

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA and
ADRIAN M. FENTY, Mayor of the District of Columbia,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals For The
District Of Columbia Circuit**

**AMICUS CURIAE BRIEF OF
MOUNTAIN STATES LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

Whether the following provisions – D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 – violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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**AMICUS CURIAE BRIEF OF
MOUNTAIN STATES LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

Mountain States Legal Foundation (“MSLF”) respectfully submits this *amicus curiae* brief in support of Respondent.¹



**IDENTITY AND INTEREST
OF AMICUS CURIAE**

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF’s members include individuals who live and work in every State of the Nation, with a majority residing in the American West. These men and women, many direct descendants of colonists, hold first, foremost, and fundamental, their individual right “to keep and bear arms” to defend themselves, their

¹ In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37(2)(a), the parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*’s intention to file this brief.

loved ones, and their property and to defend their country against tyranny. For them, that right is neither an antiquated anachronism nor an historical artifact; instead, it is a critical component of the Constitution's Bill of Rights and a deeply imbued ingredient of the cultural heritage of the American West.



SUMMARY OF THE ARGUMENT

The Court of Appeals for the District of Columbia Circuit held that the Second Amendment protects an individual's right to keep and bear arms, irrespective of a person's participation in a militia. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007). This holding is in accord with the Framers' two primary motivations for inclusion of the Amendment: self-defense and protection from government tyranny. These motivations become obvious upon review of the Framers' ideological predecessors, their personal views on an armed populace, and the political movements of the day.

Furthermore, these motivations can be realized only by a Second Amendment that protects an individual right to keep and bear arms. Logically, in present times, arms can be used for self-defense only if a person, who does not belong to a militia, is guaranteed the individual right to keep and bear arms. Moreover, an armed populace cannot possibly protect against government tyranny if arms are restricted to

militia members only, and the organization, arming, and discipline of the militia is reserved solely to the federal government. U.S. Const. art. I, § 8, cl. 16. Should this Court adopt a collective rights construction of the Second Amendment, the decision would be grossly out of step with the history, culture, and jurisprudence of the American West, the people of which dearly value their right to self-defense and protection against government tyranny. Therefore, this Court risks the loss of the high regard that Westerners have for its jurisprudence, should the Court so restrict that right.

◆

ARGUMENT

Petitioners insisted that this Court grant *certiorari* because the decision of the D.C. Circuit Court, in holding that the Second Amendment protects individual rights, “drastically departs from the mainstream of American jurisprudence.” Pet. at 8. In actuality, that decision is in complete accord with the jurisprudence, as well as the history and culture, of the States that constitute the American West.² An

² For purposes of this Brief, the Western United States, or American West, consists of States and portions of States west of the 100th meridian, but excludes Hawaii and the coastal regions of California, Oregon, and Washington. Though it is acknowledged that the West is culturally, historically, and geographically diverse, this Brief makes generalizations regarding a uniquely Western culture that unquestionably exists.

analysis of “Western” history, culture, and jurisprudence, however, must begin with a discussion of the philosophical underpinnings of the Second Amendment.³ These philosophical underpinnings, which have been embraced by and have endured as essential components of “Western” culture, can be satisfied only if the right “to keep and bear arms” is an individual right.

I. THE PHILOSOPHICAL UNDERPINNINGS OF THE SECOND AMENDMENT INCLUDE THE RIGHT TO SELF-DEFENSE AND THE ABILITY TO GUARD AGAINST GOVERNMENT TYRANNY.

As has been noted frequently, the philosophical underpinnings of the Second Amendment were derived primarily from English values. *See, e.g., Silveira v. Lockyer*, 328 F.3d 567, 582 (9th Cir. 2003) (Kleinfeld, J., dissenting) (“The history that led to the drafting of the Second Amendment evolved for centuries in England, leading to its immediate predecessor in the English Declaration of Rights.”); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 *Hastings Const. L.Q.* 285, 287 (1983) (“[T]he key to [the] construction

³ The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II.

[of the Second Amendment] is the English tradition the colonists inherited, and the English Bill of Rights from which much of the American Bill of Rights was drawn.”). In medieval England, organized police forces were non-existent and individuals bearing arms were solely responsible for their own security and self-defense. Joyce Lee Malcolm, *To Keep and Bear Arms* 2 (Harvard University Press 1994). During the reigns of King Charles II, and his brother, King James II, many attempts were made to disarm a heavily armed populace to protect the Crown from a popular revolt. Malcolm, 10 *Hastings Const. L.Q.*, at 295-305. In 1689, after William of Orange conquered England in the Glorious Revolution, Parliament declared that the throne was “vacant.” Malcolm, *To Keep and Bear Arms* 113. Parliament then offered William and his wife Mary the throne only on condition that they accept the terms of the newly formed Bill of Rights, amongst which was a proviso that: “the Subjects [of England] which are Protestants [could] have Arms for the Defence suitable to their Conditions and as allowed by Law.” *Silveira*, 328 F.3d at 583 (Kleinfeld, J., dissenting); English Declaration of Rights, 1 W. & M., sess. 2, ch. 2 (1689).

Two of the primary motivations for granting this right included: (1) defense of one’s property and family against criminals, and (2) protection of individual rights through a check on royal power. Malcolm, *To Keep and Bear Arms* 115-21. These same principles also motivated the Framers of the United

States Constitution. As Judge Kleinfeld, joined by Judges Kozinski, O’Scannlain, and Nelson, explained:

The English Bill of Rights and the Constitution’s predecessor state constitutions based on it protected a private and individual right to bear arms both for self defense and for the defense against oppression. . . . The Second Amendment was not novel, but rather codified and expanded upon [these] long established principles.

Silveira, 328 F.3d at 584 (Kleinfeld, J., dissenting).

The first of these motivations – defense of family and property – was viewed by the Framers, and their philosophical predecessors, as a primary justification for the right to keep and bear arms. Christopher J. Schmidt, *An International Human Right To Keep And Bear Arms*, 15 Wm. & Mary Bill Rts. J. 983, 993-94 (2007) (citing Andrew P. Napolitano, *Constitutional Chaos* 56 (2004)); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 43 (1997) (the Framers “thought the right of self-defense to be absolutely fundamental . . . ”). Famed British jurist William Blackstone, upon whose scholarship many of the Framers relied, wrote that “Self-Defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society.” 3 William Blackstone, *Commentaries on the Laws of England* 4 (1765-1769). Thus, “having arms for [the people’s] defence . . . is, indeed, a publick allowance under due restrictions, of the natural right of resistance and self-pervations,

when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”¹ William Blackstone, *Commentaries on the Laws of England* 136, 139 (1765-1769).

Likewise, in 1764, Italian author and philosopher Cesare Beccaria explained the importance of this right in his book, *On Crimes and Punishments*, which influenced many of the Framers.⁴ Beccaria explained:

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of

⁴ Thomas Jefferson copied the cited excerpt from Beccaria’s book into his compilation of favorite quotations. See Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comm. 87, 90-91 (1992); Ronald S. Resnick, *Private Arms As The Palladium Of Liberty: The Meaning Of The Second Amendment*, 77 U. Det. Mercy L. Rev. 1 n.142 (1999) (citing Thomas Jefferson, *The Commonplace Book of Thomas Jefferson* 314 (G. Chinard ed., 1926)). In addition, John Adams quoted Beccaria’s book to open the Boston Massacre trial. Don B. Kates, Jr., *Handgun Prohibition And The Original Meaning Of The Second Amendment*, 82 Mich. L. Rev. 204 n.132 (1983) (citing 3 *Legal Papers of John Adams* 28 (1965)).

the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty – so dear to men, so dear to the enlightened legislator – and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.

Kates, 82 Mich. L. Rev. at 234 (citing C. Beccaria, *On Crimes And Punishments* 145 (1819) (originally published in 1764)).

Likewise, as Robert E. Shalhope explained in his oft-cited discussion of the Second Amendment, George Washington and James Madison, among other Framers, “firmly believed that the character and spirit of the republic rested on the freeman’s possession of arms as well as his ability and willingness to defend himself and his society.” Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599, 614 (1982). John Adams similarly believed the individual possession of firearms was necessary for private self-defense. Kates, 82 Mich. L.

Rev. at 228 (citing 3 J. Adams, *A Defense of the Constitutions of the Government of the United States of America* 475 (1787-88)). The personal possession of firearms was particularly essential because a professional police force did not exist, even in metropolitan areas, for almost fifty years after the ratification of the Constitution. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 646, n.46 (1989). Thus, preservation of the individual right of self-defense was unquestionably one of the primary motivations behind the Second Amendment. Kates, 9 Const. Comm. at 93.

Regarding the second motivation, “a core value protected by the Second Amendment for ‘the people’ was ‘the Right of the people to alter or abolish’ tyrannical government as they had done a decade before.” *Silveira*, 328 F.3d at 576 (Kleinfeld, J., dissenting) (quoting The Declaration of Independence para. 2 (U.S. 1776)). The Framers were keenly aware of the success enjoyed by a haphazard bunch of armed colonists who, in their rejection of British tyranny, had just defeated the world’s most powerful army. See, e.g., David Harmer, *Securing A Free State: Why The Second Amendment Matters*, 1998 B.Y.U. L. Rev. 55, 82-84 (1998) (citing The Federalist No. 46, at 321 (James Madison) (Jacob E. Cooke ed., 1961)).

Thus, many of the Framers preferred an armed populace to standing armies to protect against tyranny and to preserve liberty. See, e.g., *id.* para. 13 (1776) (Among the Framers’ grievances against the King of England was that he had “kept among us, in

times of peace, standing armies without the consent of our legislature.”). Thomas Jefferson proclaimed, “[t]he strongest reason for the people to retain the right to keep and bear arms is, as a last resort, to protect themselves against tyranny in government.” Michael Busch, *Is The Second Amendment an Individual or a Collective Right: United States v. Emerson’s Revolutionary Interpretation of the Right to Bear Arms*, 77 St. John’s L. Rev. 345, 369 n.144 (2003) (quoting 1 Thomas Jefferson, *Thomas Jefferson Papers* 334 (C.J. Body ed., 1950)). James Madison believed that an armed populace, in conjunction with principles of federalism, was necessary to protect against federal tyranny. The Federalist No. 46, at 335 (James Madison) (Benjamin Fletcher Wright ed., 1961) (“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.”). Likewise, Alexander Hamilton wrote: “If representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self defense, which is paramount to all positive forms of government . . . ” The Federalist No. 28, at 224 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Hamilton explained, “if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people while there is a large body of citizens little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights, and those

of their fellow citizens.” The Federalist No. 29, at 229 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

The Bill of Rights, including the Second Amendment, was written in large part to satisfy the concerns of the Anti-Federalists, who believed that “to preserve liberty, it is essential that the whole body of the people always possess arms . . .” *U.S. v. Emerson*, 270 F.3d 203, 244-45, 264 (5th Cir. 2005) (“[T]he Second Amendment protects the right of individuals to privately keep and bear their own firearms . . . ”); *Letters From the Federal Farmer to the Republican* 18 (1788). The Framers believed that the “pragmatic value [of the Second Amendment] lay less in repelling usurpation than in deterring it before it occurred.” Kates, 9 Const. Comm. at 89. To this end, Justice Joseph Story, in his famed Commentaries on the Constitution, explained that the Second Amendment broadly protects the most fundamental individual liberties: “The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers.” 3 Joseph Story, *Commentaries on the Constitution* § 1890 (1833). Thus, it is clear that protection against tyranny and the corresponding protection of individual liberty was the second philosophical underpinning of the Second Amendment.

II. THESE PHILOSOPHICAL UNDERPINNINGS OF THE SECOND AMENDMENT ARE SATISFIED ONLY IF THE RIGHT TO KEEP AND BEAR ARMS IS AN INDIVIDUAL RIGHT.

Petitioners claim that the right protected by the Second Amendment includes only “the right to keep and bear arms as part of a well-regulated militia, not to possess guns for private purposes.” Pet. Br. at 11-12. To determine the validity of this hypothesis, the place to begin is, naturally, the text of the Amendment. As the dissenting judges in *Silveira* explain, “[t]hough the stated justification and purpose of the Amendment relates to the militia, the language is carefully drafted to avoid abridging the traditional English Bill of Rights entitlement of individuals to possess arms for self defense.” *Silveira*, 328 F.3d at 588 (Kleinfeld, J., dissenting). Indeed, if Petitioners’ hypothesis were valid, neither of the Framers’ two primary motivations for the Second Amendment would have been satisfied by the Amendment.

For the Second Amendment to protect an individual’s ability to engage in self-defense, the right embodied in the Second Amendment must be individual in nature. This statement is so obvious that it requires little explanation; for an individual to defend himself with arms, he must, personally, possess those arms, regardless of his association with any militia. Moreover, in spite of the development of modern police forces, the use of arms for self-defense purposes remains relevant today. For example, after September 11, 2001, many Americans recognize an increased

need to bear arms to protect themselves and their families. *See, e.g.*, Tom Curry, *Gun Arrest Gives Webb Political Opening*, available at <http://www.msnbc.msn.com/id/17819572/> (Jan. 25, 2008) (U.S. Sen. James Webb explains that, post-9/11, it is increasingly important to exercise the individual right to bear arms in self-defense, a right he exercises).

Furthermore, this Court's recent decision in *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005), illuminates the importance of the Second Amendment right of an individual to keep and bear arms for self-defense. There, this Court held that, under ordinary circumstances, an individual has no right to police protection, even in instances when the police are aware of danger to that individual.⁵ Indeed, if individuals want to ensure that they are safe from dangers posed by those who would do them harm, they have no choice but to exercise their individual right to "keep and bear arms."

Likewise, the purported requirement of membership in a state-regulated militia would undermine the people's ability, as individuals, to serve as a check against tyranny, thereby directly compromising the people's independence and liberty. The Framers

⁵ A mother did not, "for purposes of the Due Process Clause, have a property interest in police enforcement" of a restraining order protecting her children, even when she made repeated requests to the police to enforce that order. *Town of Castle Rock*, 545 U.S. at 768. Ultimately, the subject of that restraining order – the father – murdered his three children. *Id.* at 753-54.

expressly granted the federal government the power to organize, arm, and discipline the militia. U.S. Const. art. I, § 8, cl. 16. It would be impossible for the people to use arms to defend against “usurpation and arbitrary power of rulers” if those rulers were solely responsible for regulating and controlling the distribution, possession, and use of those arms. *See, e.g.*, Schmidt, 15 Wm. & Mary Bill Rts. J. at 993. Thus, the Framers could not possibly have intended for arms to be kept and borne exclusively for use in a militia.

Though the notion of a successful popular uprising may seem obsolete, armed citizenry employing guerilla warfare can achieve success even against a modern, organized military with the most technologically advanced weaponry. *See, e.g.*, Kates, 82 Mich. L. Rev. at 269. In April 1943, for example, a few hundred Jewish Resistance fighters, with only pistols, rifles, and Molotov cocktails, resisted heavily-armed and highly-trained Nazi soldiers for nearly a month. *The Warsaw Ghetto Uprising*, available at <http://www.ushmm.org/outreach/wgupris.htm> (Jan. 26, 2008). More recently, Afghan rebels, with the approval of the United States, defeated the militarily-superior Soviet Union and drove it from their country. *See, e.g.*, Paul Kengor, *The Crusader: Ronald Reagan and the Fall of Communism* 250-62 (2006).

Moreover, “[t]he great value of the [individual] right [to bear arms] is political, not military. This value lies, not in the fact that the Amendment enables armed resistance, but that by enabling armed resistance it should make the conditions which would justify such resistance less likely to occur.” Harmer, 1998 B.Y.U. L. Rev. at 92. Thus, although the likelihood of a popular uprising overthrowing a tyrannical government regime was far greater in the eighteenth century than it is today, the presence of an armed populace and the corresponding threat of armed resistance continue to restrain government. *See, e.g., Note, The Impact of State Constitutional Right To Bear Arms Provisions on State Gun Control Legislation*, 38 U. Chi. L. Rev. 185, 192 (1970). This threat of armed conflict only exists, however, when individuals, irrespective of their participation in a militia, have the right to “keep and bear arms.”

III. THE VALUES UNDERLYING THE SECOND AMENDMENT ARE PRESENT IN THE HISTORY, CULTURE, AND JURISPRUDENCE OF THE AMERICAN WEST.

Though the original understanding of constitutional text is the most intrinsically sound method of construction, *see, e.g., South Carolina v. U.S.*, 199

U.S. 437, 448 (1905), this Court has engaged occasionally in a more far-reaching cultural and historical examination in its analysis of constitutional text. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (examining “our Nation’s history, legal traditions, and practices”). Such an examination of the American West, the Nation’s heartland, reveals that the right of individuals to “keep and bear arms” for self-defense and for protection against tyranny, which were the primary philosophical underpinnings of the Second Amendment, remain fundamental elements of the history, culture, and jurisprudence of the American West.

A. The Possession And Use Of Arms For Self-Defense Is Of Fundamental Importance In The History And Culture Of The West.

Prior to 1754, Indian tribes used guns, acquired through trade with French fur traders, for defense against attacking tribes. David B. Kopel, *The Samurai, The Mountie, And The Cowboy* 307-08 (Prometheus Books 1992). After the French defeat in the French and Indian War, Indians acquired guns from British traders. *Id.* In part because of the presence of armed Indians, “life itself would have been impossible for the new people who would be called ‘Americans,’” as the new settlers frequently had to defend themselves with their own guns. *Id.* at 309. Because Western expansion was inevitably met with resistance,

arms were essential for self-defense from the seventeenth through the twentieth centuries. *Id.*

Likewise, the rapid westward expansion surpassed the government's ability to enforce the law. *Id.* at 323. Even in frontier towns that employed some form of official police, the law enforcement officers that did exist often lacked the resources to pursue criminals beyond the town border, or were too corrupt themselves to do so. *Id.* at 323, 326. Thus, settlers were left to defend themselves, often with firearms that they owned and kept in their homes. *Id.*

To this day, the right to "keep and bear arms" for self-defense remains a core value amongst citizens of the American West. In December 2007, when an attacker opened fire inside a mega-church in Colorado Springs, one of the church members, who volunteered as an armed security guard, saved hundreds of lives when she shot and wounded the attacker. Judith Kohler, *Police: Gunman Had Been Thrown Out Of Missionary School*, Denver Post, Dec. 10, 2007, available at http://www.denverpost.com/search/ci_7681300 (Feb. 2, 2008). Similar examples of the use, by private citizens, of their guns to defend themselves and others are legion. John R. Lott, Jr., *More Guns, Less Crime* (University of Chicago Press 1990).

B. The Possession And Use Of Arms As A Defense Against Tyranny To Preserve Individual Liberty Is A Fundamental Value In Western History And Culture.

Defense of individual liberty from tyranny through the right to “keep and bear arms” is as fundamental to Westerners as it was to the Framers. The American West is one of the most sparsely settled, rural areas in the United States. Of the 16 States with the lowest population density, 15 are located in the West. U.S. Census Bureau, *Population, Housing Units, Area, and Density: 2000*, available at http://factfinder.census.gov/servlet/GCTTable?_bm=y&-ds_name=DEC_2000_SF1_U&-CONTEXT=gct&-mt_name=DEC_2000_SF1_U_GCTPH1_US9&-redoLog=false&-_caller=geoselect&-geo_id=&-format=US-9|US-9S&-_lang=en (Jan. 15, 2008). Not surprisingly, therefore, Western culture is primarily a “land-based culture” closely associated with ranching and farming activities. Erin Morrow, *The Environmental Front: Cultural Warfare In The West*, 25 J. Land Resources & Env'tl. L. 183, 208 (2005); H.R. Res. 411, 109th Cong. (2005) (“Ranching is an important part of the culture and economy of many rural communities throughout the American West, and the rural West depends on a healthy and thriving ranching industry.”). Much like the “individualist philosophy of our Founders,” *Silveira*, 328 F.3d at 571 (Kleinfeld, J., dissenting), this rural Western culture emphasizes individualism, independence, self-sufficiency, and self-governance, resulting in a strong distrust of

government.⁶ Morrow, 25 J. Land Resources & Envtl. L. at 209-216.

A report by the National Institute of Justice reveals that these characteristics also typify the modern gun culture. Specifically, the Institute concluded that the modern gun culture is “best typed as rural rather than urban: . . . emphasiz[ing] independence, self-sufficiency, mastery over nature, [and] closeness to the land. . . .” Kopel, at 305 (citing James Wright, Peter Rossi, and Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America* 113 (Aldine 1983)). Additionally, to this day, the gun culture generally distrusts government and is skeptical towards the government’s true intentions. Erik Luna, *The .22 Caliber Rorschach Test*, 39 Hous. L. Rev. 53, 77 (2002). “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. *Id.* Indeed, in most instances, the individual right to “keep and bear arms” restrains federal employees and provides an incentive for them to act appropriately, without actually placing their safety in jeopardy.

⁶ The Libertarian Party, which advocates limited government – including a right to keep and bear arms for self-defense and for protection against government tyranny – was founded in a Western State (Colorado) in 1971. John Hospers, *The Founding of the Party*, available at http://libertyunbound.com/archive/2007_06/hospers-party.html (Jan. 28, 2008); *Why Libertarians Support Equal Rights for America’s Gun Owners*, available at <http://www.lp.org/issues/gun-rights.shtml> (Jan. 28, 2008).

Nonetheless, although widespread possession of guns amongst the populace serves primarily to deter government tyranny without resorting to actual violence, Harmer, 1998 B.Y.U. L. Rev. at 92, one example of an armed conflict occurred in 1992 at Ruby Ridge, Idaho. There, private citizens exercised their right to bear arms in an attempt to defend themselves against an overzealous and unconstitutional government siege. *Harris v. Roderick*, 126 F.3d 1189, 1192-94 (9th Cir. 1997).

C. The Possession And Use Of Arms For Self-Defense And Defense Against Tyranny To Preserve Individual Liberty Is Viewed As A Fundamental Right In Western Culture, As Evidenced By Arms Jurisprudence.

Contrary to Petitioners' allegation that an individual rights construction of the Second Amendment "drastically departs from the mainstream of American jurisprudence," an analysis of the jurisprudence in the American West reveals that Westerners share the same individual rights views as the Framers of the Amendment. Pet. at 8. Of the 18 States comprising the American West, only California lacks some explicit constitutional protection for the right to keep and bear arms. Robert A. Creamer, *History Is Not Enough: Using Contemporary Justifications For The Right To Keep And Bear Arms In Interpreting The Second Amendment*, 45 B.C. L. Rev. 905, 920-25 (2004). Of the remaining 17 States, Kansas has

constitutional provisions similar to the Second Amendment, Idaho grants the right to bear arms to “the people,” and the Alaska constitution grants an “individual right to keep and bear arms.” Kan. Const. Bill of Rights, § 4; Idaho Const. art. I, § 11; Alaska Const. art. I, § 19. The remaining 14 Western States go much farther in defining the right. Arizona, Colorado, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming all explicitly protect the individual’s right to bear arms for use in self-defense. Ariz. Const. art. 2, § 26; Colo. Const. art. II, § 13; Mo. Const. art. 1, § 23; Mont. Const. art. 2, § 12; Neb. Const. art. I, § 1; Nev. Const. art. 1, § 11; N.M. Const. art. II, § 6; N.D. Const. art. I, § 1; Okla. Const. art. 2, § 26; Or. Const. art. I, § 27; S.D. Const. art. VI, § 24; Texas Const. art. I, § 23; Utah Const. art. I, § 6; Wash. Const. art. 1, § 24; Wyo. Const. art. 1, § 24. Both the prevalence of such constitutional provisions and the degree to which they explicitly protect an individual’s right to bear arms provide compelling evidence that the people of the American West view the right to keep and bear arms for self-defense as a fundamental right.

Moreover, these Western values are not some sort of cultural relic. Since 1978, seven Western States have added or amended constitutional provisions related to the right to bear arms, and in so doing, each State either strengthened the individual’s right to bear arms or preserved an already existing individual right to bear arms. Prof. Eugene Volokh, *State*

Constitutional Right To Keep And Bear Arms Provisions, available at <http://www.law.ucla.edu/volokh/beararms/statecon.htm> (Jan. 28, 2008); Creamer, 45 B.C. L. Rev. at 918. Thus, the right to keep and bear arms for the purposes of self-defense remains an important value in the West. For Westerners there are few other rights as important as the right, as individuals, to keep and bear arms.

Likewise, Western courts have not hesitated to protect an individual's right to keep and bear arms for self-defense or as protection against government tyranny in support of individual liberty. For example, Article I, § 27 of the Oregon Constitution provides: "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." In *Oregon v. Hirsch*, 114 P.3d 1104, 1114 (Or. 2005), the Oregon Supreme Court explained that the likely purpose for this constitutional provision was to enable the people to engage in self-defense and as a check on government power. (Citing *Oregon v. Kessler*, 614 P.2d 94, 97 (Or. 1980)). Similarly, the South Dakota Supreme Court has concluded that the State constitution, including the right to bear arms, protects an individual's right to self-defense. *Conaty v. Solem*, 422 N.W.2d 102, 104-05 (S.D. 1988).

Although all the States, to various degrees, sanction the use of deadly force as a last resort for self-defense, *see, e.g.*, Martha C. Nussbaum, *Two Conceptions Of Emotion In Criminal Law*, 96 Colum.

L. Rev. 269, 327 (1996); *Beard v. U.S.*, 158 U.S. 550, 563 (1895),⁷ many Western States have expanded the right to self-defense through “make my day” or “castle doctrine” laws that give individuals a broad right to use deadly force for self-defense within the home, even if not a last resort. *See, e.g.*, Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality In Self-Defense Law*, 2 J.L. Econ. & Pol’y 331, 336-39 (2006). Currently, at least eleven of the eighteen Western States have some form of “make my day” or “castle doctrine” statute on the books, eight of which have been enacted in the past two years. Most States having such laws are “stand your ground” States that do not impose a duty to retreat. Alaska Stat. Ann. § 09.65.330 (2006); Ariz. Rev. Stat. § 13-418 *et seq.* (2006); Colo. Rev. Stat. Ann. § 18-1-704.5 (1985); Idaho Code Ann. § 6-808 (2006); Kan. Stat. Ann. § 21-3218 *et seq.* (2006); Mont. Code Ann. § 45-3-103 (1973); N.D. Century Code § 12.1-05-07 (2007); 21 Okla. St. Ann. § 1289.25 (2006); S.D. Codified Laws

⁷ In *Beard*, this Court held:

A man may repel force by force in defense of his person, habitation, or property against anyone or many who manifestly intend and endeavor to commit a known felony by violence or surprise or either. In such case he is not compelled to retreat, but may pursue his adversary until he finds himself out of danger, and if, in the conflict between them he happen to kill him, such killing is justifiable.

Beard, 158 U.S. at 563 (citing 2 Whart. Cr. Law, § 1019).

§ 22-18-4 (2006); Texas Penal Code Ann. § 9.31 (2007); Utah Code Ann. § 76-2-405 (1973).

Furthermore, many Western courts have interpreted broadly an individual's right to self-defense outside the home. *See, e.g., Utah v. Starks*, 627 P.2d 88 (Utah 1981) (defendant may use deadly force in self-defense even after defendant armed himself and went to a location where he knew he would find the deceased); *Wyoming v. Bristol*, 84 P.2d 757 (Wyo. 1938) (defendant who armed himself, went to the restaurant in which his enemy was eating, and was attacked, unprovoked, by his enemy, could use deadly force against his enemy in self-defense); *Thomas v. Texas*, 51 S.W. 1109 (Tex. Crim. App. 1899) (deadly force may be used in self-defense even if defendant seeks out deceased for the purpose of provoking difficulty, so long as there was no actual provocation).

Ultimately, Western jurisprudence reveals that Westerners share the same views of the Second Amendment as did the Framers. Specifically, the right to "keep and bear arms" is both an individual and fundamental right, the exercise of which may be used by citizens for their own self-defense and to protect their Republic from tyranny.



CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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