No. 03-51

IN THE
SUPREME COURT OF THE UNITED STATES

SEAN SILVEIRA, JACK SAFFORD, PATRICK OVERSTREET, DAVID K. MEHL, SGT. STEVEN FOCHT, SGT. DAVID BLALOCK, MARCUS DAVIS, VANCE BOYES, and KEN DEWALD,
PETITIONERS,

-versus-

BILL LOCKYER, Attorney General, and GRAY DAVIS, Governor, State of California,
RESPONDENTS.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit, Stephen Reinhardt, Raymond C. Fisher, Circuit Judges, & Frank J. Magill, Senior Circuit Judge, Eighth Circuit.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners respectfully submit this REPLY BRIEF in response to newly raised matters in the BRIEF IN OPPOSITION filed by respondents October 22, 2003.

THE CASE

The complaint is a notice pleading subject to the analysis in *Conley v. Gibson*, 355 U.S. 41 (1957). Petitioners make sufficient allegations of standing and ripeness, as set out in the PETITION FOR WRIT OF CERTIORARI, pp. 1-3, including present ownership of firearms subject to the Act, and the desire to acquire arms rendered unlawful by its provisions. The use of such arms is directly in accord with the underlying purposes of the Second Amendment that go back before BLACKSTONE, STORY, and COOLEY.[1]

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[1] *See* I COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS (8TH ed. 1927)(personal nature of Second Amendment rights); II BLACKSTONE, *The Rights of Persons*, in COMMENTARIES bk. 1, c. I, 127, 143, 144 (1803). Justice Story wrote this legendary paragraph:

> The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic .... III STORY, COMMENTARIES ON THE CONSTITUTION at 746, §1890 (Rothman 1st ed 1991).

Blackstone stated clearly in his 1803 COMMENTARIES – *supra,* on the fundamental nature of various personal rights, including that of bearing arms for self-defense:

> 5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence ....
>
> [It] is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

The lower court had no difficulty with the sufficiency of the complaint and the ripeness-standing issues, nor did the six Circuit Judges who dissented from denial of rehearing en banc. The opinion below declared one provision of the statute unconstitutional, the exemption allowing retired police to own firearms prohibited to other citizens. *See* PETITION at 101A.

Petitioners would have no difficulty meeting the "[f]earing that they would be prosecuted …" standard of *Thompson v. Western States Med. Ctr.,* 535 U.S. 357, 365 (2002).

The original complaint was filed early in Year 2000. Any ambiguities can be cured by amendment prior to trial to conform to developments in the years intervening.

The BRIEF IN OPPOSITION seriously misstates the posture and case of Petitioners and uses every anti-Second Amendment "buzzword" in the political Lexicon, instead of focusing on relevant case law and the question of certworthiness.

I. CONFLICT WITH PRECEDENT FROM THIS COURT

1. Respondents invoke *Cruikshank, Slaughter-House, Presser,* and *Miller* as supporting the judgment below and representing "more than 120 years" of holdings that the Second Amendment – unlike the First, Fourth, Fifth, Sixth, and Eighth Amendments[2] - does not apply to the States.

> … the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birth-right to enjoy entire ….

[2] Relevant cases applying Amendments I, IV, V, VI, and VIII to the States include: *West Virginia Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943); *Watchtower v. Village of Stratton,* 536 U.S. 150 (2002)(prior restraints); *Mapp v. Ohio,* 367 U.S. 643 (1961); *Powell v. Alabama,* 287 U.S. 45 (1932)(presumption of innocence); *Duncan v. Louisiana,*

In fact, however, this Court has not *refused* to apply a Bill of Rights clause to the States in the 78 years since before *Gitlow v. New York,* 268 U.S. 652 (1925)(First Amendment presumed applicable to States). The opportunity to apply the Second Amendment to the States has simply not arisen in an appropriate case under review, not until the present *Silveira* appeal with its several certworthy questions.[3]

Initially, respondents on p. i cite *Miller* as having upheld "the conviction of an individual who violated a federal gun control law ...." That is false and misleading. Miller was not convicted, but exonerated by the lower court, which held the statute unconstitutional under the Second Amendment. 26 F. Supp. 1002 (W.D. Ark. 1939). This kind of error and misstatement permeates the BRIEF IN OPPOSITION.

The Ninth Circuit panel opinion, moreover, explicitly rejected both *Cruikshank* and Presser, stating: "[W]e are in agreement with the Fifth Circuit ... that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. *See Emerso*n, 270 F.3d at 221 n.13." *Silveira,* 312 F.3d at 1067 n.17.[4]

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391 U.S. 145 (1968); *Benton v. Maryland,* 395 U.S. 704 (1969); *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Malloy v. Hogan,* 378 U.S. 1 (1964); *Griffin v. California,* 380 U.S. 609 (1965); *Cooper Industries v. Leatherman Tool,* 532 U.S. 424 (2001)(Eighth Amendment); *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897)(applying just compensation and civil jury right to the States).

[3] It is elementary that denial of certiorari allows no inferences on the merits, although respondents appear to argue otherwise.

[4] Another panel of the Ninth Circuit in *Fresno RPC v. Van de Camp,* 965 F.2d 723 (9th Cir. 1992), however, had explicitly followed *Cruikshank* and *Presser.* The law of the Ninth Circuit on this point is most uncertain and depends upon the panel.

The conflict is this: To follow *Slaughter-House, Cruikshank,* and *Presser* would be to disregard the entire line of incorporation cases from the past 78 years: *E.g., Gitlow v. New York,* 268 U.S. 652 (1925); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Benton v. Maryland*, 395 U.S. 704 (1969)(double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964)(Fifth Amendment); and *Cooper Industries v. Leatherman Tool,* 532 U.S. 424 (2001). *Presser* is even at odds with the rationale of *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)(applying just compensation and civil jury right to the States).[5]

In reading the BRIEF IN OPPOSITION, one gets the impression that Respondents believe *nothing* in the Bill of Rights should apply to the States. Respondents do not acknowledge *any* of the incorporation cases such as *Benton, Duncan, Malloy,* and the many others in this important body of jurisprudence.[6]

2. Congressional history, ignored by Respondents, also supports incorporation of the Second Amendment through both the due process and privileges or immunities clauses of the Fourteenth Amendment. The same Congress that proposed the Fourteenth Amendment passed the Freedmens Bureau Act in part to protect "the right of the people to keep and bear arms …"[7] in the former rebellious Confederate States.[8]

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[5] *Chicago B. & Q.* is often not closely read by scholars and the reference to the civil jury right is usually overlooked.

[6] *See generally* AMAR, BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998), and LEVY, LEONARD W. ORIGINS OF THE BILL OF RIGHTS (Yale 1999).

[7] 14 STAT. 173, 176.

[8] Georgetown Emeritus Professor Antieau notes that in the debates on the Fourteenth Amendment, Senator Howard assured supporters "that Black freedmen would have equality of right 'to keep and bear arms.'" CONGRESSIONAL GLOBE, 39th Cong., 1st Sess., 2765-66. ANTIEAU, THE

As historian Eric Foner emphatically stated:

> But it is abundantly clear that Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, [and] the right to bear arms .... The Freedmen's Bureau had already taken steps to protect these rights, and the [Fourteenth] Amendment was deemed necessary, in part, precisely because every one of them was being systematically violated in the South in 1866. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 258 (1988).[9]

Justice Black's concise Appendix in *Adamson v. California,* 332 U.S. 46, 68 (1947), and Michael Kent Curtis' detailed insightful book carefully examine the historical texts, debates in Congress, party platforms, and constitutional tracts. Curtis concludes: "On careful analysis, these texts provide support for the proposition that the Fourteenth Amendment was designed to apply the Bill of Rights to the States."[10] Curtis observes that "[t]his history shows that the rights set out in the Bill of Rights were cherished and appealed to by antislavery northerners and were disregarded in the South and elsewhere in the interest of protecting slavery."[11]

Overall Curtis "found over **thirty examples** of statements by Republicans during the Thirty-eighth and Thirty-ninth Congresses indicating that they believed that at least some Bill of Rights liberties

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INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 286 (1997).

[9] Foner cites CONGRESSIONAL GLOBE, 42d Cong., 1st Sess., Appendix 83; 39th Cong., 1st Sess. 1033, 1088, 2765; and Curtis, *The Fourteenth Amendment and the Bill of Rights,* 14 CONN. L. REV. 237-306 (1982).

[10] CURTIS, NO STATE SHALL ABRIDGE 8 (Duke 1986).

[11] Id. at 33.

limited the states."[12] Crosskey and Aynes provide further and relatively overwhelming support and analysis.[13] Specific references to the First and Second amendments appear often in this Congressional history. Curtis adds:

> John Bingham, the author of the amendment, and Senator Howard, who managed it for the Joint Committee in the Senate, clearly said that the amendment would require the states to obey the Bill of Rights. *Not a single senator or congressman contradicted them.* (Emphasis in original).[14]

Today this material is all online in minutes through the Library of Congress and other websites. *See* CONGRESSIONAL GLOBE, 39th Cong., HTTP://MEMORY.LOC.GOV/AMMEM/AMLAW/LLCG_BROWSE.HTML.

The 1908 monumental work of Horace Flack at Johns Hopkins also supports the conclusion that the Fourteenth Amendment protects the individual right to keep and bear arms, and incorporates at least the Bill of Rights, as against state action. Flack traced the legislative history of civil rights bills as well as the Thirteenth and Fourteenth Amendments. He observes that:

> … it is evident that the right to bear arms was regarded as one of the rights pertaining to citizens, and as this right is secured by the

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[12] Id. at 112 (Emphasis added).

[13] *See* Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority,* 22 U. CHI. L. REV. 1 (1954); Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI-KENT L. REV. 627 (1994).

[14] Id. at 91. *See also* Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority,* 22 U. CHI. L. REV. 1 (1954).

> Second Amendment, it may reasonably be inferred that the other rights and privileges secured or enumerated by the first eight Amendments were also regarded as belonging to all persons. The bill passed the House February 6, 1866, by a vote of 136 to 33 ….[15]

Congressmen Stevens and Bingham in December of 1865 had both introduced resolutions proposing what in time would become the Fourteenth Amendment. Mr. Bingham stated that the proposal "meant nothing less than conferring upon Congress the power to enforce, in every State of the Union, the Bill of Rights, as found in the first eight amendments."[16]

The respondents totally disregard not only the incorporation jurisprudence of this Court, but also the explicit Congressional history.

3. The decision below conflicts in further ways with precedent from this Court. The notion that Petitioners lack standing because the Ninth Circuit denies Second Amendment protection to individual citizens is wrong and sharply in conflict with decisions from this Court.

Jack Miller, an individual, had standing in *United States v. Miller,* 307 U.S. 174 (1939). Mr. Lawrence in *Lawrence v. Texas,* 539 U.S. ___ (2003), had standing although his arguments may have seemed foreclosed by *Bowers v. Hardwick,* 478 U.S. 186 (1986).

Even Dred Scott had *standing* to sue and appear to argue the merits before Chief Justice Roger Taney!

Judge Kozinski in dissent below notes that *Miller* upheld the standing of the individual defendants, and then decided the merits.[17] The same is true of

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[15] FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 17 (Johns Hopkins 1908).

[16] Id. at 56 & 57.

[17] *Silveira v. Lockyer,* 328 F.3d 567, 569 (9th Cir. 2003)(Kozinski, *J,* dissenting from denial of rehearing).

Eisenstadt v. Baird, 405 U.S. 438, 443-46 (1972)(leading standing-strict scrutiny case). Indeed, Baird had to overcome an adverse 1938 per curiam from this Court. He nonetheless had full personal and *jus tertii* standing to challenge the Massachusetts laws restricting birth control, although those had been unanimously upheld in *Gardner v. Massachusetts,* 305 U.S. 559 (1938)(per curiam).

Since Messrs Miller, Lawrence, Baird and even Dred Scott had standing, so too do Mr. Silveira and his co-petitioners. The issue is certainly certworthy.

4. The position of the court below and that of respondents on ripeness-standing is also in direct conflict with decisions of this Court. Cases such as *Gratz v. Bollinger,* 539 U.S. ___ (2003); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)(ripeness-strict scrutiny); *Thompson v. Western States Medical Center,* 535 U.S. 357 (2002); *Griswold v. Connecticut,* 381 U.S. 479 (1965)(standing – strict scrutiny); and *Doe v. Bolton,* 410 U.S. 179 (1973)(ripeness – strict scrutiny), have dealt with standing at length. The position of respondents and the ruling below are contrary to nearly a century of standing and ripeness jurisprudence, including cases as early as *Truax v. Raich,* 239 U.S. 33 (1915)(standing and ripeness in pre-enforcement case).

Although petitioners would face arrest if they should exercise their rights, there is no requirement that petitioners be in imminent danger of arrest before contesting a law that directly burdens their freedom of action. The present controversy is as hard fought and adversarial as *West Virginia Bd. of Educ.* v. *Barnette,* 319 U.S. 624 (1943)(overruling *Gobitis*)(pre-enforcement challenge allowed prior to effective date of regulation), and *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925)(pre-enforcement action allowed 17 months before statute would become effective).

The whole purpose of the federal DECLARATORY JUDGMENT ACT, SEN. REP. NO. 1005, 73d CONG., 2d SESS., was to avoid unnecessary risk of prosecution for citizens with a legitimate interest in challenging a burdensome law.

5. The citations on page 6 of Respondents' Brief to cases such as *Lewis, Adams, Bean,* and *Lopez* are wide of any relevant mark in this case. None was a Second Amendment case, in form, argument, or briefing.

Petitioners have examined the briefs and records in *Lewis,* 445 U.S. 55, 60-68 (1980). The Court there held 6-3 that although a "prior state-court felony conviction may be subject to collateral attack under *Gideon v. Wainwright*, 372 U.S. 335, it could properly be used as a predicate for his subsequent conviction for possession of a firearm in violation of … [the] Omnibus Crime Control and Safe Streets Act of 1968." Lewis involved nothing more than a convicted felon seeking to prevent authorities from using an invalid uncounseled conviction against him as a sentencing enhancement. The dissenting opinions were persuasive.

6. Lastly, the respondents fail to mention the significant case of *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003). *Eldred* is relevant to the militia clause that prefaces the Second Amendment and mentions one of its several purposes. The militia clause, a dangling participle, was explained long ago in Cooley's treatise, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW sec. IV (1898):

> *The Right is General.* -- 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.

II. CIRCUIT CONFLICT

The BRIEF IN OPPOSITION at 7 denies the sharp Circuit conflict described both by the panel and the Circuit Judges dissenting from denial of rehearing en banc. Respondents attempt to describe the lengthy opinions below as merely "advisory."

In fact, the conflicts among the circuits and the highest courts of the States are several, as described in the PETITION FOR WRIT OF CERTIORARI at 3-27.

III. THIS CASE DOES NOT SEEK AN ADVISORY OPINION – THERE IS AN ACTIVE CASE AND CONTROVERSY

Again, Respondents claim that the decision below and the *Emerson* decision were unnecessary, advisory, and gratuitous dicta. Respondents even go so far as to mis-represent that Petitioners "candidly admit" asking for an advisory opinion. Not so.

This is the kind of case where incremental threshold questions must be resolved by this Court before a trial on the merits can be had. Such cases are a regular occurrence at the appellate level. For example, see *United Building v. Mayor,* 465 U.S. 208 (1984).

CONCLUSIONS

For the reasons set out, this Court should grant certiorari.

RESPECTFULLY,

_____

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