No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA, et al.,

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 SECOND AMENDMENT FOUNDATION AS AMICUS CURIAE SUPPORTING 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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INTEREST OF AMICUS CURIAE[1]

Second Amendment Foundation ("SAF"), a tax-exempt organization under § 501(c)(3) of the I.R.C., is a non-profit educational foundation incorporated in August 1974 under the laws of the State of Washington. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has 650,000 members and supporters residing in every state of the Union.

SAF files this *amicus curiae* brief in order to direct the Court's attention to arguments and authorities that support the judgment of the court below.

SUMMARY OF ARGUMENT

The purpose of the Second Amendment is to prevent Congress from using its Article I authorities, including its authority to regulate the militia, to disarm American citizens. The principal reason for including a preamble praising the militia – a preamble that does not substantively alter the operative prohibition on federal overreaching – was to endorse

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

the traditional citizen militia, which many Americans preferred as an alternative to standing armies. The language, grammar, and history of the Amendment show both that its protection is not limited to militia-related activities, and that the protected right does extend to having arms for self defense against violent criminals.

ARGUMENT

I. Petitioners' interpretation of the Second Amendment is untenable, and the legal test suggested in *United States v. Miller* is unworkable

Petitioners' principal claim is that the Second Amendment "protects the possession and use of guns only in service of an organized militia."[2] This interpretation leads to one of three untenable conclusions:

- that the federal government is free to eliminate the people's constitutional right to keep and bear arms by abolishing or failing to maintain an organized militia, a conclusion that is absurd on its face;[3] or
- that American citizens have a right to require the federal government to maintain an

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[2] Pet. Br. 8; see also *id*. 11-12, 21.

[3] For additional detail, see *infra* pages 17-18; Nelson Lund, *Putting the Second Amendment to Sleep*, 8 Green Bag 2d 101 (2004).

organized militia in which they can keep and bear arms, which implies – contrary to all historical evidence – that the Second Amendment substantially amended the provision of Article I giving Congress virtually unfettered authority to regulate the militia;[4] or

- that the Second Amendment forbids Congress to preempt state laws conferring a right to keep and bear arms while serving in a state militia, which has the problems discussed below.

Petitioners appear to adopt this third alternative,[5] which is fatally flawed. First, like the second alternative, it entails an historically unsupported assumption that the Second Amendment substantially altered Congress' Article I authority to regulate the militia. Second, a right of the states to organize and arm their own militias as they see fit conflicts with the constitutional prohibition against their keeping troops without the consent of Congress.[6] Third, this Court has consistently concluded that the federal government has extremely broad powers to preempt state militia regulations, and has never suggested

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[4] See U.S. Const. art. I, § 8, cl. 16. For more detail, see Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 Tex. Rev. L. & Pol. 157, 183-84 (1999).

[5] Pet. Br. 21.

[6] See U.S. Const. art. I, § 10, cl. 3. Some militia organizations, like our modern National Guard, are functionally equivalent to "troops."

that the Second Amendment has *any relevance at all* to preemption questions. *E.g.*, *Houston v. Moore*, 18 U.S. 1 (1820); *Perpich v. Dep't of Def.,* 496 U.S. 334 (1990).[7] Accordingly, petitioners' interpretation of the Second Amendment is insupportable.

United States v. Miller, 307 U.S. 174 (1939), suggests an interpretation that is different from petitioners', and more facially plausible, namely that private citizens might have a right to possess weapons that are "part of the ordinary military equipment or [whose] use could contribute to the common defense." *Id*. at 178. This test (which is not *Miller*'s holding) implies that American citizens have a right to possess at least those weapons that an unaided individual can "bear" and that "could contribute to the common defense." Today this would include, at a minimum, the fully automatic rifles that are standard infantry issue, and probably also shoulder-fired rockets and grenades.

When *Miller* was decided, infantry were typically armed with the same sort of bolt-action rifles that civilians commonly kept for use in everyday life, just

[7] Dissenting in *Houston v. Moore*, Justice Story noted that the Second Amendment *at most* might confirm that states have a limited concurrent power to regulate their militia "in the absence of, or subordinate to, the regulations of Congress." 18 U.S. at 52-53. Cf. *Hamilton v. Regents*, 293 U.S. 245, 260 (1934) (citing Second Amendment when noting that state militia laws that are not preempted must also transgress "no right safeguarded to the citizens by the Federal Constitution").

as founding-era civilians commonly kept the same kinds of weapons they would need if called for military duty.[8] That has now changed, and the categorical approach tentatively suggested in *Miller* will not generate a workable approach to assessing modern firearms laws. For a discussion of the difficulties entailed in applying *Miller*'s suggested test to the instant case, see Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 Geo. Mason U. Civ. Rts. L.J. 229, 231-36 (forthcoming 2008).

Accordingly, the ambiguous opinion in *Miller* should be read to hold only that this Court required further evidence before it could decide whether an unregistered short-barreled shotgun was, in the circumstances presented by that case, covered by the Second Amendment.

As the following discussion will show, the purpose of the Second Amendment is to prevent Congress from using its Article I authorities, including its authority to regulate the militia, to disarm American citizens. The principal reason for including a preamble praising the militia – a preamble that does not substantively alter the operative prohibition on federal overreaching – was to endorse the traditional citizen militia, which many Americans preferred as an alternative to standing armies. The language,

[8] See Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 42 & n.98 (1996).

grammar, and history of the Amendment demonstrate both that its protection is *not* limited to militia-related activities, and that the protected right *does* extend to having arms for self defense against violent criminals.

II. The text of the Second Amendment establishes that the constitutional right extends beyond militia-related weapons and activities

It is self evident that the Second Amendment's preambular phrase alludes to *a* reason for guaranteeing the right of the people to keep and bear arms. The constitutional text, however, does not imply that fostering a well regulated militia is the sole or even principal purpose for protecting that right.[9] The Amendment's preface has a meaningful logical relationship to the right to arms, which is explained in Parts III and IV *infra*, but it is not the relationship suggested by petitioners.

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[9] Eighteenth century state constitutions frequently included explanatory language that was manifestly over- and/or under-inclusive. See Eugene Volokh, *The Commonplace Second Amendment,* 73 N.Y.U. L. Rev. 793 (1998).

A. The grammatical structure of the Second Amendment does not imply that the purpose of the constitutional right is limited to fostering a well regulated militia

The most significant grammatical feature of the Second Amendment is that its preamble is an absolute phrase, often called an ablative absolute or nominative absolute.[10] Such constructions are grammatically independent of the rest of the sentence, and do not qualify any word in the operative clause to which they are appended.[11] The usual function of absolute constructions is to convey some information about the circumstances surrounding the statement in the main clause.[12]

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[10] This common Latin construction takes the ablative case. In English, where it is less common, it now takes the nominative case. For an historical discussion, see C. T. Onions, *An Advanced English Syntax* 68-70 (1904).

[11] See, *e.g.*, John Wilson, *The Elements of Punctuation* 4 (1857) (nominative absolutes "are grammatically independent of the other portions of the sentence in which they occur"); Virginia Waddy, *Elements of Composition and Rhetoric* 13 (1889) ("The absolute phrase is without grammatical dependence on any other word.").

[12] See, *e.g.*, Onions, *supra*, at 68 ("In English, as in other languages, the Participial Adverb Clause is in origin a simple Adverbial Adjunct, consisting of a noun or noun-equivalent in an oblique case with a participle in agreement with it, and denoting an attendant circumstance, cause, condition, etc.").

A telling example is provided by Article 3 of the Northwest Ordinance:

> Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.[13]

This provision – ratified by the same Congress that drafted the Second Amendment – attests to a belief in the beneficent effects of schools and education. But it does not imply that "[r]eligion, morality, and knowledge" are their *only* purpose. Still less could the provision be interpreted to require religious censors in the schools, or to allow the abolition of secular schools if the government came to believe that such education undermines religion and morality.

Another very significant grammatical feature of the Second Amendment is that the operative clause is a command. Because no word in that command is grammatically qualified by the prefatory assertion, the operative clause has the same meaning that it would have had if the preamble had been omitted, or even if the preamble is demonstrably false.

Consider a simple example. Suppose that a dean announces: "The teacher being ill, class is cancelled." Nothing about the dean's prefatory statement, including its truth or falsity, can qualify or modify the operative command. If the teacher called in sick to

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[13] Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52.

watch a ball game, the cancellation of the class remains unaffected. If the dean was secretly diverting the teacher to work on a special project, the class is still cancelled. If someone misunderstood a phone message, and inadvertently misled the dean into thinking the teacher would be absent, the dean's order is not thereby modified.

The Second Amendment's grammatical structure is identical, and so are the consequences. Whatever a well regulated militia may be, or even if such a thing no longer exists, the right of the people to keep and bear arms is not to be infringed. What's more, whether or not such a militia can contribute to the security of a free state, the right of the people to keep and bear arms remains unaffected. Indeed, even if it could be proved beyond all doubt that *disarming* the people is necessary to the security of a free state, still the right of the people to keep and bear arms would remain unchanged.

Undoubtedly, new information or changed opinions about the preambular assertion might suggest the need to issue a new command. If, for example, the dean discovered that the teacher wasn't going to be absent after all, he might make a new announcement reversing his earlier decision. Similarly, if the American people came to believe that civilian disarmament laws were necessary to promote public safety, Congress might initiate a repeal of the Second Amendment under Article V. In both cases, a new command would be needed because the truth or falsity of the

preambular assertion cannot alter the original, operative command.

It is true, of course, that a grammatically absolute phrase – like countless other forms of contextual evidence – may sometimes help to resolve ambiguities in the operative command to which it is appended. But such contextual evidence cannot change the meaning of the command. And it is true that an absolute phrase – like other kinds of contextual evidence – may sometimes persuade the recipient of a command that he or she may safely disobey it. But that also does not change the meaning of the command.

Lest one suppose that those who adopted the Second Amendment could have been unaware of the implications of its grammatical structure, consider the Patent and Copyright Clause:

> The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[14]

Unlike the Second Amendment, this provision contains an *operative* clause that sets out a purpose (the promotion of useful knowledge) and a subordinate phrase that specifies the means by which that purpose may be pursued (creating patents and copyrights).

[14] U.S. Const. art. I, § 8, cl. 8.

Because of this grammatical subordination, the authorization to grant copyrights and patents is limited by the goal set out in the operative clause, as this Court has acknowledged. *E.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003).[15]

The Patent and Copyright Clause provided an obvious model that the draftsmen of the Second Amendment could have used to limit the right to keep and bear arms to militia purposes. That model was emphatically not followed, for the Second Amendment does not say anything like, "The people shall have a right to promote the security of a free state by keeping and bearing such arms as are suitable for use in a well regulated militia."

The familiar words of the Preamble – which announce that the Constitution was adopted "in [o]rder" to achieve specified goals – offered another grammatical model that might have been adapted to impose some kind of militia limitation on the right to

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[15] Even after recognizing the affirmative textual limitation on congressional power that the constitutional text clearly imposes, this Court has been notably restrained in enforcing that limitation. See, *e.g.*, *Eldred*, 537 U.S. at 204-05 ("[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . ." (internal quotation marks and citation omitted)); *id*. at 205 n.10 (rejecting use of heightened scrutiny). It follows *a fortiori* that this Court should not infer a "militia limitation" that the language of the Second Amendment does *not* impose.

keep and bear arms.[16] But the Second Amendment does not read: "In order to secure the existence of a well regulated militia, which is necessary to the security of a free state, the right of militiamen to keep and bear arms shall not be infringed."

The language of the Second Amendment unequivocally protects the right of the people to keep and bear arms, grammatically unqualified by any militia limitation.[17]

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[16] U.S. Const. pmbl. The operative clause of the Preamble "ordain[s] and establish[s] this Constitution." Accordingly, this Court has warned that the Preamble may not be employed to enlarge the powers given to the federal government elsewhere in the Constitution, *i.e*, apart from the Preamble. *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905). Similarly, the Second Amendment's preamble cannot contract the right to arms specified in its operative clause.

[17] *Amici* Professors of Linguistics and English assert, as though it were self-evidently dictated by the text, that "the absolute clause affirmatively states *the* cause or reason for the Second Amendment's existence." Br. Am. Cur. Profs. Linguistics and English 10-11 n.6 (emphasis added). This "sole cause" interpretation is not correct, and is certainly not self-evident. Reasoning from this unsubstantiated premise, *amici* mistakenly contend that the preambular phrase "significantly affects the meaning of the main clause" by implying that the Second Amendment "never would have been adopted but for [its framers' belief] that a well regulated militia is necessary to the security of a free state." *Id*.

Whatever the framers may have believed about the importance of a well regulated militia, and whether their beliefs were well founded or not, the Second Amendment's operative clause means what it says. This conclusion does not amount to "omitt[ing]" or "wish[ing] away" the preambular phrase. *Id*. On

(Continued on following page)

B. The term "bear Arms" in the Second Amendment's operative clause does not imply that the Amendment has an exclusively military purpose

Petitioners and *amici* Professors of Linguistics and English maintain that the term "bear Arms" implies that the Second Amendment refers only to the military use of weapons.[18] If it were true, this would come as a surprise to several members of this Court. See *Muscarello v. United States*, 524 U.S. 125, 142-43 (1998) (Ginsburg, J., dissenting). But it is false.

First, the very dictionaries quoted by *amici* to prove "an overwhelming military meaning" of the word "arms" refute their claim.[19] Noah Webster's 1828 dictionary, for example, says: "In law, arms are any thing which a man takes in his hand in anger, to strike or assault another."[20]

Second, it was perfectly normal to use the term "bear arms" in civilian contexts. James Wilson – a preeminent lawyer and an early member of this Court – used the term in a discussion of homicide in

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the contrary, the analysis presented here and *infra* produces a much more coherent and cogent interpretation of the whole text than the one offered by these *amici* and by petitioners.

[18] Pet. Br. 16-17; Br. Am. Cur. Profs. Linguistics and English 18-27.

[19] Br. Am. Cur. Profs. Linguistics and English 19.

[20] Quoted in *id*. 20 n.18; see also *id*. (quoting a 1730 dictionary that defined arms as "all manner of Weapons made use of by Men either for defending themselves, or for attacking others").

"defence of one's person or house." Interpreting the 1790 Pennsylvania Constitution's guarantee of the right "to bear arms," Wilson characterized this provision as a recognition of the natural law of self-preservation and as a descendant of the Saxons' obligation to "keep arms for the preservation of the kingdom, and of their own persons."[21]

Third, the relevant constitutional term in the instant case is "keep . . . Arms." Only through the wildest exaggeration of the military connotations of "bear arms" could one possibly conclude that "keep arms" has been transmuted through propinquity into a military term.

C. "The people" referred to in the Second Amendment has always been a much larger body of individuals than the militia

Another textual indication that the preambular phrase does not limit the operative language is provided by the Second Amendment's use of "Militia" and

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[21] 2 *Collected Works of James Wilson* 1142 (Kermit L. Hall & Mark David Hall eds., 2007) (internal quotation marks omitted). Additional examples are collected in U.S. Department of Justice, *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel (Aug. 24, 2004), at 16-19; Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 Tex. L. Rev. 237, 255-57, 260-64 (2004); Clayton Cramer & Joseph Olson, *What Does "Bear Arms" Imply?*, Georgetown J.L. & Pub. Pol'y (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081201.

"the people." These are different words with different meanings. Furthermore, the militia and the people are and always have been very substantially noncongruent bodies.

The militia has always been a small subset of "the people" whose right to keep and bear arms is protected by the Second Amendment. James Madison, for example, estimated that the militia comprised about one-sixth of the population when the Constitution was adopted.[22]

Most obviously, women were not part of the eighteenth century militia, nor are they included today (except for female volunteers in the National Guard).[23] Women, however, have always been citizens and thus part of "the people." See, *e.g.*, *Minor v. Happersett*, 88 U.S. 162, 165-70 (1874) (although women did not have voting privileges, they were part of "the people" who ordained and established the Constitution, and they have always been citizens). Just as women have always been covered by the First Amendment's "right of the people" to assemble and petition for redress of grievances, and the Fourth Amendment's "right of the people" to be secure from unreasonable searches and seizures, women have

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[22] *The Federalist No. 46*.

[23] Act of May 8, 1792, ch. XXXIII, 1 Stat. 271; 10 U.S.C. 311(a).

always had the same Second Amendment rights as men.[24]

Even if one mistakenly supposed that "the people" referred to in the First, Second, and Fourth Amendments included only those citizens with full political rights (thus excluding women), the militia and the people would still remain substantially noncongruent.[25] Under the Second Militia Act of 1792, for example, the militia included most free able-bodied male citizens who were at least 18 but under the age of 45.[26] This would have included a substantial number of men who were not old enough to vote

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[24] The framers of the Bill of Rights knew how to draw precise distinctions between rights appertaining to militiamen and those belonging to the general population. See U.S. Const. amend. V (requiring presentment or grand jury indictment "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger"). This example further undermines the supposition that the framers thoughtlessly conflated the militia with the people in the Second Amendment.

[25] Political speeches during the founding period sometimes seemed to equate the militia with the people. Careful attention to the context, however, shows that such statements were not meant literally, but rather served rhetorically to contrast a relatively broad-based militia with narrower variations. See, *e.g.*, 10 *The Documentary History of the Ratification of the Constitution* 1312 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (George Mason at the Virginia ratifying convention); 2 *The Complete Anti-Federalist* 341 (Herbert J. Storing ed., 1981) (Federal Farmer).

[26] Act of May 8, 1792, ch. XXXIII, 1 Stat. 271. The current statutory definition of the militia scarcely differs from the definition adopted in 1792. See 10 U.S.C. 311(a).

or who were disenfranchised by property qualifications.[27] Thus, the militia included many men who did not have full political rights.

The opposite form of noncongruence was also significant. Those who were physically unable to perform militia duties, as well as those aged 45 and older, still had all their political rights, including the right to vote. Besides the numerous men in these categories, many other citizens were legally exempted from militia duties.[28] Thus, many men with full political rights were not subject to militia obligations.

The noncongruence of the militia and the people points to another fatal defect in petitioners' interpretation of the Second Amendment. Nothing in the Constitution purports to forbid Congress from exempting *everyone* from militia duties, as this Court has recognized.[29] It would be absurd to conclude that if Congress effectively abolished the militia by enacting

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[27] The minimum age for voting was twenty-one. Property qualifications had been relaxed in some states, but such qualifications were still significant. See, *e.g.*, Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 24 (2000) ("By 1790, according to most estimates, roughly 60 to 70 percent of adult white men (and very few others) could vote.").

[28] See Act of May 8, 1792, ch. XXXIII, § 2, 1 Stat. 271, 272.

[29] The Constitution "left [to the states] an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or *totally disappeared*." *Arver v. United States*, 245 U.S. 366, 383 (1918) (emphasis added).

such a universal exemption, the right of "the people" to keep and bear arms would thereby vanish. Congress cannot abolish this constitutional right of the people by abolishing the militia. Neither can the right be limited to contexts in which its exercise contributes to the functioning of an organized militia that Congress is not even required to maintain.

III. The nature and history of the Second Amendment confirm that its purpose cannot be confined to fostering a well regulated militia

The preceding analysis demonstrates that the text does not impose a "militia-related" limitation on the Second Amendment right. The constitutional language, however, would be nonsensical if one could not specify any relation at all between the right to arms and the desideratum of a well regulated militia. There is such a relationship, though not the one assumed by petitioners, who mistakenly contend that the Second Amendment protects access to arms only in the service of an organized militia.

A. The Second Amendment contributes to a well regulated militia by preventing a specific misuse of Congress' Article I authorities, including its authority to regulate the militia

Article I of the Constitution gives Congress virtually plenary authority to regulate the militia,[30] and the Second Amendment does not purport to shift any of that power to the state governments. The Court has recognized this fact by deciding numerous preemption cases involving state militia laws without so much as mentioning the Second Amendment. See, *e.g.*, *Houston v. Moore*, 18 U.S. 1 (1820); *Perpich v. Dep't of Def.,* 496 U.S. 334 (1990).

This Court's disregard of the Second Amendment in preemption cases makes perfect sense, for the Amendment does not purport to require, authorize, or even allow any kind of regulation by the federal or state governments. Still, it would seem that protecting the right to arms must have *something* to do with the well regulated militia, or the Second Amendment's preamble would be entirely out of place.[31]

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[30] U.S. Const. art. I, § 8, cl. 16.

[31] See, *e.g.*, Alma Blount & Clark S. Northup, *An Elementary English Grammar with Composition* 177 (1912) (although absolute constructions "are not formally connected with the sentence proper" there must be a "thought-relation between this noun-participle group and the sentence proper; otherwise the absolute phrase ought not to be in the sentence").

Let us focus again on the language of the Constitution. One obvious way for a militia to be well regulated is to be well trained or well disciplined as a military organization, and the framers of the Second Amendment no doubt meant to conjure thoughts of such an organization.[32] The Second Amendment, however, added absolutely nothing to Congress' almost plenary Article I authority to provide for military training and discipline. Furthermore, the term "well regulated" also has a broader meaning that is actually more relevant in this context.

To see why, note that any possible contribution of the Second Amendment to a well regulated militia must arise from governmental *inaction* (*viz*., from *not* adopting regulations that infringe the right of the people to keep and bear arms). Note also that – while it may not be immediately obvious to readers conditioned by experience with the modern regulatory Leviathan – the term "well regulated" need not mean *heavily* regulated or *more* regulated. On the contrary, it is perfectly possible for the government to engage in *excessive* regulation or *inappropriate* regulation,

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[32] See, *e.g.*, *The Federalist No. 29*:

> It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects. . . . If a well regulated militia be the most natural defence of a free country, it ought certainly to be under the regulation, and at the disposal of that body, which is constituted the guardian of the national security.

and such regulations are just what the Second Amendment forbids.

As its operative clause makes clear, the Second Amendment simply forbids one kind of inappropriate regulation (among the infinite possible regulations) that Congress might be tempted to enact under its sweeping authority to make all laws "necessary and proper" for executing its Article I militia powers (or perhaps other delegated powers).[33] What is that one kind of inappropriate regulation? Disarming the citizens from among whom any genuinely traditional militia must be constituted.[34]

Congress is permitted to omit many things that are required for a well regulated militia, and may even take affirmative steps to ruin the militia. Congress may organize the militia so as to create the functional equivalent of an army,[35] or it may so neglect the militia as to deprive it of any meaningful existence. The Second Amendment does not purport to interfere with the general discretion of Congress to regulate, or fail to regulate, or perversely regulate the militia. All it does is forbid one particularly extravagant extension

[33] See U.S. Const. art. I, § 8, cl. 18.

[34] Traditionally the militia was a broad body of civilians who could be summoned to meet public emergencies, in contradistinction to armies made up of paid troops. Accordingly, the Constitution systematically distinguishes the two. For further detail, see Lund, *Past and Future*, *supra*, at 22-24.

[35] Congress has done exactly that in modern times, and this Court has upheld its authority to do so. *Perpich*, 496 U.S. 334.

of Congress' Article I powers, namely *disarming American citizens*, which might otherwise have been attempted under color of regulating the militia (or of exercising some other Article I authority).

B. The Second Amendment's background and drafting history confirm that the constitutional right is not limited to militia-related purposes

The history of the Second Amendment confirms this limited and indirect – though real – relationship between a well regulated militia and the constitutional right to arms.

At the Philadelphia Convention, qualms were repeatedly expressed about the danger of standing armies in peacetime, along with a preference for maintaining the militia as an alternative to such armies.[36] It was also recognized, however, that a traditional militia could not by itself adequately provide for the nation's security, even in peacetime.[37]

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[36] See, *e.g.*, 2 *The Records of the Federal Convention of 1787* (Max Farrand ed., rev. ed. 1937), at 326 (Mason), 329 (Gerry), 509 (Gerry), 563 (Randolph).

[37] See, *e.g.*, Letter from George Washington to the President of Congress (Sept. 24, 1776), in *Writings of George Washington* 67, 71-74 (Lawrence B. Evans ed., 1908); 2 *Records of the Federal Convention*, *supra*, at 332 (Charles Pinkney); *The Federalist No. 25*; Letter from Gouverneur Morris to Moss Kent (Jan. 12, 1815), in 3 *Records of the Federal Convention*, *supra*, at 420.

Accordingly, the delegates put no significant limits on federal military authority in the constitution they proposed.[38]

Near the end of the Convention, however, George Mason recurred to the uneasiness he and others had expressed. Recognizing that "an absolute prohibition of standing armies in time of peace might be unsafe," Mason proposed that the clause giving the federal government almost plenary authority over the militia be prefaced with the following words: "And that the liberties of the people may be better secured against the danger of standing armies in time of peace."[39]

James Madison himself spoke in favor of this proposal, arguing that the proposed addition would not actually restrict the new government's authority, but would constitute a healthy disapprobation of unnecessary reliance on armies.[40] The only recorded objection, offered by Gouverneur Morris, was that this language set "a dishonorable mark of distinction on the military class of Citizens."[41]

Mason's motion failed. When one reads the Second Amendment with this history in mind, it is

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[38] Limitations on congressional power are slight. U.S. Const. art. I, § 8, cl. 12 (army appropriations limited to two years), cl. 16 (states retain right to appoint officers and administer congressionally-dictated militia training).

[39] 2 *Records of the Federal Convention*, *supra*, at 616-17.

[40] See *id*. at 617.

[41] *Id*.

apparent that its text incorporates what Madison had seen as the virtue of Mason's suggestion at the Convention, while avoiding aspersions on military men.

During the subsequent ratification debates, the massive transfer of military authority to the federal government became one of the chief Anti-Federalist complaints.[42] The Federalists who controlled the First Congress, however, were no more willing than the Philadelphia Convention had been to curtail federal authority in this field. As Madison noted when introducing his initial draft of the Bill of Rights in the House of Representatives, he was averse to reconsidering "the principles and substance of the powers given" to the new government, but he was quite prepared to incorporate noncontroversial "provisions for the security of rights."[43]

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[42] See, *e.g.*, Letter from the Federal Farmer (Oct. 10, 1787), in 2 *Complete Anti-Federalist*, *supra*, at 241-43; Brutus, Essay (Jan. 10, 1788), in 2 *Complete Anti-Federalist*, *supra*, at 405, 406-08; The Impartial Examiner, Essay (Feb. 27, 1788), in 5 *Complete Anti-Federalist*, *supra*, at 180, 181-82; Luther Martin, "Genuine Information" (Nov. 29, 1787), in 3 *Records of the Federal Convention*, *supra*, at 172, 208-09; *The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins* 191-92, 192-94, 196-99 (Neil H. Cogan ed., 1997) (John Smilie and William Findley at the Pennsylvania ratifying convention, George Mason at the Virginia ratifying convention, and Patrick Henry at the Virginia ratifying convention, respectively).

[43] 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 1025 (1971).

Consistent with Madison's view – though not with petitioners' interpretation of the Second Amendment – Congress rejected proposals to put substantive limits on congressional authority over armies and the militia.[44] What the First Congress was quite willing to do, and what it did do in the Second Amendment, was to make explicit the utterly noncontroversial denial of federal power to infringe the right of the people to keep and bear arms.

Much like George Mason's proposal at the Philadelphia Convention, Madison's initial draft of a right-to-arms provision in the First Congress sought to give comfort to those who worried about abuses of the federal military power, but without diminishing that power:

> 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.[45]

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[44] *Complete Bill of Rights, supra,* at 169-70 (Sherman), 172 (Burke), 173-74 (unidentified Senator); 2 Schwartz, *supra*, at 1152 (unidentified Senator).

[45] *Complete Bill of Rights*, *supra*, at 169. This proposal resembles a provision in a bill of rights, written by a committee on which Madison and Mason had both served at the Virginia ratifying convention, and proposed by that convention to the First Congress. See 2 Schwartz, *supra*, at 764-65 (members of the committee), 842 (reprinting the proposal). What it does *not*

(Continued on following page)

Like the Mason proposal that Madison had supported at the Philadelphia Convention, though more subtly, Madison's initial draft in the First Congress lauded the militia without diminishing federal authority to keep up standing armies, and without requiring the federal government actually to maintain a well regulated militia.

In the Madison draft, however, the comment about the militia's value was attached to a provision guaranteeing a right of the people rather than to a provision about congressional authority to regulate the militia, as Mason's proposal at Philadelphia had been. This created the potential for confusion, and virtually all of the modifications made in Congress to Madison's initial draft had the effect of clarifying that the right of the people to keep and bear arms was not confined to the militia context.

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resemble is a completely separate proposal, written by the same committee and proposed by the same Virginia ratifying convention, which said in plain words essentially what petitioners claim is implied through indirection by Madison's initial draft and by the Second Amendment itself:

> That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same.

Id. at 843. Although Madison was obviously quite familiar with this proposed amendment, he offered nothing like it to the First Congress. (An unidentified Senator did offer an amendment with the same wording, which was voted down. *Id*. at 1151, 1152.)

First, the House deleted the reference to a "well armed" militia, which might have misleadingly suggested that the sole purpose of protecting the people's right to arms was to ensure that the organized militia would be well armed. The text sent to the Senate read:

> A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed; but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.[46]

The Senate went further. It deleted the conscientious objector clause and the reference to a militia "composed of the body of the people," both of which might have suggested that the right to arms was somehow confined to the militia context.[47] The Senate also specifically *rejected* a proposal to qualify the right to

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[46] *Complete Bill of Rights*, *supra*, at 172. The change from "free country" to "free state" was purely stylistic. See Eugene Volokh, "*Necessary to the Security of a Free State,*" 83 Notre Dame L. Rev. 1 (2007).

[47] *Complete Bill of Rights*, *supra*, at 173-74. The Senate also replaced "the best security of a free state" with "necessary to the security of a free state." *Id*. at 175-76. This strengthened the declaratory force of the preambular endorsement of the militia by eliminating any suggestion that standing armies might be an acceptable, even if imperfect, substitute for a well regulated militia. Elbridge Gerry had worried about such an inference during the House debates. *Id*. at 187-88. The change had no effect on the meaning of the operative clause.

keep and bear arms by adding the phrase "for the common defence."[48]

Having stripped Madison's initial draft of several potentially misleading cues, Congress adopted the text that is now a part of the Constitution:

> 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.

This text offered nothing to satisfy Anti-Federalist desires for actual limits on federal authority over military affairs, and the *only* contemporaneous criticisms of the Second Amendment were complaints that it did not satisfy these desires.[49] The private right protected by the Second Amendment caused no controversy, precisely *because* it is a private right.

The drafting history of what became the Second Amendment thus confirms that its endorsement of the traditional militia does not imply that the people's right to arms is contingent on the manner in which Congress exercises its authority to organize and regulate the militia.

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[48] *Id.* at 174-75.

[49] See Stephen P. Halbrook, *The Right of the People or the Power of the State*, 26 Val. U. L. Rev. 131, 184-85, 192-94 (1991).

C. This Court has recognized that the Constitution contains declaratory language that does not change the legal effects that the Constitution would have had without that language

When Congress sent the Bill of Rights to the states for ratification, it described its provisions as "declaratory and restrictive clauses" meant to "prevent misconstruction or abuse of [the Constitution's] powers."[50] The Second Amendment has both declaratory and restrictive elements. The words of praise for the militia in the Second Amendment are a *declaration* of respect for the traditional militia system, which might – or in practice might *not* – provide an alternative to the standing armies that many citizens feared. That explains both why the declaratory, preambular language was included, and why the Amendment was so carefully drafted to ensure that the *restriction* on federal infringement of the people's right to arms is not dependent on its actually contributing to the maintenance of a well regulated militia.

This Court has often recognized that the Constitution contains language whose omission would not have changed the meaning of the document. As early as *Marbury v. Madison*, 5 U.S. 137, 174 (1803), the Court acknowledged that an entire constitutional clause might be interpreted to be without effect if

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[50] 2 Schwartz, *supra*, at 1164.

"the words require it."[51] *McCulloch v. Maryland*, 17 U.S. 316, 420-21 (1819), went even further: *without* claiming that the words *required* such an interpretation, the Court concluded that the Necessary and Proper Clause may not augment and certainly does not diminish the incidental powers elsewhere conferred by implication on Congress.

Perhaps the best example of constitutional language that was not meant to change the meaning of the Constitution came from the very same draftsmen who gave us the Second Amendment. The Tenth Amendment simply reaffirms what was already established by the original Constitution. Citing relevant historical documents, this Court concluded that its purpose was simply to provide reassurance to the public that the new government was meant to be one of limited, enumerated powers:

> The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than *declaratory* of the relationship between the national and state governments as it had been established by the Constitution before the amendment *or that its purpose was other than to allay fears* that the new national

[51] The full sentence in *Marbury* reads: "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it." Petitioners quote only the first clause. Pet. Br. 17.

> government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e.g., II Elliot's Debates, 123, 131; III *id*. 450, 464, 600; IV *id*. 140, 149; I Annals of Congress, 432, 761, 767-768; Story, Commentaries on the Constitution, §§ 1907-1908.

United States v. Darby, 312 U.S. 100, 124 (1941) (citations in original) (emphasis added); see also *New York v. United States*, 505 U.S. 144, 156 (1992) (reaffirming *Darby*'s characterization of the Tenth Amendment and quoting Justice Story's *Commentaries on the Constitution*).

Thus, this Court has concluded that an *entire constitutional amendment* was adopted only to allay what were regarded as unfounded fears, without changing or qualifying anything in the Constitution to which it was appended. It is therefore not at all anomalous that the Second Amendment – drafted by the same Congress and adopted at the same time – includes a reassuring preambular comment that was not meant to change or limit the effects of the operative clause to which it was appended.

IV. The purpose of the Second Amendment includes protection of the fundamental natural right of self defense against criminal violence

Respect for the original meaning of the Second Amendment requires that its language be applied – faithfully and appropriately – to contemporary society,

which is in important respects quite different from that of two centuries ago.

Petitioners emphasize the paucity of debate during the founding period about the relevance of the Second Amendment to the right of self defense against criminal violence.[52] The fact that public debates focused on questions about the Second Amendment's adequacy as an obstacle to tyrannical exercises of federal military power does not so much as suggest that *anybody* thought the new federal government did or should have the authority to disarm its citizens in the name of crime control. Such illogical inferences have long been rejected. *E.g., Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 644-45 (1819) (specific cases contemplated by the framers do not limit the reach of constitutional provisions); *Weems v. United States*, 217 U.S. 349, 373 (1910) (general language not restricted by "the mischief which gave it birth"); *Oncale v. Sundowner Offshore Servs*., 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

With respect to the right to arms, the concern that was foremost for the founding generation – fear of a tyrannical federal government – has understandably subsided. At the same time, the military power of the government has become overwhelming, which greatly diminishes the potential of an armed

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[52] *E.g.*, Pet. Br. 28.

citizenry to deter such tyranny. It remains true that a large stock of arms in private hands raises the expected cost to the government of engaging in seriously oppressive actions, and thereby makes such oppression less likely to occur.[53] But whereas Madison could plausibly argue that the new federal government would be incapable of raising an army capable of subduing America's armed populace,[54] today's armed forces have the technical ability to inflict unthinkable mayhem on the civilian population.

Even more important, a significant gap has developed between civilian and military small arms. Eighteenth century Americans commonly used the same arms for civilian and military purposes, but today's infantry and organized militia are equipped with an array of highly lethal weaponry that civilians do not employ for self defense or other important lawful purposes. The Constitution does not require this Court to blind itself to that post-*Miller* reality, or to hold that the civilian population has a right to keep every weapon that the militia can expect to find useful if called to active duty.

Nor should the Court blind itself to other contemporary realities, the most important of which is

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[53] For further detail, see Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 115 (1987); Lund, *Past and Future*, *supra*, at 56-58.

[54] *The Federalist No. 46*.

the problem of criminal violence, and the inability of the government to control it. Rather than focus exclusively on eighteenth century comments about maintaining an armed counterweight to the armies of a potentially tyrannical federal government, the Court should recognize that the broader purpose of the Second Amendment emerges readily from the Constitution's founding principles.

Those founding principles are summed up in the familiar liberal axioms set out in the Declaration of Independence. In liberal theory, the most fundamental of all rights is the right of self defense. Thomas Hobbes, the founder of modern liberalism, advanced this proposition with his customary forcefulness when he acknowledged only one natural right, and described it as "the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life."[55]

Among the political theorists most often cited by major American writers during the founding period,[56] there was unanimous agreement about the centrality of the right of self defense:

> ***Locke***: "[B]y the Fundamental Law of Nature, Man being to be preserved, as much as possible, when all cannot be preserved, the

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[55] *Leviathan*, ch. 14 (first paragraph) (1651).

[56] See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 Am. Pol. Sci. Rev. 189 (1984).

> safety of the Innocent is to be preferred: And one may destroy a man who makes War upon him, or has discovered an Enmity to his being for the same Reason, that he may kill a Wolf or a Lion . . . ."[57]
>
> ***Montesquieu***: "The life of states is like that of men. Men have the right to kill in the case of natural defense; states have the right to wage war for their own preservation."[58]
>
> ***Blackstone***: "Self-defence 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."[59]

The exchange of rights that constitutes the social contract does not diminish the central importance of the natural right to self defense. Rather, political or legal limitations on the exercise of that right must be understood as efforts to *enhance* the citizens' ability to protect their lives effectively. For that reason alone, the Second Amendment should be applied vigorously with respect to governmental restrictions on the liberty of citizens to defend themselves against the violent criminals whom the government cannot control.

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[57] *Second Treatise of Government* § 16 (1690).

[58] *The Spirit of the Laws*, bk. X, ch. 2, at 138 (Anne M. Cohler et al. eds. & trans., 1989) (1748).

[59] 3 *Commentaries* *4.

This corollary to the central premise of liberal political theory is consistent with evidence about eighteenth century attitudes. William Blackstone, for example, characterized the English right to arms as a "public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[60] Just as one would expect from the fundamental principle of liberal theory, Blackstone makes no distinction between oppression by the government itself and oppression that the government fails to prevent. If anything, his language seems to refer more easily to the ineradicable phenomenon of criminal violence, experienced by all free societies, than to the extraordinary instances of governmental oppression that call for armed resistance.

In America, a similarly broad understanding of the purpose of the right to arms was articulated repeatedly during the founding period. Post-Revolution constitutions in Pennsylvania and Vermont, for example, proclaimed that "the people have a right to bear arms for the defence of *themselves* and the state."[61] Similarly, the Anti-Federalist minority at

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[60] 1 *Commentaries* *139.

[61] Pa. Const. of 1776, ch. I, art. XIII (emphasis added), Vt. Const. of 1777, ch. I, art. XV (emphasis added), in *Complete Bill of Rights*, *supra*, at 184, 184-85, respectively. The Pennsylvania Constitution of 1790 similarly provided that "the right of citizens to bear arms, in defence of themselves and the state,

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the Pennsylvania ratifying convention proposed a bill of rights including this provision:

> 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 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 governed by the civil power.[62]

Similarly, the New Hampshire ratifying convention proposed an amendment specifying that "Congress shall *never disarm any Citizen* unless such as are or have been in Actual Rebellion."[63] And the minority at

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shall not be questioned." Pa. Const. of 1790, art. IX, § 21, in *Complete Bill of Rights*, *supra*, at 184.

[62] *Complete Bill of Rights*, *supra*, at 182 (emphasis added). It would be anachronistic to think that the reference to "killing game" in this proposal reflected a passion for sport. Apart from the role of hunting as a food source at that time, Americans would have been acutely aware, from Blackstone if from nowhere else, of the English game laws behind which the "preventing of popular insurrections and resistance to the government, by disarming the bulk of the people . . . [was] a reason oftener meant, than avowed, by the makers of forest or game laws." 2 *Commentaries* *412 (footnote omitted).

[63] *Complete Bill of Rights*, *supra*, at 181 (emphasis added).

the Massachusetts ratifying convention proposed that the federal Constitution:

> be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from *keeping their own arms*; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them . . . .[64]

The natural right of self defense is the most fundamental right known to liberal theory, and the Second Amendment is our Constitution's most direct legal expression of Blackstone's insight that "in vain would [basic rights such as that of personal security] be declared, ascertained, and protected by the dead letter of the laws, if the [English] constitution had provided no other method to secure their actual enjoyment."[65]

It would not be easy to find a more vivid illustration of Blackstone's point than the District of Columbia, where every effort has been made to disarm the

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[64] *Id.* (emphasis added). Note that the right-to-arms provision is as separate from the standing-army provision as it is from the provision dealing with freedom of the press and religion.

[65] 1 *Commentaries* *136. "Personal security" is listed as the first of the three great primary rights. *Id.* *125. The right to arms is one of five auxiliary rights that help to secure the great primary rights. *Id.* *139.

citizenry. According to what Blackstone calls "the dead letter of the laws," personal security must be very well assured in a city where almost nobody except agents of the government is authorized to possess an operable firearm. The reality is rather different, and nothing in the Constitution requires this Court to ignore that reality.

In the twenty-first century, the most salient purpose of the Second Amendment is to protect the people's ability to defend themselves against violent criminals. Accordingly, the federal government must be required to offer justifications for gun control statutes that go far beyond fashionable slogans and unsubstantiated appeals to hypothetical salutary effects on public safety. Any other approach would trivialize the fundamental right protected by the Second Amendment.

Petitioners have not satisfied the standard of exacting scrutiny to which the District of Columbia's disarmament laws should be subjected, and this failure is fatal to their case. Nor should this Court accept the Solicitor General's beguiling invitation to remand the case for application of some lower level of scrutiny loosely derived from an inapt analogy to governmental regulation of elections that the government itself conducts.[66] The D.C. Code unequivocally forbids American citizens to keep an operable firearm in their own homes for the protection of their

[66] U.S. Br. Am. Cur. 24.

own lives. Under no standard or review that respects the fundamental nature of the Second Amendment right could this prohibition possibly be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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