

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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04-5016, 04-5081

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**SANDRA SEEGARS, GARDINE HAILES, ABSALOM F. JORDAN, JR.,  
CARMELA B. BROWN, and ROBERT N. HEMPHILL**

Appellants and Cross-Appellees

v.

**JOHN D. ASHCROFT, Attorney General of the United States,**

Appellee and Cross-Appellant

and

**ANTHONY A. WILLIAMS, Mayor, District of Columbia,**

Appellee

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**BRIEF FOR APPELLANTS/CROSS-APPELLEES**

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Appeal from the U.S. District Court  
for the District of Columbia  
District Ct. Civil No. 1-03CV00834(RGW)

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **Parties and Amici**

Plaintiffs in the district court and appellants/cross-appellees in this court include Sandra Seegars, Gardine Hailes, Absalom F. Jordan, Jr., Carmela B. Brown, and Robert N. Hemphill. Defendants in the district court include John D. Ashcroft, Attorney General of the United States, and Anthony A. Williams, Mayor of the District of Columbia. Ashcroft is also cross-appellant in this court. The amici in the district court and in this court include the Violence Policy Center and the Brady Center to Prevent Gun Violence.

Circuit Rule 26.1 is inapplicable inasmuch as all plaintiffs/appellants are natural persons.

### **Rulings Under Review**

The rulings under review are the final Order of the district court for the District of Columbia, the Honorable Reggie B. Walton presiding, entered in this case on January 14, 2004, granting defendants' motions to dismiss (Joint Appendix ["JA"] 27), and the Amended Memorandum Opinion entered on January 29, 2004 (JA 28). The Opinion is reported at 297 F. Supp. 2d 201.

### **Related Cases**

This case has not previously been before this Court or any other court. *Shelly*

*Parker et al. v. District of Columbia*, No. 04-7041, currently pending in this Court, is a related case inasmuch as it challenges the same provisions of the D.C. Code as this case under one of the same theories as this case, i.e., that such provisions violate U.S. Const., Amend. II. There are no related cases in any other court of which counsel is aware.

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## **JURISDICTIONAL STATEMENT**

Jurisdiction in the district court was founded on 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States, and under 28 U.S.C. § 1343(3) in that this action seeks to redress the deprivation, under color of the laws, statute, ordinances, regulations, customs and usages of the District of Columbia, of rights, privileges or immunities secured by the United States Constitution, and by Acts of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. This action seeks declaratory and injunctive relief and a writ of mandamus pursuant to 28 U.S.C. §§ 2201, 2202, and 42 U.S.C. § 1983.

This Court has jurisdiction under 28 U.S.C. § 1291. The district court rendered final judgment for the defendants in an Order granting the motions to dismiss on January 14, 2004, Joint Appendix (“JA”) 27, and an accompanying Memorandum Opinion dated January 14, 2004. Plaintiffs filed a timely notice of appeal on January 15, 2004. JA 95. The court issued an Amended Memorandum Opinion on January 29, 2004. JA 28. Defendant John D. Ashcroft filed a notice of appeal on March 15, 2004. JA 97. Both appeals are from a final order by the United States district court that disposes of all claims with respect to the parties.<sup>1</sup>

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<sup>1</sup> By Order dated March 19, 2004, this Court consolidated the two appeals as cross-appeals.

## STATEMENT OF ISSUES

Law-abiding residents of the District of Columbia wish to possess pistols and usable firearms in their dwellings for security and protection against crime. These measures are prohibited by D.C. Code § 7-2502.02(a) (prohibits registration of pistol), § 7-2507.02 (requires firearms to be disassembled or locked), and § 22-4504(a) (prohibits carrying pistol in one's dwelling). The issues are whether the requirements of standing and ripeness were met to challenge such provisions, and whether these provisions:

1. Infringe on the right of the people to keep and bear arms guaranteed by the Second Amendment to the U.S. Constitution.

2. Are inconsistent with D.C. Code § 1-303.43, in which Congress authorized the District to pass only “usual and reasonable police regulations . . . necessary for the regulation of firearms.”

3. Violate the Civil Rights Act of 1866, 42 U.S.C. §1981(a), which guarantees to all persons “the same right . . . to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . .”

## CONSTITUTION, STATUTES, AND REGULATIONS

The following are in the Addendum: U.S. Const., Amend. II; 42 U.S.C. §

1981(a); D.C. Code §§ 1-303.43, 7-2502.01, 7-2502.02, 7-2507.02, 7-2507.06, 22-4504, 22-4515.

## **STATEMENT OF THE CASE**

### **Proceedings in the Court Below**

This is an action for declaratory and injunctive relief to allow plaintiffs, who are law-abiding residents of the District of Columbia, to possess pistols in their homes for security, to carry them in the home when necessary, and to keep firearms in the home ready for use. Complaint, JA 9. The D.C. Code criminalizes these defensive measures.

Defendants include John D. Ashcroft, Attorney General of the United States, and Anthony A. Williams, Mayor of the District of Columbia, in their official capacities. Both defendants head law enforcement agencies and departments of prosecuting attorneys which enforce and prosecute violations of the D.C. Code.

Count One of the complaint alleges that these provisions infringe on the right of the people to keep and bear arms as guaranteed by U.S. Const., Amend. II. JA 17-18. Count Two alleges that these provisions are not authorized by the enabling act passed by Congress, D.C. Code § 1-303.43, which is limited to “usual and reasonable police regulations . . . necessary for the regulation of firearms.” JA 18-20. Count Three alleges that the provisions violate 42 U.S.C. §1981(a), which guarantees to all persons “the same right . . . to the full and equal benefit of all laws and proceedings for the

security of person and property as is enjoyed by white citizens . . . .” JA 21-22.

Defendant Attorney General Ashcroft filed a motion to dismiss the plaintiffs’ claims against him under Fed. R. Civ. P. 12(b), on the basis that the elements of standing and ripeness were lacking. Defendant Mayor Williams filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim on which relief can be granted.

The district court entered an Order on January 14, 2004, granting the motions to dismiss for the reasons set forth in the Memorandum Opinion of the same date. JA 27. That Opinion was superseded by the Amended Memorandum Opinion dated January 29, 2004. JA 28. The court found that plaintiffs’ challenges to D.C. Code §§ 7-2502.02 (ban on possession of a pistol) and 22-4504(a) (ban on carrying a pistol) were non-justiciable due lack of standing and ripeness. JA 93-94. However, the court found that plaintiff Hailes’ challenge to § 7-2507.02 (ban on operable firearm) was justiciable. JA 94.

The district court dismissed Count One of the complaint, concluding that “Ms. Hailes’ claims are not only lacking on the merits, but that the Second Amendment does not apply to the District of Columbia.” JA 94. The court held that Counts Two and Three failed to state a claim on which relief can be granted. JA 49 n.12. This appeal followed.

## Facts

D.C. Code § 7-2502.01(a) provides that “no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm.” However, § 7-2502.02(a) provides: “A registration certificate shall not be issued for a: . . . (4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976 . . . .”<sup>2</sup> Violation is punishable by a \$1000 fine and not more than one year imprisonment. § 7-2507.06.<sup>3</sup>

Registered firearms kept at home must be disabled so that they may not be used by the lawful owner. Section 7-2507.02 provides:

Except for law enforcement personnel described in § 7-2502.01(b)(1), each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

No exception is provided for defensive use in the home against a violent intruder. Violation is punishable by imprisonment for not more than 1 year and a fine of \$1,000. § 7-2507.06.

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<sup>2</sup> “‘Pistol’ means any firearm originally designed to be fired by use of a single hand.” § 7-2501.01(12).

<sup>3</sup> A second offense is punishable by up to \$5000 fine and five years imprisonment, except an unregistered firearm possessed on one’s premises is punishable as above. § 7-2507.06(2).

It is a crime to carry a pistol without a license, even in one's dwelling. Section 22-4504(a) provides:

No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-4515, except that:

(1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than \$ 5,000 or imprisoned for not more than 5 years, or both . . . .

The offense may be prosecuted as a felony in all cases, for it is the defendant's burden to establish the "dwelling house" exception.<sup>4</sup> If met, the violation is punishable as a misdemeanor under § 22-4515, which provides for a \$1000 fine and no more than one year imprisonment.

"[N]o specific intent to use the gun . . . need be proved in order to obtain a conviction . . . ." *Bsharah v. United States*, 646 A.2d 993, 999-1000 (D.C. 1994). *See Yoon v. United States*, 594 A.2d 1056, 1057 (D.C. 1991) (no defense that operator of market "had been held up at gunpoint at least six times and shot at twice; the most

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<sup>4</sup> "The burden is on appellant to produce some evidence to bring himself within the exception." *Fortune v. United States*, 570 A.2d 809, 810 (D.C. 1990) (noting lack of case law on "who, within a residential household, is entitled to claim the 'dwelling house' exception").

recent holdup was four days before the present events”).

The offense occurs when a pistol is carried without a license, but licenses are unavailable. “It is common knowledge . . . that with very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable.” *Bsharah*, 646 A.2d at 996 n.12.

Prosecution for violation of the provisions at issue may be made by the U.S. Attorney, who serves under defendant Ashcroft, or D.C. Corporation Counsel, which serves under the direction of defendant Williams.<sup>5</sup> The Attorney General’s Motion to Dismiss at 6 & n.1, explains:

Typical prosecutions conducted by the U.S. Attorney for the District of Columbia involve violations of multiple provisions of the statutes (usually carrying an unregistered pistol without a license) or violations charged as felonies . . . .

[Footnote 1] *See Copening v. United States*, 353 A.2d 305, 307 n.2 (D.C. 1976) (noting long-standing consent by D.C. government to permit U.S. Attorney to include prosecution for possession of an unregistered firearm along with prosecution for carrying a pistol without a license).

An arrest may be made by officers of the Metropolitan Police Department, which serves under defendant Williams, or of federal law enforcement agencies, such as the

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<sup>5</sup> *See* D.C. Code § 23-101(a) (violation of penal statutes where the maximum imprisonment does not exceed one year prosecuted in the name of the District by the D.C. Corporation Counsel); § 23-101(c) (all other criminal prosecutions conducted in the name of the United States by the U.S. attorney).

Federal Bureau of Investigation or the Bureau of Alcohol, Tobacco, Firearms and Explosives, which serve under defendant Ashcroft.

All plaintiffs are eligible under the laws of the United States to possess firearms.<sup>6</sup>

All plaintiffs wish to obtain pistols to defend themselves in their homes. But for D.C. Code § 7-2502.02(a), all plaintiffs would forthwith obtain and register a pistol to keep at home for self protection. JA 14-16.<sup>7</sup>

Plaintiff Sandra Seegars, who is retired on a disability, is a Commissioner of the D.C. Taxicab Commission and an elected Advisory Neighborhood Commissioner. She resides in a high crime neighborhood and is a crime victim. JA 14.

Plaintiff Gardine Hailes is employed as an officer manager. Her house and her neighbor's house have been burglarized. She currently possesses a registered shotgun which she keeps bound by a trigger lock. But for D.C. Code § 7-2507.02, she would remove the trigger lock when she deems it necessary to defend herself in her home. JA 14-15.

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<sup>6</sup> Federal law lists the categories of persons which Congress has determined may not be trusted to possess firearms. *See* 18 U.S.C. § 922(g). Background checks are performed on all persons who receive firearms from licensed dealers. § 922(t).

<sup>7</sup> Factual allegations refer to the complaint, which must be taken as true in a motion to dismiss.

Plaintiff Absalom F. Jordan, Jr., is an elected Advisory Neighborhood Commissioner and an NRA Certified Firearms Instructor. He is a victim of attempted armed robbery.<sup>8</sup> Jordan lives in a major drug area and is involved in efforts to expel drug dealers from the neighborhood. He lawfully owns a pistol which he stores outside the District. But for D.C. Code § 7-2502.02(a), Jordan would forthwith register his pistol with the District and keep it at his residence for self protection. JA 15.

Plaintiff Carmela B. Brown is a writer and actor. She resides in a high crime neighborhood rife with open-air drug trafficking and prostitution. JA 15. Plaintiff Robert N. Hemphill is a retired postman. JA 15.

Plaintiffs wish to obtain and possess pistols to keep in their homes for lawful defense from any sudden, deadly attack by an intruder. Plaintiff Hailes wishes to render her shotgun usable should urgent circumstances warrant. However, they face arrest, prosecution, and incarceration should they violate the above provisions. But for those provisions and the enforcement thereof by defendants, plaintiffs would forthwith obtain and possess pistols and keep firearms in usable condition when necessary for security. As a proximate cause of the provisions and their enforcement, plaintiffs are subjected to irreparable harm. JA 15-17.

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<sup>8</sup> He was denied a license to carry a pistol under the D.C. Municipal Regulations. *Jordan v. District of Columbia*, 362 A.2d 114 (D.C. 1976).

## SUMMARY OF ARGUMENT

Plaintiffs have standing, and the case presents a live controversy. Their grievances are within the zone of interests protected by the Second Amendment and by the statutes invoked here. Defendants, who have no duty to protect citizens, violate plaintiffs' right to keep arms, thereby increasing the risk of injury to plaintiffs' persons and property.

Plaintiffs suffer injury by being forced into the dilemma of forgoing prudent security measures and being threatened by criminals, or violating the law and being threatened with arrest and prosecution. Their injuries would be redressed by a favorable decision. They thereby meet the justiciability requirements set forth in *Navegar v. United States*, 103 F.3d 994 (D.C. Cir. 1997), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Defendants aggressively enforce the District's firearms prohibitions. Plaintiffs fears of prosecution are not imaginary, and they need not expose themselves to arrest to challenge the ordinances.

No doubt exists that the challenged provisions apply to plaintiffs. Jordan must keep his pistol stored outside of the District, and Hailes must keep her registered shotgun unusable, depriving both of the use of their firearms for protection in their own homes. The other plaintiffs would forthwith obtain pistols for home security but for

enforcement of the law. There is nothing speculative about their wish to engage in conduct plainly prohibited on the face of the allegedly unconstitutional statute.

This is an action under 42 U.S.C. § 1983, which does not require exhaustion of local administrative remedies. *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 516 (1982). It would be futile to apply to register a pistol when such registration is plainly prohibited.

The complaint states a valid claim for violation of the Second Amendment, which provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), held that “the people” means the same in the First, Second, and Fourth Amendments. In the Constitution’s usage, “rights” are held by individuals, while governments have “powers.” “The people” are distinguished from “the militia” and “the States,” terms used in the Militia Clause of Art. I, § 8, and the Fifth and Tenth Amendments.

The Second Amendment guarantees a right to possess a pistol, which is an ordinary militia firearm. *United States v. Miller*, 307 U.S. 174, 178 (1939), adopted the test of whether a firearm “is any part of the ordinary military equipment or that its use could contribute to the common defense.” *Miller* focused on the nature of the arm, not the status of the possessor as a militia member.

The most exhaustive appellate decision on the Second Amendment, *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), followed *Miller* in holding that the Second Amendment “protects the rights of individuals, including those not then actually a member of any militia . . . , to privately possess and bear their own firearms, such as the pistol involved here . . . .”

The terms “to keep and bear arms” refer to an individual right. Bearing arms in a militia may be a duty, but is not a “right.” The argument that the Second Amendment protects a “right” to carry weapons in the militia has no merit.

To “keep” arms includes keeping them in the home, and is not subsumed by the term “bear” arms. To “bear” arms includes any carrying of a firearm, whether by a citizen or a soldier. Whether one may bear arms in, or even join, a militia is a matter for legislative and military judgment, and is not a constitutional right.

Federal-State militia powers are defined in U.S. Const., Art. I, § 8, cl. 16, not the Second Amendment. While the Amendment’s militia clause serves as an admonition, its only substantive guarantee is that the people have a right to keep and bear arms, which right promotes a well regulated militia.

The federal appellate courts are split on whether the Amendment protects individual rights or “collective rights” which have no concrete existence. The latter view is best articulated in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003). The

district court here followed *Silveira* and rejected *Emerson*. *Silveira* is unpersuasive in attempting to transform “the right of the people to keep and bear arms” into an elusive State power over militias.

The District’s firearms prohibitions may be justified only on a convoluted, unnatural reading of the Second Amendment. District residents are among “the people” whose right to have arms “shall not be infringed,” rendering the provisions at issue void.

The complaint also alleges that the provisions at issue are not authorized by D.C. Code § 1-303.43, which limits the District’s power to “such *usual and reasonable* police regulations” which are “necessary for the regulation of firearms.”

The provisions are not “usual.” Under the laws of the United States and of every State in the Union, a law-abiding citizen may possess a pistol in the home. “Owning a gun is usually licit and blameless conduct.” *Staples v. United States*, 511 U.S. 600, 613-14 (1994). No law of the United States or of any State requires a firearm at home to be disabled in all circumstances or prohibits carrying a pistol in one’s own dwelling.

The provisions are not “reasonable.” Congress has consistently interpreted the Second Amendment to protect the individual right to keep and bear firearms. It did so in the Freedmen’s Bureau Act (1866), the Property Requisition Act (1941), and the Firearms Owners’ Protection Act (1986).

What Congress deemed “usual and reasonable” may also be found by reference to what Congress enacted for the District. The Act of 1932, which remains in effect, focused on disarming criminals, not law-abiding citizens, of pistols. Machine guns are banned, but not pistols. Provisions for transfer of pistols and licenses to carry pistols indicate that Congress intended that pistols could be possessed. The provision that persons need not have a license to carry a pistol in their dwellings reflected “the right of an individual to possess a pistol in his home.” Senate Report 575, 72d Cong., 1st Sess., at 3 (1932).

The “usual and reasonable” criteria are not mere platitudes, but must be taken seriously. “Congress, if it had been so minded, could have authorized such a sweeping, not to say *unusual and unreasonable*, regulation,” but it did not. *Crane v. District of Columbia*, 289 F. 557, 561 (D.C. App. 1923). The prohibitions at issue, being neither usual nor reasonable, are not authorized by § 1-303.43 and are thus void.

The complaint also alleges that the District’s prohibitions violate the Civil Rights Act of 1866, 42 U.S.C. §1981(a), which guarantees “the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . .” This paralleled the Freedmen’s Bureau Act of 1866, which protected “the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and

. . . estate, . . . including the constitutional right to bear arms . . . .” § 14, 14 Stat. at 176-77.

Both Acts were intended to override the Black Codes, which prohibited blacks from possessing firearms, and to protect the same rights. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 424 n.31 (1968). Section 1981 would not only forbid discrimination, it would also “affirmatively secure for all men, whatever their race or color, what the Senator [Trumbull] called the ‘great fundamental rights’ . . . .” *Id.* at 432. The “full and equal benefit” clause “guarantee[s] numerous rights other than equal treatment . . . .” *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 671 (1987) (Brennan, J., concurring in part and dissenting in part).

The District’s firearms prohibitions abrogate the fundamental right to “the security of person and property” as protected by § 1981. Accordingly, plaintiffs stated a claim on which relief may be granted, and it was error to dismiss the complaint.

## **ARGUMENT**

### **Standard of Review**

As the issues here are questions of law, this Court conducts a *de novo* review. *Berger v. Iron Workers Reinforced Rodmen*, 170 F.3d 1111, 1125 (D.C. Cir. 1999).

**I. THIS ACTION PRESENTS A JUSTICIABLE  
CASE OR CONTROVERSY**

**A. Plaintiffs' Grievances are Within the Zone of Interests  
Protected by the Second Amendment and by Statute**

The provisions at issue injure plaintiffs by prohibiting them from obtaining pistols and from keeping operable firearms to protect themselves in their homes, in violation of the Second Amendment and the statutes invoked here.<sup>9</sup> Standing may derive from “the ‘zone of interests’ intended to be protected or regulated by the statute or constitutional guarantee in question.” *Navegar v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997), citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982).<sup>10</sup>

“[P]reenforcement challenges have been heard outside of the First Amendment context . . . .” *Navegar*, 103 F.3d at 999 (citing economic injury cases).<sup>11</sup> By violating plaintiffs’ right to keep arms, the provisions at issue increase the risk of injury to

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<sup>9</sup> D.C. Code § 1-303.43 limits firearm regulation to “usual and reasonable police regulations.” 42 U.S.C. §1981(a) guarantees the right “to the full and equal benefit of all laws and proceedings for the security of person and property.”

<sup>10</sup> “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n.3 (1973).

<sup>11</sup> No constitutional right is “less ‘fundamental’ than” others, and “we know of no principled basis on which to create a hierarchy of constitutional values or a complementary ‘sliding scale’ of standing . . . .” *Valley Forge*, 454 U.S. at 484.

plaintiffs' persons and property. Indeed, the burglaries and robberies they have previously suffered and may suffer in the future are every bit as cognizable as non-violent economic injuries.<sup>12</sup>

The District has a far higher murder rate than any State.<sup>13</sup> Yet “a government and its agents are under no general duty to provide . . . police protection, to any particular individual citizen.” *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981) (*en banc*) (women raped and assaulted).

“The right to defend oneself from a deadly attack is fundamental.” *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982).<sup>14</sup> A person must provide her own

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<sup>12</sup> “An identifiable trifle is enough for standing . . .” *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (a stake of \$5).

<sup>13</sup> *FBI Uniform Crime Report* (2003), 79 (murder/non-negligent manslaughter rate of 46.2 per100,000).

<sup>14</sup> *Delahanty v. Hinckley* 686 F. Supp. 920, 929 (D. D.C. 1986), observed:

While blighted areas may be some of the breeding places of crime, not all residents of [them] are so engaged, and indeed, most persons who live there are lawabiding but have no other choice of location. But they . . . may seek to protect themselves, their families and their property against crime, and indeed, may feel an even greater need to do so since the crime rate in their community may be higher than in other areas of the city. . . . To remove cheap weapons from the community may very well remove a form of protection assuming that *all* citizens are entitled to possess guns for defense.

protection in her home. “[A] person who takes no initiative to provide security in these private places is essentially leaving security to chance.” *State v. Hamdan*, 2003 Wis. 113, 665 N.W.2d 785, 807 (2003).<sup>15</sup>

*Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000), upheld standing where:

[T]he statute deprives him of the ability to possess a firearm and, consequently, has cost him his job as an Indianapolis police officer. If we were to conclude that the statute runs afoul of the Second Amendment, . . . then the disability imposed by the statute would be void, and Gillespie would regain the opportunity to carry a firearm . . . . In other words, he has suffered a cognizable injury as a result of the statute’s enactment, and that injury is one that would be redressed through a favorable ruling on his Second Amendment challenge.

Accordingly, plaintiffs’ grievances are within the zone of interests intended to be protected by the Second Amendment and by statute. Their injuries would be redressed by a favorable ruling.

### **B. Plaintiffs Meet Standing and Ripeness Requirements**

Plaintiffs suffer injury by being forced into the dilemma of forgoing prudent security measures and being threatened by criminals, or violating the law and being

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<sup>15</sup> “If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence . . . .” *Id.* at 808. “The right of defense of self, property and family is a fundamental part of our concept of ordered liberty. . . . For many, the mere possession of a firearm in the home offers a source of security.” *Arnold v. Cleveland*, 616 N.E.2d 163, 169-70 (Ohio 1993).

threatened with arrest. They meet all of the requirements of standing and ripeness.

Based on the facts alleged, plaintiffs meet the standing elements set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), as follows:

First, the plaintiff must have suffered an “injury in fact”--an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” . . . . Second, there must be a causal connection between the injury and the conduct complained of-- the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” . . . Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” (Citations omitted.)

In addition to standing, plaintiffs meet the necessary ripeness requirements.

*Navegar* explained:

In deciding whether a case is ripe for adjudication, federal courts generally consider the hardship to the parties of withholding court resolution (a factor that overlaps with the “injury in fact” facet of standing doctrine), and the fitness of the issues for judicial decision (a factor that resembles the prudential concerns applied in the standing context).

103 F.3d at 998, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

Regarding hardship, *Abbott Laboratories* noted, “The alternative to compliance . . . would risk serious criminal and civil penalties . . . .” *Id.* at 153. “To require [petitioners] to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily.” *Id.* Judicial resolution is appropriate where “the issue tendered is a purely legal one,” and where “final agency

action” exists. *Id.* Here, the issue is purely legal, enforcement of the ordinance is longstanding, and the injuries are severe: risk crime against one’s person and property in one’s own home or risk arrest and criminal prosecution.

“Even when the criminal statute that a litigant challenges has not yet been enforced against her, the challenger’s claim may be justiciable if the challenger can demonstrate that she faces a threat of prosecution under the statute which is credible and immediate, and not merely abstract or speculative.” *Navegar*, 103 F.3d at 998. “A credible threat of imminent prosecution can injure the threatened party by putting her between a rock and a hard place--absent the availability of preenforcement review, she must either forego possibly lawful activity because of her well-founded fear of prosecution, or willfully violate the statute, thereby subjecting herself to criminal prosecution and punishment.” *Id.*, citing *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298-99 (1979).

The provisions at issue are aggressively enforced, and plaintiffs surely meet the following level of threat articulated in *Babbitt*:

When fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not “first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.” . . . Moreover, the State has not disavowed any intention of invoking the criminal penalty provision . . . . Appellees are thus not without some reason in fearing prosecution . . . .

442 U.S. at 302.

In the District of Columbia, plaintiffs' fear of prosecution is not imaginary or speculative. Nor have Ashcroft and Williams disavowed any intention of invoking the criminal penalties.

“It is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.” *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). *Steffel* viewed an actual controversy as existing where a criminal statute clearly applied to a person who thereby refrained from engaging in what he alleged to be constitutionally-protected conduct.<sup>16</sup> *Navegar* noted:

To require litigants seeking resolution of a dispute that is appropriate for adjudication in federal court to violate the law and subject themselves to criminal prosecution before their challenges may be heard would create incentives that are perverse from the perspective of law enforcement, unfair to the litigants, and totally unrelated to the constitutional or prudential concerns underlying the doctrine of justiciability.

103 F.3d at 1000-01.

*Navegar* upheld standing to challenge provisions that clearly applied, but “the general nature of the language of these [other] portions of the Act makes it impossible

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<sup>16</sup> While police informed the plaintiff that he may be arrested if he did not stop handbilling, *Steffel, id.* at 455-56 & n.2, trespass laws require notice and refusal to leave. *Steffel* did not suggest that a personal threat of arrest is required for standing where the law clearly applies.

to foretell precisely how these provisions may be applied . . . .” *Id.* at 1001. The latter involved allegedly vague definitions that the agency had not applied in a manner injurious to plaintiffs. Here no doubt exists that the challenged provisions apply to plaintiffs.<sup>17</sup>

*Peoples Rights Organization, Inc. v. City of Columbus* (“PRO”), 152 F.3d 522, 528-29 (6th Cir. 1998), found standing and ripeness in the following situation:

Plaintiffs . . . face a clear Hobson’s choice. They can either possess their firearms in Columbus and risk prosecution under the City’s law, or, alternatively, they can store their weapons outside the City, depriving themselves of the use and possession of the weapons.

Two plaintiffs here are in the same situation in that they already possess firearms subject to the prohibition. To avoid the risk of arrest and prosecution, Jordan must store his pistol outside the District, which deprives him of its use and possession. JA 15. Similarly, Hailes keeps her shotgun disabled, depriving herself of having it usable in an emergency against violent intruders. JA 16.

The ordinance is fit for review because it “is not subject to any type of clarifying interpretation . . . . Rather, the words of the ordinance provide the sole source of

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<sup>17</sup> “This is not to say that there must always be an explicit and specific threat of enforcement in order that one may obtain a judicial declaration such as that sought here.” *Lion Manufacturing Corp. v. Kennedy*, 330 F.2d 833, 838 n.10 (D.C. Cir. 1964) (but plaintiffs failed to describe how law applied to them).

guidance for firearms' owners." *PRO*, 152 F.3d at 530.

It would be insufficient to allege that plaintiffs merely "'desire' and 'wish' to engage in certain *possibly* prohibited activities." *Id.* at 529-30 & n.8 (emphasis added). Here, however, plaintiffs allege that they would "forthwith" obtain pistols for their security but for a law which clearly applies. A challenge to a firearms prohibition is justiciable where "the plaintiffs wish to engage in conduct plainly prohibited on the face of the allegedly unconstitutional statute." *Coalition of New Jersey Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d 666, 673 n.10 (D. N.J. 1999), *aff'd*, 263 F.3d 157 (3d Cir. 2001) (*mem.*), *cert. denied*, 534 U.S. 1039 (2001).

This is not a case where the law is not enforced, as in *Poe v. Ullman*, 367 U.S. 497, 501 (1961) (ban on contraceptives). Defendants vigorously enforce the provisions at issue.

In sum, plaintiffs have adequately demonstrated the elements of standing and ripeness.

**C. Plaintiffs are not Required to Pursue Local Administrative Remedies in a § 1983 Action, Which in Any Event Would be Futile**

This action seeks relief under 42 U.S.C. § 1983. JA 11. "[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496,

516 (1982).

Moreover, it would be futile to apply to register a pistol, as such registration is prohibited. D.C. Code § 7-2502.02(a)(4). It would also be futile to apply for a license to carry a pistol, as such licenses are not issued to the public, including plaintiffs. JA 13; *Jordan*, 362 A.2d at 114; *Bsharah*, 646 A.2d at 996 n.12. No license would be issued to carry an unregistered, and hence illegal, pistol.

In holding this action not to be ripe, the district court confused pistol registration with a license to carry a pistol:

Title 24 of the District of Columbia Municipal Regulations § 2303.9(c) permits the Chief of Police to issue a registration certificate to individuals who “[h]ave reason to fear injury to his or her person or property or any other proper reason.” D.C. Mun. Regs. tit. 24, § 2303.9(c) (2001).

JA 47 n.10. The Regulations concern “a license to carry a concealed weapon,” § 2303.1, and do not permit the Chief of Police to issue a registration certificate. Given the absolute bar on pistol registration in § 7-2502.02(a)(4), applying to register a pistol and pursuing administrative and judicial appeals could not offer any relief.

Failure to obtain a license is no defense to charges “where a licensing ordinance, valid on its face, prohibits certain conduct unless the person has a license.” *Poulos v. New Hampshire*, 345 U.S. 395, 409 & n.13 (1953). That assumes that the issuing authority “could be compelled to issue the requested license on demand,” *id.* at 408,

and that there is a “remedial state procedure for the correction of the error.” *Id.* at 414. However, one could not be convicted under an invalid law requiring a license to exercise a constitutional right: “The statutes were as though they did not exist.” *Id.* at 414. Nothing in *Poulos* would require plaintiffs here to apply to register pistols when the law prohibits such registration and is being challenged as void.

Where a person was denied purchase of a rifle from the Army because he refused to join an organization the law unconstitutionally required him to join, he was “injured” by the requirement and the case was justiciable. *Gavett v. Alexander*, 477 F. Supp. 1035, 1041 (D. D.C. 1979). Where “the statute’s plain words . . . renders him ineligible for a rifle purchase[,] . . . it would be a wholly futile step to require him to exhaust the ‘remedy’ [of an administrative procedure] . . .” *Id.* at 1043 (brackets in original), citing *Humana & South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1081 (D.C. Cir. 1978). The case was ripe without pursuing a futile administrative procedure.

In sum, this is a § 1983 action, under which plaintiffs are not required to exhaust local remedies. Applying to register pistols would be futile in that the law clearly prohibits any such registration. This case presents a justiciable controversy.

## **II. THE PROHIBITIONS VIOLATE THE SECOND AMENDMENT**

### **A. The Terms “Right of the People” Denotes Individual Freedoms, Not Governmental Powers**

Count One of the complaint alleges that the provisions at issue infringe on rights under the Second Amendment to the U.S. Constitution, which provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” JA 17-18.

District residents are included in “the people.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), explained about that term:

“The people” seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects “the right of the people to keep and bear Arms,” and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to “the people.” See also U.S. Const., Amdt. 1 (“Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble”) . . . . While this textual exegesis is by no means conclusive, it suggests that “the people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.<sup>18</sup>

*Verdugo-Urquidez* represents “firm and considered dicta that binds this court.”

*Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003). Earlier precedent

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<sup>18</sup> For a more expansive meaning, see 494 U.S. at 287 (Brennan, J., dissenting):

[T]he term “the people” is better understood as a rhetorical counterpoint to “the Government,” such that rights that were reserved to the “the people” were to protect all those subject to “the Government.” . . . “The people” are “the governed.”

also recognized individuals in the United States – but not in foreign countries – as having Second Amendment rights. If the Bill of Rights applied world wide, the American Judiciary would have to assure military enemies “freedoms of speech, press, and assembly as in our First Amendment, right to bear arms as in the Second, security against ‘unreasonable’ searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.” *Id.* at 1140, quoting *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950).

“Rights” are held by individuals, not by governments. The Bill of Rights “embod[ies] certain guarantees and immunities which we had inherited from our English ancestors,” and “in incorporating those principles into the fundamental law,” exceptions were recognized. *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). “Thus, . . . the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons . . . .”<sup>19</sup> *Id.*

As the Tenth Amendment shows, governments have “powers,” not “rights”: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” The United

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<sup>19</sup> See *United States v. Cruikshank*, 92 U.S. 542, 551, 553 (1876) (equating right to assemble and to keep and bear arms as not being “granted” by the Constitution because such rights preexisted the Constitution).

States and the States have “power” or “authority” (Art. I, § 8), including over “the militia” (*id.* Cl. 15 & 16). The Second Amendment protects the right of “the people” to keep and bear arms, in contrast to usage in the Fifth Amendment referring to the “the militia, when in actual service.” As stated in *United States v. Emerson*, 270 F.3d 203, 227-28 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002):

[A]s used throughout the Constitution, “the people” have “rights” and “powers,” but federal and state governments only have “powers” or “authority”, never “rights.” Moreover, the Constitution’s text likewise recognizes not only the difference between the “militia” and “the people” but also between the “militia” which has not been “call[ed] forth” and “the militia, when in actual service.” (Citations omitted.)

“Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the ‘right to keep and bear arms’ is, as the Amendment’s text suggests, a personal right.” *Printz v. United States*, 521 U.S. 898, 939 n.2 (1997) (Thomas, J., concurring) (citations omitted). *See Spencer v. Kemna*, 523 U.S. 1, 22 (1998) (Stevens, J., dissenting) (a criminal conviction “may result in tangible harms such as . . . loss of the right to vote or to bear arms”).<sup>20</sup>

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<sup>20</sup> In *Burton v. Sills*, 248 A.2d 521 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969), the Supreme Court found “want of a substantial federal question.” A State law required that firearm owners have an identification card, which “shall not be denied to any person of good character” and which thereby did not adversely affect the plaintiffs. 248 A.2d at 523-24. The Second Amendment was only one of five claims before the Court. It is speculative to assert why the Court dismissed the appeal, but lack of standing would be a good guess.

The residents of the District are among “the people,” and they have a “right” to keep and bear arms.<sup>21</sup> As the following shows, a pistol is an arm protected by the Second Amendment.

**B. *Miller* Held that the Second Amendment Guarantees a Right to Possess an Ordinary Militia Firearm, Which Includes a Pistol**

*United States v. Miller*, 307 U.S. 174 (1939), addressed the nature of the “arms” that the people have a right to keep and bear. It reversed a decision that requiring registration of certain firearms violates the Second Amendment,<sup>22</sup> and remanded for fact-finding based on the following:

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

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<sup>21</sup> “There is nothing in the history of the constitution, or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property.” *Callan v. Wilson*, 127 U.S. 540, 550 (1888). See *Pernell v. Southall Realty*, 416 U.S. 363, 370-71 (1974) (“Like other provisions of the Bill of Rights, it [the Seventh Amendment] is fully applicable to courts established by Congress in the District of Columbia.”).

<sup>22</sup> The provision in *Miller* required registration of certain firearms, and did not absolutely prohibit them, as here. This case does not raise the issue of whether registration of firearms violates the Second Amendment. Cf. *Watchtower v. Village of Stratton*, 536 U.S. 150, 153, 166 (2002) (voiding registration requirement for door-to-door advocacy under First Amendment).

Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

307 U.S. at 178.

*Miller* thus focused on the nature of a protected “arm,” and did not question that “the people” means individuals or that the private defendant had standing to raise the Second Amendment.<sup>23</sup> *Miller* did not suggest that the possessor must be a member of the militia or National Guard,<sup>24</sup> asking only whether the arm could have militia use.<sup>25</sup>

Justice Thomas has observed:

In *Miller*, we determined that the Second Amendment did not guarantee a citizen’s right to possess a sawed-off shotgun because that weapon had not been shown to be “ordinary military equipment” that could “contribute to the common defense.” . . . The Court did not, however,

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<sup>23</sup> “The Second Amendment guarantees no right to keep and bear *a firearm* that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia . . . .’” *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (quoting *Miller*) (emphasis added). *Lewis* held that “*These* legislative restrictions on the use of firearms” – i.e., a felon may not receive a firearm – “are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties.” *Id.* (emphasis added).

<sup>24</sup> See *Perpich v. Department of Defense*, 496 U.S. 334 (1990) (finding National Guard to be part of U.S. Armed Forces and discussing State militia powers with no mention of Second Amendment).

<sup>25</sup> Militia-type arms would be those appropriate for such militia duties as “to execute the laws of the Union, suppress Insurrections and repel Invasions.” U.S. Const., Art. I, § 8, cl. 15.

attempt to define, or otherwise construe, the substantive right protected by the Second Amendment.

*Printz*, 521 U.S. at 938 n.1 (Thomas, J., concurring).

*Miller* relied in part on *Aymette v. State*, 2 Hump. (21 Tenn.) 154, 158 (1840), which held that “the *arms*, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments on their rights by those in authority.”<sup>26</sup> *Aymette* further remarked: “The citizens have the unqualified right to keep the weapon . . . . But the right to bear arms is not of that unqualified character.”<sup>27</sup> *Id.* at 160.

While the declaration of the Second Amendment was made “to assure the continuation and render possible the effectiveness of such [militia] forces,” historically “the Militia comprised all males physically capable of acting in concert for the common defense,” and “these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” *Miller*, 307 U.S. at 178-79.

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<sup>26</sup> *Aymette* involved a knife. Later precedent held pistols to be military-type weapons and invalidated prohibitions on civilian possession thereof. *Andrews v. State*, 50 Tenn. 165 (1871).

<sup>27</sup> That was because the Tennessee Constitution guaranteed the right to bear arms “for their common defence,” 2 Hump. (21 Tenn.) at 158, a limitation not provided by the Second Amendment.

*Miller* approvingly cited the commentaries of Joseph Story and Thomas M. Cooley.

*Id.* at 182 n.3. Justice Story wrote:

The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.<sup>28</sup>

Similarly, Judge Cooley called the right to arms as “among the other safeguards to liberty” and noted that a well-regulated militia could not exist “unless the people are trained to bearing arms.”<sup>29</sup>

In *Emerson*, 270 F.3d at 260, the Fifth Circuit concluded: “We hold, consistent with *Miller*, that it [the Second Amendment] protects the rights of individuals, including those not then actually a member of any militia or engaged in active military service or

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<sup>28</sup> 2 J. Story, *Commentaries on the Constitution* 646 (5th ed. 1891). “One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people, and making it an offense to keep arms . . . .” J. Story, *A Familiar Exposition of the Constitution* 264 (1893).

<sup>29</sup> T. Cooley, *Constitutional Limitations* 729. T. Cooley, *General Principles of Constitutional Law* 281-282 (2d ed. 1891), states further:

It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . . The meaning of the provision undoubtedly is that the people from whom the militia must be taken shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.

training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons.” The United States agreed with that statement in the *Emerson* case before the Supreme Court.<sup>30</sup>

*Fraternal Order of Police v. United States*, 173 F.3d 898, 905-06 (D.C. Cir. 1999), found a Second Amendment challenge not to have been properly raised. “Since *Miller* dealt with Congress’s authority to prohibit ownership of short-barreled shotguns, FOP could have challenged the test’s applicability by arguing that it serves only to separate weapons covered by the amendment from uncovered weapons.” *Id.* at 906. However, FOP failed to present pertinent evidence.<sup>31</sup> *Id.*

Accordingly, the Second Amendment protects the individual right to keep a pistol and operable firearm in the home. The provisions at issue violate this right.

### **C. The Terms “Keep and Bear Arms” Refer to Individual Rights and Not to a Non-Existent “Right” to Bear Arms in a Militia**

The Second Amendment’s terms “to keep and bear arms” refer to a “right of the

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<sup>30</sup> Brief of the United States in Opposition at 20, in <http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.html>. “[T]he *Emerson* opinion, and the balance it strikes, generally reflect the correct understanding of the Second Amendment.” Memorandum From the Attorney General To All United States Attorneys, App., *id.*

<sup>31</sup> See *United States v. Maple*, 334 F.3d 15, 21 (D.C. Cir. 2003) (Second Amendment claim could not be raised for the first time on appeal).

people,” i.e., an individual liberty. Bearing arms in a militia may be a duty, but is not a “right.” The argument that the Second Amendment protects some sort of “right” to carry weapons in the militia has no merit.

To “keep” means in part “to continue to have or hold; not lose or give up.” *Webster’s New World Dictionary* (New York: Prentice Hall, 1991 ), 738. “The plain meaning of the right of the people to keep arms is that it is an individual, rather than a collective, right and is not limited to keeping arms while engaged in active military service or as a member of a select militia such as the National Guard.” *Emerson*, 270 F.3d at 232.

This usage is borne out in Samuel Adams’ proposal for a bill of rights at the Massachusetts ratification convention, which stated: “And that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms . . . .” *Documentary History of the Ratification of the Constitution* (2000), vol. 6, at 1453.

It has been argued that “bear arms” has an exclusively military meaning. This is contrary to ordinary linguistic usage, then and now. The bill of rights proposed by the Dissent of Minority in the Pennsylvania convention declared: “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 . . . .” *Documentary History of the Ratification of the Constitution* (1976), vol. 2, at 623-24.

“No one doubts that one who bears arms on his person ‘carries a weapon.’” *United States v. Johnson*, 216 F.3d 1162, 1165 (D.C. Cir. 2000) (defendant held pistol), quoting *Muscarello v. United States*, 524 U.S. 125, 130 (1998). “Surely a most familiar meaning [of carrying a firearm] is [in] the Constitution’s Second Amendment (‘keep and bear Arms’) . . . .” *Id.*, 524 U.S. at 143 (Ginsburg, J., dissenting).

Those who would restrict “bear arms” to military usage also contend that “‘keep and bear’ appears to have been understood as a unitary phrase, like ‘cruel and unusual’ or ‘necessary and proper.’” Dorf, “What Does the Second Amendment Mean Today?” 76 *Chi.-Kent L. Rev.* 291, 317 (2000). While not based on any precedent, this assertion is uncritically cited for the view that “keep” has no separate meaning from “bear.” JA 75; *Silveira v. Lockyer*, 312 F.3d 1052, 1074 (9<sup>th</sup> Cir. 2003).

Yet the terms “cruel and unusual” and “necessary and proper,” like keep and bear, have separate meanings. “As a textual matter, . . . a disproportionate punishment can perhaps always be considered ‘cruel,’ but it will not always be (as the text *also*

requires) ‘unusual.’” *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (emphasis added). *And see id.* at 994-95. Similarly, courts consider whether a law is “both necessary and proper to carrying into effect the Federal Government’s . . . powers . . . .” *Jinks v. Richland County, South Carolina*, 538 U.S. 456, 462 (2003). *See Printz*, 521 U.S. at 923-24 (finding law violative of federalism not to be “proper for carrying into Execution the Commerce Clause”).

Moreover, nothing in the constitutional text recognizes a “right” to bear, use, or have access to arms in the militia, or even to join a militia, and no court has ever recognized any such “right.” Military service may be a legal “duty,” but it is never a right. “The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments . . . .” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

While the Second Amendment declares the principle that “a well regulated militia [is] necessary to the security of a free state,” it neither delegates nor reserves any power to Congress or to the States. Instead, powers over the militia are addressed in U.S. Const., Article I, § 8, clause 16, which provides that “Congress shall have power”:

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 . . . .

The “people” in the Second Amendment are not limited to the militia when in actual service, but such language is found in the Fifth Amendment exception from the indictment requirement for persons “in the Militia, when in actual service in time of War or public danger . . . .”

Aside from the Second Amendment, neither the United States nor the States may prohibit the people from having arms so that they may perform militia service. *Presser v. Illinois*, 116 U.S. 252, 265 (1886), which held that restrictions on armed groups parading in cities “do not infringe the right of the people to keep and bear arms,” added that the States may not prohibit possession of arms:

All citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government . . . the States cannot, even laying the constitutional provision in question [the Second Amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

*Id.*

Again, it is Article I, § 8, clause 16, and the Tenth Amendment that define and preserve state militia powers, not the Second Amendment. While the Second

Amendment's militia clause serves as an admonition, the Amendment's only substantive guarantee is that the people have a right to keep and bear arms. Recognition of that right, in turn, promotes and makes possible a well regulated militia.

In sum, while "the people" have a right to keep and bear arms, no "right" to serve and bear arms in a militia exists – one serves in a militia solely as prescribed by legislation and military discretion. State-federal powers regarding the militia are defined in U.S. Const., Art. I, § 8, and the Second Amendment adds nothing to this division of power. Finally, while one can "bear arms" in a militia, the "right" to "keep and bear arms" is held by individuals.

**D. While the Appellate Courts are in Disarray, the Ninth Circuit's *Silveira* Opinion Fails to Establish the "Collective Rights" View**

The federal appellate courts did not mention the Second Amendment until the second half of the twentieth century. Some opinions treat the Amendment as protecting individual rights, while others treat it as guaranteeing elusive "collective rights" which have no concrete existence.

The Fifth Circuit's opinion in *Emerson, supra*, is the most substantial exposition of the individual rights view. Opinions upholding that view typically state that peaceable citizens have a right to keep and bear arms, while criminals have forfeited the right. *See United States v. Allen*, 190 F.3d 1208, 1212 (11th Cir. 1999)

(“conviction of a felony results in the loss of constitutional rights important to each United States citizen, such as the rights . . . to bear arms”); *United States v. Sharp*, 12 F.3d 605, 608 (6th Cir. 1993) (“It is a serious matter, obviously, to deprive an American citizen of civil rights as important as . . . the right to keep and bear arms”).<sup>32</sup>

The only substantial effort by a federal appellate court to justify the “collective rights” view is *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003), *pet. for reh. denied*, 328 F.3d 567, 568 (9th Cir. 2003) (see dissenting opinions by Judges Pregerson, Kozinski, Kleinfeld, and Gould), *cert. denied*, 124 S. Ct. 803 (2003). As these dissents

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<sup>32</sup> “Although an individual’s right to bear arms is constitutionally protected, . . . the possession of a gun, especially by anyone who has been convicted of a violent crime, is nevertheless a highly regulated activity, and everyone knows it.” *United States v. Hutzell*, 217 F.3d 966, 969 (8th Cir. 2000), *cert. denied*, 532 U.S. 922 (2001). See *Runnebaum v. NationsBank of MD*, 123 F.3d 156, 176 (4th Cir. 1997) (*en banc*) (“individuals have the constitutional right to peaceably assemble, see U.S. Const. amend. I; and to ‘keep and bear Arms,’ U.S. Const. amend. II.”); *United States v. Wiley*, 309 F.Supp. 141, 145 (D. Minn. 1970) (felons are “a separate class whose individual right to bear arms may be prohibited.”), *aff’d*, 438 F.2d 773 (8th Cir. 1971); *United States v. Bowdach*, 414 F. Supp. 1346, 1353 & n.11 (S.D. Fla. 1976) (“possession of the shotgun by a non-felon has no legal consequences. U.S. Const. Amend. II.”), *aff’d*, 561 F.2d 1160 (5th Cir. 1977); *Gilbert Equipment Co., Inc. v. Higgins*, 709 F. Supp. 1071, 1090 (S.D. Ala. 1989) (Second Amendment “guarantees to all Americans ‘the right to keep and bear arms’”), *aff’d*, 894 F.2d 412 (11th Cir. 1990) (*mem.*); *United States v. Swinton*, 521 F.2d 1255 (10th Cir. 1975) (“there is no absolute constitutional right of an individual to possess a firearm”) (emphasis added); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942) (statute “undoubtedly curtails to some extent the right of individuals to keep and bear arms”), *cert. den. sub mon.*, *Velazquez v. United States*, 319 U.S. 770 (1943).

indicate, the Ninth Circuit is fractured on the issue.

The district court opinion here follows *Silveira*. Instead of acknowledging the significance of the statement in *Verdugo-Urquidez*, 494 U.S. at 265, that “the right of the people” means the same in First, Second, and Fourth Amendments, *Silveira* argues: “If the term ‘the people’ in the latter half of the Second Amendment must have the same meaning throughout the Constitution, so too must the phrase ‘militia.’” *Id.* at 1071. It is unclear how this implies that the right to have arms does not belong to “the people.”

*Silveira* avers that the term “bear arms” refers only “to the carrying of arms in military service,” *id.* at 1072, and that “the reason why that term [‘keep arms’] was included in the amendment is not clear.” *Id.* at 1074. Could it be that the Framers meant what they said?

*Silveira* maintains that debate in the state ratification conventions show that “the proposed amendments had nothing to do with an individual right to possess arms,” *id.* at 1082, but ignores key passages. It quotes Patrick Henry concerning the militia, *id.* at 1080, but ignores his statement that “The great object is, that every man be armed. . . . Every one who is able may have a gun.” Jonathon Elliot, *Debates in the Several State Conventions* (1836), vol. 3, at 386. *Silveira* seeks to explain George Mason’s

draft of a proposal similar to the Second Amendment by remarks Mason made in support of an entirely-separate proposal, 312 F.3d at 1082 – of which the court appears unaware – “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.” Elliot, *Debates*, vol. 3, at 660. That proposal would be rejected by the U.S. Senate, *Journal of the First Session of the Senate* 75 (1820), yet *Silveira* proposes its content as the meaning of the Second Amendment.

*Silveira* claims that “some of the framers explicitly disparaged the idea of creating an individual right to personal arms,” i.e., that “John Adams ridiculed the concept of such a right, asserting that the general availability of arms would ‘demolish every constitution.’” 312 F.3d at 1085. But Adams actually stated in the cited work: “To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defense, or by partial orders of towns, counties, or districts of a state, is to demolish every constitution . . . .” John Adams, *A Defense of the Constitutions of Government of the United States of America* (1787-88), vol. 3, at 475. Adams thus sanctioned using arms in private self-defense, and was adverse to arms use when *not* in self-defense or by official order.<sup>33</sup>

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<sup>33</sup> St. George Tucker, the first commentator on the Constitution, wrote about the Second Amendment:

In *The Federalist* No. 46, James Madison referred to “the advantage of being armed, which the Americans possess over the people of almost every other nation,” noting that “the governments [of the kingdoms of Europe] are afraid to trust the people with arms.” 15 *Documentary History of the Ratification of the Constitution* (1986), vol. 15, at 492-93. *Silveira* claims, despite Madison’s clear word choice, that “the Americans” meant only “militiamen,” 312 F.3d at 1080 n.41, and ignores the reference to the European kingdoms being “afraid to trust *the people* with arms” – which could only have been a reference to the populace at large.

Similarly, *Silveira* never mentions the uncontradicted commentary by Tench Coxe when the Second Amendment was introduced in Congress:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.”

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This may be considered as the true palladium of liberty . . . The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

1 Blackstone, *Commentaries* (St. George Tucker ed. 1803), App. 300.

*Federal Gazette*, June 18, 1789, at 2, col. 1, quoted in Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (1984), 76-77.

This is only a sampling of errors in *Silveira*. None of the other “collective rights” opinions even attempt to justify their conclusions based on the text and the Framers’ intent.

The District’s firearms prohibitions may be justified only on a convoluted, unnatural reading of the Second Amendment. The clear text, “the right of the people to keep and bear arms, shall not be infringed,” renders the provisions at issue void.

**II. THE DISTRICT’S FIREARM PROHIBITIONS ARE NOT  
“USUAL AND REASONABLE POLICE REGULATIONS”  
AUTHORIZED BY ACT OF CONGRESS**

Count Two of the complaint alleges that the provisions at issue are not authorized by law. JA 18-20. In enacting D.C. Code § 1-303.43, Congress authorized the District to regulate firearms according to the following criteria:

The Council of the District of Columbia is hereby authorized and empowered to make, and the Mayor of the District of Columbia is hereby authorized and empowered to enforce, all such *usual and reasonable* police regulations, in addition to those already made under §§ 1-303.01 to 1-303.03 as the Council may deem necessary for the regulation of firearms, projectiles, explosives, or weapons of any kind in the District of Columbia. (Emphasis added.)

The general authority of the D.C. Council to legislate concerning firearms under

§ 1-303.43 was upheld in *Maryland & D.C. Rifle & Pistol Association v. Washington*, 442 F.2d 123 (D.C. Cir. 1971), which did not consider specific provisions of the firearms law.<sup>34</sup> The prohibition on pistols did not yet exist when that case was decided.

The three provisions of the D.C. Code at issue are not “usual,” which means “such as is in common or ordinary use; such as is most often seen, heard, used, etc.”<sup>35</sup> *Webster’s New World Dictionary* (New York: Prentice Hall, 1991), at 1470. Under the laws of the United States and of every State in the Union, a law-abiding citizen may possess a pistol in the home – not one of those jurisdictions bans possession of a

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<sup>34</sup> “We neither investigate nor decide whether particular provisions of the regulations in suit, as distinguished from the regulations as a whole, exceed the Council’s authority or conflict with the 1932 statute . . . .” *Id.* at 125 n.9. *See also McIntosh v. Washington*, 395 A.2d 744, 750-51, 754 (D.C. 1978) (same; prohibition on registration of pistols not raised).

<sup>35</sup> The terms entail comparison with other subjects of like kind. *E.g.*, *Ullman v. District of Columbia*, 21 App.D.C. 241 (1903) (“To keep a record of transactions is now usual, we may say, almost universal, in all classes of business”); *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 150 (D.C. Cir. 1990) (factors were “usual and reasonable” where group given permit to march “on grounds traditionally made available to permit holders”); *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100, 114 (1953) (anti-discrimination law valid as “reasonable and usual police regulation” of restaurants).

pistol.<sup>36</sup> *See Staples v. United States*, 511 U.S. 600, 613-14 (1994) (“owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm”). Under the laws of the United States and of every State in the Union, firearms may be kept in the home other than unloaded and disassembled or bound by a trigger lock or similar device. Under the laws of the United States and of every State in the Union, pistols may be carried in one’s own dwelling place without a license.<sup>37</sup>

The above provisions of the D.C. Code are not “reasonable,” and would not have been understood by Congress as being so. Congress has consistently interpreted the Second Amendment to protect the individual right to keep and bear firearms, including pistols. To counteract the southern Black Code prohibitions on possession of firearms by newly freed slaves, the Freedmen’s Bureau Act, § 14, 14 Stat. 173, 176-77 (1866), declared:

the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and [estate], *including the constitutional right to bear arms*, shall be secured to and enjoyed by all

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<sup>36</sup> *See* Bureau of Alcohol, Tobacco, and Firearms, *State Laws and Published Ordinances – Firearms*, ATF P 5300.5 (2001), and “State Firearms Laws,” Appendix A to Halbrook, *Firearms Law Deskbook: Federal and State Criminal Practice* (Thomson/West Group, 2003).

<sup>37</sup> *See* App. A to Halbrook, *Firearms Law Deskbook* (State by State summary).

the citizens . . . without respect to race or color or previous condition of slavery. (Emphasis added.)

When the Nazi threat arose, Congress passed preparedness legislation, but prohibited it from being construed to requisition or register “firearms possessed by any individual for his personal protection or sport” or “to impair or infringe in any manner the right of any individual to keep and bear arms.” Property Requisition Act, P.L. 274, 55 Stat., pt. 1, 742 (1941).

In regulating commerce in firearms, Congress declared that “it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms” and “this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.” Gun Control Act, § 101, P.L. 90-618, 82 Stat. 1214 (1968). Congress later recognized “the rights of citizens . . . to keep and bear arms under the second amendment to the United States Constitution.” Firearms Owners’ Protection Act, §1(b), P.L. 99-308, 100 Stat. 449 (1986).

What Congress deemed “usual and reasonable” may also be found by reference to what Congress enacted for the District.<sup>38</sup> The Act of 1932, which remains in effect,

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<sup>38</sup> For a history of Congressional legislation on firearms in the District, *see* Halbrook, “Second Class Citizenship and the Second Amendment in the District of Columbia,” 5 *Geo. Mason U. Civ. Rts. L.J.* 105, 109-15 (1995) (cited in WestLaw as

focuses on disarming criminals, not law-abiding citizens, of pistols.<sup>39</sup> Machine guns and sawed-off shotguns are banned,<sup>40</sup> but not ordinary pistols, rifles, and shotguns.<sup>41</sup> Transfer of a pistol requires a 48-hour waiting period and notice to the police,<sup>42</sup> and “any person having a bona fide residence or place of business” may apply for a license to carry a pistol concealed upon his or her person if he or she has “good reason to fear injury to his or her person or property or has any other proper reason.”<sup>43</sup> Given these provisions, Congress did not intend that pistols would be banned.

What Congress deemed “usual and reasonable” is particularly striking in regard to Congress’ intent that citizens would need no license to have and carry a pistol on their own premises. *Billinger v. United States*, 425 A.2d 1304, 1305 (D.C. 1981), explains:

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5 GMUCRLJ 105).

<sup>39</sup> D.C. Code § 22-4502 (committing crime of violence with pistol); § 22-4503 (drug addict and felon may not possess pistol).

<sup>40</sup> D.C. Code § 22-4514.

<sup>41</sup> Given the definition of “pistol” as a firearm “fired by use of a single hand,” § 7-2501.01(12), a handicapped person who has the use of only one hand or other person who cannot handle a shoulder arm is deprived of the use of any firearm for self protection.

<sup>42</sup> D.C. Code § 22-4508.

<sup>43</sup> D.C. Code § 22-4506.

Modeled after the Uniform Firearms Act drafted by the National Conference of Commissioners on Uniform State Laws, and approved by the American Bar Association, the District's firearms control law sought to strike a balance between severely restricting the flow and use of guns on the streets, and the traditional right of citizens to have arms in their homes and on other land belonging to them. See 75 Cong. Rec. 12754 (1932).<sup>44</sup>

To strike this balance, the "dwelling house, place of business, and other land possessed" exception was made to the general prohibition.<sup>45</sup>

The provisions at issue are further not usual and reasonable given that "the right to defend oneself from a deadly attack is fundamental," *Panter*, 688 F.2d at 271, and that the District has "no general duty to provide . . . police protection, to any particular individual citizen." *Warren*, 444 A.2d at 3.

Moreover, the provisions are absolute prohibitions, not "police regulations . . . necessary for the regulation of firearms," D.C. Code § 1-303.43. *In Re Monaghan*, 690 A.2d 476, 477 (D.C. 1997), found that the offense of soliciting for prostitution "is a penal statute, not a police or municipal ordinance or regulation." The provision is

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<sup>44</sup> That citation refers to Senator Capper's explanation, quoting the Senate Report, that "the *right* of an individual to possess a pistol in his home or on land belonging to him would not be disturbed by the bill." Senate Report 575, 72d Cong., 1st Sess., at 3 (1932) (emphasis added).

<sup>45</sup> The "provision permitting the carrying of an unlicensed pistol in one's home or place of business" was eliminated by the District in 1994. *United States v. Woodfolk*, 656 A.2d 1145, 1149 n.11 (D.C. 1995); D.C. Code § 22-4504.

“‘designed absolutely to prohibit’ soliciting for prostitution and not just to ‘regulate’ it.” *Id.* at 478. The provisions at issue here do not “regulate” pistols, they prohibit them.

*Crane v. District of Columbia*, 289 F. 557, 558 (D.C. App. 1923), considered whether the District had power to forbid unlicensed vendors from selling goods at public places. Congress authorized “usual and reasonable police regulations, for 11 distinct and clearly specified purposes,” including “to regulate,” “to prohibit,” or “to regulate or prohibit.”<sup>46</sup> *Id.* at 560. Obviously, the power to “regulate” is not the power to “prohibit.”

Since Congress authorized the District to regulate vendors but not to prohibit them, *Crane* held the ordinance to be void. *Id.* “Congress, if it had been so minded, could have authorized such a sweeping, not to say *unusual and unreasonable*, regulation, but it chose to limit the power of the commissioners to such – ‘reasonable and usual police regulations . . . as they may deem necessary for the protection of the lives, limbs, health, comfort and quiet of all persons . . . .’” *Id.* at 561 (emphasis added).

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<sup>46</sup> See *Thomas v. District of Columbia*, 90 F.2d 424, 426 (D.C. Cir. 1937) (authority to make “usual and reasonable police regulations . . . .To *prohibit* the deposit upon the streets” of injurious articles) (emphasis added).

Whether an ordinance is usual and reasonable is a matter for judicial decision based on evidence submitted by the parties. “If it be shown and determined that the regulations, or any material parts thereof, are unusual or unreasonable, they would be inoperative and void, to the extent that they are so unusual or unreasonable, because, in such case they would not be within the power delegated by Congress.” *Moore v. District of Columbia*, 12 App.D.C. 537, 540 (1898).<sup>47</sup>

Accordingly, the prohibitions at issue, being neither usual nor reasonable, are not authorized by D.C. Code § 1-303.43 and are thus void.

### **III. THE DISTRICT FIREARMS PROHIBITIONS VIOLATE THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. §1981(a)**

Count Three of the complaint alleges that the District’s prohibitions at issue violate the Civil Rights Act of 1866, 42 U.S.C. §1981(a), which provides in part: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . .” JA 21-22. This guarantees the right to security in one’s home, including arms to protect one’s person

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<sup>47</sup> See *La Forest v. Board of Commissioners of the District of Columbia*, 92 F.2d 547, 549-50 (D.C. Cir. 1937) (“if such a case [of unreasonable regulations] should arise the right of review by this court insures protection against such abuse of power”); *Reynolds v. District of Columbia*, 614 A.2d 1285, 1288-89 (App.D.C. 1992) (holding regulation not to be “a reasonable regulation designed to control traffic”).

– a right “enjoyed by white citizens” when the Act was adopted in 1866.

The Freedmen’s Bureau Act protected “the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate, . . . including the constitutional right to bear arms . . . .” § 14, 14 Stat. at 176-77. This section “re-enacted, in virtually identical terms for the unreconstructed Southern States, the rights granted in §1 of the Civil Rights Act of 1866.” *Georgia v. Rachel*, 384 U.S. 780, 797 n.26 (1966).

The antebellum Slave Codes prohibited blacks from possession of firearms. African Americans were not deemed citizens in part because “it would give them the full liberty of speech . . . and to keep and carry arms wherever they went.” *Scott v. Sanford*, 60 U.S. 393, 417 (1857).

After slavery ended, these restrictions were reenacted as the Black Codes. The Civil Rights Act and Freedmen’s Bureau Act were intended to override the Black Codes and, *inter alia*, to guarantee what a Freedmen’s Bureau circular explained as follows: “All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves.” Ex. Doc. No. 70, House of Rep., 39th Cong., 1st Sess., at 65 (1866).<sup>48</sup>

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<sup>48</sup> See Halbrook, “The Freedmen’s Bureau Act and the Conundrum Over Whether the Fourteenth Amendment Incorporates the Second Amendment,” 29 *N.*

The first Freedmen’s Bureau Bill, S. 60, recognized the right “to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms.” Cong. Globe, 39th Cong., 1st Sess., 654 (1866).

*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423 n.23 (1968), explained:

When Congressman Bingham of Ohio spoke of the Civil Rights Act, he charged that it would duplicate the substantive scope of the bill [S. 60] recently vetoed by the President . . . . Even Senator Trumbull of Illinois, author of the vetoed measure as well as of the Civil Rights Act, had previously remarked that the latter was designed to “extend to all parts of the country,” on a permanent basis, the “equal civil rights” which were to have been secured in rebel territory by the former [S.60], . . . to the end that “all the badges of servitude . . . be abolished.”

*Id.* at 424 n.31.

Section 1981 not only forbids discrimination, it also protects substantive rights. “Senator Trumbull’s bill would, as he pointed out, ‘destroy all [the] discriminations’ embodied in the Black Codes, but it would do more: It would affirmatively secure for all men, whatever their race or color, what the Senator called the ‘great fundamental rights’ . . . .”<sup>49</sup> *Jones*, 392 U.S. at 432. “If we are to give [the law] the scope that its

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*Kentucky L.R.*, No. 4, 683 (2002) (available on WestLaw at 29 NKYLR 683).

<sup>49</sup> “Senator Trumbull emphasized that the bill protected ‘such rights as should appertain to every free man.’” *General Building Contractors Ass’n. v. Pennsylvania*, 458 U.S. 375, 387 (1982) (citation omitted). The Black Codes included both “express racial classifications” and “facially neutral” ones, both of which were “methods of resurrecting the incidents of slavery.” *Id.* at 386-87.

origins dictate, we must accord it a sweep as broad as its language.” *Id.* at 437 (brackets in original).

The “full and equal benefit” clause of § 1981 “guarantee[s] numerous rights other than equal treatment . . . .” *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 671 (1987) (noting that the Black Codes “forbade owning firearms”). *Id.* at 672-73 (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in part and dissenting in part).

Like the Civil Rights Act, the Freedmen’s Bureau Act embodies the intent of the Fourteenth Amendment. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 397 (1978) (opinion of Marshall, J.). Referring to the “personal rights” guaranteed in the first eight amendments, including “the right to keep and bear arms,” Senator Jacob Howard explained that the Amendment would compel the States “to respect these great fundamental guarantees.” Quoted in *Duncan v. Louisiana*, 391 U.S. 145, 166-67 (1968) (Black, J., concurring). See *Kasler v. Lockyer*, 23 Cal. 4th 472, 506, 2 P.3d 581, 601-05, 97 Cal. Rptr. 2d 334 (2000) (Brown, J., concurring) (personal right to bear arms protected by both Acts and the Amendment).

Section 1981’s guarantee of “the security of person and property” is a historical expression of the “indefeasible right of personal security, personal liberty and private property.” *Griswold v. Connecticut*, 381 U.S. 479, 485 n. (1965). See *Washington v.*

*District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986) (noting “a liberty interest in ‘personal security’”). These three “absolute rights” are preserved by “auxiliary rights,” including the right “of having arms for their defence.” 1 Blackstone, *Commentaries* 143-44.

For the above reasons, the provisions at issue violate the fundamental rights protected by § 1981 and are null and void.

### **CONCLUSION**

This Court should reverse the judgment of the district court.

**CERTIFICATE OF COMPLIANCE**

Compliance with F.R.App.P. 32(a)(7)(B) has been met, in that the brief contains  
13,381 words.

Respectfully submitted,

Sandra Seegars *et al.*, Appellants/Cross-Appellees

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# **A D D E N D U M**

## UNITED STATES CONSTITUTION

### *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.

## UNITED STATES CODE

### *42 U.S.C. §1981(a)*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

## DISTRICT OF COLUMBIA CODE

### *§ 1-303.43. Regulations relative to firearms, explosives, and weapons*

The Council of the District of Columbia is hereby authorized and empowered to make, and the Mayor of the District of Columbia is hereby authorized and empowered to enforce, all such usual and reasonable police regulations, in addition to those already made under §§ 1-303.01 to 1-303.03 as the Council may deem necessary for the regulation of firearms, projectiles, explosives, or weapons of any kind in the District of Columbia.

### *§ 7-2502.01. Registration requirements*

(a) Except as otherwise provided in this unit, no person or organization in the District of Columbia (“District”) shall receive, possess, control, transfer, offer for sale,

sell, give, or deliver any destructive device, and no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm. A registration certificate may be issued:

(1) To an organization if:

(A) The organization employs at least 1 commissioned special police officer or employee licensed to carry a firearm whom the organization arms during the employee's duty hours; and

(B) The registration is issued in the name of the organization and in the name of the president or chief executive officer of the organization;

(2) In the discretion of the Chief of Police, to a police officer who has retired from the Metropolitan Police Department; or

(3) In the discretion of the Chief of Police, to the Fire Marshal and any member of the Fire and Arson Investigation Unit of the Fire Prevention Bureau of the Fire Department of the District of Columbia, who is designated in writing by the Fire Chief, for the purpose of enforcing the arson and fire safety laws of the District of Columbia.

(b) Subsection (a) of this section shall not apply to:

(1) Any law enforcement officer or agent of the District or the United States, or any law enforcement officer or agent of the government of any state or subdivision thereof, or any member of the armed forces of the United States, the National Guard or organized reserves, when such officer, agent, or member is authorized to possess such a firearm or device while on duty in the performance of official authorized functions;

(2) Any person holding a dealer's license: Provided, that the firearm or destructive device is:

(A) Acquired by such person in the normal conduct of business;

(B) Kept at the place described in the dealer's license; and

(C) Not kept for such person's private use or protection, or for the protection of his business;

(3) With respect to firearms, any nonresident of the District participating in any lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction; provided, that such person, whenever in possession of a firearm, shall upon demand of any member of the Metropolitan Police Department, or other bona fide law enforcement officer, exhibit proof that he is on his way to or from such activity, and that his possession or control of such firearm is lawful in the jurisdiction in which he resides: Provided further, that such weapon shall be unloaded, securely wrapped, and carried in open view.

**§ 7-2502.02. *Registration of certain firearms prohibited***

(a) A registration certificate shall not be issued for a:

(1) Sawed-off shotgun;

(2) Machine gun;

(3) Short-barreled rifle; or

(4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm during the employee's duty hours or to a police officer who has retired from the Metropolitan Police Department.

(b) Nothing in this section shall prevent a police officer who has retired from the Metropolitan Police Department from registering a pistol.

**§ 7-2507.02 *Firearms required to be unloaded and disassembled or locked***

Except for law enforcement personnel described in § 7-2502.01(b)(1), each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

**§ 7-2507.06. Penalties**

Any person convicted of a violation of any provision of this unit shall be fined not more than \$ 1,000 or imprisoned for not more than 1 year, or both; except that:

(1) A person who knowingly or intentionally sells, transfers, or distributes a firearm, destructive device, or ammunition to a person under 18 years of age shall be fined not more than \$ 10,000 or imprisoned for not more than 10 years, or both.

(2)(A) Except as provided in subparagraph (B) of this paragraph, any person who is convicted a second time for possessing an unregistered firearm shall be fined not more than \$ 5,000 or imprisoned not more than 5 years, or both.

(B) A person who in the person's dwelling place, place of business, or on other land possessed by the person, possesses a pistol, or firearm that could otherwise be registered, shall be fined not more than \$ 1,000 or imprisoned not more than 1 year, or both.

**§ 22-4504. Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty**

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-4515, except that:

(1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land

possessed by the person, shall be fined not more than \$ 5,000 or imprisoned for not more than 5 years, or both; or

(2) If the violation of this section occurs after a person has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or another jurisdiction, the person shall be fined not more than \$ 10,000 or imprisoned for not more than 10 years, or both.

(b) No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence.

#### ***§ 22-4515. Penalties***

Any violation of any provision of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than \$ 1,000 or imprisonment for not more than 1 year, or both.

## CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2004, two (2) true and correct copies of the foregoing were served by first class mail, postage prepaid, to:

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