Case No. 19-55376

In the

United States Court of Appeals

for the

Ninth Circuit

VIRGINIA DUNCAN; RICHARD LEWIS; PATRICK LOVETTE;
DAVID MARGUGLIO; CHRISTOPHER WADDELL;
CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., a California corporation,
Plaintiffs-Appellees,

v.

XAVIER BECERRA,
in his official capacity as Attorney General of the State of California,
Defendant-Appellant.

Appeal from a Decision of the United States District Court for the Southern District of California, Case No. 3:17-cv-01017-BEN-JLB · The Honorable Roger T. Benitez, Senior District Judge

BRIEF OF *AMICUS CURIAE* AMERICANS AGAINST GUN VIOLENCE IN SUPPORT OF APPELLANT'S REQUEST FOR REVERSAL

ANTHONY P. SCHOENBERG
PATRICK S. LOI
FARELLA BRAUN + MARTEL LLP
235 Montgomery Street, 17th Floor
San Francisco, California 94104
(415) 954-4400 Telephone
(415) 954-4480 Facsimile
tschoenberg@fbm.com
ploi@fbm.com

Attorneys for Amicus Curiae Americans Against Gun Violence

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Americans Against Gun Violence states that it is a non-profit 501(c)(3) organization, that it does not have a parent corporation, and that no publicly-traded corporation owns 10% or more of the stock of Americans Against Gun Violence.

Dated: March 18, 2021

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: */s/ Patrick S. Loi*
Patrick S. Loi

Attorneys for Amicus Curiae
Americans Against Gun Violence

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I. INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Americans Against Gun Violence ("AAGunV") is a nonprofit organization whose principal purpose is to educate the public about the need to lower the high rates of gun violence in the U.S. Founded in 2016 in the wake of repeated mass shootings, AAGunV's intent is to reduce gun violence in the U.S. by advocating for the adoption of gun control regulations like those in place in other nations around the world. In pursuit of that goal, AAGunV has previously filed an amicus brief in the U.S. Supreme Court.

AAGunV seeks to fulfill the "classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). AAGunV offers this brief to provide the Court with additional information and context regarding the development of the individual rights view of the Second Amendment, and the flaws in the U.S. Supreme Court's eventual decision to adopt that view in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[1] All parties have consented to the filing of this brief. Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that no party's counsel or other person authored the brief in whole or in part or contributed money intended to fund preparing or submitting the brief.

II. BACKGROUND

The text of 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.

Over the course of U.S. history, courts universally understood this language to provide only a limited, collective right to use firearms to the extent necessary to maintain effective state militias (the "collective rights" view) rather than a broad, individual right to possess and use firearms for self-defense unconnected with militia service (the "individual rights" view). This was because the phrase "A well regulated Militia being necessary to the security of a free State," (the "Prefatory Clause") was interpreted as setting out the purpose and scope of the protection granted in the phrase "the right of the people to keep and bear Arms, shall not be infringed" (the "Operative Clause").

The Supreme Court twice found that this was the proper way to construe the Second Amendment. In *United States v. Miller*, 307 U.S. 174, 176 (1939), the Supreme Court considered the scope of the Second Amendment when criminal defendants asserted that a federal gun control law restricting the transport of sawed-off shotguns violated their Second Amendment rights. The Supreme Court found that the inability to show any connection between the use of this type of gun and the purpose identified in the Second Amendment's Prefatory Clause was fatal

to this challenge. *Id.* at 178. The court observed that "[i]n 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 of efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep such an instrument." *Id.*. This was to say that the possession of a firearm is only protected under the Second Amendment to the extent that it reasonably furthered that provision's core purpose—preserving the well regulated militia. Forty years later, in *Lewis v. United States*, 445 U.S. 55, 65 n. 8 (1980), the Supreme Court reaffirmed this understanding. *Id.* (explaining that a federal gun control law did not 'trench upon any constitutionally protected liberties," because, under *Miller,* the "Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'").

With the exception of one outlier, every federal circuit court to consider the issue applied *Miller* to hold that the Second Amendment does not protect the right to possess and use guns for private, civilian purposes.[2] Indeed, the Ninth Circuit

[2] *See, e.g.*, *United States v. Haney*, 264 F.3d 1161, 1164-1166 (10th Cir. 2001); *United States v. Napier*, 233 F.3d 394, 402-404 (6th Cir. 2000); *Gillespie v. Indianapolis*, 185 F.3d 693, 710-711 (7th Cir. 1999); *United States v. Scanio*, No. 97-1584, 1998 WL 802060, *2 (2d Cir. Nov. 12, 1998) (unpublished opinion); *United States v. Wright*, 117 F.3d 1265, 1271-1274 (11th Cir. 1997); *United States*

conducted its own detailed analysis of the Second Amendment in *Silveira v. Lockyer*, 312 F.3d 1052, 1087 (9th Cir. 2002), examining both the language of the provision and the historical record informing its adoption, and it concluded that "the collective rights view, rather than the individual rights models, reflects the proper interpretation of the Second Amendment."

While the collective rights view was the law applied by courts at every level, the individual rights view was fabricated over the course of decades thorough the efforts of pro-gun special interests. Saul Cornell, *"Half Cocked": The Persistence of Anachronism and Presentism in the Academic Debate Over the Second Amendment*, 106 J. Crim. L. & Criminology 203, 205-206 (2016) (explaining that "the 'individual rights' view articulated in *Heller* . . . was largely an invented historical tradition. Gun rights advocates both within and outside of the legal academy worked assiduously to create this revisionist history of the Second Amendment and deployed it effectively in *Heller* . . ."). Until the latter part of the 20th century, the individual rights view was non-existent. Michael Waldman, *How*

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v. Rybar, 103 F.3d 273, 285-286 (3d Cir. 1996); *Hickman v. Block*, 81 F.3d 98, 100-103 (9th Cir. 1996); *United States v. Hale*, 978 F.2d 1016, 1018-1020 (8th Cir. 1992); *Thomas v. Members of City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (*per curiam*); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (*per curiam*); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971). In the one outlier case, *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), the Fifth Circuit adopted the individual rights view of the Second Amendment, but subsequent Court of Appeals decisions declined to follow *Emerson*. *See Silveira*, 312 F.3d at 1060-66; *United States v. Parker*, 362 F.3d 1279, 1283-84 (10th Cir. 2004).

the NRA Rewrote the Second Amendment, POLITICO Magazine (May 19, 2014), https://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856/ (last visited March 15, 2021) ("From 1888, when law review articles were first indexed, through 1959, every single one on the Second Amendment concluded it did not guarantee an individual right to own a gun."). However, that changed in the late 1970's when the gun lobby began channeling substantial money toward the idea that the Second Amendment protected an individual right to firearms. *Id.* (explaining that "a squad of attorneys and professors began to churn out law review submissions, dozens of them, at a prodigious rate" with "[f]unds—much of them from the [National Rifle Association]—flow[ing] freely.") *see also* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. REV. 309, 317 (1998) (explaining that "the gun lobby pursued an aggressive campaign to build a body of favorable literature" and an "arm of the National Rifle Association [] dispensed sizable grants to encourage writing that favored the individual rights model . . .").

The gun lobby's efforts eventually bore fruit, and the popular understanding of the Second Amendment among Americans gradually shifted to the individual rights view even though that view was completely divorced from how the Second Amendment was interpreted by the courts. *See* Waldman, *supra* ("In 1959, according to a Gallup poll, 60 percent of Americans favored banning handguns;

that dropped to 41 percent by 1975 and 24 percent in 2012. By early 2008, according to Gallup, 73 percent of Americans believed the Second Amendment 'guaranteed the rights of Americans to own guns' outside the militia.").

Supreme Court justices recognized even while it was happening that pro-gun special interests were attempting to manufacture constitutional protection for the individual use of firearms. *See Adams v. Williams*, 407 U.S. 143, 150 (1972) (Douglas, J. dissenting) (recognizing that "[t]here is no reason why all pistols should not be barred to everyone except the police" but at the same time a "powerful lobby dins into the ears of our citizenry that [pistol purchases] are constitutional rights protected by the Second Amendment . . . "). That view was so contrary to history, established law, and the Second Amendment itself that, in 1991 former Chief Justice Warren Burger called it "one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime." Warren E. Burger, PBS NewsHour, December 16, 1991.

In 2008, the gun lobby's decades-long campaign came to a head when the Supreme Court issued its decision in *Heller*. Despite the preexisting judicial consensus that the Prefatory Clause limited constitutional protection for firearm use to the militia context, *Heller* read that provision out of the Second Amendment entirely and held that the Second Amendment protects an individual right to use

firearms in self-defense. *Heller*, 554 U.S. at 635. However, the *Heller* majority's reasoning failed to properly construe both the text and the history of the Second Amendment which plainly indicate that the collective rights view is the correct one. *Heller's* holding cannot be squared with the intent or language of the Second Amendment. As explained by the Appellants and other amici, the district court's order applied *Heller* broadly to strike down the prohibition on large capacity magazines ("LCM") set out in Cal. Penal Code § 32310.

AAGunV understands, of course, that this Court is bound by *Heller* and cannot simply disregard it. But given that *Heller's* holding is based on a demonstrably incorrect and unsupportable reading of the Second Amendment – which, as explained below, has become only more obvious as new empirical methods of mining historical data have become available – the Ninth Circuit should apply it narrowly here to find that Section 32310 does not violate the Second Amendment.[3]

[3] The importance of this issue cannot be overstated. Approximately 40,000 American civilians die of gunshot wounds every year in the United States. *See Fatal Injury Data | WISQARS | Injury Center | CDC*, Centers for Disease Control and Prevention, http://www.cdc.gov/injury/wisqars/fatal.html (last visited March 15, 2021). The U.S. rate of gun-related deaths is ten times higher than the average rate for peer countries. Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010*, 129(3) Am J Med 266 (2016). The U.S. homicide rate is seven times higher than the average for peer countries, driven by a gun-related homicide rate that is 25 times higher. *Id.* Studies show that the availability of LCMs facilitates mass shootings, and LCM bans help reduce that carnage. *See* Louis Klarevas, Andrew Conner & David

III. ARGUMENT

The *Heller* majority went to great lengths to avoid the language of the Prefatory Clause which expressly ties the right to "keep and bear Arms" with the militia. It reasoned that the Prefatory Clause only indicated the reason for adopting the Operative Clause and did not limit the grant of the Operative Clause. *Heller*, 554 U.S. at 578, 599-600. As to the Operative Clause, the *Heller* majority determined that the actual right granted by the Operative Clause included the individual right to use firearms for self-defense because the phrase "keep and bear Arms" (1) referred to individual firearm use and not just collective militaristic use, and (2) was intended to codify what was purportedly a widely-understood, preexisting right to use firearms in this way. *Id.* at 581-95.

None of these propositions are supportable for the following reasons: (1) the tenets of constitutional interpretation do not permit disregarding the Prefatory Clause; (2) historical research consistently shows that both "keep arms" and "bear arms" had a military connotation during the founding era; (3) there is no evidence that the Second Amendment was intended to codify a preexisting right or that such a right even existed; and (4) the drafting history of the Second Amendment

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Hemenway, *The Effect of Large-Capacity Magazine Bans on High-Fatality Mass Shootings, 1990-2017*, 109(12) American Journal of Public Health 1754 (2019). The case before the Court is, quite literally, a matter of life and death.

demonstrates that the drafters did not intend for it to protect the individual use of firearms for self-defense.

The collective rights view is the only interpretation that gives effect to the language and history of the Second Amendment, and the *Heller* majority had no basis for adopting the individual rights view.

A. The *Heller* majority improperly failed to give effect to the Second Amendment's Prefatory Clause.

Under *Miller* and the many decisions that followed it, the courts have held for almost all of U.S. history that, consistent with the Prefatory Clause, the Second Amendment provided only for a collective right to use firearms in connection with militia service. The *Heller* majority recognized that this language had to have some reasonable relationship to the right granted in the Operative Clause. *Id.* at 577 ("Logic demands that there be a link between the stated purpose and the command."). However, its ultimate conclusion eschewed any reasonable relationship. Instead, it determined that the Operative Clause granted an individual right to use firearms unconnected to the militia, despite the contrary language in the Prefatory Clause, because the Prefatory Clause states the reason for adopting the Operative Clause without having any effect on the protections granted within it. *See id.* at 599 (reasoning that "[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right" and the "threat that the Federal Government would destroy the citizens' militia by

taking away their arms" was merely the "reason that right—unlike some other English rights—was codified in a written Constitution.").

The Prefatory Clause cannot be so easily cast aside. As an initial matter, this interpretation is unreasonable because it would mean that the right conferred was exponentially more far-reaching than the purported justification. Moreover, the *Heller* majority's characterization of the Prefatory Clause as merely explaining why the individual right to firearms was being codified while other English rights were not would mean that the drafters felt compelled to explain the difference between this right and the excluded rights even though the Constitution makes no mention of those excluded rights. It is unreasonable to assume that the Prefatory Clause was intended only to answer a question the Constitution does not present.

However, *Heller's* reading of the Prefatory Clause suffers from an even more fundamental problem. In its view, the scope of the Second Amendment's protection would be exactly the same regardless of whether the Prefatory Clause was included or not. Such a reading is contrary to the foundational principle that that no language of the Constitution should be rendered superfluous. *See Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect . . ."); *Myers v. United States*, 272 U.S. 52, 151 (1926) ("[R]eal effect should be given to all the words [the Constitution] uses."); *Prout v. Starr*, 188 U.S. 537, 544 (1903) ("It is one of the important

functions of this court to so interpret the various provisions and limitations in the organic law of the Union that each and all of them shall be respected and observed.").

Heller's interpretation thus improperly read the Prefatory Clause out of the Second Amendment altogether. In order to give effect to all the language of the Second Amendment, it must be construed, as it always had been, to protect only a collective right to firearms.

B. Even disregarding the Prefatory Clause, the Operative Clause itself only extends to military contexts.

The *Heller* majority's interpretation of the text of the Second Amendment started from the premise that "[t]he Constitution was written to be understood by the voters, its words and phrases were used in their normal and ordinary as distinguished from their technical meaning." *Heller*, 554 U.S. at 576 (citing *United States v. Sprague*, 282 U.S. 716, 731 (1931).). Under the *Heller* majority's own approach, any proper construction of the Second Amendment therefore requires that its language be interpreted in accordance with how it would have normally been understood during the founding era. However, as explained below, overwhelming evidence demonstrates that, during that time, the phrases "keep arms" and "bear arms" were understood to refer to the collective use of firearms in a military context. Therefore, even if it was permissible to fully disregard the

Prefatory Clause, the Operative Clause itself only grants protection for the collective, military use of firearms.

In holding that the phrase "keep and bear Arms" does not refer only to the possession and use of firearms in a military context, the *Heller* majority found that there was little evidence of how this phrase would have been understood, but there were some instances of a nonmilitary meaning. It found that the "the phrase 'keep arms' was not prevalent in the written documents of the founding period that we have found," but determined that the "few examples," all favored "the right to 'keep Arms' as an individual right unconnected with militia service." *Id.* at 582. As to "bear arms," it acknowledged that federal legal sources use the phrase "bear arms" in a military context but found that this is because those sources would "have little occasion to use it *except* in discussions about the standing army and the militia" and that other legal and non-legal sources did use that phrase in nonmilitary contexts. *Id.* at 587-88 (emphasis in original). Based on this purported lack of evidence to the contrary, the *Heller* majority held that the Second Amendment "conferred an individual right to keep and bear arms." *Id.* at 595.

This determination willfully ignored the evidence available at the time, and more recent developments have made it even more clear that "keep and bear Arms" refers to the possession and use of firearms in a collective, military context.

1. *The Heller majority disregarded substantial evidence that the phrase "bear arms" had a military connotation.*

The *Heller* majority discounted extensive evidence presented to it in 2008, which indicated that "bear arms" had a distinctly military meaning. In an amicus brief submitted in *Heller*, a group of English and Linguistics professors explained:

> The term "bear arms" is an idiom that means to serve as a soldier, do military service, fight. To "bear arms against" means "to be engaged in hostilities with." The word "arms" itself has an overwhelmingly military meaning, referring to weapons of offense or armor of defense. In every instance we have found where the term "bear arms" (or "bearing arms" or "bear arms against") is employed, without any additional modifying language attached, the term unquestionably is used in its idiomatic military sense. It is only where additional language is tacked on, either to bend the idiom by specifying a particular type of fighting or to break the idiom by adding incompatible language, that the meaning of "bear arms" deviates. In the Second Amendment, the term is employed in its natural, unadorned state and, therefore, one must conclude, was used idiomatically to refer to military service.

Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners, *District of Columbia v. Heller*, 2008 WL 157194 (U.S.), at *4

The Ninth Circuit itself reached the same conclusion in *Silveira* where it found that "[h]istorical research shows that the use of the term 'bear arms' generally referred to the carrying of arms in military service—not the private use of arms for personal purposes." 312 F.3d at 1072. In making that determination, it set out a litany of historical decisions demonstrating that this continued to be the understanding of this phrase throughout the 19th century. *See English v. State*, 35

Tex. 473, 476 (1872) ("The word 'arms' in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense."); *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891) ("[I]n regard to the kind of arms referred to in the [Second A]mendment, it must be held to refer to the weapons of warfare to be used by the militia . . ."). Most notably, an 1840 decision by the Tennessee Supreme Court found that the phrase "bear arms" does not encompass personal use for, for example, hunting. *Aymette v. State*, 21 Tenn. 154, 161 (1840) ("A man in pursuit of deer, elk and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms . . .").

2. *New empirical methods for studying founding-era English usage have made it even more clear that the phrase "keep and bear Arms" refers to collective, military firearm use.*

Recent advances in the research on this issue have further bolstered the conclusion that the Operative Clause provides only for collective, military firearm use. In particular, the field of corpus linguistics has given scholars a neutral, data-driven lens through which to examine the historical use of the phrases "keep arms" and "bear arms." That discipline studies "language based on examples of 'real life' language use." Tony McEnery & Andrew Wilson, *Corpus Linguistics: An Introduction* 1 (2d ed. 2001). This is to say that it focuses on the contemporaneous

and ordinary language use that the *Heller* majority asserted should guide the interpretation of the Second Amendment.

This study is done by analyzing a 'corpus' (or 'corpora' plural) which is a "searchable body of texts used to determine meaning through language usage." James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 Yale L.J. Forum 21, 24 (2016). Through the use of these data sets, they are able to gather information about "which meanings were possible at a given time, and what their relative distribution and frequency were." Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, The Panorama (Aug. 3, 2018). Going far beyond dictionaries, this research allows courts to consider analyses that "measur[e], in a given speech community over a given time, the statistical frequency of a word and the linguistic contexts in which it appears." *Caesars Entm't Corp. v. Int'l Union of Operating Eng'rs Local 68 Pension Fund*, 932 F.3d 91, 95 n.1 (3d Cir. 2019).

Since *Heller* was decided, the development of two corpora at Brigham Young University has shed substantially more light on what it meant to "keep arms" or "bear arms" during the founding era. The Corpus of Founding Era American English ("COFEA") includes over 120,000 texts and 154 million words from primary sources from between 1760 and 1799. The Corpus of Early Modern

English ("COEME") includes 40,000 texts and nearly 1.3 billion words from sources dating back to 1475.

These two corpora allow researchers to bring objective, empirical methods to bear on this issue. First, they measure the "statistical *frequency* of words and word senses in a given speech community over a given time period," in a way that allows them to "determine empirically," whether "the ordinary meaning of a given word" is merely "*possible*, *common*, or the *most common* sense of that word in a given context." Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 831-32 (2018). Second, the collocation method analyzes the statistical frequencies of words appearing together in a particular context in a way that reveals "the possible range of linguistic contexts in which a word typically appears and can provide useful information about the range of possible meanings and sense divisions." *Id.* at 832. Third, a "keywords in context" tool allows a researcher to pull together and analyze uses of a "particular word or phase in hundreds of contexts, all on the same page of running text." *Id.*

Studies applying these methods to the Second Amendment have found that the phrase "bear arms" has a collective connotation, typically referring to "the act of soldiering and the use of weapons in war." Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 Hastings Const. L.Q. 509, 513 (2019) LaCroix, *supra*. A survey of both legal and non-legal texts in COFEA and

COEME from the founding era determined that they "almost always use *bear arms* in an unambiguously military sense." Baron, *supra*, at 510-11 (emphasis in original). An examination of almost 1,000 uses of "bear arms" in "seventeenth- and eighteen-century English and American texts" found that "roughly 900 separate occurrences of *bear arms* before and during the founding era refer to war, soldiering, or other forms of armed action by a group rather than an individual." *Id.* at 510. In contrast, "[n]on-military uses of *bear arms* in reference to hunting or personal self-defense are not just rare, they are almost nonexistent." *Id.* (emphasis in original).

An examination of uses of "keep arms" similarly concluded that, in founding-era sources, it "almost always appears in a military context." *Id.* at 513. Between COEME and COFEA, there were a total of twenty-six occurrences of "keep arms" excluding duplicates and one instance where "keep" was used to mean "prevent," "as in 'to keep arms from somebody.'" *Id.* Of those twenty-six occurrences, twenty-five "refer[red] to weapons for use in the military or the militia," and one was ambiguous. *Id.*

Together, these authorities demonstrate that the Operative Clause, even in isolation, would not have been understood at its adoption to confer an individual right to firearms unconnected with militia service. The *Heller* majority read it to afford this right based on a purported lack of evidence to the contrary, but the

analyses that have since been conducted based on much larger samples of contemporaneous sources show that both "keep arms" and "bear arms" had a distinctly military connotation. Therefore, even if the Prefatory Clause is disregarded, the Second Amendment, at most, protects the possession and use of firearms in a collective, military context.

C. There is no evidence that the Second Amendment was understood to codify a preexisting right to bear arms as broad as what the *Heller* court purported to adopt.

The *Heller* majority took the position that the Second Amendment was intended to "codif[y] a right inherited from our English ancestors." *Heller*, 554 U.S. at 599 (quotations omitted). The *Heller* majority's analysis failed to establish either that the Second Amendment intended to codify a preexisting individual right to firearms or that a general right to do so was understood to exist at the time the Second Amendment was adopted.

First, none of the language in the Second Amendment can be read as conveying an intent to codify a preexisting individual right to possess and use firearms for self-defense. The Operative Clause states only that "the right of the people to keep and bear Arms, shall not be infringed." The *Heller* majority reasoned that the language "shall not be infringed" "implicitly recognizes the pre-existence of the right . . ." *Id.* at 592. However, even assuming that is true, it leaves the question of what right is purportedly being codified. The only right

referenced in the text is the right to "keep and bear Arms." As discussed, that phase was understood to refer to the use of firearms in a military context. When that meaning is applied, the only preexisting right that the Second Amendment purports to codify, if any, is the collective military use of firearms. Therefore, even if there was a preexisting individual right to possess and use firearms for self-defense, the language of the Second Amendment does not incorporate it.

However, the existence of that right prior to the adoption of the Second Amendment is itself not supported by the historical record. In finding that there was such a right, the *Heller* majority relied on a provision in the English Bill of Rights which stated "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." *Id.* at 593. This was far from an individual right for all citizens to have and use firearms in self-defense. Even the *Heller* majority recognized that it was a "right not available to the whole population, given that it was restricted to Protestants, and like all English rights it was held only against the Crown, not Parliament." *Id*.

Nonetheless, the *Heller* majority asserted that "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." *Id.* Historically, that is a blatantly inaccurate statement. Indeed, another source relied upon by the *Heller* majority, George Tucker's Blackstone Commentaries from the year 1803, makes that clear. While the *Heller* majority cited portions of that text

as evidence that founding-era scholars interpreted the Second Amendment as protecting an individual right unconnected with militia service,[4] its selective quotations omitted the portion of the very same paragraph making clear that this interpretation was wrong – in fact, the English Bill of Rights had been construed to *only* protect gun rights for a narrow subset of English subjects. That paragraph, commenting on the Second Amendment, states in full as follows:

> This may be considered as the true palladium of liberty….The right of self defence is the first law of nature : in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally, under the specious pretext of preserving the game : a never failing lure to bring over the landed aristocracy to support any measure, under that mask, thought calculated for very different purposes. **True it is, their bill of rights seems at first view to counteract this policy : but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.**[5]

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[4] *Id.* at 606.

[5] St. George Tucker and Sir William Blackstone, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States, and of the Commonwealth of Virginia : With an Appendix to Each Volume, Containing Short Tracts Upon Such Subjects as Appeared Necessary to Form a Connected View of the Laws of Virginia as a Member of the Federal Union*, Volume First, Part First, Appendix, Note D: View of the Constitution of the United States (Union, New Jersey: The Lawbook Exchange, Ltd., 1996), 300 (emphasis added).

Although the *Heller* majority chose to ignore this, one of its own authorities firmly demonstrates that founding-era Americans could not have inherited any belief from the English that there was a universal, individual right to possess and use firearms for self-defense. Even as to English subjects at that time, the English Bill of Rights was understood to provide only token protection for individual gun use such that all but a few could be prohibited from keeping a gun in their home. The so-called preexisting right inherited from the English did not exist even in England. Therefore, the *Heller* majority did not present any evidence that the Second Amendment was understood to incorporate any right broader than exactly what it specifies—the right to possess and use firearms in connection with militia service.

D. The drafters knowingly declined to include language in the Second Amendment that would have provided for an individual right to use weapons for self-defense.

While the Second Amendment was being drafted, the drafters had the option of including language from state proposals or previously-adopted state constitutions that referred specifically to the use of firearms for defense. They chose not to do so and instead focused the text of the Second Amendment on the importance of the militia and the preservation of the use of arms in that capacity. Their decision not to incorporate the language that others had proposed or used to

extend protection to individual firearm use for self-defense is evidence that they did not intend the Second Amendment to extend that far.

At the first Federal Congress, three states, Virginia, North Carolina, and New York, sent proposals for amendments to the Constitution which addressed protecting the institution of the militia from the new federal Government. *Heller*, 554 U.S. at 655 (Stevens, J. dissenting). Each focused on the dangers posed by standing armies and the importance of preserving state militias. *Id.* The Virginia proposal was the most influential on what became the Second Amendment. It read:

> 17th. That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power . . .
>
> 19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.

Id. at 656 (Stevens, J. dissenting) (citations omitted).

This proposal expressly provided protection for firearm use only in connection with the militia. In addition to explaining that the protection for firearm use was based on the importance of the militia as a check against the power of standing armies, the latter portion of the proposal provides that those with

religious reservations against "bearing arms" could be exempted from doing so if they paid someone to serve in their place. Consistent with the empirical research discussed above, that exemption further demonstrates that the phrase "bearing arms" in the context of the Second Amendment referred to the collective, militaristic use of firearms. *Id.* at 661 (Stevens, J. dissenting) (explaining that, based on this exemption, the phrase "bear arms" had to be understood as "unequivocally and exclusively military" because "[t]he State simply does not compel its citizens to carry arms for the purpose of . . . self-defense.").[6]

Additionally, there were several other states that did not send proposed amendments to Congress but where a minority of delegates advocated for related amendments. *Id.* at 656-57 (Stevens, J. dissenting). Most notably, a minority of delegates from Pennsylvania signed a proposal that, in contrast to the Virginia proposal, explicitly protected the use of firearms for self-defense and hunting. The Pennsylvania proposal read:

> 7. That the people have a right to bear arms for **the defense of themselves** and their own State, or the United States, or **for the purpose of killing**

[6] North Carolina adopted the Virginia proposal as its own, and New York made its own proposal that used substantially similar language. *Id.* at 656 (Stevens, J. dissenting). The New York proposal read: "That the people have a right to keep and bear Arms; that a well regulated Militia, including the body of the People capable of bearing Arms, is the proper, natural, and safe defence of a free State .... That standing Armies, in time of Peace, are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be kept under strict Subordination to the civil Power." *Id.* at 657 (Stevens, J. dissenting) (citation omitted).

> **game**; and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to, and be governed by the civil powers.

Id. at 658 (Stevens, J. dissenting) (emphasis added) (citation omitted).

With all of this language available to him, James Madison, the primary drafter of the Second Amendment, chose not to include any of the language that had been proposed to provide protection for the use of firearms for self-defense or hunting. *See id.* at 659 (Stevens, J. dissenting). Instead, his first draft of the Second Amendment took the substance of the militia-focused Virginia proposal and revised it to more concisely read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." *Id.* at 659-60 (Stevens, J. dissenting). The clause exempting "religiously scrupulous" persons was eventually removed due to concerns that Congress would be able to circumvent the amendment's protection and disarm the militias by defining "religiously scrupulous" broadly. *See id.* at 660 (Stevens, J. dissenting) (explaining that arguments in the House of Representatives reflected concern that "Congress 'can declare who are those religiously scrupulous, and prevent them from bearing arms.'") (citation omitted). What remained was a streamlined version of the

language that had been proposed by Virginia specifically to prohibit the disarmament of the militia. While the drafters had the opportunity to provide constitutional protection for the individual use of firearms, they chose not to do so.

The *Heller* majority declined to give any weight to the drafters' intentional word choice. It characterized any reliance on the drafting history as "dubious" when "interpret[ing] a text that was widely understood to codify a pre-existing right" and concluded that the version of the Second Amendment that was ultimately adopted merely codified that individual right. *See id*. at 603-04. The notion that there was a such a "pre-existing right" is, as discussed, a historical fiction. To make matters worse, the *Heller* majority also disregarded the text of the Second Amendment when arguing that preexisting state constitutions supported the individual rights view. It pointed to Pennsylvania's Declaration of Rights of 1776 which stated "That the people have a right to bear arms *for the defence of themselves* and the state . . ." and Vermont's 1777 constitution which had substantially the same language. *Id.* at 600-01 (emphasis added by court). It asserted that these "analogous arms-bearing rights" "confirmed" that its adoption of the individual rights view was correct, but it ignored the crucial distinction—the drafters of the Second Amendment chose different language. *Id.* at 600-01. The language that the *Heller* majority emphasized in those state constitutions is nowhere to be found in the Second Amendment.

The drafters of the Second Amendment chose its language carefully. They granted a specific right using terms that were understood at the time to refer to the collective, militaristic use of firearms and explained that this grant was made in order to protect the militia as an institution. While the drafters easily could have incorporated language to protect the individual use of firearms for self-defense if that was their intent, they did not do so. The Second Amendment says what it says, and its actual language and intent must be given effect.

E. The Ninth Circuit should interpret *Heller* narrowly to find that Section 32310 does not violate the Second Amendment.

AAGunV recognizes that *Heller* is binding Supreme Court precedent. However, the district court's application of *Heller* goes far beyond how it has been applied by other courts. Indeed, it is directly contrary to the Ninth Circuit's decision in *Fyock v. Sunnyvale*, 779 F.3d 991, 1001 (9th Cir. 2015) which just six years ago held that a substantially similar restriction on LCMs did not violate the Second Amendment. Given that *Heller* was wrongly decided based on an unsupportable interpretation of the language and history of the Second Amendment, the Ninth Circuit should decline to expand its reach, apply it narrowly, and reverse the district court's order.

IV. CONCLUSION

For the foregoing reasons, AAGunV respectfully requests that this Court reverse the district court order that granted summary judgment in favor of the Plaintiff-Appellees.

Dated: March 18, 2021

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: */s/ Patrick S. Loi*
Patrick S. Loi

Attorneys for Amicus Curiae
Americans Against Gun Violence

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FOR THE NINTH CIRCUIT

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By: */s/ Patrick S. Loi*
Patrick S. Loi

Attorneys for Amicus Curiae
Americans Against Gun Violence