



# **Journal on Firearms and Public Policy**







# Journal on Firearms and Public Policy

## Volume 20

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DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,  
MAYOR OF THE DISTRICT OF COLUMBIA,  
Petitioners,

v.

DICK ANTHONY HELLER  
Respondent.

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## A Heller Overview

By David B. Kopel

This Article provides a brief summary of the Supreme Court's decision in *District of Columbia v. Heller*, some background about the case, and some thoughts about issues likely to be raised post-*Heller* litigation on the Second Amendment. The case that became *D.C. v. Heller* was the brainchild of Robert A. Levy, an attorney who is a Senior Fellow in Constitutional Studies at the Cato Institute, a Washington think tank. Levy also serves on the Board of Directors of the Institute for Justice, a libertarian public interest law firm in Washington, D.C. Levy teamed up with Clark Neilly, a staff lawyer at the Institute for Justice, and together they found Alan Gura, who served as the lead attorney on the case. The case was filed in the federal district court for the District of Columbia in February 2003. There were six plaintiffs in the original case, which was then known as *Parker v. District of Columbia*; lead plaintiff Shelly Parker was a neighborhood activist who had been threatened by drug dealers.

The plaintiffs challenged three separate parts of D.C.'s gun control laws:

The ban on registration (which is required for legal possession) of any handgun that was not already registered in 1976 to its current owner. In the fall of 1976, the D.C. City Council had banned handguns, but had allowed current owners to keep their current handguns.

The gun storage law, which required that all lawful firearms (registered rifles, registered shotguns, and registered pre-1977 handguns) in homes in D.C. be kept unloaded, and either trigger-locked or disassembled that all times. The prohibition on functional firearms had no exception to allow use of a gun self-defense within the home.

The D.C. law for the licensed carrying of handguns. The law required a license, which was almost never granted, to carry a handgun. Without the license, it was illegal for the owner of a registered handgun to move the handgun from one room to another within her own home.

In March 2004, federal district Judge Emmet Sullivan ruled in favor of the D.C. government. His opinion stated that the Second Amendment has no application except to persons in a militia, and that none of the six plaintiffs were members of the D.C. militia. (All the documents from the entire case are available at [dgcuncase.org](http://dgcuncase.org).)



The case was appealed to the federal Circuit Court of Appeals for the District of Columbia.

Circuit Court of Appeals cases are heard by a randomly-selected panel of three judges, drawn from the pool of all the appellate judges in the Circuit. Oral argument for the appeal was held on December 7, 2006, and the appellate panel announced its decision on March 9, 2007. Senior Circuit Judge Laurence H. Silberman wrote the decision for the 2-1 majority.

The legal doctrine of “standing” prevents plaintiffs from bringing a case in which they do not have a genuine, personal, legal interest. If the government does something which harms Mr. X, then Mr. X can sue. But Ms. Y cannot sue, even if the oppression of Mr. X offends her sense of constitutional propriety.

The Circuit Court held that five of the six plaintiffs did not have standing, and so the Court could not address the merits of their constitutional claims. Relying on D.C. Circuit precedent for standing in Second Amendment cases, the *Parker* court ruled that the mere threat of a criminal prosecution (as opposed to an actual prosecution) was insufficient for standing. Thus, although the D.C. government had explicitly threatened to criminally prosecute Ms. Parker and others if they did what they wanted to do (e.g., have operable firearms in their homes), the plaintiffs did not have standing.

The lone plaintiff with standing, according to the appellate court, was Dick Heller. He had actually attempted to register a gun (a 9-shot .22 caliber revolver) which he already owned, and kept outside the District. Because the D.C. Metropolitan Police Department had denied his registration application, Heller had suffered a concrete legal injury as the result of the D.C. government’s decision, and so he had standing.

Reaching the merits of the case, the appellate panel ruled 2-1 that the Second Amendment applies to ordinary individuals. The court held that the handgun ban, the self-defense ban, and the carrying ban (as applied within the home) were unconstitutional.

In September 2007, D.C. petitioned the Supreme Court for a writ of certiorari. This is the standard procedure by which an appeal is brought to the Supreme Court.

D.C. Mayor Adrian Fenty rejected the entreaty of the Brady Campaign not to appeal the case. According to the Associated Press, the Brady group urged Fenty just to accept the D.C. Circuit decision, rather than give the Supreme Court a chance to make a nationally-applicable ruling on the Second Amendment. Indeed, ever since the Brady Campaign was created in the 1970s, as the “National Council



to Control Handguns,” the group had worked assiduously to keep the Second Amendment out of the Supreme Court.

Yet the Supreme Court granted certiorari in November 2007. The name for the case was recaptioned *District of Columbia v. Heller*. Mr. Heller was the only one of the original plaintiffs left. Because D.C. was the losing party at the previous stage of the case, and had filed the petition for the writ of certiorari, D.C.’s name now appeared first in the caption. In the case, D.C. is “petitioner” and Heller is “respondent.”

Briefs for the parties, as well as 67 amicus briefs, were filed in early 2008, and oral argument was held on March 18, 2008. The decision in *District of Columbia v. Heller* was the last one announced at the end of the Supreme Court’s 2007-08 term. Justice Scalia, recognized by his colleagues as the Court’s expert in firearms law and policy, wrote the majority opinion, which was joined by Chief Justice Roberts, and by Justices Thomas, Kennedy, and Alito.

The opinion held that the Second Amendment guarantees an individual right of all Americans, and is not limited to militiamen or National Guardsmen. The D.C. ordinances which ban handguns, and which prohibit self-defense in the home with any gun at all, violate the Second Amendment, the Court ruled.

Justice Stevens authored a dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer; they argued that the Second Amendment protects only a minuscule individual right which applies, at most, to actual militia duty.

Justice Breyer wrote an additional dissent, which was joined by the other three dissenters. They contended that even if the Second Amendment protects all law-abiding citizens, the handgun ban should be upheld because it is reasonable.

*Heller* was a decision clearly influenced by tremendous amount of scholarly research on firearms law and policy in the last three decades. Justice Scalia’s majority opinion cited the research of Stephen Halbrook, Joseph Olson, Clayton Cramer, Joyce Malcolm, Eugene Volokh, Randy Barnett, and Don Kates. (The last three serve on the Board of Advisors of the *Journal on Firearms and Public Policy*.)

Justice Breyer’s dissent, surveying social science research, cited, among others, Gary Kleck (also on the Board of Advisors of this *Journal*) and me (my amicus brief for the International Law Enforcement Educators and Trainers Association and other pro-rights law enforcement groups).

The Scalia opinion begins with meticulous textual analysis of the words of Second Amendment. The analysis was supplemented



by careful attention to the many early American and English sources which demonstrated the meaning of the various words.

Both Scalia and Stevens agree that there are times when the context of “bear arms” shows that it means “carry guns while serving in the militia,” and other times when the context shows a broader meaning, as in “carrying guns while hunting.” Stevens insists on an interpretive rule by which “bear arms” must mean “militia-only” unless there is a specific invocation of non-militia use. He further argues that the first clause of the Second Amendment means that the main clause must be militia-only.

Scalia argues that the first clause points to an important purpose of the right to keep and bear arms, but does not limit the right to only militia uses.

Both Scalia and Stevens brush off the “collective right” theory of the Second Amendment as obviously wrong. Under the collective right theory, no individual has a Second Amendment right; rather the right belongs only to state governments.

Scalia and Stevens strongly disagree about the nature of the Second Amendment individual right. Scalia sees the right as a normal right, akin of the individual right of freedom of speech or free exercise of religion. Stevens believes that the Amendment pertains only to individual gun ownership for purposes of militia service. He does not explain the scope of this militia-only right.

English legal history is an important part of both the Scalia majority and the Stevens dissent. Scalia points to the 1689 English Declaration of Right, and to William Blackstone’s very influential treatise, as proof of common law right to own firearms for personal defense. Blackstone had explained that the Declaration of Right protects the “natural right of resistance and self-preservation.”

Stevens retorts that the Second Amendment was not written to address self-defense, but instead was written in response to state ratification conventions’ concerns about the potential that the new U.S. federal government would abuse its extensive powers over the state militia.

After analyzing the text and the pre-1791 history of the Second Amendment, the majority opinion details the interpretation of the Second Amendment in the first half of the nineteenth century. Quoting the words of St. George Tucker, William Rawle, and Joseph Story, Justice Scalia shows that every legal scholar (except for the obscure Benjamin Oliver), along with state and federal courts, recognized the Second Amendment as an individual right to have guns for various purposes, including self-defense.



The Scalia opinion continues with explication of the public view of the Second Amendment in the latter part of the nineteenth century. After the Civil War, Congress passed the Freedmen's Bureau Act of 1866, the Civil Rights Act of 1871, and then the Fourteenth Amendment—all with the explicit purpose of stopping southern governments from interfering with the Second Amendment rights of former slaves to own firearms to protect their homes and families. All the scholarly commentators of the late 19<sup>th</sup> century—including the legal giants Thomas Cooley and Oliver Wendell Holmes, Jr.—recognized the Second Amendment as an individual right.

The Stevens opinion is at its weakest on the nineteenth century issues. At most, Stevens shows that some of the sources cited by Scalia are not necessarily incompatible with the narrow individual right. But Stevens never really addresses Scalia's proof that the overwhelming body of nineteenth century legal writers, including judges, viewed the Second Amendment as a broad individual right.

Justice Stevens' examination of legal sources is highly selective. For example, the great Justice Joseph Story wrote two legal treatises on the U.S. Constitution. The majority opinion quotes both treatises, and the latter treatise plainly describes the Second Amendment as an ordinary individual right. The Stevens opinion only discusses the first treatise, which (if tendentiously read) is ambiguous enough not to rule out the narrow individual right.

Significantly, the *Heller* majority observes that the Constitution does *not* grant a right to arms. Instead, the Constitution simply recognizes and protects an inherent human right: “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’”

The Stevens dissent places great reliance on its claim that the Supreme Court's 1939 decision *United States v. Miller* had conclusively found that Second Amendment has no application outside the militia. But as Justice Scalia points out, the *Miller* opinion turned on whether the particular *type* of gun was protected by the Second Amendment, and did not declare that only militiamen had a right to arms. Besides, Scalia notes, the reasoning in *Miller* was cursory and opaque. Significantly, as detailed in a law review article cited by Justice Scalia, *Miller* was apparently a collusive prosecution in with the defendants' lawyer and the trial judge cooperated with the U.S. Attorney's scheme to send the weakest possible Second Amendment case to the Supreme Court as a test case, thus ensuring that the Na-



tional Firearms Act of 1934 would be upheld. Miller's lawyer did not even present a brief to the Supreme Court.

In response to Justice Stevens' complaint that "hundreds of judges" have relied on the narrow individual rights interpretation of *Miller*, Scalia fires back: "their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms."

Interestingly, Justice Stevens supplies a long footnote of some of the lower federal court decisions which have supposed "relied" on *Miller*. Over half the cases in the footnote are "collective right" cases which claim that there is *no* Second Amendment individual right (not even a right for militiamen). All nine Justices of the Supreme Court agree that there is at least *some* individual right in the Second Amendment. None of the Justices claim that *Miller* provides an iota of support for the state government "collective right" theory.

It is difficult to see why the erroneous lower court collective right precedents are treated with such deference in the Stevens opinion.

The Scalia opinion provides a definitive construction of the meaning of *Miller*: "We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."

Finally, the opinion addresses the particular laws being challenged in the *Heller* case. The handgun ban is a violation of the Second Amendment because it a "prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."

The trigger lock law is unconstitutional because it prohibits self-defense. One of the important aspects of *Heller* is making clear that self-defense itself is a constitutional right.

As for the handgun carry law, the Scalia majority accepts Mr. Heller's concession that he would be content (for purposes of this particular case) to have a permit to carry in his home. The majority opinion states that Heller must be issued a home-based carry license, unless there is some reason why he is ineligible (e.g., a felony conviction).

In response to the Supreme Court decision, the D.C. City Council amended the carry law so that licenses are not needed for carry in one's home. D.C. and its amici had argued that a handgun ban was alright because people could still have long guns for self-defense in the



home. But the *Heller* majority observed: “There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upperbody strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.” The dissenting opinion written by Justice Breyer contends that courts should perform an ad hoc balancing test on the merits of gun bans or gun controls. Detailing the social science evidence which had been presented by the parties and their amici, Justice Breyer writes that there is lots of social science on both sides of the issue. Accordingly, the courts should not interfere with the D.C. City Council’s decision. Justice Scalia responds that the Breyer approach would negate the decision to enact the Second Amendment: “We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”

The *Heller* decision is very clear that not all gun controls are unconstitutional. Bans on “dangerous and unusual weapons” or “weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns” are valid.

The *Heller* opinion does not explicitly rule on the federal ban on machine guns manufactured after 1986, but the opinion can be read to imply that the automatic M-16 rifle can be outlawed.

It is unclear how courts will resolve challenges to bans on non-automatic guns, such as small handguns (dubbed “Saturday night specials” by the gun ban lobbies), or cosmetically incorrect guns (“assault weapons”), or centerfire rifles (“sniper rifles”). The broader the scope of a gun ban, the more likely a court following the *Heller* decision would find that the prohibition involves guns “typically possessed by law-abiding citizens for lawful purposes.”



As for the constitutionality of other gun controls: “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”

By affirming the validity of bans on gun carrying in “sensitive” locations such as schools and government buildings, the Court seems to imply that a total ban on gun carrying in ordinary public places is unconstitutional. Nothing in the opinion suggested that there was a constitutional problem in requiring licenses for gun carrying.

Very significantly, *Heller* did not attempt to answer the question of whether the Fourteenth Amendment makes the Second Amendment enforceable against state and local governments. By longstanding Supreme Court interpretation, each of the provisions of the Bill of Rights applies directly only to the federal government. A provision becomes a limit on state and local governments only if the Supreme Court chooses to “incorporate” that provision into the Fourteenth Amendment (which forbids states to deprive persons of life, liberty, or property without due process of law).



The Supreme Court has not definitively ruled on whether the Second Amendment is incorporated. Some 19<sup>th</sup> century cases rejected applying the Second Amendment to the states, but these cases predate the Supreme Court’s current method of Fourteenth Amendment analysis.



The Second Amendment Foundation and the National Rifle Association are already bringing legal cases against local gun bans, such as Chicago’s handgun ban, and San Francisco’s gun ban for residents of public housing. These cases may give the Supreme Court the opportunity to issue a decisive ruling on incorporation.



# Friends of the Second Amendment: A Walk through the Amicus Briefs in *D.C. v. Heller*

By Ilya Shapiro

*This Article summarizes each of the dozens of amicus brief filed in District of Columbia v. Heller. It was written before the Heller decision was announced. Ilya Shapiro is Senior Fellow in Constitutional Studies at the Cato Institute, and Editor-in-Chief of the Cato Supreme Court Review. Research assistance on this article was provided by Seth Ayarza, Jonathan Blanks, Samuel Debbeh, and Rachel Maxam.*

**Keywords:** Second Amendment, Supreme Court, amicus brief, District of Columbia, handgun prohibition, self-defense

The Supreme Court's grant of *certiorari* in the "D.C. Gun Ban Case" set off a media frenzy typically reserved for cases involving such culture-war touchstones as abortion, affirmative action, and prayer in schools. And indeed, as Barack Obama discovered to his chagrin when he commented on "bitter" Pennsylvanians who "cling to" their guns, the right to keep and bear arms touches a deep nerve in the American polity.

Also clinging to particular views of gun rights are the many lawyers, government officials, and political activists of all stripes who generated a record 68 *amicus curiae* briefs. (The Michigan racial preference cases, *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003), together generated 104 *amicus* briefs—64 in *Gratz*, 40 in *Grutter*—but these cases were consolidated for argument and neither one garnered more than *Heller* has alone.) It is striking to see so many briefs running in opposite directions. There is no agreement on any of the major issues before the Court, such as what the Founders had in mind in writing the Second Amendment, the application of the Amendment to the District of Columbia (and, by implication, to the states), the social science findings about whether gun control reduces violence, and on the constitutional meaning—if any—of Congress's past adoption of gun control laws.

The core issue is the nature of the right that the Second Amendment recognizes: the D.C. city government ties gun possession to military service; opponents to the D.C. handgun ban label gun pos-



session as an essential part of personal liberty no less than other parts of the Bill of Rights. Plenty of briefs on both sides detail the history of gun rights in colonial times through the present day. (The Cato Institute filed a brief supporting the Respondent, Dick Heller, that focuses on the right to “have and use” arms in England and America leading up to and during the Founding Era. In the interest of full disclosure, I should note that I played a small role in reviewing and commenting on this brief’s final drafts.) Other briefs focus on linguistics, or on how the Second Amendment must mean something different now than when civilians and military personnel used essentially the same arms.

Though the Court is expected to opt for the individual, private right to have guns, the briefs again divide on how to evaluate laws that infringe on this right. Should there be a “reasonableness” standard or “strict scrutiny”? Whatever the standard, if the D.C. ban survives, is anything left of the Second Amendment right?

The *amici* (19 for the District, 48 for the challengers to the handgun ban, and one for the federal government styled as not taking sides) not only echo the fundamental disagreement on the nature of the right and standard of review, but extend it. Solicitor General Paul Clement urges the Court to find an individual right to possess handguns for self-defense in the home, but also suggests that the D.C. Circuit used the wrong bright-line rule, and so the Court should remand for review under a weaker standard.

Responding to the Solicitor General proposal, many of Respondent’s *amicus* return considerable fire. The Goldwater Institute, for example, assails the government for its “uncomfortable straddle,” accusing the S.G. of advancing arguments that fail on principle and logic or that rise from “flawed premises.”

One notable *amicus* brief is signed by one Richard B. Cheney, wearing his *other* hat as President of the Senate, along with a majority of the members of both the House and the Senate. That brief explicitly endorses Judge Silberman’s ruling, advocating a repudiation of the handgun ban in light of Congress’s pro-individual rights legislation. Not surprisingly, a group of Democratic Representatives took it upon themselves to offer a contrary interpretation of Congressional activity.

Among the *amicus* briefs are competing arguments from former high-ranking Justice Department officials, contradictory interpretations of empirical evidence relating to gun violence, and the pros and cons of whether guns cause more violence against women, gays, racial and religious minorities, the elderly, and the disabled. Linguists



battle grammarians, while public health officials reach no more consensus than historians or criminologists. There is no agreement on the correct interpretation of the Court's 1939 and previous rulings on the Second Amendment, and the degree to which the current Court should be bound by those rulings. State and local governments and prosecutors also line up on both sides, foreshadowing the next stage of litigation. Many (I daresay most) of the *amicus* briefs repeat arguments spelled out more than adequately in the parties' briefs—and were likely filed so the particular organization could say to its supporters/prospective donors that it "took a stand" on this high-profile case. But a not insignificant number of the briefs should genuinely help the Court write its opinion.

And so here is a compendium of amicus briefs in *D.C. v. Heller*. For lack of a better organizing principle, I list them alphabetically, first the Petitioners' *amicis*, then the Respondent's, with the U.S. Government bringing up the rear. In addition to a summary of the argument in each brief, I provide the *amicis* interest if that is not readily apparent, and any "items of note" (interesting facts, etc.) about the brief. I hope that, when read in the light of the Court's opinions in the case, this Article can serve as a guide for counsel and potential parties in the Second Amendment litigation that is sure to follow.

## PETITIONERS' AMICI

### 1. AMERICAN ACADEMY OF PEDIATRICS, THE SOCIETY FOR ADOLESCENT MEDICINE, THE CHILDREN'S DEFENSE FUND, WOMEN AGAINST GUN VIOLENCE, YOUTH ALIVE!

**Interest:** These non-profit organizations are committed to the health, safety and wellbeing of America's children and youth, and to preventing youth violence and injury by removing handguns from homes and communities across the country.

**Argument:** Handguns are more lethal than other types of firearms and are particularly dangerous to children and youth, especially in the home. Handguns increase the likelihood and deadliness of accidents involving children because children cannot be taught gun safety. Guns make suicide more likely and suicide attempts more injurious to children and adolescents. D.C.'s gun law is reasonable because firearms and especially handguns increase homicide and assault rates among America's youth. Contrary to the popular myth that guns are necessary in the home for self-defense, one study found that there are four unintentional shootings, seven criminal assaults



or homicides, and 11 attempted or completed suicides for every time a gun is used in self-defense in the home.

## 2. AMERICAN BAR ASSOCIATION

**Interest:** The ABA is concerned that a decision favoring Heller will undermine *stare decisis* by rejecting a long and consistent line of precedent. The ABA supported legislation that eventually became the Federal Gun Control Act of 1968.

**Argument:** The decision below undermines the rule of law by failing to provide special justifications for abandoning longstanding precedent upon which legislators, regulators, and the public have relied. The D.C. Circuit decision would compound the disruption of the regulatory system critical to public safety developed in reliance on judicial precedent. The lower court does not create an objective, reliable, and intelligible definition of “Arms” and departs from the standard in *Miller*, which is whether use or possession of the firearm has a “reasonable relationship to the preservation or efficiency of a well regulated militia.” The lower court’s decision will entangle courts in factual and policy determinations more appropriately left to state and local legislatures.

## 3. AMERICAN JEWISH COMMUNITY, EDUCATIONAL FUND TO STOP GUN VIOLENCE ET AL. (63 AMICI)

**Interest:** *Amici* are religious, civic, community, and civil rights groups and group representatives—as well as victims and families of victims of gun violence—with an interest in stemming the tide of gun violence that threatens lives and communities. *Amici* groups include the D.C. Statehood Green Party, the Gray Panthers, the Methodist Federation for Social Action, and the Baptist Peace Fellowship of North America.

**Argument:** The Framers adopted the division of authority between the States and the federal government to ensure protection of our fundamental liberties. It also protects *state authority* to enact and enforce legislation to safeguard life, liberty, and property in light of local conditions and preferences to which the States are often uniquely suited to respond. The Second Amendment is a limit on federal authority to interfere with gun possession by individuals, but only when the interference would intrude on state militia authority—not a limit on state and local authority to regulate in the first instance. The Framers borrowed heavily from pre-constitutional statutes and state militia laws that had restrictions on firearms. To read the Second Amendment as providing arms so that militias can



quell insurrection, while at the same time facilitating insurrection, makes no sense. Nations sharing our common law heritage, including Canada, Great Britain, and New Zealand have handgun bans, and Austria and South Africa also strictly regulate firearms.

4. AMERICAN PUBLIC HEALTH ASSOCIATION; AMERICAN COLLEGE OF PREVENTIVE MEDICINE; AMERICAN TRAUMA SOCIETY; THE AMERICAN ASSOCIATION OF SUICIDIOLOGY

**Interest:** These four organization aim to protect Americans from preventable health threats, including firearm-related injuries.

**Argument:** Public health research may be relevant to assessing the constitutionality of the D.C. regulations. Guns in the home increase the risk of suicide, homicide, and death from accidental shooting. D.C.'s laws appear to have reduced suicide and homicide rates.

5. BRADY CENTER TO PREVENT GUN VIOLENCE, ET AL.

**Interest:** In addition to the Brady Center, *amici* are nine police organizations.

**Argument:** Read to give meaning to all of its words, the Second Amendment guarantees no right to possess firearms unless in connection with service in a state-regulated militia. *Miller* affirmed the Second Amendment's express militia purpose. The well-regulated militia is an organized military force, not an unorganized collection of individuals, so the phrase "keep and bear arms" refers to possession and use of weapons for military purposes. The Second Amendment was drafted to respond to Anti-Federalist fears that Congress would fail to arm the militia. Madison's initial proposal treated "bearing arms" as synonymous with "rendering military service" and debates at the convention reflected view that the Second Amendment only related to militia use. The guarantee of the right to "the people" is entirely consistent with the "militia purpose" interpretation. The Court should continue to entrust gun regulation in the interest of public safety to state and local legislators as it has for more than 200 years.

6. CITY OF CHICAGO

**Interest:** Chicago has similar regulations to D.C. and is concerned that an affirmance would result in challenges to its laws.

**Argument:** The Second Amendment is a federalism provision as identified by the text, historical context and the practice of state and local governments. This federalist objective of the Second Amendment was not altered or abandoned by the adoption of the Fourteenth Amendment and accordingly, the Second Amendment



should remain unincorporated against the States. For example, this Court held that the Second Amendment did not restrict the State of Illinois's authority to prohibit 400 armed men from marching through the streets of Chicago. *Presser v. Illinois*, 116 U.S. 252 (1886). The history of the Second Amendment demonstrates that any private right to own guns outside of a militia context is not fundamental.

7. D.C. APPLESEED CENTER FOR LAW AND JUSTICE, D.C. CHAMBER OF COMMERCE, FEDERAL CITY COUNCIL, D.C. FOR DEMOCRACY, D.C LEAGUE OF WOMEN VOTERS, WASHINGTON COUNCIL OF LAWYERS

**Interest:** The D.C. Appleseed Center provides pro bono representation and works on public policy issues. The D.C. Chamber of Commerce has an interest in deference to local decision-making. The Federal City Council, D.C. for Democracy, and D.C League of Women voters are non-partisan groups devoted to local welfare and safety. The Washington Council of Lawyers is a public interest law firm.

**Argument:** The Court should accord deference to local officials' exercise of their police powers. Even if the D.C. Circuit's decision stands, any private right to keep and bear arms must be subject to reasonable regulation for the purpose of public safety. The District's regulation is reasonable because it restricts access to only one category of weapons while still permitting use of other firearms. The statutes at issue strike a reasonable balance between the exercise of the police power and any legitimate private right to self-defense in the home. Many other clauses of the Constitution are subject to reasonable restriction in furtherance of public safety. For example, the Free Speech Clause permits reasonable restrictions on time, place and manner of speech.

8. DISTRICT ATTORNEYS (18)

**Interest:** District attorneys place a high priority on the successful prosecution of criminals who commit gun-related offenses. They have an interest here because an affirmance could cast doubt on gun laws critical to public safety. Included in this group are the DAs responsible for Atlanta, Boston, Chicago, Dallas, Detroit, Minneapolis, New York City, Oakland, San Diego, San Francisco, and the Maryland suburbs of Washington, D.C.

**Argument:** The Court should not provoke constitutional challenges of criminal gun laws nationwide by introducing uncertainty into a well-settled area of the law. The Court should not needlessly hinder prosecutors' ability to enforce criminal firearm laws. Criminal firearms laws have withstood repeated Second Amendment chal-



lenges in state and federal courts. These decisions were made on the assumptions that: a) the Second Amendment provides only a militia-related right to bear arms and does not apply to state or local governments; and b) that the restrictions bear a reasonable relationship to protecting public safety and thus do not violate a personal constitutional right.

#### 9. FORMER DEPARTMENT OF JUSTICE OFFICIALS

**Interest:** *Amici*, including Janet Reno, Nicholas Katzenbach, Jamie Gorelick, Warren Christopher, and Seth Waxman, submit this brief to express their view that federal, state, and local gun control legislation is a vitally important law enforcement tool used to combat violent crime and protect public safety. They disagree with the current position of the DOJ that the Second Amendment protects an individual right to keep and bear arms for purposes unrelated to a State's operation of a well-regulated militia.

**Argument:** The Second Amendment does not protect firearms possession or use that is unrelated to participation in a well-regulated militia. This is the position of the Department of Justice Office of Legal Counsel and for decades the position maintained by the DOJ. Congress has enacted a series of statutes regulating firearms possession and use. In upholding the National Firearms Act, the Supreme Court agreed that the scope of the right to keep and bear arms is limited to furthering the operation of a well-regulated militia. In 1965 the Office of Legal Counsel stated, "Both the States and the Congress were preoccupied with the distrust of standing armies and the importance of preserving State militias."

#### 10. HISTORIANS (15)

**Interest:** *Amici*, led by Jack Rakove, have an interest in the Court having an informed understanding of the history that led to the adoption of the Second Amendment.

**Argument:** Even after the English parliamentary bill of rights of 1689 allowed certain classes of Protestant subjects to keep arms, British constitutional doctrine and practice subjected the right to extensive legal regulation and limitation. The first American Bills of Rights made no mention of a private right to keep arms and the individual ownership of firearms was not an issue at the Federal Convention of 1787. The sole reference to a private right to arms appears in the draft of the Virginia Constitution that Thomas Jefferson prepared while in Philadelphia writing the Declaration of Independence. The right to keep and bear arms became an issue



only because the Constitution proposed significant changes in the governance of the militia, an institution previously regulated solely by state law. Standing armies were perceived as a threat to liberty by the Anti-Federalists, so they wanted their militias protected. Text and context both establish that the dominant issue throughout the period of ratification was the future status of the militia, not the private rights of individuals. James Madison's original draft of the second amendment does not support an individual rights interpretation.

11. MAJOR U.S. CITIES (BALTIMORE, CLEVELAND, LOS ANGELES, MILWAUKEE, NEW YORK, OAKLAND, PHILADELPHIA, SACRAMENTO, SAN FRANCISCO, SEATTLE, TRENTON), US CONFERENCE OF MAYORS, LEGAL COMMUNITY AGAINST VIOLENCE

**Interest:** Amici are eleven of America's largest cities actively engage in efforts to reduce the costs inflicted by gun violence upon local, and especially urban, communities. The Conference of Mayors is a non-partisan organization interested in maintaining flexibility in local law. The Legal Community Against Violence is a public interest law center devoted exclusively to providing legal assistance in support of gun violence prevention.

**Argument:** America's cities face substantial costs from gun violence and must have the flexibility to regulate guns to protect against loss of life, threats to public safety, killing of police officers, and crippling health care and economic costs posed by certain types of guns. The Court's precedents firmly establish that the Second Amendment imposes no barrier to state and local regulation of firearms and the Amendment should not limit the options available to cities to address gun violence.

12. MEMBERS OF CONGRESS (18 DEMOCRATIC REPRESENTATIVES)

**Interest:** Congress has, for decades, exercised the power assigned to it by the Constitution to regulate, and in some cases ban, the use or possession of certain weapons.

**Argument:** The decision by the Circuit Court is an unwarranted break with precedent and fails to accord appropriate deference to legislative judgments about the rights conferred by the Second Amendment. Even if Second Amendment rights were implicated, the Court of Appeals failed to apply an appropriate level of scrutiny. The Supreme Court has never construed the Second Amendment as applicable for purely private use. In *Lewis*, the Court applied "rational basis" scrutiny to a statute prohibiting certain people from possessing firearms. Deference to Congress as an interpreter of the



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Constitution, in appropriate circumstances, is entirely consistent with the Court's role, articulated in *Marbury v. Madison*.

#### 13. NAACP LEGAL DEFENSE & EDUCATIONAL FUND

**Interest:** The effects of gun violence on African-American citizens are particularly acute; in 2004 alone, all but two of the 137 firearm homicide victims in D.C. were African-Americans—most of whom were between the ages of 15 and 29.

**Argument:** The Court has never invalidated a firearm restriction on Second Amendment grounds and this clear and established understanding of the Second Amendment should not be disturbed. Overturning the precedent set in *Miller* would produce substantial upheaval in the manner in which firearms are regulated nationwide and would unduly limit the ability of States and municipalities to address the problem of gun violence. The problem of gun violence disproportionately affects African-Americans. Justice Powell said: “With respect to handguns,” in contrast “to sporting rifles and shotguns,” it “is not easy to understand why the Second Amendment, or the notion of liberty, should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking number of murders in our society.” The language of the Second Amendment has consistently been interpreted to permit regulations governing an individual’s possession or use of firearms—including absolute prohibitions on particularly dangerous firearms. Before *Emerson* no federal Court of Appeals had ever recognized the existence of an individual right under the Second Amendment to “keep and bear Arms” for purely private purposes.

#### 14. NATIONAL NETWORK TO END DOMESTIC VIOLENCE (NNEDV)

**Interest:** This network of state coalitions serves as a voice for battered women. NNEDV was instrumental in building support to pass the Violence Against Women Acts of 1994, 2000, and 2005.

**Argument:** Domestic violence is a serious problem and firearms only exacerbate an already deadly crisis. Domestic violence accounts for between one-third and one-half of female murders in the US. These murders are most often committed by intimate partners with handguns. According to one study, family violence accounted for 33 percent of all violent crimes and 53 percent of those crimes were between spouses. The Centers for Disease Control and Prevention report that the health-related costs of domestic violence approach \$4.1 billion annually. Gun-related injuries account for a large portion of that.



15. NEW YORK, HAWAII, MARYLAND, MASSACHUSETTS, NEW JERSEY,  
PUERTO RICO

**Interest:** These jurisdictions have restrictive laws on guns and may be fearful that a decision in favor of Heller would result in their laws being challenged or overturned.

**Argument:** The Second Amendment does not apply to the states. It was ratified to ensure that the federal government would not disarm state militias and thereby strip states of a critical component of their reserved sovereignty. Its purpose would be undermined by interpreting the amendment to authorize federal judicial review of state laws regulating weapons. States have established workable rules to protect the right to bear arms. The brief argues that Supreme Court decisions make clear, even after the Fourteenth Amendment, that the Second Amendment is not incorporated against the states.

16. PROFESSORS OF CRIMINAL JUSTICE DAVID McDOWALL AND JAMES ALAN FOX

**Interest:** Amici assert that the empirical evidence, documented in numerous well-designed and peer reviewed studies, highlights the importance of the D.C. gun law in diminishing handgun violence.

**Argument:** The D.C. ban is an effective law enforcement tool that has promoted the public health and safety by reducing the level of handgun violence. Stricter gun control law in adjacent jurisdictions would make individual gun control laws more effective. Handguns are used in 76.6 percent of murders involving firearms. There was a significant decrease in gun related homicides after the enactment of the ban.

17. PROFESSORS OF LAW ERWIN CHEMERINSKY AND ADAM WINKLER

**Argument:** If the Court finds an individual right to possess guns, then it should subject that right to reasonable regulation. No standard higher than reasonableness should be used because it will place an undue burden on the states and make it difficult for officials to shape law to local circumstances. Forty-two states have constitutional protections on the individual right to bear arms but state supreme courts have continually approved reasonable restrictions on firearms for the purpose of public safety.

18. PROFESSORS OF LINGUISTICS AND ENGLISH

**Interest:** Amici are three professors who wish to assist the Court in understanding 18th century grammar and the historical meaning of the language in the Second Amendment.



**Argument:** The first clause of the Second Amendment, “well regulated Militia,” is what linguists call an “absolute clause.” The Amendment melds the clause “A well regulated Militia is necessary to the security of a free State” together with the clause “The right of the people to keep and bear Arms shall not be infringed” to express this thought: “Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.” The language tells us that: (a) the right that is protected is the right of the people to serve in the military and keep military weaponry, and (b) the kind of military service that is protected is a “well regulated” militia.

19. VIOLENCE POLICY CENTER AND POLICE CHIEFS FOR LOS ANGELES,  
MINNEAPOLIS, SEATTLE

**Interest:** The Violence Policy Center examines the role of firearms in the United States and works to develop policies that reduce gun-related deaths and injuries.

**Argument:** The D.C. ban is a reasonable restriction on the right to bear arms and permissible under the Second Amendment because of the lethality of handguns. The brief strongly relies on *Miller*, which is read to suggest that there is no right to arms outside of a militia and even that a militia is subject to reasonable restrictions.



## RESPONDENT'S AMICI

### 1. ACADEMICS:

**Interest:** A number of economists, criminologists, and other scholars, including John Lott and Carl Moody.

**Argument:** Empirical evidence concerning the murder rate in D.C. compared to other places demonstrates convincingly that the District's handgun ban experiment was a failure. This is true even when adjusting for other variables like the economy, and trying to standardize among cities of similar economic structure.

### 2. ACADEMICS FOR THE SECOND AMENDMENT

**Interest:** Formed in 1992 by law professors, Academics for the Second Amendment's goal is to secure the right to keep and bear arms as a meaningful, individual right. The group includes Joseph Olson, Dan Polsby, Glenn Reynolds, and Randy Barnett.

**Argument:** Reading “right of the people” to mean “only those people serving in a sufficiently-organized militia” is inconsistent



with Madison's original organization of the Bill of Rights. Even under the Petitioners' logic, a law that constitutes a ban over a third of all firearms makes evolution of a well-regulated militia less unlikely. Further, the phrase "right of the people" was universally used in an individual sense.

### 3. ALASKA OUTDOOR COUNCIL, ALASKA FISH AND WILDLIFE FUND, ET AL.

**Interest:** These are all non-profit organizations whose mission is to protect and preserve Alaska's heritage of hunting, fishing and trapping, and shooting sports.

**Argument:** At the time of the founders, a "militia" referred to an unorganized and unregulated body of armed citizens—an armed citizenry. The existence of a well regulated militia rests on the prior existence of an armed citizenry. The collective rights theory is a twentieth century notion heavily influenced by German political thought that understands the state as a political institution that must have an exclusive monopoly on the use of legitimate force. The Constitution does not enact Max Weber's social theory.

### 4. AMERICAN CENTER FOR LAW AND JUSTICE



**Interest:** A public interest legal and educational organization committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice.



**Argument:** Although Article I of the Constitution gives Congress certain powers, the Bill of Rights prohibits the federal government from using those powers to contravene the right of US citizens, such as the right to keep and bear arms. Congress may not pass laws for the District that infringe the constitutional rights of citizens residing therein; nor may the District of Columbia Council, whose powers arise solely from congressional delegation. To ensure the presence of a well regulated Militia—as the best means of achieving the ultimate end of ensuring the security of a "free State"—the drafters expressly protected the right of individual citizens ("the people") to arm themselves.

### 5. AMERICAN CIVIL RIGHTS UNION

**Interest:** "The ACRU is a non-partisan legal policy organization dedicated to the protection of all constitutional rights, not just those that may be politically correct or fit a particular ideology." The group was founded by Reagan adviser Robert Carleson; members of the policy board include Ed Meese, Ken Starr, Robert Bork, and





James Q. Wilson.

**Argument:** The D.C. law contains no self-defense exception for handguns, so the law abridges a substantive right. The right to bear arms was a right deemed necessary for a foundational purpose to form militias.

#### 6. AMERICAN LEGISLATIVE EXCHANGE COUNCIL

**Interest:** To advance Jeffersonian principles of free markets, individual rights, limited government and federalism. ALEC is a membership organization of conservative state legislators.

**Argument:** This case does not involve carrying weapons, but only the right to arm oneself in the home. The right to bear arms need not have a military connotation; Pennsylvania used the phrase “the right to bear arms” and did not have a state militia. Initially the Second Amendment was only a guarantee against the federal government, but the Fourteenth Amendment incorporated it as against the states as well.

#### 7. AMERICAN ASSOCIATION OF PHYSICIANS AND SURGEONS

**Interest:** The organization represents thousands of doctors who believe that gun ownership is an essential right, one necessary to protect themselves and their offices.

**Argument:** “Medical professionals have no more qualifications or basis to opine about the Second Amendment than anyone else. The attempt to shroud political gun control arguments in the white coat of physicians and public health officials is utterly baseless, and constitutional law should not be influenced by it.... The same logic underlying [the Petitioners’] approach to gun control could be used to insist on a ban on automobiles or swimming pools, by focusing only on the harm they cause and failing to address their benefits.” The hurtful effects of gun control are felt most greatly by children and the mentally disabled, who often lack the physical and mental capacity to defend themselves.

#### 8. BUCKEYE FIREARMS FOUNDATION ET AL.

**Interest:** *Amici*, such as the National Council for Investigation and Security Services, represent the interests of the private security industry and professional investigators. The Buckeye Firearms Foundation is a statewide pro-gun group in Ohio.

**Argument:** The District of Columbia Metropolitan Police Department has failed to provide adequate police services to its citizens. The constant within the department has been the incompe-



tence, corruption, cronyism and failure to perform the most basic duty of a police department: to protect and serve. The judiciary is no solution; numerous court cases have exonerated and granted immunity to the police for their collective failure to adequately protect the public they disarmed.

#### 9. CATO INSTITUTE AND HISTORY PROFESSOR JOYCE LEE MALCOLM

**Interest:** Cato promotes understanding of the Constitution's common law context. Malcolm is the preeminent legal historian on the English origins of the right to keep and bear arms. The brief is titled, "The Right Inherited from England."

**Argument:** The English right to have and use arms belonged to individuals broadly, regardless of militia service, and particularly protected their "keeping" of guns for self-defense. The Second Amendment secures at least the individual right inherited from England, as early American authorities demonstrate. As the Supreme Court noted in *Robertson v. Baldwin*, the Bill of Rights was "not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors."

#### 10. CENTER FOR INDIVIDUAL FREEDOM

**Interest:** Dedicated to protecting the individual rights in the Constitution

**Argument:** A collective right ruling could create unexpected and disruptive effects and result in dramatic and transformative consequences for the nation, its military organizations, and its laws. *Miller* addressed plausibility of weapon type for use by state militias; lower courts have incorrectly asked whether the person bearing the weapon in question possessed the requisite intent to serve in an organized militia. A collective right ruling would create a cause of action for states to litigate that right in federal court. Such a ruling would also call the National Guard into question and collide with existing federal firearms laws

#### 11. CONGRESS OF RACIAL EQUALITY

**Interest:** CORE was founded in 1942 for the advancement of the interests and welfare of the black community.

**Argument:** Arms restrictions have historically been levied almost exclusively to the detriment of blacks and the poor. In the aftermath of Reconstruction, the South used indirect means to keep guns out of the hands of blacks through private law enforcement, as





well as taxes on ammunition that made it effectively impossible for blacks to defend themselves. This helped contribute to the rise of the Ku Klux Klan.

12. CRIMINOLOGISTS, SOCIAL SCIENTISTS, DISTINGUISHED SCHOLARS,  
THE CLAREMONT INSTITUTE

**Interest:** *Amici* are a think tank and ten distinguished scholars from various fields who are concerned about ensuring accuracy in the scholarship advanced in important matters of public policy such as those involved in this case.

**Argument:** Due to the extraordinary increase in D.C.'s crime rate since the implementation of the gun ban, there would need to be extraordinary evidence to establish the D.C. gun ban as a positive force. That evidence does not exist. This brief rebuts the "Kellerman Study" (which claims having a gun in the home triples the chances of homicide victimization, but which ignores factors—such as whether the particular gun-owner is engaged in a high-risk career such as drug dealing). The Loftin study claiming that the D.C. gun ban decreased in violence is deeply flawed in that it include reduction in justifiable homicides as a benefit, and fails to account for population changes.

13. DISABLED VETERANS FOR SELF-DEFENSE AND KESTRA CHILDERS

**Interest:** The Disabled Veterans are an unincorporated association of veterans of Vietnam, all of whom are 70 to 100 percent disabled often as the result of torture by the Communists. *Amici* want D.C. residents to be able to protect themselves in their own homes, as the veterans are able to do. Kestra Childers is a wheelchair-bound woman who enjoys shooting.

**Argument:** The right of self-defense entails by necessity the right to bear arms.

14. EAGLE FORUM AND LEGAL DEFENSE FUND

**Interest:** A legal public interest organization dedicated to limited government, individual liberty and moral virtue.

**Argument:** According to precedent and rules of grammar, the prefatory clause does not alter the operative clause's meaning. Protecting the right in order to secure a free state is one purpose, but not the exclusive purpose. The word "militia" is meant to encompass the people at large.



## 15. FORMER SENIOR OFFICIALS OF THE DEPARTMENT OF JUSTICE

**Interest:** Former Attorneys General and other high-ranking officials, including Edwin Meese, William Barr, Robert Bork, Jack Goldsmith, and Charles Cooper.

**Argument:** The current administration properly recognized that the Second Amendment secures an individual right. The DOJ has never made a sustained collective rights interpretation of the Second Amendment; when such an argument was made it was not well reasoned. The Reno brief (former DOJ officials supporting the Petitioners) errs in suggesting that individual rights interpretation would destabilize gun control regimes nationwide. The case at issue regards the very minimum core of arms rights, so there is no reason to adopt a multi-tiered approach the Solicitor General proposes.

## 16. FOUNDATION FOR FREE EXPRESSION

**Interest:** FFE is a California non-profit corporation formed to preserve and defend the constitutional liberties guaranteed to American citizens. FFE's founder is law professor James L. Hirszen, who has taught law school courses on the Second Amendment.

**Argument:** Gun bans actually increase the violence and crime they purport to diminish. A "free state" is one in which individuals are safe to travel freely and are secure in their homes by being able to defend themselves against criminals or an oppressive state.

## 17. FOUNDATION FOR MORAL LAW

**Interest:** A public interest organization dedicated to "Godly principles of Law upon which the country was founded," the Foundation litigates on the behalf of constitutional rights, fundamental freedoms and sanctity of life.

**Argument:** Our God-given freedom begins with the right of self-defense and that right is protected by the Second Amendment. Constitutional interpretation must be based on its original meaning. The purpose of the prefatory clause was to convey the general fear of tyrannical government, which is easily substantiated by historical fact.

## 18. GEORGIA CARRY.ORG

**Interest:** GeorgiaCarry.Org is dedicated to preserving the right to keep and bear arms.

**Argument:** Gun bans have historically been used to oppress blacks, whereas today they are used against politically weak groups.



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#### 19. GOLDWATER INSTITUTE

**Interest:** A core purpose of the Goldwater Institute and its Center for Constitutional Litigation is the preservation of constitutional liberties, including the right to keep and bear arms.

**Argument:** The Second Amendment right deserves protection equivalent to other fundamental individual rights enumerated in the Bill of Rights, not the “intermediate” scrutiny proposed by the Government. Because the right to self-defense precedes the establishment of government, and the Second Amendment protects that right, it deserves strict scrutiny. No remand is necessary regardless of the level of scrutiny applied.

#### 20. GRASS ROOTS OF SOUTH CAROLINA

**Interest:** Grass Roots is a nonprofit, nonpartisan organization whose mission is to protect the rights of law-abiding persons to possess and use firearms. Its members’ status as firearm-owning members of an unorganized militia provides a unique perspective.

**Argument:** The right pre-exists the Constitution, but is also protected by the penumbral “right to privacy” in the home. Thus, the D.C. gun ban is unconstitutional even if the Court uses a collective rights interpretation.

#### 21. GUN OWNERS OF AMERICA, ET AL.

**Interest:** Five gun owners associations, along with the Lincoln Institute for Research and Education (which focuses on public policy issues of interest to black middle-class Americans) and the Conservative Legal Defense and Education Fund (which is dedicated to the correct interpretation of law).

**Argument:** The Second Amendment secures the individual and unalienable right of the American people to keep and bear arms. The Court should apply a strict standard of review given the history and text of the Second Amendment.

#### 22. HEARTLAND INSTITUTE:

**Interest:** The Institute is a national non-profit organization promoting individual liberty.

**Argument:** Firearm restrictions violate the Second Amendment if they unreasonably interfere with possession in the home of the citizen, particularly if the arms are commonly used for home and self-defense.



## 23. INSTITUTE FOR JUSTICE

**Interest:** IJ is a libertarian public interest law firm which litigates constitutional rights.

**Argument:** Discussion of the Framers of the Fourteenth Amendment and the nature of the right to keep and bear arms as they understood it. The Fourteenth Amendment was intended to incorporate the Second Amendment's individual right against the states in connection with the Framers' efforts to prevent freedmen from being disarmed and victimized by state governments and militias.

## 24. INTERNATIONAL LAW ENFORCEMENT EDUCATORS AND TRAINERS ASSOCIATION, INDEPENDENCE INSTITUTE ET AL.

**Interest:** Amici are various police organizations, 29 elected California District Attorneys, and others concerned with protecting the public safety benefits of citizens possessing handguns for self-defense in the home. Attorneys on the brief are David Kopel and Chuck Michel.

**Argument:** For many citizens, guns are essential tools for protecting themselves, their families, and their communities. Home gun ownership also deters would-be intruders. Long guns are inadequate substitutes for handguns.

## 25. INTERNATIONAL SCHOLARS

**Interest:** *Amici* are scholars from nine countries with a special interest in the fundamental right of self-defense, the availability of arms to protect that right and how the laws of foreign countries observe and protect those principles.

**Argument:** Internationally, high gun ownership rates in Western democracies translates to lower crime rates, lower suicide and murder rates, and a higher degree of personal freedom and economic wealth.

## 26. JEWS FOR THE PRESERVATION OF ARMS OWNERSHIP

**Interest:** A Wisconsin-based educational organization that seeks to preserve the individual right to bear arms as a defense against tyranny.

**Argument:** Not all governments that disarm citizens commit genocide. But as a rule, governments that intend to commit genocide make an effort to disarm citizens first.



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## 27. LIBERTARIAN NATIONAL COMMITTEE

**Interest:** A political party dedicated to the protection of natural and enumerated rights.

**Argument:** The Solicitor General's brief misinterprets the intermediate review standard it proposes; the S.G. derives intermediate review from two election law cases: *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Timmons v. Twin City Area New Party*, 520 U.S. 351 (1997). The LNC brief shows the unusual features of intermediate review, and why it should not apply to the Second Amendment. Even if intermediate review were applied, the Court should affirm.

## 28. LIBERTY LEGAL INSTITUTE AND DR. SUZANNA GRATIA HUPP

**Interest:** LLI is an organization that consistently argues for the broadest possible protection for individual liberties protected by the Constitution, most notably speech, religion, and the right to bear arms. Dr. Hupp is a former Texas legislator and survivor of one of the deadliest mass shooting in U.S. history, at Luby's Cafeteria in 1991.

**Argument:** Categorical bans are unconstitutional. Bans on firearms which are descendants of those used at time of the Second Amendment ratification are also unconstitutional. Machine guns need not necessarily be legal under the Second Amendment. To say that they would be requires an application of a sort of analysis not used even for freedom of speech; the Court allows regulation of certain types of speech in certain contexts. Machine gun possession could be regulated if the government identified a compelling interest and provided the necessary nexus to the regulation, while identifying the regulation as the least restrictive means of achieving that interest. The same analysis applies to rocket launchers, etc.

## 29. MAJOR GENERAL JOHN D. ALTBURG, JR., ET AL.

**Interest:** Amici are 10 retired generals, a civilian Army leader, and the American Hunters and Shooters Association. The AHSA claims to support "sensible" gun control policies which "balance American's right to possess firearms." Amici claim interest in the present case because they believe that facility with rifles and pistols is a predictor of success in basic training and in the military, and that lawful and regulated practice with appropriate firearms is a critical component of national defense.

**Argument:** The Second Amendment secures not just the constitutional right, but the constitutional goal of collective defense.





The D.C. law impedes small arms training and undermines military preparedness. It also impedes the government's function of training citizens for national defense—and therefore is barred by the D.C. Home Rule Act.

### 30. MARICOPA COUNTY (ARIZONA) ATTORNEY'S OFFICE AND OTHER DISTRICT ATTORNEYS

**Interest:** Threats of violence to prosecutors are up. The county has an interest in ensuring that the constitutional right of its prosecutors to self-defense is not infringed.

**Argument:** Speculation on how the Court's decision could impact existing regulations is implausible. The right to keep and bear arms is an individual one because the Second Amendment's clear operative language takes precedence over its ambiguous prefatory clause. The text and the history of the Second Amendment suggest that restrictions of the right to keep and bear arms should be reviewed under the strict scrutiny standard. Substantive due process forbids the government from infringing certain fundamental liberty interests. The Court should thus only recognize narrowly-tailored exceptions (with compelling state interest for public safety) to the right to bear arms.

### 31. MEMBERS OF CONGRESS AND THE PRESIDENT OF THE SENATE

**Interest:** 55 Senators, 250 Congressmen, President of the Senate (the Vice-President)

**Argument:** Congress has regulated firearms but it has always done so "reasonably." Historical legislative evidence supports the notion that Congress conceived of the right to keep and bear arms as an individual one, and continues to interpret it that way.

### 32. MOUNTAIN STATES LEGAL FOUNDATION

**Interest:** MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system.

**Argument:** The Framers' two primary motivations for the Second Amendment were self-defense and a check on government tyranny. Interpreting the right as a collective one would effectively destroy it and frustrate those motivations. Firearms ownership is a crucial part of American culture, especially in the West.



### 33. NATIONAL RIFLE ASSOCIATION

**Interest:** The NRA is America's foremost advocate for responsible gun ownership, and the leading organization which teaches firearms safety.

**Argument:** The right of the people to keep and bear arms makes possible the existence of a well-regulated militia. This is supported by N.R.A.'s own history in promoting marksmanship and certifying police firearms instructors. The brief engages the pro-D.C. brief from Professors Chemirinsky and Winkler that argued for reasonableness standard of review, and also addresses crime and firearm accident statistics.

### 34. NATIONAL SHOOTING SPORTS FOUNDATION

**Interest:** The NSSF's manufacturer, distributor, and retailer members provide the lawful commerce in firearms that makes the exercise of Second Amendment rights possible.

**Argument:** At the time of the Constitution's ratification, many Americans feared that the national government would become a new source of tyranny. Accordingly, they sought constitutional protections from potential tyranny including freedom of religion, freedom of speech, and the right to bear arms.

### 35. OHIO CONCEALED CARRY PERMITHOLDERS AND THE U.S. BILL OF RIGHTS FOUNDATION

**Argument:** The collective rights interpretation is at odds with historical understanding of the Second Amendment. A gun ban on home ownership is at odds with privacy law. The Fourth Amendment delineates a firm line of privacy into which the government should not intrude upon the basic right self-defense.

### 36. ORGANIZATIONS AND SCHOLARS CORRECTING MYTHS AND MISREPRESENTATIONS COMMONLY DEPLOYED BY OPPONENTS OF AN INDIVIDUAL-RIGHTS-BASED INTERPRETATION OF THE SECOND AMENDMENT (A.K.A. THE "ERRORS BRIEF")

**Interest:** *Amici* are the Citizens Committee for the Right to Keep and Bear Arms, the Evergreen Freedom Foundation, and five scholars. They all "wish to expose common historical myths about the Second Amendment and the efficacy of arms prohibitions perpetuated by the District of Columbia ... and its *amici*."

**Argument:** "These common myths are numerous, but generally fall under two headings: (1) that the right to keep and bear arms



pertains only to the National Guard (the collective rights theory); and (2) that gun ownership is dangerous and owners are more likely to be injured in accidents or have their guns used against them than to successfully defend themselves.” *Amici* present a variety of arguments under each of these headings.

### 37. PARAGON FOUNDATION

**Interest:** Paragon is a non-profit organization based in New Mexico to support and advance the principles enshrined in the Declaration of Independence and the Constitution. It advocates for individual freedom, private property rights, and limited government controlled by the consent of the people.

**Argument:** The right to keep and bear arms flows from pre-existing natural rights and is grounded in the historical and textual contexts from which it arose. To hold otherwise—that the Second Amendment does not confer an individual right—would be inconsistent with the Founding Fathers’ vision of the Bill of Rights.

### 38. PINK PISTOLS AND GAYS AND LESBIANS FOR INDIVIDUAL LIBERTY

**Interest:** Self-defense, especially in instances of potential hate crimes.

**Argument:** Lesbian, gay, bisexual and transgender people have a heightened need for handguns for self-defense, because of the frequency of hate crimes, the majority of which involve attacks in the home. The police have no duty to protect and do not adequately protect LGBT individuals from hate violence. The Second Amendment guarantees the right to possess firearms for self-defense in one’s home and to prevent governmental encroachment. The militia-only interpretation would exclude LGBT people from the exercise of a constitutional right because the judicial deference to military decisions means that LGBTs can be left without any right due to their exclusion from the military. For this reason, among others, the Second Amendment must recognize an individual right.

### 39. PRESIDENT PRO TEMPORE OF THE PENNSYLVANIA SENATE, JOSEPH P. SCARNATI, III

**Interest:** Seeks to prevent Congress from being granted more authority to regulate guns.

**Argument:** Pennsylvania’s constitutional history and the impetus for adding the Second Amendment support the existence of an individual right to bear arms in self-defense. During the Proprietors’ War in Pennsylvania, the government was incapable of defending



citizens. Guns were also required for common defense against the French and Indians in pre-revolutionary times.

#### 40. RETIRED MILITARY OFFICERS

**Interest:** *Amici* are 24 retired military officers, almost all of whom have served at the highest level of command. They are interested in preserving the individual right to bear arms to better defend the country.

**Argument:** The District's view that the individual right to "keep and bear Arms" extends only to service in a state-run militia is inconsistent with its place in the Constitutional plan and untrue to history. The right to individual ownership of firearms protected by the Second Amendment is essential to national defense because civilians who are already experienced with firearms make better soldiers. There is a military necessity of civilian arms ownership, as shown by Switzerland being able to deter Nazi and Soviet invasion and by America's expulsion of British soldiers. The U.S. government has a long history of promoting civilian firearms ownership and training to better and more readily defend the nation. Although rifles are the primary military weapon, soldiers are also issued handguns for self-defense. Armed civilians are an effective deterrent to and defense against foreign invasion. Foreign aggressors know that to successfully invade the United States, they must not only defeat our military forces on the field of battle, but also suppress a well-armed citizenry.

#### 41. RUTHERFORD INSTITUTE

**Interest:** The Institute defends constitutional rights by litigation and advocacy.

**Argument:** The Framers intended the Second Amendment to apply to individuals, as a guarantor against tyrannical government. Blackstone's three primary rights of personal security, personal liberty, and private property cannot be maintained without the right of self-defense. History has shown on numerous occasions that a disarmed society almost always becomes an obedient and complacent society when faced with a tyrannical government. Such fears were paramount in the minds of the Framers of the Constitution, who had experienced first-hand the tyranny of King George III and his attempts to disarm them. Militarized police forces represent modern-day standing armies. Moreover, to the Framers, the militia consisted of all able-bodied male citizens; today, the National Guard is itself a standing army not a Second Amendment militia. An armed citizenry was the best means of guarding against the possibility of tyranny that was inherent with standing armies. Finally, the African-



American experience shows the necessity of the individual right to bear arms. Greater exposure to criminality, combined with less state protection, makes firearm ownership even more important in poor communities.

#### 42. SECOND AMENDMENT FOUNDATION

**Interest:** SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has 650,000 members and supporters, who reside in every state of the Union.

**Argument:** Every permutation of the “militia only” interpretation of the Second Amendment leads to obviously absurd results. The purpose of the Second Amendment is to prevent Congress from using its powers, including its authority to regulate the militia, to disarm citizens. The purpose of the Second Amendment includes protection of the fundamental natural right of self defense against criminal violence.

#### 43. SOUTHEASTERN LEGAL FOUNDATION, ET AL.

**Interest:** Amici are four non-profit organizations and four individuals that share and promote the public interest in the proper construction and enforcement of the laws and the Constitution. They are particularly interested here in ensuring that government regulations do not hinder the ability of women and seniors to protect themselves.

**Argument:** Historical research demonstrates that the right to self-defense has been held as an important right. Empirical research demonstrates that firearms (handguns especially) have great value in self-defense. The brief also includes many anecdotes of women and seniors defending themselves with guns.

#### 44. STATE FIREARMS ASSOCIATIONS

**Interest:** The firearms associations of 40 states are interested in preserving the American tradition of responsible, law abiding firearm ownership.

**Argument:** The Constitution protects individual gun ownership in three ways: regulating firearms is not one of the enumerated powers; the 9th and 10th amendment guarantee all other rights to the people; and the Second amendment specifically lists gun ownership as a right of the people.



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#### 45. TEXAS AND 30 OTHER STATES

**Interest:** *Amici* are 31 state Attorneys General, led by Texas Solicitor General Ted Cruz. Their interest arises from *Heller's* impact on the Second Amendment rights of their citizens.

**Argument:** The Second Amendment refers to an individual right to keep and bear arms. The Court's precedent, scholarly commentary, and history of Second Amendment all support the existence of an individual right. The D.C. ban is unconstitutional and cannot withstand scrutiny under the standard recommended. The D.C. scheme is also incongruous with the regulatory approach of the 50 states. Properly interpreted, the Second Amendment should be incorporated in the Fourteenth Amendment, and thereby made enforceable against state and local governments.

#### 46. VIRGINIA1774.ORG

**Interest:** 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's Art. I, § 13. DiGiacinto is a former Defense Intelligence Agency official who helped calculate the effective military manpower of foreign countries based in part on the colonial militia system. A part of the District was originally ceded by Virginia and the Second Amendment is the progeny of Virginia's Declaration of Rights, so Virginia1774.org can provide invaluable insight on the Second Amendment's meaning.

**Argument:** 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 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. The ability to "keep" and "bear" arms are two distinct rights, and both are protected by the Second Amendment.

#### 47. WISCONSIN

**Interest:** The State of Wisconsin looks to preserve its autonomy and protect its citizens from federal government encroachment. Wisconsin has its own state constitutional protection for the right to keep and bear arms.



**Argument:** If the Court should uphold the D.C. Circuit's decision to protect the state from an overweening and unconstitutional federal overreach into state matters, the Second Amendment should not be incorporated against the states, lest the federal government unfairly encroach upon the citizens of all the states.

#### 48. WOMEN STATE LEGISLATORS AND ACADEMICS (126)

**Interest:** *Amiae* have diverse academic backgrounds and, in many cases, disparate political ideologies and divergent views on particular women's issues. What all Amiae share, however, is their devotion to the ability of women to legally and effectively defend themselves in situations that pose serious and immediate bodily injury.

**Argument:** The time has long passed when social conditions mandated that all women depend on men for their physical security. In Washington, D.C., equal protection requires that women be free to defend themselves from physical assault using the most effective means of equalizing gender-based physical differences. Gender characteristics should at least be considered before barring law-abiding women from owning handguns, the most suitable means for their self-protection. Arming women is an effective method of self-defense. Women are more likely to live alone today. A large number of elderly women live alone because they have outlived their mates. If a woman fears for her life, the right to self-defense will not be real unless firearms are available to her.

#### THE UNITED STATES

**Interest:** The Department of Justice supports the individual Second Amendment right, but is concerned that overly strong protection of that right might undermine the 1986 federal ban on new machine guns, and federal laws against firearms possession by convicted felons. The DOJ brief was filed as one of Petitioners' amici, because it supports the result the D.C. supports: overturning the D.C. Circuit Court of Appeals decision that the handgun ban violates the Second Amendment.

**Argument:** The D.C. Circuit correctly held that the Second Amendment protects an individual right to possess firearms unrelated to militia operations. It was common in constitutional and statutory provisions at the time of the Framing for prefatory language like "well regulated Militia" to identify a goal or principle of wise governance. The Framing-era "Militia" was not a select body like today's National Guard, and militia members were expected to bring



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their own weapons when called to service. The Second Amendment was not meant to be construed such that only the militia could keep arms; the individual right is central to the preservation of liberty. Although the D.C. Circuit correctly held that the Second Amendment protects an individual right, it did not apply the correct standard for evaluating respondent's claim. The Second Amendment does not render all laws limiting gun ownership automatically invalid, but allows reasonable regulation. When a law directly limits the private possession of "Arms" the Second Amendment requires that the law be subject to heightened scrutiny. The D.C. Circuit's decision could be read to hold that the Second Amendment categorically precludes any ban on a category of "Arms." If adopted by this Court, such an analysis could cast doubt on the constitutionality of existing federal legislation prohibiting the possession of certain firearms. Given that the D.C. Code provisions at issue ban a commonly-used and commonly-possessed firearm in a way that has no grounding in Framing-era practice, those provisions warrant close scrutiny under the analysis described above and may well fail such scrutiny. Congress has substantial authority to ban the private possession of firearms by persons whom Congress deems unfit to keep such weapons, like felons. Congress has the authority to regulate the manufacture, sale, and flow of firearms in commerce. Because the Circuit Court applied a categorical rule instead of heightened scrutiny, the best course is to reverse and remand for application of the proper standard of review.







No. 07-290

**In The  
Supreme Court of the United States**

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DISTRICT OF COLUMBIA  
AND MAYOR ADRIAN M. FENTY,  
Petitioners,

v.

DICK ANTHONY HELLER,  
Respondent.

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The District Of Columbia Circuit**

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**BRIEF FOR PETITIONERS**



**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 fire- arms for private use in their homes?

**PARTIES TO THE PROCEEDING**

Petitioners District of Columbia and Mayor Adrian M. Fenty were defendants-appellees below. Mayor Fenty was substituted automatically for the previous Mayor, Anthony A. Williams, under Federal Rule of Appellate Procedure 43(c)(2).

Respondent Dick Anthony Heller was the only plaintiff-appellant below held by the court of appeals to have standing. The other plaintiffs-appellants were Shelly Parker, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon.



## DECISIONS BELOW

The decisions below are reported at 478 F.3d 370 and 311 F. Supp. 2d 103 and reprinted in the Appendix to the Petition for Certiorari (PA) at PA1a and PA71a.

## JURISDICTION

The court of appeals entered judgment on March 9, 2007, and denied *en banc* review on May 8, 2007. PA89a. A petition for certiorari was filed on September 4, 2007, and granted on November 20, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a Free State, the right of the people to keep and bear Arms, shall not be infringed.”

The Militia Clauses of the Constitution, art. I, § 8, clss. 15-16, empower Congress “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” and “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”

Relevant portions of the D.C. Code provide:

§ 7-2502.02. Registration of certain firearms prohibited.

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

- (1) Sawed-off shotgun;
- (2) Machine gun;
- (3) Short-barreled rifle; or

(4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms



KIM

PETITIONER'S BRIEF

the employee with a firearm during the employee's duty hours or to a police officer who has retired from the Metropolitan Police Department.

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

\* \* \*

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

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

\* \* \*

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

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. . . .

## STATEMENT OF THE CASE

This case involves a Second Amendment challenge to the District of Columbia's longstanding gun-control laws. The divided court below was the first federal court of appeals ever to invalidate a law under that Amendment. Its decision is wrong for three separate reasons, each of which independently warrants reversal and entry of judgment for the District.

1. The Nation's capital has regulated guns for two centuries. In 1801, the then-Town of Georgetown forbade firing guns in its "inhabited parts." Town of Georgetown Ordinance of Oct. 24, 1801. In 1809, the City of Washington similarly made it unlawful to fire guns "within four hundred yards of any house . . . or on the Sabbath." Act of the Corporation of the City of Washington ("City Act") of Dec. 9, 1809. The city later exempted militiamen "on days



of mustering, training or rejoicing, when ordered so to shoot or fire by their commanding officer.” City Act of Mar. 30, 1813.

In 1857, the city made it unlawful to carry “deadly or dangerous weapons, such as . . . pistol[s].” City Act of Nov. 8, 1857; *see* City Act of Nov. 18, 1858. In 1892, Congress similarly barred persons throughout the District from having such weapons “concealed about their person” outside of the person’s “place of business, dwelling house, or premises.” Act of July 13, 1892, ch. 159, 27 Stat. 116. In 1932 and 1943, Congress prohibited possession of machine guns and sawed-off shotguns in the District and required licenses for carrying pistols and other concealable weapons outside one’s home or place of business. Act of July 8, 1932, ch. 465, 47 Stat. 650; Act of Nov. 4, 1943, ch. 296, 57 Stat. 586. Police regulations subsequently required registration of all firearms, including pistols. D.C. Police Regs. art. 50-55 (1968).

In 1976, the Council of the District of Columbia concluded that existing laws did not adequately curb gun-related violence. As a consequence, it enacted a comprehensive new law regulating firearms. The principal provision at issue here prohibits most residents from registering (and thus possessing) any pistol not registered before the law became effective. D.C. Code §§ 7-2502.01, 7-2502.02. “Pistol” is defined as a gun “originally designed to be fired by use of a single hand.” *Id.* § 7-2501.01(12). As Mayor Walter Washington emphasized in signing the law, it “does not bar ownership or possession of shotguns and rifles.” PA116a. Resolutions to disapprove the act were introduced in the House of Representatives but were unsuccessful. *See McIntosh v. Washington*, 395 A.2d 744, 747 (D.C. 1978).

The Council targeted handguns because they are disproportionately linked to violent and deadly crime. In its report accompanying the bill, the Council cited national statistics showing that “handguns are used in roughly 54% of all murders, 60% of robberies, 26% of assaults and 87% of all murders of law enforcement officials.” PA102a. Handguns were also particularly deadly in other contexts: “A crime committed with a pistol is 7 times more likely to be lethal than a crime committed with any other weapon.” *Id.*

These dangers were even more pronounced in the District, where handguns were used in 88% of armed robberies and 91% of armed assaults. PA102a, 104a. In 1974, handguns were used to commit 155 of 285 murders in the District. PA102a. In the same year, every rapist in the District who used a firearm to facilitate his crime used a handgun. Evening Council Sess. Tr. 11:4-5, June 15, 1976.



The Council also recognized that the dangers of handguns extend beyond acts of determined criminals. It found that guns “are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities,” and that many “murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion, or intoxication.” PA102a. The Council also focused on the link between handguns and accidental deaths and injuries, particularly to young children who can wield only smaller weapons: of the “[c]lose to 3,000 accidental deaths . . . caused by firearms” annually, children were particularly vulnerable—“1/4 of the victims are under 14 years of age.” PA101a-02a.

In enacting the handgun ban, the Council found that less restrictive approaches would not be adequate. Safe-storage provisions standing alone would be insufficient to accomplish the District’s goal of reducing gun injuries and deaths. Guns stolen from even the most law-abiding citizens enable criminal gun violence. Afternoon Council Sess. Tr. 35:10-20, 42:4-10, May 3, 1976. Ready availability of guns in the home also made them “easy for juveniles to obtain.” PA103a.

The legislature concluded that “the ultimate resolution of the problems of gun created crimes and gun created accidents . . . is the elimination of the availability of handguns.” Afternoon Council Sess. Tr. 3:22-24, May 18, 1976. The Council thus chose to “freeze[e] the pistol . . . population within the District of Columbia.” PA104a. As the Council summed up, “the bill reflects a legislative decision” that handguns “have no legitimate use in the purely urban environment of the District of Columbia.” PA112a.

As part of its gun-control program, the Council also enacted a trigger-lock provision to promote gun safety at home. D.C. Code § 7-2507.02. A firearm must be kept “unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at [a] place of business, or while being used for lawful recreational purposes.” The provision’s author noted not only that 3,000 deaths resulted annually from firearm accidents, but also that loaded weapons are often misused against family members in moments of passion. Evening Council Sess. Tr. 21:1-15, Jun. 15, 1976. He explained that trigger locks may be unlocked in less than a minute. *Id.* at 42:11-18, 49:8-16.

In 1994, the Council extended the prior requirement that those who “carry” concealable weapons in public be licensed. A license is now required regardless of where such a weapon is carried. D.C.



Code § 22-4504(a). The licensing requirement, which enables the District to prevent felons and other dangerous persons from keeping concealable weapons, is separate from the registration requirement applicable to all firearms. Absent the handgun ban, District residents could register handguns and then apply for licenses to “carry” them.

2. Respondent Heller owns handguns and long guns (*i.e.*, rifles and shotguns) but stores them outside the District. Joint Appendix 77a. He and five other individuals challenged the District’s long-standing laws as infringements of their asserted right to possess guns for self-defense. Because they did not assert membership in any organized militia, the district court granted the District’s motion to dismiss the complaint. “[I]n concert with the vast majority of circuit courts,” it concluded that this Court’s decision in *United States v. Miller*, 307 U.S. 174 (1939), “reject[s] an individual right to bear arms separate and apart from Militia use.” PA75a. The district court also noted that this Court “has twice been presented with the opportunity to re-examine *Miller* and has twice refused to upset its holding.” PA75a.

3. A divided panel of the court of appeals reversed. After finding that only respondent had standing, the majority held that “the Second Amendment protects a right of individuals to possess arms for private use.” PA14a-17a, 44a. The majority also rejected the District’s argument that the Second Amendment is not implicated by local legislation governing only the Nation’s capital. PA44a-48a.

The court then held that, because a handgun is an “Arm” under the Amendment, banning handguns is *per se* invalid. PA53a. The majority dismissed as “frivolous” the District’s contention that its regulatory scheme is reasonable because other weapons, such as shotguns and rifles, fully vindicate residents’ interests in self-defense. PA53a.

The majority also invalidated the licensing law. It ruled that individuals have not only a constitutional right to possess a handgun, but also an ancillary right to move it about their homes for self-defense. PA54a. Although the District construes D.C. Code § 22-4504(a) as a licensing provision, not a flat prohibition on the use (“carrying”) of handguns, the majority held it facially unconstitutional on its contrary reading.

The majority further invalidated the trigger-lock requirement. The District construes D.C. Code § 7-2507.02, which has never been interpreted by local courts and appears never to have been enforced, to permit a lawfully owned gun to be used for self-defense. The



majority nevertheless read it to forbid that use and on that reading held the provision facially unconstitutional. PA55a.

Judge Henderson dissented. In her view, *Miller*—“the only twentieth-century United States Supreme Court decision that analyzes the scope of the Second Amendment”—compels the conclusion that “the right of the people to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual States.” PA57a-60a (footnote omitted). She also emphasized that the Amendment was intended to guard against a perceived threat to the states from the federal government. PA65a. She noted that if the District’s militia is treated as a state militia, then the Amendment would not apply because it “does not apply to gun laws enacted by the States.” PA66a n.13.

## SUMMARY OF ARGUMENT

1. The text and history of the Second Amendment conclusively refute the notion that it entitles individuals to have guns for their own private purposes. Instead, it protects the possession and use of guns only in service of an organized militia.

The first clause—“[a] well regulated Militia, being necessary to the security of a free State”—speaks only of militias, with not a hint about private uses of firearms. A well-regulated militia is the antithesis of an unconnected group of individuals, each choosing unilaterally whether to own a firearm, what kind to own, and for what purposes.

The second clause—“the right of the people to keep and bear Arms, shall not be infringed”—equally addresses the possession and use of weapons in connection with militia service. In 1791, “Arms” and “bear Arms” were military terms describing the use of weapons in the common defense, and the word “keep” was used in connection with militiamen’s possession of the arms necessary for militia service.

Taken together, the two clauses permit only a militia-related reading. To conclude that the Framers intended to protect private uses of weapons, the majority below read the entire first clause to be extraneous and the second to be in tension with the natural, military meaning of “bear Arms.” If that had been the Framers’ intent, they would have omitted the first clause and used non-military language in the second.

History confirms the District’s reading. The primary concerns that animated those who supported the Second Amendment were





that a federal standing army would prove tyrannical and that the power given to the federal government in the Constitution's Militia Clauses could enable it not only to federalize, but also to disarm state militias. There is no suggestion that the need to protect private uses of weapons against federal intrusion ever animated the adoption of the Second Amendment. The drafting history and recorded debate in Congress confirm that the Framers understood its military meaning and ignored proposals to confer an express right to weapon possession unrelated to militia service.

2. The court of appeals erred for the independent reason that the Second Amendment does not apply to District-specific legislation. Such legislation cannot implicate the Amendment's purpose of protecting states and localities from the federal government.

That conclusion follows from the history underlying the Constitution's Seat of Government Clause. In 1783, disgruntled soldiers surrounded the State House in Philadelphia, causing the Continental Congress to flee because the local authorities would not protect it.

The Framers created a federal enclave to ensure federal protection of federal interests. They could not have intended the Second Amendment to prevent Congress from establishing such gun-control measures as it deemed necessary to protect itself, the President, and this Court when similar state legislative authority was not constrained.

3. Finally, the judgment must be reversed for the separate reason that the laws at issue here are reasonable and therefore permissible. This Court has long recognized that constitutional rights are subject to limitations. Indeed, the majority below purported to recognize that gun-control laws are constitutional if they are "reasonable regulations."

The majority nevertheless found that the Council's findings regarding handguns' unique dangers in an urban environment were irrelevant because, in its view, a ban on handguns is *per se* unreasonable under the Second Amendment. Equally irrelevant was the fact that the District allows residents to keep rifles and shotguns for private purposes. The majority instead concluded that the Second Amendment precludes the District from limiting a resident's choice of firearms so long as the firearm chosen is in common use, has a military application, and is a lineal descendant of a type of arm used in 1791. That test is unworkable. It also has no basis in the Second Amendment and would implausibly give the right to keep and bear arms a uniquely privileged position in the Bill of Rights.



The District's gun-control measures should be upheld under a proper reasonableness analysis. In enacting the laws at issue here, the Council responded to the serious dangers created by ownership of guns, considered various alternatives, and sensibly concluded that the handgun ban, plus trigger-lock and licensing requirements, would reduce crime, suicide, domestic violence, and accidental shootings. Preventing those harms is not just a legitimate goal; it is a governmental duty of the highest order. Moreover, those regulations do not disarm the District's citizens, who may still possess operational rifles and shotguns. The laws at issue, adopted after extensive debate and consideration, represent the District's reasoned judgment about how best to meet its duty to protect the public. Because that predictive judgment about how best to reduce gun violence was reasonable and is entitled to substantial deference, it should be upheld.

## ARGUMENT

### I. THE SECOND AMENDMENT PROTECTS ONLY MILITIA-RELATED FIREARM RIGHTS.

Almost seventy years ago, this Court held that “[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [the state-regulated militias] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.” *Miller*, 307

U.S. at 178. The text and history of the Second Amendment confirm that the right it protects is the right to keep and bear arms as part of a well-regulated militia, not to possess guns for private purposes. The Second Amendment does not support respondent’s claim of entitlement to firearms for self-defense.

#### A. The Language Of The Entire Amendment Is Naturally Read To Protect The Keeping And Bearing Of Arms Only In Service Of A Well-Regulated Militia.

1. Both clauses of the Second Amendment, read separately or together, establish the Amendment’s exclusively military purpose.

*“A well regulated Militia, being necessary to the security of a free State, . . . ”*

Unique in the Bill of Rights, the Second Amendment begins by stating the reason for its existence: to support a “well regulated Militia.” Militias are the state-and congressionally-regulated military



forces described in the Militia Clauses (art. I, § 8, cl.15-16). Their function is to safeguard the states and to be available “to execute the Laws of the Union, suppress Insurrections and repel Invasions.” *Id.*; *Miller*, 307 U.S. at 178; *see also* U.S. Const. art. II, § 2 (President commands “the Militia of the several States, when called into the actual Service of the United States”), amend. V (cases arising in “the Militia, when in actual service in time of War or public danger” excepted from grand jury requirement).

The words “well regulated” underscore that the “Militia” contemplated by the Framers were organized and trained fighting forces. As *Miller* explained, a militia is a “body of citizens enrolled for military discipline.” 307 U.S. at 179. The language chosen in the Second Amendment was not new. The Articles of Confederation had required “every State” to “keep up a well-regulated and disciplined militia, sufficiently armed and accoutered.” Articles of Confederation art. VI. Most states passed detailed laws setting forth requirements for membership and discipline, generally requiring men of certain ages to appear periodically for muster and training under the supervision of state-appointed officers.<sup>1</sup> The laws called for highly organized bodies, specifying company and regiment size, number and rank of commissioned and non-commissioned officers, and the like. *E.g.*, Georgia Militia Law 4-5. Those men were expected to obtain specified weaponry, normally muskets and rifles, and present them when directed. *See Miller*, 307 U.S. at 179-82. Failure to appear for training, properly armed, was punishable. *E.g.*, Georgia Militia Law 1; New Hampshire Militia Law 8.

The Second Militia Act, enacted by Congress a year after the Second Amendment’s ratification, shows that the Framers similarly understood a “well regulated Militia” to be an organized and trained military force, led by state-chosen officers. It called for musters and training, and it specified particular weaponry all militia members were required to possess. *See* Act of May 8, 1792, ch. XXXIII, 1 Stat. 271. It placed special emphasis on military discipline. *See id.* §§ 6-7, 10-11.<sup>2</sup>

The remaining words of the first clause further support the point that the Second Amendment contemplates service in a military organization. The Framers specified that a well-regulated militia exists for the common defense—“being necessary” (not optional) “to the security of a free State.” This language recognizes that the militia forces exist not only to help the federal government “execute the Laws of the union, suppress Insurrections and repel invasions” (art. I, § 8, cl.15), but also to serve as the primary protectors of the



states. Nothing about this language or the opening clause as a whole so much as hints that the Amendment is about protecting weapons for private purposes.<sup>3</sup>

*“. . . the right of the people to keep and bear Arms, shall not be infringed.”*

The second clause standing alone also has a distinctly military cast. The crucial words are those that define the “right of the people” that the Amendment protects: “to keep and bear Arms.”

“Arms” are military weapons. The term historically meant “[i]nstruments of offence used in war; weapons,” and the Oxford English Dictionary notes a 1794 dictionary that understood “arms” as “those instruments of offence generally made use of in war.” 1 Oxford English Dictionary 634 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

In *Miller*, this Court held that a weapon is not a protected “Arm” absent proof that “at this time [it] has some reasonable relationship to the preservation or efficiency of a well regulated militia.” 307 U.S. at 178. The Court rejected a Second Amendment challenge to an indictment for possession of a short-barreled shotgun because the defendant had not provided that proof. At a minimum, the weapon must be “part of the ordinary military equipment” or have the potential to “contribute to the common defense.” *Id.* The Court discussed eighteenth-century militias at length (*id.* at 179-82) but made no mention of weapons for personal uses.

Moreover, “bear Arms” refers idiomatically to using weapons in a military context. This was the only sense in which the young Congress and its predecessors ever used the phrase. Paragraph 28 of the Declaration of Independence notably castigated George III for “constrain[ing] our fellow citizens . . . to bear arms against their country.” And in recorded congressional debates from 1774 through 1821, every one of the thirty uses of the phrase matched the idiomatic meaning of the day. David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 Mich. L. Rev. 588, 618-21 (2000). For decades after the adoption of the Second Amendment, the military sense of “bear arms” was “overwhelmingly dominant.” *Id.*

The word “keep” is consistent with that military sense. As noted above, the expectation of the Framers was that members of militias would bring the weapons required for service. When the Second Amendment was ratified, numerous state militia laws used the word “keep” to refer to the *requirement* that militiamen have arms so they



could bring them to musters. *E.g.*, Delaware Militia Law at 3; New Jersey Militia Law at 169; Virginia Militia Law at 2. Securing their right to “keep” those arms would ensure that they could “bear” them. *See, e.g.*, Mass. Const., art. XVII (“The people have a right to keep and to bear arms for the common defense.”).

2. In concluding that the Second Amendment protects a right to gun ownership for private uses, the majority below misread the Amendment’s text in multiple ways.

*First*, the majority read the opening clause out of the Amendment. But “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). That is particularly true for this clause, which is unique in the Bill of Rights. The Framers plainly expected it to give meaning to the whole Amendment. *See* 1 William Blackstone, *Commentaries on the Laws of England* 60 (1765) (“If words happen to be still dubious, we may establish their meaning from the context . . . . Thus the proeme, or preamble, is often called in to help the construction . . . .”); *see also* David T. Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of ‘The Right of the People to Bear Arms’*, 22 Law & Hist. Rev. 119, 154-57 (2004) (discussing eighteenth-century uses of preambles). The majority nevertheless proposed that the first clause merely states “the right’s most salient political benefit.” PA35a. Treating the Amendment’s first clause as merely stating a benefit of the Amendment—as opposed to the benefit the Amendment was enacted to realize—is both an historical and inconsistent with *Miller*’s directive that the “declaration *and* guarantee of the Second Amendment” be read in light of its “obvious purpose.” 307 U.S. at 178 (emphasis added).

*Second*, despite the contemporaneous evidence of what the Framers understood a “well regulated Militia” to be, the majority below implausibly asserted that a well-regulated militia can consist of people who are merely “subject to organization by the states (as distinct from actually organized).” PA33a. Everyone is *potentially* subject to organization, but an unorganized group is not regulated at all, let alone well-regulated. Under the majority’s understanding, even those who refused to appear for muster would still be part of a well-regulated militia. That is not how the words were understood. *See, e.g.*, The Federalist No. 29, at 180-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (citizens must “go[] through military exercises and evolutions” before “acquir[ing] the degree of perfection which



would entitle them to the character of a well-regulated militia"). Indeed, states that set forth the discipline and organization required of their militias did so while specifically invoking their need for "well regulated" militias. *E.g.*, Maryland Militia Law Chap. I ("Whereas a well regulated militia is the proper and natural defence of a free government . . .").

*Third*, the majority read the phrase "bear Arms" unnaturally. "[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824), and "[o]ne does not bear Arms against a rabbit" or an intruder, Garry Wills, *To Keep and Bear Arms*, N.Y. Rev. of Books, Sept. 21, 1995, at 63; *see Aymette v. State*, 21 Tenn. (1 Hum.) 154, 157 (1840).

The majority did not dispute that in 1791 this phrase normally meant carrying weapons in military service; rather, it stated that this usage was not "exclusive[] or "absolute." PA23a. The majority then held that the words should not be read based on their common meaning because of supposed tension with the word "keep" in the second clause. PA26a-27a. But the notion that these capable draftsmen meant to create an Amendment with such internal tensions that it could not be read naturally and harmoniously as a whole is unpersuasive.

There is no tension in the text if "bear Arms" is read in its military sense. The District does not contend that individuals may not "keep" their "Arms," but that they may keep them only if they have a militia-related reason for doing so. The majority's assertion that "keep" must mean "keep for private use," *id.*, simply begs the question of whether the Second Amendment protects only militia-related rights.

*Fourth*, the majority below also emphasized that the Second Amendment protects a "pre-existing right" and that guns were used in the founding era for private purposes. PA20a-22a. There is no persuasive reason, however, to believe that the Amendment protects all such uses, rather than retaining that role for the common law or state constitutions. *See United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (the right to bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.").

*Fifth*, the majority relied on the words "right of the people" (PA18a-19a, 27a), but recognizing such a right does not define its scope. The question is not whether individuals can enforce the right protected by the Second Amendment. The question instead



is whether this right is limited to the possession of militia-related weapons.<sup>4</sup>

The majority suggested that the language chosen was “passing strange” if the “sole concern [was] for state militias.” PA14a. Far “strange[r],” however, was the majority’s supposition that the Framers would have written the Amendment this way to protect private uses of weapons. Respondent seeks to own a handgun for self-defense in his home. If the Framers had intended the Amendment to protect that use beyond whatever rights existed at common law or in state constitutions, they would have omitted the opening clause entirely and used non-military language rather than “bear Arms.”

The Framers’ phrasing of the Second Amendment was in fact a natural way to protect a militia-related right. As the majority itself emphasized, the surrounding amendments are part of “a catalogue of cherished individual liberties.” PA22a. Given the context, it made perfect sense to speak of “the right of the people” to describe what rights the people held against the federal government. Entitling individuals to exercise this right only as part of a state-regulated militia was consistent with the Framers’ recognition that the states and the people would defend each others’ interests. *See* The Federalist No. 29 (Hamilton), No. 45, (James Madison), No. 46 (Madison).

That understanding is also consistent with the Militia Clauses in the body of the Constitution, Art. I, § 8, cls.15-16. Clause 15 allows Congress to call forth the militia into federal service, while Clause 16 makes clear that the federal government shall provide for “organizing, arming [as in “bear Arms”], and disciplining, the Militia [so that they will be well-regulated].” They further reserve to the states the appointment of officers and the training of the Militia “according to the discipline prescribed by Congress.” The natural reading of the Second Amendment in light of these clauses is that it ensures that, despite the broad powers given to Congress, it could not disarm the people serving in state militias.

The history discussed next confirms that reading. The Bill of Rights limited the federal government to protect both individual liberty and states’ rights. In the context of the Second Amendment, both causes were served by establishing a check on a powerful new federal government that might otherwise disarm the people serving in state militias under the powers granted by the Militia Clauses. Of equal significance, history also shows that the Framers made deliberate drafting choices to address this particular concern, while evidencing no support for any other purpose.



### B. The Historical Context And Drafting History Of The Second Amendment Confirm The Framers' Military Purpose.

Reading the text of the Second Amendment as a unified whole to protect only militia-related firearm rights reflects the concerns expressed by the Framers from the time of the Constitutional Convention through adoption of the Amendment by the First Congress. The Amendment was a response to related fears raised by opponents of the Constitution: that Congress would use its powers under the Militia Clauses to disarm the state militias; and that states and their citizens would be forced to rely for protection on a national standing army, widely feared as a potential oppressor.

The District focuses on the development of the Amendment's language. It traces the Amendment from proposals by the Virginia ratifying convention through James Madison's adaptation of that language and later revisions in the First Congress. This approach avoids the unsound use of remote events and widely scattered expressions by individuals not directly involved in drafting the language. This properly focused review of the history confirms that the Second Amendment is only a militia-related provision.

1. The Second Amendment was a response to the Constitutional Convention's decision to permit Congress both to establish a standing army and to exert substantial control over state militias. The Confederation militia system had proven to be a source of instability, most notably during Shays's Rebellion in 1786. Angry farmers, joined by militia units drawn from the area, threatened civil war in Massachusetts. The rebellion was suppressed using state-officered militia units, but it gravely concerned the men at the Constitutional Convention in 1787. *See Finkelman, supra*, at 211-12; 1 *Records of the Federal Convention of 1787*, at 18-19 (Max Farrand ed., Yale Univ. Press 1937) (1911); 2 *id.* at 332; cf. The Federalist No. 21, at 140 (Hamilton) (citing rebellion as forerunner of ruin of law and order). Accordingly, the Framers provided that the national government would have a professional army and gave Congress powers over state militias, including the power to "provide for organizing, arming, and disciplining" them. U.S. Const. art. I, § 8, cl. 12-16; *see Perpich*, 496 U.S. at 340 (Framers "recogniz[ed] . . . the danger of relying on inadequately trained [militia] soldiers as the primary means of providing for the common defense").

The Militia Clauses were denounced by Anti-Federalist delegates to the Constitutional Convention and produced a "storm of violent opposition" at state ratifying conventions. Frederick B. Wiener,



*Militia Clauses of the Constitution*, 54 Harv. L. Rev. 181, 185 (1940); 1 Records, *supra*, at 330-31, 385, 387, 388; 3 *id.* at 209. One particular concern was that a federal standing army would prove tyrannical, especially if the state militias became ineffective counterweights. Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 41-50 (Oxford Univ. Press 2006). American experiences under the Crown had made standing armies objects of fear and revulsion. *Id.* at 9-13; see The Declaration of Independence para. 13 (“He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.”). The shift from total state control of the militias to concurrent control with federal preeminence disturbed convention delegates, but “there is precious little evidence that advocates of local control of the militia shared an equal or even secondary concern for gun ownership” for personal uses. R. Don Higginbotham, *The Federalized Militia: A Neglected Aspect of Second Amendment Scholarship*, 55 Wm. & Mary Q. 39, 40 (1998); see Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103, 153-54 (2000); H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi.-Kent L. Rev. 403, 480-95 (2000).



The fear that the Militia Clauses give Congress exclusive power to arm the militias and thus the power to “disarm” them, by failing to provide arms, engendered particularly contentious debates at the Virginia ratifying convention. George Mason warned that Congress could use its militia powers to compel reliance on a standing army:



The militia may be here destroyed . . . by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them . . . Should the national government wish to render the militia useless, they may neglect them and let them perish . . . .

3 John Elliot, *Debates in the Several State Conventions on the Adoption of the Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 379 (2d ed. 1836). Patrick Henry concurred (*id.* at 51-52, 257) and Mason asked for “an express declaration that the state governments might arm and discipline them.” *Id.* at 380. When Madison responded that Congress’s power to provide for arming the militias posed no threat to the militia because the states shared authority to arm the militia under the Militia Clauses (*id.*), Henry disagreed. *Id.* at 386.





To deflect demands to convene a second constitutional convention before ratification, the Virginia Federalist delegates agreed to append proposals for changes to the Constitution for Congress to consider at the first opportunity. Kenneth R. Bowling, "*A Tub to the Whale*: *The Founding Fathers and the Adoption of the Federal Bill of Rights*, 8 J. Early Republic 223, 227 (1988); 3 Elliot, *supra*, at 657-62. Without debate, the convention unanimously adopted forty additions and changes presented by a committee (to which Madison, Mason, and Henry belonged) including:

17th. That the people have a right to keep and 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 armies 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 should be under strict subordination to, and be governed by, the civil power.

\* \* \*



19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.

*Id.* at 659. Separately, the convention proposed amending the Militia Clauses directly: "11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same." *Id.* at 660.<sup>5</sup>

No one at the Virginia ratifying convention mentioned a need to protect weapons for personal use from federal (or state) regulation. Instead, the persistent Anti-Federalist theme concerned arms to protect the state and its citizens against domestic and foreign enemies, including (in 1789) a potentially oppressive federal government using a standing army.

2. When the Anti-Federalists failed to prevent ratification of the Constitution, they shifted tactics and urged the addition of a Bill of Rights that they hoped would limit federal power, including the power over state militias. The Federalists in control of the First



Congress were unwilling to undo what they had achieved, but were willing to make clear that the federal government could not violate certain rights or trump reserved state powers. With respect to the Second Amendment, that meant clarifying that the federal government could not deny the people the right to keep and bear arms in service of state militias.

The language used in the Second Amendment originated from the amendments proposed at the Virginia ratifying convention, but the wording changed during the drafting process in the First Congress. Madison, the initial drafter of the Amendment, made several changes to the Virginia proposals, notably merging the conscientious objector provision (19th) with the right to bear arms and militia provisions (17th):

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

1. *Gales & Seaton's History of Debates in Congress* ("Debates") 451 (1789). Although the conscientious-objector clause did not survive, the initial inclusion of the "bear arms" phrase in both the first and third clauses strongly supports the conclusion that Madison understood the Amendment as a whole to relate to military service alone.

Madison's draft was revised to make the Amendment's exclusively military focus even clearer. A select House committee meeting in executive session transposed the first two clauses, making the reference to a "well regulated Militia" more prominent, and substituted a comma for the semi-colon, underscoring the connection between the two clauses. *Id.* at 170. The new structure and punctuation reflected the fact that the need to protect the right followed from the need for the militias. The committee shifted the militia's role from ensuring "the security of a free country" to

"the security of a free State," highlighting the role of the militia in defending the state. *Id.*

All remarks recorded in the House's debate related to military service; none pertained to private use of weapons, including self-defense. 1 Debates, *supra*, at 778-81; see Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const. L.Q. 961, 995 (1975). Members of the House



also debated the conscientious-objector clause, and their comments show that House members understood the Amendment as a whole to relate to military service. 1 Debates, *supra*, at 778-80. For instance, Elbridge Gerry opined: "If we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provision on this head." *Id.* at 779.

The Senate, meeting in closed session without recorded debate, altered the House draft to the present language and retained the direct connection between explicit purpose and right. Beyond striking the conscientious-objector clause, the Senate eliminated the House's description of the militia as "composed of the body of the people." 1 *Journal of the First Session of the Senate* ("Journal") 71 (Gales and Seaton 1789). That phrase might have been seen to undermine Congress's power under the Militia Clauses to decide how to organize the state militias. Rakove, *supra*, at 125. The Senate substituted "necessary for the security" in place of "the best security" (Journal, *supra*, at 77) but that substitution changed neither the clause's subject (the militia) nor its object (the security of a free State) and so left the military import intact.

The Senate rejected an amendment to add "for the common defence" after "Arms." Journal, *supra*, at 77. Such an amendment, while consistent with one purpose of the Militia Clauses, could have been thought inconsistent with another purpose: using the militias for law enforcement. Rakove, *supra*, at 126. The change also could have been understood to refer to common defense of the Nation and thus to detract from the guarantee that the militia also existed to protect the security of individual states. In any event, especially given the opening clause, the Amendment's "military sense is the obvious sense. It does not cease to be the obvious sense if something that might have been added was not added." Garry Wills, *A Necessary Evil: A History of American Distrust of Government* 64 (Simon & Schuster 1999).<sup>6</sup>

3. In addition to this affirmative history of what was said and done, common understandings of state arms provisions at the time further support the conclusion that the right recognized by the Second Amendment relates only to arms for the common defense.

In 1789, several state constitutions and declarations of rights included provisions recognizing a right to arms only for that purpose. Massachusetts explicitly recognized the right of the people to "keep and bear arms for the common defence." *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 183 (Neil H. Cogan ed., 1997). North Carolina had materially similar wording. *Id.* at 184. These provisions were coupled with declarations that standing



armies are “dangerous to liberty” and should not be “maintained” or “kept up.” *Id.*

Other state constitutions did not address arms possession directly but stressed the need for militia—and, by extension, privately owned military arms—for the common defense in place of a standing army. With minor variations, the Delaware, Maryland, and Virginia constitutions recognized that “well-regulated militia” provide “the proper, natural, and safe defence” of a “free State” or “free government” and that “standing armies are dangerous to liberty.” *Id.* at 183-85. New York’s constitution stated that it was the “Duty of every Man to be prepared and willing to defend [the State]” and therefore the “Militia of the State at all times . . . shall be armed and disciplined and in Readiness for Service.” *Id.* at 183. If there was a right associated with these declarations, it was only to have arms for common defense, making a standing army unnecessary. Robert Hardaway, *The Inconvenient Militia Clause of the Second Amendment*, 16 St. John’s J. Legal Comment. 41, 82 (2002).<sup>7</sup>

Article XIII of Pennsylvania’s 1776 declaration of rights is another example of the dominant focus of these provisions on communal defense:

That the people have a right to bear arms for the defense of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up: And that the military should be kept under strict subordination to, and governed by, the civil power.

Cogan, *supra*, at 184. There is strong support for the proposition that Article XIII protects only a right to bear arms for communal (rather than personal) self-defense. Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 39 Rutgers L.J. 1041 (forthcoming 2008) (discussing how Article XIII originated from dispute between frontiersmen seeking state support for community self-defense organizations and Quaker-dominated legislature that refused to provide it); see Saul Cornell & Nathan De-Dino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 495-96, 498 (2004). More significantly, the specific language in Article XIII—“defense of themselves”—is not in the Second Amendment.<sup>8</sup>

While state provisions differed, “the meaning was the same. Only the citizenry, trained, armed, and organized in the militia, could be depended on to preserve republican liberties for ‘themselves’ and to ensure the constitutional stability of ‘the state.’” Lawrence D. Cress,



*An Armed Community*, 71 J. Am. Hist. 22, 29 (1984).

Subsequently, many states adopted constitutions that protect some right to bear arms. See generally Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191 (2006). They are far from uniform, with a few tracking the Second Amendment, others explicitly protecting self-defense, others focusing on common defense, and some specifically including a right to hunt. These provisions illustrate how easy it would have been to provide for a right to own guns for private use and to decouple that right from the preservation of state militias. They also illustrate how guaranteeing some right to gun ownership has been considered vital in some, but not all, jurisdictions.

4. Not only were there extant state constitutional provisions that informed the drafters of the Second Amendment, but three proposals were introduced at state ratifying conventions that would have expressly protected a right to arms for personal use. See 2 Schwartz, *supra*, at 761 (“Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion”) (New Hampshire); *id.* at 658-59 (“That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . .”) (Pennsylvania minority); *id.* at 675, 707 (“that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms”) (Massachusetts minority). Only New Hampshire’s proposal gained ratifying convention approval.

Madison culled his proposals from a 1788 pamphlet entitled *The Ratifications of the New Federal Constitution, Together with the Amendments, Proposed by the Federal States*. 11 *The Papers of James Madison* 299 (C.F. Hobson *et al.* eds., 1977). Had any of these alternative formulations been used by Congress, a right to weapons possession for private purposes would have been established, but none was debated, much less adopted. That Congress ignored these alternatives and instead tied the right to the militia strongly suggests that Congress’s exclusive intent was to protect a militia-related right.

5. This history firmly supports the District’s reading of the Second Amendment: seeing a problem—the possibility of disarmed state militias—the Framers acted to address it. They did so by protecting the right of citizens to own guns to support those militias, but they never saw private gun ownership as a need to be addressed,



and they did not accept those proposals that would have expressly protected a right to self-defense.

The majority below suggested that its view was also compatible with this history, on the theory that securing a broad right to possess weapons for private purposes would enable states to summon armed militiamen to muster. PA44a. But the fear that Congress might disarm the citizenry *outside the context of militia service* was never expressed by any person known to be involved with the passage of the Second Amendment. Indeed, it is doubtful that Congress's limited powers, as understood in 1791, would have been thought to encompass any power over firearms outside the militia context. See *United States v. Lopez*, 514 U.S. 549 (1995). If the majority were correct, that would imply that the Framers held a surprising view of congressional authority and adopted an over-broad solution to the problem that they identified.

Moreover, the Framers likely would have feared that a broad constitutional right to possess weapons for private purposes might undermine their avowed end. Actions by individuals, unilaterally deciding what weapons to keep and how and when to use them for one's own purposes, do not ordinarily promote "the security of a free State." Events like Shays's Rebellion were vivid reminders that such actions could endanger state security. The Framers of the Second Amendment therefore placed their trust specifically in the "well regulated Militia" rather than armed individuals acting on their own.

That decision is apparent not only from the Amendment's text, but also the care both the House and the Senate took in crafting it. They were particularly meticulous regarding what became the first clause; indeed, the second clause as enacted has the same words as Madison's draft. Their efforts surely were purposeful, and should not be ignored two centuries later. History refutes the view of the majority below that all this attention was directed to a clause that does no more than announce *one* of the purposes of the Second Amendment.

\* \* \*

In sum, in light of the language and history, the best construction of the Second Amendment is one that is consistent with *Miller's* interpretive principle and that recognizes a right having "some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178. The Amendment does not pro-



tect—and was never intended to protect—a right to own guns for purely private use. Because respondent does not assert a right to keep or bear arms in connection with militia duties, he has no Second Amendment claim.

## II. THE SECOND AMENDMENT DOES NOT APPLY TO LAWS LIMITED TO THE DISTRICT OF COLUMBIA.

The judgment must be reversed for the independent reason that the Second Amendment was intended as a federalism protection to prevent Congress, using its powers under the Militia Clauses, from disarming state militias. The Amendment thus “is a limitation only upon the power of Congress and the National government” and does not constrain states. *Presser v. Illinois*, 116 U.S. 252, 265 (1886). Laws limited to the District similarly raise no federalism-type concerns, whether passed by Congress or the Council, and so do not implicate the Second Amendment. The majority concluded otherwise by asserting that the entire Bill of Rights applies to the District, but that reason does not support its conclusion.

Although many of the concerns expressed in the Bill of Rights apply to the actions of governments generally, the primary goal of those who demanded it as a condition of ratification of the Constitution was to control the federal government, which had been given powers previously belonging to the states. That is especially true with respect to the inclusion of the Second Amendment, which was prompted by fear of the federal government’s standing army and control over state militias. There was no expressed concern that states might disarm their citizens; the Amendment was enacted to protect states’ prerogatives, not constrain them. Thus, even if this Court were to read the Second Amendment to protect private uses of fire-arms, the right should be limited in application to constraining federal legislation that could implicate the Amendment’s “obvious purpose to assure the continuation and render possible the effectiveness of” state militias. *Miller*, 307 U.S. at 178.

Legislation limited to the District, where federal-state relations are not at issue, cannot implicate this obvious purpose. National limitations on what firearms may be possessed privately could conflict with a state’s ability to call forth a militia armed as the state sees fit. As the majority below recognized, the Amendment ensures “that citizens would not be barred from keeping the arms they would need when called forth for militia duty.” PA44a. But for the District there could be no conflict because Congress retains ultimate legislative power over whether and how to arm any militia, even when it del-



egates power to the District's local government. *See Sandidge v. United States*, 520 A.2d 1057, 1059 (D.C. 1987) (Nebeker, J., concurring).

Whatever the scope of the Second Amendment's protections in other contexts, its Framers could not have intended Congress to be more constrained in the seat of federal power than a state would be in its own territory. The Framers established a federal enclave in large part because of an incident in 1783 in which disgruntled, armed soldiers surrounded the State House in Philadelphia, forcing the Continental Congress to flee. Kenneth R. Bowling, *The Creation of Washington D.C.: The Idea and Location of the American Capital* 30-34, 76 (1991). Congress then depended on its host government for protection, and when "an angry regiment of the Continental Army demanding back pay" disrupted its proceedings, it asked Pennsylvania's Executive council to "call out the militia" to restore control. Lawrence Delbert Cress, *Whither Columbia? Congressional Residence and the Politics of the New Nation, 1776 to 1787*, 32 Wm. & Mary Q. 581, 588 (1975). The council refused, and Congress had to leave the city. *Id.*

In response, Madison declared that the federal government needed "complete authority over the seat of government" because, without it, "the public authority might be insulted and its proceedings interrupted." The Federalist No. 43, at 272 (Madison). The Framers therefore included the Seat of Government Clause, U.S. Const. art. I, § 8, cl.17, which provides Congress with plenary authority over this jurisdiction and explicitly allows the "Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings," to ensure that the new government could defend itself.

Particularly given that concern, the Framers could not have intended to deprive the federal government of the most important power of self-protection it has under the Seat of Government Clause by disabling Congress from enacting firearms regulations. To the contrary, they would have expected that Congress had the power to enact the types of laws at issue here under that clause. It is not plausible to think that Congress intended to restrict itself in regulating firearms in the jurisdiction in which federal interests like the White House, the Capitol, and this Court had to be most secure.

That view is particularly illogical because it suggests that the Framers *uniquely* disabled firearm regulation in the District and other federal enclaves, such as the territories and military bases. This Court has squarely held that the Second Amendment was adopted as a limitation on only federal, not state, legislation. *Presser*, 116 U.S. at 265. Although the majority below suggested that the Second Amendment



may subsequently have been incorporated against the states through the Fourteenth Amendment (PA37a-38a n.13), there is no dispute that the Second Amendment did not limit the states' regulatory authority over firearms when enacted.<sup>9</sup>

As noted above, some states have chosen to adopt constitutional provisions on gun rights and some have not. If the majority below were correct, neither Congress nor the Council would have comparable ability to choose whether similar constraints on legislative authority to enact gun-control laws are appropriate for the District. There is no reason for Congress and the Council to have less authority in the District than a state legislature would have.

Indeed, the claim below that every provision of the Constitution that restricts the national powers of Congress automatically applies when it acts pursuant to the Seat of Government Clause is simply wrong. See *Loughboro v. Blake*, 18 U.S. (5 Wheat.) 317, 318 (1820). For instance, before the Sixteenth Amendment was ratified, this Court enforced the limitation on Congress's power to impose a "Capitation, or other direct, Tax" in Article I, § 9, Clause 4, just as it enforces the Bill of Rights. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). Nonetheless, the Court held that the limitation did not apply to a real estate tax enacted by Congress limited to the District. *Gibbons v. District of Columbia*, 116 U.S. 404 (1886). And if precise parallelism were a constitutional mandate, it would suggest that the judges of the District's local court system would merit the protections of Article III, although this Court has held otherwise. *Palmore v. United States*, 411 U.S. 389, 397-98, 407-10 (1973). If the Second Amendment is read in light of the Constitution as a whole and in historical context, it too does not constrain Congress's authority over the District.

The fact that the laws in question here were enacted by the Council rather than Congress makes all the more clear that the laws do not implicate the concerns animating the Second Amendment. Congress established the Council as a local legislature that may enact legislation only for the District. D.C. Code § 1-203.02. The Council lacks the power to raise and maintain a standing army, let alone to affect militias or gun rights in the states. There is no reason to think that the Framers were worried about local entities like the District, acting through locally elected legislators, disarming their citizens, with no impact beyond their borders.

The Second Amendment thus has no bearing on what the District can do in the area of firearms regulation, just as it has no bearing on what the states can do. The routes to those conclusions differ,



because the applicable constitutional doctrines are different. But the result should be the same: the District is subject to no more restrictions under the Second Amendment than are the states and localities acting under them. Thus, even if the Second Amendment protects possession of guns for personal purposes, that protection does not extend to a law limited to the District.

### III. THE DISTRICT'S REASONABLE GUN-CONTROL LAWS DO NOT INFRINGE THE RIGHT TO KEEP AND BEAR ARMS.

In any event, the laws at issue should be upheld for the independent reason that they represent a permissible regulation of any asserted right. The rights protected by the Bill of Rights have “from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.” *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). After concluding that existing laws were insufficient, the Council reasonably found that it could substantially reduce the tragic harms caused by guns by regulating which weapons are available to District residents, how residents should store lawfully owned weapons, and who should be licensed to carry concealable weapons. The Council properly acted to reduce those harms without functionally disarming residents. Its reasonable legislative judgment should be upheld even if the Second Amendment is construed to protect the possession of firearms for self-defense in the District.

#### A. The Constitution Permits Reasonable Restrictions On The Ownership And Use Of Guns.

As the majority below purported to accept, governments may impose “reasonable restrictions” on the exercise of any Second Amendment right. PA51a. The United States agrees that “reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse” are constitutional. Brief for the United States in Opposition at 20 n.3, *Emerson v. United States*, 536 U.S. 907 (2002) (No. 01-8780). State courts interpreting their state constitutions uniformly uphold reasonable regulations as well.<sup>10</sup> Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 686-87 (2007). As one court explained, the constitutional text is subject to a rule of reason because the common law right to self-defense is subject to that rule. *Benjamin v. Bailey*, 662 A.2d 1226, 1232-35 (Conn. 1995).

To strike down reasonable regulations of guns would flout a long legal tradition. Our legal system has historically permitted rea-



sonable regulation of guns for public safety purposes. That was true in England and in the colonies, and remains true in the states. See Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 35-36 (2000); Cornell, *supra*, at 26-30. For example, Pennsylvania and Delaware passed acts prohibiting the firing of guns in cities and towns. Act of Feb. 9, 1750, ch. CCCLXXXVIII, 1750-1751 Pa. Laws 108; Act of Feb. 2, 1812, ch. CXCV, 1812 Del. Laws 522. Massachusetts prohibited Boston citizens from keeping loaded firearms in their homes. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218. State and local legislatures (including in the District) later began to regulate weapons more heavily, banning concealed weapons or even the sale of concealable weapons. *E.g.*, Act of Feb. 1, 1839, no. 77, 1839 Ala. Laws 67; Act of Feb. 10, 1831, ch. XXVI, § 58, 1831 Rev'd Laws of Ind. 180, 192; Act of Jan. 27, 1838, ch. 137, 1837-1838 Tenn. Pub. Acts 200; *see supra* pages 2-3. Federal regulation of gun possession and use was added in the twentieth century. *E.g.*, National Firearms Act, Act of June 26, 1934, Pub. L. No. 73-474, 48 Stat. 1236.

As the authorities, history, and practical realities all indicate, the Second Amendment affords elected officials substantial discretion to regulate guns. As guns have become cheaper and more lethal, state and local governments and Congress have matched the threat with increased regulation. The government must be allowed to respond appropriately to the threats posed by guns. That is particularly so regarding local laws like this one. Even if the Second Amendment were intended to apply to such laws, the Framers' overarching desire to support state prerogatives (consistent with basic concepts of federalism) requires that the Amendment at a minimum allow local governments to make different tradeoffs based on local conditions.<sup>11</sup>

The District does not suggest that gun regulations should be subject to mere rational basis review. Instead, if the Second Amendment is found to protect a right of gun ownership for purposes of self-defense, a reasonableness inquiry would consider the legislature's actual reasons for enacting a law limiting exercise of the right. Furthermore, whatever those reasons, a law that purported to eliminate that right—for instance, by banning all gun possession, or allowing only a firearm that was so ineffective that the law effected functional disarmament—could not be reasonable. Cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (land use regulation constitutes “taking” only when it eliminates essentially all use for



property); *People v. Blue*, 544 P.2d 385, 391 (Colo. 1975) (state may not render state constitutional right to bear arms “nugatory”). But at least where a legislature has articulated proper reasons for enacting a gun-control law, with meaningful supporting evidence, and that law does not deprive the people of reasonable means to defend themselves, it should be upheld. See Winkler, *supra*, at 716-19 (describing how state courts apply this type of deferential standard).

#### B. The Court Of Appeals Applied The Wrong Standard, Created An Unworkable Test, And Misconstrued Relevant Precedent.

Although the majority below purported to recognize the “reasonableness” standard, the rule it adopted makes the reasonableness of the legislature’s judgment irrelevant: “Once it is determined . . . that handguns are ‘Arms’ referred to in the Second Amendment, it is not open to the District to ban them.” PA53. But this Court has never adopted such a *per se* rule for any provision in the Bill of Rights. The rights it protects are not absolute, and the “necessities of the case”—particularly public safety concerns—may justify the regulation of a protected right. Robertson, 165 U.S. at 281; *see also Maryland v. Buie*, 494 U.S. 325 (1990) (Fourth Amendment does not require endangering safety of law enforcement officers); *New York v. Quarles*, 467 U.S. 649 (1984) (same for Fifth Amendment). “[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Nothing in the Second Amendment’s text or history suggests that it precludes legislatures from protecting their citizens by banning particularly dangerous types of weapons.

Rather than consider the “necessities of the case” or the legislature’s careful judgment, respondent argues that any weapon “in common use” that has a “military application” is an arm that cannot be banned no matter what other weapons remain available for self-defense. Response to Petition for Certiorari 24-26. The court of appeals’ equally inflexible and categorical rule would also require that the weapon be a “lineal descendant” of a “founding-era weapon.” PA51.

This test is neither meaningful nor workable. Is the assault rifle a lineal descendant of the musket? How “common” must the weapon’s use be, and in what locations and in what populations would the test be run? Because every firearm has some military application, how well-suited must it be? If the majority’s test had any limits to it, handguns might not be “arms.” *See United States v. Parker*, 362 F.3d



1279, 1284 (10th Cir. 2004); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 n.8 (7th Cir. 1982).

More important, the test leads to tragic results. It suggests, for instance, that Congress could ban the private ownership of a particularly dangerous weapon right after its invention, before it grows into common use, yet not if its dangerousness becomes clear only after its use becomes widespread. This impractical and coldhearted result does not follow even from a self-defense reading of the Second Amendment. As the majority below recognized, “the government’s interest in public safety” allows it to bar certain members of “the people” (such as felons) from exercising any Second Amendment rights. PA52a. The same interest should allow the government to bar particularly dangerous arms, whether or not they are “lineal descendants” of far less powerful “Arms” from 1791.

The majority below was mistaken in its view that *Miller* supports the *per se* test it crafted. The logical result of the holding in *Miller*—that Congress may ban all short-barreled shotguns—in fact suggests that the District’s handgun ban is constitutional. It is hard to see why short-barreled shotguns would not have some military application, and they were in sufficiently common use then for Congress to see a need to ban them. As for the lineal-descendant requirement, a short-barreled shotgun seems at least as related to its forebears as modern automatic handguns are to the pistols used by the militia in 1792.

*Miller* did not in fact define certain categories of “arms” that are entitled to Second Amendment protection; rather, it required that “possession or use” of the weapon in question “at this time ha[ve] some reasonable relationship to the preservation or efficiency of a well regulated militia.” 307 U.S. at 178. This establishes that a weapon must have at least potential militia use for the Second Amendment even to be implicated. *Miller* says nothing, however, about what are protected “arms” under a self-defense theory of the Amendment never mentioned in the case. Moreover, *Miller* never suggests that if a weapon is of the type that might be kept by someone in the militia, its potential status as an “arm” would be sufficient to render the weapon immune to proscription.

Indeed, the holding below that the Constitution bars the District from choosing which particular arms to allow is precisely backwards, as the Militia Clauses and the Second Amendment contemplate that choosing among arms is the government’s *duty*. Again, those mustering for militia service were required to bring those weapons chosen by the legislature. See *supra* pages 13-14. If the opening clause of the Second Amendment has any meaning, the rule adopted below—



which pays no heed to whether a particular arm would meet a militiaman's obligations—cannot stand.

The majority's attempt to draw support by analogy to the First Amendment also fails. PA51a-52a. On a fundamental level, the analogy is inapt. Regulating dangerous weapons is at the heart of any government's traditional police power. Unlike speech restrictions, gun regulations raise no risk of viewpoint discrimination and no specter of silencing the views of the opposition. And, of course, the First Amendment does not have an opening clause comparable to that in the Second.

But even if the First Amendment analogy were applicable, it would confirm that the District's gun regulations are entitled to great deference and are constitutional. The decision below anomalously provides that no arm may be banned under the Second Amendment even though some forms of speech and some religious practices can be banned under the First. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968) (speech mixed with conduct); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Employment Div. v. Smith*, 494 U.S. 872, 876-82 (1990) (ingesting peyote). In particular, speech can be banned when it creates sufficient risks to public order or safety. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement to "imminent lawless action"); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words"). It is difficult to imagine that the practical men who wrote the Bill of Rights meant to allow banning potentially harmful speech, but not particularly dangerous firearms.

Moreover, as the panel majority recognized, protected speech may be subjected to "time, place, or manner" restrictions. PA51a (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Although handguns are banned in the District, rifles and shotguns are not. So long as homeowners have a means of defending themselves, the handgun ban can be understood to be the Second Amendment analog to a time, place, or manner restriction properly tailored to the District's unique status as an urban jurisdiction. Indeed, First Amendment jurisprudence makes clear that "alternative" means of exercising a right need not be precisely equivalent to the banned or burdened means. See, e.g., *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986). If the Second Amendment has a self-defense purpose, it is concerned with the practical realities of functional disarmament—not guaranteeing a choice among whatever weapons fit the labels in the court of appeals' test. Cf. *NAAACP v. Button*, 371 U.S. 415, 429 (1963).



### C. The District's Gun Regulations Satisfy The Reasonableness Standard.

In 1976, the District's elected representatives determined that existing gun-control laws needed to be made more effective. The much-debated and carefully-crafted legislative solution included both a ban on handguns and a trigger-lock requirement for firearms kept at home. It was the reasonable judgment of the District's political representatives that such a comprehensive package best promoted public safety while respecting private gun ownership. In addition, the District has a longstanding gun licensing requirement that works with these provisions to promote public safety. The Second Amendment should not be read to give the courts the authority to overturn those reasoned judgments.

#### 1. The Handgun Ban Limits the Unique Harms Posed by Handguns in an Urban Environment.

a. The Council adopted a focused firearm restriction: it banned private possession of handguns, but not rifles and shotguns. Based on the evidence before it, the Council reasonably found that a handgun ban would mitigate the very serious problem of handgun violence in the District, including the use of handguns in crimes and their misuse by normally law-abiding citizens. By their nature, handguns are easy to steal and conceal, and especially effective for robberies and murders. The dangers those weapons cause are particularly acute in the District. As Councilmember Clarke noted, "The District of Columbia is a unique place. . . . [O]ur area is totally urban. There is no purpose in this city for . . . handguns other than to shoot somebody else with." Morning Council Sess. Tr. 73:9-12, May 3, 1976; *see also* Morning Council Sess. Tr. 47:20-21, May 18, 1976.

The evidence on which the Council relied was more than sufficient to justify its decision to act. *See supra* pages 4-6. The Council had a manifestly reasonable basis to conclude that handguns are uniquely dangerous, and that the dangers to others, both in the home and outside of it, justify the handgun ban. Moreover, its predictive judgment—that the deaths and serious injuries that handguns would cause would more than offset any benefits from allowing residents to keep handguns in their homes—is precisely the kind of reasoned assessment that legislatures rather than courts are tasked with making in our democracy.

The Council carefully balanced the costs and benefits of its regulations, *see supra* pages 4-5, and its determinations are entitled to substantial deference. *See Gonzales v. Carhart*, 127 S. Ct. 1610, 1636



(2007) (legislature should receive deference in absence of expert consensus). This Court “accord[s] substantial deference” to legislatures’ predictive judgments. *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Turner Broad. Sys. v. FCC* (Turner I), 512 U.S. 622, 665 (1994) (plurality opinion)). Its “sole obligation is ‘to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.’” *Id.* (quoting Turner I, 512 U.S. at 666). The Council has done so here.

b. In any event, subsequent evidence supports the Council’s judgment that banning handguns saves lives. Many cities, states, and nations regulate or ban handguns based on the unique dangers of those deadly weapons.<sup>12</sup> Those dangers exist even when the gun is kept at home and the owner is generally law-abiding and responsible.

First, handguns are vulnerable to theft, and thus often fall into the hands of criminals. Far more handguns than other firearms are stolen—hundreds of thousands per year. Caroline W. Harlow, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders* 1-3 (Special Rep. Nov. 2001), <http://www.ojp.usdoj.gov/bjs/pub/pdf/fuo.pdf>; Marianne W. Zawitz, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Firearms, Crime, and Justice: Guns Used in Crime* 3 (July 1995), <http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf>.

Inmates report (and statistics demonstrate) that the handgun is their “preferred firearm.” Harlow, *supra*, at 1-3. Handguns are the weapon most likely to be used in street crimes. Although only a third of the Nation’s firearms are handguns, they are responsible for far more killings, woundings, and crimes than all other types of firearms combined. Zawitz, *supra*, at 2. Eighty-seven percent of all guns used in crime are handguns. Craig Perkins, U.S. Dep’t of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime* 3 (Special Rep. Sept. 2003), <http://www.ojp-usdoj.gov/bjs/pub/pdf/wuvc01.pdf>.

Handguns pose particular dangers to police officers, including when executing warrants, pursuing felons, quelling domestic violence, and otherwise entering into private homes. Of the 55 police officers killed in felonies in 2005, 42 deaths were from handguns. See Federal Bureau of Investigation, *Uniform Crime Report—Law Enforcement Officers Killed and Assaulted*, at tbl.28 (2005), <http://www.fbi.gov/ucr/killed/2005/table28.htm>.

A study of the District’s handgun ban concluded that it coincided with an abrupt decline in firearm-caused homicides in the District



but no comparable decline elsewhere in the region. Colin Loftin et al., *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991). More recently, researchers found that a 10% increase in handgun ownership increases the homicide rate by 2%. See Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1095-98 (2001). Not surprisingly, other countries have had success with handgun bans and near-bans. Cukier & Sidel, *supra*, at 178-205.

Second, all too often, in the heat of anger, handguns turn domestic violence into murder. Seventy-two percent of women killed in firearm homicides in 2004 were killed by handguns. Violence Policy Center, *When Men Murder Women: An Analysis of 2004 Homicide Data*, at 3 (Sept. 2006), <http://www.vpc.org/studies/wmmw2006.pdf>. People who live in houses with firearms, particularly handguns, are almost three times more likely to die in a homicide, and much more likely to die at the hands of a family member or intimate acquaintance than people who do not. See Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084 (1993).

Third, handguns cause accidents, frequently involving children. The smaller the weapon, the more likely a child can use it, and children as young as three years old are strong enough to fire today's handguns. David Hemenway, *Private Guns, Public Health* 32 (2004). Every year, the majority of people killed in handgun accidents are young adults and children, including dozens under the age of 14. See National Center for Health Statistics, *Trend C Table 292: Deaths for 282 Selected Causes*, at 1888 (2006), [http://www.cdc.gov/nchs/data/statab/gm292\\_3.pdf](http://www.cdc.gov/nchs/data/statab/gm292_3.pdf).

Fourth, handguns are easy to bring to schools, where their concealability and capacity to fire multiple rounds in quick succession make them especially dangerous. In urban areas, as many as 25% of junior high school boys carry or have carried a gun. Jack M. Bergstein et al., *Guns in Young Hands: A Survey of Urban Teenagers' Attitudes and Behaviors Related to Handgun Violence*, 41 J. Trauma 794 (1996). In the recent Virginia Tech shooting, a single student with two handguns discharged over 170 rounds in nine minutes, killing 32 people and wounding 25 more. Reed Williams & Shawna Morrison, *Police: No Motive Found*, Roanoke Times, Apr. 26, 2007, at A1.

Fifth, handguns enable suicide. A study was conducted comparing the District to nearby Maryland and Virginia immediately after the District's handgun ban was enacted, when no changes were made in the Maryland and Virginia laws. There was a 23% drop in suicides



by firearms in the District and no increase in other suicide methods. Loftin, *supra*. Moreover, the District's overall, youth, and firearms-related suicide rates have consistently been the lowest in the Nation. See National Center for Injury Prevention and Control, WISQARS Injury Mortality Reports, 1999-2004, [http://webappa.cdc.gov/sas-web/ncipc/mortrate10\\_sy.htm](http://webappa.cdc.gov/sas-web/ncipc/mortrate10_sy.htm) (interactive database). Handguns pose a higher suicide risk than other firearms; indeed, purchasing a handgun correlates to a doubled risk that the buyer will die in a homicide or a suicide. See Hemmenway (Private Guns), *supra*, at 41; Peter Cummings et al., *The Association Between the Purchase of a Handgun and Homicide or Suicide*, 87 Am. J. Pub. Health, 974, 976-77 (1997).

The Council had good reason to conclude that other less restrictive measures were insufficient by themselves. PA104a. Safety mechanisms, while helpful, do not always work as designed, and compliance, even with mandatory safety laws, is imperfect. See Cynthia Leonardatos et al., *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 Conn. L. Rev. 157, 169-70, 178-80 (2001). Furthermore, safe-storage policies are of no help where the handgun owner is determined to kill a family member or himself.

Although there are competing views today, just as in 1976, the Council acted based on plainly reasonable grounds. It adopted a focused statute that continues to allow private home possession of shotguns and rifles, which some gun rights' proponents contend are actually the weapons of choice for home defense. Dave Spaulding, *Shotguns for Home Defense: Here's How to Choose and Use the Most Effective Tool for Stopping an Attack*, Guns & Ammo, Sept. 2006, at 42; Clint Smith, *Home Defense*, Guns Mag, July 2005, at 50 (preferring rifles). The Second Amendment inquiry requires no more.<sup>13</sup>

## 2. The Trigger-Lock Requirement Is A Reasonable Safety Regulation.

Like the handgun ban, the trigger-lock requirement in D.C. Code § 7-2507.02 is a reasonable regulation designed to prevent accidental and unnecessary shootings, while preserving citizens' ability to possess safely stored firearms. And as with the ban, the Council debated the trigger-lock requirement extensively and carefully considered opposing viewpoints. E.g., Afternoon Council Sess. Tr., May 18, 1976, at 31-33; Evening Council Sess. Tr., Jun. 15, 1976, at 33-34. Only then did it enact a trigger-lock requirement based on the predictive judgment that it would save lives.



That conclusion is confirmed by subsequent studies. In 1991 the U.S. General Accounting Office found that 8% of accidental shooting deaths resulted from shots fired by children under the age of six, which could have been prevented by child-proof safety locks. U.S. Gen Accounting Office, *Accidental Shootings: Many Deaths and Injuries Caused by Firearms Could Be Prevented* 17-19 (1991), <http://161.203.16.4/d20t9/143619.pdf>. Nor are adults immune from the kind of accidental shootings that send 15,000 people per year to hospital emergency rooms. Karen D. Gotsch et al., *CDC Surveillance Summary No. SS-2, Surveillance for Fatal and Nonfatal Firearm-Related Injuries—United States 1993-1998* 2 (Apr. 13, 2001), <http://www.cdc.gov/mmwr/pdf/ss/ss5002.pdf>.

Respondent does not argue, and the majority below did not find, that it is unconstitutional for the District to require trigger locks on guns under normal circumstances. C.A. Br. 59; PA55a. Rather, respondent's argument—which the panel embraced as a corollary of its invalidation of the handgun ban—is that the trigger-lock requirement is unconstitutional because it does not specifically contain a self-defense exception. According to respondent, even if he lawfully possessed a handgun, the District would prohibit him from unlocking it to defend himself against a sudden intruder in his home. If respondent were correct, the District agrees that the law would be unreasonable.

Respondent is wrong. Such an exception is fairly implied in the trigger lock requirement, just as it is in many of the District's other laws. See, e.g., *United States v. Bailey*, 444 U.S. 394, 410-11 (1980) (noting existence of duress and necessity defenses in common law); *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) (recognizing the necessity defense in criminal cases). As Councilmember Wilson noted, “it would have to be a very irresponsible and unintelligent judge” who would punish a person for unlocking and using a gun to defend herself against a rapist. Evening Council Sess. Tr. 26:22-28:8, Jun. 15, 1976.

This Court should not accept respondent's invitation to create an unnecessary constitutional question. Federal courts should construe statutes to avoid serious constitutional problems unless doing so would be “plainly contrary” to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Furthermore, the District's courts have not yet interpreted section 7-2507.02, and local courts normally should have the first opportunity “to avoid constitutional infirmities.” *New York v. Ferber*, 458 U.S. 747, 768 (1982).



Moreover, respondent's assertion that the law might have unconstitutional consequences under some narrow and hypothetical circumstances is insufficient to render it wholly invalid in this facial challenge. The law may be struck down only if there is "no set of circumstances" under which it would be constitutional, *United States v. Salerno*, 481 U.S. 739, 745 (1987), a burden that respondent cannot meet.

In any event, even if the lack of a specifically enumerated self-defense exception were enough to render the trigger-lock requirement unconstitutional, the proper remedy would be for this Court to disapprove only that limited application of the trigger-lock requirement and leave the remainder of the District's laws intact. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-30 (2006).

### 3. The Licensing Requirement Does No More Than Properly Limit Those Who May Carry Handguns.

As an additional corollary to its holding on the handgun ban, the majority invalidated D.C. Code § 22-4504(a), which requires a license to carry concealable weapons in the District, seemingly on the theory that it eliminates respondent's right to use handguns for self-defense in his home. However, licensing laws ensure that only law-abiding, competent individuals have access to dangerous weapons. The majority recognized that the Second Amendment permits governments to deny firearms to felons and the insane and to test for firearm proficiency and responsibility. PA52a; *see Lewis*, 445 U.S. at 65 n.8 (felons). Such laws legitimately "promote the government's interest in public safety" and are "consistent with a 'well regulated militia.'" PA52a.

Nonetheless, the majority concluded that section 22-4504(a) functions as a complete ban on using handguns for self-defense at home because one cannot obtain a license for a handgun. PA54a-55a. But if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified. Once he did, nothing in District law would prevent him from "carrying" his gun in his home when needed for self-defense.

\* \* \*

The Second Amendment was not intended to tie the hands of government in providing for public safety. Reasonable regulations of firearms have been commonplace since the founding of the Republic. Consistent with this tradition, the Council enacted gun-



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control legislation tailored to the unique problems presented by the District's urban environment. The contrary holdings of the court of appeals were premised upon reasoning with no basis in law or logic.

This Court should restore the District's laws.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

THOMAS C. GOLDSTEIN,  
CHRISTOPHER M. EGLESON  
Akin, Gump, Strauss, Hauer & Feld LLP

WALTER DELLINGER  
MATTHEW M. SHORS  
MARK S. DAVIES GEOFFREY M. WYATT  
O'Melveny & Myers LLP

LINDA SINGER  
Attorney General for the District of Columbia

ALAN B. MORRISON  
Special Counsel to the Attorney General

TODD S. KIM  
Solicitor General  
Counsel of record

DONNA M. MURASKY  
Deputy Solicitor General

LUTZ ALEXANDER PRAGER  
Office of the Attorney  
General for the District of Columbia

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## ENDNOTES

1. Prior to the drafting of the Second Amendment, twelve of the thirteen original colonies and Vermont had enacted legislation regulating their state militia along similar lines. *See An Act for forming, regulating, and conducting the military Force of this State (1786)* (Connecticut) [hereinafter Connecticut Militia Law, with subsequent citations similarly abbreviated]; *Act for Establishing a Militia, 1785 Laws of Delaware 57* (June 4, 1785); *Act for Regulating the Militia of the State, and for Repealing the Several Laws Heretofore Made for That Purpose, 1786 Georgia Session Laws* (Aug. 15, 1786); *Act to Regulate the Militia, 1777 Maryland Laws Chap. XVII* (June 16, 1777); *Act of Nov. 3, 1783, 1783 Maryland Laws Chap. I;* *Act of Mar. 10, 1785, 1785 Mass. Acts 1;* *Act of June 24, 1786, 1786 N.H. Laws 1;* *Act of Jan. 8, 1781, 1781 N.J. Laws, Chap. CCXLII;* *Act to Regulate the Militia of New York, 1786 N.Y. Laws 1* (Apr. 4, 1786); *Act for Establishing a Militia, N.C. Sess. Laws, Chap. XXII* (Nov. 18, 1786); *Act for the Regulation of the Militia, 1780 Pa. Laws 1* (Mar. 20, 1780); *Act for the Regulation of the Militia, 1784 S.C. Acts 68* (1784); *Act Regulating the Militia, 1787 Vt. Acts & Resolves 1*(Mar. 8, 1787); *Act of Oct. 17, 1785, 1785 Va. Acts, Chap. I.*
2. Congress's power under the Militia Clauses to "organiz[e]" the militias buttresses the point that the Second Amendment applies to participants in organized military entities. Since 1903, the militia has consisted of two parts, the National Guard and an "unorganized militia" including all able-bodied males, and some females, of certain ages. *Perpich v. Dep't of Defense*, 496 U.S. 334, 341-46 (1990); 10 U.S.C. § 311. The unorganized militia has no duties and receives no training, discipline, or supervision by state-appointed officers. *Id.*; *see also* D.C. Code § 49-401 (District militia law). If language is to have meaning, membership in an unorganized militia is not membership in a "well regulated" militia. Because he is sixty-six (PA120a), respondent is not a member of any statutory militia.
3. Some read the "free State" language to mean that the Amendment was intended to ensure that people could rise up outside the context of any governmental organization against a tyrannical federal army in order to be "free." Fear of federal abuse animated some opponents of the Constitution, but construing the Second Amendment as a right to rebel is inconsistent with the Treason Clause and the Militia Clauses, which specifically authorize the use of militias to "suppress Insurrections." The Framers of this "more perfect Union" did not include the Second Amendment to "undo [their] hard work at Philadelphia." Paul Finkelman, "*A Well Regulated Militia*": *The Second Amendment in Historical Perspective*, 76 Chi.-Kent L. Rev. 195, 222 (2000). The reference to "State" in the Amendment is to a governmental unit, as elsewhere in the text of the Constitution, including its amendments. It was also common in that era for legislatures to declare the need for a militia to secure a "free government," "the Commonwealth,"



or a “free State.” *See* Delaware Militia Law; Maryland Militia Law; Virginia Militia Law.

4. As the majority noted, this Court has on several occasions referred to the Second Amendment in passing when construing other constitutional provisions and statutes. PA37a-39a. The District’s position is fully consistent with the dicta cited to the effect that the Amendment protects a “right of the people.” The dicta do not speak to the nature of the right.

5. The Virginia convention’s concerns with arms for the militia and the perceived threat from a standing army were mirrored at the North Carolina and New York conventions, which suggested similarly worded amendatory language. *4 id.* at 242-47; *The Bill of Rights: A Documentary History* 912 (Bernard Schwartz ed., 1971).

6. The Senate defeated a proposal that would have amended the Militia Clauses to make explicit that states could not only arm but also regulate and discipline their militias if Congress failed to do so. 2 Schwartz, *supra*, at 1151-1153. That was one of twenty unsuccessful amendments offered by Virginia’s two Anti-Federalist senators. *Id.* at 1151-53, 1186-87. Respondent has argued that this proposal shows that the Second Amendment was not directed at ensuring the availability of arms for the militia; otherwise the two senators would have considered its inclusion unnecessary. Whatever Virginia’s senators may have contemplated, their proposal went much farther than the Second Amendment. It would not only have revised the body of the Constitution, which the Federalists opposed doing, but also have provoked disputes about whether Congress had regulated and disciplined the militias so insufficiently as to warrant state intervention. The Senate may also have concluded that the Second Amendment made the minority’s proposal redundant.

7. New Hampshire’s 1783 constitution exempted persons “conscientiously scrupulous of bearing arms” for the common defense from being “compelled thereto” but had no other provision on arms. *Id.* at 183. Georgia’s constitution directed that each county with men “liable to bear arms” should form battalions or companies. *Id.* New Jersey’s and South Carolina’s constitutions did not mention either arms or militias. Connecticut and Rhode Island had no constitutions.

8. Vermont was not yet a state, but its 1777 and 1786 declarations of rights had similar language. Cogan, *supra*, at 184-85.

9. Although this case does not present the question of incorporation, there is no reason to think that a right to possess guns for personal use is a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” and “implicit in the concept of ordered liberty.” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Moreover, incorporation against the states would be curious since the Second Amendment was enacted to protect state prerogatives.



10. See, e.g., *State v. Cole*, 665 N.W.2d 328, 336-37 (Wisc. 2003); *Robertson v. Denver*, 874 P.2d 325, 328 & nn.15-16 (Colo. 1994); *Arnold v. Cleveland*, 616 N.E.2d 163, 172-73 (Ohio 1993); *State v. LaChapelle*, 451 N.W.2d 689, 690-91 (Neb. 1990); *State v. Hamlin*, 497 So. 2d 1369, 1371 (La. 1986); *State v. McAdams*, 714 P.2d 1236, 1237-38 (Wyo. 1986); *Kalodimos v. Morton Grove*, 470 N.E.2d 266, 273 (Ill. 1984).

11. Heightened scrutiny might be appropriate if Congress overrode the explicit command of the Second Amendment by barring a member of a well-regulated militia from possessing a weapon required to meet militia obligations. The asserted right to own and use a gun for private purposes is, however, not a fundamental right, *see supra* note 9, and individuals who wish to own and use guns for their own purposes are not a suspect class, *see Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980); *United States v. Caolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). They have no difficulty in protecting their interests in political arenas.

12. E.g., Chicago Mun. Code §§ 8-20-040, 8-20-050(c); Legal Community Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws* (2006), [http://www.lcav.org/library/reports\\_analyses/regulating\\_guns.asp](http://www.lcav.org/library/reports_analyses/regulating_guns.asp); Wendy Cukier & Victor W. Sidel, *The Global Gun Epidemic: From Saturday Night Specials to AK-47s* 144 (2006).

13. The majority independently erred in its determination of the proper relief to be accorded respondent. Finding no disputed issue of material fact, it ordered that summary judgment be entered in favor of respondent. PA55a. The facts it found relevant depended, however, on its mistaken adoption of a *per se* rule. If it had properly considered the challenged laws' reasonableness, it should have affirmed the dismissal of the complaint given the facts as found by the Council, as confirmed by subsequent studies. At a minimum it should have remanded for further proceedings to allow the parties and the district court to address reasonableness in the first instance. In any event, the record is sufficient for this Court to order entry of judgment for the District.



## INTEREST OF AMICUS CURIAE<sup>1</sup>

*Pursuant to Supreme Court Rule 37.3, the American Bar Association (“ABA”), as amicus curiae, respectfully submits that the decision of the divided panel of the D.C. Circuit should be reversed, because the decision improperly rejected the long and consistent line of precedent on which this Nation has built its entire matrix of gun regulation.*

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA’s membership of more than 413,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.<sup>2</sup> The ABA’s mission is “to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.” ABA Mission and Association Goals, available at <http://www.abanet.org/about/goals.html> (last visited Jan. 10, 2008). Among the ABA’s goals are to “increase public understanding of and respect for the law, the legal process, and the role of the legal profession” and “advance the rule of law in the world.” Id.

Consistent with its mission, the ABA has two significant interests in this case. First, the ABA has placed a high priority on furthering the rule of law by promoting *stare decisis* in this country and around the world. The ABA has served as a resource in ensuring that the public respects judicial decisions and recognizes the importance of adherence to established constitutional principles in our governmental system of checks and balances. The ABA is concerned that the decision below undermines *stare decisis* by rejecting a long and consistent line of precedent absent any change in circumstances or other “special justifications” for overturning existing law. *See Randall v. Sorrell*, 126 S. Ct. 2479, 2489 (2006).

Second, the ABA performs an educational function by explaining judicial decisions to the public, the legal profession, and interested institutions, and by advising these bodies regarding implications of these decisions. For more than forty years, the ABA has predicated its educational and advisory efforts regarding gun control on the constitutional principle articulated in this Court’s opinions: that the Second Amendment ties the right to bear arms to maintenance of a well-regulated militia. Consistent with this accepted principle, the





ABA has advised Congress, counseled state and local regulators, and educated the public and the legal profession regarding the constitutionality of enacted and proposed gun control legislation.

The ABA adopted its first policy on the regulation of firearms in 1965, supporting legislation that eventually became the Federal Gun Control Act of 1968, 18 U.S.C. § 921 et seq. Since then, as the ABA has adopted several policies in favor of reasonable gun restrictions, it has relied upon the courts' longstanding interpretation that the Second Amendment relates to the maintenance of a militia.

In formulating such policies, and in assisting in the development of laws to reduce the toll that gun violence exacts, the ABA has called upon prosecutors, defense lawyers, judges, and others who deal every day with the consequences of gun violence and who have a direct interest in the consistent application of constitutional principles.

The ABA thus has marshaled its significant expertise to help governments at every level in fashioning reasonable regulation of firearms. The ABA's reliance in those efforts on the consistent judicial interpretation of the Second Amendment mirrors the similar faith that legislators place on the courts' longstanding decisions on this issue. That reliance and that faith highlight the importance of stability in constitutional adjudication.

## SUMMARY OF ARGUMENT

As this Court has recognized, the rule of law requires that courts enunciate clear legal principles of general applicability, principles that do not change absent special justifications, and principles that allow legislatures, courts, and other institutions to conduct their business in compliance with constitutional standards. The Court has repeatedly stressed the importance of this tenet of *stare decisis* in deciding constitutional questions.

*Stare decisis* is directly at issue in this case. This Court and other courts have interpreted the Second Amendment's right to bear arms as related to maintenance of a well-regulated militia. *See, e.g., United States v. Miller*, 307 U.S. 174 (1939); *see also Presser v. Illinois*, 116 U.S. 252 (1886) (confining the Second Amendment to actions of the federal government). Consistent with that interpretation, no federal appellate court prior to the decision below has invalidated a gun control law based on the Second Amendment. Those advocating legislative and executive action to regulate firearms -- as well as government officials taking such action -- have relied on this



precedent and, consistent with this constitutional understanding, have crafted hundreds of federal and state laws and regulations to abate the serious hazards of gun violence.

The decision below, in rejecting this long line of precedent, leaves in doubt the constitutionality of a vast federal and state statutory framework of gun control laws and could impede efforts by federal and state legislatures to enact other public safety and crime-fighting legislation. By upsetting the rules on which this regulatory system is predicated, without articulating any special justifications for such a change, the decision undercuts the principle of *stare decisis* and defeats long-settled expectations.

Furthermore, a key part of the standard the court of appeals applies -- whether the weapons subject to the challenged regulation are “lineal descendants” of revolutionary era firearms -- compounds this problem by leaving the boundaries of the Second Amendment indeterminate. As a matter of judicial administration, this test would require courts to decide whether categories or even individual models of firearms bear sufficient similarities with early flintlock pistols and muskets to warrant a privileged constitutional status. The proliferating questions that courts will have to face are technical and fact-based, lack any precedential basis or guidance, can be overtaken by evolving technology, and yet such determinations would now be endowed with constitutional significance so as to threaten all regulation of firearms.

At the very least, taking this approach under the Second Amendment would prompt decades of litigation. Moreover, it would involve the courts in second-guessing legislative and executive policy judgments in an area vital to public health and safety. Accordingly, changing the longstanding interpretation of the Second Amendment would frustrate settled expectations, require courts to perform historically legislative functions, and would compromise important values of certainty and finality.

## ARGUMENT

I. THE DECISION BELOW UNDERMINES THE RULE OF LAW BY FAILING TO PROVIDE SPECIAL JUSTIFICATIONS FOR ABANDONING CONSISTENT AND LONGSTANDING PRECEDENT UPON WHICH LEGISLATORS, REGULATORS, AND THE PUBLIC HAVE RELIED.



In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court advised lawmakers that they can and should rely on the Court's rulings as a durable framework for legislative action. As Justice Kennedy wrote, "When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." 521 U.S. at 536.

The experience of numerous institutions with the Court's precedents regarding regulation of firearms demonstrates how these institutions rely on longstanding judicial interpretations of constitutional provisions in enacting laws, adopting regulations, and formulating policies. Throughout the Nation's history, the democratically elected branches of federal, state, and local government have regulated firearms based on the consistent interpretation of the Second Amendment, as articulated by this and other courts and reflected in congressional statements, that limitations on firearms are permitted unless the restrictions interfere with the maintenance of a well-regulated militia. The number, diversity, and long history of regulatory enactments demonstrate that this principle of Second Amendment law has become "embedded" in our "national culture." *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000).

Again and again, this Court has emphasized why judges should eschew constitutional interpretations that would defeat such settled expectations regarding governing legal principles.

First, respect for precedent imposes discipline in judicial decision-making and prevents disruption of the political process. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("[S]tare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'"); *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) ("[T]he respect accorded prior decisions [should] increase[], rather than decrease[], with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised on their validity.").

Second, respect for precedent ameliorates the uncertainty of judge-made law and enables legislatures and regulators -- as well as legal organizations like the ABA -- to rely on accepted, generally applicable legal rules. See *John R. Sand & Gravel Co. v. United States*, No. 06-1164 slip op. at 8-9 (Jan. 8, 2008) ("reexamination of



well-settled precedent could nevertheless prove harmful . . . ‘in most matters it is more important that the applicable rule of law be settled than that it be settled right.’”) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (J. Brandeis, dissenting)).

And third, respect for precedent restrains courts from encroaching on areas long reserved to democratically elected legislators, at least absent reason to believe the challenged legislation reflects a breakdown in the democratic system, e.g., *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), has bred confusion, e.g., *California v. Acero*, 500 U.S. 565, 579 (1991), or has produced ill-founded results, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). As Justice Breyer recently summarized this Court’s approach, “[T]he rule of law demands that adhering to . . . prior case law be the norm [and] [d]eparture from precedent is exceptional and requires ‘special justifications’ . . . especially [where] the principle has become settled through iteration and reiteration over a long period of time.” Randall, 126 S. Ct. at 2489 (2006) (declining to overrule *Buckley v. Valeo*, 424 U.S. 1 (1976)).

The decision below undermines many decades of settled expectations and threatens the legal structure built upon them. Absent special justifications -- and none were articulated by the court below -- such a departure from precedent offends basic tenets of the rule of law.

#### A. The Decision Below Conflicts with a Vast Body of Precedent.

The court of appeals’ decision represents the first time since ratification of the Bill of Rights in 1791 that a federal appellate court has invalidated a regulation of firearms as offending the Second Amendment. Courts have consistently upheld regulation of firearms based on the understanding that the Second Amendment ties the right to bear arms to maintenance of a well-regulated militia, and few, if any, limitations on firearms in the modern age would defeat that purpose. For many decades, the ABA has relied on this interpretation in formulating its policies, and Congress and state and local legislatures have relied on it in adopting legislation.

Well before 1939, the year *Miller* was decided, courts routinely refused to recognize that the Second Amendment conferred an individual right to own, keep, and use weapons for self-defense. Virtually every court to consider the issue prior to *Miller* upheld legislation on firearms challenged under the Second Amendment or state analogues. See, e.g., *Aymette v. State*, 21 Tenn. (2 Hum.) 154,



157-58 (1840) (“bear arms” does not mean an individual right to carry weapons for personal use, but rather implies a right to bear arms only as related to military use); *see also Fife v. State*, 31 Ark. 455 (1876); *State v. Workman*, 14 S.E. 9 (W. Va. 1891); *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905).

In *Miller*, the Court upheld the National Firearms Act of 1934 on this basis. The Court read the “declaration and guarantee of the Second Amendment” in conjunction with the Militia Clauses of Article I. 307 U.S. at 178 Thus, in the Court’s words:

The Constitution as originally adopted granted to the Congress power—“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.” With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

*Id.* (citation omitted) (emphases added). The fundamental holding of *Miller*, based on the conjunction of these provisions, is inescapable: the Second Amendment protects “possession or use” of a firearm only insofar as related to the “preservation or efficiency of a well regulated militia.” *Id.* at 178.

Since *Miller*, each of the eleven regional federal circuits has considered the purpose and scope of the Second Amendment. Prior to the decision below, all save one interpreted *Miller* to mean that the Second Amendment protects the right to bear arms only insofar as it relates to the functioning of a well-regulated militia.<sup>3</sup> Even the one circuit that separated the right to bear arms from the maintenance of a militia, the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001), upheld the challenged restrictions on firearms. The overwhelming majority of state court cases have agreed with the established view in the federal courts.<sup>4</sup>

Nevertheless, in 2007, 216 years into the life of the Second Amendment, a divided panel of the court below concluded differently, refusing effect to laws duly enacted by the democratically elected representatives of the District of Columbia to restrict pos-



session of handguns. This new course could affect a vast array of measures intended to secure public safety and prevent crime.

B. The Decision Below Jeopardizes an Extensive Regulatory Framework That Was Predicated on Longstanding Judicial Precedent.

Relying on the consistent interpretation of the Second Amendment long “embedded” in our national culture, legislators and regulators -- at the recommendation of the ABA and others -- have built an elaborate system to regulate firearms. The ABA is concerned that the decision below would destabilize that system by prompting decades of litigation and uncertainty regarding the status of critical firearms legislation.

1. Federal Legislation on Firearms

Since 1934, Congress has repeatedly enacted firearms legislation to respond to the exponential growth in crime, attacks on national figures, and burgeoning violence. In so doing, Congress was advised, and repeatedly concluded, that the Second Amendment did not impinge on these legislative enactments.

The National Firearms Act of 1934, 26 U.S.C. §§ 5801 *et seq.*, was the first major federal gun control legislation. The Act allows the Government to regulate certain “firearms” including machine guns, short-barreled shotguns and rifles, hand grenades and bazookas, silencers, and deceptive weapons. *See* 26 U.S.C. §§ 5861. Congress soon expanded these prohibitions and restrictions in the Federal Firearms Act of 1938, 18 U.S.C. § 921. That Act bans the sale of firearms to known criminals and imposed licensing requirements for manufacturers, dealers, and importers of firearms and handgun ammunition. As *Miller* shows, by this time the link between the Second Amendment right to bear arms and the maintenance of a well-regulated militia was established in the law.

The next major legislative initiative came thirty years later. The Federal Gun Control Act of 1968, 18 U.S.C. §§ 921 *et seq.*, authorizes federal regulations related to interstate commerce in firearms, and prohibits certain persons, such as convicted felons, from buying or owning a gun. In considering this legislation, which the ABA supported, Congress specifically assessed Second Amendment law and found unwavering support in the courts for the proposition that it is only “a prohibition upon Federal action which would interfere with the organization of militia by the states of the Union.” S. Rep. No. 90-1097 (1968) as reprinted in 1968 U.S.C.C.A.N. 2112, 2169; *see also*



Mem. from William H. Rehnquist, Asst. Atty. Gen., Office of Legal Counsel, Re: Proposed Federal Gun Registration and Licensing Act of 1969 at 4 (Feb. 13, 1969) (“constitutional objections based on the Second Amendment’s guarantee of ‘the right of the people to keep and bear arms’ [do not] present any serious legal obstacle to this legislation”).<sup>5</sup>

Congress again passed gun control legislation in the 1990s. The Brady Act of 1993, 18 U.S.C. §§ 921-930, required federally licensed firearm dealers to check the National Instant Criminal Background Check System, or NICS, before selling a handgun to a prospective purchaser. During congressional hearings, the ABA again cited the uniform precedent upholding gun control legislation. Letter from Robert D. Evans, Dir., ABA, to Hon. Charles E. Schumer, Chairman, Subcommittee on Crime and Criminal Justice, U.S. House of Representatives (Apr. 4, 1991). In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act, Pub. L. 103-322, which implemented a temporary ban on semi-automatic assault weapons and increased the requirements for firearms dealer licenses under the 1938 Act. During debate on the legislation, the ABA advised that the Second Amendment as long interpreted by the courts did not limit legislative authority to enact this law.<sup>6</sup> These views were cited during Senate debate. *See, e.g.*, 139 Cong. Rec. S15,411-01 at S15,440 (Nov. 2, 1993) (stating “existing case law clearly rejects the argument that the second amendment confers an absolute and unrestricted personal right to bear arms”) (statement of Sen. Danforth, quoting ABA President L. Stanley Chauvin).

In the ensuing years, Congress adopted additional restrictions on firearms. *See, e.g.*, Domestic Violence Offender Gun Ban, 18 U.S.C. §922(g)(9); 18 U.S.C. § 924(c)(1) (sentence enhancements for crimes involving guns). The ABA continued on several occasions to advise Congress about the judicial precedent holding that the “Second Amendment []permits the exercise of broad power to limit private access to firearms.” Assault Weapons Legislation: Before the Sen. Comm. on the Judiciary, 103rd Cong. (1993) (statement of J. Michael Williams). *See also, e.g.*, *On Gun Violence: Before the Subcomm. on the Constitution, Federalism and Property Rights of the Sen. Comm. on the Judiciary* (1998) (statement of David Clark) (“[t]hroughout our nation’s history, no legislation regulating the private ownership of firearms has been struck down on Second Amendment grounds”).

Not only has this body of legislation directed social policy, influenced law enforcement, and grounded criminal convictions, it has also spawned extensive federal administrative rulemaking to guide



enforcement, including 110 separate regulations under the amended Gun Control Act of

1968, 87 regulations under the National Firearms Act, and 27 regulations under the Arms Export Control Act. *See A.T.F. P. 5300.4*, Federal Firearms Regulation Reference Guide at 32, 79, 101 & 111 (2000) (citing 27 C.F.R. §§ 447, 478-79 and 28 C.F.R. § 25). The Bureau of Alcohol, Tobacco, Firearms and Explosives (“A.T.F.”) administers these regulations and employs nearly 5,000 people to do so.

By questioning the basic constitutional premise upon which this regulatory framework rests, the decision below casts doubt on an incalculable number of laws, regulations, and administrative orders relating to firearms. How many would survive the court of appeals’ ruling is unclear, but it is more than plausible that such a significant change in Second Amendment law would dictate repeal or revision of many. At the very least, this shift in the law will prompt years of litigation regarding the constitutionality of statutory, regulatory, and administrative provisions, and will disrupt law enforcement in an area critical to public safety.

## 2. State and Local Firearm Regulations

Notwithstanding the numerous federal laws, most regulation of firearms is by state and local governments. Jon S. Vernick & Lisa M. Hepurn, *Twenty Thousand Gun-Control Laws?*, (Brookings Institution 2002). The state and local laws include bans on certain types of guns (e.g., seven states ban assault weapons), mandatory registration (seven states), licensing and permitting laws for the purchase of certain firearms (twelve states), mandatory waiting periods (twelve states), licensing of firearm dealers (twenty-six states), permitting to carry a concealed weapon (forty-six states), and mandatory background checks (forty-nine states). *Legal Comm. Against Violence, Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws* (2006). The latest A.T.F. compendium of state and local laws is 458 pages long, listing hundreds of measures. A.T.F. P. 5300.5, State Laws and Published Ordinances xvi (2005).

Revisiting the basic premise of the Second Amendment and striking down gun legislation for the first time in 216 years would have ripple effects through this entire network of state and local regulation. Although the Court ruled in *Presser v. Illinois*, 116 U.S. 252 (1886), that the Second Amendment limits the power only of the federal government, the decision relied on the importance of militias as a check on federal power. Separating the right to bear



arms from the maintenance of a well-regulated militia would cast doubt on the authority of state and local governments to regulate firearms. Such a ruling would thus invite challenges to hundreds of state and local restrictions, thrusting upon the courts difficult policy judgments about the reasonableness of individual regulations.

## II. THE DETERMINATIONS REQUIRED BY THE DECISION BELOW WOULD COMPOUND THE DISRUPTION OF THE REGULATORY SYSTEM DEVELOPED IN RELIANCE ON JUDICIAL PRECEDENT.

The impracticality and unpredictability of the approach to the Second Amendment taken in the decision below further places at risk the regulatory system for firearms. As this Court has noted, unclear and impractical standards impede effective law enforcement. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 231 (1983) (probable cause involves “factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act”) (citation omitted). Uncertain standards invite litigation, which burdens courts and regulators, and engenders further uncertainty.

### A. The Decision Below Does Not Create an Objective, Reliable, and Intelligible Definition of “Arms.”

The court below stated that “[o]nce it is determined -- as we have done -- that handguns are ‘Arms’ referred to in the Second Amendment, it is not open to the District to ban them.” Pet. App. 53.

The court, however, provided no meaningful guidance as to how judges are to determine what weapons qualify as “Arms.” Instead, the court fashioned a test that turns in large part on the physical characteristics of the weapon and whether it is a “lineal descendant” of those used by Founding-era militiamen. Pet. App. 51. In making this issue a key part of its test, the court departs from the standard articulated in *Miller*, which is whether use or possession of the firearm has a “reasonable relationship to the preservation or efficiency of a well regulated militia.” 307 U.S. at 178.

The “lineal descendant” standard is inherently subjective and is likely to engender massive confusion regarding the permissible scope of gun control. Moreover, the standard will prove highly impractical. By tying the Second Amendment to historical and technological issues, requiring judges to assess the physical effects and relative lethality of eighteenth century weapons and to extrapolate



those conclusions to the vast array of modern firearms, the decision below supplants legislative expertise and saddles courts with issues they are ill-suited to resolve. *See, e.g., United States v. Rybar*, 103 F.3d 273, 294 n.6 (3d Cir. 1996) (Alito, J., dissenting) (as a rule, appellate judges “are not experts on firearms, machine guns, . . . or crime in general”).<sup>7</sup> With many thousands of variations in arms -- plus many new ones every year -- intersecting with many hundreds of variations in state and federal regulations, the court of appeals’ departure from the *Miller* standard can only yield confusion and dislocation.

Even a brief survey of weaponry subject to regulation demonstrates that the court of appeals’ approach, focusing on the weaponry rather than the relation of the regulation at issue to a well-regulated militia, provides neither clarity nor stability. The Justice Department’s taxonomy divides firearms into three basic types -- shotguns, rifles, and handguns (including revolvers, which store ammunition in a revolving chamber, and pistols, which refer to all other handguns). But each type may be further distinguished by whether they feature automatic firing action (fully automatic weapons, which automatically load and fire bullets as long as the trigger is depressed, and semiautomatic weapons, which automatically load and fire one bullet per trigger function), caliber (bore diameter), gauge (for shotguns), and muzzle velocity (how fast a bullet leaves the gun). *See generally* Marianne W. Zawitz, U.S. Dep’t of Justice, *Bureau of Justice Statistics, Firearms, Crime, and Criminal Justice: Guns Used in Crime* 2 (1995).

Thus, under the “lineal descendant” standard employed below, courts will have to decide whether an automatic or semiautomatic pistol, or only a revolver, is protected by the Second Amendment. They will have to assess whether it is reasonable to ban certain handguns, say those over .38 caliber. They will have to decide whether to draw lines based on the number of shots a gun can fire, the type and power of bullets it uses, the accuracy of the gun at particular distances, or the general lethality of the weapon. No doubt, the distinctions courts devise on these questions will differ, both between courts and over time. As new weapons technologies develop, courts will have to revisit these questions repeatedly. Such inevitably subjective decision-making is detrimental to the rule of law, which requires clear legal rules, of general applicability, on which courts, legislators, and the legal profession may rely.

#### B. The Decision Below Will Entangle Courts in Factual and Policy Determinations More Appropriately Left to State and Local Legislatures.



From the ABA's perspective as an advocate for the rule of law, the problems with the court of appeals' approach stem not only from the disruptive consequences of changing the rules on which an entire regulatory scheme rests, but also from the adverse effects of entangling courts in essentially legislative policy decisions. Even if courts could settle on a workable definition of "arms," the assessment "whether any particular restriction on the possession of weapons is 'reasonable' -- for example, banning handguns or limiting firearms to law enforcement officers -- would be as subjective and arbitrary as decisions as to whether modern weapons are 'comparable' to 18th century weapons." Richard Allen, *A Gun May Be a Gun*, Legal Times, Nov. 26, 2007, at 42.

Insofar as courts, when deciding the reasonableness of a regulation, weigh the states' interests, the varying strength of those interests will produce disparate results in different jurisdictions. A "Saturday night special," for example, may pose a greater threat in urban areas than in rural jurisdictions, based on the level of violent crime, population density, and trafficking in unregistered guns. Thus, a court in one jurisdiction could find banning this weapon to be constitutionally "unreasonable," but courts in another jurisdiction could uphold such a ban. The prospect of such disparities militates against revision of Second Amendment standards in a manner requiring greater judicial intervention. See Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217 (1978).

Even if courts could steer through this jurisprudential thicket, that does not mean that they should. Within the boundaries set by the Constitution, the legislature has traditionally been the branch that balances the interests of the state in public safety against the interests of individuals in owning weapons.<sup>8</sup> Constricting the constitutional boundaries for legislative action on firearms lodges the reconciliation of these competing policies in courts, which are neither intended nor equipped to displace the legislative process.

Further, the decision below imperils legislative and executive determinations absent any of the accepted factors necessitating judicial intervention. Voters who oppose gun control have not had difficulty participating in the political process. They are not a discrete and insular minority. And there is no legal crisis that the other branches of government cannot resolve. Judicial entanglement in the gun control debate thus will amount to an unwarranted encroachment on the policy prerogatives of the legislative and executive branches. Such a breach of constitutional boundaries, removing an issue from the



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democratic process, will produce greater public controversy as it frustrates the policy choices of voters. As Judge Henry Friendly stated, “In the long run the people can hardly be expected to be more tolerant of judicial condemnation of reasonable efforts to protect the security of their lives and property than they were of nullification of efforts to advance their economic and social welfare.” Henry J. Friendly, BENCHMARKS 265 (1967).

This risk is particularly acute because constitutional rulings, unlike legislative enactments, are not easily adaptable to changing conditions. Regulatory agencies can clarify the law, fill the interstices of legislative enactments, and soften inequities through enforcement decisions. Legislatures can amend or repeal unworkable statutes. By comparison, constitutional decisions are enduring and inflexible. Judge Friendly, quoting Learned Hand, found this rigidity a compelling reason for judicial modesty. He observed that “[c]onstitutions are deliberately made difficult of amendment; mistaken readings of them cannot be readily corrected. . . . The Bill of [R]ights ought not to be read as prohibiting the development of ‘workable rules.’” *Id.* at 267.

## CONCLUSION

The American Bar Association respectfully requests that the Court reverse the decision below.

Respectfully Submitted,

OF COUNSEL:

ROBERT N. WEINER

JOHN A. FREEDMAN

CHRISTOPHER S. RHEE

MURAD HUSSAIN

JENNIFER NEWBERGER

EMILIA P. PETERSEN

WILLIAM H. NEUKOM, Counsel of Record

PRESIDENT AMERICAN BAR ASSOCIATION

Attorneys for Amicus Curiae

## ENDNOTES

1. Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and no person



or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of the brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

2. Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions of this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

3. See, e.g., *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984); *United States v. Rybar*, 103 F.3d 273, 285-86 (3d Cir. 1996); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *Cody v. United States*, 460 F.2d 34, 37 (8th Cir. 1972); *Hickman v. Block*, 81 F.3d 98, 101-02 (9th Cir. 1996); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997).

4. The decision below cited eight state court cases as suggesting that “the Second Amendment protects an individual right.” Pet. App.48. Seven of these cases involve statements that were not essential to the holding or construe state constitutional provisions rather than the Second Amendment. The lone exception is *Rohrbaugh v. State*, 607 S.E.2d 404, 412 (W. Va. 2004). But like *Emerson*, that decision did not declare gun control legislation unconstitutional. In upholding the West Virginia statute at issue, the court concluded: “[T]he legislature may enact laws limiting one’s firearm rights in conjunction with its inherent police power.” *Id.* at 413.

5. The ABA adopted policy in support of this legislation. The report presented to the ABA House of Delegates in connection with this policy concluded that “the right to bear arms protected by the Second Amendment relates only to the maintenance of the militia.” ABA, *Gun Control Resolution (And Report) Adopted By House of Delegates: Report of the Section of the Criminal Law* 574 (1965).

6. In 1994, the ABA called upon leaders of the legal profession to:

Educate the public and lawmakers regarding the meaning of the Second Amendment to the United States Constitution, to make widely known the fact that the United States Supreme Court and lower federal courts have consistently, uniformly held that the Second Amendment to the United States Constitution right to bear arms is related to “a well- regulated militia” and that there are no federal constitutional decisions which preclude regulation of firearms in private hands . . . .



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ABA, Gun Violence Resolution Adopted By House of Delegates (1994), available at <http://www.abanet.org/gunviol/docs/1994policy.pdf> (last visited Jan. 10, 2008).

7. These concerns are heightened by the suggestion in the decision below that a court should determine that a particular “lineal descendent” of a firearm was in “common use” and had “potential military application.” Pet. App. 51. These questions do not lend themselves to judicial expertise.

8. For example, the most notable risk factor for mortality among abused women is the presence of a gun. Jane Koziol-McLain, et al., *Risk Factors for Femicide-Suicide in Abusive Relationships: Results From a Multisite Case Control Study, in Assessing Dangerousness; Violence by Batterers and Child Abusers*, 143 (J.C. Campbell, Ed., 2d ed. (2007). See Violence Policy Center, *When Men Murder Women: An Analysis of 2005 Homicide Data* 13 (Sept. 2007). How to weigh these risks against the desire to own a gun for self defense is a policy judgment, not a constitutional one.





## INTEREST OF AMICI CURIAE<sup>1</sup>

The **Brady Center to Prevent Gun Violence** is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that the Second Amendment is not misinterpreted as a barrier to strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous briefs *amicus curiae* in cases involving the constitutionality of gun laws. A sixty-page critique of the D.C. Circuit's decision has been published at [www.bradycenter.org](http://www.bradycenter.org).

The law enforcement *amici* listed here have a compelling interest in ensuring that the Second Amendment does not stand as an obstacle to gun laws that help the police protect the public from gun crime and violence.

The **International Association of Chiefs of Police** is the largest organization of police executives and line officers in the world, representing more than 20,000 members in 112 countries.

The **Major Cities Chiefs** is composed of police executives heading the fifty-six largest police departments in the United States, protecting roughly forty percent of America's population.

The **International Brotherhood of Police Officers** is the largest police union in the AFL-CIO, representing more than 50,000 members.

The **National Organization of Black Law Enforcement Executives** represents 3,500 members nationwide, primarily police chiefs, command-level officers, and criminal justice educators.

The **Hispanic American Police Command Officers Association** represents 1,500 command law enforcement officers and affiliates from municipal police departments, county sheriffs' offices, and state and federal agencies.

The **National Black Police Association** represents approximately 35,000 individual members and more than 140 chapters.

The **National Latino Peace Officers Association** is the largest Latino law enforcement organization in the United States, with a membership including chiefs of police, sheriffs, police officers, parole agents, and federal officers.

The **School Safety Advocacy Council**, a national organization with expertise on school-based policing, trains law enforcement and



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BRADY CENTER TO PREVENT HANDGUN VIOLENCE

school officials to address issues of child safety at school and in the community.

The **Police Executive Research Forum** is a national membership organization of progressive police executives dedicated to improving policing through research and involvement in public policy debate.

## SUMMARY OF ARGUMENT

I. In holding that the Second Amendment protects ownership of handguns for private purposes such as hunting and self-defense, the lower court read out of the Amendment its first thirteen words, thus violating the fundamental rule that the Constitution must be interpreted to give meaning to all of its words. The lower court's conclusion is also contrary to *United States v. Miller*, 307 U.S. 174, 178 (1939), which held that the "declaration and guarantee" of the Second Amendment "must be interpreted and applied" in accord with its "obvious purpose" to "assure the continuation and render possible the effectiveness" of the militia.

The lower court's account of the "well regulated Militia" as a collection of unorganized individuals is contrary to the nature and function of the founding-era militia. The militia was a system of compulsory military service imposed on much of the adult, male population. As made plain in the Second Militia Act of 1792, militiamen were governed by strict rules of discipline and training. Far from being "well regulated," as was the militia known to the Framers, the militia posited by the court below is not regulated at all.

Contrary to the lower court, the Framers did not envision the guarantee of a right to possess guns for private purposes as the means of arming the militia. The arming of the militia was a matter of government command, not individual choice, and was regulated by statute. The lower court's dangerous claim that the right of persons in the "unorganized militia" to be armed for "self-defense" extends to armed resistance to a government perceived as "tyrannical" is contradicted by the Second Amendment's own expressed objective of ensuring "the security of a free State," and by the Militia Clauses of Article I, which give Congress the power to call out the militia to "suppress Insurrections."

As the Amendment's legislative history shows, "keep and bear Arms" is a military phrase that matches the Amendment's militia-related purpose. Madison's initial proposal to the First Congress contained a conscientious objector clause allowing persons "religiously"



scrupulous of bearing arms” to be exempt from compelled military service, thus establishing that the term “bear Arms” refers exclusively to military service. The debates in the First Congress confirm that Congress understood the Amendment as addressing possession of arms solely in connection with militia service. “Keep and bear Arms” denoted that militiamen were required by law to acquire and “keep” militia guns at home, as well as to “bear” them in militia service.

Contrary to the lower court’s view, guaranteeing a right to keep and bear arms to “the people” does not imply that the right extends to private purposes unrelated to militia service. The issue is not to whom the right extends, but rather the nature and scope of the right guaranteed.

II. Two hundred years of constitutional tradition support interpreting the Second Amendment to guarantee a limited right to be armed in service to an organized militia, while allowing elected legislatures, without judicial interference, to regulate private possession of guns. Legislatures are far better suited than courts to decide the difficult and hotly contested policy issues raised by the continuing tragedy of gun violence in our society. This Court should not grant the judiciary the unprecedented power to interfere with the life-and-death decisions of the people’s elected representatives in the control of deadly weaponry.



## ARGUMENT

### I. THE SECOND AMENDMENT GUARANTEES NO RIGHT TO POSSESS FIREARMS UNLESS IN CONNECTION WITH SERVICE IN A STATE-REGULATED MILITIA

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II.

The Second Amendment guarantees individuals the right to be armed only as participants in an organized militia that serves the security needs of the States.

The lower court’s contrary conclusion is inconsistent with fundamental principles of constitutional interpretation, prior rulings of this Court, and the Amendment’s legislative history.





#### A. Read To Give Meaning To All Its Words, The Amendment Connects The Right Guaranteed To The Well Regulated Militia

This Court has described as “the first principle of constitutional interpretation” the rule that the Constitution must be interpreted to give meaning to each of its words, and that constructions which would render some of its words “mere surplusage” must be avoided. *Wright v. United States*, 302 U.S. 583, 588 (1938); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Because the D.C. Circuit’s reading of the Second Amendment renders its first thirteen words of no legal effect, that reading cannot be squared with this fundamental principle.

In *Marbury*, this Court applied this principle in rejecting an interpretation that would have permitted Congress to grant original jurisdiction to the Court in categories of cases other than those enumerated in the Constitution. Such a reading, the Court explained, would have rendered without effect the Constitution’s provision that “[i]n all other cases [those in which the Court does not have original jurisdiction], the supreme court shall have appellate jurisdiction.” *Marbury*, 5 U.S. at 174 (emphasis added). This Court has often reiterated the principle. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 490-491 (1965) (invoking the canon in refusing to adopt an interpretation of the Ninth Amendment that would have “give[n] it no effect whatsoever”); *Myers v. United States*, 272 U.S. 52, 151-152 (1926) (invoking “the usual canon of interpretation of [the Constitution], which requires that real effect should be given to all the words it uses”). This rule is grounded in the great care with which the Constitution was written. “Every word appears to have been weighed with the utmost deliberation, and its full force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning.” *Holmes v. Jennison*, 39 U.S. 540, 571 (1840).

The decision below violates this “first principle” by rendering of no “force and effect” the Second Amendment’s first thirteen words. The lower court concluded that the Amendment’s assertion that a “well regulated Militia” is necessary to the “security of a free State” conveys merely a “principle of good government,” Pet. App. 34a, that is narrower than the right guaranteed. It held that the right extends to persons who have not even an “intermittent” connection to a militia, and who use guns for activities unrelated to militia service, such as “hunting and self-defense.” *Id.* at 44a. While the court below acknowledged that militia service could be one of the



purposes for gun use protected by the Amendment, its interpretation still renders the Amendment's opening clause of no legal "force and effect" because the constitutional validity or invalidity of any gun law challenged under the Amendment would be the same if the opening clause were disregarded.

The lower court's sole source was a law review article that claims it was a common drafting technique in founding-era state constitutions to include such introductory clauses, whose content allegedly does not affect the meaning of the provisions in which they appear. Pet. App. 34a (citing Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998)).

The lower court's argument suffers from two fundamental flaws. First, unlike the state constitutions cited by Professor Volokh, the Bill of Rights features no such superfluous "principles of good government." Given that "principles of good government" also were served by other provisions of the Bill of Rights, why would the First Congress confine their expression to the Second Amendment? The lower court cited not a single additional example in the entire Constitution of a clause that is merely "prefatory" and of no legal effect. On the contrary, in interpreting the one other constitutional provision that includes a statement of purpose, the Copyright and Patent Clause,<sup>2</sup> this Court has held that statement of purpose to be limiting and binding on Congress. *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966) (Congress "may not overreach the restraints imposed by the stated constitutional purpose" which is "[t]o promote the Progress of Science and useful Arts"); see also *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (recognizing the "constitutional command" ... that Congress, to the extent it enacts copyright laws at all, [must] create a 'system' that promotes[s] the Progress of Science.""). Graham's holding stands in stark contrast to the lower court's view that the first half of the Second Amendment is meaningless. Pet. App. 34a-36a.

Second, unlike the Second Amendment, most of the clauses collected by Professor Volokh have general statements of purpose that would be incapable of defining any specific, enforceable limitation on the right conferred.<sup>3</sup> Moreover, neither the court below, nor Professor Volokh, cites a single case holding that any of the statements of purpose in early constitutional provisions was in fact merely "prefatory" and did not impose a substantive limitation. The lower court's assertion that the first half of the Second Amendment may safely be ignored therefore stands utterly devoid of support.

When the Framers wanted to guarantee an unambiguously broad right, they knew how to do so, as the First Amendment plainly shows.



See U.S. Const. amend. I (“Congress shall make no law … abridging the freedom of speech.”). The Framers could have adopted a similar formulation in the Second Amendment. They did not do so.

Indeed, the Framers could have adopted the language proposed by one of the contemporaneous, albeit “marginal voices call[ing] out for a private right to arms” unconnected to militia service. *Uviller & Merkel, The Militia and the Right to Arms* 82 (Duke 2002). They could have adopted, for example, the proposed amendment offered by the New Hampshire ratifying convention, which made no reference to the militia, and provided: “Congress shall never disarm any Citizen unless such are or have been in Actual Rebellion.” *The Complete Bill of Rights: The Drafts, Debates, Sources and Origins* 181 (Cogan ed. 1997) (“Debates”).

Alternatively, had the Framers intended an armed militia to be only one of several “salutary” purposes of the right to keep and bear arms, as the lower court imagined, they could have adopted language expressing those multiple purposes. For instance, the dissenting delegates from the Pennsylvania ratifying convention proposed in their *Reasons of Dissent* pamphlet: “That the people have a right to bear arms for the defense of themselves and their own State, or the United States, *or for the purpose of killing game*; and no law shall be passed for disarming the people or any of them, unless for crimes committed.” *Debates* 182 (emphasis added). That language was not even adopted by the Pennsylvania ratifying convention. *Uviller & Merkel, supra*, at 83.

The lower court thought it “passing strange” that the drafters would have chosen the language of the Second Amendment if the right guaranteed were limited to “the protection of state militias,” instead of choosing a “more direct locution.” Pet. App. 14a, 34a. What is truly “passing strange” is the lower court’s conclusion that, of the various “locutions” they had to choose from, the Framers sought to guarantee a nonmilitia right by choosing language emphasizing the importance of a militia, while avoiding other available “locutions” making no reference to the militia at all.

#### B. *United States v. Miller* Establishes That The Amendment’s Expressed Militia Purpose Limits The Scope Of The Right Guaranteed

In its most extensive discussion of the Second Amendment, this Court implicitly applied the *Marbury* principle in holding that the “declaration and guarantee” of the Second Amendment “must be interpreted and applied” in accord with its “obvious purpose” “to



assure the continuation and render possible the effectiveness” of the militia. *United States v. Miller*, 307 U.S. 174, 178 (1939) (emphasis added).

In *Miller*, this Court considered whether the National Firearms Act’s prohibition on transporting unregistered short-barreled shotguns in interstate commerce violated the defendants’ Second Amendment rights. The Court concluded that because there was no evidence that the possession or use of a short-barreled shotgun “has some reasonable relationship to the preservation or efficiency of a well regulated militia,” the defendants’ conduct was not protected by the Second Amendment. 307 U.S. at 178.

The lower court misconstrued *Miller* by suggesting it held that the first half of the Second Amendment modified only the term “Arms” in its second half. See Pet. App. 36a. It thus concluded that *Miller* was concerned only with the type of weapon at issue. *Id.* At 40a-42a. This reading of *Miller* is flawed in three respects.

First, the lower court’s argument cannot withstand *Miller*’s clear instruction that the entire Amendment—its “declaration and guarantee” and not simply the term “Arms”—“must be interpreted and applied” with the militia “end in view.” *Miller*, 307 U.S. at 178. Second, if, as the lower court insisted, the right to be armed extends to private purposes like hunting and self-defense, then why doesn’t the *Miller* Court’s allegedly “weapons-based” focus consider the suitability of shortbarreled shotguns for such purposes? Third, the lower court’s reading suggests that the defendants’ possession and use of firearms would have been constitutionally protected if only their weapons had been employable in military service. This would imply the absurd result that the Amendment protects a constitutional right to possess military weapons such as machine guns or grenade launchers, even by persons with no connection to a lawfully-sanctioned military force.

Given the absence of support for such a view in the *Miller* opinion itself, the lower court purported to find it in the government’s brief. See Pet. App. 40a-42a. The court cited no support for its methodology of ascertaining the meaning of a judicial opinion in the briefs considered by the court. Moreover, neither the government’s brief nor the *Aymette* decision on which the government and the *Miller* Court relied, argued that evidence of a weapon’s military suitability would be sufficient to trigger Second Amendment protection. See Appellants’ Br. 4-5, *Miller*, 307 U.S. 174; *Aymette v. State*, 21 Tenn. 154, 1840 WL 1554, at \*5 (1840). Both the brief and *Aymette* made clear that the requirement that the arms involved



be militia-suitable is independent of the requirement that the right be exercised in the context of militia service. The government argued, first, that the Second Amendment “right has reference only to the keeping and bearing of arms by the people *as members of the state militia or other similar military organization provided for by law.*” Appellants’ Br. 4-5, *Miller*, 307 U.S. 174 (emphasis added). Only then did it contend that “[t]he ‘arms’ referred to in the Second Amendment are, moreover, those which ordinarily are used for military or public defense purposes.” *Id.* At 5 (emphasis added). In *Aymette*, the Tennessee Supreme Court similarly created a dual requirement: “[a]s the object for which the right to keep and bear arms is secured, is of general and public nature, to be exercised by the people in a body, for their *common defence*, so the *arms*, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment.” *Id.* (emphasis in original).

Consistent with the government’s argument and the *Aymette* ruling, the *Miller* Court held that the military utility of a gun is a necessary condition for constitutional protection, but not a sufficient condition in the hands of someone with no connection to a militia. The lower court’s ruling that the right to be armed can be “interpreted and applied” in light of private purposes like hunting and self-defense is contrary to *Miller*.

#### C. The “Well Regulated Militia” Is An Organized Military Force, Not An Unorganized Collection Of Individuals

Implicitly recognizing that the reference to a “well regulated Militia” in the Second Amendment cannot be ignored altogether, the lower court struggled to show that a right to own guns for private purposes is nonetheless consistent with the Amendment’s language. According to the lower court, the founding-era militia was “the raw material from which an organized fighting force was to be created” for which there was “no organizational condition precedent.” Pet. App. 30a. It was, therefore, merely a collection of individuals “*subject to organization by the states (as distinct from actually organized.)*” *Id.* at 33a (emphasis in original). The lower court’s account of the militia is both self-contradictory and a distortion of the nature and function of the militia.

Even the lower court acknowledged that membership in the founding-era militia involved “enrolling” by “providing one’s name and whereabouts to a local militia officer.” Pet. App. 30a. However, because enrollment, by this definition, presupposes the existence of



an organization with which individuals must formally affiliate themselves, the lower court's recognition of that requirement contradicts the court's own assertion that the militia had no "organizational condition precedent." *Id.* Moreover, nothing in the record remotely suggests that plaintiff Heller provided his "name and whereabouts to a local militia officer." Thus, even under the lower court's account, Heller has no affiliation with a militia.

Contrary to the lower court, the militia of the founding era was a system of compulsory military service imposed on much of the free, adult, male population, for which "enrollment" was only the beginning of the individual's military obligation to the government. The Second Militia Act of 1792, cited by the lower court in support of its account of the militia, in fact undermines it. In addition to requiring that citizens enroll in the militia, the Act provides that officers will "cause the militia to be exercised and trained" in accordance with specified "rules of discipline" and contemplates that militia members will be "called out on company days" to train. Second Militia Act of 1792, ch. xxxiii, 1 Stat. 271, 273; see also Webster, *American Dictionary of the English Language* (1828 ed.) ("The militia of a country are the able bodied men organized into companies, regiments and brigades ... and required by law to attend military exercises[.]"), available at <http://1828.mshaffer.com>.<sup>4</sup> In *Perpich v. Department of Defense*, 496 U.S. 334, 348 (1990), this Court described the "traditional understanding of the militia as a part-time, nonprofessional fighting force," consisting of 'a body of citizens trained to military duty.' "(quoting *Dunne v. People*, 94 Ill. 120 (1879)) (emphasis added). This concept is a far cry from the lower court's "raw material from which an organized fighting force was to be created." Pet. App. 30a.

Even if it were possible for a militia to consist only of the "raw material" of some future fighting force, the lower court's description cannot account for the Second Amendment's reference to a "well regulated" militia. The phrase "well regulated" resolves any doubt that the militia of the Second Amendment is an organized body governed by a set of rules.<sup>5</sup>

Significantly, the lower court conceded that the term "well regulated" implies that "the militia was a collective body designed to act in concert," but then argued that the term does not convert the "popular militia" of the founding era into "a 'select' militia that consisted of semi-professional soldiers like our current National Guard." Pet. App. 32a. The court of appeals incorrectly assumed that a "popular militia"—in which large segments of the population are "enrolled"—cannot also be organized and regulated. The



founding-era militia was both. In contrast, the lower court's account posits a "well regulated Militia" that is not regulated at all.

The lower court argued that guaranteeing a right to keep weapons for private purposes such as hunting and self-defense was "the best way to ensure that the militia could serve when called." Pet. App. 33a. This assertion defies common sense and is, once again, historically inaccurate. Guaranteeing a right to possess guns for private purposes is neither necessary nor sufficient as a means for arming state militias. It is not necessary, since the Constitution gave Congress the power to require the possession of guns for militia purposes, nor is it sufficient, because it makes the effective arming of the militia dependent on the uncertain choices of private citizens about whether to arm themselves and what arms to possess. Rather than leave the arming of the militia to the whims of individual gun owners, the founding-era Congress chose to regulate gun ownership for militia purposes. Pursuant to its Article I power "[t]o provide for ... arming ... the Militia," U.S. Const. art. I, § 8, Congress spelled out in detail the exact arms, ammunition, and gear that militia members, as well as officers, were required to possess. *See Act of May 8, 1792*, 1 Stat. 271-272. The Second Militia Act of 1792, enacted one year after ratification of the Bill of Rights, *required* that each militiaman "within six months" after enrollment "provide himself with a good musket or fire-lock." *Id.* at 271. Militia members were even required to keep their weapons "exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes," thus recognizing that the government's continuing interest in militia weapons deprived them of some of the attributes of private property. *Id.* at 273. This legislation would have been superfluous if the framers had contemplated that a right to own arms for private purposes would be the primary method of arming the militia. The arming of the militia was a matter of government command, not individual choice.<sup>6</sup>

The *reductio ad absurdum* of the lower court's treatment of the militia is its suggestion that the right of the people in an unorganized militia to possess guns for "self-defense" also entails the right to use those guns "to resist and throw off a tyrannical government." Pet. App. 21a, 44a (embracing private use of arms for resistance to the "depredations of a tyrannical government"). This insurrectionist view of the "well regulated Militia" puts the Second Amendment at odds with itself, and with the rest of the Constitution. First, it is contradicted by the Amendment's own words, which describe the necessity of the militia to "the security of a free State." By these words, the Second Amendment itself establishes that the militia served the



security interest of the States,<sup>7</sup> not the interest of individuals in taking up arms against the government should they decide it has become a tyranny. Second, the Constitution expressly gives Congress power to call out the militia “to execute the Laws of the Union ... [and] suppress Insurrections.” U.S. Const. art. I, § 8. The militia was regarded not as an instrument of rebellion, but as a bulwark against it.

To the extent that the Framers saw the militia as deterring government tyranny, it was as a state-organized military force serving as a deterrent to the tyrannical threat of a federal standing army consisting of professional soldiers, as distinct from the part-time citizen soldiers of the militia. Thus, Madison’s Federalist No. 46, often misrepresented to endorse an insurrectionist vision of the Second Amendment, speaks of the potential for a threatening “regular army” to be repelled by “*the State governments* with the people on their side,” and of the militia composed of “citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and *united and conducted by governments* possessing their affections and confidence.” (emphasis added).

The lower court’s insurrectionist view of the militia and the Second Amendment has disturbing implications for public safety and the rule of law. See generally Henigan, *Arms, Anarchy and the Second Amendment*, 26 Valparaiso L. Rev. 107, 122-129 (1991). The danger of individuals and groups purporting to exercise their right of armed resistance against perceived government tyranny has been illustrated throughout our history—from Shays’ Rebellion to the paramilitary activity of the Ku Klux Klan<sup>8</sup> to the Oklahoma City bombing. Members of the *amici* law enforcement groups have first-hand experience with the tragic consequences of political violence. The lower court’s insurrectionist reading of the Second Amendment may well limit the government’s power to punish political violence after the fact, and surely would curb the government’s power to prevent the stockpiling of weapons, the organization and training of private armies, and other activities exposing government officials to an ever-present threat of violent dissent. In contrast, this Court has “reject[ed] any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy.” *Dennis v. United States*, 341 U.S. 494, 501 (1951).

#### D. The Phrase “Keep And Bear Arms” Has An Exclusively Military Meaning



The lower court's approach to interpreting the phrase "keep and bear Arms" is to separate the phrase "bear Arms" from "keep Arms," and then to take both phrases out of their context in the Second Amendment in order to discover possible meanings unconnected with militia service. The issue, however, is not whether there are contexts in which "bear Arms" and "keep Arms" could have such non-militia meanings. The question is the meaning of the phrase "keep and bear Arms" as used by the framers and ratifiers of the Second Amendment.

The debates surrounding adoption of the Second Amendment, and in particular Madison's initial proposal to the First Congress, make clear that the framers understood the right to "keep and bear Arms" to refer only to military purposes. The word "keep" does not inject a private purpose into the Second Amendment, but rather merely refers to the practice of keeping at home the arms that were to be used in militia service.

1. The Second Amendment was drafted to respond to Anti-Federalist fears that Congress would fail to arm the militia

During the debates over ratification of the Constitution, Anti-Federalists expressed the fear that Congress's newly-granted power to "provide for organizing, arming and disciplining, the Militia" might be interpreted to deprive the States of the power to organize and arm their militias should Congress fail to do so. In the key Virginia ratification debates, George Mason argued that Congress's new power would allow Congress to destroy the militia by "rendering them useless—by disarming them ... Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them." 3 Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 379 (2d ed. 1941). Patrick Henry echoed this concern, in a passage often misleadingly excerpted. Henry announced that: "The great object is, that everyman be armed.... Every one who is able may have a gun." *Id.* at 386. His next sentences, often omitted by advocates for the "private rights" view, show he was referring to the need to arm the militia and the danger that Congress may fail to do so: "But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress ... how will your militia be armed?" *Id.* The Feder-



alists responded by asserting that the Constitution did not bar the States from arming their own militias, with John Marshall observing: “If Congress neglect our militia, we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into the hands of her militia-men?” *Id.* at 421. The Anti-Federalists were unpersuaded. Mason asked for “an express declaration that the state governments might arm and discipline” state militias. *Id.* at 380. The debates make clear that the continued viability of the militia was at the core of the Framers’ concerns when they discussed a right to be armed.

The Virginia debates, ignored by the lower court, have not a word about the need to guarantee a right to be armed for hunting or self-defense, or to resist a tyrannical government. See Cornell, *A Well-Regulated Militia* 55 (2006). Moreover, they show that Anti-Federalists and Federalists alike took it for granted that arming of the militia was a governmental function, not a matter left to the choice of individual citizens. The issue was whether the Constitution adequately protected the people’s right to be armed in a state-organized militia. That concern gave rise to Madison’s initial proposal to the First Congress.

2. Madison’s initial proposal treated “bearing arms” as synonymous with “rendering military service”

The lower court’s error in interpreting “bear Arms” is made plain by examining the text of Madison’s initial proposal to the First Congress, which, as even the lower court conceded, used the phrase “bearing arms” in a strictly military sense.” Pet. App. 23a-24a. While similar to the ratified version, the proposal included a conscientious objector clause:

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

*Debates* 169.

The conscientious objector clause treated “bearing arms” as synonymous with “render[ing] military service”—that is, participating in a well regulated militia. If the right was to own and use guns for private purposes, there would have been no need for such a provision. After all, private gun possession and use, in contrast to militia use, was a matter of choice. Moreover, there is no evidence or interpretive principle that would support giving “bearing arms” a



military meaning in the conscientious objector clause, while giving “bear Arms” a different meaning when referring to the right. As the debate engendered by his proposal shows, the First Congress also understood the term “bear Arms” in this way. Indeed, that debate was premised upon the understanding that the subject matter of the Second Amendment was service in an armed militia.

3. The debates in the First Congress reflect the Framers’ view that the Second Amendment related only to militia use

Every speaker who participated in the debates about the Second Amendment in the First Congress treated “bear[ing] Arms” as referring to participation in the militia. *Debates* 186-190. If anyone believed that the Second Amendment protected a right to be armed for private purposes, those views were kept hidden. *See Uviller & Merkel, supra*, at 103.

Indeed, the debates, which focused on the conscientious objector clause, are incomprehensible if a right to use arms for private purposes were at issue. The only objections to the clause related to its effect on the militia. *See Uviller & Merkel, supra*, at 98-100. For example, Rep. Elbridge Gerry argued that the clause would enable the government to “declare who are those religiously scrupulous, and prevent them from bearing arms. What, sir, is the use of the militia? It is to prevent the establishment of a standing army, the bane of liberty.” *Debates* 186. Rep. Thomas Scott argued that if those religiously scrupulous could not be “called upon for their services,” “a militia can never be depended upon.” The lack of an effective militia, he explained, “would lead to the violation of another article in the Constitution, which secures to the people the right of keeping arms.” *Id.* at 189. That right could only relate to militia use, for Scott argued that if it were violated, “recourse must be had to a standing army.” *Id.* at 189-190. Moreover, if Scott were referring to a right to keep arms for private purposes, “it is difficult to see how that right could be violated by exempting Quakers and other professing pacifist sectarians from the right and obligation of militia service,” as provided by the conscientious objector clause. *Uviller & Merkel, supra*, at 101-102.

The conscientious objector clause eventually was dropped, presumably because of the expressed fear that it would be used to weaken the militia by exempting large numbers of individuals from service. There is no evidence to suggest that by striking the clause for these reasons the right was transformed to encompass a private



right to arms unrelated to militias. On the contrary, the fact that the militia clause was retained—and was even moved to be the first words of the Amendment—suggests that the right retained its necessary connection to the militia.

Thus, the lower court's search for other contexts in which “bear Arms” could have a non-military meaning is simply irrelevant, in light of the direct evidence that Madison and the First Congress understood the phrase, in the context of the Second Amendment, to have an exclusively military meaning.

4. The phrase “keep and bear Arms” refers to possession and use of weapons for military purposes

While the lower court thought it self-evident that the word “keep” injects a private, non-militia purpose into the Amendment, there is no historical or textual basis to believe that while the right to “bear Arms” is military, the right to “keep and bear Arms” is not. There are, of course, multiple contexts in which “keep” has an “obvious individual and private meaning[].” Pet. App. 27a. It does not, however, have that meaning as part of the phrase “keep and bear Arms” in a constitutional provision referencing the importance of a “well regulated Militia.”

To the Framers, “keep and bear Arms” was a military phrase. For example, Article XVII of the Massachusetts Bill of Rights provided that “[t]he people have a right to keep and bear arms for the common defense,” while warning of the dangers of peacetime armies, and urging strict civilian control of the military. Uviller & Merkel, *supra*, at 82. Similarly, as the Tennessee Supreme Court recognized in its 1840 *Aymette* decision, in guaranteeing the right of the people to “keep and bear Arms,” “[n]o private defence was contemplated.” *Aymette*, 1840 WL 1554, at \*2.

Understood in its context, the word “keep” in the phrase “keep and bear Arms” refers to the common practice of that era, codified in the Second Militia Act of 1792, for militiamen to acquire their militia arms, as prescribed by law, and keep them at home. To provide for an effective militia, the Framers ensured that the people would have the right to “keep and bear Arms,” as militiamen could be called on to “keep” their militia arms, so as to be prepared to “bear Arms” in military service.

E. The Guarantee Of The Right To “The People” Is Entirely Consistent With The “Militia Purpose” Interpretation



The lower court held that the Second Amendment's use of the term "the people" implies a right to gun ownership for private purposes. Pet. App. 17a-18a. The court noted that "the people" appears in the First, Second, Fourth, Ninth, and Tenth Amendments, which "were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation." *Id.* at 18a (emphasis in original). Citing to dicta from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the court held that "the people" has a common definition across the Constitution, and that the Second Amendment therefore also protects an individual right, by granting a right to ownership and use of guns for private purposes. Pet. App. 18a-19a.

This conclusion contains an unwarranted deductive leap from a statement about "who" has the right to "what" that right involves. Neither the term "the people" itself nor *Verdugo-Urquidez* describes the substantive contours of the right to keep and bear arms. There is no question that the right protected by the Second Amendment extends to "the people"; the question is how that right is defined: "[T]o keep and bear arms for what?" *Aymette*, 1840 WL 1554, at \*3. Under the "militia purpose" view, the Second Amendment guarantees an individual's right to keep and bear arms to the extent the person is engaged, or seeks to be engaged, in the conduct sanctioned by the text, i.e., possessing and using arms as part of a well regulated militia.<sup>9</sup> There is nothing about the use of the term "the people" in the Second Amendment that contradicts this interpretation.

*Verdugo-Urquidez* is perfectly consistent with this view. In that case, the Court held that the defendant, a citizen and resident of Mexico, lacked standing to challenge the search of his house in Mexico under the Fourth Amendment. "The people" protected by the Fourth Amendment and other constitutional provisions, the Court held, are "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. at 265. The Court held that the defendant was not a part of this protected class. *Verdugo-Urquidez* says nothing about the substance of the Fourth Amendment—let alone the substance of the Second Amendment. "The people" defines the class of persons who are entitled to claim the benefit of the constitutional right, not the nature of the right itself.<sup>10</sup>

Looking at *whom* an amendment protects to determine what right it guarantees has no analogue in other constitutional doctrines. The lower court complicated the issue by creating a false dichotomy between "individual" and "collective" rights. Pet. App. 19a. Other



constitutional provisions employing the term “the people” demonstrate that the “individual” versus “collective” question has no bearing on the substance of the right. In the First Amendment, for example, “the right of the people peaceably to assemble” guarantees individuals the right to engage in constitutionally protected conduct that necessarily involves the participation of others. Yet no one reads the First Amendment as protecting only the “small subset” of people who tend to assemble with each other. The Second Amendment, like the Assembly Clause, is written to protect a category of conduct, not a category of people.

## II. THE COURT SHOULD CONTINUE TO ENTRUST GUN REGULATION TO ELECTED LEGISLATIVE BODIES AS IT HAS FOR MORE THAN TWO HUNDRED YEARS

The constitutional issues raised by this case must be considered in light of an extraordinary fact of constitutional history: never before in the more than two hundred years of our Republic has a gun law been struck down by the federal courts as a violation of the Second Amendment. This acknowledgment of the authority of States, municipalities, and the federal government to enact regulations limiting the private ownership and use of firearms is not just a jurisprudential curiosity; it is itself an important aspect of the Second Amendment’s history. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”). Given the long tradition of vesting the elected representatives of the people with the authority to decide the complex and hotly contested questions at the heart of the gun debate, this Court should not grant courts the unprecedented power to second-guess legislative decisions on the control of deadly weaponry.

### A. Federal, State, And Local Legislatures Have Regulated Gun Ownership In The Interest Of Public Safety Since The Founding

The regulation of gun ownership in America is not a modern invention; it was a practice accepted by the founding generation. Firearms were commonly subject to police-power regulation in the States. *See Cornell & DeDino, A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 505 (2004). Early gun regulation even extended to free white male citizens, who gener-



ally enjoyed the full panoply of political rights. A 1783 Massachusetts statute, for example, prohibited keeping a loaded firearm in “any Dwelling-House, Stable, Barn, Out-house, Warehouse, Store, Shop or other Building” in the “Town of Boston.” *Id.* at 512 (internal quotation marks omitted). The punishment was a fine and forfeiture. Pennsylvania, through the Test Acts of 1776, disarmed those who refused to take a loyalty oath. *Id.* at 506-509. The guns used in state militias were also subject to regulation: militiamen were required to bring their firearms and present them for inspection when “mustered” for service. *Id.* at 510.

The tradition of broad legislative authority over gun possession and use has continued to this day, with demonstrable public safety benefits. The evidence shows that gun laws, crafted with the guidance and support of the law enforcement community, help to keep guns out of the hands of dangerous people. For example, since the Brady Law went into effect in 1994, background checks have prevented over 1.4 million felons and other legally prohibited buyers from purchasing guns.<sup>11</sup> The percentage of violent, nonfatal crimes committed with guns declined 45 percent in the decade after the law was enacted<sup>12</sup>—a percentage that had been increasing in the five years prior to enactment.<sup>13</sup> Between 1994 and 2004, the total number of gun homicides dropped 35 percent,<sup>14</sup> and the number of nonlethal violent gun crimes dropped 74 percent.<sup>15</sup>

State gun laws also have helped to keep guns out of the hands of those likely to misuse them. Strong state laws requiring safe home storage of guns have substantially reduced the number of children killed by gunfire,<sup>16</sup> and gun registration and licensing systems have had an impact on criminals’ access to guns.<sup>17</sup> Other state laws have curbed the exporting of guns from States with weaker gun laws. Virginia’s restriction on multiple handgun purchases, for example, has sharply reduced Virginia’s relative contribution to the gun problem in the Northeast.<sup>18</sup> These successes argue strongly for continuing to give legislators wide-ranging authority to protect their constituents from gun violence.

#### B. This Court Should Exercise Caution Before Giving The Judiciary Unprecedented Authority Over Issues Like Gun Control Historically Addressed By Legislatures

Legislatures, not courts, are best positioned to respond to the will and moral values of the people. The Constitution accordingly grants legislatures significant leeway to determine the public interest in complex and intensely contested policy matters.



This Court has exercised caution in fields historically handled by legislatures, which are superior arbiters of the public interest. In takings challenges, for example, judicial review is limited because, “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.” *Berman v. Parker*, 348 U.S. 26, 32 (1954). In this context, “empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.” *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 242–243 (1984).

Legislatures are “far better equipped” than courts “to amass and evaluate the vast amounts of data bearing upon an issue.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (citation and internal quotation marks omitted). Thus, under their traditional powers, state legislatures have “great latitude” to enact regulations “protect[ing] the lives, limbs, health, comfort, and quiet of all persons.” *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted). Legislatures’ superior capacity “to amass the stuff of actual experience and cull conclusions from it,” *United States v. Gainey*, 380 U.S. 63, 67 (1965), counsels against judicial intervention in an area long the province of popular regulation.

Because gun policy must reconcile widely divergent visions of the public interest and answer hotly contested empirical questions, legislatures must have leeway to regulate in this field, which lies at the core of the police powers. Gun regulation, undeniably, is a matter of life and death. Eighty Americans die from gunshots every day, on average.<sup>19</sup> Members of the police *amicus* face gun-wielding criminals on a daily basis. From 1997 through 2006, there were almost 20,000 firearm assaults on law enforcement officers,<sup>20</sup> taking the lives of 562 officers.<sup>21</sup> Gunshot wounds account for 92% of police deaths from felonious assaults.<sup>22</sup> Well aware of these statistics, legislatures are developing effective ways to prevent gun violence, drawing from the fierce political and empirical debates raging in the background. This Court’s long-standing constitutional tradition counsels judicial restraint to “permit[] this debate to continue, as it should in a democratic society.” *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

The Framers’ careful drafting of the Second Amendment to guarantee a limited right to be armed in service to organized state militias, while allowing the people’s elected representatives to take the action they deem necessary to protect the public from gun violence, should be respected and enforced.



PAYTON

BRADY CENTER TO PREVENT HANDGUN VIOLENCE

## CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted.

DENNIS A. HENIGAN

BRIAN J. SIEBEL

JONATHAN LOWY

BRADY CENTER TO PREVENT GUN VIOLENCE

JOHN PAYTON

Counsel of Record

JOHN A. VALENTINE

JONATHAN G. CEDARBAUM

GABRIEL TARAN

JUDY COLEMAN

WILMER CUTLER PICKERING

HALE AND DORR LLP

## ENDNOTES

1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk.

2. The Copyright and Patent Clause provides: “The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8.



3. For example, the article cites the New Hampshire Ex Post Facto Article, which provides:

Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.

N.H. Const. pt. I, art XXIII (1784); Volokh, 73 N.Y.U. L. Rev. at 805. Of the thirty-seven clauses listed by Professor Volokh, twenty-five simply state the desirability of the right conferred, without reference to other values or purposes. *See*, e.g., N.C. Const. Decl. of Rights art. XV (1776) (“[T]he freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained.”). The Second Amendment’s opening clause is different from these clauses because it sets forth an independent reason for the right to keep and bear arms. Another seven of the listed clauses are themselves statements of individual rights that encompass the specific individual right conferred by the provision. *See*, e.g., Pa. Const. Decl. of Rights art. X (1776) (“[T]he people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations … are contrary to that right.”); Volokh, 73 N.Y.U. L. Rev. at 817, n.85. The Second Amendment does not switch between levels of generality: the right to keep and bear arms is not presented as subsidiary to some broader individual right. Finally, five more clauses are irrelevant because they set forth the purpose of an administrative rule, not an individual right.

With respect to all of the clauses, Professor Volokh simply provides no reason to believe that the statements of purpose would be irrelevant to the interpretation of the clauses. *See also* Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of “the Right of the People To Keep and Bear Arms,”* 22 Law & Hist. Rev. 119, 153-156 (2004) (documenting tradition of examining preamble of a statute to help construe it).

4. Another early statute dealing with the militia gives the President the power, “whenever the United States shall be invaded, or be in imminent danger of invasion[,] . . . to call forth . . . the militia of the . . . states.” Act of Feb. 28, 1795, ch. xxxvi, 1 Stat 424. The founding-era militia thus had to be ready to go into combat at a moment’s notice. The untrained collection of individuals contemplated by the lower court would have been worse than useless in response to an imminent, much less an actual, invasion.

5. The Oxford English Dictionary defines “regulated” as: “[g]overned by rule, properly controlled or directed;” or “of troops: Properly disciplined.” The Oxford English Dictionary 524 (2d ed. 1989).

6. It was true, as noted by the lower court, Pet. App. 21a, that guns acquired for militia purposes could also be used for private purposes. But this says nothing about whether guns having no connection with militia service,



possessed and used for purposes not mentioned in the Second Amendment, are constitutionally protected. The lower court's further observation that the reference to "the right ... to keep and bear Arms" suggests that the right "pre-existed the Constitution," Pet. App. 20a (emphasis in original), also says nothing about whether the right is independent of the militia. The militia system also predated the Constitution, as the Articles of Confederation had provided that "every State shall always keep a well-regulated and disciplined militia, sufficiently armed and accoutered." Articles of Confederation art. VI. Indeed, the militia system in England dated to the Assize of Arms in 1181. See Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const. L.Q. 130, 133 (1975). The lower court cited the English Bill of Rights of 1689 as a source of this preexisting right, but misinterpreted it to guarantee a private right to possess guns, when it rather "laid down the right of a class of citizens, Protestants, to take part in the military affairs of the realm. Nowhere was an individual's right to arm in self-defense guaranteed." Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. Am. Hist. 22, 26 (1984). Accord Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chicago-Kent L. Rev. 27, 59 (2000).

7. The lower court's suggestion that the term "a free State" refers to "a hypothetical polity" rather than "an actual political unit of the United States, such as New York," cannot survive a reading of the remainder of the Constitution, which throughout uses the term "State" or "States" to refer to the States of the Union. See generally Pet. App. 60a-63a (Henderson, J., dissenting).

8. See *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982) (rejecting argument that an injunction against the military training activities of the Ku Klux Klan violated the Second Amendment).

9. This account of the Second Amendment right does not involve the claim that the right belongs to "the States" instead of to "the people," a straw man that the lower court eagerly knocked down. Pet. App. 18a. As the text makes clear, the interest served by the Second Amendment is the security of the States as political entities, but the right to be armed in a well regulated militia is nevertheless a "right of the people."

10. *Verdugo-Urquidez* hardly stands for the proposition that "the people" cannot connote a "subset" of all individuals, as the lower court suggested. Pet. App. 18a-19a. This Court's own definition of "the people" creates a subset: "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265 (emphasis added).

11. U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, Background Checks for Firearms Transfers, 2005 (Nov. 2006).

12. U.S. Dep't of Justice, Bureau of Justice Statistics, Key Facts at a



Glance, Nonfatal Firearm-Related Violent Crimes, 1993-2005, available at <http://www.ojp.usdoj.gov/bjs/glance/tables/firearmnonfataltab.htm> (last visited Jan. 10, 2008).

13. U.S. Dep't of Justice, Bureau of Justice Statistics, Key Facts at a Glance, Crimes committed with firearms, 1973-2005, available at <http://www.ojp.usdoj.gov/bjs/glance/tables/guncrimetab.htm> (last visited Jan. 10, 2008).

14. *Id.*

15. Nonfatal Firearm-Related Violent Crimes, *supra* n.12.

16. Webster et al., *Association Between Youth-Focused Firearms Laws and Youth Suicides*, 292 JAMA 594 (2004) (state child access prevention laws associated with 8% decline in youth suicide rates).

17. Webster, Vernick & Hepburn, *Relationship between licensing, registration, and other gun sales laws and the source state of crime guns*, 7 Injury Prevention 184-189 (2001).

18. Weil & Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759 (1996).

19. National Center for Injury Prevention and Control, Centers for Disease Control, WISQARS, Injury Mortality Reports (2004 data).



20. Federal Bureau of Investigation, Uniform Crime Reports, Table 68, Law Enforcement Officers Assaulted.



21. Federal Bureau of Investigation, Uniform Crime Reports, Table 27, Law Enforcement Officers Feloniously Killed, Type of Weapon, 1997-2006.

22. *Id.*



No. 07-290

In The  
**Supreme Court of the United States**

DISTRICT OF COLUMBIA  
AND MAYOR ADRIAN M. FENTY,  
Petitioners,

v.

DICK ANTHONY HELLER,  
Respondent.

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The District Of Columbia Circuit

**RESPONDENT'S BRIEF**



**STATEMENT OF THE CASE**

Respondent Dick Anthony Heller successfully challenged the Nation's three most draconian infringements of Second Amendment rights. D.C. Code section 7-2502.02(a)(4) forbids registration of handguns, thereby effecting a ban on the possession of handguns within the home. D.C. Code section 7-2507.02 forbids the possession of any functional firearms within the home, without exception. D.C. Code section 22-4504(a) forbids the carrying of a handgun without a license. This section was amended in 1994 to criminalize the unlicensed carrying of a handgun within one's home. "It is common knowledge . . . that with very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable." *Bsharah v. United States*, 646 A.2d 993, 996 n.12 (D.C. 1994). Respondent challenges this provision only as it relates to his home.

No state, and only one other major city (Chicago), bans handguns outright. The other two provisions appear unique to Washington, D.C. In reviewing the handgun ban, the D.C. Circuit correctly





applied this Court's test for determining which "arms" are constitutionally protected. *United States v. Miller*, 307 U.S. 174 (1939). The court found that handguns pass the *Miller* test, as they are arms of the type in common use by individuals, the possession of which can contribute to the common defense. PA53a.

The D.C. Circuit further held, correctly, that as home possession of handguns is constitutionally protected, Petitioners may not prohibit their movement within the home. The court struck down the license provision for carrying handguns as applied to home possession. PA54a-55a.

Finally, the D.C. Circuit correctly found that the literal text of section 7-2507.02 "amounts to a complete prohibition on the lawful use of handguns for self-defense," PA55a, and is thus unconstitutional.

## SUMMARY OF ARGUMENT

The Second Amendment plainly protects "the right of the people"—an individual right—"to keep and bear arms."

However else Petitioners might regulate the possession and use of arms, their complete ban on the home possession of all functional firearms, and their prohibition against home possession and movement of handguns, are unconstitutional.

The Amendment's structure and etymology are not overly mysterious. The first clause, referencing the importance of "[a] well regulated Militia," provides a non-exclusive yet perfectly sensible justification for securing the people's right to keep and bear arms. In any event, the Second Amendment's preamble cannot limit, transform, or negate its operative rights-securing text.

The Second Amendment was engendered by the Framers' bitter experience with the King's disarmament of the population. That disarmament was especially pernicious to the colonists, who fervently believed they possessed an individual right to arms. In resisting British tyranny, the militia were not directed by the government officials they sought to overthrow, but certainly depended on the citizenry's familiarity with, and private possession of, firearms.

The Second Amendment's text thus reflects two related, non-exclusive concerns: it confirms the people's right to arms and explains that the right is necessary for free people to guarantee their security by acting as militia.

The Second Amendment's drafting and ratification history demonstrates it was designed to secure individual rights, consistent



with the demands of the Anti-Federalists, whom the Bill of Rights was intended to mollify. Petitioners' militia theory was specifically addressed—and rejected—by the Framers, and that rejection is confirmed by centuries of precedent. Precedent likewise confirms the individual nature of Second Amendment rights.

Under this Court's precedent, the arms whose individual possession is protected by the Second Amendment are those arms that (1) are of the kind in common use, such that civilians would be expected to have them for ordinary purposes, and (2) would have military utility in time of need. A weapon that satisfies only one of these requirements would not be protected by the Second Amendment. Handguns indisputably satisfy both requirements.

Petitioners concede that a functional firearms ban would be inconsistent with an individual right to arms. The dispute surrounding D.C. Code section 7-2507.02 thus merely concerns statutory interpretation. The D.C. Circuit's interpretation of this section's language is correct.

Although this case does not call upon the Court to determine the standard of review applicable to regulations of Second Amendment rights, Respondent observes that the right to arms protects two of the most fundamental rights—the defense of one's life inside one's home, and the defense of society against tyrannical usurpation of authority. Petitioners' casual use of social science sharply underscores the importance of securing Second Amendment rights with a meaningful standard of review.

Finally, Petitioners' contention that the Second Amendment is not binding law within the Nation's capital is spurious.

## ARGUMENT

### I. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT TO KEEP ORDINARY FIREARMS, UNRELATED TO GOVERNMENT MILITARY SERVICE.

#### A. Preambles Cannot Negate Operative Text.

By its own terms, the rationale of the Second Amendment's preamble is not exclusive. The operative rights-securing clause is grammatically and logically independent of the preamble. Skilled diplomacy, a powerful army, or adherence to the constitution may sufficiently provide for "the security of a free state," and still the



people would enjoy their right to arms. Most critically, the preamble cannot contradict or render meaningless the operative text.

As Petitioners note, preambles are examined only “[i]f words happen to still be dubious.” Pet. Br. 17 (quotation and citation omitted). “[B]ut when the words of the enacting clause are clear and positive, recourse must not be had to the preamble.” James Kent, 1 COMMENTARIES ON AMERICAN LAW 516 (9th ed. 1858). “The preamble can neither limit nor extend the meaning of a statute which is clear. Similarly, it cannot be used to create doubt or uncertainty.” Norman Singer, 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 47.04, at 224-25 (6th ed. 2000).

The Framers were familiar with these rules of construction. One influential English precedent held:

I can by no means allow of the notion that the preamble shall restrain the operation of the enacting clause; and that, because the preamble is too narrow or defective, therefore the enacting clause, which has general words, shall be restrained from its full latitude, and from doing that good which the words would otherwise, and of themselves, import; which (with some heat) his Lordship said was a ridiculous notion.

*Copeman v. Gallant*, 1 P. Wms. Rep. 314, 320 (Ch. 1716); see also Edward Wilberforce, STATUTE LAW: THE PRINCIPLES WHICH GOVERN THE CONSTRUCTION AND OPERATION OF STATUTES 288-89 (1881).

[G]eneral words in the enacting part, shall never be restrained by any words introducing that part; for it is no rule in the exposition of statutes to confine the general words of the enacting part to any particular words either introducing it, or to any such words even in the preamble itself.

*King v. Athos*, 8 Mod. Rep. 136, 144 (K.B. 1723); see also *Mace v. Cadell*, 1 Cowp. 232, 233 (K.B. 1774) (“if the statute meant to comprehend nothing more than is contained in the preamble, it means nothing at all”).

Preambles are “properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble.” Joseph Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 326-27 (2d ed. 1851). Accordingly, the Constitution’s other preambles are given no weight. “Although that [opening] Preamble indicates the general purposes for which the people ordained and established the Consti-



tution, it has never been regarded as the source of any substantive power . . . ." *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

The Copyright and Patent Clause preamble would arguably possess greater operative force than that of the Second Amendment, as it begins with the infinitive that introduces most powers of Congress. The power "[t]o promote the Progress of Science and the useful Arts," U.S. CONST. art. I, § 8, cl. 8, viewed with the same breadth as the power "[t]o regulate Commerce," U.S. CONST., art. I, § 8, cl. 3, could stand alone absent the text that follows. In contrast, the Second Amendment's preamble merely declares a concept. Yet "Congress need not 'require that each copyrighted work be shown to promote the useful arts.'" *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981) (citations omitted). And this Court does not question whether copyright and patent laws serve the preambular purpose of promoting progress, though some laws might fail such examination. *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003).

That the Second Amendment contained a declaration of purpose was not unusual for its day. But such declarative language was never given the transformative effect urged by Petitioners. E.g., Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U.L. Rev. 793, 794-95 (1998). The same Congress that passed the Second Amendment also reauthorized the Northwest Ordinance of 1787, containing this language: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52. But nobody would seriously contend that were religion, morality, or knowledge one day found unnecessary for good government, schools should no longer be encouraged in the states of the former Northwest Territory.

Petitioners argue that the preamble should be given controlling weight because "it cannot be presumed that any clause in the constitution is intended to be without effect," Pet. Br. 17 (quoting *Marbury v. Madison*, 5 U.S. 137, 174 (1803)). But their citation to *Marbury* is incomplete—the passage concludes: "unless the words require it." *Marbury*, 5 U.S. at 174. Because Petitioners (incorrectly) urge an interpretation of the preamble inconsistent with the plain meaning of the operative text, and considering the established rules of construction governing prefatory language, the "presumption" urged by Petitioners is rebutted. Notwithstanding *Marbury*, the Court did not give force to the opening preamble in *Jacobson* or to the Copyright preamble in *Eldred*.



No doubts or ambiguities arise from the words “the right of the people to keep and bear arms shall not be infringed.” The words cannot be rendered meaningless by resort to their preamble. Any preamble-based interpretive rationale demanding an advanced degree in linguistics for its explication is especially suspect in this context. “A bill of rights may be considered, not only as intended to give law, and assign limits to government . . . , but as giving information to the people [so that] every man of the meanest capacity and understanding may learn his own rights, and know when they are violated . . . .” 1 St. George Tucker, *BLACKSTONE’S COMMENTARIES*, app. 308 (1803).

#### B. The Second Amendment’s Plain Text Secures an Individual Right.

“The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia.*” *Patton v. United States*, 281 U.S. 276, 298 (1930), overruled on other grounds, *Williams v. Florida*, 399 U.S. 78 (1970). There should be no distinction among “‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments . . . .” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (citation omitted).

Conceding that the Second Amendment secures individual rights, Petitioners nonetheless argue that the term “bear arms” is exclusively military, such that the Second Amendment right can be exercised only under the direction of a governmental military organization. Putting aside this rather strange concept of rights – a “right” to particular weapons in an environment where the individual is obliged to obey orders, or a “right” to defend the government but not oneself or one’s family – the text does not support this notion.

“Keep and bear” embody distinct concepts in the Second Amendment, just as “speedy and public” reflect separate rights in the Sixth Amendment. Had the Framers eliminated either “speedy” or “public” from the Sixth Amendment, they would have significantly narrowed the right’s scope. Cf. U.S. CONST., amend. VIII (proscribing “cruel and unusual punishments”).

This case concerns the right to “keep” arms in the ordinary sense of the verb: to possess at home.<sup>1</sup> “Keep” has no exclusive military connotation. “Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which



the Constitution was written.” *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944). When the Constitution was written, English law had “settled and determined” that “a man may keep a gun for the defence of his house and family.” *Mallock v. Eastly*, 87 Eng. Rep. 1370, 1374, 7 Mod. Rep. 482 (C.P. 1744). Legislatures in England and America employed “keep” in the purely individual sense – especially when disarming minorities. See, e.g., 1 W. & M., Sess. 1, c. 15, § 4 (1689) (“no papist . . . shall or may have or *keep* in his house . . . any arms . . .”); 4 Hening’s Statutes at Large (Va.) 131 (“no negro, mulatto, or Indian . . . shall hereafter presume to keep, or carry any gun, powder, shot, or any club, or other weapon whatsoever . . .”).

Neither did the term “bear arms” have a uniquely military application. See, e.g., *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting). Johnson and Webster defined “bear” primarily as “to carry.” 1 Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (not paginated); Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (not paginated) (“*bear arms in a coat*”). Accordingly, “bear arms” often had purely civilian connotations. For example, Parliament forbade Scottish Highlanders to “use or bear . . . side-pistols, or guns, or any other warlike weapons, in the fields, or in the way coming or going to, from or at any church, market, fair, burials, hunttings, meetings, or any occasion whatsoever . . . .” 9 Geo. I Chap. 26 (1724), 15 Statutes at Large 246-47(1765);<sup>2</sup> cf. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857) (Constitution secured citizens’ right “to keep and carry arms wherever they went,” along with rights of speech and assembly).<sup>3</sup>

Eighteenth century constitutional drafters used “bearing arms” in the individual sense. See PA. CONST. OF 1776, art. XIII (“That the people have a right to bear arms for the defence of themselves and the state . . . .”); VT. CONST. OF 1777, Ch. 1, art. XV (same). Petitioners’ claim that Pennsylvania’s drafters used “themselves” collectively not only defies the word’s normal meaning, but would also render it redundant of “the state.”<sup>4</sup>

Pennsylvania reiterated “the right to bear arms in defence of themselves” in its 1790 constitution. James Wilson, president of Pennsylvania’s 1790 constitutional convention and later Associate Justice of this Court, explained:

[W]hen it is necessary for the defence of one’s person or house . . . it is the great natural law of self-preservation, which . . . cannot be repealed, or superseded, or suspended by any human



institution [but] is expressly recognized in the constitution of Pennsylvania.

3 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson ed., 1804) (citing PA. CONST. OF 1790, art. IX, sec. XXI); see also *Ortiz v. Commonwealth*, 681 A.2d 152, 156 (Pa. 1996). “The constitutions of most of our States assert that all power is inherent in the people; that . . . it is their right and duty to be at all times armed. . . .” *Letter from Thomas Jefferson to Justice John Cartwright* (June 5, 1824), 16 WRITINGS OF THOMAS JEFFERSON 45 (A.A. Lipscomb ed., 1903).

Perhaps the most instructive 18-century usage of “bear arms” is that of James Madison, author of the Second Amendment. In 1785, Madison introduced in Virginia’s legislature a hunting bill drafted by Jefferson. The bill stated, in part:

[I]f, within twelve months after the date of the recognizance he shall bear a gun out of his inclosed ground, *unless whilst performing military duty*, it shall be deemed a breach of the recognizance, and be good cause to bind him a new, and ever such bearing of a gun shall be a breach of the new recognizance . . . .

*A Bill for Preservation of Deer* (1785), in 2 THE PAPERS OF THOMAS JEFFERSON 443 (J. Boyd ed. 1950-1982) (emphasis added).

Madison’s usage of “bear” was no personal idiosyncracy. St. George Tucker, the leading legal scholar of the Early Republic, observed:

The bare circumstance of having arms . . . of itself, creates a presumption of warlike force in England . . . 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?

5 Tucker, BLACKSTONE’S COMMENTARIES, Note B. (*Concerning Treason*).

“An individual could bear arms without being a soldier or militiaman.” Leonard Levy, ORIGINS OF THE BILL OF RIGHTS 135 (1999). But even if “bear arms” had a purely military connotation, that idiomatic meaning would itself be transformed by inclusion of the word “keep.” For example, “Mary knows how to stir the pot” conveys a meaning (i.e., cause trouble) very different from, “Mary knows how to hold and stir the pot” (i.e., cook).

\* \* \*



To the extent the Second Amendment's preamble informs the nature of the operative rights-securing provision, the necessity of a "well-regulated Militia" does not negate, but rather advances the individual character of the right to arms.

The Militia is constitutionally defined as a pre-existing entity, separate and apart from an army or navy that might be raised. U.S. Const. amend. V ("... in the land or naval forces, or in the Militia"). "Congress was authorized both to raise and support a national army and also to organize 'the Militia.'" *Perpich v. Dep't of Def.*, 496 U.S. 334, 340 (1990). "[T]he militia" are not "troops" or "standing armies," but "civilians primarily" – "all males physically capable of acting in concert for the common defense . . ." *Miller*, 307 U.S. at 179.

"Who are the Militia? They consist now of the whole people . . ." 3 Jonathan Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 425 (2d ed. 1836) (George Mason). That "the 'militia' is identical to 'the people,'" Akhil Amar, THE BILL OF RIGHTS 51 (1998), is evident from Madison's description of "a militia amounting to near half a million of citizens with arms in their hands," who could resist an oppressive standing army. THE FEDERALIST No. 46, 244 (James Madison) (Carey & McClellan eds., 1990). This militia reflected "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast to "governments [that] are afraid to trust the people with arms." *Id.*; BOSTON EVENING POST, Nov. 21, 1768, at 2, col. 3 ("The total number of the Militia, in the large province of New-England, is upwards of 150,000 men, who all have and can use arms . . ."); NEW YORK PACKET AND AMERICAN ADVERTISER, Apr. 4, 1776, at 2, cols. 1-2 ("Whoever asserts that 10 or 12,000 soldiers would be sufficient to control the militia of this Continent, consisting of 500,000 brave men, pays but a despicable compliment to the spirit and ability of Americans").

That "the militia" was broadly composed of the general population, and expected to check government force, belies the notion that "militia" refers only to specific forces organized by government. The American militia's broad composition set it apart from its far narrower English counterpart. "[T]he Militia, in this country, is not a Select part of the People, as it is in England, set apart for that purpose, under Officers . . . employed and paid at the publick charge; but the Whole body of the people from sixteen years of age to fifty." *Speech of Gov. Morris*, June 29, 1744, in 6 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF NEW JERSEY 187 (William Whitehead ed., 1882). "Select militia members in England were required to have



qualifications even higher than those required to be a member of the House of Commons.” David Young, *THE FOUNDERS’ VIEW OF THE RIGHT TO BEAR ARMS* 11 n.6 (2007) (citation omitted).

The broad civilian understanding of who constitutes “the Militia” continues today. Congress defines “the militia of the United States” as comprising all able-bodied males from 17 to 45, who are or intend to become citizens; and members of the National Guard up to age 64. 10 U.S.C. §§ 311, 313.<sup>5</sup> Excluded from this definition of Militia, among others, are “members of the armed forces, except members who are not on active duty.” 10 U.S.C. § 312(a)(3); accord D.C. Code § 49-401 (District of Columbia required to enroll most able-bodied males age 18 to 45 in militia).

In order that the ordinary civilians constituting the Militia might function effectively, it was necessary that the people possess arms and be familiar with their use. After all, individuals called for militia duty were “expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” *Miller*, 307 U.S. at 179. Thus, the “militia system . . . implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence.” *Id.* at 179-80 (citation omitted); see also NEW YORK JOURNAL, May 11, 1775, at 1, cols. 2–3 (recommending “to the inhabitants of this country, capable of bearing arms, to provide themselves with arms and ammunition, to defend their country in case of any invasion”).

That a militia be “well-regulated” does not mean that it must necessarily be the subject of state control. With respect to troops, “regulated” is defined as “properly disciplined.” 7 OXFORD ENGLISH DICTIONARY 380 (1933). In turn, “discipline” in relation to arms is defined as “training in the practice of arms.” 3 OXFORD ENGLISH DICTIONARY 416 (1933). Notably, pre-revolutionary Americans forming voluntary associations for the purpose of resisting British rule, including Washington and Mason, employed the term “well-regulated militia” to describe their associations. 1 Kate Mason Rowland, *THE LIFE OF GEORGE MASON* 428 (1892). These organizations were decidedly not sanctioned by any governmental authority.

George Mason succinctly explained the logic underlying the relationship of the Second Amendment’s preamble to its operative text when he warned Virginia’s ratifying convention that absent a Bill of Rights, “[t]he militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless – by disarming them.” 2 Rowland, at 408.



The Second Amendment secures the *pre-existing* right of the people to keep and bear arms.<sup>6</sup> And it does so, in part, because a militia – comprised of the body of ordinary people proficient in the use of their private arms – was deemed necessary. Were the people denied their right to keep and bear arms, they could not function as a well-regulated militia.

### C. The Framers Secured an Individual Right to Keep and Bear Arms in Reaction to the British Colonial Experience.

"[C]onstitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past." *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) (L. Hand, J.). The rights secured by the first ten amendments were not conjured at random, but in reaction to specific outrages of the King's rule. The Second Amendment is no exception. While Petitioners and their amici may not believe that English law secured an individual right to arms for self-defense, Colonial Americans certainly did, and it was the repeated, wanton violation of that right that led them to demand and ratify the Second Amendment.

As British troops arrived in Boston to enforce the Townshend Acts in 1768, a call went out for the people to arm themselves. Responding to British criticism of the civilian armament, Sam Adams declared that "it is certainly beyond human art and sophistry, to prove the British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights . . . are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs." 1 WRITINGS OF SAMUEL ADAMS 299 (Harry Cushing ed., 1904). Citing Blackstone's "right of having and using arms for self-preservation and defence," Adams added, "[h]ow little do those persons attend to the rights of the constitution, if they know anything about them, who find fault with a late vote of this town, calling upon the inhabitants to *provide themselves with arms for their defence* at any time . . ." *Id.* at 317-18 (emphasis in original).

The "Journal of the Times" concurred:

It is a natural right which the people have reserved to themselves, confirmed by the [English] Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.



NEW YORK JOURNAL, Supplement, April 13, 1769, at 1, col. 3.

So accepted was the notion that Americans had the right to arms that Crown prosecutors of the soldiers charged in the Boston Massacre invoked the victims' right to armed resistance against abusive Redcoats. 3 *LEGAL PAPERS OF JOHN ADAMS* 149, 274 (L. Wroth & H. Zobel eds. 1965). John Adams, in his successful defense of the soldiers, concurred: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence, not for offence . . ." *Id.* at 248.

Nonetheless, reports of British troops disarming Americans surfaced as early as February, 1769. NEW YORK JOURNAL, Feb. 2, 1769, at 2, col. 2. And much to the dismay of the Colonists, the governing council newly appointed for Massachusetts came to propose "the disarming of the town of Boston, and as much of the province as might be." BOSTON GAZETTE, Sept. 5, 1774, at 3, col. 2. The following day, British Lt. General Thomas Gage, commander of the British military in America and Massachusetts Royal Governor, moved the powder stored at Charlestown to Castle William and forbade the release of privately-owned powder from the Boston magazine. The ensuing unrest came to be known as "the Powder Alarm." Young, *FOUNDERS' VIEW*, at 37.<sup>7</sup>

The citizens of Suffolk County, Massachusetts promptly issued a proclamation denouncing the powder seizure (among other outrages). The Continental Congress quickly approved the "Suffolk Resolves." *Id.* at 38. In addition to the powder seizure, "[t]he Crown forcibly purchased arms and ammunition held in the inventory of merchants, and an order went out that the inhabitants must turn in their arms." Stephen Halbrook, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* 45 (2008) (citation omitted).

The order to disarm was apparently ignored, but British seizure of private arms continued. "They keep a constant search for every thing which will be serviceable in battle; and whenever they esp[ie] any instruments which may serve or disserve them,—whether they are the property of individuals or the public is immaterial,—they are seized . . ." *Letter of Joseph Warren to Samuel Adams*, Sept. 29, 1774, in Richard Frothingham, *LIFE AND TIMES OF JOSEPH WARREN* 381 (1865).

The Colonists expressed their displeasure over firearms seizures. Worcester County complained to Gage that although "the People [are] justified in providing for their own Defense," passing through



Boston Neck entailed having “many places searched, where Arms and Ammunition were suspected to be; and if found seized; yet as the People have never acted offensively, nor discovered any disposition so to do, as above related, the County apprehend this can never justify the seizure of private Property.” BOSTON GAZETTE, Oct. 17, 1774, at 2, cols. 2–3. “It is said that the troops, under your command, have seized a number of cartridges which were carrying out of the town of Boston, into the country; and as you were pleased to deny that you had meddled with private property . . . I would gladly be informed on what different pretence you now meddled with those cartridges . . .” NEWPORT MERCURY (Rhode Island), Apr. 10, 1775, at 2, col. 1.

The British also prohibited importation of guns and powder, prompting further outcry. “Could they [the Ministry] not have given up their Plan for enslaving America without seizing . . . all the Arms and Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies?” NEW HAMPSHIRE GAZETTE AND HISTORICAL CHRONICLE, Jan. 13, 1775, at 1, col. 1 (reprinted in 1 AMERICAN ARCHIVES, 4TH SERIES 1065 (Peter Force ed. 1837)). South Carolina’s General Committee protested that “by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them . . . .” 1 John Drayton, MEMOIRS OF THE AMERICAN REVOLUTION 166 (1821).

Notwithstanding the import prohibition and occasional seizure of private weapons, Gage understood that complete disarmament of the population required military domination. Halbrook, THE FOUNDERS’ SECOND AMENDMENT at 49 (collecting sources). The Colonists agreed: “[I]f they should come to disarming the inhabitants, the matter is settled with the town at once; for blood and carnage must inevitably ensue . . . .” *Letter of John Andrews*, Sept. 12, 1774, in PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 359 (1866).

Not surprisingly, the Revolution’s first battle opened on April 19, 1775, with an ill-conceived British expedition to seize weapons from private property in Concord. Fear of arms seizures prompted Americans to transfer publicly-stored weapons to their homes, and when Redcoats came to seize public and private arms alike, war erupted.

The immediate aftermath of Lexington and Concord found Boston cut off from the remainder of the province. Gage offered



Bostonians free passage from the city provided they would deliver their arms for safekeeping. A vote was taken and the people agreed to Gage's terms, surrendering "1778 fire-arms, 634 pistols, 973 bayonets, and 38 blunderbusses." Richard Frothingham, HISTORY OF THE SIEGE OF BOSTON 95 (1851) (emphasis added).<sup>8</sup> Gage quickly reneged on his promise of safe passage. Young, FOUNDERS' VIEW, at 52.

Americans reacted strongly to the disarmament of Boston. Thomas Jefferson and John Dickinson drafted a "Declaration of the Causes and Necessity of Taking Up Arms," issued by the Second Continental Congress on July 6, 1775. Gage's disarmament scheme figured prominently among the "Causes" for armed revolt:

[I]t was stipulated that the said inhabitants having deposited *their arms* . . . should have liberty to depart, taking with them their other effects. They accordingly delivered up *their arms*, but . . . the governor ordered the arms . . . seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave *their most valuable effects* behind.

2 JOURNALS OF CONTINENTAL CONGRESS 136-37 (1905) (emphases added).

Disarmament as a grievance became a common theme among the Patriots. For example, addressing Indian tribes in search of alliance, Sam Adams complained that the British "have told us we shall have no more guns, no powder to use . . . How can you live without powder and guns? But we hope to supply you soon with both, of our own making." 3 WRITINGS OF SAMUEL ADAMS 212-13.

That the Colonists cared little about the prospect of having their guns seized is not the only ahistorical concept underlying Petitioners' repudiation of the Second Amendment. Redcoats and Patriots alike would have puzzled at Petitioners' notion that the Revolution produced an exclusive governmental right to operate an organized militia. The "well-regulated militia" of the American Revolution operated not merely beyond the control of, but in direct challenge to, the King's governors.

In Massachusetts, as in other colonies, militia officers were elected from among the militiamen. This "meant that [officers] appointed by the Royal governor would be thrown out. The Provincial Congress further usurped the Crown's militia power by appointing a Committee of Safety that could call out the militia when necessary." Halbrook, at 48 (citation omitted). Gage recognized this process as a threat to British rule:



The Officers of the Militia have in most Places been forced to resign their Commissions, And the Men choose their Officers, who are frequently made and unmade; and I shall not be surprized, as the Provincial Congress seems to proceed higher and higher in their Determinations, if Persons should be Authorized by them to grant Commissions and Assume every Power of a legal Government . . . .

1 PARLIAMENTARY REGISTER, 14<sup>TH</sup> PARLIAMENT, 1<sup>ST</sup> SESSION 58 (1802).

North Carolina's colonial governor, Josiah Martin, decried the new militias that "submit to the illegal and usurped authorities of [patriotic] Committees." William Hoyt, THE MECKLENBURG DECLARATION OF INDEPENDENCE 44 (1907); see also Vernon Stumpf, JO-SIAH MARTIN 112 (1986) ("they are now actually endeavoring to form what they call independent Companies under my nose"). Virginia's Governor, Lord Dunmore, complained that "[e]very County is now Arming a Company of men whom they call an independent Company for the avowed purpose of protecting their Committee, and to be employed against Government if occasion require." *Letter to Earl of Dartmouth*, Dec. 24, 1774, in 2 WRITINGS OF GEORGE WASHINGTON 445 n.1 (Worthington Ford ed., 1889). Loyalists were horrified by the rise of extra-governmental militias, but Patriots such as John Adams would have none of the criticism:

"The new-fangled militia," as the specious [Loyalist] calls it, is such a militia as he never saw. They are commanded through the province, not by men who procured their commissions from a governor as a reward for making themselves pimps to his tools, and by discovering a hatred of the people, but by gentlemen, whose estates, abilities, and benevolence have rendered them the delight of the soldiers . . . .

4 THE WORKS OF JOHN ADAMS 40-41 (1865).

Indeed, extra-governmental militias existed even in times of good relations with the Crown. Pennsylvania, owing to Quaker influence, was alone among the colonies in not having a governmentally-organized militia for most of its history. But this did not mean that a militia was unneeded in Pennsylvania, or that the colony lacked for means of defense. Responding to the depredations of privateers on the Delaware River, Benjamin Franklin published *Plain Truth* in 1747, warning of dire consequences were the people, though well-armed, to remain unprepared. 3 THE WORKS OF BENJAMIN FRANKLIN 1-21 (Jared Sparks ed., 1882). Franklin quickly followed *Plain Truth* with *Form of Association*, laying out a vision of voluntary mutual



self-defense “associations” palatable to the religiously scrupulous. The Associations would be freely formed by individuals electing their own officers, with neither offensive intent nor governmental compulsion or oversight. 3 THE PAPERS OF BENJAMIN FRANKLIN 205 (Leonard Labaree ed., 1961).

Franklin’s vision triumphed, the 1747 Association enrolling 10,000 men. William Shepherd, 6 HISTORY OF PROPRIETARY GOVERNMENT IN PENNSYLVANIA 530 (1896). But not everyone was comfortable with the arrangement:

It strongly resembles treason. The people should have desired the president and council to appoint officers for their training, and put themselves under their direction . . . This is erecting a government within a government, and rebelling against the king’s authority.

*Id.* (quoting *Letter of Thomas Penn to Mr. Peters* (March 30, 1748)). The King in Council disallowed a 1755 law granting formal recognition of the voluntary associations, but Pennsylvanians continued their voluntary armed association in times of need. Young, FOUNDERS’ VIEW, 20-23.

John Adams explicitly clarified that militia forces served their purpose regardless of whether they were organized pursuant to law. In the First Continental Congress, Adams proposed a resolution

that it be recommended to all the Colonies, to establish by Provincial Laws, where it can be done, a regular well furnished, and disciplined Militia, and where it cannot be done by Law, by voluntary Associations, and private Agreements.

1 LETTERS OF DELEGATES TO CONGRESS 132 (Paul Smith ed., 1976).

As war approached, clashes between voluntary militias and colonial governors became not merely philosophical, but physical. When Governor Dunmore seized the powder at Williamsburg, Patrick Henry’s Hanover Independent Militia Company forced restitution. R.D. Meade, PATRICK HENRY 50-51 (1969). One paper reported that as a “party of the militia being at exercise on Boston common, a party of the army surrounded them and took away their fire arms; immediately thereupon a larger party of the militia assembled, pursued the Army, and retook their fire arms.” MASSACHUSETTS GAZETTE, Dec. 29, 1774, at 2, col. 2.

Militia forces operating without the government’s blessing would prove critical to the American war effort. For example, the first American military offensive of the Revolution, Ethan Allen’s capture of Fort Ticonderoga, was accomplished by “two hundred



undisciplined men, with small arms, without a single bayonet . . . ." Ira Allen, THE NATURAL AND POLITICAL HISTORY OF THE STATE OF VERMONT 44 (reprint 1969).

Respondent does not suggest that members of private paramilitary organizations have a right to commit violent acts under the auspices of acting as a citizen militia. See, e.g., Va. Code § 18.2-433.2; Cal. Penal Code § 11460. The Framers, who organized the militia under the new constitution, doubtless agreed that citizens should not compete with legitimate government authority. "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes . . . Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1976).

But as expressed in the Declaration, the Framers saw no tension between accepting the lawful authority of an imperfect and even frequently unjust government, while retaining the ability to resist tyranny. The notion that independent, armed militia would engage in the treason and insurrection forbidden by the Constitution is spurious. The Framers, who used militia organized in direct defiance of the government they deposed, envisioned the militia as a tool for restoring the Constitution in the event of usurpation. See THE FEDERALIST No. 46 (James Madison), *supra*; THE FEDERALIST No. 29 (Alexander Hamilton).

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

2 Story, COMMENTARIES, *supra*, at 607.

Cooley agreed, explaining that the Second Amendment "is significant as having been reserved by the people as a possible and necessary resort for the protection of self-government against usurpation, and against any attempt on the part of those who may for the time be in possession of State authority or resources to set aside the constitution and substitute their own rule for that of the people." Thomas Cooley, *The Abnegation of Self-Government*, 12 PRINCETON REV. 209, 213-14 (1883). The individual use of Second-Amendment-protected arms to check despotism, "far from being revolutionary, would be in strict accord with popular right and duty." *Id.*



The Second Amendment is a doomsday provision, 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 may seem today, facing them unprepared is a mistake a free people get to make only once.

*Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc). The Framers intended the Second Amendment to guard against “[o]ne of the ordinary modes, by which tyrants accomplish their purposes without resistance [which is] by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia.” Joseph Story, A FAMILIAR EXPOSITION ON THE CONSTITUTION OF THE UNITED STATES 264 (1847).

Certainly Petitioners would not dispute Americans’ justification for revolting against Great Britain, an event that would not have been possible without the private ownership of firearms. And should our Nation someday suffer tyranny again, preservation of the right to keep and bear arms would enhance the people’s ability to act as militia in the manner practiced by the Framers.

That the Second Amendment was designed to secure a personal right of the citizens is clear from Madison’s notes for the speech introducing the Bill of Rights. “They [the proposed amendments] relate first to private rights,” 12 PAPERS OF JAMES MADISON 193-94 (C. Hobson et al. eds., 1979). Madison thus initially proposed placing the Second Amendment alongside other provisions securing individual rights in Article I, sec. 9 – following the habeas corpus privilege and the proscriptions against bills of attainder and *ex post facto* laws, together with his proposed protections for speech, press, and assembly. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (N. Cogan ed., 1997).

If “bear arms” had the exclusively military connotation urged by Petitioners, no one would have proposed qualifying the phrase with “for the common defence.” But the Senate rejected just that proposal. JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 77 (1820). Some collective rights adherents speculate that “common defence” was dropped because it was considered redundant, but more plausibly the Senate did not wish to narrow “bear arms” to a purely military usage. After all, the first Congress knew how to condition individual rights on militia service.



E.g., U.S. CONST., amend. V (no presentment or indictment right “in cases arising in . . . the Militia, when in actual service . . . ?”)<sup>9</sup>

Indeed, House debates on the Second Amendment reveal the Framers’ reluctance to adopt text that might denigrate the individual character of the right to arms. Collectivists assert that a proposal to include a conscientious objector clause in the Second Amendment confirms the military character of “bear arms.” But the proposal was defeated after Rep. Gerry warned “that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.” 1 ANNALS OF CONGRESS 778 (1834).

Representative Scott’s objection to the conscientious objector language not only reflected the individual character of the Second Amendment, but also the distinct nature of “keep” and “bear”: He said the language would “lead to the violation of another article in the constitution, which secures to the people the right of keeping arms . . . .” *Id.* at 796. Petitioners’ claim that “[a]ll remarks recorded in the House’s debate related to military service; none pertained to private use of weapons, including self-defense,” Pet. Br. 28 (citations omitted), is conclusory – true only if one accepts that “bear arms” as used by Gerry, and the people’s “right of keeping arms” as used by Scott, referred to military service. But that construction is insupportable.

Equally unpersuasive is the notion that the defeated conscientious objector clause’s military nature imparted a military flavor to what remained and passed as the Second Amendment. Other amendments, as passed, contain unrelated concepts. The First Amendment secures various rights of expression and conscience, yet nobody would contend Madison intended to protect only religious speech or assembly. Likewise, the Fifth Amendment’s Grand Jury Clause appears only tenuously related to the Takings Clause. No particular intent can be gleaned from a legislative combination of seemingly unrelated subjects, especially when anomalous provisions are omitted before final passage.<sup>10</sup>

Petitioners claim that the Second Amendment is derived from the seventeenth of certain amendments proposed by Virginia, and that Virginia “[s]eparately . . . proposed amending the Militia Clauses directly: ‘11th – That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same.’” Pet. Br. 26 (citation omitted). Yet both proposals originated in the same document, the Second Amendment’s precursor among provi-



sions “constituting the bill of rights,” and the militia amendment among what the convention labeled “[t]he other amendments.” David Young, *THE ORIGIN OF THE SECOND AMENDMENT* 462 (2d ed. 2001).

If guaranteeing the people’s “right to keep and bear arms,” with reference to a “well-regulated militia” and “a free state,” were intended to secure the states a right to arm their militias, the Virginia convention would not have separately proposed an explicit reservation of the states’ militia powers. That the Second Amendment’s direct precursor came to Congress in a “bill of rights,” alongside a state militia power among “other amendments,” strongly suggests the two are not identical.

Indeed, if rejected language is any clue as to the meaning of that which was accepted, perhaps the most telling example was the Framers’ rejection of the following proposed amendment: “That each State respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same . . . .” FIRST SENATE JOURNAL 126.

This proposal stated, in unmistakably direct and concise fashion, exactly that meaning which Petitioners would divine in the Second Amendment through tortured linguistics, fanciful explanations, and “hidden history.” *And it was rejected by the Framers.* “[H]istory does not warrant concluding that it necessarily follows from the pairing of the concepts that a person has a right to bear arms solely in his function as a member of the militia.” Robert Sprecher, *The Lost Amendment*, 51 AM. BAR ASS’N J. 554, 557 (1965).<sup>11</sup>

The Bill of Rights was never thought necessary by the Federalists, other than as a tool to placate Anti-Federalist resistance to the new constitution. While rejection of militia-powers amendments demonstrates that the Bill of Rights did not address each and every Anti-Federalist concern, the Second Amendment did at least address a different concern: the individual right to arms.

Demands for a bill of rights prevailed in five of seven constitutional ratifying conventions. The only provisions common to all were freedom of religion and the right to arms. New Hampshire’s convention demanded recognition that “Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.” 1 Elliot, *DEBATES* at 326. Pennsylvania anti-Federalists demanded

that the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed



for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.

Levy, ORIGINS, *supra* at 143-44.<sup>12</sup> In Massachusetts, Samuel Adams demanded that “the said constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms.” DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 86 (1856). These were the sentiments Madison addressed in the Second Amendment.

Petitioners’ notion that the Second Amendment secures state prerogatives to control their militia free of federal interference – as a limitation or repudiation of congressional militia powers – also contradicts the substantial body of precedent interpreting Congress’s authority over the militia. J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39 (2001). As early as 1820, this Court held that Congress had pre-empted the field of militia regulation:

Upon the subject of the militia, Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by Congress; although it should be conceded, that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised.

*Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 24 (1820) (Washington, J.). Dissenting from *Houston*’s conclusion that state courts had concurrent jurisdiction over militia courts-martial, Justice Story (joined by Chief Justice Marshall) nevertheless observed that “a State might organize, arm, and discipline its own militia in the absence of, or subordinate to, the regulations of Congress . . . .” *Houston*, 18 U.S. (5 Wheat.) at 52 (Story, J., dissenting). The Second Amendment “may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested.” *Id.* at 52-53.

This Court would later make clear that with the adoption of the Constitution, “[t]here was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies.” *Selective Draft Law Cases*, 245 U.S. 366, 383 (1918). And just as Congress may pre-empt the regulation of the states’ militias under



Article I, it likewise enjoys the exclusive power to call the states' militias into federal service, which has been delegated to the President since 1795. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827); *Luther v. Borden*, 48 U.S. (7 How.) 1, 43-44 (1849). Indeed, while Congress permits the states to maintain a voluntary defense force immune from federal conscription, 32 U.S.C. § 109(c), that part of the militia organized into the National Guard is under plenary federal control, such that a state's governor may not object to the President's training of Guard units overseas. *Perpich*, 496 U.S. 334. Petitioners' Second Amendment theory reverses each of these precedents.

Petitioners are not the first to make this mistake. In 1863, Pennsylvania's Supreme Court enjoined the conscription of Union soldiers, theorizing that the Civil War draft violated the state's militia powers. *Kneedler v. Lane*, 45 Pa. 238, 259 (1863). One Justice invoked Petitioners' view of the Second Amendment to support the decision. *Id.* at 271-72 (Thompson, J., concurring). The court quickly reversed itself. *Id.* at 295. If Petitioners' derision of the individual right to arms as proposing treason or insurrection, Pet. Br. 15 n.3, questions the legitimacy of America's Revolution, their view of the Second Amendment's impact on the allocation of federal-state power would threaten the Union itself.

Petitioners' collective-purpose interpretation is also at odds with this Court's only direct Second Amendment opinion in *Miller*. In examining whether Miller had a right to possess his sawed-off shotgun, this Court never asked whether Miller was part of any state-authorized military organization. "Had the lack of [militia] membership or engagement been a ground of the decision in *Miller*, the Court's opinion would obviously have made mention of it. But it did not." *United States v. Emerson*, 270 F.3d 203, 224 (5th Cir. 2001)(footnote omitted). Indeed, the government advanced the collectivist theory as its first argument in *Miller*, PA40a, but the Court ignored it. The Court asked only whether the gun at issue was of a type Miller would be constitutionally privileged in possessing.

## II. WASHINGTON, D.C.'S HANDGUN BANS ARE UNCONSTITUTIONAL.

To determine whether a particular weapon falls within the Second Amendment's protection, the Court need not apply any particular standard of review. The question is categorical, identical in kind to the questions courts routinely answer in determining what constitutes "religion" or "speech" under the First Amendment, or what constitutes a "search" or "seizure" under the Fourth.



Answering such questions is often a requisite first step in evaluating the constitutionality of governmental action. Only if protected speech is found will a court examine the permissibility of a particular burden on it; only if an officer has searched or seized a citizen will the reasonableness of the action be examined.

With respect to Petitioners' handgun ban, answering the threshold question resolves the case. If the possession of handguns is protected by the Second Amendment, handguns cannot be completely banned, however else the government may regulate their possession and use.<sup>13</sup> The fact that a type of arm is protected by the Second Amendment defeats Petitioners' attempt to position this case as a "standard of review" question, such that the government may ban any arms it deems too dangerous even if such arms are traditionally used for lawful civilian purposes. After all, Petitioners can conjure a rationale for banning *any* "arm."<sup>14</sup> Certainly the government may ban arms that are not protected by the Second Amendment and regulate those that are, but the threshold question of whether an arm falls into the former or latter category cannot be avoided.

Nor may the government justify a ban on a particular firearm simply by claiming to allow the possession of others. While it is a dubious proposition that Petitioners allow individuals *any* firearms for private home use, the government's compliance with the Constitution by allowing rifles would not permit the government to violate the Constitution by banning handguns – no more than the government could prohibit books because it permits newspapers and considers them an "adequate substitute." The court below properly termed this argument "frivolous." PA53a.<sup>15</sup>

The test for whether a particular weapon is or is not within the Second Amendment's protection was established in *Miller*. For all the claims that the D.C. Circuit failed to follow *Miller*, it is Petitioners and their amici – including the Solicitor General – who reject that precedent.

*Miller*'s conceptual framework is plain. First, this Court inquires whether a weapon "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia," meaning that the weapon is "any part of the ordinary military equipment or that its use could contribute to the common defense." *Miller*, 307 U.S. at 178. Second, the Court explained that when fulfilling the Second Amendment's militia rationale, people "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 179. The assumption is that at least some arms of the kind people would use for ordinary civilian purposes – arms



in “common use at the time” – would also be the arms used in militia service. This is fully consistent with the historical record, *supra* at 29.<sup>16</sup> It is also consistent with the understanding of “arms” at the time. “In law, arms are any thing which a man takes in his hand in anger, to strike or assault another.” Webster’s Dictionary, *supra* at 11, (“Arms”).

In sum, an “arm” is protected under the *Miller* test if it is of the type that (1) civilians would use, such that they could be expected to possess it for ordinary lawful purposes (in the absence of, or even despite, legal prohibition), and (2) would be useful in militia service. The latter requirement may be in tension with the pre-existing right to keep and bear arms, which is not always related to militia service.<sup>17</sup> In that respect, *Miller* may be in tension with itself. There is no justification to limit the Second Amendment’s protection to arms that have military utility.

But as a practical matter, the second prong adds nothing to the analysis in virtually all cases, including this one. Categorically, firearms “in common use” for civilian purposes – rifles, shotguns, and handguns – are plainly “part of the ordinary military equipment,” and their “use could contribute to the common defense.” *Miller*, 307 U.S. at 178. The D.C. Circuit’s opinion is thus compatible with *Miller*, because handguns meet both *Miller* criteria. Arms that may have great military utility but which are inappropriate for civilian purposes are still sensibly excluded from the Second Amendment’s protection, as civilians would not commonly use them.

The *Miller* test for whether a particular arm is constitutionally protected is hardly “unworkable.” Pet. Br. 44. To the contrary, *Miller* presents a straightforward constitutional question, lending itself to practical application far more readily than questions of whether a search is “reasonable” under the Fourth Amendment, or at what point “government entanglement” with religion becomes so “excessive” as to violate the First Amendment, *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). To the extent *Miller* can be read as establishing a “lineal descent” rule, this Court already applies precisely that framework in its Seventh Amendment jurisprudence. For example, parties in discrimination lawsuits are not denied access to civil juries simply because discrimination claims were unknown in 1791. *Curtis v. Loether*, 415 U.S. 189, 193-94 (1974).

In cases of unusual or exotic arms, or where the court lacks familiarity with a particular weapon, e.g., *Miller*, 307 U.S. at 178, courts may wish to receive evidence regarding whether a weapon has ordinary civilian application and can be traced to a form historically



used by militia forces. But in most cases, as here, the answer will be clear.

No court has questioned that a handgun, generally, is an arm “of the kind in common use” by the public and is either “ordinary military equipment” or otherwise useful in a manner that “could contribute to the common defense.” *Miller*, 307 U.S. at 178. As below, the Fifth Circuit experienced no difficulty applying the *Miller* test to handguns. *Emerson*, 270 F.3d at 227 n.22. Even courts hostile to the Second Amendment’s individual nature likewise accept that handguns are the type of arms referenced in the Amendment. In adopting the collective rights theory “without further analysis or citation of authority,” *Emerson*, 270 F.3d at 224, the First Circuit conceded that a revolver would fall within the *Miller* test’s ambit, as a handgun “may be capable of military use [and] familiarity with it might be regarded as of value in training a person to use a comparable weapon of military type and caliber.” *Cases v. United States*, 131 F.2d at 922-23; see also *Quilici v. Village of Morton Grove*, 695 F.2d 261, 266 (7th Cir. 1982) (“Handguns are undisputedly the type of arms commonly used for recreation or the protection of person and property”) (internal citations omitted).

Indeed, this Court has not required any evidentiary hearing to determine that “pistols . . . may be supposed to be needed occasionally for self-defence.” *Patsone v. Pennsylvania*, 232 U.S. 138, 143 (1914). That handguns are appropriate tools for lawful self-defense and are a class of weapon “of the kind in common use,” *Miller*, 307 U.S. at 179, has been within the judicial notice of this Court and lower federal courts for nearly a century.

Congress’s specific description of pistols as militia weapons in the Second Militia Act, so soon following passage of the Second Amendment, offers conclusive proof that handguns are within the Second Amendment’s protection. PA50a-51a. In defining handguns as militia weapons, Congress broke no new ground. The Continental Congress likewise reported pistols as acceptable militia weapons, JOURNALS OF THE CONTINENTAL CONGRESS 741-42 (Oct. 23, 1783), as had the various states. See, e.g., ACTS AND LAWS OF THE STATE OF CONNECTICUT 150 (1784); STATUTES OF THE STATE OF NORTH CAROLINA 592 (1791).

Eighteenth-century American governments recognized handguns as militia arms not only due to their military utility, but also owing to the deep roots of civilian handgun ownership from the dawn of the Nation’s settlement. Thirteen percent of firearms listed in the Plymouth Colony’s probate records from the 1670s



were pistols, “and 54.5 percent of lead projectiles recovered from Plymouth Colony digs were pistol ammunition.” Clayton Cramer and Joseph Olson, *Pistols, Crime, and Public Safety in Early America*, Willamette L. Rev. (2008 forthcoming), <http://ssrn.com/abstract=1081403> (citation omitted). Two weeks before the Boston Tea Party, John Andrews observed “twould puzzle any person to purchase a pair of p——ls [pistols] in town, as they are all bought up, with a full determination to repell force by force.” Letter of December 1, 1773 in Letters of John Andrews, Esq., of Boston, 1772–1776 12 (Winthrop Sargent ed., 1866).

Some of those pistols might have been purchased by the Tea Party Indians, “each arm’d with a hatchet or axe, and pair pistoles.” *Id. Letter of December 18, 1773.* The 634 pistols confiscated by General Gage constituted a full 18.25% of the firearms whose seizure the Continental Congress declared a *causus belli*.

Petitioners and their amici greatly overstate our Nation’s history of handgun regulation. Washington’s complete handgun ban was the first such prohibition on American soil since the Revolution. The fact that “never before in the more than two hundred years of our Republic has a gun law been struck down by the federal courts as a violation of the Second Amendment,” Brady Br. 29, is a testament to the extreme nature of Petitioners’ enactments. Notably, Petitioners’ state amici do not defend or endorse a total handgun ban, which none of them maintains. New York Br. 1, 2.

The oft-cited case of *Aymette v. State*, 21 Tenn. 154 (1840), upheld prohibition of carrying certain knives and daggers, *not* guns, as suggested by some. E.g., ABA Br. 9; Chicago Br. 14 n.15, 32; LDF Br. 15-16.<sup>18</sup> When Tennessee’s Supreme Court considered the constitutionality of banning (as opposed to regulating) the carrying of handguns, it struck down the law. *State v. Andrews*, 50 Tenn. 165 (1871). On occasion, the carrying of guns has been required in this country. See, e.g., 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, PART 1 138 (1911) (churchgoer “shall carry with him a gun, or a pair of pistols, in good order and fit for service, with at least six charges of gun-powder and ball, and shall take the said gun or pistols with him to the pew or seat”).

Various briefs invoke Georgia’s 1837 ban on the sale of certain pistols, Appleseed Br. 13; Law Professors Br. 18; Chicago Br. 14, but none mentions that the act was struck down – on Second Amendment grounds – in an as-applied challenge by a man who openly wore a prohibited pistol. *Nunn v. State*, 1 Ga. 243 (1846). Oakland does not ban all handguns, LDF Br. 20, a measure that would be



impermissible under California law. *Fiscal v. City and County of San Francisco*, \_\_ P.3d \_\_, 2008 Cal. App. LEXIS 21 (Cal. Ct. App. Jan. 9, 2008). The cited measure addressed a specific type of handgun thought unsuitable for legitimate purposes. Major Cities Br. 9.

No trial is required to establish that handguns continue to be in common use for legitimate purposes and that their possession can contribute to the common defense. Handguns are therefore protected arms under *Miller*, and the right to “keep” them “shall not be infringed.” U.S. Const., amend. II.

That the “keeping” at issue here relates to the home is significant. Even obscene materials not otherwise protected by the First Amendment may be viewed in the privacy of one’s home. *Stanley v. Georgia*, 394 U.S. 557 (1969). The exercise of Second Amendment rights within the home is entitled to no less protection. “The government bears a heavy burden when attempting to justify an expansion, as in gun control, of the ‘limited circumstances’ in which intrusion into the privacy of a home is permitted.” *Quilici*, 695 F.2d at 280 (Coffey, J., dissenting).

\* \* \*



The Solicitor General greatly overstates the D.C. Circuit decision’s implications for laws governing machine guns. Courts understand that the decision below striking down the handgun bans “address[es] only the possession of handguns, not machine guns.” *Somerville v. United States*, 2008 U.S. Dist. LEXIS 412 at \*4 (W.D. Mich. Jan. 3, 2008). And unlike the laws at issue here banning handguns,<sup>19</sup> federal law does not ban the private possession of machine guns, of which approximately 120,000 are in lawful civilian possession. Bureau of Justice Statistics, *Selected Findings: Guns Used in Crime* 4 (July 1995), <http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf> (240,000 registered machine guns); Gary Kleck, *Targeting Guns: Firearms and Their Control* 108 (1997) (half of registered machine guns are in civilian use) (citing BATF, Statistics Listing of Registered Weapons, Apr. 19, 1989).<sup>20</sup>



“ATF’s interest is not in determining why a law-abiding individual wishes to possess a certain firearm or device, but rather in ensuring that such objects are not criminally misused.” Testimony of Stephen Higgins, BATF Director, in *Hearings on H.R. 641 and Related Bills, House Judiciary Committee Subcommittee on Crime*, 98th Congress 111 (1986). To that end, federal law subjects machine gun possession to the same stringent regulatory regime considered in *Miller*.



26 U.S.C. § 5801, *et seq.*; 27 CFR 478.98, 479.84, *et seq.*; 27 C.F.R. §§ 478.98, 479.84, *et seq.* These regulations work: “it is highly unusual – and in fact, it is very, very rare,” that legally owned machine guns are criminally misused. Higgin, *supra*, at 117.

Had Miller possessed a machine gun, this Court would presumably have had little trouble finding that the weapon had militia utility. The Court might nonetheless have held that machine guns fall outside the scope of the Second Amendment’s protection as they were not “in common use at the time” such that civilians could be expected to have possessed them for ordinary lawful purposes. *Miller*, 307 U.S. at 179.

And even if this Court had accepted that some machine guns are protected by the Second Amendment, their current tight regulation under federal law could well pass any level of scrutiny devised by this Court for the regulation of protected arms. Of course, Respondent’s simple revolver is no machine gun, and the types of restrictions imposed by the National Firearms Act – including an FBI background check, \$200 tax, authorization from one’s local chief law enforcement officer, and a statement of “reasonable necessity” – would be inappropriate to apply to a common handgun.

But this case is not about what regulations ought to govern machine guns. The question is whether the arms at issue – including handguns – are protected at all. They are.

### III. WASHINGTON, D.C.’S FUNCTIONAL FIREARMS BAN IS UNCONSTITUTIONAL.

Petitioners concede that if the Second Amendment protects an individual right, “a law that purported to eliminate that right—for instance, by banning all gun possession, or allowing only a firearm that was so ineffective that the law effected functional disarmament,” would be unconstitutional. Pet. Br. 43-44.<sup>21</sup> The only dispute is whether D.C. Code section 7-2507.02 “effects functional disarmament.”

Determining whether section 7-2507.02 effects functional disarmament requires no fact-finding. And as Petitioners concede, a functional firearms ban would be unconstitutional “whatever [a Legislature’s] reasons” might be for enacting it. Pet. Br. 43. Making matters easier, Petitioners agree that section 7-2507.02 “would be unreasonable” if it offered no provision for home self-defense. Pet. Br. 56.

The statutory language is unequivocal: without exception, individuals may never possess a functional firearm at home. If Pe-



titioners wished to create an exception for home self-defense, they knew how to do so. Section 7-2507.02 permits functional firearms “at [a] place of business, or while being used for lawful recreational purposes.” Petitioners cannot “turn a few passages in the legislative history that are partially contrary to the statutory language into a justification for this court to rewrite the statute,” *Chem. Mfrs. Ass’n v. EPA*, 673 F.2d 507, 514 (D.C. Cir. 1982), and thereby add a saving exemption for home self-defense. “[T]his court will not read into a statute language that is clearly not there . . . . The express inclusion of one (or more) thing(s) implies the exclusion of other things from similar treatment.” *Castellon v. United States*, 864 A.2d 141, 148-49 (D.C. 2004) (internal quotations and citations omitted).

Indeed, the city successfully asserted a reason for “distinguish[ing] between a home and a business establishment in the Act.” *McIntosh v. Washington*, 395 A.2d 744, 755 (D.C. 1978). Petitioners cannot now be heard to argue for judicial alteration of the home-business distinction, especially as they can offer no guidelines as to when, exactly, a citizen might render her firearm operational to respond to a perceived threat. Response to Pet. for Cert. at 19-21.

Respondent would not quarrel with a true “safe storage” law, properly crafted to address Petitioners’ stated concerns. But as *McIntosh* reveals, the city said what it meant and meant what it said in prohibiting armed self-defense inside private homes. The law, as written and defended by the city, is unconstitutional.



#### IV. THE STANDARD OF REVIEW IN SECOND AMENDMENT CASES IS STRICT SCRUTINY.

Although Petitioners “do[] not suggest that gun regulations should be subject to mere rational basis review,” Pet. Br. 43, the true nature of their proposed “reasonableness” standard is exposed by their claims that the Nation’s most draconian gun laws are constitutional. The Solicitor General’s supposed “heightened” scrutiny standard is scarcely better, demanding that judges weigh conflicting and disputable scientific claims to determine the constitutionality of disarming law-abiding individuals, apparently on an as-applied basis.<sup>22</sup>

As explained *supra* and accepted by the court below, this case does not require the application of any “standard of review,” because it involves a ban on a class of weapons subject to the *Miller* test, and a statutory interpretation dispute concerning whether a particular provision enacts a functional firearms ban.



Nonetheless, should the Court venture to comment on the standard of review governing the regulation of Second Amendment rights, it should do so consistent with well-established precedent. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) (fundamental rights are those “explicitly or implicitly guaranteed by the Constitution”). Fundamental rights are those “so rooted in the traditions and conscience of our people as to be ranked as fundamental [and] implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations and quotation marks omitted). Justice Story’s “palladium of the liberties” ought to qualify, whether the Second Amendment entails the right to defend one’s life, the right to resist tyrannical usurpation of constitutional authority, or even, as Petitioners would have it, a right guaranteeing states freedom and security. See Eugene Volokh, *Necessary to the Security of a Free State*, 83 NOTRE DAME L. REV. 1 (2007).

Today the Court is told that private gun ownership is too dangerous to be counted among a first-tier of enumerated rights. Americans who suffered British rule might disagree. *Boston Gazette*, at 4, col. 1 (Dec. 5, 1774) (“But what most irritated the People next to seizing their Arms and Ammunition, was the apprehending six gentlemen . . . who had assembled a Town meeting . . . ”). As our Nation continues to face the scourges of crime and terrorism, no provision of the Bill of Rights would be immune from demands that perceived governmental necessity overwhelm the very standard by which enumerated rights are secured. Exorbitant claims of authority to deny basic constitutional rights are not unknown. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

Demoting the Second Amendment to some lower tier of enumerated rights is unwarranted. The Second Amendment has the distinction of securing the most fundamental rights of all – enabling the preservation of one’s life and guaranteeing our liberty. These are not second-class concerns. Yet preservation of human life is also the government’s chief regulatory interest in arms. Constitutional review of gun laws thus finds both individual and governmental interests at their zenith.

If a gun law is to be upheld, it should be upheld precisely because the government has a compelling interest in its regulatory impact. Because the governmental interest is so strong in this arena, applying the ordinary level of strict scrutiny for enumerated rights to gun regulations will not result in wholesale abandonment of the



country's basic firearm safety laws. Strict scrutiny is context-sensitive and is "far from the inevitably deadly test imagined by the Gunther myth." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793, 795 (2006). The prohibition on possession of guns by felons, 18 U.S.C. § 922(g), and the requirement that gun buyers undergo a background check for history of criminal activity or mental illness, 18 U.S.C. § 922(t), would easily survive strict scrutiny.

Searching for a lower level of review, the Solicitor General would look to "the practical impact of the challenged restriction," U.S. Br. 8, 24, as courts do at the outset of examining the constitutionality of election regulations. But voting is a poor analog to gun possession. Each exercise of the right to vote burdens state resources and implicates a direct interest in operating an election, which states have an express grant of authority to regulate. U.S. CONST., art. I, § 4, cl. 1.

And not all election laws are subject to the government's endorsed level of scrutiny. If the Court finds the burden to be "severe," then strict scrutiny is applied. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The Solicitor General assumes that no gun regulations – including those at issue here – can impose "severe" burdens on Second Amendment rights. But no such presumption exists in the election field. Considering the severity of the challenged gun laws, the correct standard, per the Solicitor General's precedent, is strict scrutiny.

The government's fears of a meaningful Second Amendment standard are unfounded. Seven years ago, the Fifth Circuit announced a version of strict scrutiny to evaluate gun laws under the Second Amendment, permitting regulations that are "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country." *Emerson*, 270 F.3d at 261; *United States v. Everist*, 368 F.3d 517, 519 n.1 (5th Cir. 2004) (strict scrutiny undecided, though "it remains certain that the federal government may not restrain the freedom to bear arms based on mere whimsy or convenience"). Large cities in the Fifth Circuit remain generally more peaceful than Washington, D.C.

The careless handling of social science by Petitioners and their amici underscores the impropriety of adopting anything but the highest level of scrutiny for regulations implicating Second Amendment rights. The matter is only peripheral to the case, but some



remarks are in order.

The ABA asserts that “the most notable risk factor for mortality among abused women is the presence of a gun,” and argues that “[h]ow to weigh these risks against the desire to own a gun for self defense is a policy judgment, not a constitutional one.” ABA Br. 21 n.8 (citing Jane Koziol-McLain, et al., *Risk Factors for Femicide-Suicide in Abusive Relationships: Results From a Multisite Case Control Study*, in ASSESSING DANGEROUSNESS; VIOLENCE BY BATTERERS AND CHILD ABUSERS 143 (J.C. Campbell ed., 2d ed., 2007)) (other citation omitted). Putting aside the likelihood that the Constitution embodies at least some policy choices the ABA finds uncongenial, the cited study does not support the conclusion. The study reports an adjusted odds ratio of 13.0 for “abuser gun access,” not *victim* gun access. The study does not address, much less refute, “the desire to own a gun for self defense.”<sup>23</sup>

Petitioners also persist in relying upon a deeply flawed study claiming their handgun ban reduced deaths. Colin Loftin, et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 New England Journal of Medicine 23 (1991).<sup>24</sup> Putting aside that correlation does not equal causation, even the correlative relationship is dubious. The study measures death with raw numbers rather than rates, thus ignoring the city’s dramatic depopulation through the studied period. Between the two ten-year periods examined in the study, Washington’s annual population declined 15%. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES. When one examines homicide *rates*, the supposed benefits disappear. The suicide prevention benefits are likewise overstated. Moreover, the study ends in 1988, a year in which the murder rate doubled pre-ban levels, and one year before a severe crime increase. In 1991, the peak year, the homicide rate tripled pre-ban levels. FBI UCR Data compiled by Rothstein Catalog on Disaster Recovery and The Disaster Center, available at <http://www.disastercenter.com/crime/dccrime.htm> (last visited Jan. 28, 2008).

Gun crimes, suicides, and accidents were not unknown in early America. E.g., Cramer & Olson, *Pistols*, *supra*. The same newspaper containing admonishments from Continental Congress representatives that “It is the Right of every English Subject to be prepared with Weapons for his Defense,” N.C. GAZETTE (NEWBURN), July 7, 1775, at 2, col. 3, also reported that “a Demoniac” shot three and wounded one with a sword before being shot by others. *Id.* at 3, col. 1.



Petitioners' sophistic "reasonableness" arguments were likewise familiar to the Framers – and rejected. Colonial Americans were conversant with the works of Cesare Beccaria, whose 1764 treatise *ON CRIMES AND PUNISHMENTS* founded the science of criminology. John Adams cited Beccaria to open his argument at the Boston Massacre trial. *3 LEGAL PAPERS OF JOHN ADAMS* 242. In a passage Jefferson copied into his "Commonplace Book" of wise excerpts from philosophers and poets, Beccaria decried the "False Utility" of laws that

disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code . . . will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty . . . Such laws make things worse for the assaulted and better for the assailants . . . [These] laws [are] not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree . . .

Thomas Jefferson, *COMMONPLACE BOOK* 314 (1926).

"If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion." *Ullman v. United States*, 350 U.S. 422, 427-28 (1956) (citation omitted).

Petitioners plainly disagree with the Framers' Second Amendment policy choices. Petitioners' remedy must be found within the Constitution's Fifth Article, not with linguistic sophistries or an anemic standard of review that would deprive the right of any real force.

## V. THE GOVERNMENT OF THE NATION'S CAPITAL MUST OBEY THE CONSTITUTION.

The Constitution, and its Bill of Rights – including the Second Amendment – are the supreme law of the land. U.S. CONST., art. VI, cl. 1. "That the Constitution is in effect . . . in the District has been so often determined in the affirmative that it is no longer an open question." *O'Donoghue v. United States*, 289 U.S. 516, 541 (1933).

Petitioners' legislative authority is not above the Constitution, but derived from it; a delegation of Congress's authority to legis-



late for the District. U.S. CONST., art. I, § 8, cl. 17. That power “is plenary; but it does not . . . authorize a denial to the inhabitants of any constitutional guaranty not plainly inapplicable.” *O'Donoghue*, 289 U.S. at 539. “If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void.” *Id.* at 541 (citation omitted).

Accordingly, Congress can exercise general police powers within the District, “so long as it does not contravene any provision of the Constitution of the United States.” *Palmore v. United States*, 411 U.S. 389, 397 (1973) (citation omitted). For example, Congress may operate public schools in the District of Columbia, a power otherwise reserved to the states. But such schools cannot be segregated. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Indeed, because the Constitution with its Bill of Rights applies directly to the federal government, of which the city is a creature, Petitioners are bound to respect even those rights that are not incorporated as against the states through the Fourteenth Amendment. See *Pernell v. Southall Realty*, 416 U.S. 363 (1974) (Seventh Amendment right to civil jury trial); *United States v. Moreland*, 258 U.S. 433 (1922) (Fifth Amendment right to grand jury indictment).<sup>25</sup> Even were the pre-incorporation holding of *Presser v. Illinois*, 116 U.S. 252 (1886) still good law, which is doubtful,<sup>26</sup> the fact remains that the District of Columbia is not a state. *Hepburn v. Ellzey*, 6 U.S. 445 (1805). And the question of incorporation is therefore not before the Court.

Nothing in Petitioners’ precedent suggests that the District is free to ignore constitutional restrictions. The judges of the District’s local court system do not merit Article III protection because they are Article I judges. D.C. Code § 11-101; *Palmore*, 411 U.S. at 398. When the District’s judges were Article III judges, they enjoyed Article III protection. *O'Donoghue, supra* (Congress could not reduce pay of District of Columbia judges). And pre-Sixteenth Amendment tax limitations did not apply within the District of Columbia because Article I’s District Clause grants Congress the broad power of “exclusive Legislation” for the city, including the power to tax “in like manner as the legislature of a State may tax the people of a State for State purposes.” *Gibbons v. District of Columbia*, 116 U.S. 404, 407 (1886).

Washington was not planned as a “Forbidden City” in which federal officials would be shielded from the hazards of interaction



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with the otherwise-free people of the United States. Quite the contrary:

It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution . . . . [I]t is not reasonable to assume that the cession stripped them of these rights . . . .

*O'Donoghue*, 289 U.S. at 540.

Finally, there is no logic to Petitioners' extraordinary claim that gun control "is the most important power of self-protection" for the seat of government. Pet. Br. 38. The District Clause, after all, allows Congress to "[erect] Forts, Magazines, Arsenals, dock-Yards and other needful Buildings." U.S. CONST., art. I, § 8, cl. 17. Congress surely has the power to regulate firearms in Washington; but if Congress felt that disarming Americans at home were necessary for its security, it might have attempted to do so in the first 177 years of the city's service as the seat of government. As recent history demonstrates, those who would attack our capital are hardly deterred by Petitioners' ban on handguns and functional firearms in the home.



## CONCLUSION

The decision below is correct with respect to the merits of Respondent's substantive claims, and should be affirmed in that regard.

Respectfully Submitted,

ALAN GURA\*  
ROBERT A. LEVY  
CLARK M. NEILY III

Attorneys for Respondent  
\* Counsel of Record



## ENDNOTE

1. See Question Presented. The “bearing” of arms implicates different interests and concerns not at issue here.
2. See Clayton Cramer & Joseph Olson, *What Does “Bear Arms” Imply?*, Geo. J.L. & Pub. Pol'y (forthcoming 2008), <http://papers.ssrn.com/abstract=1081201> (supplying numerous examples).
3. That early Congressional references to “bearing arms” related to military matters was a function of (1) the issues facing Congress in those years, (2) the perception that Congress did not have broad regulatory powers over private arms, and, of course, (3) the Second Amendment’s limitation on those powers. Randy Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 260-62 (2004).
4. “Themselves” as otherwise used by the Pennsylvania drafters is self-evidently not collective: “[T]he people have a right to hold themselves, their houses, papers, and possessions free from search or seizure. . . .” PA. CONST. OF 1776, ch. 1, art. X.
5. Congress may define that part of the Militia to which it wishes to apply its Article I powers, but Petitioners defy logic in suggesting that the protection of a right against the federal government may thus be legislated away by Congress. Pet. Br. 14 n.2.
6. *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (right to arms “not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence”).
7. Owing to the instability of black powder used in colonial times, fire safety measures of the day mandated that large stores of gunpowder, as those belonging to merchants, be stored in “powder houses” away from other structures, as were powder and other arms purchased by a community for the benefit of its citizens. The 1783 Massachusetts statute allegedly “prohibit[ing] Boston citizens from keeping loaded firearms in their homes,” Pet. Br. 42, was a *fire safety* measure intended to regulate the storage of gun powder: “An Act in Addition to the several Acts already made for the prudent storage of Gun-Powder within the Town of Boston.” Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218. The act opens with, “Whereas the depositing of loaded Arms . . . is dangerous to the Lives of those who are disposed to exert themselves when a Fire happens to break out,” with no reference to firearms qua firearms being inherently dangerous. *Id.*



8. Another account repeats these numbers, save for seven hundred fewer bayonets. David Ramsay, 1 HISTORY OF THE AMERICAN REVOLUTION 176 (1789). Boston's 1765 population totaled 15,520. EARLY CENSUS MAKING IN MASSACHUSETTS, 1643-1765 102 (1902).

9. Petitioners oddly claim that the “common defence” language was scrapped as an excessive and controversial revision to the Constitution’s body, Pet. Br. at 29 n.6, completely contradicting their claim that the Second Amendment was intended to remedy deficiencies in the Constitution’s militia clauses. E.g., Pet. Br. 22, 33.

10. Notably, Madison’s initial Second Amendment draft starts with the right to keep and bear arms, separated from the remaining provisions with a semicolon – the same punctuation Madison used to distinguish unrelated concepts in the First and Fifth Amendments.

11. The ABA, founded in 1878, notes it has taken the opposite view “[f]or more than forty years.” ABA Br. 2. Sprecher’s article won the ABA’s 1964 Samuel Pool Weaver Constitutional Law Essay Competition.

12. As did the Virginia majority, the Anti-Federalist Pennsylvania minority proposed a separate state militia powers amendment. *Id.*



13. Petitioners’ claim that no “per se” categorical restrictions exist within the Bill of Rights, Pet. Br. at 44, is false. Cf. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (“a law imposing criminal penalties on protected speech is a stark example of speech suppression”); cf. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment) (noting that “traditional legal categories” are “preferable to . . . ad hoc balancing”).

14. Indeed, until 1993, Petitioners even banned mace. See D.C. Code § 6-2302(7)(C) (1991) (defining tear gas as “destructive device”). Now legal, “self-defense sprays” must be registered with the police. D.C. Code § 7-2502.14.

15. Petitioners implicitly concede the point in admitting that “banning all gun possession” – presumably without impacting the possession of other “arms” – would violate the Second Amendment. Pet. Br. 43.

16. *Miller*’s earlier use of “at this time,” *id.* at 178, makes clear that the relevant time period is the present, not 1791. The Framers clearly intended to preserve people’s ability to act as militia, and would not have expected future generations to have obsolete weapons in “common use” any more





than the Framers would have expected to secure only eighteenth-century religions or media. The lineal descendants of personal arms of the type in predictable civilian usage are thus protected, but modern weapons of the type that serve no ordinary civilian function are not.

17. “Attempting to draw a line between the ownership and use of ‘Arms’ for *private* purposes and the ownership and use of ‘Arms’ for *militia* purposes would have been an extremely silly exercise on the part of the First Congress if indeed the very survival of the militia depended on men who would bring their commonplace, *private* arms with them to muster.” PA43a (emphasis in original).

18. *Aymette* expressly upheld the “unqualified right to keep” arms. *Aymette*, 21 Tenn. at 160.

19. This case does not address Petitioners’ machine gun ban, D.C. Code § 22-4514(a).

20. Title 18 U.S.C. § 922(o) prohibits the civilian transfer or possession of machine guns not lawfully possessed by May 19, 1986, exempting previously authorized machine guns.



21. Cf. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“the right to counsel is the right to the effective assistance of counsel?”) (citation omitted); *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (O’Connor, Kennedy and Souter, JJ.) (“undue burden exists” if law’s “purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability”).



22. The Solicitor General’s “reasonable alternative” test would demand that individuals wishing to exercise a fundamental constitutional right demonstrate their need to do so, subject to the skeptical review of officials hostile to the right. For example, a would-be handgun owner might have to show that she was physically incapable of using a rifle or shotgun. The *Miller* test anticipates this problem: that handguns are in common use sufficiently establishes that they are a legitimate option, within the prerogative of individuals exercising their *right*.

23. A different study indicates that women living alone with a gun face a statistically insignificant odds ratio for increased femicide of 0.22. Jacquelyn Campbell, et al., *Risk Factors for Femicide in Abusive Relationships*, 93 AM. J. PUB. HEALTH 1089, 1090-92 (2003).

24. The study constituted the bulk of Petitioners’ evidence on summary judgment.



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25. Petitioners distinguish the Second Amendment as relating only to federal authority over the states, rather than securing individual rights; but that argument assumes their conclusion. Pet. Br. 38.

26. As Judge Reinhardt recognizes, “*Presser* rest[s] on a principle that is now thoroughly discredited,” *Silveira v. Lockyer*, 312 F.3d 1052, 1067 n.17 (9th Cir. 2002) (citing *Emerson*, 270 F.3d at 221 n.13).







## INTEREST OF AMICUS CURIAE

The **Citizens Committee for the Right to Keep and Bear Arms**, a non-profit organization, seeks to preserve Second Amendment rights through education and advocacy. It strives to ensure that the Amendment is not misinterpreted in derogation of the people's right to keep and bear arms for self-defense and other constitutional purposes.

The **Evergreen Freedom Foundation** is a non-partisan, public policy research 501(c)(3) organization, based in Olympia, Washington. The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. Its efforts focus on state budget and tax policy, labor policy, welfare reform, education, citizenship and governance.

David T. Beito, Ph.D., is an Associate Professor of History at the University of Alabama. Douglas B. Rasmussen, Ph.D., is a Professor of Philosophy at St. John's University. Steve Russell, J.D., M.L.S., is an Associate Professor of Criminal Justice at Indiana University. Lynn D. Wardle, J.D., is a Professor of Law at Brigham Young University Law School. Robert E. Wright, Ph.D., is a clinical associate professor of economics at New York University.<sup>1</sup> All amici wish to expose common historical myths about the Second Amendment and the efficacy of arms prohibitions perpetuated by the District of Columbia ("District") and its amici.<sup>2</sup>

### INTRODUCTION

This brief endeavors to correct common misconceptions about the Second Amendment and gun control that persist in the media and academia, and to expose how the District of Columbia ("District") and its amici misstate and decontextualize history and contemporary research to perpetuate such myths. These common myths are numerous, but generally fall under two headings: (1) that the right to keep and bear arms pertains only to the National Guard (the collective rights theory); and (2) that gun ownership is dangerous, and owners are more likely to be injured in accidents or have their guns used against them than to successfully defend themselves. This brief cannot address all popular misconceptions or every misstatement in this case. Rather, it focuses on the most egregious and specific errors presented by the District and its amici.



## ARGUMENT

### I. THE DISTRICT FALSELY CLAIMS THAT THE RIGHT TO KEEP AND BEAR ARMS IS ONLY FOR MILITIA

#### A. The District Takes *United States v. Cruikshank* Out Of Context To Argue That The Right To Keep And Bear Arms Is Not Constitutionally Protected

The District cites *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), to argue that the right to bear arms, “is not a right granted by the Constitution” and, therefore, does not protect private uses enjoyed during the founding era. (Brief for Petitioners (“DC Brief”) at 19-20.) That statement is taken out of context to support principles contrary to those embraced by the Court. *Cruikshank*’s statement was in the context of holding that, “[t]his is one of the amendments that has no other effect than to restrict the powers of the national government.” *Id.* *Cruikshank* treated the rights of assembly and petition in the same way, and added that they pre-exist the Constitution:

It is, and always has been, one of the attributes of citizenship under a free government. It ‘derives its source,’ to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 211, ‘from those laws whose authority is acknowledged by civilized man throughout the world.’ It is found wherever civilization exists. *It was not, therefore, a right granted to the people by the Constitution.*

*Id.* at 551 (emphasis supplied). Thus, *Cruikshank* means that certain rights are not granted by the Constitution, because they pre-existed it in natural law. *Cruikshank* does not take the untenable position, implied by the District, that the right to keep and bear arms is not constitutionally protected or that it may be legislatively defined out of existence. This Court treated the rights of assembly and petition and the right to keep and bear arms the same way in *Logan v. United States*, 144 U.S. 263, 286-87 (1892).

#### B. The Brady Brief Turns The 1181 Assize Of Arms And The English Bill Of Rights On Their Heads

The Brady Brief incorrectly insists that the 1181 Assize of Arms and the English Bill of Rights included a right of arms only for soldiers. (Brief for Brady Center to Prevent Gun Violence, et



al., (“Brady Brief”) at 17-18 n.6.) The Assize required “every free layman” and “the whole community of freemen” to have armor and weapons. The Assize of Arms (1181), *reprinted in Sources of English Constitutional History* 85-87 (Carl Stephenson & Frederick George Marcham, eds., 1937). The Assize did not initially treat the “villata” as an organized entity. 1 Sir Frederick Pollock & Frederick William Maitland, *The History of English Law Before the Time of Edward I* 565 (Legal Classics Library 1982) (1895). Thus, the concept of a people armed for the defense of self and community predates any formal organization. The ordinances of 1252, 1253 and the Statute of Winchester formally organized the militia. *Id.* This Statute required that, “every man shall have in his house arms for the keeping of the peace according to the ancient assize.” Statute of Winchester (1285), *reprinted in Sources of English Constitutional History, supra*, at 174.

The English Bill of Rights provided:

[T]hat raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law; that the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law[.]

1 W. & M., 2 c. 2 (1689). The suggestion that the English Bill vested the right to “have arms” only in the military is patent nonsense. The English Bill resulted from the revolution that overthrew King James II, and declared him guilty of “keeping a standing army within this kingdom in time of peace without consent of parliament” and “causing several good subjects being Protestants to be disarmed[.]” *Id.* As the eminent English historian G.M. Trevelyan wrote:

The root of all [King James’] errors in method was the complete reliance placed by him on his soldiers. Monmouth’s rebellion enabled him to become a military despot. The regulars in England were raised from 6,000 to nearly 30,000. A great camp of 13,000 was formed at Hounslow and Heath to overawe the capitol. . . . In the neighborhood of London, robberies and murders were plentifully laid at their door. Reports were readily believed against them, for civilians of all parties hated the camp at Hounslow, rightly regarding it as a menace to their liberties and their religion.

G.M. Trevelyan, *A History of England Under the Stuarts* 359 (19<sup>th</sup> ed. Methuen & Co. 1947); see Winston S. Churchill, *The New World* 383, 391, 398 (Barnes & Noble 1956).

The Brady Brief incorrectly claims that the right to have arms



was merely for Protestants to serve in the army. (Brady Brief at 17-18 n.6.) The concern of the English Bill was that a Catholic King, in an overwhelmingly Protestant country, disarmed Protestants while developing a “great standing army, largely officered by Catholics[.]” Trevelyan, *supra*, at 360; Churchill, *supra*, at 391. The Peers’ invitation to William of Orange to remove King James and assume the throne of England, explained that the plan relied on rallying non-military people and forming them into an insurgent force:

*[T]he people are so generally dissatisfied with the present conduct of the government, in relation to their religion, liberties and properties (all of which had been greatly invaded) and they are in such expectation of their prospects being daily worse, that your Highness may be assured there are nineteen parts of twenty of the people throughout this kingdom who are desirous of a change; and who we believe, would willingly contribute to it if they had such protection to countenance their rising, as would secure them from being destroyed, before they could get in a posture to defend themselves . . . if such a strength could be landed as were able to defend itself and them, till they could be got together into some order, we make no question but that strength would quickly be increased to a number double to the army here, although all their army should remain firm to them[.]*

The Invitation to William (1688), reprinted in *The Eighteenth Century Constitution* 8 (E.N. Williams, ed., 1977) (emphasis supplied). After William landed in England, his army swelled daily. 2 Simon Schama, *A History of Britain* 318 (2001). The District’s claim that the right to have arms was for Protestants to serve in the King’s army misunderstands the history. It was mistrust of the army in the context of a popular revolution that spawned the English Bill. The framers of the Bill directly considered whether to provide that the subjects’ right to have arms was for “their common defence” and instead used the language “for their defence”, supporting the right of self-defense and the right of rebellion. Joyce Lee Malcolm, *Guns & Violence: The English Experience* 59-60 (Harvard Univ. Press 2002).

During the American founding era, Blackstone<sup>3</sup> interpreted the right to have arms as a “right of the subject” and part “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.” 1 William Blackstone, *Commentaries* \*138-39 (emphasis supplied). Blackstone clearly understood the right to have arms as part of the right of self-defense and the right to resist oppression,



as in the revolution of 1688. Samuel Adams interpreted the English Bill the same way:

At the revolution [of 1688], the British constitution was again restor'd to its original principles, declared in the bill of rights; which was afterwards pass'd into law, and stands as a bulwark to the natural rights of the subjects. “To vindicate these rights, says Mr. *Blackstone*, when actually violated or attack'd, the subjects of England are entitled . . . **to the right of** having and using arms for self-preservation *and defence.*” These he calls “auxiliary and subordinate rights, which serve principally as *barriers* to protect and maintain inviolate the three primary rights of *personal security, personal liberty and private property*? And that of *having arms for their defence* he tells us is “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.*”

Samuel Adams, *Untitled Article*, Boston Gazette, Feb. 27, 1769, reprinted in *The Essential Bill of Rights* 150 (Gordon Lloyd & Margie Lloyd, eds., 1998) (bold emphasis added; italics original). Adams was clear that these rights were not purely military, writing that, “[e] very one knows that the exercise of military power is forever dangerous to civil rights; and we have had recent instances of violences that have been offered to private subjects[.]” *Id.*

#### C. The District Falsely Claims That The Right To Keep And Bear Arms Is Exclusively For The Common Defense

The District asks this Court to embrace the common misconception that the right to keep and bear arms is only for the “common defense”. (DC Brief at 9, 14, 30.) However, that the first Senate explicitly considered and rejected a proposal to insert the words “for the common defense” after the words “bear arms”. 1 Journal of the Senate 77 (1789) (*see also* DC Brief at 29).

#### D. The District Falsely Claims That The Right To Keep And Bear Arms Is Only For The Military, Ignoring The Original Definition Of The Militia As The Body Of The People

The District strenuously argues that the Second Amendment’s right to keep and bear arms is limited to the National Guard. (DC Brief at 11-35.) In keeping with English tradition, The Virginia Declaration of Rights, adopted less than a month before the Decla-



ration of Independence, defines the term “militia” as “composed of the body of the people”. The Virginia Declaration of Rights art. 13 (1776). John Adams similarly called for, “[a] militia law, requiring all men, or with very few exceptions[.]” John Adams, *Thoughts on Government* (1776), reprinted in 1 *American Political Writing of the Founding Era* 1760-1805 401 (Charles S. Hyneman & Donald S. Lutz, eds., 1983). Thomas Jefferson noted that, in Virginia, “[e]very able-bodied freeman, between the ages of 16 and 50, is enrolled in the militia” even though not all participated. Thomas Jefferson, *Notes on the State of Virginia* 88 (U. of North Carolina Press 1982) (1787). Joel Barlow similarly wrote that when “every citizen is a soldier and every soldier will be a citizen[.]” Joel Barlow, *Letter to His Fellow Citizens* (1801), reprinted in 2 *American Political Writing During the Founding Era*, *supra*, at 1124.

One revolutionary pamphleteer wrote that, “armies should always be composed of the militia or body of the people[.]” Theophilus Parsons, *The Essex Result* (1778), reprinted in 1 *American Political Writing of the Founding Era*, *supra*, at 501. Several documents from state ratifying conventions were submitted with the clause:

That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people capable of bearing [or trained to] arms, is the proper, natural, and safe defence of a free state.

Ratification of New York (1788), 1 *Elliot's Debates* 328 (J.B. Lippincott 1901); Ratification of Rhode Island (1790), 1 *Elliot's Debates*, *supra*, at 335; Ratification of Virginia (1787), 3 *Elliot's Debates*, *supra* at 659; Proposed Declaration of Rights in North Carolina Convention (1788), 4 *Elliot's Debates*, *supra* at 244.

When the Bill of Rights, including the Second Amendment, refers to “the people” it is a term of art signifying members of the national community. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). The “right of the people” in the Second Amendment refers to all members of the national community. *Id.* This is consistent with the definition of the militia as composed of the body of the people rather than a military organization.

#### E. The District Falsely Claims That Congress Can Change The Constitution By Adopting A Limited Definition Of The Term “Militia” And That Congress Did So



Notwithstanding the history of the terms “militia” and “the people” the District contends that because Mr. Heller is not a member of the National Guard, he is not part of the “militia” and does not have Second Amendment rights. (DC Brief at 14 n.2 and text.) In other words, the District suggests that Congress can use a statute to re-define the words of the Constitution and limit the scope of our rights. As this Court held in *Boerne v. Flores*, 521 U.S. 507, 519 (1997), “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.” If Congress adopted a more limited definition of the term “militia” than historically applied, it has no impact on the meaning of the Second Amendment. Furthermore, Congress has not re-defined the term “militia”. The National Guard is not the constitutional militia. It was organized under the Army Clause and not the Militia Clause of the Constitution, because the Militia Clause authorizes activities only within the United States. David T. Hardy, *Armed Citizens, Citizen Armies*, 9 Harv. J. of L. & Pub. Pol'y 559, 625-26 (1986).

#### F. The District Falsely Claims That State Law Permitted Significant Gun Control In The Founding Era



The District suggests that restrictive gun control was tolerated in the founding era to infer that such controls must be constitutional. (DC Brief at 42.) However, each of the example statutes is regulatory and not prohibitive of the possession of arms or the loading and use of arms for self-defense. None of these statutes prohibited carrying a weapon, although two prohibited carrying it concealed.

##### 1. Massachusetts

The District cites a 1783 Massachusetts statute to suggest a tradition of firearm regulation. (DC Brief at 42; *see also* Brief for Amici Curiae DC Appleseed Center for Law & Justice, et al. (“Appleseed Brief”), at 12.) However, the District’s Statute is a prohibition and not a regulation. The prefatory clause indicated that it was intended to protect firefighters:

*WHEREAS the depositing of loaded Arms in the Houses of the Town of Boston, is dangerous to the Lives of those who are disposed to exert themselves when a Fire happens to break out in the said Town:*

An Act in Addition to the several Acts already made for the Prudent Storage of Gun-Powder within the town of Boston, Act of





Mar. 1, 1783, ch. 8, 1783 Mass. Acts 218-19. To that end, the statute made it illegal to:

take into any dwelling House, Stable, Barn, Out-house, Warehouse, Store, Shop, or other building, within the town of *Boston*, any Cannon, Swivel, Mortar, Howitzer, or Cohorn, or Fire-Arm, loaded with, or having Gun Powder in the fame, or shall receive into any Dwelling-House, Stable, Barn, Out-house, Store, Warehouse, Shop, or other Building, within the said Town, any Bomb, Granade, or other Iron Shell, charged with, or having Gun-Powder in the same[.]

*Id.* The foregoing did not prohibit the loading, carrying or use of pistols or other arms for self-defense. It was intended to prevent fire hazards resulting from storing explosives inside buildings.

#### 2. Alabama

The District cites Act of Feb. 1, 1839, no. 77, 1839 Ala. Laws 67 (“Alabama Statute”), as an example of an early gun control law. (DC Brief at 42.) This statute makes it a crime to, “carry concealed about his person any species of firearms[.]” It has nothing to do with outlawing handguns or preventing the loading of a gun for self-defense or having a loaded gun in one’s home.

#### 3. Indiana

The District cites the Act of Feb. 10, 1831, ch. 26, § 58, 1831 Rev’d Laws of Ind. 180, 192 (“Indiana Statute”), as another example of an early gun control law. (DC Brief at 42.) It prohibits “wearing” certain weapons “concealed[.]” It does not outlaw handguns or prevent loading or using a gun for self-defense and, in fact, exempted “travellers” from its requirements. *Id.*

#### 4. Tennessee

The District cites Act of Jan. 27, 1838, ch. 137, 1837-1838 Tenn. Pub. Acts 200 (“Tennessee Statute”), as a further example of early gun control. (DC Brief at 42.) The Chicago Brief claimed that it, “banned the sale of any concealable weapon, including all pistols, ‘except such as are used in the army and navy of the United States, and known as the navy pistol.’” (Brief of the City of Chicago and the Board of Education for the City of Chicago (“Chicago Brief”) at 13-14.) No portion of this quote appears in the Tennessee Statute, nor does it contain any reference to the army or navy. It banned the sale of “any Bowie knife or knives, or Arkansas toothpick”, or other knives resembling these. It is revealing that, to support its thin



historical claims, the District cited a narrowly tailored knife regulation.

### 5. Georgia

Several amici supporting the District cited the Georgia Act of Dec. 25, 1837, 1837 Ga. Laws 90, banning pistols, in order to imply that handgun prohibitions do not violate the Constitution. (Chicago Brief at 14; Brief of Law Professors Erwin Chemerinsky and Adam Winkler at 18; Appleseed Brief at 13.) However, these amici inexplicably failed to disclose that Georgia's pistol ban was held unconstitutional as violating the natural right of self-defense and the Second Amendment's right to bear arms, which included, “[t]he right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description[.]” *Nunn v. State*, 1 Ga. 243, 251 (1846) (state could constitutionally prohibit concealing a pistol but not prohibit carrying it).

#### G. The Appleseed Brief Mis-Cites State Cases To Argue That It Is Constitutional To Ban An Entire Class Of Weapons

The Appleseed Brief cites a series of state cases to argue that it is constitutional to ban an entire class of weapons. (Appleseed Brief at 26.) Seven of these eight cases are severely over-claimed and, in at least two cases, directly contradict the principles for which they are cited.

In *State v. Swanton*, 629 P.2d 98, 99 (Ariz. App. 1981), the Arizona Court of Appeals held that “nunchakus” were not “arms” under Arizona’s Constitution, let alone a class of arms. *Id.* Even if nunchakus were arms, the “class” would be blunt weapons, not one anachronistic blunt weapon. The court specifically refused to apply the Second Amendment. *Id.*

In *Benjamin v. Bailey*, 662 A.2d 1226, 1235 (Conn. 1995), the Connecticut Supreme Court upheld a ban on certain assault weapons. However, this was based, in part, on holding that, “there are many firearms [that] fit the general designation of ‘assault weapons,’ and [that] are virtually identical to the banned weapons, but [that] do not appear on the list [of proscribed weapons].” *Id.* Thus, notwithstanding the Appleseed Brief, *Benjamin* did not countenance banning of a class of arms.

In *Robertson v. Denver*, 874 P.2d 325, 329-30 (Colo. 1994), the Colorado Supreme Court upheld an assault weapons ban, but found that the subcategory of banned weapons was infinitesimally small and affected weapons that were not for self-defense:



Denver has sought to prohibit the possession and use of approximately forty firearms. The evidence also established that currently there are approximately 2,000 firearms available for purchase and use in the United States. Given the narrow class of weapons regulated by the ordinance, we have no hesitancy in holding that the ordinance does not impose such an onerous restriction on the right to bear arms as to constitute an unreasonable or illegitimate exercise of the state's police power: there are literally hundreds of alternative ways in which citizens may exercise the right to bear arms in self-defense. While carving out a small category of arms which cannot be used for purposes of self-defense undoubtedly limits the ways in which the right to bear arms may be exercised, the barriers thereby created do not significantly interfere with this right. To the contrary, as the evidence plainly shows, there are ample weapons available for citizens to fully exercise their right to bear arms in self-defense.

*Id.* (emphasis supplied). Unlike the present case, where the prohibition covers a very large class of weapons ideally suited for self-defense, the Denver ordinance affected a narrowly tailored subclass within the larger class (rifles) and represented a tiny fraction of that class.

In *Commonwealth v. Davis*, 343 N.E.2d 847, 848-50 (Mass. 1976), the Massachusetts Supreme Court upheld a prohibition on short-barreled shotguns, a small subclass within a larger class (shotguns).

In *People v. Brown*, 235 N.W. 245, 246-47 (Mich. 1931), the Michigan Supreme Court held that every individual had a right to possess a "revolver" for self-defense, but upheld a narrow prohibition of a single revolver, the blackjack, and not all handguns. This holding is directly at odds with a general ban on handguns.

In *State v. LaChapelle*, 451 N.W.2d 689, 690-91 (Neb. 1990) (quoting *State v. Fennell*, 382 S.E.2d 231 (1989)) (emphasis supplied), the Nebraska Supreme Court held that a prohibition against sawed off shotguns was constitutional, in part, because:

Although Fennell argued that the statute absolutely prohibited possession of any "short-barreled shotguns," the court observed that the questioned statute "does not completely ban a class of weapons protected by the Constitution"; rather, the statute allowed possession of any shotgun with a barrel length of 18 inches or greater.

The court also held that short barreled rifles, short barreled shotguns and machine guns were weapons of crime and would not ordinarily be possessed by law abiding citizens and, therefore, could



be banned. *Id.* at 691. This ruling is directly at odds with the claim that banning an entire class of arms is constitutional.

In *Morrison v. State*, 339 S.W.2d 529, 531-32 (Tex. Crim. App. 1960), the court held that a “machine gun is not a weapon commonly kept, according to the customs of the people and appropriate for open and manly use in self defense” and is “ordinarily used for criminal and improper purposes.” *Id.* This ruling cannot justify a ban on a “commonly kept” class of weapons with numerous legal purposes, including self-defense.

#### H. The District Falsely Claims That The Pennsylvania Declaration of Rights Does Not Include Keeping Arms For Self-Defense

The District claims that the Pennsylvania Declaration of Rights includes an “example of the dominant focus of these provisions on communal defense[.]” (DC Brief at 31.) However, the Declaration states that, “the people have a right to bear arms for the defense of themselves and the state[.]” Pennsylvania Declaration of Rights, art. 13 (1776). James Wilson, a delegate to the Federal Convention and Pennsylvania Supreme Court Justice, stated that the right to bear arms was related to, “the great natural law of self preservation,” stating that it, “is one of our many renewals of the Saxon regulations. ‘They were bound,’ says Mr. Selden, to keep arms for the preservation of the kingdom, and of their own persons.” James Wilson, *The Works of the Honourable James Wilson* 84-85 (Lorenzo Press 1804) (emphasis supplied). Far from suggesting that the right to bear arms was primarily military, the text and history of the Pennsylvania Declaration embraced the familiar purpose of self-defense.

At the Pennsylvania Ratifying Convention, the dissenters proposed a bill of rights, including a provision likely based on the Pennsylvania Declaration:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals[.]

Dissent of the Minority, December 18, 1787, Pennsylvania Ratifying Convention (emphasis supplied), reprinted in *The Essential Bill of Rights, supra*, at 309. This provision envisioned an individual right, with a self-defense component and a military component, and was intended to prevent laws from disarming the people “or any of them”.



During America's founding era, in both America and England, the idea of helplessly waiting for the police to come to the rescue was not familiar. There were no professional police. It was the duty of free people to arm and defend themselves and their communities. Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 Constitutional Comment. 87, 92 (1992).

#### I. The District Misused The Oxford English Dictionary To Support An Artificially Narrow Definition Of "Arms"

The District quotes selectively from definition 2.a. of the word "arm" in the *Oxford English Dictionary* ("OED") to suggest that the term "arms" only includes war weapons. (DC Brief at 15.) The full definition is:

Instruments of offence used in war; weapons. fire-arms: those for which gunpowder is used, such as guns and pistols, as opposed to swords, *spears*, or *bows*. small-arms: those not requiring carriages, as opposed to artillery. stand of arms: a complete set for one soldier.

1 OED 634 (2d ed. 2000) This definition includes the term "weapons" as well as "fire-arms" which makes no reference to military uses, and "small-arms" which defines small weapons "as opposed to artillery", contrasting a military weapon. While war weapons are covered by the definition, two of its subparts require no military context.

The District quotes a 1794 reference in the *OED* mentioning arms used in war. (DC Brief at 15.) However, this is only one of several references. A reference prior to the Bill of Rights was, "1650 T. B. *Worcester's Apophth.* 97 They were come to search his house for Armes." 1 OED, *supra*, at 634. While a military application of the term "arms" is one possibility, it is not the exclusive meaning. The District's argument ignores several general definitions. For example, definition III.10, from a 1641 reference: "Arms, in the understanding of law is extended to any thing that a man, in his anger or fury, **takes** in his hand to cast at or strike another." *Id.* (emphasis supplied).

#### J. The Linguist's Amicus Brief Misuses Webster's Dictionary To Inject A Military Meaning Into The Second Amendment

The Linguist's Brief cites two definitions in Webster's 1828 Dictionary, for "arms" and "keep" in order to project an exclusively military meaning onto the Second Amendment. (Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W.



Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners at 20 n.18, 27.) However, Webster also defines the term “arms” more generally, and includes a broad legal definition:

1. Weapons of offense, or armor for defense and protection of the body.
- ....
4. In law, arms are any thing which a man takes in his hand in anger, to strike or assault another.

1 Noah Webster, *An American Dictionary of the English Language* 13 (1828) (emphasis supplied). None of the definitions of “keep” suggests a military context. 2 *Id.* at 2. Noah Webster understood that the role of arms was not only military. During the Constitution ratification debates, Webster said:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.

Noah Webster, *An Examination into the Leading Principles of the Federal Constitution (1787)*, reprinted in *Pamphlets on the Constitution of the United States* 24, 55-56 (Paul Leicester Ford, ed., 1888) (emphasis supplied). The principle of “the people” being “armed” to counter-balance a “standing army” was well-understood in the founding era.

#### K. The District Denies The Sovereignty Of The People By Falsely Claiming That The Second Amendment Permits Them To Be Disarmed In Favor Of An Exclusive Military Class

The broad distribution of arms among “the great body of the people” served the democratic purpose of preventing an undue concentration of armed power in an exclusive military class, making the people vulnerable to tyranny. As founding era writer Joel Barlow observed:

If it be wrong to trust the legislative power of the state for a number of years, or for life, to a small number of men; it is certainly more preposterous to do the same thing with regard to military power. Where the wisdom resides, there ought the strength to reside, in the great body of the people; and neither the one nor the other ought ever to be delegated, but



for short periods of time, and under severe restrictions. This is the way to preserve a temperate and manly use of both; and thus, by trusting only to themselves, the people will be sure of a perpetual defence against the open force, and the secret intrigues of all possible enemies at home and abroad.

Joel Barlow, *A Letter to the National Convention of France on the Defects in the Constitution of 1791* (1792), reprinted in 2 *American Political Writing of the Founding Era*, *supra*, at 837 (emphasis supplied). The use of the term “the people” is unmistakable and repeatedly teaches that an armed citizenry is necessary to ensure that power ultimately remains in them. Tench Coxe explained, ten days after the Bill of Rights was proposed in the House of Representatives, that the right to keep and bear private arms existed to protect the people against tyranny:

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



Federal Gazette, June 18, 1789, at 2, col. 1 (*quoted in* Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 Geo. Mason U. Civ. Rts. L.J. 105, 123 (1995)). While arguing for majority rule at the 1788 Virginia Constitutional Convention, James Madison said that, “[a] government resting on a minority is an aristocracy and not a Republic . . . and could not be safe with a numerical and physical force against it, without a standing army, an enslaved press, and a disarmed populace.” Ralph Ketcham, *James Madison: A Biography* n.94, at 640 (U. of Virginia Press 1995) (emphasis supplied) (quoting James Madison, *James Madison's Autobiography*, 2 Wm. & Mary Q. 208 (1945)). A “disarmed populace” serves the interests of tyranny as Justice Story described:



One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia.

. . . .

The right of the citizens to keep and bear arms had justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpations and



arbitrary power of rulers; and it will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Joseph Story, *A Familiar Exposition of the Constitution of the United States*, 319 (Regeney 1986) (1859) (emphasis supplied). The District's statute makes it an offense to keep arms and attempts to disarm the people. The idea that the Second Amendment is merely a right for the army, but permits the disarmament of the people, turns the Second Amendment on its head.

The District claims that the framers did not craft the Second Amendment to undo all of their hard work by sanctioning insurrection. (DC Brief at 15 n.3.) This betrays a fundamental misunderstanding of the founding era. Like the Declaration of Independence itself, on June 2, 1784, the New Hampshire Constitution embraced a right of revolution as a last resort:

Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

N.H. Const. part. 1, art. X (1784). The District unwisely trusts that the founders established a government so foolproof that it could never succumb to tyranny.

In the Declaration of Independence, Jefferson wrote that revolution should not be undertaken lightly because, “[p]rudence, indeed, will dictate that governments long established should not be changed for light and transient causes.” The Declaration of Independence para. 3 (U.S. 1776). Thus, the people should not foment revolution over minor disagreements about policy. History has proven that an armed populace in America does not attempt to overthrow the government over minor issues. However, as Jefferson eloquently wrote:

[W]hen a long train of abuses and usurpations begun at a distinguished period and pursuing invariably the same object, evinces a design to reduce [the people] under absolute despotism, it is their right, it is their duty to throw off such



government, and to provide new guards for their future security.

*Id.* In the end, the only statistic that matters in Second Amendment discussions is that at least sixty million (and perhaps over one hundred million) people were murdered by their own governments during the twentieth century. Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995, 1025 (1995) (book review). In America today, the necessity of exercising the last resort of revolution appears remote. But a Constitution is not for the moment—it is for the ages. The people's right to alter or abolish a despotic government is fundamental to their sovereignty. The means to exercise that right should not be entrusted to an exclusive military class any more than the freedom of speech should be entrusted only to government spokespersons.

## II. THE DISTRICT MAKES NUMEROUS FACTUAL AND STATISTICAL MISREPRESENTATIONS IN ATTEMPTING TO JUSTIFY DISARMING ITS PEOPLE

### A. The District Falsey Claims That Its Law Permits People To Assemble And Load Long Guns For Self-Defense

The District falsely claims that its prohibition of handguns is reasonable because it allows the people to keep long guns for self-defense, (DC Brief at 49), and suggests that its trigger lock and storage requirement is not an unreasonable infringement of the right to keep and bear arms. (DC Brief at 55-57.) There is no exception in D.C. Code § 7-2507.02 permitting a weapon to be loaded and unlocked for self-defense.

The District argues, without citing a single example, that a self-defense exception may be “implied” and that there may be judicial lenience in self-defense cases. (DC Brief at 56.) However, there is an explicit exemption in the statute for firearms at a place of business. D.C. Code § 7-2507.02. Thus, in a future case, the District may well rely on the rule articulated by the District’s Court of Appeals that, “the express inclusion of one (or more) thing(s) implies the exclusion of other things from similar treatment.” *Castellon v. United States*, 864 A.2d 141, 149 (2004) (citations omitted). In *McInosh v. Washington*, 395 A.2d 744, 755 (D.C. App. 1978), where the District’s Court of Appeals upheld the exception for places of business against an equal protection challenge, there was no mention of a self-defense exception for assembling and loading a weapon.



Based on the foregoing analysis, it is not at all clear that District's courts would be lenient in excusing the loading and enabling of a weapon for self-defense. Even when the District has applied statutory self-defense exceptions in other arms-related statutes, it has applied the exception only during the act of self-defense and not before or after. *Logan v. United States*, 402 A.2d 822, 826 (D.C. 1979). This has permitted courts to excuse the use of the firearm for self-defense, but then convict the person for carrying the weapon in the first place. *Cooke v. United States*, 275 F.2d 887, 888 (D.C. 1960). The court recognized the irrationality of that result, writing that “[t]here does appear to be an inconsistency between acquitting a man of assault on grounds of self-defense, and convicting him for carrying the instrument used in that defense[.]” *Id.* However, the court upheld the conviction because the statute did not provide a self-defense exception to the prohibition against carrying. *Id.* In another case, the District prosecuted an individual for possession of an unlicensed firearm after the individual shot an intruder. The District contended that, while the self-defense was excused, the possession of the weapon was not:

The government acknowledges that this case presents a difficult sentencing decision for the Court. On the one hand, the defendant fired his gun at a burglar. The safety of his home had been violated. Certainly, if the burglar were inside the home there would be no question that the defendant had the right to defend himself (although he would still face the current charge of CWPL because self-defense would only excuse the use of the weapon, not the possession of the weapon).

Government's Memorandum in Aid of Sentencing, *United States v. Plesha*, Criminal No. F-5775-07, at 3 (Sup. Ct. D.C., October 29, 1997) (emphasis supplied). Despite the District's promises to the contrary, it is likely that the District would prosecute the loading or assembly of a weapon prior to self-defense.

If a person threatened to kill an estranged spouse, it is doubtful that the spouse could load a weapon to prepare, even if a self-defense exception applied. This concern is compounded because carrying an unloaded and disassembled weapon is prohibited. *Rouse v. United States*, 391 A.2d 790 (D.C. 1978). One may be prosecuted for a self-defense use, even when s/he is carrying the arm for a lawful purpose. *Cooke v. United States*, 275 F.2d 887, 889 n.3 (D.C.Cir. 1960) (holding that a violation of DC Code § 22-4504 does not require the



defendant to intend to use the arm unlawfully); *Carey v. United States*, 377 A.2d 40, 43 (D.C. 1977). There is no exception for a weapon to be made operational for self-defense. Even if the court created a self-defense exception, it is unlikely that the exception would protect the unlocking or loading of the weapon prior to self-defense. The District's so-called support of the common law right of self-defense is disingenuous when it simultaneously denies law-abiding citizens the means of protecting themselves.

#### B. The District Falsely Asserts That Other Jurisdictions' Laws Are Comparable To The District Law

Using only the example of Chicago, the District asserts that “[m]any cities, states and nations regulate or ban handguns based on the unique dangers of those deadly weapons[.]” (DC Brief at 50.) However, D.C. Code § 7-2502.02 is not a gun regulation—it is an outright prohibition. When arguing that its regulations are “reasonable” the District cannot compare its outright prohibition to handgun regulations in other jurisdictions. The District’s examples at the petition stage included Europe and Canada. (Petition for Writ of Certiorari at 23, 27.) The District’s own source material reveals that at least fifty of the sixty-nine countries studied (seventy-one percent) permit handguns for the defense of persons and property. Wendy Cukier & Victor W. Sidel, *The Global Gun Epidemic: From Saturday Night Specials to AK-47’s* 144 (2006). “District of Columbia [firearm laws] are stricter than almost any European state.” James B. Jacobs, *Can Gun Control Work?* 35 (Oxford U. Press 2003). In Canada, a permit is required but may be issued to any law abiding adult. Safe storage is required, but any “lawful excuse,” including home defense, is a valid reason for loading a handgun in the home.<sup>4</sup>

#### C. The District Relies On Deeply Flawed Research And Evidence Taken Out Of Context To Claim That Its Handgun Ban Has Reduced Homicide Rates

The District inaccurately claims that its gradual handgun ban caused an abrupt decline in firearm-related homicides. (DC Brief at 49, 53.) In support of that conclusion, the District cites the discredited study by Colin Loftin, et al., *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991). The Loftin study is the only data cited by the petitioner that is specific to the District, and it has been thoroughly discredited by two subsequent studies, described as follows by Professor Kleck:



Consider, for example, a study of D.C.'s gradual ban on handguns in 1976. The study's authors, Loftin, et al. (1991), compared trends in gun homicide and nongun homicide in D.C. with trends in the city's suburbs, and concluded, using very strongly worded terms, that the law caused an abrupt decrease in the gun homicide rate. Kleck, Britt, and Bordua requested their data for reanalysis and were flatly refused by Loftin. We obtained the data independently, performed the reanalysis, and found that the authors' conclusions collapsed as soon as any of three improvements were made: (1) extending the time period studied to include more postintervention time points, (2) comparing D.C. with a control area, Baltimore, that was far more similar to D.C. than its suburbs, and (3) use of a more theoretically appropriate statistical model that assumed that a slow-motion handgun ban should have a gradual effect rather than an abrupt one. Any one of these changes reversed the Loftin et al. conclusions, supporting the hypothesis that the D.C. handgun ban had no impact on homicide[.]

Gary Kleck, *Targeting Guns: Firearms and Their Control* 355 (1997); Chester Britt III, et al., *A Reassessment of the D.C. Gun Law: Some Cautionary Notes On the Use of Interrupted Time Series Designs For Policy Impact Assessment*, 30 Law & Soc'y Rev. 361 (1996).

If disarming law abiding people was effective, one would expect that, after thirty years of the most restrictive handgun prohibition in America, the District would have a below average murder rate. In fact, in 2006 the District's murder rate was more than double that of comparable cities and five times the national average. Federal Bureau of Investigation, Crime in the United States 2006 (2007), available at [http://www.fbi.gov/ucr/cius2006/data/table\\_01.html](http://www.fbi.gov/ucr/cius2006/data/table_01.html) (national data), [http://www.fbi.gov/ucr/cius2006/data/table\\_08\\_dc.html](http://www.fbi.gov/ucr/cius2006/data/table_08_dc.html) (D.C. data), [http://www.fbi.gov/ucr/cius2006/data/table\\_16.html](http://www.fbi.gov/ucr/cius2006/data/table_16.html) (data on cities with populations between 500,000 and one million) (statistics complied by Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?* scheduled for publication in Geo. Mason U. Civ. Rts L.J.).

The District cited Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1095-98 (2001), for the proposition that, "a 10% increase in handgun ownership increases the homicide rate by 2%." (DC Brief at 52.) The Brief of the Claremont Institute exposes many flaws in this research which need not be repeated here. It is interesting to note that, like Loftin, Mr. Duggan has repeatedly refused to share his data for verification. Florenz Plassman & John R.



Lott, Jr., *More Readers of Gun Magazines, But Not More Crimes*, Soc. Sci. Research Network 3 (July 2, 2002), available at <http://ssrn.com/abstract=320107>; John R. Lott, *The Bias Against Guns* 233, 246 (2003).

The District cites Cynthia Leonardatos, et al., *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 Conn. L. Rev. 157, 169-70, 178-80 (2001), for the proposition that, “[s]afety mechanisms, while helpful, do not always work as designed, and compliance, even with mandatory safety laws, is imperfect.” (DC Brief at 54.) While this citation is technically accurate, it is taken out of context and ignores the well-supported conclusions of the article, which are that the District’s measures are ineffective in reducing the misuse of arms and interfere significantly with self-defense:

Legislative mandates for gun storage, and legislative mandates for gun personalization initially seem attractive because they promise to reduce gun misuse by unauthorized persons. But when these mandates are closely examined, their practical ability to reduce unauthorized use seems rather small, and is outweighed by the increased dangers that result from interference with lawful defensive uses, and by the widespread resistance that will be encountered, from both police and civilians.

*Id.* at 219. Thus, far from concluding that the District’s trigger lock and storage requirements are reasonable, the Leonardatos article actually suggests that they are unreasonable.

#### D. The District Falsely Asserts that Handguns are Deadlier than Long Guns

The District claims that handguns are the most common weapons in street crimes. (DC Brief at 51.) However:

54-80% of homicides occur in circumstances in which in which long guns could be substituted for handguns, that most surveyed felons say would carry a sawed-off long gun if they could not get a handgun, and that the deadliness of the substituted long guns would almost certainly be at least 1.5-3 times greater than that of handguns.

Gary Kleck, *Point Blank: Guns and Violence in America* 92 (1991). Even if a handgun ban could be perfectly enforced, it would not make a significant difference. Making the realistic assumption that substituted long guns would be twice as lethal as handguns, the substitu-



tion rate would have to be less than forty-four percent in order for the ban to provide any improvement. *Id.* The conclusion of this analysis is that, “controls aimed solely at handguns or at small, cheap handguns are a mistake because they encourage substitution of more lethal types of guns.” Kleck, *Targeting Guns, supra*, at 139, 303.

#### E. The District Incorrectly Asserts That Handguns Are Dangerous In The Hands Of Ordinary Citizens

It is important to confront the persistent falsehood that a privately-owned firearm is more dangerous to the law abiding owner than a potential intruder. In reality, “[a] fifth of the victims defending themselves with a firearm suffered an injury, compared to almost half of those who defended themselves with weapons other than a firearm or who had no weapon.” U.S. Dep’t of Justice, Bureau of Justice Statistics, Crime Data Brief, (April 1994, revised Sept. 24, 2002), *available at*, <http://www.ojp.usdoj.gov/bjs/pub/ascii/hvfsdaft.txt>. Similarly, “[r]esistance with a gun appears to be the most effective in preventing serious injury” to the victim. Jungyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Actions on the Outcomes of Crimes*, 42 Criminology 861, 902 (2004). It strains reason and ignores statistics to claim that an unarmed victim is safer than an armed one. It is also insulting to the character of a free people to suggest that they surrender to the demands of violent criminals in the timid hope of appeasing them, rather than arming themselves to resist.

The District further claims that prison inmates prefer handguns. (DC Brief at 51.) However, law-abiding citizens purchasing weapons for self-protection also prefer handguns. U.S. Department of Justice, Nat'l Institute of Justice, *Guns in America: National Survey on Private Ownership and Use of Firearms* 3, 4, 7 (May 1997), *available at*, <http://www.ncjrs.gov/pdffiles/165476.pdf>. Unlike law-abiding citizens, inmates report that if they could not get a handgun they would resort to highly lethal sawed-off shotguns. Gary Kleck, *Point Blank, supra*, at 92.

The District cites Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084 (1993), for the proposition that people in households with guns are more likely to die in a homicide. (DC Brief at 52.) As Professor Kleck stated:

This finding was a largely or entirely spurious association that failed to control for risk factors that increase the likelihood both of owning guns for self-protection and of becoming homicide vic-



tims, including being a drug dealer (as distinct from a mere user) and being a member of a street gang. The association also becomes insignificant if one adjusts for a level of error which Kellerman has acknowledged affects surveys. Further, the finding was also confined to the high homicide areas of just three urban counties, and thus could not be generalized to any larger population.

Kleck, *Targeting Guns*, *supra*, at 22, 57, 60, 216-18, 244-47.

#### F. The District Falsely Asserts That Accidental Handgun Deaths Of Children Are Frequent

The District claims that handguns frequently cause accidents involving children and that “dozens” are killed annually. (DC Brief at 53.) The mental picture of a child shooting himself or a playmate with an improperly stored gun is wrenching. However, Americans are extremely careful when it comes to safeguarding children against such accidents. Each year, approximately forty-eight children under thirteen years old die from reported handgun accidents in the United States. Kleck, *Targeting Guns*, *supra*, at 299. This statistic is likely overstated, because some of these are almost certainly extreme abuse incidents where the abuser claims that the death was an accident. *Id.*

Compared to other hazards of daily life, gun ownership is relatively safe. For example, swimming pools annually account for 350-500 deaths of children under five years old and 2,600 injuries, some resulting in permanent brain damage. Consumer Product Safety Commission, Backyard Pool: Always Supervise Children, Safety Commission Warns, CPSC Document #5097, available at, <http://www.cpsc.gov/cpscpub/pubs/5097.html>. This is so, even though there are only five-million home swimming pools compared to forty-three million households with guns. Kleck, *Targeting Guns*, *supra*, at 296. Thus, the risk of fatal accidents is over one-hundred times greater for a household with a pool than a household with a handgun. Each year in America there are approximately one-thousand deaths related to bicycles, and approximately one-million emergency room visits. Consumer Product Safety Commission, Bicycle Study, CPSC Document #344 at 1, <http://www.cpsc.gov/cpscpub/pubs/344.pdf>. These casualties cause losses of approximately eight-billion dollars annually. *Id.*

The Brief of the American Academy of Pediatrics relies on U.S. Dep’t of Justice, Nat’l Inst. of Justice, *High School Youths, Weapons and Violence: A National Survey* 6 (1998), available at, <http://www.ncjrs.gov/pdffiles/172857.pdf>, for the proposition that “there is simply



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no way to make guns ‘safe’ for children—gun safety programs have little effect in reducing firearms death and injury.” (Brief of the American Academy of Pediatrics, et al., at 7). In fact the cited report says no such thing. U.S. Dep’t of Justice, Nat’l Inst. of Justice, *supra*, at 6. While every accidental loss of a child is tragic, the small number lost in handgun accidents demonstrates that Americans are conscientious about their safety.

#### G. The District Overstates The Impact Of Handguns In The Schools

The District claims that a significant percentage of middle school students in some areas claim to have carried a gun to school. (DC Brief at 53.) There are approximately seven school shooting deaths per year in the United States. Gary Kleck, *Targeting Guns*, *supra*, at 203-04 (1997). While each one of these deaths is a tragedy, a greater number of deaths occur annually as a result of high school football. Frederick O. Mueller, et al., *Catastrophic Injuries in High School and College Sports*, 8 HK Sport Science Monograph Series 42, 47 (1996).

### CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

JEFFREY B. TEICHERT  
*Counsel of Record*

### ENDNOTES

1. Institutional affiliations of professors are provided only for identification.
2. The parties were notified of the intention to file this brief seven days prior to its due date as per the consent letters filed in this matter. No counsel for a party authored this brief in whole or in part. No person other than *amicus curiae*, their members, or counsel made a monetary contribution to its preparation or submission.
3. This Court has said, “Blackstone’s Commentaries are accepted as the most satisfactory exposition of the common law of England.” *Schick v. United States*, 195 U.S. 65, 69 (1904). The volume of Blackstone’s Commentaries dedicated to the rights of persons was published only eleven years



before the Declaration of Independence and was widely read in the American colonies. Edmund Burke, *Speech on Conciliation with the Colonies* (March 22, 1775), reprinted in *The Essential Bill of Rights* 170, 173 (Gordon Lloyd & Margie Lloyd, eds., 1998) (“I hear that [booksellers] have sold nearly as many of Blackstone’s ‘Commentaries’ in America as in England”).

4. “Every person commits an offence who, without lawful excuse, uses . . . transports or stores a firearm . . . or any ammunition . . . in a careless manner or without reasonable precautions for the safety of other persons.” Criminal Code, R.S.C., ch. C-46, § 86(1) (1985) (Can.).





# INTEREST OF AMICUS CURIAE<sup>1</sup>

*Amici curiae* include an institution and many distinguished scholars from various fields who are concerned about ensuring accuracy in the scholarship advanced in important matters of public policy such as those involved in this case.<sup>1</sup>

## THE CLAREMONT INSTITUTE

The Claremont Institute is a nonprofit organization which seeks to promote scholarly analysis on important policy issues including gun control.

## DISTINGUISHED SCHOLARS

**Frederick Bieber** is a professor at Harvard Medical School who lectures on gun-shot wounds.

**David Bordua** is Professor Emeritus of Sociology at the University of Illinois at Champaign. He is the author or co-author of, among other works, *Firearms Ownership and Violent Crime: A Comparison of Illinois Counties*, in J. Byrne and R. Sampson (ed.), *The Social Ecology of Crime* (1986); *Gun Control and Opinion Measurement*, 5 Law & Pol'y Quarterly 345 (1983); and *Patterns of Legal Firearms Ownership: A Situational and Cultural Analysis of Illinois Counties*, 2 Law & Pol'y Quarterly 147 (1979).

**Edwin Cassem** is a professor at Harvard Medical School and co-author of *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda*, 62 Tenn. L. Rev. 513 (1995).

**Raymond Kessler** is a professor of criminal justice at Sul Ross State University. He has authored, among other works, *Enforcement Problems of Gun Control: A Victimless Crimes Analysis*, 16 Crim. L. Bulletin 131 (1980); *Gun Control and Political Power*, 5 Law & Pol'y Quarterly 381 (1983); and *The Ideology of Gun Control*, 12 Quarterly J. of Ideology 381 (1988).

**Gary Mauser** is Professor Emeritus at the Institute for Canadian Urban Research Studies, Simon Fraser University in Burnaby, British Columbia. He has authored or co-authored, among other works, *Would Banning Firearms Reduce Murder and Suicide: A Review of*



*International Evidence*, 30 Harv. J.L. & Pub. Pol'y 651 (2007); *Gun Control in the United States*, 3 Crim. L. Forum 147 (1992); *An Evaluation of the 1977 Canadian Firearms Legislation: Robbery Involving a Firearm*, 35 Applied Econ. 423 (2003), *On Defensive Gun Use Statistics*, 13 Chance [Magazine of the American Statistical Association] (2000).

**Daniel Polsby** is dean and professor of law at George Mason University. He has authored or co-authored, among other works: *Long Term Non-Relationship of Firearm Availability to Homicide*, 4 Homicide Studies 185 (2000); *American Homicide Exceptionalism*, 69 U. Colo. L. Rev. 969 (1998); *Firearms Costs, Firearms Benefits and the Limits of Knowledge*, 86 J. Crim. L. & Criminology 207 (1995); *Of Holocausts and Gun Control*, 75 Wash. U. L.Q. 1237 (1998); and *Reflections on Violence, Guns and the Defensive Use of Deadly Force*, 49 Law & Contemp. Probs. 89 (1986).

**Lawrence Southwick** is Professor Emeritus at the State University of New York-Buffalo and has authored: *Self-Defense with Guns: The Consequences*, 28 J. Crim. Just. 351 (2000); *An Economic Analysis of Murder and Accident Risks for Police in the United States*, 30 Applied Econ. 593 (1998); and *Do Guns Cause Crime? Does Crime Cause Guns? A Granger Test*, 25 Atlantic Econ. J. 256 (1997).



**Lance Stell** is the Charles A. Dana Professor and Director of Medical Humanities at Davidson College. He is the author of *Self Defense and Handgun Rights*, 2 J.L. Econ. & Pol'y 265 (2006); *Gun Control*, in *A Companion to Applied Ethics*, R.G. Frey & C.H. Wellman (eds.) 192 (2003); *The Production of Criminal Violence in America: Is Strict Gun Control the Solution?*, 32 J.L. Med. & Ethics (2001); *Gun Control and the Regulation of Fundamental Rights*, Crim. Just. Ethics (2001); and *Guns, Politics and Reason*, 9 J. Am. Culture 71 (1986).



**William Tonso** is a professor of sociology at the University of Evansville. He edited *The Gun Culture and Its Enemies* (1989), and authored *Social Science and Sagecraft in the Debate Over Gun Control*, 5 Law & Pol'y Quarterly 325 (1983).

**Walter E. Williams** is the John M. Olin Distinguished Professor of Economics at George Mason University. A nationally syndicated columnist, he is the author of six books and numerous publications on various issues relating to economics and public policy, including gun control.

Additional *amici* are listed in the Appendix.



## SUMMARY OF ARGUMENT

Handgun prohibition is simply not effective to produce good and valuable effects in society. Handgun prohibitions such as those enacted by the City Council of the District of Columbia (“the District”) appear to be effective only at removing from law-abiding citizens the best means of protecting themselves, their loved ones and others from violent criminals. The District’s 30-year social experiment with handgun prohibition has, if anything, illustrated this sad fact. Rather than becoming safer, our Nation’s Capital has unfortunately become known as the “murder capital” of the United States, one of the most violent cities in the country. In light of the District’s gun prohibitions, there is little that the residents can realistically do but hope that they do not become victims themselves.

This case involves various statistics and differing analyses of those statistics. But, in the end, the reality is that the District is claiming that its gun laws—the most restrictive gun prohibitions in the Nation—have been effective in reducing violent crime when, among other things:

- since the implementation of the 1977 ban, the District’s murder rate has only *once* fallen below what it was in 1976;
- since 1977, there have been only *four years* when the District’s violent crime rate fell below the rate in 1976; and
- in an incredible 15 years that the ban has been in place the District has ranked #1 or #2 in murders; in four of those years it was #4.

The District and its *amici* assert that the District’s gun bans actually reduced violent crime notwithstanding the increased crime rates. However, the studies advanced in support of this position are fundamentally flawed and reach conclusions favorable to the District only through questionable selection of data and extremely unorthodox methodologies—such as ignoring large population changes, and counting only raw numbers of homicides (which incorrectly included justifiable homicides as well as murders) rather than per capita murder rates. Correctly analyzed, the District’s crime statistics confirm that there is no real evidence that the handgun ban helped, and reason to believe that it may have hurt the District’s residents.



Underlying the District's gun ban is the theory that the presence of more guns in a given society means there will be more violence and death. National and international data refute this; if anything they show that areas with more gun ownership often have lower violent crime or murder rates than those that forbid guns. Nor do such bans avert suicide, though they do cause the suicidal to turn to equally effective methods other than guns.

The District's policies are not backed by evidence justifying the need to divest law-abiding persons of the only reliable means of self-defense. This is especially true because those citizens virtually never commit violent crimes. The unique importance of firearms is that only they allow weaker people to resist predation by stronger ones:

Reliable, durable, and easy to operate, modern firearms are the most effective means of self-defense ever devised. They require minimal maintenance and, unlike knives and other weapons, do not depend on an individual's physical strength for their effectiveness. Only a gun can allow a 110 pound woman to defend herself against a 200 pound man.

Linda Gorman & David B. Kopel, *Self-defense: The Equalizer*, 15 Forum for Applied Research & Pub. Pol'y 92, 92 (2000).

## ARGUMENT

### I. THERE IS NO EVIDENCE THAT THE DISTRICT'S GUN PROHIBITIONS HAVE PRODUCED GOOD RESULTS.

A. Following the enactment of the District's handgun ban, the District has not been made safer—indeed, the District has only become an even more dangerous place to live.

Contrary to the assertions of the District and its *amici*, there is simply no persuasive evidence that the District's handgun ban has reduced violent crime. Indeed, if there is anything to be discerned from the state of affairs in the District, it is that the handgun ban has made things worse, as murder and other violent crime has skyrocketed.

Over the five pre-ban years the murder rate fell from 37 to 27 per 100,000 population. In the five post-ban years the murder rate rose to 35. *Id.* Averaging the rates over the 40 years surrounding the bans yields a pre-ban DC rate (1960-76) of 24.6 murders. The aver-





age for the post-ban years is nearly double: 47.4 murders per 100,000 population. The year before the bans (1976), the District's murder rate was 27 per 100,000 population; after 15 years under the bans it had *tripled* to 80.22 per 100,000 (1991). *Id.*

After 1991, the homicide toll declined in the District and still “the percentage of killings committed with firearms remained far higher than it was when the ban was passed.” Paul Duggan, “Crime Data Underscores Limits of D.C. Gun Ban’s Effectiveness,” *Washington Post*, Nov. 13, 2007, at B01.<sup>2</sup> In 2003 the Secretary of Defense noted that the District’s murder rate was higher than Baghdad’s. Robert Endorf, *The District of Columbia Gun Ban: Where the Seductive Promise of Gun Control Meets Reality*, 19 J. Firearms & Pub. Pol'y 43, 44 (2007). In 2006, even after a decade of drops in the murder rate, the District’s murder rate “was more than five times higher than the national average, and more than double the rate in comparably sized cities.” Nelson Lund, *D.C.’s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 Geo. Mason U. Civ. Rts. L.J. 229, 230 n.5 (2008) (citing FBI statistics on murder data from DC and other jurisdictions).

After the gun prohibitions, the District became known as the “murder capital” of America. Before the challenged prohibitions, the District’s murder rate was declining, and by 1976 had fallen to the 15th highest among the 50 largest American cities. After the ban, the District’s murder rate fell below what it was in 1976 *only one time*. *Id.* at 3a. In half of the post-ban years, the District was ranked the worst or the second-worst; in four years it was the fourth worst. *Id.* at 4a.

Nor is there evidence that the bans have reduced overall violent crime rates. From 1977 to 2006, there were only *four years* when the District’s violent crime rate fell below the rate in 1976. See District of Columbia Crime Rates 1960-2006, <http://www.disastercenter.com/crime/dccrime.htm> (reporting data from FBI Uniform Crime Reports<sup>3</sup>). In 2006, the District’s “overall violent crime rate was about triple the national average, and about fifty percent higher than in comparably sized cities.” Lund, *supra*, at n.5.

It is theoretically possible that the gun bans had some small positive effect that has been continually overwhelmed by other, more powerful factors causing the murder and violent crime rates to climb. However, in light of this undisputed statistical evidence, the counter-evidence for any “positive effects” would have to be extraordinary. No such counter-evidence exists.



B. Studies relied upon by the District and amici to try to explain away the District's substantial increase in murder during the handgun ban period are unreliable.

### 1. The Loftin study

The only evidence for the District's and *amicis* claim that the District's handgun ban reduced murder is a study published in 1991 by Colin Loftin and others. Colin Loftin, *et al.*, *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991). However, the Loftin study—which compared statistics from two time periods: 1968-76 and 1977-87—contains many errors that render the study unreliable.

The fundamental error in the Loftin study is that, contrary to standard criminological practice, it utilizes only the *raw number* of “homicides” (as Loftin defined that term)<sup>4</sup> per month in the District rather than murder *rates* per year, which, as noted above, continued to rise during the handgun ban period. *See id.*

The extremely unorthodox methodology of using raw numbers rather than rates was buttressed by the Loftin study's use of the wrong before/after date. The study used October 1976 (the date the bans were enacted), and failed to consider the lawsuit which delayed the effective date of the ban until February 1977.<sup>5</sup> *See* Chester L. Britt, Gary Kleck & David J. Bordua, *A Reassessment of the D.C. Gun Law: Some Cautionary Notes on the Use of Interrupted Time Series Designs for Policy Impact Assessment*, 30 Law & Soc'y Rev. 361, 374 (1996) (discussing the fact that the law became “fully effective” on February 21, 1977).

The Loftin study accurately reports that the raw number of “homicides” declined in the first few years after the ban. *But murder rates did not.* The Loftin study's incorrect use of raw numbers instead of murder rates obscures the more plausible reason behind the drop in raw numbers: a substantial decline in the District's population. During the Loftin study period, the District's population declined from 809,000 in 1968 to 622,000 in 1987. *See* <http://www.disastercenter.com/crime/dccrime.htm>. Murder rates rose after the ban.

The Loftin study acknowledges the possibility of population decline, but, rather than examine population estimates for the period, simply concludes based on vital statistics that there was no population decline. Loftin, *et al.*, *supra*, at 1616. Yet population estimates for the District clearly show the large decline between the two study periods (1968-76 and 1977-87).

Moreover, again contrary to criminological practice, the Loftin



study takes no account of other changes (e.g., large police personnel increases) which may also have impacted the total homicides.

However, even using Loftin's own data, when analyzed under correct criminological methodology (examining yearly murder rates per 100,000 (to correct for population changes)) the 25% number vanishes. Thus, when adjusted for population decline, the most that Loftin's own data shows is a drop in the *total* homicide rate of 33.0 per 100,000, to 31.2 per 100,000. This change (5.7%) is smaller than the one that the Loftin study authors themselves call statistically insignificant. *See* Loftin, et al., *supra*, at 1617 (stating that a decline of 7% in gun-related homicides and a 12% increase in gun-related suicides occurring outside the District was statistically insignificant).

Also, re-creating the Loftin study using the FBI's data on murder and non-negligent homicide rates (not the Loftin study's broader definition of homicide) reveals no significant change in the District's murder rate. Instead, the difference between the mean murder rate for 1968 through 1976 (33) and for 1977 through 1987 (30) is statistically insignificant.

Furthermore, the Loftin study is, in statistical terms, a "fragile" study. *See* Britt, et al., *supra*, at 375 (discussing "fragility"). That is, the Loftin study and its conclusions hold together only if certain variables are carefully chosen and not altered. If virtually any variable is adjusted even slightly, the study's conclusions are unsupported—or even contradicted. For example, using the correct "effective date," 1977 (the year that the injunction against the ban was lifted), makes the resulting pre-ban to post-ban change in murder rates insignificant. Adding one more year of data to either the beginning or end of the sample also makes the resulting change insignificant. *See id.* (demonstrating the fragility of the Loftin's study even using the study's incorrect "raw number" methodology). And if all available data is used (1960-2006), one would conclude, under Loftin's methodology, that the handgun ban caused a large and significant increase in the murder rate.

Among other issues, the "fragility" of the Loftin study and its incorrect "effective date" were part of a larger published debate concerning the reliability of the Loftin study. *See* Britt, et al., *supra* (criticizing the Loftin study); David McDowall, Colin Loftin & Brian Wiersema, *Using Quasi-Experiments to Evaluate Firearm Laws: Comment on Britt et al.'s Reassessment of the DC Gun Law*, 30 Law & Soc'y Rev. 381 (1996); Britt, et al., *Avoidance and Misunderstanding: A Rejoinder to McDowall et al.*, 30 Law & Soc'y Rev. 393 (1996). In 2004, the Nation-



al Academy of Sciences rendered its verdict on the debate, finding the Britt, *et al.* critique (and other studies) to be sound, stating:

Britt et al. (1996) ... demonstrate that the earlier conclusions of Loftin et al. (1991) are sensitive to a number of modeling choices. They demonstrate that the same handgun-related homicide declines observed in Washington, DC, also occurred in Baltimore, even though Baltimore did not experience any change in handgun laws. Thus, if Baltimore is used as a control group rather than the suburban areas surrounding DC, the conclusion that the handgun law lowered homicide and suicide rates does not hold. Britt et al. (1996) also found that extending the sample frame an additional two years (1968-1989) eliminated any measured impact of the handgun ban in the District of Columbia. Furthermore, Jones (1981) discusses a number of contemporaneous policy interventions that took place around the time of the Washington, DC, gun ban, which further call into question a causal interpretation of the results.

In summary, the District of Columbia handgun ban yields no conclusive evidence with respect to the impact of such bans on crime and violence. The nature of the intervention—limited to a single city, nonexperimental, and accompanied by other changes that could also affect handgun homicide—make it a weak experimental design. *Given the sensitivity of the results to alternative specifications, it is difficult to draw any causal inferences.*

Charles F. Wellford, John V. Pepper & Carol V. Petrie (eds.), *Firearms and Violence: A Critical Review* 98 (National Academies Press 2005) (emphasis added; footnote omitted).

After the ban, how did the murder rate in the District change in relation to the murder rates in nearby Virginia and Maryland? The District always had a higher murder rate relative to Maryland and Virginia. As the following graph indicates, before the ban, murder was declining in all three. After the ban, all three had generally stable murder rates for a decade until all three began rising—the District much more than the other two. The claim that the bans have succeeded simply does not square with the District's failure to reduce its murder rate even slightly relative to its neighbors.

The reality is that one's chance of being murdered in the District has not dropped, but has continually gone up following the enactment of the gun ban. In only one of the 30 post-ban years has the District's



murder rate been lower than its pre-ban 1976 rate. And, as to overall violent crime, in only *four* of the post-ban years was the District's rate below the pre-ban year 1976. *See* <http://www.disastercenter.com/crime/dccrime.htm>.

In response to the fact that the District's homicide rates continued to increase (sometimes drastically) during the handgun ban period, *amici* for the District argue that, "in the mid-1980s," "the entire nation experienced an increase in violent crimes during this period because of the emergence of the crack cocaine market and related gang activity." Brief of Professors of Criminal Justice as *Amici Curiae* in Support of Petitioners, at 14. However, this explanation ignores the fact that the District's murder rate grew much worse relative to the 50 largest U.S. cities and to the United States as a whole. The crack epidemic and gang activity was national; but while murder in other cities rose, murder in the District skyrocketed.

Some other factors unique to the District must have been at work. It is possible that the District's gun law itself may have been a contributing factor in the increased crime. What is certain is that the Loftin study's conclusion that murder was reduced is unreliable.

## 2. The Kellermann study

The District and its *amici* claim that merely living in a house with a gun triples the chance of becoming a homicide victim, citing Arthur L. Kellermann, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084 (1993). *See* Cert. Petition at 25; Petitioners' Brief at 52; Brief of *Amici Curiae* American Public Health Ass'n, et al., at 14. Yet, though the Kellermann study analyzed over 400 homicides, "the authors did not document a single case in which the victim was killed with a gun kept in the victim's home." Gary Kleck, *Targeting Guns: Firearms and Their Control* 245 (1997). Apparently in over 95% of the cases the gun was brought to the home by the killer. *Id.* at 245-46.

It seems the decedents may have been unrepresentative of ordinary gun owners; their deaths may have stemmed from high risk career or personal relationship choices, not from their gun ownership. A national study of gun murders between acquaintances in homes finds "the most common victim-offender relationship was ... between persons involved in drug dealing, where both parties were criminals who knew one another because of prior illegal transactions." *Id.* at 236.

Moreover, the Kellermann study vastly underestimates the defensive benefits of guns in the home by acknowledging only instances



es when guns killed an intruder, even though the vast majority of defensive uses result in criminals fleeing rather than being shot. *See Brief of Amici Curiae International Law Enforcement Educators & Trainers Ass'n, et al.*, at 15 (discussing defensive benefits). And, if they were shot, six times more criminals would survive than would die. Don B. Kates, *The Value of Civilian Arms Possession as Deterrent to Crime or Defense Against Crime*, 18 Am. J. Crim. L. 113, 135-36 (1991).

Furthermore, the Kellermann study is founded upon flawed assumptions as to causation, rendering the study unreliable and leading to absurd conclusions. For example: if a group of people who died in a particular year were compared with a group who did not die, it is highly probable that that comparison will reveal that many more of the decedents visited a hospital in that year. Under the Kellermann methodology, one would be allowed to erroneously conclude that hospitals cause death. *See John R. Lott, Jr., More Guns, Less Crime* 24 (Univ. of Chicago Press 2000) (2d ed.) (giving this example); *see also* Kleck, *Targeting Guns*, at 243-47; Gary Kleck, *Can Owning a Gun Really Triple the Owner's Chances of Being Murdered? The Anatomy of an Implausible Causal Mechanism*, 5 Homicide Studies 64-77 (2001).

Noting these problems with the Kellermann study, the National Academy of Sciences found that the Kellermann "conclusions are not tenable." Charles F. Wellford, John V. Pepper & Carol V. Petrie (eds.), *Firearms and Violence: A Critical Review* 118-19 (National Academies Press 2005).<sup>6</sup>

## II. CRIMINOLOGICAL EVIDENCE FROM THE UNITED STATES AND FROM FOREIGN JURISDICTIONS DISCREDITS THE NOTION THAT "MORE GUNS EQUALS MORE MURDER."

The District's lack of evidence supporting its gun policies are not surprising, given the shaky foundations and erroneous assumptions underlying those policies. The primary pillar of the argument that gun prohibition produces good results is the notion that "more guns equals more murder." *See Cert. Pet.* at 22-29; Petitioners' Br. at 49-55; *Brief of Amici Curiae American Public Health Ass'n, et al.*, at 8-20; *Brief of Professors of Criminal Justice as Amici Curiae in Support of Petitioners*, at 5. However, this notion is demonstrably untrue.

A. United States statistics show that increased gun availability does not increase the number of murders.



The United States has the most extensive data on gun ownership and murder. The earliest reliable gun ownership data begin right after WWII. In 1946 there were 34,400 civilian firearms per 100,000 Americans and the murder rate was 6.9 per 100,000 population; 60 years later in 2004, gun ownership had almost tripled (85,000 guns per 100,000). Yet the murder rate had actually *declined* to 5.5 per 100,000. *Id.* This evidence discredits the simplistic notion that increasing the civilian gunstock produces concomitant (or any) increases in murder.

TABLE I

Year	Guns per 1000 persons	Murders per 1000 persons
1946	344	0.069
1950	381	0.053
1960	431	0.051
1970	549	0.079
1980	738	0.101
1990	853	0.094
2000	885	0.055
2001	876	0.056
2002	867	0.056
2003	858	0.057
2004	850	0.055

These figures discredit the theory that predicts increased murder from an increase in guns. For example, the gunstock per 1000 persons rose from 627 to 858 over the 30-year period between 1974-2003, but the murder rate fell 41%.

Additionally, according to the National Crime Victimization Survey, despite the increasing gunstock, nonfatal firearms crimes fell by over 50% since 1993.<sup>7</sup> Consideration of such data led one researcher to conclude that, while rising crime rates might cause frightened citizens to acquire guns, such rises in the civilian gunstock do not increase violent crime. Lawrence Southwick, *Do Guns Cause Crime? Does Crime Cause Guns? A Granger Test*, 25 Atlantic Econ. J. 256 (1997).

Professor Southwick's conclusions confirmed those of a study of gun ownership and crime over 170 American cities with widely varying levels of gun ownership; the study controlled for other factors in violence rates. The results showed that higher violence levels increased gun ownership; but increased gun ownership did not in-



crease murder or other crimes. Gary Kleck & Britt Patterson, *The Impact of Gun Control and Gun Ownership Levels on City Violence Rates*, 9 J. Quant. Criminology 249-87 (1993); see also Lott, *More Guns, Less Crime*, *supra*, at 113-14 (reaching the same conclusion from data from states across the entire country).

Subsequently, the most extensive and sophisticated econometric analysis (covering 20 years in 50 states) of whether increased levels of gun handgun ownership, or of gun ownership in general, increases crime concluded: “The estimated net effect of guns on crime... is generally very small and *insignificantly different from zero.*” Carlisle Moody & Thomas Marvell, *Guns and Crime*, 71 So. Econ. J. 720, 735 (2005) (emphasis added).

B. The Duggan study relied on by the District and *amici* is fundamentally flawed.

To counter such evidence, the District and its *amici* cite a study by Mark Duggan for the proposition that “increases in gun ownership lead to increases in the number of homicides.” Brief of Professors of Criminal Justice as *Amici Curiae* in Support of Petitioners, at 5 (quoting Mark Duggan, *More Guns More Crime*, 109 Pol. Econ. 1086, 1100-01 (2001)); see also Petitioners’ Brief at 52; Cert. Pet. at 27; Brief of *Amici Curiae* American Public Health Ass’n, et al., at 15. However, the Duggan study is fundamentally flawed, as are these conclusions.

The Duggan study was not based on actual data about gun distribution evidence. That is, Duggan never measured whether any city had more guns or less guns. Instead, his study is based solely on the circulation of one magazine, *Guns & Ammo*.

What the Duggan study does not tell its readers is that, because of commitments to advertisers to guarantee certain levels of circulation during the 1990s, between 5% and 20% of *Guns & Ammo* copies were bought by the magazine itself and distributed free to doctors’ and dentists’ offices. The counties in which these self-purchases were made were where the magazine thought that crime rates were increasing. See Florenz Plassmann & John Lott, Jr., *More Readers of Gun Magazines, But Not More Crimes*, Soc. Sci. Research Network (July 2, 2002) (available at <http://ssrn.com/abstract=320107>). Because of the self-purchases, *Guns & Ammo* is probably the only magazine that implies the relationship that Duggan finds. See John R. Lott, Jr., *The Bias Against Guns* 232-34 (2003).

Simply put, the Duggan study is fundamentally unsound. The study stands in sharp contrast to a much more exhaustive econo-



metric analysis of the subject, which concluded that gun ownership does not cause violence. Moody & Marvell, *supra*, at 726-30, 733-35. The Moody study so found after analyzing *actual* gun ownership survey data plus circulation data from the three more popular gun magazines. *Id.* See also Lott, *More Guns, Less Crime*, *supra*, at 113-14 (discussing survey gun ownership survey data indicating that the number of guns is inversely related to the amount of crime).

In sum, although American murder rates have fluctuated substantially since 1946, none of those fluctuations fulfilled the prediction that prodigious increases in guns would increase violence. As the standard text on the criminology of firearms states:

The per capita accumulated stock of guns (the total of firearms manufactured or imported into the United States, less exports) has increased in recent decades, yet there has been no correspondingly consistent increase in either total or gun violence... About half of the time gun stock increases have been accompanied by violence decreases, and about half the time [they have been] accompanied by violence increases, *just what one would expect if gun levels had no net impact on violence rates.*

Kleck, *Targeting Guns*, *supra*, at 18 (emphasis added).

C. Foreign criminological evidence discredits the notion that more guns equals more murder.

The evidence from foreign jurisdictions leads to the same conclusion as the United States data. In general, comparison of “homicide and suicide mortality data for thirty-six nations (including the United States) for the period 1990-1995” to gunstock levels shows “no significant (at the 5% level) association between gun ownership and the total homicide rate.” Kleck, *Targeting Guns*, *supra*, at 254. Additionally, in a 2001 European study of 21 nations’ data, “no significant correlations [of gunstock levels] with total suicide or homicide rates were found.”<sup>8</sup>

A 2007 study compared gun ownership and murder in every European nation on which the data could be found. Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International Evidence*, 30 Harv. J.L. & Pub. Pol'y 651-94 (2007). Again, nations with more guns did not exhibit higher murder rates. Indeed, the tendency is generally the opposite: murder rates for the seven nations having 16,000+ guns average out to 1.2 per 100,000 population while the murder rates for the nine nations



having just 5,000 or fewer guns is well over three times higher, at 4.4 per 100,000. *Id.*

These national comparisons suggest that the determinants of murder are factors such as basic socio-economic and cultural factors, and not the mere availability of guns.

Leading gun control advocates have admitted that “Israel and Switzerland [have] rates of homicide [that] are low despite rates of home firearm ownership that are at least as high as those noted in the U.S.” Arthur L. Kellermann, et al., *The Epidemiologic Basis for the Prevention of Firearm Injuries*, 12 Annual Rev. Pub. Health 17, 28 (1991). Cf. Lott, *More Guns, Less Crime*, at 113 (making the same point about Finland and New Zealand as well as Israel and Switzerland). To the same effect, within Canada,<sup>9</sup> “England, America and Switzerland, [the areas] with the highest rates of gun ownership are in fact those with the lowest rates of violence.” Joyce Lee Malcolm, *Guns and Violence: The English Experience* 204 (Harvard 2002).<sup>10</sup>

The non-relation of gunstock rates to murder is confirmed by studies of the effects of gun bans on murder and suicide in various jurisdictions. Some studies show no effect; in others *gun* deaths declined somewhat after gun bans—but this produced no net benefit—killings with other deadly instruments just rose to make up the difference. Kleck, *Targeting Guns*, *supra*, at 265-89 (collecting studies).

### III. EVEN NATIONAL GUN BANS FAIL TO REDUCE VIOLENCE.

The District officials who enacted the bans did not expect to reduce criminal activity; the bans were primarily intended to “start a trend, eventually leading to a federal handgun ban.” Paul Duggan, “Crime Data Underscore Limits of D.C. Ban’s Effectiveness,” *Washington Post*, Nov. 13, 2007 (also noting that then-Councilman Marion Berry admitted that the bans would “not take one gun out of the hands of one criminal”). Yet the experience of other nations suggests that even a national handgun ban would not reduce homicide.

Consider Russia, where handguns have been banned to civilians for over 90 years, and this strictly enforced by methods forbidden to American police. Kates & Mauser, *supra*, at 650-51. The ban has been successful in the irrelevant respect that *gun* murders are rare in Russia. But other murder weapons are substituted—and the Russian murder rate has always been higher than gun-ridden America’s. *Id.* In recent years Russia’s murder rate has been nearly four times higher. Former Soviet nations like Belarus and Lithuania also ban handguns and their murder rates are two or three times higher than



America's. See Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J.L. & Econ. 615, 625ff. (2001) (listing rates).

In England, violent crime steadily rose over decades of ever more restrictive controls, culminating in its 1997 handgun ban. Despite confiscation of hundreds of thousands of guns, by 2000 English violence rates far surpassed American. John van Kesteren, et al., in Esther Bouten, et al., *Crime Victimization in Comparative Perspective: Results from the International Crime Victims Survey, 1989-2000*, 13, 15-16 (2002). Specifically, the number of deaths and injuries from gun crime in England and Wales increased 340 percent in the seven years from 1998 to 2005. David Leppard, "Ministers 'covered up' gun crime," the *Sunday Times* (London), Aug. 26, 2007.<sup>11</sup> The rates of serious violent crime, armed robberies, rapes and homicide have also soared. Today, English headlines resemble the melodramatic American headlines of the 1960s.<sup>12</sup>

When it had no firearms restrictions [19th and early 20th Century] England had little violent crime, while the present extraordinarily stringent gun controls have not stopped the increase in violence....



Armed crime, never a problem in England, has now become one. Handguns are banned but the kingdom has millions of illegal firearms. Criminals have no trouble finding them and exhibit a new willingness to use them. In the decade after 1957 the use of guns in serious crime increased a hundredfold.



Joyce Lee Malcolm, *Guns and Violence: The English Experience*, 209, 219 (Harvard 2002).

It may be remarked that despite its burgeoning violence, England's murder rate is still far below America's. This is true; but when England allowed anyone to own handguns, and had gun laws vastly less restrictive than any modern American state, England's murder rate was minuscule—far below either its current rate or the contemporary American rate. Colin Greenwood, *Firearms Control: Armed Crime and Firearms Control in England and Wales*, Ch. 1 (1972) ("An Unrestricted Era"); Malcolm, *supra*, at 137.

The current difference between English and American murder rates reflects socio-economic and cultural differences, not any shortage of guns for English criminals. The 1997 handgun ban has proved unenforceable even over a relatively small island; England's National Crime Intelligence Service 2002 Report laments that while "Britain has some of the strictest gun laws in the world [i]t appears that anyone who wishes to obtain a firearm [illegally] will have little difficulty





*in doing so.*" Don B. Kates, *The Hopelessness of Trying to Disarm the Kind of People who Murder*, 12 Bridges 313, 319 (2005) (quoting the NCIS) (emphasis added).

#### IV. HANDGUN BANS DO NOT REDUCE SUICIDE RATES.

"If there were a strong causal connection between firearms and suicide the United States would be a world leader in suicide... [but] the U.S. suicide rate is average for industrialized nations." James B. Jacobs, *Can Gun Control Work?* 6 (Oxford Univ. Press 2003).

The District's and *amicus*'s claim that handgun bans reduce suicide is contradicted by local, national and international studies showing that nations with fewer guns do not have fewer suicides. Kleck, *Targeting Guns*, *supra*, at 254; see Killias, et al., *supra*. For instance, "if the Brady Act did have the effect of modestly reducing firearms suicides ... this effect was completely offset by an increase of the same magnitude in nonfirearm suicide" resulting in the same number of deaths. Jacobs, *Can Gun Control Work?*, *supra*, at 120. Nor, conversely, have vast increases in American gun ownership led to increased suicide. Kleck, *Targeting Guns*, *supra*, at 265. Some nations with more guns have higher gun suicide, but nations with fewer guns just have more suicide using other means. *See id.* at 265-89 (collecting studies). A World Health Organization report cites studies "conclud[ing] that removing an easy and favored method of suicide was not likely to affect substantially the overall suicide rate because other methods would be chosen." W.H.O., *Changing Patterns in Suicide Behavior* 20 (1982). And in suicide attempts "guns are not significantly more likely to end in death than those involving hanging, [car exhausts] or drowning." Kleck, *Targeting Guns*, *supra*, at 266.

The evidence indicates that people so determined on suicide that they would use a gun will find another instrument if guns are unavailable. And handgun bans just turn the suicidal to long guns: "handguns have no significant advantages over long guns for committing suicide[] probably half of [American] gun suicides are committed with long guns...." *Id.* at 282. In Canada, where handguns are less common, "[n]inety percent of [gun suicides] are committed with long guns." Philip C. Stenning, *Gun Control - A Critique of Current Policy*, 15 Pol'y Options 13, 15 (1994).

In 2001, the largest study on youth suicides was performed, involving two surveys of 17,004 adolescents (12-18) and samples of national, state and county level cross-sectional data for various years from 1950 on. David Cutler, et al., *Explaining the rise in youth suicide in*



J. Gruber (ed.), *Risky behavior among youths: An economic analysis* 219-269 (Univ. of Chicago Press 2001). That study found

the most important explanatory variable [for juvenile suicide] is the increased share of youths living in homes with divorced parents. [This eclipses] ... either the share of children living with step-parents or the share of female-headed households.

*Id.* at 219.

The Cutler study found some evidence of a relationship between higher gun ownership and suicide, but that relationship disappears and is in fact reversed with the inclusion of a variable for the rate that people go hunting. *Id.* at 31-34. The higher suicide rate is related to higher rates that people in certain counties go hunting, not whether people own a gun. *Id.* The problem is that studies like those relied on by the District and their *amici*, which use very low numbers of sample cases, have confounded the fact that people in counties with a lot of hunters are also more likely to own guns.

The Cutler study authors were unable to discern whether the apparent hunting effect is due to some other cultural factors in areas with a lot of hunters, or whether it was due to hunting itself. In any case, an examination of gun ownership rates, omitting the hunting effect will cause a spurious positive correlation between suicide and gun ownership. *Id.*

From long before the bans—the District has *always* had among the nation's lowest suicide rates. This may be because of its very high African-American population. Differing population segments often have very different suicide rates for various reasons. African-Americans have a much lower suicide rate than whites.<sup>13</sup> Women commit suicide much less than men.<sup>14</sup> Indian women on the island of Fiji have a suicide rate several times higher than that of Fijian women. Kates & Mauser, *supra*, at 692-93.

As with murders, the Loftin study discussed above created the misimpression that the bans reduced District suicide because Loftin reported raw suicide data without considering the District's precipitously declining population. When the Loftin methodology is corrected to account for population changes, Loftin's own data show that there was a decline in gun suicide rates, and an *increase* in non-gun suicide rates—for a statistically insignificant decline of 11.4 per 100,000 to 11.2 per 100,000 (1.5%) in total suicide rates. See Loftin, *supra*, at 1617 (stating that a 12% increase in gun-related suicides outside the District was insignificant).



The evidence shows that several years before the bans, the District's gun suicide rate started declining; later, the non-gun rate began declining as well. In fact, the non-gun suicide drop was slightly greater after the bans. That greater drop in non-gun suicides continues to date.

Obviously some factor other than the bans caused a suicide reduction that included both gun and non-gun suicides.

#### V. THE DISTRICT'S BAN OF ARMED HOME DEFENSE ADMITS OF NO IMPLIED EXCEPTION.

Apparently for the first time, the District now claims that its residents may keep long guns for defense in the home. Petitioners' Br. at 49, 54. This assertion was not made below where it would have been subject to discovery. Discovery would have revealed that the District has never (so far as we can find) announced this purported exception either to the public or to its police.

We leave to the Brief of *Amicus Curiae* Citizens Committee for the Right to Keep and Bear Arms (the "Errors Brief"), the refutation of this newly asserted exception. We note, however, that the District has made no attempt to outline what such an exception would entail. This is understandable because such an exception would be incoherent unless carefully drafted—a legislative, not a judicial, task. Consider at least seven different forms which such a defense might take:

- a) Despite the challenged ordinances, there is an implicit self-defense exception allowing a District resident to keep an un-trigger locked handgun loaded and assembled in her night stand; or
- b) Despite those ordinances there is an implicit exception allowing a District resident to keep an un-trigger-locked shotgun assembled and loaded by her bedside<sup>15</sup>; or
- c) There is an implicit exception allowing a woman who has been stalked, raped, or threatened with death by her ex-husband or someone else to keep an un-trigger locked handgun loaded and assembled in her night stand for self-defense; or
- d) There is an implicit exception allowing a woman who has been stalked, raped, or threatened with death by her ex-husband or someone else to keep an un-trigger-locked shotgun assembled and loaded for self-defense by her bedside; or



- e) The obverse of (a)—(d): yes, it was illegal for her to have a handgun or a loaded shotgun, but now that she has shot an intruder with it, that shooting gives her a defense to prosecution for the gun law violations; or
- f) There is an implicit exception allowing a woman who has been stalked raped or threatened by her ex-husband or someone else to assemble, load and unlock her shotgun if she spies him lurking outside her home; or
- g) When a woman is attacked by a knife-wielding attacker in her home there is an implicit exception allowing her to go and assemble, load and unlock her shotgun.

We reiterate there is no exception in the challenged ordinances—and it is not the province of a court to define them. Compare Chicago: it has a handgun ban, Chicago Mun. Code § 8-20-050, but Illinois law specifies that self-defense use precludes prosecution. 720 Ill. Comp. Stat. 5/24-10 (West 2004). Moreover, law-abiding adult Chicagoans can keep loaded long guns for self-defense.

Also, New York City, famous for its restrictive gun laws, requires a license to possess a handgun, but it is undisputed that a licensed handgun may properly be used “for protection of person and property in the dwelling.” *Archibald v. Codd*, 59 A.D.2d 867, 868, 399 N.Y.S.2d 235, 237 (1977).

And, as discussed in the Brief of *Amici Curiae* International Scholars at Section III, numerous countries—even those with stringent handgun regulation—allow the owning of handguns and other firearms for home self-defense.

#### VI. WHATEVER BENEFITS GUN CONTROL OFFERS CAN BE ACCOMPLISHED BY A PERMIT OR BACKGROUND CHECK SYSTEM.

There are less drastic, but fully adequate, means to regulate guns at the District’s disposal. For example, federal law conditions gun purchases on a background check to exclude juveniles, felons and the persons adjudicated mentally unfit.<sup>16</sup> Many states have their own supplementary background checks and also forbid gun ownership by juveniles, felons and the deranged.<sup>17</sup> The efficacy of such provisions is confirmed by two facts: First, almost without exception murderers and gun criminals have life histories of violence, felony, psychopathology and/or substance abuse.<sup>18</sup> The whole corpus of research shows that



the vast majority of persons involved in life-threatening violence have a long criminal record with many prior contacts with the justice system... There are some life-threatening violent offenders who have n[ever previously] been apprehended and charged, but there is no evidence to suggest that their violence is the result of some unique or different set of causal factors.

Delbert S. Elliott, *Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 U. Colo. L. Rev. 1081, 1093 (1998).

Second, over the past decade 48 states have issued permits to carry concealed handguns for lawful protection to about five million Americans; most of those states have been issuing under statutorily standardized criteria by which an adult with a clean record and safety training can obtain a permit.<sup>19</sup> These permit-holders' subsequent histories show virtually no crime, contrary to the mythology that ordinary people commit violent crimes if given access to guns. Lott, *More Guns, Less Crime*, *supra*, at 219-22.

Liberal gun carry permit issuance under objective standards has not resulted in the thousands of murders that the District's theory predicts. *See id.* In every state where they were considered, these laws were opposed in editorials claiming that ordinary people commit most murders and predicting that if enacted the laws would vastly increase murder.<sup>20</sup> To the contrary, the laws' enactments have been followed by an outpouring of news articles with titles like: "Records Say Licensed Gun Owners Are Least of Florida's Crime Problem";<sup>21</sup> "Michigan Sees Fewer Gun Deaths—With More Permits";<sup>22</sup> "Gun Permits Surge, But Not Violence";<sup>23</sup> "Gun Law: Concealed Weapons Advocates Were Right: Crime Didn't Go Up in North Carolina";<sup>24</sup> "CCW Law Fares Well So Far: Officials Satisfied with Controversial Gun Permits";<sup>25</sup> "Concealed Weapons Owners No Trouble";<sup>26</sup> "Pistol Packing and Proud of It";<sup>27</sup> "Handgun Law's First Year Belies Fears of 'Blood in the Streets'";<sup>28</sup> "Gun-Toting Kentuckians Hold Their Fire";<sup>29</sup> "Police Say Concealed Weapons Law Has Not Brought Rise in Violence."<sup>30</sup> *See, e.g.*, Alan Bartley & Mark Cohen, *The Effect of Concealed Weapons Laws: An Extreme Bound Analysis*, 36 Econ. Inquiry 258 (1998) (demonstrating that right-to-carry laws reduce violent crime).

Gun possession by ordinary people does no harm because responsible law-abiding adults virtually never commit violent crimes.<sup>31</sup> All that gun controls can usefully do is forbid guns to criminals, juveniles and the deranged. If such laws fail it is not because they are too narrow but because those against whom the laws are aimed do not obey laws.





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Confirming this fact are two recent general studies of gun control. In 2005, the U.S. National Academy of Sciences released its evaluation based on review of 253 journal articles, 99 books, 43 government publications and some empirical research of its own. Wellford, et al., *Firearms and Violence: A Critical Review*, *supra*, at 98. The Academy could not identify *any* gun control that had reduced violent crime, suicide or gun accidents. The same conclusion was reached in a 2003 evaluation by the Centers for Disease Control's then-extant studies. *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws* (CDC 2003).<sup>32</sup>

## CONCLUSION

In this case, the facts simply do not fit the rhetoric behind the District's gun ban. Such bans do not produce good results. Rather, such bans irrationally strip law-abiding citizens of the most effective means of defending themselves and their loved ones—and, if the evidence indicates anything, it is that criminals take full advantage.

*Amici* respectfully submit that the judgment of the Court of Appeals was correct and should be affirmed.



Respectfully submitted,



Don B. Kates

Marc James Ayers  
*Counsel of Record*  
BRADLEY ARANT ROSE  
& WHITE LLP

*Counsel for Amici Curiae*

## ADDITIONAL AMICI CURIAE

**Ryan C. Amacher** is a professor of economics and public affairs and former President at the University of Texas at Arlington.

**Walter E. Block** is the Harold E. Wirth Eminent Scholar Endowed Chair and Professor of Economics at Loyola University in New Orleans, Louisiana.





**Dennis Halcoussis** is a professor of economics at California State University, Northridge.

**William S. Peirce** is Professor Emeritus of Economics at Case Western Reserve University in Cleveland, Ohio.

**Keith T. Poole** is a professor of political science at the University of California, San Diego.

**Henry E. Schaffer** is Professor Emeritus of Genetics and Biomathematics at North Carolina State University.

**William A. Schroeder** is a professor of law at Southern Illinois University School of Law.

**Allan Walstad** is a professor of physics at the University of Pittsburgh at Johnstown.

**Francis R. Whitehouse Jr.** is a professor of business and economics at Lynchburg College.

**Michael K. Wohlgemant** is the William Neal Reynolds Distinguished Professor of Agricultural and Resource Economics at North Carolina State University.

## ENDNOTES

1. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 7 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. The NRA Civil Rights Defense Fund made financial contributions to support the preparation of this brief.

2.<http://www.washingtonpost.com/wp-dyn/content/article/2007/11/12/AR2007111201818.html?sid=ST2007111300923>

3. Regarding the FBI Uniform Crime Reports, see <http://www.fbi.gov/ucr/ucr.htm>.

4. The Loftin study's definition of "homicide" (from data from the National Center for Health Statistics) included civilian self-defense killings. *See* Loftin et al., at 1616 (defining "homicide" so as to include homicide by legal intervention with a firearm, which has its own ICD-9 code: E970). It is reasonable to assume that more defensive killings took place before the 1977 implementation of the ban on using any firearm for home defense. Accordingly, Loftin's reported decline in "homicide" may have partly reflected the disappearance of justifiable homicide against violent home invaders. By contrast, the FBI data concerns only criminal killings (murders and non-negligent manslaughters), which we use here. *See* FBI Uniform



Crime Reporting Methodology, [http://www.fbi.gov/ucr/cius2006/about/table\\_methodology.html](http://www.fbi.gov/ucr/cius2006/about/table_methodology.html).

5. An injunction against the entire law was granted by the D.C. Superior Court in December 1976. The injunction was lifted by the District of Columbia Court of Appeals on February 4, 1977. *See McIntosh v. Washington*, 395 A.2d 744 (D.C. 1978).

6. *Amici* American Academy of Pediatrics, et al., rely on a later Kellermann study in asserting such a relationship between home gun ownership and homicide. AAP Br. at 9 (citing Arthur L. Kellermann, et al., *Injuries and deaths due to firearms in the home*, 45 J. Trauma, Injury, Infection, & Critical Care 263 (1998)). However, the 1998 study contains many of the same flaws. For example, in that study only 14.2% of the homicides studied involved the gun kept in the home where the homicide occurred. Additionally, “many these shootings almost certainly occurred in the home of the attacker and not of the victim....” These and other problems render the 1998 Kellermann just as unreliable as the 1993 study. *See* Kleck, *supra*, 5 Homicide Stud. at 69-71.

7. *See* United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Nonfatal firearm-related violent crimes 1993-2005 [http://www.ojp.usdoj.gov/bjs/glance/tables/firearm\\_nonfataltab.htm](http://www.ojp.usdoj.gov/bjs/glance/tables/firearm_nonfataltab.htm).

8. Quoted from the Abstract to Martin Killias, et al., *Guns, Violent Crime, and Suicide in 21 Countries*, 43 Canadian J. Criminology 429-48 (2001).

9. Philip C. Stenning, *Gun Control - A Critique of Current Policy*, 15 Pol'y Options 13 (1994).

10. In fact, in the 1990s, English, Canadian and Australian violence rates escalated to twice American rates despite decades of increasingly restrictive controls. John van Kesteren, et al., in Esther Bouten, et al., *Crime Victimization in Comparative Perspective: Results from the International Crime Victims Survey, 1989-2000*, 13, 15-16 (2002).

11. <http://www.timesonline.co.uk/tol/news/uk/crime/article2328368.ece>

12. *See, e.g.*, “Violent Crime is Out of Control,” Jul. 21, 2005, <http://uk.news.yahoo.com/050721/140/fntfz.html>; “Police fear gun crime explosion,” *Evening Standard* (London), Apr. 12, 2005, [<http://www.thisislondon.com/news/londonnews/articles/1786737?source=Evening%20Standard>]; “Gun Crimes Growing ‘Like Cancer,’” *BBC News*, May 21, 2003; “Handgun Crime ‘Up’ Despite Ban,” *BBC News*, Jul. 16, 2001; “[PM Blair] Pledge[s] to Tackle Soaring Street Crime,” *BBC News*, Jul. 12, 2002; “Britain’s Tough Gun Control Laws Termend Total Failure: Land of Hope and Gunrunning,” *Punch*, May 3-16, 2000; “Gun crime soars in Britain,” *Reuters* (London), Jan. 9, 2003.

*See also* the following articles for the dates indicated a) from the *Times* (Lon-



don), Jan. 16, 2000: “Killings Rise As 3 Million Illegal Guns Flood Britain.”; Oct. 13, 2002: “Murder rate soars to highest for a century”; b) from the *Independent*: Jan. 15, 2002: “Police Move to Tackle Huge Rise in Gun Crime”; Dec. 27, 2002: “Firearms amnesty to tackle surge in gun crime” [<http://news.independent.co.uk/uk/crime/story.jsp?story=364549>]; c) from the *Telegraph* (London): Aug. 25, 1999: “[Home Secretary Jack] Straw Braced for 20% Increase in Crime Rate”; Jul. 17, 2001: “Gun crime rises despite Dunblane pistol ban”; Feb. 24, 2002: “Gun crime trebles as weapons and drugs flood British cities.”

13. Centers for Disease Control and Prevention, National Center for Health Statistics. Compressed Mortality File 1979-1998. CDC WONDER On-line Database, compiled from Compressed Mortality File CMF 1968-1988, Series 20, No. 2A, 2000 and CMF 1989-1998, Series 20, No. 2E, 2003. Accessed at <http://wonder.cdc.gov/cmf-icd9.html> on Jan 30, 2008 11:24:13 AM. White suicide rate: 13.1/100,000 per year. African-American suicide rate: 6.4/100,000 per year. Other races: 7.4/100,000 per year.

14. *Id.* Male suicide rate: 19.5/100,000 per year. Female suicide rate: 5.0/100,000 per year.

15. Note that these possible “exceptions” would nullify the ordinances.

16. *See Jacobs, supra*, at ch.2.

17. *Id.*

18. Kates & Mauser, *supra*, 30 Harv. J.L. & Pub Pol. at 885-70 (collecting studies); Delbert S. Elliott, *Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 U. Colo. L. Rev. 1081, 1089 (1998) (life-threatening criminals/murderers “almost always have a long history of involvement in criminal behavior”); Philip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*, 73 Fordham L. Rev. 589 (2004) (gun misuse is concentrated among people with arrest records).

19. *See* David Kopel, “Nebraska is 40th State to Enact Shall Issue Licenses for Defensive Handgun Carrying,” *The Volokh Conspiracy*, Apr. 1, 2006, [http://volokh.com/archives/archive\\_2006\\_03\\_26-2006\\_04\\_01.shtml#1143873304](http://volokh.com/archives/archive_2006_03_26-2006_04_01.shtml#1143873304).

20. *See, e.g.*, Editorial: “Turning Florida Into the Wild West,” *Daytona Beach Evening News*, Apr. 10, 1985; Editorial: “Johnson Bill is Deadly Plan,” *Tallahassee Democrat*, Feb. 17, 1987.

21. *Tallahassee Democrat*, Nov. 4, 1990.

22. Dawson Bell, *Detroit Free Press*, Jan. 6, 2008 [<http://www.freep.com/apps/pbcs.dll/article?AID=/20080106/news06/801060602/1008>]

23. *Detroit News*, Mar. 21, 2002.



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24. *Chapel Hill Herald*, May 6, 1997, at 4 (“I am glad I was wrong. I haven’t had a single report of a licensed concealed weapon being used to commit a crime.”).
25. *Detroit Free Press*, Jan. 2, 2002.
26. *Gainesville Sun*, Nov. 4, 1990 (quoting a state legislator who led opposition to the new law as stating: “My fears have not been borne out.”).
27. *Roanoke Times*, May 19, 2002.
28. *Texas Lawyer*, Dec. 9, 1996, at 2.
29. *Cincinnati Enquirer*, Jun. 16, 1997, at A1.
30. *Palm Beach Post*, Jul. 26, 1988, at A1.
31. See Lott, *More Guns, Less Crime*, at 219-22.
32. <http://cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm>.





# INTEREST OF AMICUS CURIAE<sup>1</sup>

*Amici* are district attorneys, police organizations, and other persons concerned with protecting the public safety benefits of citizens possessing handguns for self-defense in the home.<sup>1</sup>

## INTERNATIONAL LAW ENFORCEMENT EDUCATORS AND TRAINERS ASSOCIATION

The International Law Enforcement Educators and Trainers Association (ILEETA) is a professional association of 4,000 persons who provide training to law enforcement in the proper use of firearms, and on many other subjects.

ILEETA is participating because police recruits who already have personal civilian experience using handguns are better trainable to use handguns safely and proficiently as police officers.

## 29 CALIFORNIA DISTRICT ATTORNEYS

The elected California District Attorneys in this brief represent populous counties such as Orange, Fresno, and San Bernardino, as well mid-sized and rural counties.

## SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION

The Southern States Police Benevolent Association (SSPBA) consists of more than 20,000 law enforcement employees in 12 southeastern states. SSPBA's polling shows that its members strongly support the Second Amendment.

The interests of additional amici are described in the Appendix.

## SUMMARY OF ARGUMENT

Before the enactment of the handgun ban, fewer than ½ of 1% of guns seized by police in the District had been lawfully registered. Accordingly, the bans on ownership of registered handguns and on home self-defense by law-abiding people have virtually nothing to do with the legitimate government interest in crime control.

To the contrary, the handgun and self-defense bans are criminogenic.



Guns save lives. In the hands of law-abiding citizens, guns provide very substantial public safety benefits. In all 50 states—but not in the District—it is lawful to use firearms for defense against home invaders. The legal ownership of firearms for home defense is an important reason why the American rate of home invasion burglaries is far lower than in countries which prohibit or discourage home handgun defense.

By drastically reducing the rate of confrontational home invasions, the deterrent effect of U.S. home defensive gun ownership greatly reduces the assault rate (since there are many fewer confrontations) and thereby reduces the total U.S. violent crime rate by about 9%.

Numerous surveys show that firearms are used (usually without a shot needing to be fired) for self-defense at least a 97,000 times a year, and probably several hundred thousand times a year.

The anti-crime effects of citizen handgun ownership provide enormous benefits to law enforcement, because there are fewer home invasion emergencies requiring an immediate police response, and because the substantial reductions in rates of burglary, assault, and other crimes allow the police and district attorneys to concentrate more resources on other cases and on deterrence.

Lawful civilian handgun ownership improves police training, by providing a larger body of recruits who are experienced in handgun safety and accuracy, as well as providing civilian experts whose ideas are adopted by police trainers.

Ordinary law-abiding citizens are not too hot-tempered or accident-prone to possess firearms safely for home defense.

Especially for home defense in an urban area, long guns are inadequate substitutes for handguns. Handguns are safer for victims, for families, and for the community as a whole.

This Court's precedents point to the unconstitutionality of the handgun ban.

## ARGUMENT

In December 1976, the law-abiding citizens of Washington, D.C., were re-registering their handguns at police headquarters. Most police were appalled at the imminent ban:

“We don’t appreciate being heels,” Clark<sup>2</sup> said, pointing out the pain it takes to tell an elderly widow who is living alone “that even though your husband bought the gun legally and



registered it properly, you can't keep it. Why that makes an innocent citizen a crook."

It was a theme heard often in D.C. today, and surprisingly, *it seems to gall policemen more than anybody else.*

"You're not controlling guns, you're controlling people," said Sgt. Jimmy King, a veteran robbery squad investigator.

*"Honest citizens, the little old lady who's not hurting anybody anyway is the real victim. We're not stopping these bums killing each other, us, or committing armed robberies..."*

Like most officers, King believes the court is the real answer.

"The court is not enforcing the laws we already have on the books," he said, explaining:

"There's a law on the books today which allows a five-year additional sentence for any crime committed while armed, but it's not enforced."

*King's sentiments were echoed throughout police headquarters and by officers on the streets.*

"I don't know why they bother to make new laws, they don't enforce the old ones," said Fourth District Officer Andrew Way as he wrote a parking ticket yesterday.



Earl Byrd, *D.C.'s Gun Registration*, WASH. STAR, Dec. 2, 1976 (emphasis added).

The notion that most police support handgun prohibition is false.<sup>3</sup> Police critics of the D.C. ban have included D.C. Police Chief Maurice Turner (who was muzzled by Mayor Marion Barry), former Police Chief Charles Ramsey, and union leaders at the city jail who testified in favor of a repeal bill. Tom Sherwood, *Should the District Lift Its Freeze on Handguns?* WASH. POST, July 23, 1982; *Ramsey shifts stand on gun ban*, WASH. TIMES, Nov. 11, 2007. Inaccurate claims that "the police" support D.C.'s draconian laws alienate the public from the police.

Amici have no fears that upholding the rights of law-abiding citizens to possess handguns and other functional defensive firearms in their homes will endanger law enforcement officers.<sup>4</sup> Police in the District are killed at a rate about six times higher than the national rate, a statistic that hardly suggests that the District's ban on law-abiding citizens protecting their homes has helped protect the police.<sup>5</sup>



## I. THE EFFICACY AND SOCIAL BENEFITS OF ARMED SELF-DEFENSE

Police carry handguns on duty and keep those guns for home protection for an obvious reason: the guns are essential, life-saving tools for protecting themselves, their families, and their communities. See James Jacobs, *Exceptions to a General Prohibition on Handgun Possession: Do They Swallow Up the Rule?* 49 L. & CONTEMP. PROBS. 6 (1986)(carefully analyzed, almost all the rationales for allowing police and security guards to possess handguns show that prohibition of handguns for other persons is illogical). Ample empirical evidence demonstrates that the home possession of firearms by law-abiding citizens also contributes substantially to public safety.

### A. Burglary

The only national study of how frequently firearms are used against burglaries was conducted by the Centers for Disease Control and Prevention (CDC). In 1994, random digit dialing phone calls were made throughout the United States, resulting in 5,238 interviews. The interviewees were asked about use of a firearm in a burglary situation during the previous 12 months. Extrapolating the polling sample to the national population, the researchers estimated that in the previous 12 months, there were approximately 1,896,842 incidents in which a householder retrieved a firearm but did not see an intruder. There were an estimated 503,481 incidents in which the armed householder *did* see the burglar, and 497,646 incidents in which the burglar was scared away by the firearm. Robert Ikeda et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 VIOLENCE & VICTIMS 363 (1997).

Only 13% of U.S. residential burglaries are attempted against occupied homes. U.S. Bureau of Justice Statistics, *Household Burglary*, BJS BULL. at 4 (1985). Criminologists attribute the prevalence of day-time burglary to burglars' fear of confronting an armed occupant; burglars report that they avoid late-night home invasions because, "That's the way you get yourself shot." GEORGE RENGERT & JOHN WASILCHICK, *SUBURBAN BURGLARY: A TALE OF TWO SUBURBS* 33 (2d ed. 2000)(study of Delaware County, Penn., and Greenwich, Conn.); *see also* JOHN CONKLIN, *ROBBERY AND THE CRIMINAL JUSTICE SYSTEM* 85 (1972)(study of Massachusetts inmates, reporting that some gave up burglary because of "the risk of being trapped in the house by the police or an armed occupant.").

The most thorough study of burglary patterns was a St. Louis survey of 105 currently active burglars. The authors observed, "One



of the most serious risks faced by residential burglars is the possibility of being injured or killed by occupants of a target. Many of the offenders we spoke to reported that this was far and away their greatest fear." As a result, most burglars tried to avoid entry when an occupant might be home. RICHARD WRIGHT & SCOTT DECKER, BURGLARS ON THE JOB: STREETLIFE AND RESIDENTIAL BREAK-INS 112-13 (1994).

Burglars in other nations behave differently.

A 1982 British survey found 59% of attempted burglaries involved an occupied home. Pat Mayhew, *Residential Burglary: A Comparison of the United States, Canada and England and Wales* (Nat'l Inst. of Just., 1987). The *Wall Street Journal* reported:

Compared with London, New York is downright safe in one category: burglary. In London, where many homes have been burglarized half a dozen times, and where psychologists specialize in treating children traumatized by such thefts, the rate is nearly twice as high as in the Big Apple. And burglars here increasingly prefer striking when occupants are home, since alarms and locks tend to be disengaged and intruders have little to fear from unarmed residents.<sup>6</sup>

In the Netherlands, 48% of residential burglaries involved an occupied home. Richard Block, *The Impact of Victimization, Rates and Patterns: A Comparison of the Netherlands and the United States*, in VICTIMIZATION AND FEAR OF CRIME: WORLD PERSPECTIVES 26 tbl. 3-5 (Richard Block ed., 1984). In the Republic of Ireland (which, along with England, is one of the few European nations where handguns are banned), criminologists report that burglars have little reluctance about attacking an occupied residence. See Claire Nee & Maxwell Taylor, *Residential Burglary in the Republic of Ireland*, in WHOSE LAW AND ORDER? ASPECTS OF CRIME AND SOCIAL CONTROL IN IRISH SOCIETY 143 (Mike Tomlinson et al. eds., 1988). In Toronto, where handguns are legal but rare, 44% of home burglaries take place when the victim is home. See IRWIN WALLER & NORMAN OKHIRO, BURGLARY: THE VICTIM AND THE PUBLIC 31 (1978).

An American burglar's risk of being shot while invading an occupied home is greater than his risk of going to prison. Presuming that the risk of prison deters some potential burglars, the risk of armed defenders would deter even more.<sup>7</sup>

Florida State University criminologist Gary Kleck's book *Point Blank: Guns and Violence in America* won the highest honor awarded by the American Society of Criminology: the Michael Hindelang



Book Award “for the greatest contribution to criminology in a three-year period.” In the book Kleck detailed an important secondary consequence of the deterrence of home invasion. Suppose that the percentage of “hot” (occupied residence) burglaries rose from current American levels (around 13%) to a level similar to other nations (around 45%). Knowing how often a hot burglary turns into an assault, we can predict that an increase in hot burglaries to the levels of other nations would result in 545,713 more assaults every year. This by itself would raise the American violent crime rate 9.4%. GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 140 (1991).

Put another way, the American violent crime rate is significantly lower than it would otherwise be, because American burglars are so much less likely to enter an occupied home. Given that the average cost of an assault, in 2006 dollars, is \$12,032,<sup>8</sup> the annual cost savings from reduced assault amounts to more than six billion dollars (\$6,566,018,816).

Interestingly, because burglars do not know *which* homes have a gun, people who do not own guns enjoy substantial free-rider benefits because of the deterrent effect from the homes that do keep arms.<sup>9</sup>

### B. Deterrence

Intending to build the case for comprehensive federal gun restrictions, the Carter administration awarded a major National Institute of Justice (NIJ) research grant in 1978 to University of Massachusetts sociology professor James Wright and his colleagues Peter Rossi and Kathleen Daly. Wright had already editorialized in favor of much stricter controls. Rossi would later become president of the American Sociology Association. Daly would later win her own Hindelang Award, for her feminist perspectives on criminology.

When the NIJ authors rigorously examined the data, they found no persuasive evidence in favor of banning handguns or self-defense. Notably, the D.C. bans had not reduced crime. JAMES WRIGHT, PETER ROSSI & KATHLEEN DALY, *UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA* 294-96 (1983)(critiquing two previous studies, one of them by the U.S. Conference of Mayors; presumably the critiques were persuasive, since neither the USCM brief nor any other of Petitioners’ amici cite the studies).

Wright and Rossi produced another study for the National Institute of Justice. Interviewing felony prisoners in 11 prisons in 10 states, Wright and Rossi discovered that:





- 34% of the felons reported personally having been “scared off, shot at, wounded or captured by an armed victim.”
- 8% said the experience had occurred “many times.”
- 69% reported that the experience had happened to another criminal whom they knew personally.
- 39% had personally decided not to commit a crime because they thought the victim might have a gun.
- 56% said that a criminal would not attack a potential victim who was known to be armed.
- 74% agreed with the statement that “One reason burglars avoid houses where people are at home is that they fear being shot.”

JAMES WRIGHT & PETER ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 146, 155 (expanded ed. 1994).



Notably, “the highest concern about confronting an armed victim was registered by felons from states with the greatest relative number of privately owned firearms.” *Id.* at 151. The authors concluded “the major effects of partial or total handgun bans would fall more on the shoulders of the ordinary gun-owning public than on the felonious gun abuser of the sort studied here....[I]t is therefore also possible that one side consequence of such measures would be some loss of the crime-thwarting effects of civilian firearms ownership.” *Id.* at 237.

### C. The Frequency of Defensive Gun Use

There have been 13 major surveys regarding the frequency of defensive gun use (DGU) in the modern United States. The surveys range from a low of 760,000 annually to a high of three million. The more recent studies are much more methodologically sophisticated.

In contrast, much lower annual estimates come from the National Crime Victimization Survey (NCVS), a poll using in-person home interviews conducted by the Census Bureau in conjunction with the Department of Justice. The NCVS for 1992-2005 would suggest about 97,000 DGUs annually, with 75,000 DGUs in 2005, the last year for which data are available.





A criticism of the NCVS figure is that it is too low because the NCVS never directly asks about DGUs, but instead asks open-ended questions about how the victim responded. Because the NCVS first asks if the respondent has been a victim of a crime, the NCVS results exclude people who answer “no” because, thanks to successful armed self-defense, they do not consider themselves “victims.” Further, the NCVS only asks about some crimes, and not the full scope of crimes from which a DGU might ensue. *See, e.g.*, GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 152-54 (1997).

Gary Kleck and Mark Gertz conducted an especially thorough survey in 1993, with stringent safeguards to weed out respondents who might misdescribe a DGU story. Kleck and Gertz found a midpoint estimate of 2.5 million DGUs annually. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOL. 150 (1995).

The Kleck/Gertz survey found that 80% of defensive uses involved handguns, and that 76% of defensive uses do not involve firing the weapon, but merely brandishing it to scare away an attacker. *Id. at 175.*

Marvin Wolfgang, “the most influential criminologist”<sup>10</sup> in the English-speaking world, and an ardent supporter of gun prohibition, reviewed Kleck’s findings. Wolfgang wrote that he could find no methodological flaw, nor any other reason to doubt the correctness of Kleck’s figure:

I am as strong a gun-control advocate as can be found among the criminologists in this country....I would eliminate all guns from the civilian population and maybe even from the police. I hate guns....

Nonetheless, the methodological soundness of the current Kleck and Gertz study is clear....

The Kleck and Gertz study impresses me for the caution the authors exercise and the elaborate nuances they examine methodologically. I do not like their conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well.

Marvin Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. CRIM. L. & CRIMINOL. 188, 191-92 (1995).



Philip Cook of Duke and Jens Ludwig of Georgetown were skeptical of Kleck's results, and so they conducted their own survey for the Police Foundation. That survey produced an estimate of 1.46 million DGUs.<sup>11</sup>

The National Opinion Research Center (NORC) argues that the figures from Kleck are probably too high, and from the NCVS too low; NORC estimates the actual annual DGU figure to be somewhere in the range of 256,500 to 1,210,000. Tom Smith, *A Call for a True in the DGU War*, 87 J. CRIM. L. & CRIMINOL. 1462 (1997).

This Court need not resolve the particulars of the debate among the social scientists. All social science research shows that defensive gun use is frequent in the United States.

#### D. Natural Experiments

In October 1966, the Orlando Police Department began conducting highly-publicized firearms safety training for women, after observing that many women were arming themselves in response to a dramatic increase in sexual assaults in the area. Orlando rapes fell by 88% from 1966 to 1967. Burglary fell by 25%. Not one of the 2,500 trained women actually ended up firing her weapon; the deterrent effect of the publicity sufficed. As Gary Kleck and David Bordua note: "It cannot be claimed that this was merely part of a general downward trend in rape, since the national rate was increasing at the time. No other U.S. city with a population over 100,000 experienced so large a percentage decrease in the number of rapes from 1966 to 1967...."<sup>12</sup> That same year, rape increased by 5% in Florida and by 7% nationally.<sup>13</sup>

In March 1982, the Atlanta exurb of Kennesaw passed an ordinance requiring all residents (with exceptions, including conscientious objectors) to keep firearms in their homes.<sup>14</sup> House burglaries fell from 65 per year to 26, and to 11 the following year.<sup>15</sup>

#### E. 911 is Insufficient

America's police officers work very hard to rescue crime victims as rapidly as possible. But it is simply impossible for the police to arrive quickly enough to prevent all victims from being injured by violent predators. For example:

- In Washington, D.C., in 2003, the average police response time for highest-priority emergency calls was 8 minutes and 25 seconds.<sup>16</sup>



- In Salt Lake City, 911 callers are frequently put on hold.<sup>17</sup>
- The average response time for Priority One calls (defined as life-threatening emergencies) in Atlanta and its three surrounding counties is 11.1 minutes.<sup>18</sup>
- In Los Angeles, the average emergency response time is 10.5 minutes.<sup>19</sup>
- In New York City it is 7.2 minutes for crimes in progress.<sup>20</sup>
- The *New York Times* reported that in Nassau County in 2003, 11% of 911 callers got a pre-recorded message and soothing music, rather than a human operator.<sup>21</sup>
- The average response time for crime in progress calls in Rochester, New York, was 14 minutes, 31 seconds.<sup>22</sup>
- In Philadelphia the time for Priority One calls is just under 7 minutes.<sup>23</sup>
- The average in St. Petersburg, Florida, for Priority One (again, defined as “life-threatening”) is 7 minutes, 5 seconds.<sup>24</sup>



Note that the above times are how long it takes the police to arrive after being dispatched. The times do *not* include the time that the caller waits for the 911 operator to pick up, and then talks with the operator.

Petitioners' law requiring crime victims to depend entirely on 911 ignores the fact that any criminal in control of a crime scene will not permit his victim to call the police, and that the neighbors may be unaware of the crime in progress. In contrast, when the victim of a home invasion has a handgun, the victim can prevent the criminal from gaining control of the scene, and the victim can use her free hand to dial 911.

#### F. Self-Defense Does Not Make Victims Worse Off

It is sometimes claimed that a victim resists with a gun will have the weapon taken away, or that resistance will enrage the criminal into a fatal attack. Yet data from the National Crime Victimization Survey show that a victim's weapon is taken by the attacker in, at most, one percent of cases in which the victim uses a weapon.





*See KLECK, TARGETING GUNS*, at 168-69. Data from the National Crime Victimization Survey and other sources also show that “There is no sound empirical evidence that resistance does provoke fatal attacks.”<sup>25</sup> Nor does resistance with a firearm increase the chance of victim injury.<sup>26</sup> Instead, “The use of a gun by the victim significantly reduces her chance of being injured....”<sup>27</sup>

#### G. Police Benefits of Citizen Self-Defense

A very important reason why most police officers join a public safety department, or why lawyers join a prosecutor’s office, is that they care deeply about public safety. Accordingly, when armed citizens deter or thwart crime, citizens are helping to create the safe society to which the police and prosecutors have dedicated their careers.

The important deterrent effect of armed citizens—particularly in reducing hot burglaries and the assaults and rapes that often result from hot burglaries—substantially reduces the number of emergencies to which police must respond. Consequently, the police have more resources available for other emergencies, and for investigative and preventive work. District Attorneys benefit from having fewer crimes to prosecute, so that they can devote greater attention to other cases.

Further, the lawful availability of handguns for citizens provides the police with a much larger pool of recruits who have experience with handgun safety, and who have learned some basics (or developed proficiency) in handgun accuracy.

Significantly, many police firearms instructors are civilians. Many innovations in police firearms training have been created by civilian trainers, who themselves train police officers and police instructors. Civilian experts have more time to dedicate to the subject than do almost all police instructors—because many police instructors do not train full-time, and those that do must teach a variety of subjects. Civilian Jeff Cooper’s “The Modern Technique” is the foundation for defensive handgun instruction for an enormous number of departments. *See JEFF COOPER, PRINCIPLES OF PERSONAL DEFENSE* (rev. ed. 2007); *see also JOHN FARNAM, THE FARNAM METHOD OF DEFENSIVE HANDGUNNING* (2d ed. 2005).

In short, law-abiding armed citizens play a substantial role in the core governmental function of protecting public safety. Their role is a modern example of how the main clause of the Second Amendment (protecting negative liberty, by prohibiting citizen disarmament) reinforces the introductory clause (affirming the active



liberty of citizen participation in public security). Cf. STEPHEN BREYER, ACTIVE LIBERTY (2005); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 137 n. 13 (1997) (“police officers being necessary to law and order, the right of the people to carry handguns shall not be infringed”).

## II. THE INVIDIOUS CONFLATION OF LAW-ABIDING GUN OWNERS WITH INCIPIENT MURDERERS

Petitioners’ prohibitions are now and always have been based on invidious prejudice that the law-abiding citizens of the District are incipient murderers.

For example, Petitioners darkly warn that the possession of a handgun will lead to homicides even by people who are “generally law-abiding and responsible.” Pet. br. 51. Likewise, the enactment of the bans was supported by “findings” claiming that “firearms are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities. Most murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion, or intoxication, and where the killer and victims are acquainted. Twenty-five percent of these murders are within families.” David A. Clarke, Chairperson of the Committee on the Judiciary and Criminal Law, *Bill No. 1-164, the ‘Firearms Control act of 1975’*, Apr. 21, 1976, at 5.

To see the error of Petitioners’ aspersions on the law-abiding citizens of the District, one need only look at District’s own data. Pursuant to a local law that took effect in 1969, all lawfully-owned firearms in the District had to be registered.

Before the bans, fewer than 0.5 % of D.C. crime guns were registered to D.C. residents. Paul Valentine, *Mayor Signs Stringent Gun Control Measure*, WASH. POST, July 24, 1976, at E1, E3 (Police Chief Maurice “Cullinane acknowledged at the Mayor’s press conference that less than 0.5 per cent of the guns seized by police last year were registered. There are about 60,000 registered weapons in the city.”).

Regulatory excess aimed at the last 10% of a problem has been described as “tunnel vision” which “imposes high costs without achieving additional safety benefits.” STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 11 (1992). The D.C. prohibition is even worse, for it targets only 0.5% of the problem, at a great cost in reduced public safety.

The law-abiding gun owners of the District were not the cause of the District’s crime problems. That an infinitesimal number of registered gun owners did misuse their guns does not justify bar-



ring all law-abiding persons from owning functional firearms, just as the fact that an infinitesimal number of police misuse their guns does not justify disarming all of the police. *Cf. Romer v. Evans*, 517 U.S. 620, 632 (1996)(law “seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.”); *Cleburne v. Cleburne Living Center*, 472 U.S. 432 (1985)(law based on irrational prejudice).

Likewise, the fact that law-abiding citizens and police officers are sometimes the victims of gun thefts does not justify banning either group from possessing functional guns. The problem of gun theft could be addressed by a narrowly tailored law, such as a requirement that guns be locked up when no one is home. The law review article (co-authored by the counsel of record of this brief) that Petitioners cite to dispute the efficacy of gun lock laws actually says that gun owners resist locking laws *if* the laws interfere with self-defense. Pet. br. 54, citing Cynthia Leonardatos, David Kopel, & Paul Blackman, *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 CONN. L. REV. 157 (2001).

Petitioners implicitly claim that a typical citizen of the District who can pass a criminal records and mental records background check (such as the National Instant Check System) is at serious risk of committing murder. It is hard to imagine how such a population could be considered fit for home rule. Amici (which include many Maryland and Virginia police officers) reject Petitioners’ dire and suspicious attitude toward the law-abiding citizens of the District of Columbia.

The large majority of murderers have prior criminal records; thus, Petitioners’ premise for the bans—the “finding” that “Most murders are committed by previously law-abiding citizens”—is indisputably false, and therefore irrational. The truth is that “Homicide offenders are likely to commit their murders in the course of long criminal careers consisting primarily of nonviolent crimes but including larger than normal proportions of violent crimes.” David Kennedy & Anthony Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 HOMICIDE STUD. 263, 276 (1998).<sup>28</sup> For example:

- A *New York Times* study of the murders in that city in 2003-05 found “More than 90 percent of the killers had criminal records ...”<sup>29</sup>



- In 1989, the *New York Times* reported that in Washington, D.C., almost all the murderers and victims were “involved in the drug trade.”<sup>30</sup>
- In Lowell, Massachusetts, “Some 95% of homicide offenders” had been “arraigned at least once in Massachusetts courts” before they killed. “On average... homicide offenders had been arraigned for 9 prior offenses....”<sup>31</sup>
- Of Illinois murderers in 2001, 43% had an Illinois felony conviction and 72% had an Illinois arrest within the last 10 years.<sup>32</sup>
- Baltimore police records show that 92% of 2006 murder suspects had criminal records.<sup>33</sup>
- A study of Minneapolis homicide offenders found that 73% had been arrested at least once by the Minneapolis Police Department, with an average number of 7.4 arrests.<sup>34</sup>
- “The vast majority of persons involved in life threatening violence have a long criminal record with many prior contacts with the justice system.” Delbert Elliott, *Life Threatening Violence is Primarily a Crime Problem*, 69 COLO. L. REV. 1081, 1093 (1998)(summarizing studies); see also Kennedy & Braga, 2 HOMICIDE STUD. at 267 (among the well-established “criminological axioms” of homicide is that a “relatively high proportion of victims and offenders have a prior criminal record (about two thirds of offenders and half of victims)”)(parenthetical in original).

#### A. Domestic Violence

The D.C. bans’ false findings that “Most murders are committed by previously law-abiding citizens” were supported by the claim that there are many murders involving “arguments” or “where the killer and victims are acquainted” and that a quarter of such murders are “within families.” Clarke, *supra* p. \_\_\_, at 5. The Council did not seem to realize that criminals too have acquaintances, relatives, homes, and arguments. In fact, the perpetrators of “argument” or “domestic” homicide are, like other homicide perpetrators, overwhelmingly per-



sons with extensive criminal records (and who are therefore barred by federal law from possessing any firearm):

- About 18% of homicides involve boyfriends/girlfriends, friends, or family members. It is misleading to combine these homicides with “acquaintance” homicides (which are about 28% of homicides), because the most common way that the “acquaintances” met was through “prior illegal transactions,” such as drug dealing.<sup>35</sup>
- A Police Foundation study of Kansas City revealed that in 90% of homicides among family members, the police had been called to the home within the past two years. The median number of previous calls was five.<sup>36</sup>
- Another study found that 72% of domestic murderers had prior criminal history; 40% had been under restraining orders.<sup>37</sup>
- “A history of domestic violence was present in 95.8%” of the intra-family homicides studied.<sup>38</sup>

Thus, “Homicides are likely to be part of a pattern of continuing violence—especially, but not exclusively, for domestic homicide.”<sup>39</sup>

Significantly, many domestic shootings involve lawful self-defense. Data from Detroit, Houston, and Miami, showed very large majorities of wives who killed their husbands were not convicted, or even indicted, because they were “act[ing] in self-defense against husbands who are abusive to themselves, their children, or both.” MARGO DALY & MARTIN WILSON, HOMICIDE 15, 199-200 (1988); see also Angela Browne, *Assault and Homicide at Home: When Battered Women Kill*, in 3 ADVANCES IN APPLIED SOCIAL PSYCHOLOGY 61 (Michael Saks & Leonard Saxe eds., 1986)(FBI data show that 4.8% of U.S. homicides are women killing a mate in self-defense). In a study of domestic violence victims in West Virginia shelters, “26.5% reported that they believed they would have to use a gun to protect themselves.” MARGARET PHIPPS BROWN ET AL, THE ROLE OF FIREARMS IN DOMESTIC VIOLENCE 31 (2000).

There is no doubt that an abused woman is at much greater risk if her abuser has a gun. However, research shows *no* heightened risk to an abuse victim who lives apart from the abuser and who has her own gun. An abuser’s being armed creates a 7.59 odds ratio for increased risk of femicide. Living alone and having a gun yields an



odds ratio of 0.22, far below the 2.0 level necessary for statistical significance. Jacquelyn Campbell et al., *Risk Factors for Femicide in Abusive Relationships*, 93 AM. J. PUB. HEALTH 1089, 1090-92 (2003). Petitioners and their amici relentlessly cite variants of the first figure, but ignore the second figure.

Federal law bans the possession of any firearm by a person subject to a domestic violence restraining order, by any person convicted of a domestic violence misdemeanor, or of a felony, including non-violent felonies such as drug possession. 18 U.S.C. § 922(g)(8) & (9). The bans for domestic abusers are not overbroad, and therefore do not violate the right to arms. *See Oregon v. Hirsch*, 338 Or. 622, 114 P.3d 1104 (2005)(felon-in-possession law not overbroad); *Wisconsin v. Thomas*, 274 Wis.2d 513, 683 N.W.2d 497 (Wis. App. 2004)(same). Petitioners' law disarming abuse victims is overbroad. *See West Virginia ex rel. Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988) (gun restrictions may not be "overbroad" or "sweep unnecessarily broadly"); *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980)(ban on home possession of a protected arm is *per se* unconstitutional); *Junction City v. Mevis*, 226 Kan. 516, 601 P.2d 1145 (1979)(ban on weapons transport was "constitutionally overbroad", even though "city maintains that the courts should read additional exceptions into the act which are not specifically contained therein"); *Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972) ("overbroad" restrictions on firearms possession and transport; a "legitimate and substantial" government "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

#### B. Juveniles

The instant case involves firearms ownership by law-abiding adults. Yet Petitioners and their amici cite statistics about gun misuse by juveniles.

The citations miss Justice Frankfurter's point that it is unconstitutional to infantilize the entire nation by restricting adults to possessing only items suitable for children. *Butler v. Michigan*, 352 U.S. 380 (1957)(rejecting the notion that literature for adults should be censored to protect children from seeing inappropriate materials). Besides, ordinary American teenagers are, like ordinary American adults, not incipient murderers. The vast majority of young murderers are, like their older counterparts, established criminals:



- A Los Angeles study showed that gangs had a role in 80% of all adolescent homicides.<sup>40</sup>
- 57% of homicides perpetrated by male youths are committed in the course of another crime, such as robbery or rape.<sup>41</sup>
- A study of young murderers found that 89% had psychotic symptoms.<sup>42</sup>

### C. Body Count Statistics

Petitioners and their amici cite various articles comparing the number of criminals killed by armed citizens with the number of deaths from gun misuse, and claim that since the former number is smaller than the latter, guns must be too dangerous for home defense.

Again, the comparison falsely combines two separate groups: law-abiding gun owners (who are disarmed by Petitioners' law) and illegal criminal gun owners (who are not, and who perpetrate the vast majority of murders).

More fundamentally, counting the number of criminal deaths is a very inappropriate measure of anticrime utility. Amici would strongly oppose making the number of justifiable homicides into a positive metric for the performance of particular police forces or individual officers.

Besides, the survey evidence of defensive gun use (detailed in Part I) is unanimous that the large majority of DGUs consist only of brandishing a gun, rather than firing a shot, let alone a fatal one.

### D. Accidents

One reason that the per capita death rate from firearms accidents has declined by 86% since 1948, while the per capita firearms supply has risen by 158% is that handguns have replaced many long guns as the firearm kept in the home.<sup>43</sup> The gun accidental death rate for children has fallen even more sharply, by 91%. Handguns are more difficult for a small child to accidentally discharge than are long guns. The trigger on a rifle or shotgun is easier to pull than is the heavier trigger on a revolver or the slide on a self-loading pistol. Handguns can be hidden from inquisitive children more easily than long guns can.

For all ages, the fatal gun accident rate is at an all-time low, even as the per capita gun supply is at an all-time high. The annual risk





level for a fatal gun accident is 0.22 per 100,000 population—about the risk level for taking two airplane trips a year, or for a whooping cough vaccination. (2004 gun data); BREYER, BREAKING THE VICIOUS CIRCLE, at 5, 7 (airplane and vaccine data).

Swimming pools are involved in many more accidental child fatalities than are firearms. NATIONAL SAFETY COUNCIL, INJURY FACTS 2007, at 133, 144 (in 2003, there were 7 accidental firearms deaths for children aged under 5, and 49 for ages 5-14; for the combined age groups in that same year, there were 86 bathtub deaths, and 285 in swimming pools); STEVEN LEVITT & STEPHEN DUBNER, FREAKONOMICS 135-36 (rev. ed. 2006)(swimming pool accidents cause more deaths of children under 10 years than all forms of death by firearm combined. “The likelihood of death by pool (1 in 11,000) versus death by gun (1 in 1 million-plus) isn’t even close.”)(parentheticals in original).

To ban airplanes, swimming pools, or whooping cough vaccine based on a microscopic rate of fatal accidents would be absurd; the District’s assertion of accidents as a reason for banning handguns or functional firearms cannot pass rational basis review.

The people who cause gun accidents tend to have high rates of “arrests, violence, alcohol abuse, highway crashes, and citations for moving traffic violations.” Julian Waller & Elbert Whorton, *Unintentional Shootings, Highway Crashes, and Acts of Violence*, 5 ACCIDENT ANALYSIS & PREVENTION 351, 353 (1973). Unlike in 1973, many such people are now prevented from buying a gun by the National Instant Check System.

It is true, and trivial, that homes with guns have more gun accidents, just as homes with lawnmowers have more lawnmower accidents.

### III. LONG GUNS ARE INADEQUATE SUBSTITUTES

Mayor Fenty claims that “It is plainly relevant that the District allows residents to possess other perfectly effective firearms....”<sup>44</sup> To the contrary, the District’s highest court has recognized that banning self-defense in the home is the intent of the gun lock statute, and has upheld that ban.<sup>45</sup> Moreover, handguns are often superior and safer for self-defense *especially* in urban environments. That is why 80% of defensive uses of firearms are with handguns.<sup>46</sup> That is why almost all police officers use handguns when entering a building, and why so many police officers use handguns for defense of their homes and families when off-duty:



- A handgun is much easier to hold while phoning (or for police, radioing) for help.
- The ability to summon help while simultaneously keeping the gun pointed at the criminal reduces the chance that the home-owner or the police officer will have to shoot the criminal; it is preferable that criminals be captured rather than killed.
- Especially in a home, a long gun is harder to maneuver (e.g., around corners) and shoot, and, because of its length, is easier for a criminal to grab. Thus, handguns are far superior as defensive arms for use in small urban spaces such as apartments.
- For persons who have relatively weak upper body strength (such as the elderly, or small persons, or some women), a handgun is much easier to hold, control, and aim accurately.

The reason that handguns have been called “equalizers”<sup>47</sup> is that they are the best tool for a person to defend herself against larger or more numerous attackers, especially in a close-range setting such as the home.

#### IV. THE HANDGUN AND SELF-DEFENSE BANS VIOLATE PRECEDENT AND ORIGINAL INTENT

While strict scrutiny is the appropriate standard of review for most gun controls, it unnecessary here, for this Court’s own precedents indicate the unconstitutionality of a handgun ban.

*Robertson v. Baldwin* declared “the carrying of concealed weapons” (presumably, handguns and knives) to be an exception to the Second Amendment. 165 U.S. 275, 281-82 (1897). The exception proves the rule: that a ban on all handguns in the home violates the Second Amendment. Similarly, Justice Holmes’ opinion in *Patsone v. Pennsylvania* upheld a state statute against legal aliens possessing long guns for hunting, because the statute “does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defence.” 232 U.S. 138, 143 (1914).

Petitioners’ extreme and unusual law is well outside the constitutional mainstream. Cf. *Lawrence v. Texas*, 539 U.S. 558 (2003)(only four states had the law at issue; here, only Chicago and a few of its suburbs ban handguns, and even they do not outlaw home self-defense with long guns); *Romer v. Evans* 517 U.S. 620 (1996)(empha-



sizing extreme, unique nature of the law); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (unusual statute “forbidding the use” of a lawful product in the home).

St. George Tucker—the leading legal scholar of the Early Republic, on whom this Court has relied many times for original intent—used an example of a law like the one at bar to illustrate the necessity of judicial review. 1 WILLIAM BLACKSTONE, COMMENTARIES, app. at 289 (St. George Tucker ed., Lawbook Exch., 1996)(1803) (arguing that the Necessary and Proper clause barred disarming citizens, because disarmament could never be necessary or proper). He further stated that self-defense is part of the Second Amendment: “This may be considered as the true palladium of liberty....The right of self defence is the first law of nature.” *Id.* at vol. 1, app. at 300. Justice Story later adopted the “true palladium” image of the Second Amendment in his own treatise. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 607 (2d. ed. 1851).

In a passage ignored by Petitioners’ amici historians, Tucker wrote: “The right of the people to keep and bear arms shall not be infringed. Amendments to C. U. S. Art. 4, and this without any qualification as to their condition or degree, as is the case in the British government.” *Id.* at vol. 2, 143 n.40. (The right to arms was originally the fourth of 12 amendments Congress proposed to the people.)

Like all 19<sup>th</sup> century commentators, Tucker recognized the Second Amendment as an individual right belonging to all citizens, and including the right to possess arms for self-defense. *See* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359.

In 1846, the Supreme Court of Georgia held that a ban on handguns violated the Second Amendment, but that restrictions on concealed carry did not. *Nunn v. Georgia*, 1 Ga. 243 (1846); *see also* Jason Mazzone, *The Bill of Rights in Early State Courts*, 92 MINN. L. REV. 1 (2007)(observing that post-Barron, many state courts still applied the Bill of Rights to state laws, and several did so with the Second Amendment); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1203-17 (1992)(*Nunn* was one of several state opinions which provided the intellectual foundation for the 14<sup>th</sup> Amendment).

The District has a legitimate interest in a screening system, such as the National Instant Check System, for purchasers of firearms. However, banning handguns and home defense because of invidious prejudice amounts to unconstitutionally piling “inference upon inference”<sup>48</sup> and “prophylaxis upon prophylaxis.”<sup>49</sup>



## CONCLUSION

“I don’t intend to run this government around the moment of survival,” declared D.C. Councilman David A. Clarke, chairman of the committee that created the handgun and self-defense ban.<sup>50</sup> The Second Amendment forbids banning the tools of survival. Petitioners’ dangerous laws deprive the public and law enforcement of the life-saving, crime-reducing effects of gun ownership which are apparent in the 50 states.

The decision below should be affirmed.

Respectfully submitted,

DAVID B. KOPEL  
*Counsel of Record*  
INDEPENDENCE INSTITUTE

C.D. MICHEL  
JASON A. DAVIS  
TRUTANICH-MICHEL, L.L.P.



## APPENDIX. STATEMENT OF INTEREST OF ADDITIONAL AMICI

### **Maryland State Lodge, Fraternal Order of Police**

Founded in 1967, the Maryland State Lodge of the Fraternal Order of Police is the largest organization of rank and file law enforcement officers in Maryland, comprising 19,198 members and 68 subordinate lodges. The Maryland FOP’s mission is to support the interests of law enforcement and public safety.

### **San Francisco Veteran Police Officers Association**

San Francisco Veteran Police Officers Association (SFVPOA) represents retired San Francisco officers. SFPVOA members and their families need to be able to defend themselves from the criminals they have arrested throughout their careers, and SFPVOA recognizes the self-defense needs of all law-abiding citizens. The SFVPOA participated in the lawsuit that overturned a handgun ban in San Francisco. *Fiscal v. City & County of San Francisco*, —Cal. Rptr. 3d—, 2008 WL 81550 (Cal. Ct. App. 2008).

### **Long Beach Police Officers Association**

The Long Beach Police Officers Association represents members in the police officer, corporal, sergeant and lieutenant ranks, who police the 35<sup>th</sup>-largest city in the United States.





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### **Texas Police Chiefs Association**

The Texas Police Chiefs Association was founded in 1958 to promote, encourage and advance the professional development of Chiefs of Police and senior police management personnel throughout the State of Texas. TCPA represents over 600 law enforcement executives in Texas.

### **Texas Municipal Police Association**

Founded in 1950 to promote professionalism in law enforcement, the Texas Municipal Police Association represents 14,000 officers. TMPA provides law enforcement training in a wide variety of subjects, with special emphasis on bringing courses to rural departments that cannot afford to send officers to big cities for classes.

### **New York State Association of Auxiliary Police**

The New York State Association of Auxiliary Police represents uniformed police volunteers in 55 police departments throughout New York State. Auxiliary police in New York date back to 1932; their status was formalized by the statewide Defense Emergency Act of 1951.

### **Alpine County, California, District Attorney Will Richmond**

Will Richmond previously served as District Attorney for Tulare County, and as Deputy Chief Assistant U.S. Attorney for Eastern District of California. He was appointed Alpine County District Attorney in 2002, and then elected to the position.

### **Amador County, California, District Attorney Todd Reibe**

First elected in 1999, Todd Reibe was re-elected in 2002 and 2006.

### **Butte County, California, District Attorney Michael Ramsey**

Michael Ramsey has served as a prosecutor for 29 years, and as Butte County District Attorney for over 20 years. During his administration the department has instituted 17 special prosecution units and investigative programs.

### **Colusa County, California, District Attorney John Poyner**

John Poyner was first elected District Attorney in 1986, and has been re-elected ever since. He is California District Attorneys Association President-Elect for 2007-2008.

### **Del Norte County, California, District Attorney Michael D. Reise**

Michael D. Reise was elected to his first term in 2002, and re-elected in 2006.

### **El Dorado County, California, District Attorney Vern Pierson**

As a career prosecutor, Vern Pierson has served as a vertical prosecutor for domestic violence and sexual assault. He helped create the Field Guide used by thousands of California police officers, and he is the author of the annually-updated California Evidence Pocketbook. He teaches trial





advocacy and the laws of evidence to California prosecutors. Since 1999, he has served on the committee that provides the annual legal revisions for Peace Officers Standards and Training (P.O.S.T.).

**El Norte County, California, District Attorney Michael D. Reise**

Michael D. Reise was elected to his first term in 2002, and re-elected in 2006.

**Fresno County, California, District Attorney Elizabeth A. Egan**

Elizabeth Egan was elected in 2002. She heads one of the largest prosecutorial agencies in California.

**Glenn County, California, District Attorney Robert Holzapfel**

Robert Holzapfel was first elected District Attorney of Glenn County in 1990 and was re-elected 1994, 1998, 2002, and 2006.

**Imperial County, California, District Attorney Gilbert Otero**

Gilbert Otero was first elected in 1992, and is currently serving his fourth term. He is Past President of the California District Attorneys Association

**Kern County, California, District Attorney Edward Jagels**

Edward Jagels was first elected District Attorney of Kern County in 1983, at the age of 33. He is a Past President of the California District Attorneys Association. He has served on the Governor's Law Enforcement Steering Committee, the Attorney General's Policy Council on Violence Prevention, and was co-author and campaign chair of the Crime Victims Justice Reform Act (Prop. 115).

**Kings County, California, District Attorney Ron Calhoun**

Ron Calhoun was first elected in 1999, and is currently serving his third term.

**Madera County District Attorney Ernest J. LiCalsi**

Ernest J. LiCalsi was first elected in 1992. He is an Adjunct Professor at California State University, Fresno, where he teaches Criminal Legal Process and Advanced Criminal Legal Process for the Department of Criminology.

**Mariposa County, California, District Attorney Robert H. Brown**

Former Naval Commander Robert H. Brown began his career as a lawyer after retiring from the U.S. Navy. He has been a prosecutor since 1985, and was elected District Attorney in 2002 and re-elected in 2006.

**Mendocino County, California, Sheriff Thomas D. Allman**

Thomas Allman has been a law enforcement officer since 1981. He has served in a variety of assignments, including undercover narcotics work targeting methamphetamine. He was elected Sheriff in 2006.

**Merced County, California, District Attorney Larry Morse**

Larry Morse joined the District Attorney's office in 1993, and was elected District Attorney in 2006. He was named Prosecutor of the Year by A



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Women's Place of Merced County and by the Central Valley Arson Investigators Association.

**Modoc County, California, District Attorney Gary Woolverton**

After more than 30 years in private practice, specializing in workman's compensation, Gary Woolverton was elected District Attorney in 2006.

**Mono County, California, District Attorney George Booth**

George Booth has worked as both a criminal defense attorney and Deputy District Attorney and Assistant District Attorney for Mono County. He has been in the District Attorney's Office for 18 years.

**Orange County, California District Attorney, Tony Rackauckas**

Before being elected District Attorney, Tony Rackauckas had served as Presiding Judge of the Appellate Department of the Superior Court, and before that as a judge of the Superior Court and the Municipal Court. He was elected District Attorney in 1998, and re-elected in 2002 and 2006. During his time in office gang membership has decreased by 8,500 members, a reduction of 45 percent. There are 55 fewer gangs.

**Placer County, California, District Attorney Brad Fenocchio**

Brad Fenocchio joined Placer County District Attorney's office in 1985, and was first elected District Attorney in 1994. He received the Rural and Medium County Outstanding Prosecutor of the Year Award for the State of California in 2003; the National Association of Counties 2003 Achievement Award presented to the Placer County District Attorney's Office for its innovative the Community Agency Multidisciplinary Elder Team; and the Attorney General's Distinguished Service Award for Elder Abuse Prosecution presented by California Attorney General's Office in 2003.

**San Bernardino, California, District Attorney Michael Ramos**

Michael Ramos was elected 2002 and re-elected in 2006. In 2004 he was appointed to California Victim Compensation and Government Claims Board, and was elected to the California District Attorneys Association Board of Directors. He was given the Latino of the Year Award in 1999, by the Redlands Northside Impact Committee.

**Santa Barbara County, California, District Attorney Christie Stanley**

Christie Stanley joined the Santa Barbara County District Attorney's office in 1980. In 1984 she was recognized as "Deputy District Attorney of the Year." She was elected in 2006.

**Shasta County, California, District Attorney Gerald C. Benito**

Gerald C. Benito was first elected District Attorney in 2003.

**Sierra County, California, District Attorney Larry Allen**

Larry Allen was elected District Attorney/Public Administrator of Sierra



County on March 5, 2002 and took office as the County's 37th District Attorney on January 6, 2003.

#### **Siskiyou County, California, District Attorney J. Kirk Andrus**

J. Kirk Andrus was appointed District Attorney in 2005, and was elected in 2006. He is the youngest District Attorney in California.

#### **Solano County, Calif., District Attorney David W. Paulson**

Before joining the District Attorney's Office in 1977, David W. Paulson had served as a military trial judge and as an appellate military judge on the Navy's highest court, the Navy-Marine Corps Court of Criminal Appeals.

He was appointed District Attorney by the Board of Supervisors in 1993, elected in 1994, and re-elected in 1998, 2002, and 2006. He is a Past President (2004-2005) of the California District Attorneys Association (CDAA), and served as CDAA Director in 1995-1997.

He is also a Past President (2005-2006) of the Board of Directors of the Institute for the Advancement of Criminal Justice (IACJ), and currently serves as the Editor-in-Chief of *The Journal of the Institute for the Advancement of Criminal Justice*. Mr. Paulson was recently appointed Chair of the Board of Advisors for the new LL.M. in Prosecutorial Science program at Chapman University School of Law.

#### **Sutter County, California, District Attorney Carl V. Adams**



Carl V. Adams is the senior elected District Attorney in California. He was first elected in 1982, and has been re-elected six times after that. He serves on the Board of the California District Attorneys Association.



#### **Tehama County, California, District Attorney Gregg Cohen**

Gregg Cohen was first elected in 1998, and is serving his 3rd term. He served on the California District Attorneys Association Board of Directors in 2005 and 2006, as Vice-Chairman of Rural Counties in 2007, and also served on the Corrections and Parole Committee. His prior experiences includes service in the Criminal Division of the San Diego City Attorney's Office, the Shasta County District Attorney's Office, in the U.S. Attorney's Office in San Diego, and in private firms specializing in toxic tort litigation.

#### **Trinity County, California, District Attorney Michael Harper**

Michael Harper was elected in 2006. Prior to taking office he was Deputy District Attorney in Trinity County from 2001-2007, and has worked as a prosecutor for 15 years.

#### **Tulare County, California, District Attorney Phil Cline**

Phil Cline began his career as a prosecutor in 1978 with the Tulare County District Attorney's Office. Before being appointed District Attorney in 1992, he had specialized for seven years in homicide cases. He was first elected in 1994. He created Tulare County's Rural Crime Program, the first of its kind in the nation. He is a Past President of the Tulare County Police Chiefs Association.



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### **Ventura County, California, District Attorney Gregory Totten**

Gregory Totten was first elected in 2002, and was re-elected in 2006. He has been named the Ventura County Kiwanis “Law Enforcement Officer of the Year.” He serves on the Board of Directors of the California District Attorneys Association

### **Rep. Andy Olson**

Oregon State Rep. Olson is Vice-chair of the Human Services and Women’s Wellness Committee, and also the Deputy Republican Leader. Before joining the legislature, he was a Lieutenant in the Oregon State Police, where he served for 29 years.

### **National Police Defense Foundation (NPDF)**

The National Police Defense Foundation (NPDF) is a non-profit organization of over 100,000 members and supporters dedicated to protecting and defending law enforcement. The NPDF offers free medical support services to all law enforcement personnel who experience a job-related illness and disability. NPDF also provides legal support for police officers who are the victims of fabricated allegations, or of retaliation for whistle-blowing. NPDF’s “Safe Cop” program was recognized by Congress in 1995; the program offers a \$10,000 reward for public information leading to the arrest and conviction of any person who shoots a law enforcement officer. Safe Cop produced the information that led to the arrest and conviction of the murderers of Orange, New Jersey, Police Officer Joyce Carnegie and of Deputy Sheriff Paul Rein of the Broward County Sheriff’s Department. The State Troopers Coalition of the National Police Defense Foundation was established to address the needs of state troopers nationwide. More than 60 law enforcement organizations are affiliated with NPDF.

### **Law Enforcement Alliance of America**

Founded in 1991, the Law Enforcement Alliance of America’s 75,000 members and supporters are comprised of law enforcement officers, crime victims, and concerned citizens.

### **Independence Institute**

Founded in 1985, the Independence Institute is a nonpartisan, nonprofit public policy research organization dedicated to providing information to concerned citizens, government officials, and public opinion leaders.

Independence Institute staff have written or co-authored scores of law review and other scholarly articles on the gun issue, and several books, including the only law school textbook on the subject: ANDREW MCCLURG, DAVID B. KOPEL & BRANNON P. DENNING, GUN CONTROL AND GUN RIGHTS (NYU Press, 2002).

### **International Association of Law Enforcement Firearms Instructors**

The International Association of Law Enforcement Firearms Instructors (IALEFI) is the world’s largest association of police firearms instructors.





Founded in 1981, IALEFI conducts national and regional training conferences for instructors. IALEFI comprises over 10,000 members, approximately ninety percent of whom are active, non-retired instructors. IALEFI instructors include members of every federal law enforcement agency, and every branch of the U.S. military. Most IALEFI members are Americans, with Canadians comprising the largest group from the 15 other nations also having members. IALEFI publishes a quarterly magazine, *The Firearms Instructor*, and also publishes various manuals, including *Firearms Training Standards for Law Enforcement Personnel* and the *Standards & Practices Reference Guide for Law Enforcement Firearms Instructors*. IALEFI strongly supports the right of law-abiding citizens to own handguns for self-defense, and is particularly cognizant of how widespread civilian handgun ownership leads to better police firearms training, as described in Part I.G. of this Brief.

## ENDNOTES

1. The parties have consented to the filing of this brief. Counsel of record for all parties received written notice in December of intent to file this brief. No counsel for a party authored the brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. The NRA Civil Rights Defense Fund has made contributions to the Independence Institute that have been used in part to fund the preparation of this brief.
2. Officer David Clark, one of two officers in charge of registration for the Gun Control Section of the D.C. police.
3. See, e.g., David Griffith, *Shooting Straight: The Majority of Cops Believe Citizens Should Have the Right to Own Handguns* POLICE, Mar. 2007, , at 10, <http://www.policemag.com/Articles/2007/03/Editorial.aspx>; Officers Emphatically Say "No" to Gun Control, POLICE, Mar. 2007, at 14 (both articles reporting results of a survey conducted by the magazine); *Police Views on Gun Control*, AUSTIN AMERICAN-STATESMAN, Oct. 4, 1993, at A8 (1993 poll by the Southern States Police Benevolent Association shows that 90% of southern police feel that the Constitution protects the right of individuals to keep and bear arms); Funny You Should Ask, POLICE, Apr. 1993, at 56 (85% of police believe civilian gun ownership increases public safety); *The Law Enforcement Technology Gun Control Survey*, L. ENFORCEMENT TECH, July/Aug. 1991, at 14-15 ("75% do not favor gun control legislation . . . with street officers opposing it by as much as 85%").
4. Cf. David Mustard, *The Impact of Gun Laws on Police Deaths*, 44 J. L. & ECON. 635 (2001) (allowing licensed, trained citizens to carry concealed handguns in public places does not increase police officer deaths, and may reduce police deaths).



5. The District has approximately 0.2% of the national population (2000 census), but accounts for 1.2% of police officers murdered. *See* FBI, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 2006, table 1, available at <http://www.fbi.gov/ucr/killed/2006/table1.html> (cumulative data for 1997-2006).
6. Kevin Heilliker, *Pistol-Whipped: As Gun Crimes Rise, Britain Is Considering Cutting Legal Arsenal*, WALL ST. J., Apr. 19, 1994, at A1.
7. JAMES WRIGHT, PETER ROSSI, & KATHLEEN DALY, UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA 139-40 (1983) (Nat'l Inst. of Just. study); *see also* Gary Kleck, *Crime Control Through the Private Use of Armed Force*, 35 SOC. PROBS. 1, 12, 15-16 (1988).
8. *See* Ted Miller et al., *Victims Costs and Consequences* 9 (Nat'l Inst. of Just., NCJ 155282, 1996), <http://www.ncjrs.gov/pdffiles/victcost.pdf> (the 1996 figures were multiplied by 1.28, to account for 1996-2006 increases in the Consumer Price Index).
9. David Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345, 363-66 (2001). For more, see Philip Cook & Jens Ludwig, *Guns & Burglary* and David Kopel, *Comment*, both in *EVALUATING GUN POLICY* (Jens Ludwig & Philip Cook eds., 2003)(pro/con analysis of the relationship between guns and burglary).
10. Ellen Cohn & David Farrington, *Who Are the Most Influential Criminologists in the English-Speaking World?* 34 BRIT. J. CRIMINOL. 204 (1994) (based on citations in top journals). Dr. Wolfgang was also President of the American Society of Criminology, and President of the American Academy of Political and Social Science. His research was cited in *Furman v. Georgia*, 408 U.S. 238, 250 n.15 (1972)(Douglas, J., concurring).
11. PHILIP COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY OF FIREARMS OWNERSHIP AND USE 62-63 (1996). Cook and Ludwig argue that their own study produced implausibly high numbers, and they prefer the NCVS estimate. *Id.* at 68-75. For a response, *see* Gary Kleck, *Has the gun deterrence hypothesis been discredited?* 10 J. FIREARMS & PUB. POL'Y 65 (1998), <http://saf.org/kleck1998.pdf>.
12. Gary Kleck & David Bordua, The Factual Foundation for Certain Key Assumptions of Gun Control, 5 L. & POL'Y Q. 271, 284 (1983); Gary Kleck, *Policy Lessons from Recent Gun Control Research*, 49 J.L. & CONTEMP. PROBS. 35, 47 (1986).
13. *See* Don Kates, *The Value of Civilian Handgun Possession As a Deterrent to Crime or Defense Against Crime*, 18 AM. J. CRIM. L. 113, 153 (1991).

One article argued that the drop in Orlando rapes was statistically insignificant, being within the range of possibly normal fluctuations. David McDowall et al., *General Deterrence through Civilian Gun Ownership*, 29 CRIMINOLOGY 541 (1991). However, the authors' statistical model was such that even if gun-based deterrence had entirely eliminated rape in Orlando,



the model would have declared the result to be statistically insignificant. KLECK, TARGETING GUNS, at 181.

14. *Town to Celebrate Mandatory Arms*, N.Y. TIMES, Apr. 11, 1987, at 6.
15. Kleck, 35 SOC. PROBS. at 13-15. The McDowall article (*supra* note 13) reports that there was no statistically significant change in the Kennesaw burglary rate. But the article improperly combined household burglaries (which did decline substantially) with other forms of burglary, such as unoccupied businesses. KLECK, POINT BLANK, at 136-38.
16. *Ramsey defends 911 response*, WASH. TIMES, May 11, 2004, at A1.
17. Debbie Dujanovic, *911 Nightmare Uncovered in Investigative Report*, KSL.com, Nov. 1, 2007, [ttp://www.ksl.com/?nid=148&sid=2077061](http://www.ksl.com/?nid=148&sid=2077061).
18. *911 Response Times: An I-Team Investigation*, Fox 5 ATLANTA, <http://www.fox5atlanta.com/iteam/911.html>.
19. *L.A. police average over 10 minutes in responding to 911 calls*, A.P. wire, July 1, 2003; *see also Cop Response Slows*, L.A. DAILY NEWS, July 22, 2001 (median of 8 minutes, 30 seconds; average of 12.1 minutes).
20. *Mayor Bloomberg Releases Fiscal 2005 Mayor's Management Report*, US STATES NEWS, Sept. 12, 2005.
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26. Kleck, 35 Soc. PROBS. at 7-9; Gary Kleck & Miriam DeLone, *Victim Resistance and Offender Weapon Effects in Robbery*, 9 J. QUANTITATIVE CRIMINOL. 55, 73-77 (1993)(study of all NCVS robbery data from 1979-85; most effective form of resistance, both for thwarting the crime, and for reducing the chance of victim injury, is resistance with a gun); Kleck & Gertz, 86 J. CRIM. L. & CRIMINOL at 174-75; William Wells, *The Nature and Circumstances of Defense Gun Use: A Content Analysis of Interpersonal Conflict Situations Involving Criminal Offenders*, 19 JUST. Q. 127, 152 (2002).
27. Lawrence Southwick, *Self-Defense with Guns: The Consequences*, 28 J. CRIM. JUST. 351, 362, 367 (2000)(NCVS robbery data, pertaining to situations where the robber has a non-gun weapon; if the robber has a gun, or has no weapon, victim gun possession did not seem to affect injury rates. If 10% more victims had guns, serious victim injury would fall 3-5%).



28. The article's analysis of 1988 national data on homicide in 33 large cities showed that 54% of killers had a prior adult criminal record, 2% had a juvenile record only; no information was available on 25% and 20% did not have criminal record; so 74% of killers for whom records were available had a prior criminal record.
29. Jo McGinty, *New York Killers, and those Killed, by the Numbers*, N.Y. TIMES, Apr. 28, 2006.
30. Richard Berke, *Capital Offers a Ripe Market to Drug Dealers*, N.Y. TIMES, Mar. 28, 1989, at 1, 6.
31. Anthony Braga et al., *Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, Massachusetts*, 9 POLICE Q. 20, 29-31 (2006).
32. Philip Cook et al., *Criminal Records of Homicide Offenders*, 294 JAMA 538 (2005).
33. Gus Sentementes, *Patterns persist in city killings: Victims, suspects usually black men with long criminal histories*, BALT. SUN, Jan. 1, 2007.
34. Kennedy & Braga, 2 HOMICIDE STUD. at 276, 283 (studying homicides perpetrated from Jan. 1, 1994 to May 24, 1997, and examining suspects' MPD arrest records from 1990 onward; the study did not examine records of arrests by other law enforcement).
35. KLECK, TARGETING GUNS, at 236, analyzing data from US DOJ, *Murder Cases in 33 Large Urban Counties in the United States 1988*, <http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/09907.xml>, and FBI, *Supplementary Homicide Reports* (1995).
36. MARIE WILT ET AL. DOMESTIC VIOLENCE AND THE POLICE 23 (1977).
37. Linda Langford et al., *Criminal and Restraining Order Histories of Intimate Partner-Related Homicide Offenders in Massachusetts, 1991-95* in THE VARIETIES OF HOMICIDE AND ITS RESEARCH (FBI Academy, 2000), <http://www.icpsr.umich.edu/HRWG/PDF/hrwg99.pdf>.
38. Paige Hall-Smith et al., *Partner Homicide in Context*, 2 HOMICIDE STUD. 400, 410 (1998).
39. Kennedy & Braga, 2 HOMICIDE STUD. at 267.
40. Off. of Juv. Just. & Delinq. Prev., *Report to Congress on Juvenile Violence Research* 14 (July 1999), [www.ojjdp.ncjrs.org/pubs/jvr/contents.html](http://www.ojjdp.ncjrs.org/pubs/jvr/contents.html).
41. Ann Loper & Dewey Cornell, *Homicide by Juvenile Girls*, 5 J. CHILD & FAM. STUD. 323, 326, 330 (1996)(also noting that males constitute 94% of juvenile homicide perpetrators).
42. Wade Myers & Kerrilyn Scott, *Psychotic and Conduct Disorder Symptoms in Juvenile Murderers*, 2 HOMICIDE STUD. 160 (1998)(also noting prior studies showing young murderers to be distinguished by "neurological abnormalities," "criminally violent family members" and "gang membership").



43. An additional reason for the 86% reduction in accidents may be expert-led safety programs, principally Project ChildSafe (created by the National Shooting Sports Foundation, funded in part by the DOJ, partnered with the National Lieutenant Governors Association, and promoted by local law enforcement)([www.projectchildsafe.org](http://www.projectchildsafe.org)), and Eddie Eagle Gun Safety (created by the NRA, winner of two awards from the National Safety Council, and taught by police and sheriffs departments all over America) ([www.nrahq.org/safety/eddie/awards.asp](http://www.nrahq.org/safety/eddie/awards.asp)).

44. Adrian Fenty & Linda Singer, *Fighting for Our Handgun Ban*, WASH. POST, Sept. 4, 2007.

45. *McIntosh v. Washington*, 395 A.2d 744, 755 (D.C. 1977)(noting the Council's finding that "that for each intruder stopped by a firearm there are four gun-related accidents within the home"—and thereby showing that elimination of self-defense against intruders was considered by the Council to be a price worth paying).

46. Kleck & Gertz, 86 J. CRIM. L. & CRIMINOL., at 175.

47. "Be not afraid of any man,

No matter what his size.

When danger threatens, call on me

And I will equalize."



Late 19<sup>th</sup> century advertisement for the Equalizer, a Colt handgun (which is now antique, but banned in the District).



48. *Gonzales v. Raich*, 545 U.S. 1, 35 (2005)(Scalia, J., concurring); *Sabri v. United States*, 541 U.S. 600, 608 (2004); *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Mathews v. Lucas*, 427 U.S. 495, 522 (1976)(Stevens, J., dissenting); *Anderson v. United States*, 417 U.S. 211 (1974); *Ingram v. United States*, 360 U.S. 672, 680 (1959); *Pereira v. United States*, 347 U.S. 1, 15 (1954)(Minton, J., concurring and dissenting); *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943); *United States v. Classic*, 313 U.S. 299, 332 (1941)(Douglas, J., dissenting); *United States v. Ross*, 92 U.S. 281, 282 (1875).

49. *Fed. Election Comm'n v. Wis. Right to Life*, -U.S.-, 127 S.Ct. 2652, 2673 (2007).

50. Daniel Greene, *The Case for Owning a Gun*, THE WASHINGTONIAN, Mar. 1985.





# INTEREST OF AMICUS CURIAE<sup>1</sup>

Second Amendment Foundation (“SAF”), a tax-exempt organization under § 501(c)(3) of the I.R.C., is a non-profit educational foundation incorporated in August 1974 under the laws of the State of Washington. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has 650,000 members and supporters residing in every state of the Union.

SAF files this *amicus curiae* brief in order to direct the Court’s attention to arguments and authorities that support the judgment of the court below.

## SUMMARY OF ARGUMENT

The purpose of the Second Amendment is to prevent Congress from using its Article I authorities, including its authority to regulate the militia, to disarm American citizens. The principal reason for including a preamble praising the militia—a preamble that does not substantively alter the operative prohibition on federal overreaching—was to endorse the traditional citizen militia, which many Americans preferred as an alternative to standing armies. The language, grammar, and history of the Amendment show both that its protection is not limited to militia-related activities, and that the protected right does extend to having arms for self defense against violent criminals.

### ARGUMENT I. PETITIONERS’ INTERPRETATION OF THE SECOND AMENDMENT IS UNTENABLE, AND THE LEGAL TEST SUGGESTED IN *UNITED STATES V. MILLER* IS UNWORKABLE

Petitioners’ principal claim is that the Second Amendment “protects the possession and use of guns only in service of an organized militia.”<sup>2</sup> This interpretation leads to one of three untenable conclusions:

- that the federal government is free to eliminate the people’s constitutional right to keep and bear arms by abolishing or failing to maintain an organized militia, a conclusion that is absurd on its face;<sup>3</sup> or



- that American citizens have a right to require the federal government to maintain an organized militia in which they can keep and bear arms, which implies—contrary to all historical evidence—that the Second Amendment substantially amended the provision of Article I giving Congress virtually unfettered authority to regulate the militia,<sup>4</sup> or
- that the Second Amendment forbids Congress to preempt state laws conferring a right to keep and bear arms while serving in a state militia, which has the problems discussed below.

Petitioners appear to adopt this third alternative,<sup>5</sup> which is fatally flawed. First, like the second alternative, it entails an historically unsupported assumption that the Second Amendment substantially altered Congress' Article I authority to regulate the militia. Second, a right of the states to organize and arm their own militias as they see fit conflicts with the constitutional prohibition against their keeping troops without the consent of Congress.<sup>6</sup> Third, this Court has consistently concluded that the federal government has extremely broad powers to preempt state militia regulations, and has never suggested that the Second Amendment has *any relevance at all* to preemption questions. *E.g., Houston v. Moore*, 18 U.S. 1 (1820); *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990).<sup>7</sup> Accordingly, petitioners' interpretation of the Second Amendment is insupportable.

*United States v. Miller*, 307 U.S. 174 (1939), suggests an interpretation that is different from petitioners', and more facially plausible, namely that private citizens might have a right to possess weapons that are "part of the ordinary military equipment or [whose] use could contribute to the common defense." *Id.* at 178. This test (which is not *Miller's* holding) implies that American citizens have a right to possess at least those weapons that an unaided individual can "bear" and that "could contribute to the common defense." Today this would include, at a minimum, the fully automatic rifles that are standard infantry issue, and probably also shoulder-fired rockets and grenades.

When *Miller* was decided, infantry were typically armed with the same sort of bolt-action rifles that civilians commonly kept for use in everyday life, just as founding-era civilians commonly kept the same kinds of weapons they would need if called for military duty.<sup>8</sup> That has now changed, and the categorical approach tentatively suggested in *Miller* will not generate a workable approach to assessing modern



firearms laws. For a discussion of the difficulties entailed in applying *Miller*'s suggested test to the instant case, see Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 Geo. Mason U. Civ. Rts. L.J. 229, 231-36 (forthcoming 2008).

Accordingly, the ambiguous opinion in *Miller* should be read to hold only that this Court required further evidence before it could decide whether an unregistered short-barreled shotgun was, in the circumstances presented by that case, covered by the Second Amendment.

As the following discussion will show, the purpose of the Second Amendment is to prevent Congress from using its Article I authorities, including its authority to regulate the militia, to disarm American citizens. The principal reason for including a preamble praising the militia—a preamble that does not substantively alter the operative prohibition on federal overreaching—was to endorse the traditional citizen militia, which many Americans preferred as an alternative to standing armies. The language, grammar, and history of the Amendment demonstrate both that its protection is *not* limited to militia-related activities, and that the protected right *does* extend to having arms for self defense against violent criminals.



## II. THE TEXT OF THE SECOND AMENDMENT ESTABLISHES THAT THE CONSTITUTIONAL RIGHT EXTENDS BEYOND MILITIA-RELATED WEAPONS AND ACTIVITIES



It is self evident that the Second Amendment's preambular phrase alludes to *a* reason for guaranteeing the right of the people to keep and bear arms. The constitutional text, however, does not imply that fostering a well regulated militia is the sole or even principal purpose for protecting that right.<sup>9</sup> The Amendment's preface has a meaningful logical relationship to the right to arms, which is explained in Parts III and IV *infra*, but it is not the relationship suggested by petitioners.

A. The grammatical structure of the Second Amendment does not imply that the purpose of the constitutional right is limited to fostering a well regulated militia

The most significant grammatical feature of the Second Amendment is that its preamble is an absolute phrase, often called an ablative absolute or nominative absolute.<sup>10</sup> Such constructions are grammatically independent of the rest of the sentence, and do not qualify any word in the operative clause to which they are appended.<sup>11</sup> The usual function of absolute constructions is to convey some informa-





tion about the circumstances surrounding the statement in the main clause.<sup>12</sup>

A telling example is provided by Article 3 of the Northwest Ordinance:

Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.<sup>13</sup>

This provision—ratified by the same Congress that drafted the Second Amendment—attests to a belief in the beneficent effects of schools and education. But it does not imply that “[r]eligion, morality, and knowledge” are their *only* purpose. Still less could the provision be interpreted to require religious censors in the schools, or to allow the abolition of secular schools if the government came to believe that such education undermines religion and morality.

Another very significant grammatical feature of the Second Amendment is that the operative clause is a command. Because no word in that command is grammatically qualified by the prefatory assertion, the operative clause has the same meaning that it would have had if the preamble had been omitted, or even if the preamble is demonstrably false.

Consider a simple example. Suppose that a dean announces: “The teacher being ill, class is cancelled.” Nothing about the dean’s prefatory statement, including its truth or falsity, can qualify or modify the operative command. If the teacher called in sick to watch a ball game, the cancellation of the class remains unaffected. If the dean was secretly diverting the teacher to work on a special project, the class is still cancelled. If someone misunderstood a phone message, and inadvertently misled the dean into thinking the teacher would be absent, the dean’s order is not thereby modified.

The Second Amendment’s grammatical structure is identical, and so are the consequences. Whatever a well regulated militia may be, or even if such a thing no longer exists, the right of the people to keep and bear arms is not to be infringed. What’s more, whether or not such a militia can contribute to the security of a free state, the right of the people to keep and bear arms remains unaffected. Indeed, even if it could be proved beyond all doubt that *disarming* the people is necessary to the security of a free state, still the right of the people to keep and bear arms would remain unchanged.

Undoubtedly, new information or changed opinions about the preambular assertion might suggest the need to issue a new command. If, for example, the dean discovered that the teacher wasn’t



going to be absent after all, he might make a new announcement reversing his earlier decision. Similarly, if the American people came to believe that civilian disarmament laws were necessary to promote public safety, Congress might initiate a repeal of the Second Amendment under Article V. In both cases, a new command would be needed because the truth or falsity of the preambular assertion cannot alter the original, operative command.

It is true, of course, that a grammatically absolute phrase—like countless other forms of contextual evidence—may sometimes help to resolve ambiguities in the operative command to which it is appended. But such contextual evidence cannot change the meaning of the command. And it is true that an absolute phrase—like other kinds of contextual evidence—may sometimes persuade the recipient of a command that he or she may safely disobey it. But that also does not change the meaning of the command.

Lest one suppose that those who adopted the Second Amendment could have been unaware of the implications of its grammatical structure, consider the Patent and Copyright Clause:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.<sup>14</sup>

Unlike the Second Amendment, this provision contains an *operative* clause that sets out a purpose (the promotion of useful knowledge) and a subordinate phrase that specifies the means by which that purpose may be pursued (creating patents and copyrights). Because of this grammatical subordination, the authorization to grant copyrights and patents is limited by the goal set out in the operative clause, as this Court has acknowledged. *E.g., Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003).<sup>15</sup>

The Patent and Copyright Clause provided an obvious model that the draftsmen of the Second Amendment could have used to limit the right to keep and bear arms to militia purposes. That model was emphatically not followed, for the Second Amendment does not say anything like, “The people shall have a right to promote the security of a free state by keeping and bearing such arms as are suitable for use in a well regulated militia.”

The familiar words of the Preamble—which announce that the Constitution was adopted “in [o]rder” to achieve specified goals—offered another grammatical model that might have been adapted to impose some kind of militia limitation on the right to keep and



bear arms.<sup>16</sup> But the Second Amendment does not read: “In order to secure the existence of a well regulated militia, which is necessary to the security of a free state, the right of militiamen to keep and bear arms shall not be infringed.”

The language of the Second Amendment unequivocally protects the right of the people to keep and bear arms, grammatically unqualified by any militia limitation.<sup>17</sup>

B. The term “bear Arms” in the Second Amendment’s operative clause does not imply that the Amendment has an exclusively military purpose

Petitioners and *amici* Professors of Linguistics and English maintain that the term “bear Arms” implies that the Second Amendment refers only to the military use of weapons.<sup>18</sup> If it were true, this would come as a surprise to several members of this Court. See *Muscarello v. United States*, 524 U.S. 125, 142-43 (1998) (Ginsburg, J., dissenting). But it is false.

First, the very dictionaries quoted by *amici* to prove “an overwhelming military meaning” of the word “arms” refute their claim.<sup>19</sup> Noah Webster’s 1828 dictionary, for example, says: “In law, arms are any thing which a man takes in his hand in anger, to strike or assault another.”<sup>20</sup>

Second, it was perfectly normal to use the term “bear arms” in civilian contexts. James Wilson—a preeminent lawyer and an early member of this Court—used the term in a discussion of homicide in “defence of one’s person or house.” Interpreting the 1790 Pennsylvania Constitution’s guarantee of the right “to bear arms,” Wilson characterized this provision as a recognition of the natural law of self-preservation and as a descendant of the Saxons’ obligation to “keep arms for the preservation of the kingdom, and of their own persons.”<sup>21</sup>

Third, the relevant constitutional term in the instant case is “keep . . . Arms.” Only through the wildest exaggeration of the military connotations of “bear arms” could one possibly conclude that “keep arms” has been transmuted through propinquity into a military term.

C. “The people” referred to in the Second Amendment has always been a much larger body of individuals than the militia

Another textual indication that the preambular phrase does not limit the operative language is provided by the Second Amendment’s use of “Militia” and “the people.” These are different words with



different meanings. Furthermore, the militia and the people are and always have been very substantially noncongruent bodies.

The militia has always been a small subset of “the people” whose right to keep and bear arms is protected by the Second Amendment. James Madison, for example, estimated that the militia comprised about one-sixth of the population when the Constitution was adopted.<sup>22</sup>

Most obviously, women were not part of the eighteenth century militia, nor are they included today (except for female volunteers in the National Guard).<sup>23</sup> Women, however, have always been citizens and thus part of “the people.” See, e.g., *Minor v. Happersett*, 88 U.S. 162, 165-70 (1874) (although women did not have voting privileges, they were part of “the people” who ordained and established the Constitution, and they have always been citizens). Just as women have always been covered by the First Amendment’s “right of the people” to assemble and petition for redress of grievances, and the Fourth Amendment’s “right of the people” to be secure from unreasonable searches and seizures, women have always had the same Second Amendment rights as men.<sup>24</sup>

Even if one mistakenly supposed that “the people” referred to in the First, Second, and Fourth Amendments included only those citizens with full political rights (thus excluding women), the militia and the people would still remain substantially noncongruent.<sup>25</sup> Under the Second Militia Act of 1792, for example, the militia included most free ablebodied male citizens who were at least 18 but under the age of 45.<sup>26</sup> This would have included a substantial number of men who were not old enough to vote or who were disenfranchised by property qualifications.<sup>27</sup> Thus, the militia included many men who did not have full political rights.

The opposite form of noncongruence was also significant. Those who were physically unable to perform militia duties, as well as those aged 45 and older, still had all their political rights, including the right to vote. Besides the numerous men in these categories, many other citizens were legally exempted from militia duties.<sup>28</sup> Thus, many men with full political rights were not subject to militia obligations.

The noncongruence of the militia and the people points to another fatal defect in petitioners’ interpretation of the Second Amendment. Nothing in the Constitution purports to forbid Congress from exempting *everyone* from militia duties, as this Court has recognized.<sup>29</sup> It would be absurd to conclude that if Congress effectively abolished the militia by enacting such a universal exemption, the right of “the people” to keep and bear arms would thereby vanish. Congress cannot abolish this constitutional right of the people



by abolishing the militia. Neither can the right be limited to contexts in which its exercise contributes to the functioning of an organized militia that Congress is not even required to maintain.

### III. THE NATURE AND HISTORY OF THE SECOND AMENDMENT CONFIRM THAT ITS PURPOSE CANNOT BE CONFINED TO FOSTERING A WELL REGULATED MILITIA

The preceding analysis demonstrates that the text does not impose a “militia-related” limitation on the Second Amendment right. The constitutional language, however, would be nonsensical if one could not specify any relation at all between the right to arms and the desideratum of a well regulated militia. There is such a relationship, though not the one assumed by petitioners, who mistakenly contend that the Second Amendment protects access to arms only in the service of an organized militia.

- A. The Second Amendment contributes to a well regulated militia by preventing a specific misuse of Congress’ Article I authorities, including its authority to regulate the militia



Article I of the Constitution gives Congress virtually plenary authority to regulate the militia,<sup>30</sup> and the Second Amendment does not purport to shift any of that power to the state governments. The Court has recognized this fact by deciding numerous preemption cases involving state militia laws without so much as mentioning the Second Amendment. See, e.g., *Houston v. Moore*, 18 U.S. 1 (1820); *Perpich v. Dep’t of Def.*, 496 U.S. 334 (1990).



This Court’s disregard of the Second Amendment in preemption cases makes perfect sense, for the Amendment does not purport to require, authorize, or even allow any kind of regulation by the federal or state governments. Still, it would seem that protecting the right to arms must have *something* to do with the well regulated militia, or the Second Amendment’s preamble would be entirely out of place.<sup>31</sup>

Let us focus again on the language of the Constitution. One obvious way for a militia to be well regulated is to be well trained or well disciplined as a military organization, and the framers of the Second Amendment no doubt meant to conjure thoughts of such an organization.<sup>32</sup> The Second Amendment, however, added absolutely nothing to Congress’ almost plenary Article I authority to provide for military training and discipline. Furthermore, the term “well regulated” also has a broader meaning that is actually more relevant in this context.





To see why, note that any possible contribution of the Second Amendment to a well regulated militia must arise from governmental *inaction* (*viz.*, from *not* adopting regulations that infringe the right of the people to keep and bear arms). Note also that—while it may not be immediately obvious to readers conditioned by experience with the modern regulatory Leviathan—the term “well regulated” need not mean *heavily* regulated or *more* regulated. On the contrary, it is perfectly possible for the government to engage in *excessive* regulation or *inappropriate* regulation, and such regulations are just what the Second Amendment forbids.

As its operative clause makes clear, the Second Amendment simply forbids one kind of inappropriate regulation (among the infinite possible regulations) that Congress might be tempted to enact under its sweeping authority to make all laws “necessary and proper” for executing its Article I militia powers (or perhaps other delegated powers).<sup>33</sup> What is that one kind of inappropriate regulation? Disarming the citizens from among whom any genuinely traditional militia must be constituted.<sup>34</sup>

Congress is permitted to omit many things that are required for a well regulated militia, and may even take affirmative steps to ruin the militia. Congress may organize the militia so as to create the functional equivalent of an army,<sup>35</sup> or it may so neglect the militia as to deprive it of any meaningful existence. The Second Amendment does not purport to interfere with the general discretion of Congress to regulate, or fail to regulate, or perversely regulate the militia. All it does is forbid one particularly extravagant extension of Congress’ Article I powers, namely *disarming American citizens*, which might otherwise have been attempted under color of regulating the militia (or of exercising some other Article I authority).

#### B. The Second Amendment’s background and drafting history confirm that the constitutional right is not limited to militia-related purposes

The history of the Second Amendment confirms this limited and indirect—though real—relationship between a well regulated militia and the constitutional right to arms.

At the Philadelphia Convention, qualms were repeatedly expressed about the danger of standing armies in peacetime, along with a preference for maintaining the militia as an alternative to such armies.<sup>36</sup> It was also recognized, however, that a traditional militia could not by itself adequately provide for the nation’s security, even



in peacetime.<sup>37</sup> Accordingly, the delegates put no significant limits on federal military authority in the constitution they proposed.<sup>38</sup>

Near the end of the Convention, however, George Mason recurred to the uneasiness he and others had expressed. Recognizing that “an absolute prohibition of standing armies in time of peace might be unsafe,” Mason proposed that the clause giving the federal government almost plenary authority over the militia be prefaced with the following words: “And that the liberties of the people may be better secured against the danger of standing armies in time of peace.”<sup>39</sup>

James Madison himself spoke in favor of this proposal, arguing that the proposed addition would not actually restrict the new government’s authority, but would constitute a healthy disapprobation of unnecessary reliance on armies.<sup>40</sup> The only recorded objection, offered by Gouverneur Morris, was that this language set “a dishonorable mark of distinction on the military class of Citizens.”<sup>41</sup>

Mason’s motion failed. When one reads the Second Amendment with this history in mind, it is apparent that its text incorporates what Madison had seen as the virtue of Mason’s suggestion at the Convention, while avoiding aspersions on military men.

During the subsequent ratification debates, the massive transfer of military authority to the federal government became one of the chief Anti-Federalist complaints.<sup>42</sup> The Federalists who controlled the First Congress, however, were no more willing than the Philadelphia Convention had been to curtail federal authority in this field. As Madison noted when introducing his initial draft of the Bill of Rights in the House of Representatives, he was averse to reconsidering “the principles and substance of the powers given” to the new government, but he was quite prepared to incorporate noncontroversial “provisions for the security of rights.”<sup>43</sup>

Consistent with Madison’s view—though not with petitioners’ interpretation of the Second Amendment—Congress rejected proposals to put substantive limits on congressional authority over armies and the militia.<sup>44</sup> What the First Congress was quite willing to do, and what it did do in the Second Amendment, was to make explicit the utterly noncontroversial denial of federal power to infringe the right of the people to keep and bear arms.

Much like George Mason’s proposal at the Philadelphia Convention, Madison’s initial draft of a right-to-arms provision in the First Congress sought to give comfort to those who worried about abuses of the federal military power, but without diminishing that power:



The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.<sup>45</sup>

Like the Mason proposal that Madison had supported at the Philadelphia Convention, though more subtly, Madison's initial draft in the First Congress lauded the militia without diminishing federal authority to keep up standing armies, and without requiring the federal government actually to maintain a well regulated militia.

In the Madison draft, however, the comment about the militia's value was attached to a provision guaranteeing a right of the people rather than to a provision about congressional authority to regulate the militia, as Mason's proposal at Philadelphia had been. This created the potential for confusion, and virtually all of the modifications made in Congress to Madison's initial draft had the effect of clarifying that the right of the people to keep and bear arms was not confined to the militia context.

First, the House deleted the reference to a "well armed" militia, which might have misleadingly suggested that the sole purpose of protecting the people's right to arms was to ensure that the organized militia would be well armed. The text sent to the Senate read:

A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed; but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.<sup>46</sup>

The Senate went further. It deleted the conscientious objector clause and the reference to a militia "composed of the body of the people," both of which might have suggested that the right to arms was somehow confined to the militia context.<sup>47</sup> The Senate also specifically rejected a proposal to qualify the right to keep and bear arms by adding the phrase "for the common defence."<sup>48</sup>

Having stripped Madison's initial draft of several potentially misleading cues, Congress adopted the text that is now a part of the Constitution:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.





This text offered nothing to satisfy Anti-Federalist desires for actual limits on federal authority over military affairs, and the *only* contemporaneous criticisms of the Second Amendment were complaints that it did not satisfy these desires.<sup>49</sup> The private right protected by the Second Amendment caused no controversy, precisely because it is a private right.

The drafting history of what became the Second Amendment thus confirms that its endorsement of the traditional militia does not imply that the people's right to arms is contingent on the manner in which Congress exercises its authority to organize and regulate the militia.

C. This Court has recognized that the Constitution contains declaratory language that does not change the legal effects that the Constitution would have had without that language

When Congress sent the Bill of Rights to the states for ratification, it described its provisions as “declaratory and restrictive clauses” meant to “prevent misconstruction or abuse of [the Constitution’s] powers.”<sup>50</sup> The Second Amendment has both declaratory and restrictive elements. The words of praise for the militia in the Second Amendment are a *declaration* of respect for the traditional militia system, which might—or in practice might *not*—provide an alternative to the standing armies that many citizens feared. That explains both why the declaratory, preambular language was included, and why the Amendment was so carefully drafted to ensure that the *restriction* on federal infringement of the people’s right to arms is not dependent on its actually contributing to the maintenance of a well regulated militia.

This Court has often recognized that the Constitution contains language whose omission would not have changed the meaning of the document. As early as *Marbury v. Madison*, 5 U.S. 137, 174 (1803), the Court acknowledged that an entire constitutional clause might be interpreted to be without effect if “the words require it.”<sup>51</sup> *McCulloch v. Maryland*, 17 U.S. 316, 420-21 (1819), went even further: *without* claiming that the words *required* such an interpretation, the Court concluded that the Necessary and Proper Clause may not augment and certainly does not diminish the incidental powers elsewhere conferred by implication on Congress.

Perhaps the best example of constitutional language that was not meant to change the meaning of the Constitution came from the very same draftsmen who gave us the Second Amendment. The Tenth Amendment simply reaffirms what was already established by



the original Constitution. Citing relevant historical documents, this Court concluded that its purpose was simply to provide reassurance to the public that the new government was meant to be one of limited, enumerated powers:

The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than *declaratory* of the relationship between the national and state governments as it had been established by the Constitution before the amendment *or that its purpose was other than to allay fears* that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e.g., II Elliot's Debates, 123, 131; III *id.* 450, 464, 600; IV *id.* 140, 149; I Annals of Congress, 432, 761, 767-768; Story, *Commentaries on the Constitution*, §§ 1907-1908.

*United States v. Darby*, 312 U.S. 100, 124 (1941) (citations in original) (emphasis added); see also *New York v. United States*, 505 U.S. 144, 156 (1992) (reaffirming *Darby*'s characterization of the Tenth Amendment and quoting Justice Story's *Commentaries on the Constitution*).

Thus, this Court has concluded that an *entire constitutional amendment* was adopted only to allay what were regarded as unfounded fears, without changing or qualifying anything in the Constitution to which it was appended. It is therefore not at all anomalous that the Second Amendment—drafted by the same Congress and adopted at the same time—includes a reassuring preambular comment that was not meant to change or limit the effects of the operative clause to which it was appended.

#### IV. THE PURPOSE OF THE SECOND AMENDMENT INCLUDES PROTECTION OF THE FUNDAMENTAL NATURAL RIGHT OF SELF DEFENSE AGAINST CRIMINAL VIOLENCE

Respect for the original meaning of the Second Amendment requires that its language be applied—faithfully and appropriately—to contemporary society, which is in important respects quite different from that of two centuries ago.

Petitioners emphasize the paucity of debate during the founding period about the relevance of the Second Amendment to the right of self defense against criminal violence.<sup>52</sup> The fact that public debates focused on questions about the Second Amendment's



adequacy as an obstacle to tyrannical exercises of federal military power does not so much as suggest that *anybody* thought the new federal government did or should have the authority to disarm its citizens in the name of crime control. Such illogical inferences have long been rejected. *E.g.*, *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 644-45 (1819) (specific cases contemplated by the framers do not limit the reach of constitutional provisions); *Weems v. United States*, 217 U.S. 349, 373 (1910) (general language not restricted by “the mischief which gave it birth”); *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) (“[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

With respect to the right to arms, the concern that was foremost for the founding generation—fear of a tyrannical federal government—has understandably subsided. At the same time, the military power of the government has become overwhelming, which greatly diminishes the potential of an armed citizenry to deter such tyranny. It remains true that a large stock of arms in private hands raises the expected cost to the government of engaging in seriously oppressive actions, and thereby makes such oppression less likely to occur.<sup>53</sup> But whereas Madison could plausibly argue that the new federal government would be incapable of raising an army capable of subduing America’s armed populace,<sup>54</sup> today’s armed forces have the technical ability to inflict unthinkable mayhem on the civilian population.

Even more important, a significant gap has developed between civilian and military small arms. Eighteenth century Americans commonly used the same arms for civilian and military purposes, but today’s infantry and organized militia are equipped with an array of highly lethal weaponry that civilians do not employ for self defense or other lawful purposes. The Constitution does not require this Court to blind itself to that post-*Miller* reality, or to hold that the civilian population has a right to keep every weapon that the militia can expect to find useful if called to active duty.

Nor should the Court blind itself to other contemporary realities, the most important of which is the problem of criminal violence, and the inability of the government to control it. Rather than focus exclusively on eighteenth century comments about maintaining an armed counterweight to the armies of a potentially tyrannical federal government, the Court should recognize that the broader purpose of the Second Amendment emerges readily from the Constitution’s founding principles.



Those founding principles are summed up in the familiar liberal axioms set out in the Declaration of Independence. In liberal theory, the most fundamental of all rights is the right of self defense. Thomas Hobbes, the founder of modern liberalism, advanced this proposition with his customary forcefulness when he acknowledged only one natural right, and described it as “the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life.”<sup>55</sup>

Among the political theorists most often cited by major American writers during the founding period,<sup>56</sup> there was unanimous agreement about the centrality of the right of self defense:

Locke: “[B]y the Fundamental Law of Nature, Man being to be preserved, as much as possible, when all cannot be preserved, the safety of the Innocent is to be preferred: And one may destroy a man who makes War upon him, or has discovered an Enmity to his being for the same Reason, that he may kill a Wolf or a Lion . . .”<sup>57</sup>

Montesquieu: “The life of states is like that of men. Men have the right to kill in the case of natural defense; states have the right to wage war for their own preservation.”<sup>58</sup>



Blackstone: “Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.”<sup>59</sup>



The exchange of rights that constitutes the social contract does not diminish the central importance of the natural right to self defense. Rather, political or legal limitations on the exercise of that right must be understood as efforts to *enhance* the citizens’ ability to protect their lives effectively. For that reason alone, the Second Amendment should be applied vigorously with respect to governmental restrictions on the liberty of citizens to defend themselves against the violent criminals whom the government cannot control.

This corollary to the central premise of liberal political theory is consistent with evidence about eighteenth century attitudes. William Blackstone, for example, characterized the English right to arms as 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.”<sup>60</sup> Just as one would expect from the fundamental principle of liberal theory, Blackstone makes no distinction between oppression by the government itself and oppression that the government fails to prevent. If anything, his language seems to refer more easily to the ineradicable phenomenon of criminal violence, experienced by all





free societies, than to the extraordinary instances of governmental oppression that call for armed resistance.

In America, a similarly broad understanding of the purpose of the right to arms was articulated repeatedly during the founding period. Post-Revolution constitutions in Pennsylvania and Vermont, for example, proclaimed that “the people have a right to bear arms for the defence of *themselves* and the state.”<sup>61</sup> Similarly, the Anti-Federalist minority at the Pennsylvania ratifying convention proposed a bill of rights including this provision:

That the people have a right to bear arms for the defense of *themselves* and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people *or any of them*, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and governed by the civil power.<sup>62</sup>

Similarly, the New Hampshire ratifying convention proposed an amendment specifying that “Congress shall *never disarm any Citizen* unless such as are or have been in Actual Rebellion.”<sup>63</sup> And the minority at the Massachusetts ratifying convention proposed that the federal Constitution:

be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from *keeping their own arms*; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them . . .<sup>64</sup>

The natural right of self defense is the most fundamental right known to liberal theory, and the Second Amendment is our Constitution’s most direct legal expression of Blackstone’s insight that “in vain would [basic rights such as that of personal security] be declared, ascertained, and protected by the dead letter of the laws, if the [English] constitution had provided no other method to secure their actual enjoyment.”<sup>65</sup>

It would not be easy to find a more vivid illustration of Blackstone’s point than the District of Columbia, where every effort has been made to disarm the citizenry. According to what Blackstone calls “the dead letter of the laws,” personal security must be very well assured in a city where almost nobody except agents of the gov-



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ernment is authorized to possess an operable firearm. The reality is rather different, and nothing in the Constitution requires this Court to ignore that reality.

In the twenty-first century, the most salient purpose of the Second Amendment is to protect the people's ability to defend themselves against violent criminals. Accordingly, the federal government must be required to offer justifications for gun control statutes that go far beyond fashionable slogans and unsubstantiated appeals to hypothetical salutary effects on public safety. Any other approach would trivialize the fundamental right protected by the Second Amendment.

Petitioners have not satisfied the standard of exacting scrutiny to which the District of Columbia's disarmament laws should be subjected, and this failure is fatal to their case. Nor should this Court accept the Solicitor General's beguiling invitation to remand the case for application of some lower level of scrutiny loosely derived from an inapt analogy to governmental regulation of elections that the government itself conducts.<sup>66</sup> The D.C. Code unequivocally forbids American citizens to keep an operable firearm in their own homes for the protection of their own lives. Under no standard or review that respects the fundamental nature of the Second Amendment right could this prohibition possibly be upheld.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Nelson Lund  
George Mason University School of Law

## ENDNOTES

1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.
2. Pet. Br. 8; see also *id.* 11-12, 21.



3. For additional detail, see *infra* page – [last paragraph of Section III]; Nelson Lund, *Putting the Second Amendment to Sleep*, 8 Green Bag 2d 101 (2004).
4. See U.S. Const. art. I, § 8, cl. 16. For more detail, see Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 Tex. Rev. L. & Pol. 157, 183-84 (1999).
5. Pet. Br. 21.
6. See U.S. Const. art. I, § 10, cl. 3. Some militia organizations, like our modern National Guard, are functionally equivalent to “troops.”
7. Dissenting in *Houston v. Moore*, Justice Story noted that the Second Amendment *at most* might confirm that states have a limited concurrent power to regulate their militia “in the absence of, or subordinate to, the regulations of Congress.” 18 U.S. at 52-53. Cf. *Hamilton v. Regents*, 293 U.S. 245, 260 (1934) (citing Second Amendment when noting that state militia laws that are not preempted must also transgress “no right safeguarded to the citizens by the Federal Constitution”).
8. See Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 Ga. L. Rev. 1, 42 & n.98 (1996).
9. Eighteenth century state constitutions frequently included explanatory language that was manifestly over- and/or under-inclusive. See Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998).
10. This common Latin construction takes the ablative case. In English, where it is less common, it now takes the nominative case. For an historical discussion, see C. T. Onions, *An Advanced English Syntax* 68-70 (1904).
11. See, e.g., John Wilson, *The Elements of Punctuation* 4 (1857) (nominative absolutes “are grammatically independent of the other portions of the sentence in which they occur”); Virginia Waddy, *Elements of Composition and Rhetoric* 13 (1889) (“The absolute phrase is without grammatical dependence on any other word.”).
12. See, e.g., Onions, *supra*, at 68 (“In English, as in other languages, the Participial Adverb Clause is in origin a simple Adverbial Adjunct, consisting of a noun or noun-equivalent in an oblique case with a participle in agreement with it, and denoting an attendant circumstance, cause, condition, etc.”).
13. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52.
14. U.S. Const. art. I, § 8, cl. 8.
15. Even after recognizing the affirmative textual limitation on congressional power that the constitutional text clearly imposes, this Court has been notably restrained in enforcing that limitation. See, e.g., *Eldred*, 537 U.S. at 204-05 (“[I]t is Congress that has been assigned the task of defining the



scope of the limited monopoly that should be granted to authors . . . .” (internal quotation marks and citation omitted); *id.* at 205 n.10 (rejecting use of heightened scrutiny). It follows *a fortiori* that this Court should not infer a “militia limitation” that the language of the Second Amendment does *not* impose.

16. U.S. Const. pml. The operative clause of the Preamble “ordain[s] and establish[s] this Constitution.” Accordingly, this Court has warned that the Preamble may not be employed to enlarge the powers given to the federal government elsewhere in the Constitution, *i.e.*, apart from the Preamble. *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905). Similarly, the Second Amendment’s preamble cannot contract the right to arms specified in its operative clause.

17. *Amici* Professors of Linguistics and English assert, as though it were self-evidently dictated by the text, that “the absolute clause affirmatively states *the cause or reason* for the Second Amendment’s existence.” Br. Am. Cur. Profs. Linguistics and English 10-11 n.6 (emphasis added). This “sole cause” interpretation is not correct, and is certainly not self-evident. Reasoning from this unsubstantiated premise, *amici* mistakenly contend that the preambular phrase “significantly affects the meaning of the main clause” by implying that the Second Amendment “never would have been adopted but for [its framers’ belief] that a well regulated militia is necessary to the security of a free state.” *Id.*

Whatever the framers may have believed about the importance of a well regulated militia, and whether their beliefs were well founded or not, the Second Amendment’s operative clause means what it says. This conclusion does not amount to “omitt[ing]” or “wish[ing] away” the preambular phrase. *Id.* On the contrary, the analysis presented here and *infra* produces a much more coherent and cogent interpretation of the whole text than the one offered by these *amici* and by petitioners.

18. Pet. Br. 16-17; Br. Am. Cur. Profs. Linguistics and English 18-27.

19. Br. Am. Cur. Profs. Linguistics and English 19.

20. Quoted in *id.* 20 n.18; see also *id.* (quoting a 1730 dictionary that defined arms as “all manner of Weapons made use of by Men either for defending themselves, or for attacking others”)

21. 2 *Collected Works of James Wilson* 1142 (Kermit L. Hall & Mark David Hall eds., 2007) (internal quotation marks omitted). Additional examples are collected in U.S. Department of Justice, *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel (Aug. 24, 2004), at 16-19; Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service*



*in an Organized Militia?*, 83 Tex. L. Rev. 237, 255-57, 260-64 (2004); Clayton Cramer & Joseph Olson, *What Does “Bear Arms” Imply?*, Georgetown J.L. & Pub. Pol'y (forthcoming), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1081201](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081201).

22. *The Federalist No. 46.*

23. Act of May 8, 1792, ch. XXXIII, 1 Stat. 271; 10 U.S.C. 311(a).

24. The framers of the Bill of Rights knew how to draw precise distinctions between rights appertaining to militiamen and those belonging to the general population. See U.S. Const. amend. V (requiring presentment or grand jury indictment “except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”). This example further undermines the supposition that the framers thoughtlessly conflated the militia with the people in the Second Amendment.

25. Political speeches during the founding period sometimes seemed to equate the militia with the people. Careful attention to the context, however, shows that such statements were not meant literally, but rather served rhetorically to contrast a relatively broad-based militia with narrower variations. See, e.g., 10 *The Documentary History of the Ratification of the Constitution* 1312 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (George Mason at the Virginia ratifying convention); 2 *The Complete Anti-Federalist* 341 (Herbert J. Storing ed., 1981) (Federal Farmer).

26. Act of May 8, 1792, ch. XXXIII, 1 Stat. 271. The current statutory definition of the militia scarcely differs from the definition adopted in 1792. See 10 U.S.C. 311(a).

27. The minimum age for voting was twenty-one. Property qualifications had been relaxed in some states, but such qualifications were still significant. See, e.g., Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 24 (2000) (“By 1790, according to most estimates, roughly 60 to 70 percent of adult white men (and very few others) could vote.”).

28. See Act of May 8, 1792, ch. XXXIII, § 2, 1 Stat. 271, 272.

29. The Constitution “left [to the states] an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or *totally disappeared*. *Arver v. United States*, 245 U.S. 366, 383 (1918) (emphasis added).

30. U.S. Const. art. I, § 8, cl. 16.

31. See, e.g., Alma Blount & Clark S. Northup, *An Elementary English Grammar with Composition* 177 (1912) (although absolute constructions “are not formally connected with the sentence proper” there must be a “thought-





relation between this noun-participle group and the sentence proper; otherwise the absolute phrase ought not to be in the sentence").

32. See, e.g., *The Federalist No. 29*.

33. See U.S. Const. art. I, § 8, cl. 18.

34. Traditionally the militia was a broad body of civilians who could be summoned to meet public emergencies, in contradistinction to armies made up of paid troops. Accordingly, the Constitution systematically distinguishes the two. For further detail, see Lund, *Past and Future, supra*, at 22-24.

35. Congress has done exactly that in modern times, and this Court has upheld its authority to do so. *Perpich*, 496 U.S. 334.

36. See, e.g., 2 *The Records of the Federal Convention of 1787* (Max Farrand ed., rev. ed. 1937), at 326 (Mason), 329 (Gerry), 509 (Gerry), 563 (Randolph).

37. See, e.g., Letter from George Washington to the President of Congress (Sept. 24, 1776), in *Writings of George Washington* 67, 71-74 (Lawrence B. Evans ed., 1908); 2 *Records of the Federal Convention, supra*, at 332 (Charles Pinkney); *The Federalist No. 25*; Letter from Gouverneur Morris to Moss Kent (Jan. 12, 1815), in 3 *Records of the Federal Convention, supra*, at 420.

38. Limitations on congressional power are slight. U.S. Const. art. I, § 8, cl. 12 (army appropriations limited to two years), cl. 16 (states retain right to appoint officers and administer congressionally-dictated militia training).

39. 2 *Records of the Federal Convention, supra*, at 61617.

40. See *id.* at 617.

41. *Id.*

42. See, e.g., Letter from the Federal Farmer (Oct. 10, 1787), in 2 *Complete Anti-Federalist, supra*, at 241-43; Brutus, Essay (Jan. 10, 1788), in 2 *Complete Anti-Federalist, supra*, at 405, 406-08; The Impartial Examiner, Essay (Feb. 27, 1788), in 5 *Complete Anti-Federalist, supra*, at 180, 181-82; Luther Martin, "Genuine Information" (Nov. 29, 1787), in 3 *Records of the Federal Convention, supra*, at 172, 208-09; *The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins 191-92, 192-94, 196-99* (Neil H. Cogan ed., 1997) (John Smilie and William Findley at the Pennsylvania ratifying convention, George Mason at the Virginia ratifying convention, and Patrick Henry at the Virginia ratifying convention, respectively).

43. 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 1025 (1971).

44. *Complete Bill of Rights, supra*, at 169-70 (Sherman), 172 (Burke), 173-74 (unidentified Senator); 2 Schwartz, *supra*, at 1152 (unidentified Senator).



45. *Complete Bill of Rights, supra*, at 169. This proposal resembles a provision in a bill of rights, written by a committee on which Madison and Mason had both served at the Virginia ratifying convention, and proposed by that convention to the First Congress. See 2 Schwartz, *supra*, at 764-65 (members of the committee), 842 (reprinting the proposal). What it does *not* resemble is a completely separate proposal, written by the same committee and proposed by the same Virginia ratifying convention, which said in plain words essentially what petitioners claim is implied through indirection by Madison's initial draft and by the Second Amendment itself.

That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same.

*Id.* at 843. Although Madison was obviously quite familiar with this proposed amendment, he offered nothing like it to the First Congress. (An unidentified Senator did offer an amendment with the same wording, which was voted down. *Id.* at 1151, 1152.)

46. *Complete Bill of Rights, supra*, at 172. The change from "free country" to "free state" was purely stylistic. See Eugene Volokh, "Necessary to the Security of a Free State," 83 Notre Dame L. Rev. 1 (2007).

47. *Complete Bill of Rights, supra*, at 173-74. The Senate also replaced "the best security of a free state" with "necessary to the security of a free state." *Id.* at 175-76. This strengthened the declaratory force of the preambular endorsement of the militia by eliminating any suggestion that standing armies might be an acceptable, even if imperfect, substitute for a well regulated militia. Elbridge Gerry had worried about such an inference during the House debates. *Id.* at 187-88. The change had no effect on the meaning of the operative clause.

48. *Id.* at 174-75.

49. See Stephen P. Halbrook, *The Right of the People or the Power of the State*, 26 Val. U. L. Rev. 131, 184-85, 192-94 (1991).

50. 2 Schwartz, *supra*, at 1164.

51. The full sentence in *Marbury* reads: "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it." Petitioners quote only the first clause. Pet. Br. 17.

52. E.g., Pet. Br. 28.

53. For further detail, see Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 115 (1987); Lund, *Past and Future, supra*, at 56-58.



54. *The Federalist No. 46.*
55. *Leviathan*, ch. 14 (first paragraph) (1651).
56. See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 Am. Pol. Sci. Rev. 189 (1984).
57. *Second Treatise of Government* § 16 (1690).
58. *The Spirit of the Laws*, bk. X, ch. 2, at 138 (Anne M. Cohler et al. eds. & trans., 1989) (1748).
59. III *Commentaries* \*4.
60. I *Commentaries* \*139.
61. Pa. Const. of 1776, ch. I, art. XIII (emphasis added), Vt. Const. of 1777, ch. I, art. XV (emphasis added), in *Complete Bill of Rights, supra*, at 184, 184-85, respectively. The Pennsylvania Constitution of 1790 similarly provided that “the right of citizens to bear arms, in defence of themselves and the state, shall not be questioned.” Pa. Const. of 1790, art. IX, § 21, in *Complete Bill of Rights, supra*, at 184.
62. *Complete Bill of Rights, supra*, at 182 (emphasis added). It would be anachronistic to think that the reference to “killing game” in this proposal reflected a passion for sport. Apart from the role of hunting as a food source at that time, Americans would have been acutely aware, from Blackstone if from nowhere else, of the English game laws behind which the “preventing of popular insurrections and resistance to the government, by disarming the bulk of the people . . . [was] a reason oftener meant, than avowed, by the makers of forest or game laws.” II *Commentaries* \*412 (footnote omitted).
63. *Complete Bill of Rights, supra*, at 181 (emphasis added).
64. *Id.* (emphasis added). Note that the right-to-arms provision is as separate from the standing-army provision as it is from the provision dealing with freedom of the press and religion.
65. Blackstone, I *Commentaries* \*136. “Personal security” is listed as the first of the three great primary rights. *Id.* \*125. The right to arms is one of five auxiliary rights that help to secure the great primary rights. *Id.* \*139.
66. U.S. Br. Am. Cur. 24.

