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,

v.

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

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

BRIEF OF *AMICUS CURIAE* JEWS FOR THE PRESERVATION OF FIREARMS OWNERSHIP IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Jews for the Preservation of Firearms Ownership ("JPFO") is a non-profit tax-exempt Wisconsin corporation with more than 5,000 members and many more Internet-based supporters. Not a lobbying group, JPFO is an educational organization with a vital interest in preserving the individual right to keep and bear arms. Based upon original historical research and analysis, JPFO has observed that the 70 million innocent civilians murdered in the 20th Century's eight major genocides were direct victims of "gun control" laws and policies that disarmed them.

To JPFO, the Second Amendment to the United States Constitution stands as the Founding Fathers' clear and unmistakable legal statement that an armed citizenry is the bulwark of liberty and provides the fundamental basis for law-abiding Americans to defend themselves, their families, their communities and their nation against all aggressors, including, ultimately, a tyrannical government.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

As a civil rights organization, JPFO's paramount interest is the preservation of liberty under the Bill of Rights, and a uniform, proper interpretation of the Second Amendment advances that interest. The instant case would represent the very first time this Court will have taken up a detailed and comprehensive analysis of the nature and scope of the Second Amendment, a provision of the Bill of Rights that is arguably the very last line in the defense of American liberty.

SUMMARY OF THE ARGUMENT

This case raises an issue of fundamental Constitutional importance. The Second Amendment has never been comprehensively addressed by this Court. As Petitioners demonstrate, the federal courts have until recently given little substantive attention to the Second Amendment. Even in *United States v. Miller*, 307 U.S. 174 (1939), the procedural context of the case did not afford this Court an opportunity to delve in as great detail into the nature and scope of the Second Amendment as the Court has done with the other essential aspects of our Constitutional scheme. The result is that there is no clear guidance for any court, federal or otherwise, about the meaning and effect of the Constitutional right to keep and bear arms. Only since the recent case of *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), has any federal court addressed the issue comprehensively. The instant case represents the second such attempt, and, as Petitioners demonstrate, it is diametrically opposed to the view expressed in *Emerson*.

It is essential that this Court once and for all take up the issue of the right to keep and bear arms for two main reasons. First, the Framers understood that the right to keep and bear arms is critical to prevent the rise of tyranny. Along with fundamental rights such as free speech, free press, and peaceable assembly, the Framers understood that the right to keep and bear arms is essential for a free people to remain free. They recognized that an armed people can never be subjugated by a tyrannical ruler. Accordingly, they sought to ensure that the newly formed United States could never undermine that fundamental protection. Given that the

Framers' highest priority was preserving a free people from tyranny, this Court should interpret the Second Amendment clearly to further the Framers' intentions in this and subsequent cases.

Second, throughout history the disarmament of populations has substantially increased a people's risk of suffering genocide and mass oppression. History, both recent and distant, is replete with a familiar pattern: the pattern of disarmament and genocide. Throughout the world we have seen first disarmament and then genocide and mass oppression practiced in Ottoman Turkey, the Soviet Union, Nazi Germany, Communist China, Guatemala, Uganda, Cambodia, and Rwanda, to name a few. In our own history we saw African-Americans in the South systematically denied arms in an effort to facilitate oppression. Because disarmament so naturally and inevitably goes hand in hand with mass oppression and genocide, it is critically important that this Court address the Constitutionality of laws that disarm the American people.

ARGUMENT

I. THE COURT SHOULD DEFINITIVELY ADDRESS THE RIGHT TO KEEP AND BEAR ARMS BECAUSE THE FRAMERS UNDERSTOOD THE RIGHT AS FUNDAMENTAL TO PREVENT THE RISE OF TYRANNY

As Petitioners demonstrate, Second Amendment jurisprudence has, until very recently, been given scant substantive attention by the federal courts. In *United States v. Miller*, 307 U.S. 174 (1939), this Court had its first occasion to directly address the right to keep and bear arms. The procedural context of that case precluded this Court from giving the Second Amendment's nature and scope the careful scrutiny that this Court has given the other essential aspects of our Constitutional scheme. As a result there is no clear guidance for any court, federal or otherwise, about the meaning and effect of the Constitutional right to keep and bear arms.

Recently, the Fifth Circuit plunged deeply into the subject in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (Second Amendment broadly protects an individual right to keep and bear arms). *Emerson* represents the first time any federal court has addressed the issue comprehensively. The instant Ninth Circuit case represents the second such attempt, and, as Petitioners demonstrate, it directly opposes the view expressed in *Emerson*.

The Framers of the Constitution understood and did not question the essential role an armed citizenry plays in the defense of a free people. They had before them a rich history

of European despotism from which to draw the keen understanding that armed people are free people. Because the Framers were unmistakably aware of the essential nexus between firearms ownership and liberty, this Court should take up a thorough review of the issue and render a determination, once and for all, regarding the manner in which our Constitution addresses this vital principle of freedom.

Judge Kozinski concisely explained the Framer's understanding in his dissent below:

> But the simple truth born of experience is that tyranny thrives best where government need not fear the wrath of an armed people.

Silveira v. Lockyer, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting).

Contemporary writings amply evidence that the Framers knew this truth. In the debates over ratification of the Constitution, one New York anti-federalist known as "Brutus" (thought to be New York judge and convention delegate Robert Yates) noted that a great imbalance of power between the government and the people posed a great risk:

> The liberties of the people are in danger from a large standing army, not only because the rulers may employ them for the purposes of supporting themselves in any usurpations of power . . . but there is a great hazard that any army will subvert the forms of government, under whose authority they are raised, and

> establish one according to the pleasure of their leader.

Brutus No. X, *The Anti-Federalist Papers and the Constitutional Convention Debates* 287 (Ralph Ketcham ed., 1986).

Alexander Hamilton's answer, in *Federalist* 29, emphasized how the armed citizens would oppose and deter the excesses of a standing army:

> . . . if circumstances at any time should oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens.

The Federalist No. 29, at 185 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

James Madison similarly argued that the American people, unlike most of their counterparts in Europe, have the advantage of being armed, and thus a standing army in the hands of a tyrant could not overcome the collective armed defensive efforts of the citizenry. *The Federalist* No. 46 (James Madison).

George Mason, understanding the fundamental nature and function of the militia, noted simply: "I ask, Who are the militia? They consist now of the whole people, except a few

public officers." 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 425 (Jonathan Elliot 2d ed., 1836) (remarks of George Mason at the Virginia ratification convention). Thus, the militia was understood to be the whole of the people a peop le armed and ready to defend their liberty against enemies foreign and domestic.

On January 7, 1788, "The Republican" affirmed the benefits of maintaining an armed citizenry:

> . . . It is a capital circumstance in favor of our liberty that the people themselves are the military power of our country. In countries under arbitrary government, the people oppressed and dispirited neither possess arms or know how to use them. Tyrants never feel secure until they have disarmed the people.

The Origin of the Second Amendment 188-91 (David E. Young ed., 1991) (quoting article in The Hartford Courant).

The Framers drew most of their examples from the history of oppressed peoples living under the yoke of despotic European monarchs. One example the Framers sought to emulate, however, was that of Switzerland. The Framers saw the Swiss, the most universally armed citizenry in all of Europe, as a prime example of how a free nation defends itself from external aggression and also from internal usurpation of government power. During the debates over the Militia Act of 1792, Representative James Jackson of Georgia had this to say about the Swiss:

> . . . the people of America would never consent to be deprived of the privilege of carrying arms. . . . The Swiss Cantons owed their emancipation to their militia establishment . . . . In a Republic, every man ought to be a soldier, and prepared to resist tyranny and usurpation, as well as invasion, and to prevent the greatest of all evils – a standing army.

2 Annals of Cong. 1852-53 (1790). The Swiss example demonstrated to the Framers how an armed citizenry could forestall the rise of tyranny.

In addition, the Framers could refer to the long history of English law. Blackstone listed the right to possess arms as one of the five auxiliary rights of English subjects without which their primary rights could not be maintained. 1 William Blackstone, *Commentaries* *143-44.

In his dissent to the instant Ninth Circuit decision below, Judge Kleinfeld noted that the "historical context of the Second Amendment is a long struggle by the English citizenry to enable common people to possess firearms." *Silveira*, 328 F.3d at 582 n.76.

The struggle culminated in the drafting of the English Declaration of Rights. In the aftermath of Charles II's and James II's attempts to disarm the people, the Declaration of Rights became an explicit condition to the accession of William and Mary to the throne in 1689. It is the Declaration of Rights that forms the basis of Blackstone's understanding of the basic rights of Englishmen. *Id.* at 582-83.

Aptly describing the Second Amendment as a "doomsday provision," Judge Kozinski saw the Amendment as

> one designed for those exceptionally rare circumstances where all other rights have failed---where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies seem today, facing them unprepared is a mistake a free people get to make only once.

Id. at 570.

Historical documents disclose the Framers' deep concern about the potential rise of tyranny and the people's means to deter it. *See Emerson*, 270 F.3d at 227; Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 55-87 (2d ed. 1994) (quoting and citing numerous original sources). That this Court has never thoroughly analyzed this issue of such fundamental importance to the Framers argues forcefully for a definitive resolution of the issue now.

Because the Framers understood that an armed populace is essential to prevent the rise of tyranny, this Court should grant the Petition for a Writ of Certiorari to definitively determine the nature and scope of the Constitutional right to keep and bear arms.

II. THE COURT SHOULD DEFINITIVELY ADDRESS THE CONSTITUTIONALITY OF LAWS THAT DISARM THE AMERICAN POPULACE BECAUSE THROUGHOUT HISTORY THE DISARMAMENT OF POPULATIONS HAS SIGNIFICANTLY INCREASED A PEOPLE'S RISK OF SUFFERING GENOCIDE AND MASS OPPRESSION

> All too many of the great tragedies of history -- Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name a few--- were perpetrated by armed troops against unarmed populations.

Silveira, 328 F.3d at 569-70 (Kozinski, J., dissenting).

Denying the individual right to keep and bear arms has been a *modus operandi* of official repression since the advent of the modern state. The Ninth Circuit decision below follows an ominous footpath. Because of the tragic history of citizen disarmament, this Court should grant certiorari and seize the opportunity to decide whether the Ninth Circuit's course is permissible under our Constitution.

Sobering it is to realize that every instance of genocide of the Twentieth Century was made possible by the disarmament of a civilian population. Upwards of 70 million people were killed in Ottoman Turkey (1915-17), the Soviet Union (1929-45), Nazi Germany and Occupied Europe (1933-1945), Nationalist China (1927-1949), Communist China (1949-52, 1957-60, and 1966-70), Guatemala (1960-81), Uganda (1971-79), Cambodia (1975-79), and Rwanda (1994). *See* Aaron Zelman & Richard W. Stevens, *Death by "Gun Control": The Human Cost of Victim Disarmament* 3 (2001);

see also R. J. Rummel, *Death by Government* (1997) (comprehensive analysis of genocide resulting from imbalance of power between civilians and governments). Some governments have massively confiscated weapons prior to committing mass murder. In other cases, confiscation followed after the groundwork was laid by "reasonable" regulation and registration of firearms.

A prime example is the Ottoman Empire's near total extermination of the Armenians. After deposing Sultan Abdul Hamid II in 1908, the reforming "Young Turks" enacted Article 166 of the Ottoman Penal Code (1911) prohibiting the possession, carrying, and importation of "prohibited weapons" without government permission. Zelman & Stevens, *supra*, at 145. Subsequently the Turkish government ordered that all Armenians turn over all firearms, bombs, and daggers. The government further ordered that the Armenians be deported to concentration camps, and that any Armenians "who dare to use arms" to resist deportation were to be "arrested dead." *Id.* at 136-38 (*citing* Official Proclamation to Deport Armenians, June 26, 1915, Preamble, Item 5, Item 6).

Ultimately, between 1 and 1.5 million Armenians were murdered by their government. The victims had been rendered ill-equipped to raise a hand in their own defense.

Certainly the most infamous genocide of the Twentieth Century was the Nazi slaughter of the European Jews. Less well-known is the role that legal gun control played. Seemingly innocuous, a 1928 law enacted by the liberal pre-Nazi Weimar government prohibited firearms ownership without a license. After they attained power,

however, the Nazis were able to selectively enforce this law against the Jews. A 1936 memorandum of the Bavarian Political Police documents the procedure:

> In principle, there will be very few occasions where concerns will not be raised regarding the issuance of weapons permits to Jews. As a rule, we have to assume that firearms in the hands of the Jews represent a considerable danger to the German people.

Id. at 89-90 (*citing* Bayerishe Politische Polizei, Waffenscheinen an Juden, February 5, 1936). Eventually the Nazis ended the "registration" charade. In a series of decrees issued in November 1938, all German Jews were prohibited from possessing firearms. *Id.* at 95-98 (*citing, inter alia, Nazis Smash, Loot and Burn Jewish Shops and Temples Until Goebbels Calls Halt*, New York Times, Nov. 11, 1938, at 1).

In 1938, the Nazis also updated the 1928 law and severely limited the rights of non-Jews to own firearms. Exempt from this law were "authorities of the Reich," "various government entities," and "departments and their subdivisions of the National Socialist Workers' Party designated by the deputy of the Führer." *Id.* at 90-91 (*citing* Reichgesetzblatt 1938, I, 265, §11). The Nazi laws simplified the job of rounding up Jews and other declared "enemies of the State."

In his dissent below, Judge Kozinski noted:

> If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht

> for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

Silveira, 328 F.3d at 570 (Kozinski, J., dissenting). *See also* Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 Arizona J. Int'l & Comp. L. 483 (2000) (Nazi augmentation of Weimar gun control laws rendered Jews defenseless against officially sanctioned arms roundups and eventual victimization).

More recently, the world saw approximately 800,000 members of the Rwandan Tutsi tribe slaughtered by their Hutu rulers during the Spring and Summer of 1994 due to a 1979 law that left the Tutsi minority largely disarmed. Zelman & Stevens, *supra*, at 123-31 (citing original sources).

Today the formula is playing out in Zimbabwe. The government there has supported large-scale violence against white land owners and has undertaken a comprehensive round up of firearms owned by those landowners. *Id.* at 183-97 (citing original reports).

Civilian disarmament also played an unfortunate part in our own nation's history of state-approved repression of African Americans. There was a wide variety of "gun control for blacks" legislation, both before and after the Civil War, including both naked prohibition and licensing. Zelman & Stevens, *supra*, at 204 (citing numerous sources). When slavery was legal, the slave states had comprehensive legal and customary prohibitions on black ownership of firearms. Robert J. Cottrol & Raymond T. Diamond, *The Second*

Amendment: Towards an Afro-Americanist Reconsideration, 80 Geo. L. Rev. 309, 335-38 (1991). For example, in Florida, "patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process." *Id.* In the North, however, blacks successfully defended themselves against mob violence by bearing arms in their own defense. *Id.* at 341-42 (*cited in Silveira*, 328 F.3d at 569 (Kozinski, J., dissenting)).

In *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857), Chief Justice Taney noted that black citizenship was unthinkable because blacks would have "the right to keep and carry arms wherever they went."

Disarmament consistently appeared as a component of the post-Civil War Black Codes designed to limit blacks' freedom as much as possible. *Silveira*, 328 F.3d at 577 (dissenting opinion); Cottrol & Diamond, *supra*, at 344. For instance, Mississippi enacted a statute specifically prohibiting freed blacks from owning and possessing any weapon without a license. Cottrol & Diamond, *supra*, at 344 n.176. Louisiana and Alabama followed suit. *Id.* at 344-345 nn.176-178 (citing and quoting original sources).

The passage of the Fourteenth Amendment invalidated the expressly racial "gun control" laws, but restrictions on firearms possession continued. Examples include laws that permitted the carrying of military firearms, but not inexpensive weapons that freed blacks could afford. Such laws rendered blacks defenseless in public places where racial attacks often occurred. *See* Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity--the*

Redeemed South's Legacy To a National Jurisprudence, 70 Chi.-Kent L. Rev. 1307-1335 (1995). "The model of gun control that emerged from the redeemed South is a model of distrust for the South's untrustworthy and unredeemed class, a class deemed both different and inferior, the class of Americans of African descent." *Id.* at 1333.

The racial design of civilian disarmament laws was no secret. Thus, in *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941), in his special concurrence, Justice Buford noted that the Florida gun control provision at issue was specifically passed to "for the purpose of disarming Negro laborers . . . [and] was never intended to be applied to the white population."

The black freedmen understood that their disarmament would only be the beginning of white oppression. One Louisiana black wrote in 1865, "As one of the disenfranchised race, I would say to every colored soldier, 'Bring your gun home.'" Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 120 (1988).

Legal restrictions on blacks' firearm ownership meant that blacks frequently were unable to protect themselves from white terrorists and lynchers. "Disarmament was the tool of choice for subjugating both slaves and free blacks in the South." *Silveira*, 328 F.3d at 569 (Kozinski, J., dissenting).

Further, "[p]rivate terrorist organizations, such as the Ku Klux Klan, were abetted by southern state governments' refusal to protect black citizens, and the violence of such could groups could only be realistically resisted with private firearms." *Silveira*, 328 F.3d at 577 (Kleinfeld, J. dissenting).

The tragic history of civilian disarmament cries a warning against any systematic attempts to render innocent citizens ill-equipped to defend themselves from tyrants, terrorists, despots or oppressive majorities. Given the grave consequences of civilian disarmament and the Framers' express efforts to preclude such disarmament, there can be few issues more worthy of this Court's consideration.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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