No. 23-878

IN THE
Supreme Court of the United States

JAVIER HERRERA,
Petitioner,
v.
KWAME RAOUL, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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March 15, 2024

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Foundation for Moral Law is an Alabama-based nonprofit corporation dedicated to the defense of the United States Constitution as written according to the strict intent of its Framers. The Foundation believes the Second Amendment clearly protects the individual right to keep and bear arms as essential to the natural right of self-defense, which is essential for the protection of the God-given right to life guaranteed in the Declaration of Independence and in the Fifth and Fourteenth Amendments to the United States Constitution.

SUMMARY OF THE ARGUMENT.

This case deals with the most basic of all human rights—the right to life—and the concomitant right to defend one's life. This right would be meaningless if one were denied the right to carry arms in one's defense. The Framers developed their understanding of unalienable human rights largely through the writings of Thomas Hobbes and John Locke. For both Hobbes and Locke, all rights stem from the fundamental human motivation to preserve their own lives. Hobbes stated this as the first right

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of *amicus curiae*'s intention to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

of nature: "the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own life." Thomas Hobbes, *Leviathan* XIV (1651). Similarly, Locke posited that everyone "is bound to preserve himself, and not to quit his station wilfully." John Locke, *The Second Treatise on Civil Government* § 6 (1689). Consequently, "Men, being once born, have a right to their Preservation." *Id.* at § 25. If humanity's most basic purpose is to live, "natural reason" dictates that they must have the freedom to do what is necessary to preserve their lives. The basic right to life necessarily implies a right to defend oneself against enemies or otherwise hostile forces. Locke epitomized this sentiment by arguing that one has the right to kill even a petty thief in self-defense, since it is impossible to know his full intentions at the time. Denying a person the right to keep and bear arms is tantamount to denying him the right to self-defense, which is essential to the right to life itself.

The Seventh Circuit's defiant rejection of this Court's "common use" test for determining which firearms are protected by the Second Amendment, puts the Seventh Circuit at odds with other circuits, with this Court, with the plain wording and meaning of the Second Amendment, with history, and with common sense.

Petitioner has well established the Seventh Circuit's split with other circuits and with the holdings of this Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. Chicago,* 561 U.S. 742 (2010), and *New York State Rifle Pistol*

Assn. v. Bruen, 597 U.S. 1, 142 S. Ct. 2111 (2022), so *amicus* will not repeat those arguments. Rather, *amicus* will focus upon the history leading up to the adoption of the Second Amendment, the intent of its Framers, and the plain meaning of the Amendment itself.

ARGUMENT

Chicago, Cook County, and Illinois have enacted rifle and magazine bans (hereinafter referred to collectively as "Illinois laws") that prohibit certain "assault weapons" including various models of semiautomatic rifles with pistol grips the AR-15 and large-capacity magazines or ammunition feeding devices.

Dr. Javier Herrera is a Chicago emergency-room physician and tactical medic on a Special Weapons and Tactics (SWAT) team. As a SWAT team member, he is required to be proficient with the AR-15 and other weapons because he has to handle or secure an injured officer's weapon in the event that officer hands the weapon to him.

Dr. Herrera owns an AR-15 and a Glock 45 along with magazines, and he testified that he owns them for self-defense, hunting, and expert shooting. However, the Illinois laws prohibit him from keeping them in his home, so he keeps them in another county. Consequently, they are of no value to him in self-defense, and his inability to access them prevents him from participating in SWAT team drills and maintaining the proficiency he needs.

Dr. Herrera challenged these bans in court, but the district court and the Seventh Circuit both

rejected his claims. The Seventh Circuit concluded that semiautomatic rifles such as the AR-15 and their magazines are not even "arms" because the military uses fully automatic M-16s. Pet.App.33-38. The Seventh Circuit also concluded that this Court's common-use test is "circular" and that ownership statistics for determining common use are irrelevant. Pet.App.40-41.

The reasoning employed by the Seventh Circuit defies this Court, makes a mockery of the plain language of the Second Amendment, ignores history, and is contrary to the Framers' intent.

I. The history leading up to the adoption of the Second Amendment demonstrates an intent to protect all weapons in common use.

The history leading up to the adoption of the Second Amendment is clearly intertwined with the American War for Independence of 1776-1783. The American Revolution Institute of The Society of the Cincinnati [2] has prepared a detailed study of weapons used in the War for Independence and says:

> Supplying its troops with the weapons required to win the Revolutionary War was a critical, complex and ever-present issue for

[2] "A Revolution in Arms: Weapons in the War for Independence", The American Revolution Institute of The Society of the Cincinnati, October 11, 2018 – March 24, 2019, https://www.americanrevolutioninstitute.org/exhibition/a-revolution-in-arms/. The Society of the Cincinnati was founded in 1783 and is composed of descendants of commissioned officers who served in the Continental Army or Navy or in allied forces of France.

the new American nation. When the war began in 1775, there were few factories in America capable of producing firearms, swords and other weapons—let alone in the quantities necessary to sustain an army for several years. At the height of the war, fifty thousand men served in the Continental Army, with another thirty thousand state and militia troops fighting for the American cause. To arm these soldiers against the well-supplied British regulars, American officials gathered weapons from an array of sources on two continents.

Patriots had begun to amass caches of weapons as tensions grew in the months leading up to the Battles of Lexington and Concord in 1775, seizing British arms from royal storehouses, provincial magazines and supply ships. At the beginning of the Revolution, the army relied on soldiers to bring weapons from home, including hunting guns, militia arms and outdated martial weapons from the French and Indian War. American soldiers also carried weapons captured from the enemy in the field and reissued to Continental and state troops. A growing number of American manufacturers produced weapons on government contracts, as the domestic arms industry expanded to try to meet the demand, but they could not sustain the American troops through a long conflict. Success on the battlefield ultimately depended on the hundreds of thousands of arms supplied by France and Spain.

> Shipments of arms and ammunition from France began arriving in 1776 and continued for the rest of the war.[3]

Because there were few factories in America capable of producing firearms, the Continental Army had to use whatever weapons were available. They relied on weapons their soldiers brought from home, including hunting guns, militia arms, and outdated weapons from the French and Indian War of a decade earlier, as well as weapons confiscated from British storehouses and weapons supplied by France and Spain.

The Institute pictures and describes various weapons used during the American War for Independence, including:

- The British Pattern 1769 Short Load Musket
- The French Model 1766 Industry Musket
- The Pennsylvania Long Rifle
- The common musket
- The Hessian Dragoon Pistol (captured)
- The holster pistol
- Various swords[4]

The Institute's website and display also features a Continental Army enlistment agreement from Massachusetts in which soldiers agree that

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[3] *Id.*

[4] *Id.*

> …each of Us do engage in furnish and carry with us into the Service, a good effective Fire-arm, and also a Bayonet (if to be obtained) Cartridge Box and Knap-Sack; and if no Bayonet, in Lieu thereof, a Sword, Hatchet or Tomahawk.[5]

In keeping with English tradition going back to the Assize of Arms of 1181 and the English muster laws of the 1570s which required that all able-bodied men appear for duty when required, the Massachusetts Bay Colonial Militia was founded on December 13, 1606 and required all men to appear with "A Gun fit for service, a Cartouch Box, and a Sword, Cutlass, or Hanger, and at least Twelve Charges of Powder and Ball, or Swain Shot, and Six Spare Flints" when called upon by authorities.[6]

> While most units used their personal weapons, a few arms were issued to the towns by the colonies. These muskets were held by the town and issued to men who did not have a firearm whenever the militia "mustered" on the town green. The most common weapon for many of these men was the New England style fowler, which used a British made lock, mounted on a locally made barrel and stock. Long weapons, they often had a 46 inch barrel, which gave a total length of over 5 feet.

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[5] *Id.*

[6] Order of Massachusetts Bay Colonial Militia, December 13, 1636; quoted by Chris Eger, "The Firearms of the American Colonial Militia, Pre-1776", July 1, 2017, https://www.guns.com/news/2017/07/01/guns-of-the-greatest-revolution-ever

> Smoothbore in design they could be loaded with shot for hunting or a single large bullet for military service.[7]

Clearly, those who led the American War for Independence wanted their soldiers to be well-armed, with whatever weapons were available, wherever and however obtained. The thought that the protection of firearms should be limited to those in military use would have been totally foreign to them. Although they wanted the best weapons they could obtain, they were willing to use whatever was available.

The same is true today. If a military test is used at all (which it should not be), the test would be not whether it is currently in use by the military, but whether it could be of military utility. A soldier in combat may prefer a fully automatic M16, but if no M16 were available, he would certainly prefer a semi-automatic AR-15 rather than no weapon at all.

The logical conclusion of the "military use" test as employed by the Seventh Circuit is that whenever the military stops using a certain weapon and starts using another, the previous weapon is immediately stripped of Second Amendment protection. This would reduce the Amendment's protection to a very narrow and constantly-changing list of weapons—which may be what Respondents want, but not what the Second Amendment says and means. Reduced to absurdity, it could even mean that only fully

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[7] *Id.*

automatic weapons enjoy Second Amendment protection.

II. Illinois' restriction on keeping firearms is contrary to the plain language of the Second Amendment.

This is apparent from the very language of the Second Amendment: "the right of the people to keep and bear arms shall not be infringed." The two initial verbs stand out and carry distinct meanings: "keep" and "bear."

The use of the verb "keep" demonstrates that the Framers intended to protect the right of the individual citizen to own and possess firearms and keep them in their homes, rather than receiving them from an armory only when reporting for militia or guard duty. As this Court held in *District of Columbia v. Heller*:

> We turn to the phrases "keep arms" and "bear arms." Johnson defined "keep" as, most relevantly, "[t]o retain; not to lose," and "[t]o have in custody." Johnson 1095. Webster defined it as "[t]o hold; to retain in one's power or possession." No party has apprised us of an idiomatic meaning of "keep Arms." Thus, the most natural reading of "keep Arms" in the Second Amendment is to "have weapons." The phrase "keep arms" was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to "keep Arms" as an

> individual right unconnected with militia service.

554 U.S. 570, 582 (2008).

The use of the word "bear" reveals that the Framers intended that individual citizens were to have the right to carry their firearms in public. Again, as the majority held in *Heller*:

> At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed. 1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation.

Id. at 584. Illinois' firearm restrictions are contrary to this plain language of the Second Amendment.

III. Illinois' restriction on firearms is contrary to the intent of those who drafted the Second Amendment.

The Framers clearly contemplated an individual right to keep and bear arms. Consider the following statements of leading Americans of the founding era:

> Oh, Sir, we should have fine times indeed, if to punish tyrants, it were only sufficient to assemble the people. Your arms, wherewith you could defend yourselves, are gone; and you have no longer an aristocratical; no longer a democratical spirit. Did you ever read of any revolution in any nation, brought about

> by the punishment of those in power, inflicted by those who had no power at all?

Patrick Henry, *Speech in the Virginia Ratifying Convention*, June 5, 1788; [8]

"Whenever governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins." Rep. Elbridge Gerry of Massachusetts, spoken during floor debate over the Second Amendment, Annals of Congress (Aug. 17, 1789);

> A people who would stand fast in their liberty, should furnish themselves with weapons proper for their defense, and learn the use of them. It is indeed an hard case, that those who are happy in the blessings of providence, and disposed to live peaceably with all men, should be obliged to keep up the idea of blood and slaughter, and expend their time and treasure to acquire the arts and instruments of death. But this is a necessity which the depravity of human nature has laid upon every state. Nor was there ever a people that continued, for any considerable time, in the enjoyment of liberty, who were not in a capacity to defend themselves against invaders, unless they

[8] We will not address whether this means only concealed carry, or only open carry, or both, because both rights are violated by the Illinois statutes.

> were too poor and inconsiderable to tempt an enemy.

Simeon Howard, *A Sermon Preached to the Ancient and Honorable Artillery Company in Boston* (Jun. 7, 1773);

> The laws that forbid the carrying of arms are laws of such a nature. They disarm only those who are neither inclined nor determined to commit crimes . . . Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.

Thomas Jefferson, *Commonplace Book* (quoting 18th century criminologist Cesare Beccaria), 1774-1776;

"For a people who are free, and who mean to remain so, a well-organized and armed militia is their best security." Thomas Jefferson, *Eighth State of the Union Address* (1808);

> A strong body makes the mind strong. As to the species of exercises, I advise the gun. While this gives moderate exercise to the body, it gives boldness, enterprise and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body and stamp no character on the mind. Let your gun therefore be your constant companion of your walks.

Thomas Jefferson, *Letter to Peter Carr* (Aug. 19, 1785);

"Always remember that an armed and trained militia is the firmest bulwark of republics—that without standing armies their liberty can never be in danger, nor with large ones safe." James Madison, *First Inaugural Address* (March 4, 1809);

> In a general view, there are very few conquests that repay the charge of making them, and mankind are pretty well convinced that it can never be worth their while to go to war for profit sake. If they are made war upon, their country invaded, or their existence at stake, it is their duty to defend and preserve themselves, but in every other light and from every other cause is war inglorious and detestable.

Thomas Paine, *The Crisis* (1778);

"A militia, when properly formed, are in fact the people themselves . . . and include all men capable of bearing arms." Richard Henry Lee*, Letter from the Federal Farmer to the Republic* (1788);

> The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers,

> to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Justice Joseph Story, *Commentaries on the Constitution* § 1890 (1833).

"That no man shou'd scruple, or hesitate a moment to use a[r]ms in defence of so valuable a blessing, on which all the good and evil of life depends; is clearly my opinion; Yet A[r]ms . . . should be the last resource." George Washington, *Letter to George Mason* (Apr. 5, 1769);

> The Constitutions of most of our states assert that all power is inherent in the people; that they may exercise it by themselves, in all 8 cases to which they think themselves competent, (as in electing their functionaries executive and legislative, and deciding by a jury of themselves, both fact and law, in all judiciary cases in which any fact is involved) or they may act by representatives, freely and equally chosen; that it is their right and duty to be at all times armed; that they are entitled to freedom of person; freedom of religion; freedom of property; and freedom of the press.

Thomas Jefferson, *Letter to John Cartwright* (Jun. 5, 1824);

"The right of self defense never ceases. It is among the most sacred, and alike necessary to nations and to individuals." James Monroe, *Second Annual Message to Congress* (Nov. 16, 1818);

> [He] conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack on his liberty and property, by whomsoever made. The particular States, like private citizens, have a right to be armed, and to defend by force of arms, their rights, when invaded.

Roger Sherman, Debates on the Militia Act of 1782, quoted and cited by Stephen P. Halbrook, *The Founders' Second Amendment* 262 (2012);

"That the said Constitution shall never be 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." Samuel Adams, *Debates of the Massachusetts Convention of 1788*.[9]

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[9] In quotations throughout this brief, the original spellings have been preserved.

IV. The Framers' reliance upon the militia demonstrates their belief in widespread ownership of firearms.

Those who drafted the Second Amendment contemplated widespread private ownership and possession of firearms. This is clear from their use of the term "militia" as encompassing all able-bodied adult males. The Constitution did not create the militia; the people have always possessed a natural right to organize locally for their mutual defense.

The militia might be said to be a natural institution of the people like the family, the state, and the church. In the time of the judges of Israel, the ancient Hebrews called their army "the people," and it consisted of all able-bodied men with certain exemptions for those who had economic commitments, a recent marriage, or unmilitary qualities. Deuteronomy 20:1–9. As Chaim Herzog and Mordecai Gichon state in Battles of the Bible (1997) at pages 37, 85–86, and 109: "The military organization of the Israelites was, like that of all nations emerging from tribal status, based on the duty of every able-bodied male to bear arms and serve, whenever necessary, in his tribal contingent in the national host."

As Israel moved from a decentralized confederation of tribes governed by judges to a monarchy under Saul, David, and Solomon, they began to rely upon a standing national army of conscripts instead of a people's militia.

The right to bear arms was the badge of an Anglo-Saxon freeman and was closely associated with his

political privileges. In A.D. 878, King Alfred in Anglo-Saxon England gathered the armed citizenry into a fyrd or militia to defend against the Danish invaders. In A.D. 890, the Laws of King Alfred the Great required subjects to possess arms for the defense of the kingdom. After the Norman Conquest, the Assize of Arms contained a similar requirement in A.D. 1181. And § 6 of the Statute of Winchester of A.D. 1285 declared:

> it is commanded that every man have in his house harness [armor] for to keep the peace of the ancient assize; that is to say, every man between fifteen years of age and sixty years, shall be assessed and sworn to armor according to the quantity of their lands and goods.

The American colonies followed a similar practice. The militia of Jamestown Colony was organized as early as 1607 and was frequently called up for military action against the Powatan Federation. The Massachusetts colonies organized their militias from the beginning of their settlement, and in 1636 the Massachusetts General Court organized the militias of the various towns into three regiments. By the time of the French and Indian War in 1760s, the British regulars often used colonial militiamen in their military campaigns. Edward P. Cheyney, *A Short History of England* 65 (1919*). See also,* G. Adams and H. Stephens, *Select Documents of English Constitutional History*, 23–25 (1926).

These militia were locally organized and locally led, but there were also more broad-based units

known as "rangers" consisting of men who had previous fighting experience. Each colonial government organized the various town militias within that colony, but there was no pan-colonial force. The idea of cooperation among the colonies was, as of that time, a thing of the future.

The War for Independence forced some changes. The militias of the various states began to work together, and the Continental Congress, for the first time, created a continental army with fixed terms of enlistment and fixed forms of discipline and training. The Massachusetts Legislature directed militia commanders to prepare one-third of their command to respond instantly to calls for action; this one-third became known as the Minute Men (of whom Paul Revere was famously a part). Together, the Continental Army and the militiamen secured American independence. Many colonists praised the militiamen for their loyal and selfless service, but others said the militiamen lacked the training and discipline to stand up to British regulars.

When the Constitutional Convention met in 1787, they gave considerable attention to matters of national defense. They knew the new nation needed a military defense, but they also knew a standing army could be oppressive. Accordingly, they crafted a constitution that balanced the power of the national government against that of the state and local governments and their militias.

First, Article I, § 8 provides that: "The Congress shall have power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;" and that "The

Congress shall have power . . . To provide and maintain a Navy." Notice the different language. Congress is empowered to "raise and support" Armies and to "provide and maintain" a Navy, and the two-year appropriation limit for Armies does not apply to the Navy. "Provide and maintain" implies a more permanent force than does "raise and support." The Framers apparently believed a permanent naval force was necessary, but they believed armies should be raised and supported as needed, and in peacetime the nation would rely upon the local and state militias.

Then, Article I, § 8 of the Constitution addresses the militia:

> The Congress shall have power . . . To make rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Congress has supervisory authority over the armed forces generally, but the authority to train the militia and appoint militia officers is reserved to the states, provided they conduct that training "according to the discipline prescribed by Congress." Congress also has power to provide for calling the

militia into federal service, meaning that Congress can federalize the militia of one or more states or pass legislation authorizing the President to call the militia into federal service. All of this ties in with the Second Amendment: "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."

In 1792, Congress passed the Uniform Militia Act to give limited direction to the state militias. Section 1 of the Act defined militia according to the common historic understanding:

> That each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of 18 years, and under the age of 45 years (except as is herein after excepted) shall severally and respectively be enrolled in the militia by the captain or commanding officer of the company, within whose bounds such citizens shall reside, and that within 12 months of the passing of this act. … That every citizen so enrolled and notified shall, within 6 months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack [etc.] … and shall appear so armed, accoutred and provided, when called out to exercise, or into service . . . and that from and after five years 14 from the passing of this Act, all muskets for arming the militia as herein required shall of bores sufficient for balls of the eighteenth part of a pound. And every citizen so enrolled,

> and providing himself with the arms, ammunition and accoutrements required as aforesaid, shall hold the same exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes.

The definition of the militia as all able-bodied male citizens was in keeping with the understanding of the time. Noah Webster, in the 1828 edition of his *American Dictionary of the English Language,* offered the following definition:

> Militia: The body of soldiers in a state enrolled for discipline, but not engaged in actual service except in emergencies; as distinguished from regular troops, whose sole occupation is war or military service. The militia of a country are the able bodied men organized into companies, regiments and brigades, with officers of all grades, and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations.

More recently, *Black's Law Dictionary* defines militia similarly: "The body of citizens in a state, enrolled for discipline as a military force, but not engaged in actual service except in emergencies, as distinguished from regular troops or a regular army." 1145 (4th ed. 1968). And the definition found in the United States Code today is similar:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or

> who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.
>
> (b) The classes of the militia are
>
> (1) The organized militia, which consists of the National Guard and the Naval Militia; and
>
> (2) The unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

10 U.S.C. § 311.

One purpose of the militia is to defend the liberty of the people against foreign invaders. Throughout history it has worked effectively, and it still works today. CDR Robert Menard attended a 1960 meeting between US Navy personnel and their Japanese counterparts. One American naval officer asked why the Japanese did not invade America's west coast. A Japanese admiral answered: "We knew that probably every second home in your country contained firearms. We knew that your country actually had state championships for private citizens shooting military rifles. We were not fools to set foot in such quicksand." Massad Ayoob, *The Rationale of the Automatic Rifle* (2001), https://www.backwoodshome.com/the-rationale-ofthe-automatic-rifle/.

But the militia serves another purpose: the defense of the people's liberty against domestic

tyrants. Lest some think this thought seems radical and almost subversive, consider James Madison's words in *The Federalist No. 46:*

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the state governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth of the number able to bear arms. This proportion would not yield in the United States an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

(Carey & McClellan eds., 2001). And Alexander Hamilton, a continental colonel but hardly a wild-eyed revolutionary, expressed a similar thought in *The Federalist No. 29*:

> Little more can reasonably be aimed at with respect to the people at large than to have

> them properly armed and equipped. . . . This will not only lessen the call for military establishments; but if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens, little, if at all, inferior to them in discipline and in the use of arms, who stand ready to defend their rights and those of their fellow citizens.

(Carey & McClellan eds., 2001).

Across both the ocean and millennia, Aristotle would have agreed: "[A] king's body-guard consists of citizens, a tyrant's of foreign mercenaries . . . For those who possess and can wield arms are in a position to decide whether the constitution is to continue or not."[10] The Framers' reliance upon a militia composed of the able-bodied men of the states and local communities, men who possessed arms and knew how to use them, demonstrates the high value they placed upon the Second Amendment right to keep and bear arms.

However, as this Court has clearly recognized in *Heller,* the militia clause of the Second Amendment is only the "prefatory clause;" the keep and bear arms clause is the "operative clause." The prefatory clause states a reason for the operative clause, but not a pre-condition and not even the only reason: "The prefatory clause does not suggest that

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[10] Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right*, 7–8 (2013) (quoting Aristotle, Politics, § 1301a (350 B.C.)).

preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting." *Heller* at 599.

In a day when police forces were not readily available, especially in rural areas, and even in urban areas could not be quickly summoned by calling 911, and in which many relied upon hunting to provide food for their families, these other purposes of the Second Amendment were even more vital than today.

Dr. Herrera's ownership of an AR-15 will be of little value to him if he cannot use it to train for his SWAT team duties or protect himself or his family in their home or on the street. Illinois' restrictions and the Seventh Circuit decision have reduced this precious Second Amendment right to a virtual nullity.

CONCLUSION

In 1989, Sanford Levinson published an article in the Yale Law Journal titled *The Embarrassing Second Amendment*. Professor Levinson suggested that liberal academics wish the Second Amendment were not part of the Constitution and therefore downplay its importance by interpreting it to apply only to governments rather than individuals or in other ways giving it a very limited construction. However, Levinson says, the Amendment appears to mean exactly what it says: "the people" have a right

to "keep and bear arms."[11]

Levinson's article helps us understand why officials and legislators in liberal-leaning states adopt statutes and policies that seem to defy this Court's clear pronouncements in *Heller, McDonald,* and *Bruen.* But the Second Amendment is part of the Constitution and therefore the Supreme Law of the Land. Unless and until it is amended or repealed, it must be interpreted as written.

This Court has spoken clearly as to the meaning of the Second Amendment, and most lower courts have followed this Court's interpretation. But because a few have twisted the Second Amendment to say what they wish it said rather than what it actually says, this Court should grant this Petition for Writ of Certiorari and reverse the Seventh Circuit decision.

Respectfully submitted,

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[11] Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. J. 637 (1989).

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March 15, 2024