No. 07-290

# In The
# Supreme Court of the United States

**DISTRICT OF COLUMBIA, et al.,**

***Petitioners,***

*v.*

**DICK ANTHONY HELLER**

***Respondent.***

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

**BRIEF OF VIRGINIA1774.ORG, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT**

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## QUESTION PRESENTED

Whether the following provisions — D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 — violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.

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## INTEREST OF AMICUS CURIAE[1]

Virginia1774.org was founded by Rudolph DiGiacinto in 2004 to be the authority on the legal history of the colonial Virginia militia and the origin of the Virginia Constitution Art. I, § 13. Mr. DiGiacinto is a former Intelligence officer for the Defense Intelligence Agency (DIA) who helped to calculate the effective military manpower of foreign countries based in part upon the colonial British militia system.

Virginia1774.org strives to provide free to the public primary government and private source documents as well as original research to advance the understanding of those documents as it relates to the Virginia Constitution Art. I, § 13. A part of the District of Columbia was originally ceded from Fairfax County, Virginia. The Second Amendment to the United States Constitution is the progeny of the Virginia Declaration of Rights and as such Virginia1774.org can provide an invaluable insight on the origin and meaning of the Second Amendment to the United States Constitution.

[1]Pursuant to Supreme Court Rule 37.3(a), the *amicus curiae* states that the parties have consented to the filing of this brief and have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The Second Amendment to the United States Constitution is a self-executing provision that preserves to the people or individuals both a well regulated militia as well as the right to keep and bear arms. These rights are separate and distinct, are joined by necessity and law and continue in full force.

The right to self-defense is the first law of nature and no government has the right to disarm or deprive the people or individuals of their natural rights. The social nature of human beings formed and mandated a societal self-defense in the form of the militia where each member of that society who is able-bodied is duty bound to participate in its defense. The self-executing nature of the Second Amendment forbids laws or ordinances that prohibit the right of the people or individuals to keep and bear arms for self-defense, self-preservation, or for any other lawful purpose.

## ARGUMENT

### THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION IS A SELF-EXECUTING PROVISION THAT PRESERVES BOTH A WELL REGULATED MILITIA AND THE RIGHT OF THE PEOPLE OR INDIVIDUALS TO KEEP AND BEAR ARMS FOR THEIR OWN

**SELF-DEFENSE, SELF-PRESERVATION, OR ANY OTHER LAWFUL PURPOSE.**

## A. THE PEOPLE ARE THE MILITIA.

The militia consists of the whole people and is not severable. The United States Constitution was amended in 1791 to include a bill of rights "to secure the dearest rights of the people". 3 *The Papers of George Mason* 1054 (Robert A. Rutland ed. 1970). The Second Amendment to the United States Constitution is a self-executing constitutional provision.

> [W]here a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provision. In short, if complete in itself, it executes itself.

*Davis v. Burke*, 179 U.S. 399, 403 (1900).

"The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions." *City of Boerne v. Flores, Archbishop of San Antonio, et al.*, 521 U.S. 507, 524 (1997). Legislative bodies may enact laws concerning a self-executing constitutional provision, but they may do so only to facilitate the exercise of the constitutional right or its enforcement. See 16 C.J.S. *Constitutional Law* §

91 (2005). This Court therefore should adopt the Strict Scrutiny standard of review when laws or regulations come into conflict with the fundamental rights protected by the Second Amendment.[2]

The District of Columbia was originally formed by land ceded from Fairfax County, Virginia[3] and from land ceded from Maryland. The District was not a completely sovereign entity as Virginia's laws were originally allowed by Congress to operate within its borders and likewise with the laws of Maryland. See *United States v. Simms*, 5 U.S. (1 Cranch) 252, 253 (1803). Similarly, the protections of each states' constitution (and the Constitution of the United States) remained in force in those areas that had been ceded. See *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat) 235, 239-40 (1819).

In 1802 Congress passed an act enabling the President of the United States to form the militia of the District of Columbia "as nearly as may be, to the laws of Maryland and Virginia as they stood in force in the said counties, respectively, on the first Monday in December, in the year one thousand eight

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[2] This brief is focused largely on the historical materials, more particularly those related to the militia in Virginia. *Virginia1774.org* strongly urges the court to adopt strict scrutiny as the appropriate standard of review for laws which conflict with the second amendment. This topic is covered at length in the briefs submitted by other *amici* and by Respondent. See Respondent's Brief at 54-62. Amicus curiae also shares Respondent's concern with the hybrid scrutiny suggested by the Solicitor General and urges this Court to reject that approach. *Id.* at 55.

[3] Fairfax County was formed in 1742 from Prince William County which itself was formed in 1731 from Stafford County, Virginia. See Va. Stat. at Large, 5 Hening 207-208 (1823); Va. Stat. at Large, 4 Hening 303 (1823).

hundred:" *The Military Laws of the United States Relating to the Army, Volunteers, Militia and to Bounty Lands and Pensions From the Foundations of the Government to the Year 1863,* at 149 (John F. Callan ed. 1863). President Thomas Jefferson appointed John Mason (Son of George Mason) to be the first commander of the District of Columbia Militia as Brigadier General. See Wilhelmus B. Bryan, 1 *A History of the National Capital From its Foundation Through the Period of the Adoption of the Organic Act* at 564-565 (1914). This Court's first case dealing with the District of Columbia's Militia and determining which public officers were exempt from militia service in Alexandria (D.C.) occurs in *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806). The District of Columbia and the Commonwealth of Virginia were intertwined in law and history.

The Colony of Virginia was the oldest and largest colony and became the first representative colonial body in America in 1619. By an Act of the Virginia General Assembly in 1808, William Waller Henning compiled the laws of Colonial Virginia which were then published in 1809 as *The Statutes at Large: Being a Collection of All the Laws of Virginia from the First Session of the Legislature in 1619*. The first laws on the subject of arms by the Virginia legislature were enacted in 1623:

> "That no man go or send abroad without a sufficient partie well armed." & "That men go not to worke in the ground without their arms (and a centinell upon them.)" (1623) Va. Stat. at Large, 1 Hening 127 (1823).

> “All men that are fittinge to beare armes, shall bring their peices to church uppon payne of every effence” & “It is ordered and appoynted, That the commanders of all the severall plantations, doe upon holy days exercise the men under his command” (1631) *Id*. at 174.

> "...But it is thought convenient that any man be permitted to kill deare or other wild beasts or fowle in the common woods, forests, or rivers in regard that thereby the inhabitants may be trained in the use of theire armes the Indians kept from our plantations, and the wolves and other vermine destroyed..." (1632) *Id*. at 199.

> "All persons except negroes to be provided with arms and ammunition or be fined at the pleasure of the Governor or Council." (1639) *Id*. at 226.

The counties of Accomack-Northampton enforced these laws and enacted their own in 1643 on the subject of bearing of arms. “It is ordered that noe person or persons whatsoever within the County of Northampton Except those of the Commission shall from henceforth travel from house to house within the said County without a sufficient Fixed gun with powder and shott.” Susie M. Ames, *County Court Records of Accomack-Northampton, Virginia, 1640-1645* at 268 (University Press of Virginia 1973).

In 1671 Governor William Berkeley answered questions about the defenses of Virginia stating, “All

our freemen are bound to be trained every month in their particular counties, which we suppose, and do not much mistake in the calculation, are near eight thousand horse: there are more, but is too chargeable for poor people, as wee are, to exercise them."(1671) Va. Stat. at large, 2 Hening 512 (1823).

These statutes show that militia service was compulsory and as George Mason would later state, "They consist now of the whole people, except a few public officers." 3 *The Papers of George Mason*, *supra*, at 1081. As Thomas Jefferson later wrote, "[t]heir governor, constitutionally the commander of the militia of the state, that is to say, of every man in it able to bear arms...always in readiness..." *Letter from Thomas Jefferson to Destutt de Tracy* (Jan. 26, 1811), in *The Portable Thomas Jefferson*, at 524 (Merrill D. Peterson ed. 1975). The Virginia courts had held at least well into the 19th century the same idea stating that "[t]he militia embraces the whole arms bearing population." *Burroughs v. Peyton*, 57 Va. (16 Gratt.) 470 (1864)(interpreting portions of the Confederate Constitution by reference to the Constitution of the United States).

As the population of the colony of Virginia grew, more counties were established and the militia was organized as it was in England. Each county nominated and the Royal Governor appointed a county lieutenant as the head of the militia for that county. Kate M. Rowland, 1 *The Life of George Mason, 1725-1792* at 8, 33-34 (1892). The first formal laws or acts for the better regulation of the militia began to take place at the end of the 17th century. An intelligence report concerning the

murder of the inhabitants of Stafford County[4] was sent by the county lieutenant to the governor of Virginia:

> On Sunday the sixteenth, about three of the clock in the afternoon, came about twenty or thirty Indians to Thomas Barton, about twenty miles above my house....The Indians fell on them and killed Barton's three children, the man and his wife and his three children. The orphan boy ran away, he being out at play, blessed be God, got to a neighbor's house and is safe. They killed them with arrows and wooden tomahawks, . . . plundered all the house and carried every thing away...

Col. George Mason to Governor Nicholson, June 18, 1700, *Id. at 25-27*. Colonel Mason (Grandfather of George Mason of the Revolution) wrote three weeks later that

> [t]he Rangers continue their duty according to your Excellency's commands...The neighbors having fitted out their sons and other young men well acquaint, so their ranging is as low as my Plantation at Pohick...The Inhabitants still continue from their houses, but abundance better satisfied

[4] Stafford County at the time having not yet been subdivided into Fairfax and Prince William Counties, included the area of the original District of Columbia. See Va. Stat. at Large, *supra* note *3*. The murders occurred nearby.

> since part of the Rangers is constantly ranging among them."

Col. George Mason to Governor Nicholson, July 10, 1700, in *Id*.

As a result of this incident and others the Virginia General Assembly passed "*An act for the better strengthening the frontiers and discovering the approaches of an enemy*" in 1701. This act provided

> [t]hat all such persons as shall be seated in cohabitations by virtue of this act shall be also exempted from all military comands but what shall be setled by public authority among themselves and shall tend to their owne defence and security....
>
> **...**Provided alwayes, and it is the true intent and meaning of this act that for every five hundred acres of land to be granted in pursuance of this act there shall be and shall continually be kept upon the said land one christian man between sixteen and sixty years of age perfect of limb, able and fitt for service who shall alsoe be continually provided with a well fixt musquett or fuzee, a good pistoll, sharp simeter, tomahauk and five pounds of good clean pistoll powder and twenty pounds of sizable leaden bulletts or swan or goose shott to be kept within the fort directed by this act besides the powder and shott for his necessary or usefull shooting at game."

Va. Stat. at Large, 3 Hening 206-207 (1823).

The people moving into the "frontier" were responsible for their own safety. The colony of Virginia tried to ensure the success of these settlements by requiring the inhabitants to be well armed and set a minimum land to fit male ratio. In 1723 slave uprisings were becoming a real concern and a law is passed disarming all "negroes," "mulattoes," and "Indians" but with a proviso for those living at the frontier plantations, which provided that

> nonetheless, That every free negro, mulatto or indian, being a house-keeper, or listed in the militia, may be permitted to keep one gun, powder, and shot; and those who are not house-keepers, nor listed in the militia aforesaid, who are now possessed of any gun, powder, shot, or any weapon, offensive or defensive, may sell and dispose thereof, at any time before the last day of October next ensuing. And that all negroes, mulattos, or indians, bond or free, living at any frontier plantation, be permitted to keep and use guns, powder, and shot, or other weapons, offensive, or defensive; having first obtained a license for the same, from some justice of the peace of the county wherein such plantation lie; the said license to be had and obtained, upon the application of such free negroes, mulattos, or indians, or the owners of such as are slaves, any thing

> herein contained to the contrary thereof, in any wise, notwithstanding."

*An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and Indians, bond or free* (1723), Va. Stat. at Large, 4 Hening 131 (1823). Those who were not considered members of the society or the "people" were a threat and were generally disarmed or heavily restricted against ownership of arms. "Papists" are disarmed in 1756. *An Act for disarming Papists, and reputed Papists, refusing to take the oaths to the government* (1756) Va. Stat. at Large, 7 Hening 35-39 (1823).

During the French and Indian war the term "well regulated" is codified into law as a means to better distinguish the available males fit for service and to arm, muster and train them. The General Assembly passed *An Act for the better regulating and disciplining the Militia* stating, "Whereas it is necessary, in this time of danger, that the militia of this colony should be well regulated and disciplined." (1757) Va. Stat. at Large, 7 Hening 93-106 (1823).

The regulation of the militia by no means disarmed the disabled members of society who could not serve, members of the governor's council, nor did it disarm the overseers who were exempt from militia service and whose job it was to control the slaves who posed a real internal threat to the society. In 1766 another militia act was passed which required that those who were exempt from the militia were required to keep arms and ammunition at their houses:

> [t]hat every person so exempted (not being a Quaker) shall always keep in his house or place of abode, such arms, accoutrements and ammunition, as are by the said act required to be kept by the militia of this colony;... And such exempts shall also, in case of any invasion or insurrection, appear with their arms and ammunition, at such place as shall be appointed by the commanding officer of the militia of their respective counties..."

*An act to continue and amend the act for the better regulating and disciplining the milita* (1766), Va Stat. at Large, 8 Hening 243-244 (1823).

George Mason was the primary author of the Virginia Declaration of Rights pronouncing the essential rights of the people on June 12, 1776. It was the first of its kind upon the continent. *See* 1 *The Papers of George Mason*, *supra* at 433-437. The militia clause of this declaration Va. Const. Art. I, § 13, was drawn from George Mason's own experience in the Crown's militia and his vast knowledge of English law including the English Bill of Rights whose influence can be seen in the Virginia Declaration of Rights:

> 13. That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty: and that, in all cases, the military should be under strict

> subordination to, and governed by, the civil power.

*Virginia Gazette* (Alexander Purdie) No. 72., June 14, 1776, at 2.

Mason was later called upon to help write the United States Constitution. During the Federal Convention, Mr. Roger Sherman of Connecticut exclaimed that a bill of rights was not required as the state Declaration of Rights were not repealed by this constitution. George Mason replied to this assertion, "The laws of the United States are to be paramount to the States Bills of Rights." The Convention refused to adopt a Federal Bill of Rights and in silent protest George Mason refused to sign the Constitution. Kate M. Rowland, 2 *The Life of George Mason, 1725-1792*, at 172-176 (1892).

The Virginia ratification debate of the United States Constitution became a fertile forum for Mason and other Virginia Patriots to explain the Constitution. Amendments to the Constitution were proposed and written by George Mason. The proposals were prefaced with:

> That there be a Declaration or Bill of Rights, asserting and securing from encroachment the essential Rights of the People, in some manner as the following…
>
> …17. That the People have a Right to keep & to bear Arms; that a well regulated Militia, composed of the Body of the People, trained to Arms, is the proper natural and safe Defence of a

> free State; that standing Armys in time of Peace are dangerous to Liberty, and therefore ought to be avoided, as far as the Circumstances and Protection of the Community will admit; and that in all Cases, the Military shou'd be under strict Subordination to and govern'd by the Civil Power.

(ca. June 11, 1788) 3 *The Papers of George Mason*, *supra* at 1068-1071.

At the debate George Mason stated:

> An instance within the memory of some of this house, will shew us how our militia may be destroyed. Forty years ago, when the resolution of enslaving America was formed in Great-Britain, the British parliament was advised by an artful man, [Sir William Keith] who was governor of Pennsylvania, to disarm the people. That it was the best and most effectual way to enslave them.

Statement of George Mason (June 14, 1788), *Id*. at 1073-1076. Two days later George Mason spoke again, stating:

> Mr. Chairman—A worthy member has asked, who are the militia, if they be not the people, of this country, and if we are not to be protected from the fate of the Germans, Prussians, &c. by our representation? I ask who are the militia? They consist now of the whole

> people, except a few public officers. But I cannot say who will be the militia of the future day. If that paper on the table gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor; but may be confined to the lower and middle classes of the people, granting exclusion to the higher classes of the people. If we should ever see that day, the most ignominious punishments and heavy fines may be expected. Under the present government all ranks of people are subject to militia duty.

Statement of George Mason (June 16, 1788), *Id*. at 1080-1081.

Mason made no distinction between the militia and the people. Patrick Henry who was Mason's closest ally in the debate put it quite clearly. "The militia, sir, is our ultimate safety. We can have no security without it...The great object is, that every man be armed.... Every one Who is able may have a gun." Statement of Patrick Henry (June 14, 1788) in 3 *The Debates In The Several State Conventions, On The Adoption Of The Federal Constitution, As Recommended By The General Convention At Philadelphia, In 1787* at 385-386 (Jonathan Elliot, ed. (1836))(hereinafter "3 *Elliot's Debates").*

George Mason had great concerns over the nature of the Federal District and expressed them during the debate. "Now, sir, if an attempt should be made to establish tyranny over the people, here are

ten miles square, where the greatest offender may meet protection….Why was this dangerous power given?" Comments of George Mason (June 16, 1788), in 3 *The Papers of George Mason, supra* at 1082-1083. George Mason then argued that the people must secure their rights in this new federal government just as they had in Virginia.

> All governments were drawn from the people, though many were perverted to their oppression. The government of Virginia, he remarked, was drawn from the people; yet there were certain great and important rights, which the people by their bill of rights declared to be paramount to the power of the legislature. He asked, why should it not be so in this constitution? Was it because we were more substantially represented in it, than in the state government? If in the state government, where the people were substantially and fully represented, it was necessary that the great rights of human nature should be secure from the encroachments of the legislature; he asked, if it was not more necessary in this government, where they were but inadequately represented? He declared, that artful sophistry and evasions could not satisfy him. He could see no clear distinction between rights relinquished by a positive grant, and lost by implication. Unless there were a bill of rights, implication might swallow up all our rights.

*Id*. at 1083-1085.

The rights protected would naturally have included personal firearms for self-defense, self-preservation and militia service and was well known by all Virginians.

> As to the protection of our own frontiers, it would seem best to leave it to the people themselves, as hath ever been the case, and if at any time the frontier men should be too hard pressed, they may be assisted by the midland militia. This will always secure to us a hardy set of men on the frontiers, used to arms, and ready to assist against invasions on other parts. Whereas, if they are protected by regulars, security will necessarily produce inattention to arms, and the whole of our people becoming disused to War, render the Curse of a standing army Necessary.

Letter from Richard Henry Lee to James Monroe (Jan. 5, 1784), in 2 *The Letters of Richard Henry Lee* 288 (James C. Ballagh, ed. 1914).

James Madison made a rough calculation of the military manpower of the country which included the people being armed with personal weapons:

> It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best

> acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

Federalist No. 46 (James Madison), as published in *New York Packet*, Jan. 29, 1788.

After the ratification of the United States Constitution and the addition of the Bill of Rights, Virginia jurist St. George Tucker wrote about the Second Amendment:

> 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 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to The Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia, at* 300 (William W. Birch & Adam Small 1803). Tucker continues:

> [t]he game-laws, as was before observed, have been converted into the means of disarming the body of the people... The congress of the United States possesses no power to regulate, or interfere with the domestic concerns, or police of any state: it belongs to them to establish any rules respecting the rights of property; nor will the constitution permit any prohibition of arms to the people; or of peaceable assemblies by them, for any purpose whatsoever, and in any number, whenever they may see occasion."

*Id* at 315-316.

The militia in Colonial Virginia was composed of the people equipped with their own personal weapons. Those who lived in the frontier areas had to defend themselves with their own weapons. They could not dial "911" because neither phones nor a police force existed to come to their aid. They were the police and the military and they would not have had it any other way as they believed this would lead to a standing army. To disarm the people was to disarm the militia, the only safe defense of a free state.

## B. THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS.

The Second Amendment to the United States Constitution states in part, "the right of the people to keep and bear arms shall not be infringed." U.S. Const. Amend. II. The individual right to keep and bear arms under this constitution applies to all citizens of the United States regardless of its "incorporated" status under the U.S. Const. amend. XIV. See, i.e., *Pointer v. Texas*, 380 U.S. 400 (1965) (example and explanation of the "incorporation" doctrine).

> [I] have the highest veneration for those gentlemen; but, sir, give me leave to demand, What right had they to say, We, *the people*? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorized them to speak the language of, We, *the people*, instead of, We, the *states*? States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states.

Statement of Patrick Henry (June 4, 1788), in 3 Elliot's Debates, *supra* at 22. "When we come to the judiciary, we shall be more convinced, that this government will terminate in the annihilation of the state governments: the question then will be, whether a consolidated government can preserve the

freedom, and secure the great rights of the people." Statement of George Mason (June 4, 1788), in 3 The Papers of George Mason, *supra* at 1050-1054. This Court has upheld the view of the meaning of "We, the People" consistent with Patrick Henry's and George Mason's understanding, including its use under the Second Amendment. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

All citizens of the United States are afforded the protections of the United States Bill of Rights, because "We, *The People*" is synonymous with citizen. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws…[o]ne of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The Bill of Rights and the Supremacy Clause of the U.S. Constituion, see U.S. Const. Art. VI, cl. 2., places limits on what can be done by Congress and by other political subdivisions within the United States. As a general matter, inferior legislatures cannot restrict what the Constitution protects, see, i.e, *Loving v. Virginia*, 388 U.S. 1 (1967)(marriage), nor can state law stand in the way of or prohibit something authorized by Federal Law. See, i.e., *Case v. Bowles*, 327 U.S 92 (1946); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

Under 10 U.S.C. § 4309 "All rifle ranges constructed in whole or in part with funds provided by the United States may be used by members of the armed forces and by persons capable of bearing arms." 10 U.S.C.A. § 4309(a). It is a maxim, but not absolute, of statutory construction that the mention of one thing means the exclusion of another. See *United States v. Vonn*, 535 U.S. 55, 65 (2001).

Therefore, it can be argued that Congress purposely did not restrict the right to use publicly funded rifle ranges exclusively to members of state National Guards, but broadly included all individuals who were capable of bearing arms. Congress has defined the term "capable of bearing arms" to mean the individual citizen and not a member of a "state regulated militia".

The word *infringe* has been defined as: "To break, as contracts; to violate, either positively by contravention, or negatively by non-fulfillment or neglect of performance. A prince or a private person infringes an agreement or covenant by neglecting to perform its conditions, as well as by doing what is stipulated not to be done." Noah Webster, *An American Dictionary of the English Language* (1828) *reprinted at* The ARTFL Project On-line Edition <http://machaut.uchicago.edu/websters>. "What the Constitution says shall not be done, cannot be done." *Button v. Day*, 158 S.E.2d 735, 741 (Va.1968). "Prohibitory provisions in a constitution are self-executing to the extent anything done in violation of them is void." *State v. Nelson*, 502 P.2d 841, 846 (Kan. 1972); see also, *supra*.

The history of the individual right to keep and bear arms in the United States again traces its origin through Virginia. When the Colony of Virginia agreed to surrender to the total authority of the post English civil war government in 1651, the 13th condition of the compact protected private ownership of arms and ammunition stating the following:

> 13thly. That all amunition, powder and arms, other then for private use shall

> be delivered up, securitie being given to make satisfaction for it.

(1651) Va. Stat. at Large, 1 Hening 365 (1823). In 1676 the Virginia General Assembly passed the following law:

> It is ordered that all persons have hereby liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony, and that the Indians of the Easterne shore have like and equall liberty of trade or otherwayes with any other our ffriends and neighbouring Indians.

(1676) Va. Stat. at Large, 2 Hening 403 (1823).

Virginia adopted the common law of England in 1661. See Va. Stat. at Large, 3 Hening 41-43 (1823). This reinforced the protections of a persons right to arm themselves in self-defense. The English Bill of Rights stated in part: "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." English Bill of Rights, 1 W. & M., st. 2, c. 2 (1689).

As a Protestant colony, the law in Virginia encouraged and demanded that those who were full members of the society to always posses arms. These and other parts of the British Constitution gave George Mason the legal foundation to form the Fairfax Independent Company of Volunteers on September 21, 1774. It was also the first of its kind

upon the Continent. See 1 *The Papers of George Mason, supra* at 433-437.

> It was formed upon the liberal sentiments of public good, for the great and useful purposes of defending our country, and preserving those inestimable rights which we inherit from our ancestors; it was intended in these times of extreme danger, when we are threatened with the ruin of that constitution under which we were born, and the destruction of all that is dear to us, to rouse the attention of the public, to introduce the use of arms and discipline, to infuse a martial spirit of emulation, and to provide a fund of officers, that in case of absolute necessity, the people might be the better enabled to act in defence of their invaded liberty.

*Remarks on Annual Elections for the Fairfax Independent Company* (April 1775), in *Id*. at 229-232. This Independent Company was actually a paramilitary organization outside of the Crown's militia and could not have been formed if the individual right to keep and bear arms in Virginia was not protected.

In May 1775, Patrick Henry marched his Hanover Independent Company of Volunteers toward Williamsburg to retrieve the gunpowder stolen by Royal Governor Lord Dunmore. *Virginia Gazette* (Alexander Purdie), No. 14., May 5, 1775, at 2, col. 1. Lord Dunmore's action was an inter-colony

coordinated attempt to disarm the people. Patrick Henry stated, "You may in vain mention to them the duties upon tea, etc. These things, they will say, do not affect them. But tell them of the robbery of the magazine, and that the next step will be to disarm them, and they will be then ready to fly to arms to defend themselves." William W. Henry, 1 *Patrick Henry: Life, Correspondence and Speeches* 276-285 (Charles Scribner's Sons1891).

James Madison as a member of the Orange County Committee of Safety wrote to Patrick Henry and the Hanover Independent Company on the use of force on behalf of the Committee:

> We the Committee for the County of Orange having been fully informed of your principled and reasonable proceedings in procuring a compensation for the powder fraudulently removed from the Country Magazine by command of Lord Dunmore and which it evidently appears his Lordship, notwithstanding his assurances, had no intention to restore, intreat you to accept their cordial thanks for this testimony of your zeal for the honour and interest of your Country. We take this occasion also, to give it as our opinion that the blow struck in the Massachusetts Government is a hostile attack on this and every other Colony, and a sufficient warrant to use violence and reprisal in

> all cases where it may be expedient for our security and welfare.

James Madison, May 9, 1775. <http://memory.loc.gov/master/mss/mjm/01/0000/0057.jpg>[5]

The actions of George Mason and Patrick Henry in raising and using the Independent Companies along with others eventually forced Lord Dunmore out of Virginia and put Virginia into patriot hands. This secured the lines of communications between the Southern and Northern colonies and allowed Virginia to supply troops for the Continental Line.

When George Mason wrote the Virginia Declaration of Rights he had no hesitation on its meaning despite that it did not contain the words, "the right of the people to keep and bear arms shall not be infringed."[6] The only known interpretation of Va. Const. Art. I, § 13, comes from George Mason himself in a petition written in December of 1781 just after the victory at Yorktown. He emphatically stated that the people have the right to take up arms against oppression in any form:

> That the good People of Virginia took up Arms, in the present Contest with Great Britain, in Defence of their Liberty and Property, invaded by an

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[5] The text used here is that which was transcribed by Rudolph A. DiGiacinto for Virginia1774.org, and is available online at <http://www.virginia1774.org/HanoverTranscription.html>.

[6] That wording does not become part of the Virginia Constitution until 1971. Va. Const. Art. I, § 13 (1971).

arbitrary & tyrannical Government; that as it is not merely for Names, but our essential Rights we are contending, the same Principles which first induced us to draw the Sword will again dictate Resistance to Injustice & Oppression, in whatever Shape, or under whatever Pretence, it may be offered. And altho' your Petitioners will always be ready most chearfully to contribute to the utmost of their Abilitys, everything proper & necessary in Support of the just War in which the United American States are engaged; Yet we shou'd hold ourselves unworthy the Name of Freemen, if we tamely submitted to such Injustice & oppression as hath lately been exercised over us... That altho' the thirteenth Article of the Bill of Rights expressly declares "that in all Cases, the Military shou'd be under strict Subordination to, and governed by the Civil Power" Yet Horses & other Effects have been frequently taken from the Inhabitants by Military-Officers, and Soldiers, without authority from, or application to the Civil Magistrate, and without Appraisement; by which many poor Familys have been ruined...Your Petitioners conceive that the Enormity & Tyranny of these Proceedings can hardly be parralled in the most despotic Governments; and that, without exemplary Punishment upon the Guilty, a Man can have no Security in his Property; or must be reduced to the fatal Necessity of punishing the

> Aggressor with his own Hand; as in a State without Laws, every Man has a Right to do.

*A Petition and Remonstrance from the Freeholders of Prince William County* (December 10, 1781), in 2 *The Papers of George Mason*, *supra* at 700-711.

The Founding Fathers of Virginia left their writings and impressions about the right to keep and bear arms after the Revolution. St. George Tucker again opines on the issue:

> And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts and law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the right of having and using arms for self-preservation and defense.

2 Tucker, *Blackstone's Commentaries*, at 144. "In America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty." *Id. at 414*.

Thomas Jefferson on this issue wrote the following:

> The constitutions of most of our States assert, that all power is inherent in the

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

*Letter from Thomas Jefferson to Major John Cartwright* (June 5, 1824) in *The Portable Thomas Jefferson* 579 (Merrill D. Peterson ed. 1975).

All types of arms were protected and possessed by Virginians including Swivels (cannon), pistols, muskets and short barreled shotguns or Blunderbusses as can be seen in the advertisement of these items for sale by St. George Tucker in the Virginia Gazette in October 1779. *Virginia Gazette* (Dixon & Nicholson), No. 34., October 2, 1779, at 3, col. 1. http://research.history.org:80/DigitalLibrary/VirginiaGazette/VGImagePopup.cfm?ID=6523&Res=HI>. These same type of short barreled shotguns (now commonly known as sawed-off shotguns) were ordered to be used by George Washington earlier in the year for his troops: "It appears to me that Light Blunderbusses on account of the quantity of shot they will carry, will be preferable to Carbines, for Dragoons, as the Carbines only carry a single ball especially in case of close action." Letter from George Washington to the Board of War (April 4, 1779), in

14 *The Writings of George Washington from the Original Manuscript Sources 1745 – 1799*, at 331 (John C. Fitzpatrick ed. 1936). George Washington's letter as Commander of the American Forces now provides this Court with the "evidence" it was lacking that a sawed-off shotgun is a weapon of the military or the militia. See *United States v. Miller*, 307 U.S. 174 (1939). The Virginia Militia Act of 1785 cited in the *Miller* opinion states under section VI: "That two years after the commencement of this act, shall be allowed for providing the arms and accoutrements herein directed; but in the mean time, the militia shall appear at musters with, and keep by them, the best arms and accoutrements they can get." *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections* (1785) Va. Stat. at Large, 12 Hening 16 (1823). Therefore any arm including a blunderbuss was an acceptable arm of the militia.

St. George Tucker would directly address the Second Amendment as it applies to men being armed or carrying weapons:

> The same author observes elsewhere; "the very use of weapons by such an assembly, without the king's license, unless in some lawful and special cases, carries a terror with it, and a *presumption* of warlike force, etc." The bare circumstance of having arms, therefore, of itself, creates a *presumption* of warlike force in England, and may be given in evidence there, to prove *quo animo* the people are assembled. But ought that

> circumstance of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself? In many parts of the United States, a man no more thinks of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.

5 Tucker, *Blackstone's Commentaries*, at 19.

In a strange quirk of history the Virginia Supreme Court has never squarely addressed the issue of its own constitution under Va. Const. Art. I, § 13. No known case law exists but in an unrelated case it did state the following:

> The numerous restrictions imposed on this class of people in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms.

*John Aldridge v. The Commonwealth*, 4 Va. Cas. 447 (Va. Gen Ct. 1824).

The Virginia General Assembly did address the issue by resolution in 1964 expressing that body's thoughts on the Second Amendment and the individual right to keep and bear arms:

> Whereas, from the landing at Jamestown on to the expansion of this nation to the Pacific coast, a peaceful society developed in the area that was wrested from the wilderness by sturdy riflemen armed with their personal weapons and skilled in their use; and
>
> Whereas, the history of this great nation bears witness to the many benefits derived by a citizenry, free to own - bear - and become skilled in the use of - rifles and other firearms and among these historic occasions, to mention but a few, were the following: Valley Forge, Yorktown, New Orleans, the Alamo, Manassas, Chateau Thierry, Tarawa and Iwo Jima; and
>
> Whereas, the right of the citizen is entwined in the very roots of the founding of this Commonwealth when it was not only the individual's right to bear arms but his duty to bear arms in the defense of his community…
>
> …Resolved by the House of Delegates, the Senate concurring, That the right to keep and bear arms guaranteed by the second amendment to the Constitution of the United States and which right is an inalienable part of our citizens' heritage in this State shall not be infringed;

H.J.R. No. 21., House of Delegates 98 (Virginia 1964)("Concerning the Inherent Right of Citizens of this Commonwealth to Own and Bear Arms").

Crime or accidents involving firearms occurred in Colonial Virginia like they do today including accidental shootings and domestic violence. See *Criminal Proceedings in Colonial Virginia; Records of Fines, Examinations of Criminals, Trial of Slaves etc., Richmond, County, 1710 to 1754 reprinted in* 10 American Legal Records 105, 123, 233 (Peter Charles Hoffer ed. & William B. Scott trans., University of Georgia Press 1984).

To disarm the people because of some misuses of firearms would have been suicidal as the early inhabitants of Stafford County knew first hand. Dueling was a major problem in Virginia although outlawed before the Revolution it continued until the late 19th century. Virginia protected the individual rights of its citizens despite this "barbaric practice". See generally *Cullen v. The Commonwealth*, 65 Va. (24 Gratt) 624 (1873). It instead passed harsh laws to punish the criminal act. See, i.e., *Royall v. Thomas*, 69 Va. (28 Gratt) 130 (1877).

This Court has stated that there exists no constitutional due process right to various types of police protection. See, i.e, *Town of Castle Rock-Colorado v. Gonzales*, 545 U.S. 748 (2005) (enforcement of restraining order); *Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989)(social services protection against abusive father). The District of Columbia may not use the police power to disarm its citizens in contravention

of the "supreme law of the land". *Michigan Cent. R. Co. v. Vreeland*, 227 U.S. 59, 66 (1913). The law of agency applies to municipal corporations. See, i.e., *Lynde v. Winnebago County*, 83 U.S. 6 (1872). The District of Columbia therefore cannot do what Congress itself is prohibited from doing by the Constitution. See, i.e., *Tate v. Department of Conservation and Development*, 133 F.Supp. 53 (E.D. Va. 1955) (applying principals of *Brown v. Board of Education of Topeka, Kansas,* 349 U.S. 294 (1955) and other cases to state parks, even if the land is leased by the government to a third party).

The District of Columbia's ban and requirements under D.C. Code § 7-2502.02(a)(4), D.C. Code § 22-4504(a), and D.C. Code § 7-2507.02 violate the Second Amendment to the United States Constitution and are unconstitutional. It deprives the people of the District as citizens of the United States the right to keep and bear arms for self-defense, self-preservation, and the common defense of the community in which they live regardless of whether they are part of a "state regulated" militia.

This Court should examine the state of things existing when the Constitution was framed and adopted by those who wrote it, in order to ascertain the meaning or intent of the law. See *State of Rhode Island v. Com. of Massachusetts,* 37 U.S. (12 Pet.) 657, 721 (1838).

> I consider and fear the natural propensity of rulers to oppress the people. I wish only to prevent them from doing evil. By these amendments, I would give necessary powers, but no unnecessary power. If the clause stands

> as it is now, it will take from the state legislatures what divine providence has given to every individual—the means of self defence.

Statement of George Mason (June 14, 1788), in 3 *The Papers of George Mason*, *supra* at 1073-1076.

The right of the people or individuals to keep and bear arms may not be infringed because it is the foundation of the individual's personal security. The individual does not give up the right or means of self-defense by entering a state of society. The Virginia Supreme Court quoted Sir Mathew Hale as stating:

> The right of self-defence in these cases is founded in the law of nature, and is not, nor can be superseded by the law of society. The true principle upon which rests our right of defending either our persons or our goods is this: the law of nature does not oblige us to give them up when any one has a mind to hurt them or to take them from us, and this is evident because our right to them would be unintelligible, or would, in effect, be no right at all, if we were obliged to suffer all mankind to treat them as they pleased without endeavoring to prevent it. This right of defence is indefinite in its extent, and while legal principles are general their application to particular cases must always depend upon special circumstances.

*Parrish v. Commonwealth*, 81 Va. 1, 4 (1884) (overruled in part by *Fortune v. Comm*., 112 S.E. 861 (Va. 1922), but cited solely for the quoted and internally cited material) The Court continues, quoting "Rutherford's Institutes":

> The law allows us to defend our persons and our property; and such general allowance implies that no particular means of defence are prescribed to us. We may, however, be sure that whatever means are necessary are lawful, because it would be absurd to suppose that the law of nature allows of defence and yet forbids us, at the same time, to do what is necessary for the purpose. From hence it follows that he who attempts to injure us, gives us an indefinite right over his person, or a right to make use of such means to prevent the injury *as his behavior and our situation make necessary*.

*Id*. (emphasis in original)

The Virginia Supreme Court also opined that "Man as an individual possesses certain rights which are called inherent rights...which are not surrendered by entering into an organized society." *Richmond F. & P. Railroad Co. v. City of Richmond*, 133 S.E. 800, 803 (Va. 1926)[7]. "It must never be forgotten, however, that the liberties of the people are not so safe under the gracious manner of

[7] A paraphrase of The Virginia Declaration of Rights and the Va. Const. Art. I, § 1.

government, as by the limitation of power." Richard Henry Lee to Patrick Henry (May 28, 1789) in 2 *The Letters of Richard Henry Lee*, *supra* at 487.

As the individual right to keep and bear arms secures the individual's safety, its marriage with a well regulated militia protects the society in which they live. The District of Columbia would best be served by heeding the words of George Washington and once again compel militia service to end the high crime rate:

> But your first object should be a well regulated Militia Law; the People, put under good Officers, would behave in quite another Manner; and not only render real Service as Soldiers, but would protect, instead of distressing, the Inhabitants. What I would wish to have particularly insisted upon, in the New Law, should be, that every Man, capable of bearing Arms, should be obliged to turn out, and not buy off his Service by a trifling fine. We want Men, and not Money.

Letter from George Washington to Governor William Livingston (NJ) (Jan. 24, 1777) in 7 *The Writings of George Washington from the Original Manuscript Sources 1745 - 1799*, *supra* at 56.

## CONCLUSION

For all the foregoing reasons, *Amicus Curiae*, Virginia1774.org respectfully submits that this Court should affirm the judgment of United States Court of Appeals District of Columbia Circuit below.

Respectfully Submitted,

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