clear that its purpose was to create a stronger government that could better protect individual liberty from the dangers of mob rule, a fact which was quickly illustrated by the new federal government's response to the Whiskey Rebellion of 1794, when George Washington called forth the constitutional militia of the States to swiftly suppress an insurrection by self-styled citizen militias. Mark Bonsteel Tachau, *A New Look at the Whiskey Rebellion*, in *The Whiskey Rebellion: Past and Present Perspectives* 97 (Steven R. Boyd ed., 1985). Modern experience confirms the view that it is the rule of law, rather than insurrection, that guarantees individual liberty.

3. A Second Amendment Right to Insurrection Would Create Conflict Among Constitutional Provisions

Just as courts should not read one provision of a statute to conflict with another, *see Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 872 (2000), they ought not read the Second Amendment as arming the populace to commit what the Constitution itself

deems a capital offense, *see Cohens v. Virginia*, 19 U.S. 264, 393 (1821) (describing "the duty of the Court" to "construe the constitution as to give effect to both provisions, . . . and not to permit their seeming repugnancy to destroy each other"). "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). The Second Amendment, article I, section 8 of the Constitution, and contemporaneous State constitutions and militia statutes all provide for the militias to be called forth to preserve the *security of the State* and to *quell insurrections*. *See supra* III.A.2 and *infra* III.A.4. To read the Second Amendment as providing arms so that militias can quell, while at the same time facilitating, insurrection makes no sense.

Nor is it plausible to suggest that the Second Amendment *sub silentio* protects a right to bear arms to overthrow the government any time some unspecified number of individuals, in their unguided discretion, decide that the government is "tyrannical." Rather, those individuals are bound by the Constitution to either live within the confines of the rule of law or to garner a supermajority in favor of amendment. *See* U.S. Const. art. V. Should they choose to follow any other course of action, the Constitution is replete with its own survival mechanisms, including the power of Congress to "call[ ] forth the Militia to execute the Laws of the Union [and] *suppress Insurrections*," U.S. Const. art. I, § 8, cl. 15 (emphasis added), and "in Cases of Rebellion" that threaten the nation's unity, even to invade the otherwise invulnerable privilege of habeas corpus, *see* U.S. Const. art. I, § 9, cl. 2; *Hamdi*, 542 U.S. at 525. In addition to these powers, early on,

Congress augmented the President's power to quash insurrection with the Calling Forth Act, 1 Stat. 264 (1792) ("in case of insurrection in any state, against the government thereof," the President may call forth the militia to suppress the insurrection), and strengthened this power following the Whiskey Rebellion, 1 Stat. 424, § 1 (1795). In this regard, the Constitution forms an amendable, yet indestructible, Union of indestructible States. *See Texas v. White*, 74 U.S. 700, 725 (1868), *overruled on other grounds by Morgan v. U.S.*, 113 U.S. 476 (1885) (citation omitted); U.S. Const. art. IV § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them . . . against domestic Violence.").

4. Contemporaneous State Constitutions Reinforce That the Right to Bear Arms Had No Insurrectionary Component

State constitutions in existence at the time of the founding predominately reflect a right to bear arms *in defense of the State* or for the "common defense." Indeed, all 15 State constitutions in effect through 1820 that mentioned arms protection expressly limited the exercise of such right in whole or part to the protection of "the State" or for "the common defence," a concept that is fundamentally at odds with any purported right to take up arms *against* the State. *See* Appendix A. Three additional State constitutions identified the "well regulated militia," not an ad hoc "citizens' militia," as "the proper" defense of the State. *Id.* By contrast, the Court in *Heller* identified a mere seven of the 24 State constitutions then in effect that arguably reflected some

form of right to bear arms for self-defense. *Heller*, 128 S. Ct. at 2802.

The historical record over the next century is to the same effect. Of the 37 States in the Union at the time of the adoption of the Fourteenth Amendment, only 26 had some form of a constitutional right to bear arms. *See* Appendix B.[6] While a small number of these provisions apparently included a right to "self-defense," *Heller*, at 2802-03, strikingly, 19 of the 26 expressly restricted the right to bear arms for the purpose of defending the State or for the "common defense." Appendix B. Moreover, six that did not (Georgia, Maryland, New Hampshire, North Carolina, Rhode Island, and Virginia) largely mirrored in whole or part the federal text. *See* Appendix B; U.S. Const. amend. II. This underscores the fact that at no time has the Second Amendment been understood to protect a personal or private right of insurrection.

5. Pre-Civil War Case Law Demonstrates That the Right to Bear Arms Did Not Entail a Right to Insurrection

Heller posits that 19-century cases support the existence of an individual right to bear arms unconnected to militia service. 128 S. Ct. at 2807. Even accepting that conclusion as true, the cases on which the Court relied make clear that there is no constitutionally-protected right to bear arms for insurrectionary purposes. *Houston v. Moore*, 18 U.S.

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[6] As noted above, *Amicus* incorporates Respondents' argument that the right to bear arms is not "fundamental," and thus may not be applied to the States through the Fourteenth Amendment. *See generally* Resp'ts' Br.; *Washington v. Glucksburg*, 521 U.S. 702, 719-20 (1997).

1, 50 (1820), the principal case on which the *Heller* Court relied, could not have been more clear on this point: while Congress has limited constitutional powers over the militia, "in all other respects, and for all other purposes, the militia are subject to the control and government of the State authorities." While the *Heller* majority and dissent differed about Justice Story's view, the Justice was quite clear in the unanimous *Martin v. Mott*, 25 U.S. 19 (1827), that the Constitution does not embody a right to keep arms for insurrection. The Constitution itself protected against tyranny:

> The remedy for . . . official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, . . . the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

Id. at 32; *see also* Story on the Constitution § 1201 (5th ed.) ("There is but one of two alternatives, which can be resorted to in cases of insurrection . . . either to employ regular troops or to employ the militia to suppress them.").

Other cases relied on by the Court in *Heller* also belie any right to keep and bear arms for insurrection against the government. *See Aymette v. State*, 21 Tenn. 154, 158 (1840) ("The object then, for which the right of keeping and bearing arms is secured, is the defence of the *public* . . . to maintain the supremacy of the laws and the constitution."); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) ("[T]he right

guaranteed . . . is calculated to incite men to a manly and noble defence *of . . . their country*.") (emphasis added); *U.S. v. Sheldon*, in 5 Transactions of the Supreme Court of the Territory of Michigan 337, 346 (W. Blume ed. 1940) ("No rights are intended to be granted by [the Second Amendment] for an unlawful or unjustifiable purpose.").

Other contemporaneous cases, not discussed by the Court in *Heller*, are to the same effect. The Arkansas Supreme Court, for example, was explicit in disavowing any concordant right to insurrection: "[T]he Legislature possesses competent powers to prescribe, by law, that any and all arms, kept or borne by individuals, shall be so kept and borne as not to . . . in any manner endanger the free institutions of this State or the United States." *State v. Buzzard*, 4 Ark. 18, 27 (Ark. 1842); *see also State v. Smith*, 11 La. Ann. 633 (1856) ("[The Second Amendment] was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke."); *Speer v. Sch. Dirs.*, 50 Pa. 150, 165-66 (1865) (describing Pennsylvania's constitutional provisions against insurrection). In Texas, meanwhile, it was understood that the State constitution's right to bear arms in "the lawful defence of himself or the State," created an individual right that was "in addition [to]" and went beyond the Second Amendment right. *See Cockrum v. State*, 24 Tex. 394, 401 (1859).

6. The Defeat of the Confederacy Cemented the Union's Constitutional Commitment to Quell Insurrection

Secessionists who disagreed with the election of Abraham Lincoln rose up in arms against what they claimed was government tyranny. Bernard Schwartz, *From Confederation to Nation: The American Constitution 1835-1877* 132 (Johns Hopkins Univ. Press 1973). The secessionists' claim that they were free to secede belied the plain language of the newly-enacted constitutional amendments and the very concept of the Union. As Lincoln stated, the Union was "perpetual;" once a State bound itself to the Union, the only way to separate was by agreement between the majority of States: "no State, upon its own mere motion, can lawfully get out of the union . . . acts of violence, within any State or States, against the authority of the United States are insurrectionary or revolutionary. . . ." 4 Abraham Lincoln, *The Collected Works of Abraham Lincoln* 267 (Roy P. Basler ed., Rutgers Univ. Press 1955); Abraham Lincoln, *The Collected Works of Abraham Lincoln: First Supplement, 1832-1865* 434 (Roy P. Basler ed., Greenwood 1974); *see also infra* Section IV.

The defeat of the Confederacy cemented the Union's commitment to quell insurrection and rebellion. *See* Cornell, *supra* 167. The Fourteenth Amendment is replete with anti-insurrectionary and anti-rebellion language, leaving no doubt that insurrection against the government is far from a constitutionally-protected right. U.S. Const. amend. XIV § 2 (protecting against denial of right to vote "except for participation in rebellion"), § 3 (preventing holding of office by those who "shall have engaged in

insurrection or rebellion"), and §4 (excluding from the public debt "any debt or obligation incurred in aid of insurrection or rebellion against the United States").

7. The History of Reconstruction Does Not Provide Justification for Re-interpreting the Insurrectionary Scope of the Second Amendment

Insurrectionists claim that a narrow interpretation of the Second Amendment prevented freedman from forcefully resisting white tyranny. *See*, *e.g.*, Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 309-61, 354-55 (1991). The irony in this claim is rich. It is no secret that the "[i]nsurrectionist construct is a continuation of a concerted effort, born and nurtured in the antebellum South, to limit the federal government's effectiveness in protecting the democratic rights of the most vulnerable Americans." Horwitz, *supra*, at 126. Private white militias (*i.e.*, the unorganized militia, including the Klan, Knights of White Camelia and local rifle clubs) brutalized, killed, and otherwise disenfranchised southern blacks under the guise of resisting the tyranny of the federal government. *See* Eric Foner, *The Reconstruction Amendments: Official Documents as Social History*, *History Now*, 562-63 (Dec. 2004). It was, in fact, the federal government that was the most effective protector of the freedmen from unorganized militias.

Insurrectionists' argument that arms would have facilitated black resistance to white oppression also ignores the practical impossibility of such resistance. The freedmen were outnumbered by well-

trained, private militia forces (including many returning Confederate soldiers) that, in the absence of federal troops, were able to terrorize them even when they did have access to weapons. Horwitz, *supra*, at 132-33. While there are inspirational instances of former slaves using arms in legitimate self-defense, it was the federal government, for the most part, that could, and indeed for a time did, provide the needed protection. Nothing exemplifies this more clearly than the Colfax massacre in 1873, in which a standoff between armed black Republicans and white private militias in the wake of a contested election resulted in the death of hundreds of blacks. *Id.*

Respondent NRA argues that the Freedmen's Bureau Act, which was passed by the same Congress that passed the Fourteenth Amendment, created a substantive right to bear arms that was enforceable against the States. NRA Br. at 13-14. Yet like the Civil Rights Act before it, the Freedmen's Bureau Act had an equality limitation:

> the right to . . . have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district *without respect to race or color or previous condition of slavery*.

Act of July 10, 1866, § 14, 14 Stat. 173, 176 (1866) (emphasis added). The last phrase would be surplusage if the Act were read to guarantee a substantive right. Lawrence Rosenthal, *The New*

Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation at 22, *at* http://ssrn.com/abstract=1358473.

Faced with violence in the South, Congress did not view the solution as simply arming the freedmen. Rather, Congress *limited* the proliferation of arms amongst former Confederates and others by disbanding the militias and prohibiting their arming. *See* Otis A. Singletary, *Negro Militia and Reconstruction* 3-4 (1963); *see* Act of Mar. 2, 1867, ch. 170 § 6, 14 Stat. 485, 487 (1866). While the drafters of the Freedmen's Bureau Act removed the word "disarm" from the text, this was done as a political accommodation over concerns that it would disarm *all* persons, including those loyal to the State. It was understood that whatever the Second Amendment may mean, it did not include a right to bear arms for the purpose of insurrection. *See* Cong. Globe, 39th Cong., 1st Sess. 1849 (1866) (Mr. Hendricks) ("people bearing arms in hostility to the Government would not be protected by [the Second Amendment]"); *id.* (Mr. Willey) ("I should be very willing to favor discriminating legislation that would regulate the use of arms by the militia in the South."). Thus, Congress affirmed that the Second Amendment provides no protection to those who seek to bear arms outside of the legitimate purposes provided for by State law. *Cf. Presser v. Illinois*, 116 U.S. 252 (1886).

IV. An Incorporated Individual Right to Keep and Bear Arms to Resist Governmental Authority Cannot Be Reconciled with Our Existing Constitutional Order, National Sovereignty, or Our Democratic Form of Government, and Would Also Prevent States From Banning Private Military Organizations

Under insurrectionist theory, one of the purposes of the Second Amendment is to preserve the ability of individuals (or, more realistically, groups of individuals) to prepare for armed "resistance" to a tyrannical government. According to this theory, the threatened or actual use of force against the government is legitimate if the government is perceived to be acting in a tyrannical or unjust manner.

As stated by one *amicus*: " 'To many gun owners, firearms [and the threat of their use] represent the last line of defense against official tyranny . . . ,' although actual armed conflicts with the government are rare." Rocky Mountain Gun Owners Br. at 17. Accordingly, "widespread possession of guns amongst the populace often serves to deter government tyranny without resorting to actual violence." *Id.* Inherent in the logic of a right to possess firearms for the purpose of resisting a perceived threat of governmental tyranny is that, at some point, individuals are entitled to take the next step and use violence if the government refuses to yield. The proposition that the Second Amendment includes a right to resort to the threatened or actual use of violence as a method of influencing governmental action has profound, deleterious, and multifaceted implications.

A. An Insurrectionist Right Is Logically and Functionally Unworkable Within Our Existing Constitutional Order

As discussed above, the Constitution is replete with provisions intended to quell violent resistance to the government. Taken together, these clauses "make it overwhelmingly clear that the Constitution was framed to forbid, prevent, and punish insurrection against its own law—as, indeed, any constitution that claims legitimate authority must do." Gary Wills, *A Necessary Evil: A History of American Distrust of Government* 214 (Simon and Schuster 1999).

The Declaration of Independence recognized that human beings possess an inalienable right derived from natural law to resist and abolish tyrannical governments; but this revolutionary right is not a *constitutional* right, and "it does not find any support anywhere in the text, background, or court interpretation of the Second Amendment." Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 Chi.-Kent L. Rev. 349, 359-360 (2000). In contrast to the Declaration of Independence, the Constitution is not a charter for revolution; it is a charter for government. *See* Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U. L. Rev. 107, 129 (1991). "History and logic do not permit one to take the right of armed revolution as a serious proposition of positive constitutional law. Only the legal revolutions provided by the political process are recognized by the Constitution." Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 Hamline L. Rev. 69, 95 (1986). The Civil War was fought largely to vindicate the

principle that the democratic institutions of our constitutional government cannot be overruled by violent dissenters. Horwitz, *supra*, at 174.

Indeed, in his first inaugural address, President Lincoln flatly rejected the argument, made by the seceding States, that a right to resist the government by force of arms had a constitutional basis:

> Whenever [the people] shall grow weary of this existing Government, they can exercise their *constitutional* right of amending it, or their *revolutionary* right to dismember or overthrow it.

Lincoln, First Inaugural Address, Mar. 4, 1861, *available at http://www.bartleby.com/124/pres31.html* (Emphasis original). The two rights are mutually exclusive. Lincoln further stated:

> It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our National Constitution, and the Union will endure forever, it being impossible to destroy it except by some action not provided for in the instrument itself.

Id. Ninety years later, this Court affirmed Lincoln's reading of the Constitution by recognizing that any right to violent resistance to governmental authority is extra-constitutional and a predicate to its exercise in this country is the destruction of the existing constitutional order:

> Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of

> the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy.

Dennis v. U.S., 341 U.S. 494, 501 (1951).

Under *Dennis*, therefore, the use (or threatened use) of violence to resist governmental authority violates the Constitution and is permissible (as an extra-constitutional right) only if the existing constitutional order completely breaks down. *Id.* Accordingly, the Second Amendment cannot be read to establish a constitutional right to bear arms for the purpose of resisting perceived governmental tyranny because, logically, such a right (like any constitutional right) can be exercised only *within* the existing constitutional order; if that order is extant, then the prerequisite conditions for lawful violent resistance are necessarily absent.

In addition to being baseless and illogical, a purported constitutional right to take up arms to resist governmental tyranny would also be unworkable and functionally ludicrous. If an individual asserts that the government has become sufficiently tyrannical to justify armed resistance under the Second Amendment, there must be some constitutional authority to examine and judge the legitimacy of the individual's claim (history having demonstrated that the difference between tyranny and good government is often subjective). But the right to bear arms in resistance to the government would, of course, be empty if it permitted that same government (through its courts or otherwise) to be the arbiter of whether or not it was acting tyrannically. Henigan, *supra*, at

123. And if the government were in fact tyrannical, it would never recognize a legitimate cause for resistance against itself. *See* Robert Hardaway et al., *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms*, 16 St. John's J. Legal Comment 41, 100-01 (2002). In short, because a purported constitutional right to resist a tyrannical government cannot logically or sensibly be exercised within the existing constitutional order, it should not be recognized.

B. An Insurrectionist Right Cannot Be Reconciled With State Sovereignty

As this Court recognized in *Dennis*, any purported constitutional right to employ violence or the threat of violence as a method to resist governmental authority is a recipe for anarchy. 341 U.S. at 501. Because a constitutional right in our system is a limitation on the power of the democratically-elected majority, a constitutional right to bear arms to resist governmental authority "must operate to restrain the power of that majority to prevent armed insurrection. Once democratic government is stripped of that power, it is stripped of the power to protect all of our other liberties." Henigan, *supra*, at 128. As stated by Roscoe Pound, a "legal right of the citizen to wage war on the government is something that cannot be admitted [because it] would defeat the whole Bill of Rights." Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* 90-91 (Yale Univ. Press 1957). If a government's authority can be overruled by violent dissent, the government has lost its monopoly on the use of force, ceases to be a State, and "its form of organization becomes indistinguishable from other types of organizations."

Ezra Suleiman, *Dismantling Democratic States* 24 (Princeton Univ. Press 2003).

According to one *amicus*, the so-called "Sagebrush Rebellion," a dispute between local citizens and the federal government over land-use policies in the western United States in the late twentieth century, is an example of a heavily-armed populace successfully exercising its Second Amendment rights to resist the federal government with an implied threat of violence (although "no shots were fired"). *See* Rocky Mountain Gun Owners' Br. at 17-18. Even if the Sagebrush Rebellion ended peacefully, there are profound implications to the assertion that citizens may legitimately use even an implied threat of violence to influence governmental policy.

During the Virginia convention to ratify the Constitution, James Madison noted that the monopoly on force was a fundamental organizing principle of any political entity:

> There never was a government without force. What is the meaning of government? An institution to make people do their duty. A government leaving it to a man to do his duty, or not, as he pleases, would be a new species of government, or rather no government at all.

3 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* at 414 (2d ed. 1863). According to one well-known definition, "[a] compulsory political association with continuous organization . . . will be called a 'state' if and in so far as its administrative staff successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its

order." Max Weber, *The Theory of Social and Economic Organization* at 154 (Oxford Univ. Press 1946). If a State is deterred from enforcing its judicial or administrative prerogatives by threats of violence (as is approvingly alleged by insurrectionist *amici* to have occurred to the federal government during the Sagebrush Rebellion), it has lost the monopoly on force and is not functioning as a State but has, instead, reverted to a pre-governmental society where might makes right. Horwitz, *supra*, at 174. Ultimately, if a State is unable to enforce its will in the face of violent dissent, it has lost its claim to sovereignty.

C. Allowing Violent Resistance to Influence Government Action Violates the Equal Protection Clause of the Fourteenth Amendment and Is Inherently Antidemocratic

Recognition of an individual right to bear arms for the purpose of influencing governmental action through violence (or the threat of violence) is antithetical to universally recognized principles of democracy and violates the Equal Protection Clause of the Fourteenth Amendment. Ours is a democratic system of government and the right of all qualified citizens to vote in State and federal elections is guaranteed by the Constitution. *See*, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Under our democratic form of government, "people govern themselves through their elected representatives" and " 'each and every citizen has an inalienable right to full and effective participation in the political processes.' " *Bd. of Estimate v. Morris*, 489 U.S. 688, 693 (1989) (quoting *Reynolds*, 377 U.S. at 565). The essence of our democratic system of government is

the idea that each person is an equal citizen with equal political and civil rights. *See*, *e.g.*, *Gray v. Sanders*, 372 U.S. 368 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualification."); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

The Equal Protection Clause of the Fourteenth Amendment prohibits any citizen from being given greater political rights than any other citizen. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555.

The end result of our democratic system is that governmental actions reflect the will of the majority or at least the will of the majority's elected representatives. Thus, the decision of a group of individuals to take up arms to resist governmental authority is in effect an attempt to veto the decision of the majority through violence. Horwitz, *supra*, at 166. To legitimize the use of private violence as a means of influencing the government necessarily gives relatively greater political power to individuals and groups willing and able to use violence to achieve their political objectives. This aggregation

of relatively greater political power in a violent subset of citizens is antithetical to universally-accepted principles of democracy and cannot be reconciled with the Equal Protection Clause of the Fourteenth Amendment, which this Court has repeatedly held prohibits "debasement or dilution" of the political rights of certain citizens relative to others. *Reynolds*, 377 U.S. at 555.

D. Incorporation of an Insurrectionist Right Could Prevent States From Banning Private Military Organizations

Because a lone individual could not realistically resist a tyrannical government in a meaningful way, an individual right to bear arms in resistance to government tyranny necessarily implies that groups of individuals may join together to resist. Because effective collective resistance with firearms requires group training and drill, recognition of an insurrectionist right threatens to invalidate State laws that prohibit private paramilitary organizations. This Court's decision in *Presser v. Illinois*, 116 U.S. 252, 264-265 (1886), held that the Second Amendment did not prohibit States from forbidding "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law." But the holding in *Presser* was based on "the fact that the [Second] amendment is a limitation only upon the power of congress and the national government, and not upon that of the state." *Id.* at 265. Thus, if this Court holds that the Second Amendment is applicable to the States through the Fourteenth Amendment, the continuing vitality of *Presser* is called into question.

Heller noted the holding in *Presser*, but suggested that no one supporting "the individual-rights interpretation of the [Second] Amendment" had "contended that States may not ban such [private paramilitary] groups." 128 S. Ct. at 2813. To the contrary, that was near precisely the holding in *Nunn v. State*, 1 Ga. 243, 251 (1846), which the Court in *Heller* quoted at length and praised as "perfectly captur[ing]" the interplay of the operative and prefatory clauses of the Second Amendment. 128 S. Ct. at 2809. In *Nunn*, the Georgia Supreme Court wrote:

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, ... Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right. . . .

1 Ga. at 251. While none of the parties or *amici* in *Heller* may have pressed this argument, it was obviously raised in *Presser* and has also been posited more recently. In *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 216 (S.D. Tex. 1982), for instance, the KKK argued that a Texas law banning private armies violated the Second Amendment. The district court upheld the Texas law on the grounds that the "Second Amendment has not been incorporated into the Fourteenth Amendment and thus is not directly applicable to the states" and that the organization in question had "no relationship whatsoever to any state or federal militia." *Id.* Now that *Heller* has held that the Second Amendment protects the right to bear arms without regard to militia affiliation, appli-

cation of the Second Amendment to the States through the Fourteenth Amendment would eliminate the bases on which the district court rejected the KKK's Second Amendment attack on the prohibition of private armies. This could make it difficult if not impossible for States to ban private armies sponsored by terrorists or other violent extremist groups.

CONCLUSION

For the foregoing reasons, *Amicus* submits that the Second Amendment should not be incorporated by the Fourteenth Amendment to apply to the States. If, however, the Court holds that the Amendment is incorporated, *Amicus* urges the Court to clarify that the scope of the right protected does not include an individual right to amass arms or use arms against the government.

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January 5, 2010

APPENDIX

APPENDIX A

STATE CONSTITUTIONAL PROVISIONS RELATING TO THE RIGHT TO ARMS IN EFFECT THROUGH 1820

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Connecticut	1638	None.
Rhode Island	1663	None.
Delaware	1776	None.
Maryland	1776	Dec. of Rts., Art. XXV: That *a well-regulated militia is the proper and natural defence of a free government.*
New Hampshire	1776	None.
New Jersey	1776	None.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
North Carolina	1776	Dec. of Rts. § XVII: That the people have a right to bear arms, *for the defence of the State*; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.
Pennsylvania	1776	Dec. of Rts. § XIII: That the people have a right to bear arms *for the defence of* themselves and *the state*; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
South Carolina	1776	None.
Virginia	1776	Bill of Rts., § 13: That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe *defence of a free State*; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases *the military should be under strict subordination to, and governed by, the civil power.*
Georgia	1777	None.*

* A 1770 Georgia law provided that men qualified for militia duty were required "to carry fire arms" "for the security and *defence of this province* from internal dangers and insurrections." *See D.C. v. Heller*, 128 S. Ct. 2783, 2802-03 (2008).

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
New York	1777	Art. XL: And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defence; and *it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it*; this convention therefore . . . declare that the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness *for service* . . .

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Vermont	1777	Ch. I, art. 16: That the people have a right to bear arms *for the defence of* themselves and *the State* – and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power . . . . Ch. II, art. V: The freemen of this Commonwealth, and their sons, shall be trained and *armed for its defence*, under such regulations, restrictions and exceptions, as the general assembly shall, by law, direct . . . .
South Carolina	1778	None.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Massachusetts	1780	Pt. I, art. XVII: The people have a right to keep and to bear arms *for the common defence*. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.
New Hampshire	1784	Pt. 1st, art. 24: A *well regulated militia is the proper, natural, and sure defense, of a State.*

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Vermont	1786	Ch. I, art. XVIII: [Same as 1777 – "*for the defence of . . . the State*"]. Ch. II, art. XIX: The inhabitants of this Commonwealth shall be trained and armed *for its defence*, under such regulations, restrictions, and exceptions, as the General Assembly shall by law direct.
Georgia	1789	None.
Pennsylvania	1790	Art. IX, § 21: That the right of citizens to bear arms, *in defence of* themselves and *the State*, shall not be questioned.
South Carolina	1790	None.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
U.S. Constitution	1791	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.
Delaware	1792	None.
Kentucky	1792	Art. XII, § 23: The rights of the citizens to bear arms *in defense of* themselves and *the State* shall not be questioned.
New Hampshire	1792	Art. XXIV: [Same as 1784 – "*A well regulated militia is the proper, natural, and sure defence of a state.*"].

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Vermont	1793	Ch. I, art. XVI: [Same as 1786 – "*for the defence of . . . the State*"]. Ch. II, art. LIX: [Same as 1786 – "inhabitants of this Commonwealth shall be trained and armed *for its defence*"].
Tennessee	1796	Art. XI, § 26: That the free men of this State have a right to keep and to bear arms *for their common defence.*
Georgia	1798	None.
Kentucky	1799	Art. 10, § 23: [Same as 1792 – "*in defence of . . . the State*"].

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Ohio	1802	Art. VIII, § 20: That the people have a right to bear arms *for the defense of* themselves and *the State*; and as standing armies in time of peace are dangerous to liberty, they shall not be kept up: and that the military shall be kept under strict subordination to the civil power.
Louisiana	1812	Art. III, § 22: The free white men of this State, shall be armed and disciplined *for its defence*; but those who belong to religious societies, whose tenets forbid them to carry arms, shall not be compelled so to do, but shall pay an equivalent for personal service.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Indiana	1816	Art. I, § 20: That the people have a right to bear arms *for the defence of* themselves, and *the state*; and that the military shall be kept in strict subordination to the civil power.
Mississippi	1817	Art. I, § 23: Every citizen has a right to bear arms *in defence of* himself and *the State*.
Connecticut	1818	Art. I, § 17: Every citizen has a right to bear arms *in defence of* himself and *the state*.
Illinois	1818	None.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Alabama	1819	Art. I, § 23: Every citizen has a right to bear arms *in defence of* himself and *the State*.
Maine	1819	Art. I, § 16: "Every citizen has a right to keep and bear arms *for the common defence*; and this right shall never be questioned."
Missouri	1820	Art. CIII, § 3: That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that their right to bear arms, *in defense of* themselves and of *the state*, cannot be questioned.

APPENDIX B

STATE CONSTITUTIONAL PROVISIONS RELATING TO THE RIGHT TO ARMS IN EFFECT FROM 1821 THROUGH 1868

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Massachusetts	1780	[Unchanged since 1780 – "*for the common defence*"].
New Hampshire	1792	[Unchanged since 1792 – "*A well regulated militia is the proper, natural, and sure defence of a state.*"].
Vermont	1793	[Unchanged since 1793 – "*for the defence of . . . the State*"].
Connecticut	1818	[Unchanged since 1818 – "*in defence of . . . the state*"].
Maine	1819	[Unchanged since 1819 – "*for the common defence*"].

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
New York	1821	None.
Virginia	1830	Art. I: [Same as 1776: "*defence of a free State*"].
Delaware	1831	None.
Mississippi	1832	Art. I, § 23: [Same as 1817 - "*in defence of . . . the state*"].
Michigan	1835	Art. I, § 13: Every person has a right to bear arms *for the defense of* himself and *the state*.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Tennessee	1835	Art. I, § 26: That the free white men of this State have a right to keep and to bear arms *for their common defence*. Art. I, § 24: That *the sure and certain defence of a free people, is a well regulated militia*: and, as standing armies in time of peace are dangerous to freedom, they ought to be avoided, as far as the circumstances and safety of the community will admit; and that in all cases the military shall be kept in strict subordination to the civil authority.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Arkansas	1836	Art. II, § 21: That the free white men of this state shall have a right to keep and bear arms *for their common defence*.
Texas	1836	Dec. of Rts., § 14: Every citizen shall have the right to bear arms *in defence of* himself and *the republic*. The military shall at all times and in all cases be subordinate to the civil power. Dec. of Rts., § 15: The *sure and certain defence of a free people is a well-regulated militia*; and it shall be the duty of the legislature to enact such laws as may be necessary to the organizing of the militia of this republic.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Florida	1838	Art. I, § 21: That the free white men of this State shall have the right to keep and to bear arms, *for their common defense.*
Pennsylvania	1838	Art. IX, § 21: The right of the citizens to bear arms, *in defence of* themselves and *the State*, shall not be questioned.
Rhode Island	1843	Art. I, § 22: The right of the people to keep and bear arms shall not be infringed.
New Jersey	1844	None.
Louisiana	1845	Tit. III, art. 60: [Same as 1812 - "men of this State . . . armed . . . *for its defence*"].

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Texas	1845	Art. I, § 13: Every citizen shall have the right to keep and bear arms, *in the lawful defence* of himself or *the State*.
Iowa	1846	None.
New York	1846	None.
Illinois	1848	None.
Wisconsin	1848	None.
California	1849	None.
Kentucky	1850	Art. XIII, § 25: That the rights of the citizens to bear arms *in defence of* themselves and *the State* shall not be questioned; but the general assembly may pass laws to prevent persons from carrying concealed arms.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Michigan	1850	Art. XVIII, § 7: Every person has a right to bear arms *for the defense of* himself and *the state*.
Virginia	1850	Art. XIII: [Same as 1830: "*defence of a free State*"].
Indiana	1851	Art. I, § 32: The people shall have a right to bear arms, *for the defense of* themselves and *the State*.
Maryland	1851	Dec. of Rts. § 25: [Same as 1776 – "That a *well-regulated militia is the proper and natural defence of a free government*."].

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Ohio	1851	Art. I, § 4: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.
Louisiana	1852	Tit. III, art. 59: [Same as 1845 – "men of this State . . . armed . . . *for its defence*"].
Iowa	1857	None.
Minnesota	1857	None.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Oregon	1857	Art. I, § 27: The people shall have the right to bear arms for the *defence of* themselves, and *the State*, but the Military shall be kept in strict subordination to the civil power[.]
Kansas	1859	Bill of Rts., § 4: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.
Alabama	1861	Art. I, § 23: [Same as 1819 – "*in defence of . . . the State*"].

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Arkansas	1861	Art. II, § 21: That the free white men and Indians of this State have the right to keep and bear arms *for their* individual or *common defense.*
Florida	1861	Art. I, § 21: [Same as 1838 – "*for their common defense*"].
Louisiana	1861	Tit. III, art. 59: [Same as 1852 – "men of this State . . . armed . . . *for its defence*"].
Mississippi	1861	Art. I, § 23: [Same as 1832 – "*in defence of . . . the state*"].
South Carolina	1861	None.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
West Virginia	1863	None.
Arkansas	1864	Art. II, § 21: [Same as 1836 – "*for their common defence*"].
Louisiana	1864	Art. IV, § 67: All able-bodied men in the State shall be armed and disciplined *for its defence*.
Maryland	1864	Dec. of Rts. § 25: [Same as 1851 - "That a *well-regulated militia is the proper and natural defence of a free government*."].
Nevada	1864	None.
Virginia	1864	None.
Alabama	1865	Art. I, § 27: That every citizen has a right to bear arms *in defence of* himself and *the State*.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Florida	1865	None [1838 provision deleted].
Georgia	1865	Art. I, § 4: 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.
Missouri	1865	Art. I, § 8: [Same as 1820 – "*in defense of . . . the state*"].
South Carolina	1865	None.
Texas	1866	Art. I, § 13: Every citizen shall have the right to keep and bear arms, *in the lawful defence of* himself or *the State*.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Maryland	1867	Dec. of Rts. § 28: [Same as 1864 – "That a *well-regulated militia is the proper and natural defence of a free government.*"].
Alabama	1868	Art. I, § 28: [Same as 1865 – "*in defence of . . . the state*"].
Arkansas	1868	Art. I, § 5: The citizens of this State shall have the right to keep and bear arms *for their common defense.*
Florida	1868	Dec. of Rts., § 22: The people shall have the right to bear arms *in defense of* themselves and of *the lawful authority of the State.*

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Georgia	1868	Art. I, § 14: A *well-regulated militia being necessary to the security of a free people*, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne.
Louisiana	1868	None.
Mississippi	1868	Art. I, § 15: All persons shall have a right to keep and bear arms for their defence.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
North Carolina	1868	Art. I, § 24: 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; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to and governed by the civil power.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
South Carolina	1868	Art. I, § 28: The people have a right to keep and bear arms *for the common defence*. As, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the general assembly. The military power ought always to be held in an exact subordination to the civil authority, and be governed by it.