No. 07-290

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

BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE* [1]

The Center for Individual Freedom (hereinafter "*Amicus*") is a non-profit, non-partisan organization dedicated to defending the individual rights protected by the United States Constitution, including the right of the people to keep and bear arms. Since its founding in 1998, *Amicus* has appeared before this Court as *amicus curiae* in several cases involving individual liberties enshrined in the Constitution's Bill of Rights.

Consistent with this mission, *Amicus* files the instant brief in support of Respondent, and to bring to the attention of the Court matter not already addressed, matter that may be of considerable assistance to it. More precisely, *Amicus* submits for consideration its view that United States Supreme Court precedent does not reject an individual right of the people to keep and bear arms under the Second Amendment, subject to reasonable regulation, afforded other individual rights preserved by the Constitution. *Amicus* also submits that the potential real-world consequences that could ensue from acceptance of Petitioners' collective right position would severely endanger the very freedoms that *Amicus* exists to promote.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have received notice of, and consented to, the filing of this brief.

Pursuant to Rule 37.6, *Amicus* affirms that no counsel for any party authored this brief in whole or in part, that no party or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or entity other than *Amicus Curiae*, its supporters, or its counsel made such a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Bill of Rights is almost entirely a declaration of individual rights held by "the people." Petitioners, however, contend that the Second Amendment somehow stands strangely alone among the individual freedoms guaranteed by the Bill of Rights by protecting only a collective right of state governments to arm and maintain formal militias. In support of this proposition, Petitioners insist that Supreme Court precedent refutes an individual right to keep and bear arms.

That assertion is incorrect. Rather, the Supreme Court has never settled the issue of whether the Second Amendment protects an individual right of the people to keep and bear arms, nor has it held that the Second Amendment protects only the collective right of state governments to maintain organized militias.

Petitioners and their *amici* go to great lengths to suggest that recognizing an individual right to keep and bear arms would create disruptive consequences. That conclusion is also incorrect. It is, in fact, a *collective* right ruling that could create even more unexpected and disruptive effects, and result in more dramatic and transformative consequences for the nation, its military organizations, and its laws. Among other effects, such a holding would contradict multiple provisions of the Constitution, undermine numerous federal firearms laws, and compel reexamination of the structure of the nation's military and National Guard as they now exist.

These potential repercussions highlight the implausibility of the proposition that Petitioners ask this Court to accept. Accordingly, this brief examines

the rarely-considered but broad consequences of Petitioners' collective right position.

ARGUMENT

Amicus respectfully joins in the arguments set forth in Respondent's brief that the text and history of the Second Amendment establishes an individual right of the people to keep and bear arms. In addition, *Amicus* considers it critical to refute Petitioners' argument that Supreme Court precedent rejects an individual right interpretation of the Second Amendment, and to bring to this Court's attention the radical effects that could flow from a collective right interpretation.

Accordingly, this brief demonstrates in Part I that the Supreme Court has never determined whether the Second Amendment protects either an individual or collective right of the people to keep and bear arms.

In Part II, this brief examines the radical repercussions that Petitioners' collective right proposition could generate. In the divisive contemporary public and legal debate over the meaning of the Second Amendment, many commentators have discussed the logical consequences that could flow from an individual right to keep and bear arms. There is little discussion, however, of the dramatic consequences that would follow a collective states' right to keep and bear arms. Perhaps the startling and chaotic nature of the consequences of a collective right position is precisely why this thesis receives so little discussion. Given the importance of this case, consideration of such potential consequences is imperative.

I. SUPREME COURT PRECEDENT DOES NOT ESTABLISH A COLLECTIVE RIGHT OF STATES TO KEEP AND BEAR ARMS, NOR DOES IT REJECT AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

Petitioners and their *amici* contend that the Supreme Court in *United States v. Miller*, 307 U.S. 174 (1939), somehow established only a collective Second Amendment right of the states, rather than of individuals, to keep and bear arms. Pet. Br. 11. They further suggest that lower courts have uniformly, scrupulously, and justifiably applied such a holding since that time. *Id.* Under their view, the Second Amendment imposes few, if any, restraints upon governmental ability to infringe upon individual citizens' right to keep and bear arms outside a formal military context. *Id.* at 15.

That is an incorrect reading of *Miller*. No unequivocal precedent exists to settle the question currently before the Court. Neither *Miller*, nor any other decision by the Court, stands for Petitioners' proposition that the Second Amendment protects a collective right of the states to keep and bear arms, or rejects an individual rights view. Rather, the Court in *Miller* declared itself unable to determine the defendants' Second Amendment rights because no counsel appeared on behalf of the defendants at oral argument to defend their position.

Since *Miller*, subsequent lower courts and commentators have unfortunately misread, misapplied, and distorted that decision and other Supreme Court precedent regarding the Second Amendment. Initially, lower courts quickly began to recognize that almost *any* type of weapon can be used by militias in modern warfare. *Cases v. United States*, 131 F.2d

916 (1st Cir. 1942). Consequently, they shifted from *Miller's* inquiry regarding whether the weapon could be used by a militia to an inquiry into the defendant's state of mind. *Id.* These courts asked whether the person bearing the weapon in question possessed the requisite cognitive intent to serve in an organized militia. *Id.*

Ultimately, however, courts retreated to Petitioners' instant position that *Miller* recognized only a collective states' right to maintain militias of sufficient power to repel federal armies, and that individual citizens cannot claim a Second Amendment right to keep and bear arms for their own protection. *United States v. Tot*, 131 F.2d 261, 266 (3d. Cir. 1942). In other words, according to this view, the Second Amendment merely empowers states to maintain military organizations free from federal interference. *Id.*

Citing *Miller* for a proposition for which *Miller* does not stand, Petitioners make *Miller* falsely appear to establish a rule that it in fact does not, rendering the Second Amendment peculiar by defining "the people" to mean governmental entities. It is therefore critical that Second Amendment precedent be analyzed in a reasoned and rightful manner, and applied accordingly without any preconceptions.

A. The Supreme Court In *United States v. Miller* Was Unable To Determine Whether The Defendants' Second Amendment Rights Had Been Violated

United States v. Miller is the sole case in which the Court has directly considered the Second Amendment in the past century. *Miller*, 307 U.S. at 174. Although Petitioners cite *Miller* for the proposition

that no individual right to keep and bear arms derives from the Second Amendment, the holding is actually equivocal and indefinite.

In *Miller*, criminal defendants Jack Miller and Frank Layton were charged in federal court with "unlawfully, knowingly, willfully, and feloniously" transporting an unregistered shotgun with a barrel fewer than the required 18 inches in length from Oklahoma to Arkansas in violation of Section 11 of the National Firearms Act. *Id.* at 175. Defendants demurred, and the trial court sustained the Demurrer on the basis that the National Firearms Act "offend[ed] the inhibition of the Second Amendment to the Constitution." *Id.* at 176.

Thus, it must initially be noted that the trial court recognized an individual right to keep and bear arms under the Second Amendment, disproving any assertion that early federal courts uniformly recognized only a collective states' right.

Following the trial court's dismissal, the government appealed, ultimately to the Supreme Court. The defendants, however, refused to even appear before the Supreme Court to defend their position or engage in oral argument, as their indictment had been quashed. *Id.* at 177. Because no appearance by counsel was made on behalf of the defendants, their position thus wasn't argued.

As a result, a unanimous Supreme Court held only that the failure of the defendants to appear for argument rendered the Court unable to determine whether the Second Amendment protected the defendants' right to keep and bear the firearm in question:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a

> barrel of less than eighteen inches in length" 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. Thus, the Court didn't reject an individual right of the people to keep and bear arms under the Second Amendment, nor did it hold that the Second Amendment creates a collective states' right. Rather, the Court observed that the absence of evidence entered into the record rendered it unable to thoroughly apply the Second Amendment's provisions to the allegations in question. *Id.* at 179.

Notably, the Solicitor General in *Miller* argued Petitioners' present proposition in their brief. Specifically, the government in *Miller* claimed that the Second Amendment refers only to state militias' privilege to keep and bear arms. Appellant's Br. at 15, 307 U.S. 704 (No. 696). According to the government's brief at the time, 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*.

This precisely reflects Petitioners' collective rights proposition, and it is significant that the Court did not resolve the matter on that basis.

Given the Court's limited holding, it obviously did not accept wholesale the government's collective states' right argument. Had the Court agreed

with the government's argument (now repeated by Petitioners), it could have explicitly so stated. Alternatively, the Court could have decided the defendants' fate on the basis of lack of standing to invoke Second Amendment protections, since neither defendant had presented evidence that he was a member of an organized state militia.

Instead, the Court relied upon the government's *secondary* position that a sawed-off shotgun was outside the scope of the term "Arms" in the Second Amendment. Appellant's Br. at 18, 307 U.S. 704 (No. 696). Clearly, the Court focused on the *type* of firearms protected by the Second Amendment, not the question of whether the Second Amendment establishes an individual or collective right. *Miller*, 307 U.S. at 178. Had the Court decided to settle the larger question, it could have observed that neither defendant presented evidence that he was affiliated with an organized militia, instead of observing that neither defendant presented evidence that the weapon was of use to an organized militia. *Miller*, 307 U.S. at 177.

Thus, *Miller* does not stand for the proposition that the Second Amendment is unrelated to an individual right of the people to keep and bear arms. To the contrary, the *Miller* Court acknowledged that "the Militia comprised all males physically capable of acting in concert for the common defense." *Id.* at 179. Had the defendants retained counsel to represent them and present argument before the Supreme Court, or had argued their reading of the Second Amendment, the Court might have ruled quite differently. Unfortunately, the Court was unable to conduct a thorough analysis, and its decision created as many questions as it settled.

Regardless, Petitioners cannot claim that *Miller* settled the Second Amendment's meaning or established a collective right to keep and bear arms.

B. Subsequent Lower Courts Have Misconstrued The Holding In *United States v. Miller*

Early lower court cases applying *Miller* quickly fell into the habit of misinterpreting its actual holding, de-emphasizing its focus on whether the firearm in question was one with which a military unit might equip itself. Instead, they shifted the focus to the state of mind of the person claiming Second Amendment protections. *Cases*, 131 F. 2d at 923.

In *Cases*, the defendant was charged with illegally possessing and transporting a firearm and ammunition. *Id*. In affirming the defendant's conviction, the court recognized the logical limitation of the *Miller* decision of just three years earlier:

> [U]nder the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia. . . At any rate the rule of the *Miller* case, if intended to be comprehensive and complete would seem to be already outdated, in spite of the fact that it was formulated only three and a half years ago, because of the well known fact that in so called "Commando Units" some sort of military use seems to have been found for almost any modern lethal weapon.

Id. at 922. The United States Court of Appeals for the First Circuit then broadly reformulated its

directive into an examination of the defendant's state of mind. More precisely, the *Cases* court held that an individual asserting a Second Amendment claim must have intended to serve and maintain a formal militia as his paramount motive. *Id.* at 923. Because the *Cases* defendant had possessed and transported the contraband firearm "purely and simply on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated militia that the Second Amendment was designed to foster as necessary to the security of a free state," the conviction was upheld. *Id.* In so doing, the First Circuit revised and expanded the limited *Miller* decision.

Subsequent lower courts continued to misinterpret the Supreme Court's *Miller* holding, most often by applying the state of mind requirement concocted by the *Cases* decision. *See, e.g., United States v. Wiley*, 309 F. Supp. 141, 145 (D. Minn. 1970) (*citing Cases*, 131 F.2d 916 (1st Cir. 1942)). Recognizing the logical limitations of that test, however, lower courts again misapplied *Miller* to hold that the Second Amendment protects only a states' right to maintain organized militias. *Tot*, 131 F.2d 265.

In *Tot,* the defendant had been convicted of illegal possession of a firearm capable of being fitted with a silencer in violation of federal law. *Id*. Despite the fact that nothing in *Miller* refutes an individual right to possess a firearm, the *Tot* Court chose to cite it for precisely that proposition, stating that the Second Amendment "was not adopted with individual rights in mind, but as a protection for the States in maintenance of their militia organizations against possible encroachment by the federal power." *Id.* at 266.

Continuing that flawed line of reasoning, the United States Court of Appeals for the Sixth Circuit held in *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971), that because the Second Amendment "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right to possess a firearm." *Id.* at 149. In so doing, the court cited page 178 of the *Miller* opinion. *Id.* Once again, however, the *Miller* decision only observed that because the defendants had failed to appear or present evidence that a sawed-off shotgun was a weapon useful to a militia, the Court was unable to determine whether the Second Amendment protected its possession. *Miller*, 307 U.S. at 178.

More recent lower courts have continued to grasp at the proposition that the Second Amendment exists only to thwart federal interference with state militias, despite the fact that in *Miller*, the Supreme Court sidestepped the government's contention that the Second Amendment protects only a collective right. *Id.*

In *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), the plaintiff appealed rejection of his concealed carry firearm application by California authorities. *Id.* at 100. The United States Court of Appeals for the Ninth Circuit dismissed the plaintiff's appeal on the basis that he lacked standing, stating that "the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen." *Id.* at 101. This misapplication of *Miller's* holding is flawed on several grounds. First, the opinion asserts that *Miller* "upheld a conviction under the National Firearms Act," when in fact

Miller merely vacated the district court's decision quashing the defendants' indictment. *Miller,* 307 U.S. at 178. More fundamentally, as noted above, the *Miller* decision had refused to accept the proposition advanced by the government's brief in that case, which the *Hickman* court nevertheless adopted. *Id.* Thus, the *Miller* court had refused to endorse the very assertion for which the *Hickman* court cited it.

The Supreme Court has thus not settled the question at issue in this case or held that the Second Amendment protects only a collective states' right to keep and bear arms in service of an organized militia. The limited holding of *United States v. Miller* did not answer the question of whether the Second Amendment protects an individual or collective governmental right to keep and bear arms. Unfortunately, subsequent lower courts cited by Petitioners held otherwise. By misconstruing *Miller* and its legacy, however, Petitioners essentially write a provision of the Constitution out of existence.

II. ADOPTING PETITIONERS' COLLECTIVE RIGHT VIEW WOULD TRIGGER RADICAL, UNEXPECTED, AND DISRUPTIVE CONSEQUENCES

Should the Court nevertheless adopt Petitioners' collective right view of the Second Amendment, several Constitutional conflicts could flow therefrom.

Assuming, *arguendo*, Petitioners' contention that the Second Amendment protects only a collective right of states to keep and bear arms, the legal effects on the nation, the Constitution, federal laws, and military organizations are logically inescapable and could be monumental. Indeed, the sweeping Constitutional tension of such consequences emphasizes the

implausibility of the proposition that Petitioners ask this Court to accept. After all, had Petitioners' rationale prevailed among those who drafted and ratified the Constitution, these inherent contradictions would have been readily apparent.

A. A Collective Right Ruling Would Create A Cause Of Action For States To Litigate That Right In Federal Court

As noted above, the Bill of Rights is almost entirely a declaration of individual rights. Accordingly, when a provision within the Bill of Rights protects an individual right of "the people," the practical implications are typically straightforward and familiar. Specifically, the individual right renders its subject matter protected from government infringement or abuse absent sufficient justification. In turn, individual citizens possess a legal right of action against government to seek relief to ensure the full enjoyment and exercise of that right. 42 U.S.C. § 1983.

Should this Court rightfully recognize that the Second Amendment protects an individual right of the people to keep and bear arms, the results would thus be rather familiar, allowing an ordinary and customary private action against the federal government to enforce that right.

By the same token, however, a collective right would create a right of action by the state against the federal government to seek relief. For example, states' Eleventh Amendment protection against defending lawsuits in federal courts is regularly enforced by the Supreme Court. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Accordingly, should this Court rule that the Second Amendment

protects only a collective right, it could unleash a flood of new claims by which states would enforce their newfound right against the federal government.

Despite the relative dearth of legal discussion on this issue, these are critical consequences that must be addressed.

B. A Collective Right To Keep And Bear Arms Would Contradict Other Constitutional Provisions, Call The National Guard Into Question, And Collide With Existing Federal Firearms Laws

If this Court accepts Petitioners' collective right proposition, then the Second Amendment guarantees state governments the right to maintain military instruments as a counterweight to the federal military. Pet. Br. 12. In other words, according to Petitioners' view, the Second Amendment protects independent state military forces capable of resisting the powerful federal forces.

As noted previously, such a holding would render the Second Amendment and its straightforward use of the phrase "the right of the people" anomalous among the Bill of Rights. It would also create a wave of other unanticipated and radical consequences. Namely, if the Second Amendment creates only a state right, then that contradicts several military power provisions within the Constitution, it likely renders the National Guard as currently administered unconstitutional, and it potentially allows state governments the right to disregard federal firearms laws that presently limit states' ability to formulate a powerful militia.

1. *A Collective Right Decision Would Contradict Other Provisions Of The Constitution*

It is well established that Constitutional provisions are to be read as harmonious wherever possible. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (according definition of "the people" as used by the First, Second, Fourth, Ninth, and Tenth Amendments). A collective right ruling, however, would necessarily place the Second Amendment in conflict with several clauses of the Constitution. This is because many of the powers granted the federal government by Article I contradict Petitioners' position that the Second Amendment merely empowers states to maintain militia forces as a counterweight to the federal military.

For example, Article I, Section 8, Clause 15 empowers Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 8, cl. 15. If this Court were to create a collective states' right from the Second Amendment, the federal government might suddenly be prevented from calling militias in a manner that would trump state control. For example, deploying state forces outside of national borders, integrating them with federal forces during deployment, or placing them under long-term federal command would be suspect.[2]

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[2] For instance, federal activation of National Guard troops during Hurricane Katrina in 2005, as well as deployment to Iraq and Afghanistan, provide immediate, real-world examples of potential sources of conflict if Petitioners' collective right proposition is accepted.

As another example, Article I, Section 8, Clause 16 empowers Congress:

> 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 according to the discipline prescribed by Congress.

U.S. CONST. art. I, § 8, cl. 16. Should this Court adopt a collective right holding, Congress's ability to dictate the organizing, arming, disciplining, and training of state militias under this clause might be dramatically circumscribed because it could obviously undermine states' ability to maintain those same militias. Even the appointment of federal officers, rather than state-appointed officers, to control such state militia forces might violate the Second Amendment under a collective right view.

As a third example, Article I, Section 10, Clause 3 commands that:

> No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONST. art. I, § 10, cl. 3. If Petitioners are correct in their contention that the Second Amendment protects the states' right to keep and bear arms as a bulwark against federal power, then almost *any* federal measure limiting state militia independence in the manner described above could suddenly be

subject to dispute and litigation. After all, under the collective right view, the "militia" refers to organized state military organizations, and the preceding clause's limitation upon states' ability to "keep Troops" is immediately suspect. Pet. Br. 12.

Such Constitutional conflicts could be unavoidable under a collective right decision.

2. *A Collective Right Holding Could Immediately Call Federal Firearms Laws Into Question*

If Petitioners are correct in their assertion that the Second Amendment protects only the states' right to maintain militias, then federal firearms laws are also suddenly open to legal challenge.

Assuming the validity of Petitioners' collective right view, the purpose of the Second Amendment is to preserve state militia independence from federal control and suppression. Pet. Br. 21. In turn, this would require that state militias be sufficiently powerful and independent to repel the federal military. *Id.* Because arming and maintaining a state militia of sufficient size and force would be extremely expensive, states could opt to compel citizens to obtain and preserve firearms and other military instruments. Pet. Br. 16-17. By doing so, states would not only save money, but also ensure that citizen militia members would naturally become more familiar with their weapons without as much need for formal, periodic, costly state training. *Id.* In fact, that is precisely what Congress compelled via the Militia Act of 1792, which stated:

> Be it enacted . . . [t]hat each and every free able-bodied white male citizen of the respective

> states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia. . . And . . . [t]hat every citizen so enrolled and notified shall, within six months thereafter, provide himself with a good musket or firelock, sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accounted and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.

Act of May 8, 1792, ch. 33, 1 Stat. 271 (1792). Other nations such as Israel and Switzerland similarly compel such citizen self-arming to this day. Indeed, those nations allow for citizen possession or control of such weapons as missiles, artillery, and anti-aircraft weaponry. *See* SWITZ. CONST. art. 18; David Kopel, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 283, 292, 295 (1991).

Obviously, a collective right view of the Second Amendment as applied to such a system would run head-on into existing federal firearms laws. As just one example, the federal prohibition against automatic weapons could suddenly be in jeopardy. 18 U.S.C. § 922(o) (1988).

Furthermore, states could argue that their refusal to outlaw particular weapons preempted a federal right to limit or prohibit possession of those weapons by implication. Just as the Commerce Clause sometimes prohibits state regulation of interstate commerce by negative implication, states might determine that they also possessed such a power over firearms by negative implication. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (addressing whether burden imposed upon interstate commerce by facially non-discriminatory statute renders it unconstitutional). From that point forward, federal authority to regulate firearms could be limited to laws concerning their movement in interstate commerce.

Thus, inherent in Petitioners' collective right position is the consequent power of states to challenge discordant firearms laws and enact legislation authorizing possession of weaponry currently prohibited by federal law. Furthermore, a collective right holding could allow a dramatically broader variety of arms in the hands of citizens than would a decision recognizing an individual right of the people to keep and bear arms. This is because an individual rights view would extend to individualized weapons only, subject to reasonable restriction. Resp. Br. 45.

In contrast, a collective right view could logically include *all* variety of weapons currently within the federal arsenal, because the states would be empowered to arm themselves sufficiently to thwart those same federal forces. Pet. Br. 21. Given the fact that there is no Constitutional limitation upon the types of weapons that the federal government can possess, a collective states' right position could logically require a similar freedom for the respective

state militias. If the logic behind the Second Amendment is to preserve the right of states to maintain militias that constitute a counterweight to federal forces, as Petitioners contend, then states would logically be allowed to keep and bear even the most potent and destructive weapons of modern warfare.

Once again, if Petitioners are correct, then they must be taken at their word, and the enormous potential consequences of that position must be considered.

3. *A Decision Establishing A Collective Right Would Immediately Open The National Guard As Presently Constituted To Legal Challenge*

Third, if the Court accepts Petitioners' position that the Second Amendment exists to preserve state militias, as opposed to an individual right of the people to keep and bear arms, then the National Guard as presently governed could also be subject to court challenge. Given the National Guard's critical role in our nation's international war against terrorism, this is a particularly critical inquiry today.

As discussed above, the 1792 Militia Act originally established the militia to include every able-bodied male citizen between the ages of eighteen and forty-five, whom it required to self-arm and self-equip. Act of May 8, 1792, ch. 33, 1 Stat. 271 (1792). In subsequent decades, however, the militia as originally constituted proved insufficient for America's growing military requirements, and Congress gradually enacted reforms that ultimately forged today's National Guard. In so doing, Congress transformed the National Guard from a disordered assemblage

into a nationalized organization. 10 U.S.C. § 332 (1988); *Perpich v. Department of Defense*, 496 U.S. 334, 349 (1990).

As a result of those gradual reforms, the modern National Guard members serve a hybrid designation, simultaneously subject to both their respective state officers and the federal military structure. 10 U.S.C. § 311 (1988). Members therefore undertake an oath to both their state and federal governments, but the federal government possesses the preemptive power and duty to activate, lead, pay, supply, arm, and train them. *Id.* Perhaps most critically for purposes of this case, individual states are prohibited by law from refusing National Guard activation by the federal government. 10 U.S.C. § 332 (1988); *Perpich*, 496 U.S. at 349 (1990).

Given this gradual transformation, and the current structure of the National Guard, it logically cannot serve the role of state militia that underlies Petitioners' collective right interpretation of the Second Amendment. Stated differently, the National Guard cannot stand as a *state* bulwark against abuses by the federal government, because it now exists primarily as a *federal* force subject to national control.

The Court in *Perpich* confirmed this conclusion. The issue before the Court was whether individual state governors were empowered to prohibit their respective National Guard units from deployment abroad by the federal government. *Id.* at 336. The Court determined that control of the National Guard rested with Congress through its powers to declare war and raise armies under Article I, not state officials. *Id.* at 349. Accordingly, the National Guard is primarily a federal entity in character and

structure, with only limited control by individual state governors. *Id.* at 351.

Given this fact, the National Guard's status as an organization subject to federal authority might immediately be exposed to challenge if Petitioners' collective right proposition is adopted.

Thus, should Petitioners' contention that the Second Amendment confers only a collective right upon the states prevail, then a dramatic reexamination of other relationships between state and federal governments will be necessary. If this Court rules that the Second Amendment effectuates the proposition that state militias exist to check federal power, then other seemingly settled questions of state-federal relations may be reopened to question.

These inescapable conflicts provide additional reason to conclude that Petitioners' collective right proposition is unfounded. The Second Amendment's language refers to the "right of the people" rather than the "right of the states," just as the Constitution's Preamble identifies "We the People" as the source of authority, not "We the States." An individual rights view of the Second Amendment accords much more consistently with the other provisions of the Constitution, and it avoids the collisions between state and federal governments that would follow a collective right holding.

CONCLUSION

For each of the foregoing reasons, *Amicus* respectfully submits that the decision below should be affirmed, and that the Second Amendment to the United States Constitution confers an individual right of the people to keep and bear arms.

Respectfully Submitted,

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