IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 03-CV-0213-EGS**
	)	
DISTRICT OF COLUMBIA, et al.	)	
	)	
Defendants.	)	

MEMORANDUM OF *AMICUS CURIAE* THE HEARTLAND INSTITUTE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF INTEREST OF *AMICI CURIAE* THE HEARTLAND INSTITUTE

The Heartland Institute is a national nonprofit, nonpartisan, public policy research organization based in Chicago, Illinois. Founded in 1984, it produces expert research and commentary on a wide range of public policy issues for the nation's 8,300 state and national elected officials. More than 100 academics and professional economists and 360 state elected officials participate in Heartland's programs as researchers, writers, peer reviewers, and advisors. Heartland is supported by approximately 1,500 donors, and is a tax-exempt charity under Section 501(c)3 of the Internal Revenue Code.

The Second Amendment and gun control have long been of concern to Heartland and its researchers. In 1995, Heartland published The Heartland Institute study "Taking Aim at Gun Control" by Daniel Polsby, then the Kirkland & Ellis Professor of Law at Northwestern University School of Law in Chicago and now Professor of Law and Associate Dean for Academic Affairs at George Mason University School of Law, and Dennis Brennan, Chairman of the Department of Economics at Harper College in Palatine, Illinois. The Heartland Institute submitted in 1999 an *amicus* brief in *United States v. Timothy Joe Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999), arguing that the Supreme Court's decision in *United Stataes v. Miller*, 307 U.S. 174 (1939), did not foreclose an individual rights reading of the Amendment. Heartland's Web site (at www.heartland.org) has nearly 80 studies and reports on Second Amendment issues.

SUMMARY OF ARGUMENT

The contention of the Defendants and the *Amici* that support them that the Second Amendment guarantees a "states' right" or "collective right" to keep and bear arms is unsupported by *United States v. Miller*, 307 U.S. 174 (1939). It is plain from consideration of the *Miller* opinion in its entirety that this case rejects the "states' right" theory and supports the

individual right of the people to possess firearms. Later cases that purport to rely upon *Miller* misconstrue it and ignore contradictory language in it. Furthermore, no court has foreclosed an individual rights reading of the Second Amendment. In addition, the overwhelming weight of scholarly opinion, relying upon detailed and disciplined analysis of the Constitution and examination of its historical context, and, specifically, review of the provisions of the Second Amendment, demonstrate that this Amendment provides for a personal right to keep and bear arms. Furthermore, it has been definitively established, in rigorous crime rate studies, that handgun bans such as that in effect in the District of Columbia result in *more* violent crime, not less. *Amicus Curiae* The Heartland Institute therefore respectfully suggests to this Court that it grant Plaintiff's Motion for Summary Judgment.

ARGUMENT

I. The Supreme Court's Holdings in *United States v. Miller* and in Other Post-*Miller* Cases Support an Individual Rights Interpretation of the Second Amendment.

A. The Supreme Court's Holding in *United States v. Miller* Implicitly Adopted an Individual Rights Interpretation of the Second Amendment.

United States v. Miller, 307 U.S. 174 (1939), is the United States Supreme Court's only significant interpretation of the Second Amendment in this century. *Miller* arose as a result of an appeal taken by the United States Government following the dismissal of an indictment against two Arkansas men accused of possessing a sawed-off shotgun in violation of the National Firearms Act of 1934. *Miller, supra,* 307 U.S. at 174, *citing* 48 Stat. 1236, § 6 (1934). The U.S. District Court for the Western District of Arkansas had quashed the indictment after finding that the National Firearms Act "offend[ed] the inhibition of the Second Amendment to the Constitution." *See United States v. Miller,* 26 F. Supp. 1002, 1003 (W.D. Ark. 1939), *rev'd,* 307 U.S. 174 (1939). Following the District Court's decision, the Government appealed directly to

the United States Supreme Court. The Government was the only party that filed a brief with the Court and was the sole party appearing at oral argument.

The Supreme Court reversed the District Court, but, in doing so, it avoided any sweeping statements regarding the scope of the Second Amendment. It held simply that:

> [i]n the absence of any evidence tending to show that possession or use of a [sawed-off shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Id. at 178. Implicit in the holding is the point that if the defendants *had* made such a showing, the Court might have struck down the provision in question. There seemed no question that the defendants as individuals were competent to raise the Second Amendment as a defense. If a collective or states' rights view were adopted, the Court could have reversed the District Court on the ground that the individual defendants — who were apparently not members of any formal "well regulated militia" — did not have standing to invoke the Second Amendment's protections.

While Justice McReynolds described the "obvious purpose" of the Second Amendment to be assuring "the continuation and render possible the effectiveness of" the militia and wrote that the Amendment "must be interpreted and applied with that end in view," he also noted that at the time of the Framing, militias were made up of individuals, *viz*. "all males physically capable of acting in concert for the common defense," who often supplied their own weapons. *Miller, supra,* 307 U.S. at 178-79. Militia members are, in Justice McReynolds' words, "civilians primarily, soldiers on occasion." *Id.* More importantly they are, as McReynolds recognized, *individuals*.

Securing for individuals the right to keep and bear arms so that they could fulfill that role as members of militias, should the need arise, would be the primary means of "assur[ing] the continuation and render[ing] possible the effectiveness of" the militias. As Thomas Cooley noted, "The alternative to a standing army is a 'well regulated militia'; but this cannot exist unless the people are trained to bearing arms." 1 Thomas M. Cooley, Constitutional Limitations 729 (8th ed. 1927); *see also* William Van Alstyne, "The Second Amendment and the Personal Right to Arms," 43 Duke L.J. 6, 1244 (1994)(The Second Amendment "expressly embraces" the right to keep and bear arms and "erects the very scaffolding of a free state upon that guarantee"; "The militia to be well-regulated is a militia to be drawn from people with a right to keep and bear arms . . . rather than from some other source (*i.e*., from people without rights to keep and bear arms)").

Had the *Miller* Court believed that rights under the Second Amendment existed only for the benefit of states, and not individuals, then the Court would have had to ask only one question: "Are Messrs. Miller and Layton states?" Since the answer to that question is "no," the Court simply could have dismissed the Second Amendment argument for lack of standing. That the Court did not strongly suggests that it did not in fact adopt a "states' rights" or "collective rights" interpretation of the Second Amendment, which is confirmed by the Court's rejection of such arguments made by the Government in its brief, described below**.**

B. The *Miller* Court Rejected the Collective Rights Argument Put Forth by the Government in that Case.

Further supporting the argument that the *Miller* Court implicitly adopted an individual rights interpretation of the Second Amendment is the fact that Court rejected the collective rights argument made by the United States Government in its brief, which was the only brief filed with the Court.

The Government claimed that "the very language of the Second Amendment discloses that this right has reference only to the keeping and bearing of arms by the people as members of the state militia or other similar military organization provided for by law." Brief of the United States, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696), at 4-5. The Government further argued that the Second Amendment "gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers" and "did not permit the keeping of arms for purposes of private defense." *Id.* at 12. The reference to a "well regulated militia" that precedes the Second Amendment, it maintained, "indicates that the right to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state." *Id.* at 15.

The Court made no direct mention of the Government's arguments in its opinion; rather, it partially adopted an alternative argument of the Government. Assuming *arguendo* that the Second Amendment protected an individual's right to keep and bear arms, the Government argued, the only arms protected were those suitable to military purposes, as opposed to weapons — like sawed-off shotguns — that "constitute the arsenal of the 'public enemy' and the "gangster" and that the National Firearms Act was intended to regulate. *Id*. at 18, 20. Even here the Court handed the Government only half a loaf, however. The *Miller* Court said merely that it was presented with no evidence of and could not take judicial notice of a sawed-off shotgun's military utility.

It is true that "[t]he Court [in *Miller*] did not . . . attempt to define, or otherwise construe, the substantive right protected by the Second Amendment." *Printz v. United States*, 521 U.S. 898, 937 n.1 (1997)(Thomas, J., concurring). But it is also true that the *Miller* Court implicitly

adopted the position that the Amendment protects an individual right by: (i) not reversing the lower court's decision on the ground that the defendants lacked standing; and (ii) by rejecting the Government's arguments that the Second Amendment protected only a collective right.

C. Dicta in Post-*Miller* Supreme Court Cases Support an Individual Rights Interpretation of the Second Amendment.

Since *Miller*, the Supreme Court has not taken up a Second Amendment case, but the Supreme Court has repeatedly mentioned the Second Amendment in other cases. The most significant of these statements is a rule for Fourteenth Amendment interpretation, which has been used in six opinions:

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

Albright v. Oliver, 510 U.S. 266, 307 (1994)(Stevens, J., dissenting on other grounds); *Planned Parenthood v. Casey*, 505 U.S. 833, 841 (1992)(O'Connor, J., opinion for the Court); *Moore v. East Cleveland*, 431 U.S. 494, 502 (1976)(plurality op.); *Id*. at 542 (White, J., dissenting on other grounds); *Roe v. Wade*, 410 U.S. 113, 169 (1973)(Stewart, J., concurring).

The statement first appeared in Justice Harlan's famous dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961)(Harlan, J., dissenting on other grounds). This rule plainly treats "the right to keep and bear arms" as one of the "specific guarantees" in the Bill of Rights which the Fourteenth Amendment *could* make enforceable against state action. Whether the Second Amendment is incorporated is not the issue in the instant case; rather, the Court's recognition of the right to keep and bear arms as part of the Bill of Rights litany which could be incorporated shows that the Court considers the Second Amendment to be an individual right. It

would be an absurdity for the Court to discuss, in the context of Fourteenth Amendment incorporation, a right which belongs only to state governments. Many other Fourteenth Amendment cases recognize the Second Amendment as an individual right; these cases antedate and precede *Miller*, and include opinions by Justice Black, who served on the Court that decided *Miller*.[1]

The Supreme Court has also listed restrictions on the right to keep and bear arms (such as the sawed-off shotgun restrictions at issue in *Miller*, or restrictions on individuals carrying concealed handguns) in pari materia with restrictions on other individual rights (such as libel laws which limit free speech) to show that none of the personal rights of the Bill of Rights are absolute. *Konigsberg v. State Bar*, 366 U.S. 36, 49-50 (1961); *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).[2]

II. Federal Court Decisions Citing *Miller* for the Proposition that the Second Amendment Does Not Guarantee an Individual Right, Or that the Right Protected Is Available Only to Members of a Militia, Misconstrue the *Miller* Court's Holding.

A number of federal court decisions misrepresent the holding of *Miller* to the extent that they cite *Miller* for the proposition that the Second Amendment protects no individual right, or

[1] *Duncan v. Lousiana*, 391 U.S. 145, 166-67 (1968)(Black, J., dissenting)("the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms; the right to be exempted from the quartering of soldiers in a house without consent of the owner..."); *Knapp v. Schweitzer*, 357 U.S. 371, 378-79 (1958); *Adamson v. California*, 332 U.S. 46 , 78, 104-07 (1947)(Black, J., dissenting)(quoting Congressional Record showing that sponsors of the Fourteenth Amendment considered the Second Amendment to be a "personal right"); *Twining v. New Jersey*, 211 U.S. 78 (1908), overruled *Malloy v. Hogan*, 378 U.S. 1 (1964)(right to arms and right to civil jury trial treated identically); *Trono v. United States*, 199 U.S. 521, 528 (1905)(same); *Kepner v. United States*, 195 U.S. 100, 123-24 (1904)(same); *Miller v. Texas*, 153 U.S. 535, 538 (1894)(application of Second, Fourth, and Fifth Amendments to state prosecution of an individual discussed in identical terms); *United States v. Cruikshank*, 92 U.S. 542 (1876)(right to assemble and right to keep and bear arms are "found wherever civilization exists"; the Constitution protects both pre-existing rights, but does not create them; the constitutional right to assembly and to bear arms is not infringed by actions of private parties); *see also Logan v. United States*, 144 U.S. 263, 286-88 (1892)(repeating *Cruikshank*'s rule that First Amendment assembly right and Second Amendment arms right are identical in scope). *Cf. Brown v. Walker*, 161 U.S. 591, 634 (1896)(Field, J., dissenting)(Fifth Amendment case; Bill of Rights litany includes "the right to bear arms" as among "the essential and inseparable features of English liberty").

hold that *Miller* conditions the exercise of the right on actual membership in a militia. Therefore, these decisions should not be regarded as persuasive authority by this Court.

A. Several Federal Lower Court Decisions Distort and Misconstrue the Supreme Court's Holding in *Miller*.

A number of federal court decisions are sometimes represented as rejecting an individual rights reading of the Second Amendment. *See, e.g., Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996); *Love v. Pepersack*, 47 F.3d 120 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996). Unfortunately, much of this post-*Miller* jurisprudence has been altered and reprocessed so as to bear no recognizable relationship to the original. A close reading of these cases reveals that those courts either misinterpret *Miller* or cite it for untenable propositions.

In *Hickman*, the Ninth Circuit rejected an individual's Second Amendment challenge to state and local officials' denial of his application for a permit to carry a concealed weapon on the ground that an individual had no standing to invoke the Second Amendment. *Hickman, supra*, 81 F.3d at 101. In doing so, the court relied on decisions from other circuits that the Amendment "does not protect the possession of a weapon by a private citizen." *Id.* Not only did the Ninth Circuit's opinion misstate the holding of *Miller*, stating that "the Court [in *Miller*] found that the right to keep and bear arms is meant solely to protect the right of the states to keep and maintain armed militia," *id.*, but also the court made several factual errors regarding the case itself that suggest the court had not read the *Miller* opinion carefully.[3]

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[2] *See generally* David B. Kopel, "The Supreme Court's Thirty-Five Other Second Amendment Cases." 18 St. L. U. L. Rev. 99 (1999).

[3] First, the court claimed that *Miller* "upheld a conviction under the National Firearms Act." *Hickman*, 81 F.3d at 101. This is incorrect; the Court reversed the District Court's decision to quash the indictment of the defendants

In *Love v. Pepersack*, the Fourth Circuit stated that "lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual right." *Love, supra*, 47 F.3d at 124, and that "the collective right of keeping and bearing arms . . . must bear 'a reasonable relationship to the preservation or efficiency of a well-regulated militia.'" *Id.*, quoting *United States v. Johnson*, 497 F.2d 548,550 (4th Cir. 1974)(*per curiam*), quoting *United States v. Miller*, 307 U.S. 174, 178 (1939). Again, the Fourth Circuit ignored or was unaware of the Government's position, which the Supreme Court had declined to adopt. Moreover, the language quoted from *Miller* is misleading. Read in context, the language from *Miller* quoted by the *Love* court referred only to the nature of the weapon itself, not to the question of an individual right to possess weapons in general.[4] The Court was not discussing whether the defendants' possession of a weapon contributed to the preservation of efficiency of a militia.[5]

The Sixth Circuit Court of Appeals, in *United States v. Warin*, similarly adopted a collective rights reading of the Second Amendment. The *Warin* court affirmed the conviction of a man charged with possession of an unregistered machine gun who claimed membership in the

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Miller and Layton. Since the indictment was quashed, they had never been tried, much less convicted. The court also stated that the Supreme Court "rejected the appellant's hypothesis that the Second Amendment protected his possession of [a sawed-off shotgun]." *Id*. This, too, is incorrect. It was the Government that appealed the lower court decision to quash the indictment, not the defendants. As discussed above, had the Ninth Circuit consulted the Government's brief and compared it to the Court's holding in *Miller*, it would find that the very position for which it cites *Miller* was presented and rejected by the Supreme Court.

[4] This is clear from the entire passage, but courts nevertheless have maintained that "the *Miller* Court assigned no special importance to the character of the weapon itself, but instead demanded a reasonable relationship between its 'possession or use' and militia related activity." *United States v. Rybar*, 103 F.3d 273, 286 (3rd Cir. 1996). This simply misreads the Court, which stressed that, without evidence, it was unable to pass on a sawed-off shotgun's military utility and that it could not take judicial notice of that fact. *Miller*, 307 U.S. at 178. No reference was made to the defendants' apparent lack of connection to a well regulated militia. Interestingly, *Rybar* cites as support for its position another court of appeals case, *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), and not the *Miller* decision itself.

[5] Though if the purpose of providing for armed militias was to provide a check on the exercise of tyrannical power, as even the Government conceded in its brief, *see* Brief of the United States in *Miller, supra*, at 12, then that purpose would be frustrated if the government could prohibit private ownership of firearms.

unorganized militia of Ohio[6] and who sought to demonstrate that the weapon in question was to be offered to the U.S. military "as an improvement on the military weapons presently in use." *Warin, supra*, 530 F.2d at 105. The Sixth Circuit did not even discuss *Miller*, but based its rejection of the defendant's Second Amendment claim on its previous holding in *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971), in which the Sixth Circuit cited *Miller* for the proposition that the Second Amendment applied only "to the right of the State to maintain a militia" and that "no serious claim to any express constitutional right of an individual to posses a firearm" could be maintained. *Id.* at 149. Though *Stevens* cites to page 178 of the *Miller* opinion, there is nothing there that remotely supports the Sixth Circuit's conclusion. The *Miller* page cited by the *Stevens* court contains the language, quoted above, that the Court could not, without evidence, conclude that a sawed-off shotgun is the type of weapon protected by the Second Amendment. *See Miller*, 307 U.S. at 178. Nevertheless, solely on the strength of its dubious reading of *Miller* in *Stevens*, the *Warin* court concluded that it was "clear that the Second Amendment guarantees a collective rather than an individual right." *Warin*, 530 F.2d at 106.

Finally, *Cases v. United States*, and not *Miller*, is the real source for many of the sweeping propositions for which other federal courts have misleadingly cited *Miller*. The First Circuit, in 1942, rejected a Second Amendment challenge and upheld the conviction of a defendant, a convicted felon, for possession of a firearm in violation of federal law. *Cases, supra*, 131 F.2d at 917-18. In doing so, the First Circuit refused to follow *Miller* to the extent that the case could be read to restrict governmental regulation of any weapon for which "a reasonable relationship to the preservation or efficiency of a well-regulated militia" could be

[6] Like many states, Ohio has a constitutional provision subjecting all resident citizens of certain ages to service in the state militia. See Ohio Const. art. IX, § 1.

demonstrated. *Id.* at 922. Such a reading, coupled with the realities of modern warfare in which all weapons had potential military utility, the court stated, would mean that "the federal government would be empowered only to regulate the possession or use of [antique or obsolete] weapons. . . ." *Id*. The court also noted that:

> Another objection to the rule of the *Miller* case as a full and general statement is that according to it Congress would be prevented by the Second Amendment from regulating the possession or use by private persons not present or prospective members of any military unit, of distinctly military weapons . . . even though under the circumstances . . . it would be inconceivable that a private person could have any legitimate reason for having such a weapon.

Id. This, the court concluded, "is in effect to hold that the limitation of the Second Amendment is absolute." *Id*.

Rather than leave such questions for resolution by the Supreme Court, the *Cases* court proceeded to uphold the conviction based on the assumption that the defendant was "in possession of, transporting and using the firearm and ammunition simply on a frolic of his own without any thought or intention of contributing to the efficiency of the well-regulated militia." *Id*. at 923. The court made and relied upon this assumption even while conceding that the weapon involved had military utility. The court's justification was that there "was no evidence that the appellant was or ever had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career." *Id*.

Cases' additional "state of mind" requirement has proved popular with subsequent courts, which have found it a convenient method for disposing of Second Amendment claims. In *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), the Eighth Circuit, describing *Cases* as "one of the most illuminating circuit opinions on the subject of 'military' weapons and the Second Amendment," upheld the conviction of a defendant for possession of unregistered machine guns,

despite evidence that the guns themselves were military weapons, the possession of which could contribute to the maintenance and efficacy of a well-regulated militia. *Hale, supra*, 978 F.2d at 1019. Dismissing the *Miller* Court's language about the origins of the militia as "historical residue," the Eighth Circuit went on to adopt the *Cases* state of mind test:

> Where . . . a claimant presented no evidence either that he was a member of a military organization or that his use of the weapon was in 'preparation for a military career,' the Second Amendment did not protect the possession of that weapon.

Id. at 1020.

Similarly, in *Love v. Pepersack*, 47 F.3d 120 (4th Cir. 1995), the Fourth Circuit cited *Miller* for the proposition that the person's possession of a weapon, not the weapon itself, must have a reasonable relationship to the maintenance of a militia. *Love, supra*, 47 F.3d at 124. The court rejected the defendant's Second Amendment claim because she did not "identify how her possession of a handgun will preserve or insure the effectiveness of the militia." *Id. See also United States v. Wright*, 117 F.3d 1265, 1272 (11th Cir. 1997)(adopting "intent" test); *United States v. Rybar*, 103 F.3d 273, 286 (3rd Cir. 1996)(defendant failed "to establish that his firearms possession bears a reasonable relationship 'to the preservation of efficiency of a well-regulated militia.'"); *Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987)(same).

Even when claimants have attempted to present evidence of membership in an unorganized militia, or otherwise attempted to meet the *Cases* intent requirement, courts dismiss such evidence out of hand. *See Rybar, supra*, 103 F.3d at 286 (membership in a "hypothetical or 'sedentary' militia will not suffice"; defendant's status as a militia member under 10 U.S.C. § 311(a) insufficient); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977)("To apply the [Second A]mendment so as to guarantee appellant's right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a

member of the Kansas militia, would be unjustifiable in terms of either logic or policy"; but giving no explanation why such an application would be unjustified).

Last, a New York district court concluded that "the [Supreme] Court's jurisprudence teaches that the [Second] Amendment establishes a collective right, rather than an individual or private right." *Accu-Tek, supra*, 935 F. Supp. at 1318. Yet the court cited as support for its proposition not *Miller*, but the *Warin* decision. *Id.* The only citation to *Miller* actually made by the court was to quote the language that the Amendment must be interpreted and applied to render viable the militia. *Id.* The court then quoted the *Stevens* decision's bald assertion that "there can be no serious claim" that the Second Amendment protected an individual right." *Id.* Note again how the most restrictive statements about the Second Amendment's scope are found not in *Miller* but in what other courts allege that *Miller* held — allegations that find little support in the actual language of *Miller*.

In these cases holding that the Second Amendment protects no individual right, it is evident that those courts did not undertake a careful analysis of *Miller*, much less engage in detailed historical, structural, or textual analysis of the Second Amendment to arrive at their decisions. In contrast with the careful, scholarly opinion of the District Court and Fifth Circuit in the *Emerson* case, previous decisions endorsing a collective rights interpretation of the Second Amendment seem to have been motivated by a desire to support a personal belief apparently held by those judges that individuals ought not to have the right to own guns.

B. Other Federal Court Decisions Similarly Make Erroneous Use of *Miller*.

Other federal district court and court of appeals decisions have rejected an individual rights reading of the Second Amendment, often asserting either that *Miller* endorses a collective rights reading or applying the "intent" test invented by the First Circuit in *Cases*. These opinions, too, are flawed, and should not be relied on by this Court.

In 1942, the same year that *Cases* was decided, the Third Circuit Court of Appeals addressed the scope of the Second Amendment and the *Miller* decision in *United States v. Tot*, 131 F.2d 261 (3rd Cir. 1942). In upholding the conviction of a defendant for possession of a gun capable of being fitted for a silencer, the court declared that the Second Amendment "was not adopted with individual rights in mind, but as protection for States in the maintenance of their militia organizations against possible encroachments by federal power." *Tot, supra*, 131 F.2d at 266. It then cited historical materials and law review articles purporting to offer support for the court's statement. However, none of the sources cited support the contention that the Amendment "was not adopted with individual rights in mind"; many of the sources, in fact, support the view that the Second Amendment guarantees an individual right. *See* Brannon P. Denning, "Gun Shy: The Second Amendment as an 'Underenforced Constitutional Norm,'" 21 Harv. J. L. & Pub. Pol'y 719, 735-47 (1998)(discussing in detail the sources cited by the *Tot* court). Prior to its historical discussion, the court stated that, in its view, "[t]he contention of the appellant [that the statute violated the Second Amendment] could . . . be denied without more under the authority of [Miller]." *Tot, supra*, 131 F.2d at 266. As in *Cases*, the underlying assumption of the court in *Tot* was that *Miller* rejected an individual rights reading of the Second Amendment.

Other courts cite *Miller* for propositions that the Court's opinion simply does not contain. The Third Circuit Court of Appeals, *in Eckert v. City of Philadelphia*, 477 F.2d 610 (3rd Cir. 1973), cited *Miller* (without any accompanying page reference) in support of the proposition that "the right to keep and bear arms is not given by the United States Constitution." *Eckert, supra*, 477 F.2d at 610. In a highly publicized case upholding a Chicago suburb's ban on handgun ownership, the Seventh Circuit characterized *Miller* as having extended Second Amendment protection to arms that "are necessary to maintain a well regulated militia" but concluded, without analysis, that "[u]nder the controlling authority of Miller . . . the right to keep and bear handguns is not guaranteed by the second amendment." *Quilici v. Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982)(footnote omitted). It added in a footnote, again without giving reasons, that "we do not consider individual owned handguns to be military weapons." *Id*. at 270 n.9. *See also Oakes, supra*, 564 F.2d at 387 (citing *Miller* as having rejected "the absolute right [of citizens] to keep and bear arms" despite the fact that the Court in *Miller* never addressed the scope of the Amendment's protections); *United States v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. 1981)(citing *Miller* as support for the statement that "[i]t is well established that the Second Amendment is not a grant of right but a limitation on the power of Congress and the national government"); Brannon P. Denning, "Can the Simple Cite Be Trusted?: Lower Court Interpretations of *United States v. Miller* and the Second Amendment," 26 Cumb. L. Rev. 961 (1996).

III. Even Courts That Narrowly Interpret *Miller* to Deny Second Amendment Claims Have Not Foreclosed an Individual Rights Reading of the Second Amendment.

Finally, even the cases discussed above, in which courts have incorrectly interpreted *Miller*, have not categorically held that an individual can never put forth a viable Second Amendment claim. For example, the *Cases* court did not deny that the Second Amendment

contained a right that could be invoked by an individual. The court held simply that to put forth a viable claim, the appellant was required to demonstrate that he "was or ever had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career," and not "in possession of, transporting and using the firearm and ammunition simply on a frolic of his own . . . without any thought or intention of contributing to the efficiency of the well-regulated militia . . . ." *Cases*, 131 F.2d at 923. Similarly, while adopting *Cases'* judicially-created "intent" requirement, *Pepersack*, *Wright*, *Rybar*, and *Sandidge*, discussed *supra*, all hold that the defendant merely failed to meet the intent "test," not that an individual can never put forth a winning claim.

Other courts that have adopted a reading of the Second Amendment that absolutely bars an individual claim, *see, e.g., Hickman, supra, Tot, supra*, do so either upon a gross misreading of *Miller*, or as part of a conclusory holding that finds no support in the Court's *Miller* decision. In the wake of recent scholarship, many courts have begun to eschew the categorical statements of earlier courts, even if they continue to read the Second Amendment narrowly. *See, e.g.*, *United States v. Spruill*, 61 F. Supp. 2d 587, 590-91 (W.D.Tex. 1999)(noting the recent attention paid to the Second Amendment by scholars and lack of clear direction by the Supreme Court, holding only that "[w]ithout more at this time . . . the Court chooses to . . . hold[] that the Second Amendment does not prohibit the federal government from imposing some restrictions on private gun ownership")(emphasis added).

The courts increasingly express uncertainty over whether the Second Amendment protects only "states' right" and offers no protection to individuals. The uncertainty now expressed by courts stands in sharp contrast to the conclusory statements of previous courts that the Second Amendment protects either "states' rights" or "collective rights" and offers no

protection for individuals. *Runnenbaum v. Nationsbank of Maryland N.A.*, 123 F.3d 156, 170 n.8 (4th Cir. 1997)(en banc)(In making the point that the "constitutionally-protected status of an activity . . . has little, if any, bearing" on whether the activity is recognized under the Americans with Disabilities Act as a "major life activity"; court noted that "carrying a firearm [is not] one of the major life activities under the ADA, though individuals have the constitutional right to . . . to 'keep and bear Arms,'" citing the Second Amendment); *United States v. Atlas*, 94F.3d 447, 452 (8th Cir. 1996) (Arnold, C.J., dissenting)("[P]ossession of a gun, in itself, is not a crime. (Indeed, though the right to bear arms is not absolute, it finds explicit protection in the Bill of Rights.)"); *United States v. Ardoin*, 19 F.3d 177, 186 (5th Cir. 1994)(Weiner, C.J., concurring in part, dissenting in part, and dissenting in the judgment)(criticizing majority's conclusion that a defendant convicted of not paying taxes on illegal firearms could have avoided criminal liability by not owning or possessing the arms in question; "[s]uch casual, dismissive responses are just not satisfactory when it comes to engaging in an activity, such as keeping and bearing arms, that arguably implicates the Bill of Rights"); *Gilbert Equipment Co. v. Higgins*, 709 F. Supp. 1071, 1090 (S.D. Ala. 1989)(despite holding that "the right to keep and bear arms does not extend to and include the right to import arms," nevertheless holding that "[t]he Second Amendment to the United States Constitution guarantees to all Americans the right 'to keep and bear arms' and further provides that this right 'shall not be infringed'").

IV. Detailed, Disciplined Constitutional Analysis Demonstrates that the Second Amendment Guarantees to the People the Right to Keep and Bear Arms.

As discussed above, many of the decisions foreclosing claims based upon an individual's Second Amendment right to bear arms have done so with conclusory, truncated and categorical misstatements that ignore the text of the Amendment and violate classic principles of constitutional interpretation. These decisions are among those cited by the *Amici* who support

the Defendants herein in concluding that the Amendment protects only "states' rights" or "collective rights."

Recently, however, scholarly and jurisprudential attention to Second Amendment historical and textual analysis has become more prevalent, predominantly leading to the conclusion that the Amendment confers upon the people a personal right to keep and bear arms that may not be the subject of governmental limitations and restrictions. Laurence H. Tribe, 1 American Constitutional Law, at 897 and n.211 (3d ed. 2000). The Fifth Circuit decision in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) is a decision which warrants detailed review, as does Lund's Primer. Nelson Lund, "A Primer on the Constitutional Right to Keep and Bear Arms," Virginia Institute for Public Policy 2002.

A. The Fifth Circuit Decision in *Emerson* Demonstrates the Proper Analytical Framework in Second Amendment Cases.

In a lengthy and scholarly opinion, the Fifth Circuit squarely held that the Second Amendment guarantees an individual right to bear arms.[7] *Emerson, supra*, 270 F.3d at 260, In so holding, the court conducted a careful review of *Miller*, including examination of the Government's brief from that case. *Id*. at 221-28. The court concluded that *Miller* provides no support for the collective rights theory and moreover undercuts that theory. *Id.* at 227-28.

The court next conducted an explicit textual review of the language of the Second Amendment and compared it with other constitutional provisions, concluding, among other things, that "[i]t appears clear that 'the people,' as used in the Constitution, including the Second Amendment, refers to individual Americans." *Id.* at 229.

Next, the court considered the historical context in which the Second Amendment was enacted and analyzed both the Federalist and Anti-Federalist positions. *Id.* at 230-41. The court

further analyzed the debates surround the state ratification process, as well as the process by which the Bill of Rights was added. *Id.* at 230-64.

All of these sources compelled the conclusion that the Second Amendment involves a personal, not collective, right, the court found:

> We reject the collective rights and sophisticated collective rights models for interpreting the Second Amendment. We hold, consistent with *Miller*, that it protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal individual weapons and are not of the general kind of type excluded by *Miller*.

Id. at 261. This court's conclusion, based upon careful and detailed scholarship, compels the same conclusion in the instant case.

B. Lund's Primer on Second Amendment Analysis Demonstrates as Well the Proper Analytical Framework in Second Amendment Cases.

Lund begins by observing that the Second Amendment is the only provision in the Constitution which contains a preface. U.S. CONST. amend. II. He attributes the scholarly dispute between "states' rights" collectivists and personal rights proponents to confusion about the prefatory terms[8] "A well regulated Militia" and "being necessary to the security of a free State." Lund states that those who adopt the states' rights/collective interpretation, which includes most courts, essentially conflate "the people" with the "State," while personal rights advocates conflate "the people" with the "well regulated Militia." The "states' rights" theorists are totally wrong, and the personal rights proponents are partly so, Lund states:

> The judicially regnant collective right theory is completely wrong, and demonstrably so. The alternative theory is correct to the extent that it treats the right to arms as one belonging to individuals rather than to governments, but it

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[7] . The court found, however, that the defendant's Second Amendment rights were not infringed by 18 U.S.C. § 922(g)(8)(C)(ii).

[8] The Amendment states in its entirety: "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.

> goes astray in trying to "match" the militia with the people. Properly understood, the Second Amendment means exactly the same thing that it would have meant had the prefatory phrase about the militia been omitted. That prefatory phrase helps to illuminate the animating purpose of the Second Amendment, and it addressed a very specific eighteenth century political issue, but it does not create any tension or inconsistency with the operative clause, and it certainly does not alter or modify the meaning of the operative clause.

Lund at 2-3.

It is wrong to equate "the people" and "the State," Lund observes, because nowhere in the Constitution are these two terms used interchangeably. Rather, in numerous provisions, the Constitution explicitly distinguishes between them. Article I, for example, initially provided that the members of the House of Representatives were to be elected by "the people," while Senators were to be selected by the states' legislatures. U.S. CONST. art. I, § 2, cl. 1; *id*. at § 3, cl. 1. The Seventeenth Amendment altered the Senatorial selection process by providing for direct election not by "the State" but "by the people." Id. at amend. XVII, cl. 1; *see Lund* at 4-5. Furthermore, the last amendment in the Bill of Rights provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. *See generally Lund* at 4-9.

Furthermore, Lund points out, the First and Fourth Amendments were framed at the same time as the Second Amendment, and all three Amendments describe "the right of the people." U.S. CONST. amend. I, II, IV. Lund states:

> The utter strangeness of the states' right theory of the Second Amendment is immediately apparent when one tries to imagine why the framers of the Bill of Rights would have used an identical phrase — "the right of the people" — to describe two rights indubitably belonging to individual citizens and one right belonging solely to state governments or at most to certain employees of state governments.

Lund at 3.

Moreover, Lund states, it is significant to note that the Constitution also draws a distinction between "the Militia" and "the army." Separate constitutional provisions address each individually. U.S. CONST. art I, § 8, cl. 12-14; art. II, § 2. The Constitution reserves most powers over the army and the Militia to Congress, enabling the States only to appoint Militia officers and train the Militia members as provided by Congress. *Id*. at art. I, § 8, cl. 12-16. In addition, the Constitution forbids the States from keeping troops unless Congress consents. *Id*. at art.I, § 10, cl. 3.

Considered against this background, the fallacy of the "states' rights" theory is readily apparent. As Lund states:

> Turning back to the Second Amendment with these facts in mind, it becomes apparent why the Second Amendment cannot possibly have been meant to constitutionalize a right of the states to keep up military organizations like the National Guards. That theory implies that the Second Amendment silently repealed or amended two separate provisions of the Constitution: the clause giving the federal government virtually complete authority over the militia, and the clause forbidding the states to keep troops without the consent of Congress. When the Bill of Rights was adopted, nobody so much as suggested that it would alter these provisions, and nobody claims such a thing today. Indeed, these two provisions of the original Constitution have allowed the federal government essentially to eliminate the state militias as independent military forces by turning them into adjuncts of the federal army through the National Guard system. Under the states' right theory of the Second Amendment, the National Guard system must be unconstitutional, which everyone (including the Supreme Court) agrees is not the case.

Lund at 8. These factual realities eviscerate the "states' rights" theory.

The political issue solved by the Second Amendment, to which Lund refers, was that the Constitution, as submitted for ratification in 1787, gave military control almost exclusively to the Federal government, which Anti-Federalists feared could be used to raise a standing army by which the people could be oppressed and tyrannized. *Lund* at 8. Anti-Federalists viewed the

existence of state Militia as a counter to this perceived threat, albeit a weak one. The solution to this dispute was the existence of an armed populace. Lund quotes James Madison:

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone they would not be able to shake off their yokes.

> Implicit in the debate between the Federalists and Anti-Federalists were two *shared* assumptions: first, that the proposed new Constitution gave the federal government almost total legal authority over the army and the militia; and, second, that the federal government should not have any authority at all to disarm the citizenry.

Lund, supra at 10, quoting *The Federalist No. 46.*

Lund in his Primer thus demarcates elementary and classic rules of constitutional construction. He begins by reviewing the language of Second Amendment itself, evaluating it as a whole and construing it so that no term is superfluous. He then reviews the Constitution in its entirety, comparing the words of the Amendment to identical words used elsewhere. His conclusions are, first, that the Framers distinguished "the people" and "the State" and, contrary to the "states' rights" proponents, never used these two words interchangeably.

Second, Lund observes that the Constitution forbids states from maintaining armed forces without Congressional consent, an observation which effectively deals a lethal blow to the "states' right" argument. Last, he considers the historical background against which the Constitution, and specifically the Second Amendment, was adopted, observing that it is permeated with the assumption that nothing about the Amendment restricted the right of

individuals to keep and bear arms. For all of these reasons, the arguments of Defendants and their *Amici* are misguided and ought to be rejected by this Court.

V. Societal Reasons Support "the Right of the People to Keep and Bear Arms."

Is the Second Amendment outmoded by rapid growth in the sophistication of armaments? Lund answers this question in the negative:

> Apart from the Second Amendment's role in deterring government oppression, the right to arms has another purpose that is every bit as important and urgent today as it was in the eighteenth century. That purpose is to enable American citizens to defend themselves, not against direct oppression by the government, but against oppression from which the government fails to protect them. The principal source of such oppression today is violent criminals.
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> * * *
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> [T]he police do not and cannot protect law-abiding citizens from criminal violence. The impotence of our governments in the face of criminal violence is so obvious that it is simply preposterous to maintain that those individuals with the means and the will to arm themselves are not thereby enhancing their ability to exercise their natural right of self-defense.

Lund at 13.

The *Amici* supporting the Defendants herein portray themselves as influential in the prevention of gun violence. The Brady Center to Prevent Gun Violence states that it "has a substantial and ongoing interest in ensuring that our Nation's constitutional jurisprudence not function as a barrier to strong government action to prevent gun violence." (Memorandum of *Amicus Curiae* Brady Center to Prevent Gun Violence in support of Defendants' motion to dismiss and in opposition to Plaintiffs' motion for summary judgment at 1.) The Violence Policy Center "examines the role of firearms in America, analyzes trends and patterns in firearms violence, and works to develop policies to reduce gun-related death and injury." (Brief of the Violence Policy Center as *Amicus Curiae* in Support of Defendants' Motion to Dismiss and Opposition to Summary Judgment at 1.)

Glaringly absent from the briefs submitted by these *Amici*, however, is any claim that their advocacy of gun control measures has been effective in reducing crime in America. They make no such claims because the evidence is overwhelmingly to the contrary. John Lott's definitive and sophisticated academic study, demonstrates that definitively:

> Nondiscretionary concealed-handgun laws have equal deterrent effects on murders committed both with and without guns. Despite differences in the rates at which women and men carry guns, no difference exists in the total benefit they derive in terms of reduced murder rates. The evidence strongly rejects claims that criminals will be more likely to use firearms when their potential victims are armed. Furthermore, the increased presence of concealed handguns under nondiscretionary laws does not raise the number of accidental deaths or suicides from handguns.
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> * * *
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> One prominent concern about leniency in permitting people to carry concealed handguns is that the number of accidental deaths might rise, but I can find no statistically significant evidence that this occurs. Even the large estimate of nine more accidental deaths per year is extremely small in comparison to the number of lives saved from fewer murders.
>
> The evidence for Pennsylvania and Oregon also provides the first estimates of the annual social benefits that accrue from private expenditures on crime reduction. Each additional concealed-handgun permit reduces total losses to victims by between three and five thousand dollars. . . . The evidence implies that concealed handguns are the most cost-effective method of reducing crime that has been analyzed by economists; they provide a higher return than increased law enforcement or incarceration, other private security devices, or social programs like early educational intervention.

John R. Lott, Jr., More Guns, Less Crime: Understanding Crime and Gun Control Laws at 115 (2d. ed.)(University of Chicago Press 2000).

The Heartland Institute study, "Taking Aim at Gun Control" ("Heartland Study"), also dispels a number of gun control myths. One such myth is that guns are not effective as self-protection against criminals. *Heartland Study* at 4. The study found that 83 percent of Americans will become the victims of violent crime at some time in their lives. Police resources

are spread thin – there is only a single officer on patrol for every 3,300 people. *Id*. The study further found that:

> [E]very year adults use guns for protective purposes 2.5 million times. As many as 65 lives are protected by guns for every life lost to a gun. Each year, potential victims kill between 2,000 and 3,000 criminals; they wound an additional 9,000 to 17,000.

Heartland Study at 4.

Another myth is that gun control measures keep guns out of the hands of criminals. Not true, according to the *Heartland Study*:

> In surveys of prisoners, a majority report that they had owned a handgun prior to their imprisonment. But only 7 percent of criminals' handguns are obtained from legitimate retail sources. Three-fourths of felons surveyed report they would have no trouble obtaining a gun when they were released, despite legal prohibitions against firearms ownership by convicted felons.

Id.

More specifically, Lott and a colleague have examined and measured whether the District of Columbia's ban on handguns has reduced crime rates in the District. Eli Lehrer and John R. Lott Jr., *The Ban Against Public Safety: D.C. Gun Laws Have Increased Crime,* Washington Times, August 11, 2003, at A19. Rather than reducing violent crime and robberies rates, these crime rates substantially *increased* after the handgun ban went into effect in 1976. During the five-year period prior to the ban, the murder rate decreased from 37 to 27 per 100,000 persons. During the five-year period after the ban, the murder rate increased to 35 per 100,000 persons. And, to this day, the rate has never fallen below the pre-1976 rate of 27. The robbery rate has followed the same trend, falling from 1,514 to 1,003 per 100,000 in the five years prior to 1976 and then rose to 1,635 in the five years subsequent to 1976.

In short, despite the wishful thinking of Defendants' *Amici*, the record is clear that gun control laws have failed to reduce gun violence in the District and elsewhere. More than that,

however, the record is clear that private ownership of guns is the most effective way to reduce such violence. Against this record, it is furthermore clear that this Court ought to grant the Plaintiffs' Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* The Heartland Institute requests that this Court grant the Plaintiffs' Motion for Summary Judgment.

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Respectfully submitted,

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