No. 07-290

IN THE

Supreme Court of the United States

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

v.

DICK ANTHONY HELLER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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Table of Contents

Table of Authorities

Statutes and Regulations

Congressional Materials

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

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.[2] 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

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[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.

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. Acevedo*, 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.[3] 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

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[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. Pepersack*, 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).

agreed with the established view in the federal courts.[4]

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 possession 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.

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[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.

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").[5]

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

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[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).

legislation, the ABA advised that the Second Amendment as long interpreted by the courts did not limit legislative authority to enact this law.[6] 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*,

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[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 . . . .

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).

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 Refernce 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").[7] 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

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[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.

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 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.[8] 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

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[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.

branches. Such a breach of constitutional boundaries, removing an issue from the 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.

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