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 Circuit

BRIEF FOR THE NATIONAL RIFLE ASSOCIATION AND THE NRA CIVIL RIGHTS DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

STEPHEN D. POSS
Counsel of Record
KEVIN P. MARTIN
CHRISTINA E. NOLAN
SCOTT B. NARDI
NICHOLAS W. PILCHAK
MICHAEL P. SUGRUE
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
(617) 570-1000

Counsel for the Amici

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INTEREST OF THE *AMICI*[1]

The precise question presented by this case—whether three District of Columbia Code provisions violate the Second Amendment—belies its importance to the liberty cherished by the American people. If the Second Amendment is interpreted as Petitioners and their supporting *amici* prefer and the District's laws upheld, the individual right to keep and bear arms—identified by the Framers, in the very text of the Constitution, as integral "to the security of a free State"—will not only be infringed, but effectively abolished. See U.S. Const. amend. II ("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 outcome would cause grave harm not only to the tens of millions of law-abiding Americans who keep and bear arms for self-defense and other lawful, private purposes, but to the entire nation, which in times of gravest peril has always relied upon the body of ordinary men and women, and their everyday familiarity with arms, for its security.

Amicus curiae the National Rifle Association (the "NRA") is widely recognized as America's foremost defender of Second Amendment rights—indeed, the NRA is America's oldest civil rights organization. The NRA was founded in 1871 by Union generals who, based on their experiences in the Civil War, desired to promote marksmanship and expertise

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[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 the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

with firearms among the citizenry. Today, the NRA has nearly four million members and its programs reach millions more. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA also collects and publishes real-life examples of citizens from all walks of life whose lawful possession of firearms enabled them to protect themselves from violent criminals. The NRA has a vital interest in this case, as Petitioners' arguments, if accepted, would abrogate the fundamental right to keep and bear arms enjoyed by the NRA's members and other Americans. The passage of laws like the District's in other communities would then make the nation more, not less, dangerous, as armed citizens would cease to be an effective deterrent to burglars, rapists and other criminals.

Amicus curiae the NRA Civil Rights Defense Fund (the "Fund") was established by the NRA in 1978 for purposes including assisting in the preservation and defense of the human, civil, and constitutional rights of the individual to keep and bear arms in a free society. To accomplish this, the Fund provides legal and financial assistance to individuals and organizations defending their right to keep and bear arms and advocates proven criminal justice reforms. Additionally, the Fund sponsors legal research and education on a wide variety of issues, including the meaning of the Second Amendment. The Fund has a compelling interest in this case because the arguments made by the Petitioners, if accepted by this Court, would severely harm the American people, whose Constitutional rights the Fund was created to protect.

SUMMARY OF THE ARGUMENT

In adopting the Second Amendment, the Framers guaranteed an individual right to keep and bear arms for private purposes, not a collective right to keep and bear arms only in connection with state militia service. This is clear from the text of the Amendment itself, which guarantees "the right of *the people* to keep and bear Arms." Throughout the Constitution, individual rights are guaranteed to "the people"; when the Framers refer to a power of a State, they refer, unsurprisingly, to "the States." While Petitioners stress Framing-era debates concerning the Militia, the Framing generation viewed the individual right to keep and bear arms for personal use as a fundamental right of a free people. The Framers also sought to ensure a well-regulated militia by guaranteeing private ownership of firearms, as civilian ownership and use of firearms would confer experience and arms invaluable to militia service, and a right of private ownership would prevent the federal government from effectively disarming the populace by declining to organize the militia.

This individual right to keep and bear arms is a fundamental right; the Second Amendment on its face describes it as essential to a "free State"—a democratic state free from government tyranny. As with the fundamental democratic rights guaranteed by the First Amendment, laws burdening Second Amendment rights should be subjected to strict scrutiny and struck down in their entirety when overly broad. Petitioners and their supporting *amici* attempt to conjure fears of legal bedlam should courts examine firearms laws under strict scrutiny, yet they present no real argument that long-standing

laws regulating the ownership and use of firearms, such as laws barring ownership by convicted felons or the insane, would fail to pass muster under that test.

The D.C. Code provisions at issue in this case cannot survive strict scrutiny (or any level of scrutiny) and should be found facially invalid. While handguns and other firearms, like many other everyday objects such as automobiles, are involved in crimes and accidents, there are hundreds of millions of firearms and tens of millions of handguns in private possession, of which only a minute fraction are ever used unlawfully or involved in an accidental shooting. Most major American cities, unlike the District, have not taken the extreme and unconstitutional measure of banning the ownership of handguns by law-abiding citizens. The most significant effect of the District's handgun ban is to effectively deny *law-abiding* citizens the freedom to exercise their common law right to self-defense, a right exercised by millions of citizens annually and one that is sorely needed in the District.

ARGUMENT

I. The Second Amendment Guarantees an Individual Right to Keep and Bear Arms

1. Petitioners and their supporting *amici* argue that the Second Amendment protects a collective right—the right to keep and bear arms only in connection with service in an organized state militia—and that it does not protect an individual right to keep and bear arms for any private purpose. See Petitioners' Brief ("Pet. Br.") at 11–12 (Second Amendment protects "the right to keep and bear

arms as a part of a well-regulated militia, not to possess guns for private purposes"). Petitioners' reading of the Second Amendment, under which a government could disarm the people by the expedient of disbanding the organized militia, is at war with the Amendment's plain text and must be rejected.

By its terms, the Amendment protects the right "of the people" to keep and bear arms. The holder of the right is unambiguous: it is not the States, it is "the people" themselves. The Tenth Amendment, in which the Framers refer both to the "people" and to the States, demonstrates that the Framers were capable of distinguishing between individual rights and state power. See U.S. Const. amend X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Usage of the term "the people" elsewhere in the Bill of Rights further confirms that a right guaranteed to "the people" is an individual right. See *id.*, amend. I (guaranteeing "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"); *id.*, amend. IV (referring to "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

Had the Framers' intent been to protect state authority to organize militias, the Second Amendment could easily have been articulated differently. The Framers, for instance, could have adopted an amendment proposed by the Virginia ratifying convention, which stated: "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." Levy, Origins of the Bill of Rights 279 (1999). The Framers, however, rejected that proposal in favor of guaranteeing a right to "the people."

In light of the Amendment's text, it should be unsurprising that in *United States* v. *Miller*, 307 U.S. 174 (1939)—upon which Petitioners and their supporting *amici* attempt to rely for its *dicta* that the preamble of the Second Amendment informs the Amendment's scope—this Court operated from an assumption that there is an *individual* right to keep and bear arms.

As an initial matter, had the *Miller* Court concluded that there is not an individual right to keep and bear arms other than for use in service of an organized militia—the position advocated by Petitioners here—it might have said so. Instead, the Court reasoned:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees *the right to keep and bear such an instrument.*

307 U.S. at 178 (emphasis added). Hence, at most *Miller* held (based on the incomplete factual record before the Court) that short-barreled shotguns are not an "Arm" within the meaning of the Second

Amendment—it said nothing about *who* is permitted to keep and bear arms.[2]

Indeed, the *Miller* Court *nowhere* discussed the modern status of the "Militia" in 1939; it never even suggested, as do Petitioners, see *infra* at 12, that because Congress had separated the Militia into an organized militia (the National Guard) and an unorganized militia of able-bodied civilian males, the Second Amendment was irrelevant to members of the latter. See also Act of June 3, 1916, ch. 134, § 57, 39 Stat. 197, currently codified as amended at 10 U.S.C. § 311. Had *Miller* adopted Petitioners' position, it would not have considered whether short-barreled shotguns have "some reasonable relationship to the preservation or efficiency of a well regulated militia," as Miller was not in the National Guard and therefore would have had no right to keep and bear any firearm.

2. Petitioners argue that the Second Amendment's preamble—"A well regulated Militia, being necessary to the security of a free State"—necessarily limits the scope of the right found in the Amendment's operative clause—"the right of the people to keep and bear Arms, shall not be infringed." See, *e.g.*, Pet. Br. at 11–12. Under this reading of the text, the Second Amendment protects only "the right to keep and bear arms as a part of a

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[2] Thus, the brief of the American Bar Association as *amicus* in support of Petitioners, which urges a collective-right position based on adherence to *Miller*, is wholly misguided. *Miller* at most stated that the Second Amendment's reference to "Arms" is to firearms bearing "some reasonable relationship to the preservation or efficiency of a well regulated militia." Whatever the outer boundaries of that test, a handgun surely qualifies.

well-regulated militia, not to possess guns for private purposes." *Ibid.*

While, to be sure, the Second Amendment refers to the utility of an armed population in preventing government tyranny, the Framers did not consider the right limited to that purpose. The Framers were well aware that in late-18th century America a significant segment of the population depended upon private ownership of arms to provide food for their families and to defend themselves and their families from attack. Americans' personal right to possess such firearms for hunting or self-defense was part of the essence of the Framers' view of themselves as a free and democratic people. Had Americans in 1787 been told that the federal government could ban the frontiersman in his log cabin, or the city merchant living above his store, from keeping firearms to provide for and protect himself and his family, it is hard to imagine that the Constitution would have been ratified.

More importantly, Petitioners' argument confuses a goal of the Amendment with the means selected to achieve that goal. Even assuming for sake of argument that the Framers were contemplating only empowering the Militia as a check on the national government, they did not seek to achieve that goal by preserving for state governments the authority to organize and arm the Militia. Indeed, under the second Militia Clause of the Constitution it is the *federal* government that has the right to organize, arm, and discipline the Militia—state governments are limited to appointing Militia officers and training the Militia according to federal standards, and governing only such part of

the Militia as is not "employed in the Service of the United States." See U.S. Const. Art. I, § 8, cl. 16.

In addition to providing some authority over the Militia to the States, the Framers sought to effectuate their purpose of guarding against federal overreaching by guaranteeing the right of the people to keep and bear arms. That they would approach the issue in this way was perfectly sensible. As an initial matter, while an oppressive federal government might seek to raid militia depots as the British attempted at Lexington and Concord, arms dispersed among the people would prove far more difficult to confiscate. Moreover, an individual accustomed, through everyday ownership and use, to the bearing of arms will obviously be a more effective militiaman than an individual who handles guns only during infrequent militia drills. Under the second Militia Clause, Congress can choose not to train the Militia, as is the case with the "unorganized militia" today. See 10 U.S.C. § 311. A militia that only practices with arms under conditions set by Congress can hardly be expected to serve either as an effective check to a national standing army, or as an effective adjunct to that army should the need arise.

Notably, the history of the NRA and its activities today illustrate the Framers' wisdom in assuring a "well-regulated Militia" by guaranteeing to "the people" the right to keep and bear arms. The NRA was formed in 1871 by two Union veterans dismayed by the lack of marksmanship shown by their troops during the war. In an effort to ensure a higher quality pool of military recruits for any future war, their goal was for the NRA to promote skilled firearms use among civilians along with recognition

of the virtues and values inherent in firearms ownership.

Among the NRA's first actions was the establishment of a firing range for civilian practice, and the NRA continues to be the leader in firearms education for civilians. Over 50,000 NRA-certified instructors now train about 750,000 gun owners a year.[3] NRA courses include, among others, firearms marksmanship and safety training. Additionally, nearly 1,000 NRA-certified coaches are specially trained to work with young competitive shooters. Law enforcement firearms training has been another priority for the NRA. In 1960 the NRA became the premier national trainer of law enforcement officers with the introduction of its NRA Police Firearms Instructor certification programs. Today, there are more than 10,000 NRA-certified police and security firearms instructors training law enforcement officers across the entire nation.

Since 1903 the NRA has promoted shooting sports among America's youth. Today, youth programs remain a cornerstone of the NRA, with more than one million youth participating in NRA shooting sports events and affiliated programs with groups such as 4-H, the Boy Scouts of America, the American Legion, the Jaycees and others. High school and college students, including ROTC students, across the country compete in NRA-sponsored pistol and rifle competitions.

Consistent with the Framers' intent, the firearms expertise developed by the NRA and its members through civilian use has been made available to the

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[3] For a discussion of the NRA's educational and training activities, see generally http://www.nra.org/aboutus.aspx.

country during times of crisis. Individual NRA members have brought their civilian firearms experience with them in the many conflicts fought by this nation since the NRA's founding. In World War II, the NRA opened its firing ranges to the government, developed training materials, and encouraged members to serve as plant and home guard members. After the war, President Truman expressed the nation's gratitude for the NRA's contributions, stating:

> During the war just ended, the contributions of the Association in the matter of small-arms training aids, the nation-wide pre-induction training program, the recruiting of experienced small-arms instructors for all branches of the armed services, and technical advice and assistance to the Government civilian agencies aiding in the prosecution of the war—all contributed freely and without expense to the Government—have materially aided our war effort.

Letter reprinted in Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency, S. Comm. on the Judiciary, 90th Cong. 484 (1967).

Thus, Petitioners' assertion that the supposed sole purpose of the Second Amendment (assuring a well-regulated militia) is only advanced by protecting the right of active members in an organized militia to possess firearms for militia-related purposes is patently wrong. An effective militia cannot spring forth fully-formed from a people unfamiliar with firearms. Widespread civilian familiarity with firearms from private ownership and use, on the

other hand, greatly contributes to the efficacy of the militia when called upon.

3. Further illustrating the invalidity of Petitioners' reading of the Second Amendment, it would permit the federal government to wholly disarm the people and rely entirely on a federal standing army. This result, obviously at odds with one of the Framers' goals in enacting the Second Amendment, further confirms that the Amendment must protect an individual right.

Petitioners argue that, at most, the Second Amendment protects "the right to keep and bear arms as a part of a well-regulated militia." Pet. Br. at 11–12. Petitioners, noting that "since 1903, the militia has consisted of two parts, the National Guard and an 'unorganized militia,'" *id.* at 14 & n. 2, further insist that "[i]f language is to have meaning, membership in an unorganized militia is not membership in a 'well regulated' militia." *Ibid.* At the same time, however, Petitioners assert that a militia is only "well regulated" within the meaning of the Second Amendment if the *federal* government has exercised its authority under the second Militia Clause to organize, arm, and discipline that Militia. See *id.* at 21 ("Clause 16 makes clear that the federal government shall provide for 'organizing, arming * * * and disciplining, the Militia [so that they will be well-regulated]'" (bracketed material in original)). To summarize these various strands of Petitioners' argument, only federal legislation enacted under the second Militia Clause can make a militia "well regulated" within the meaning of the Second Amendment, and only members of a well-regulated militia have any right to keep and bear arms.

Congress, however, has *no* obligation to organize any militia. See*, e.g., Perpich* v. *Dep't of Defense*, 496 U.S. 334, 350 (1990) ("It is by congressional choice that the available pool of citizens has been formed into organized units"). Under Petitioners' reading of the Constitution, in which only federal action can make a militia "well regulated," if Congress were to elect not to form the militia into organized units then *no* citizen would have a Second Amendment right to keep and bear arms. And if a State were to attempt to raise a body of men as a militia, that body would, lacking federal organization under the second Militia Clause, not be "well regulated," and its members would lack any Second Amendment rights.

Obviously the Framers, who indisputably were opposed to disarming the people in favor of a federal standing army, see Pet. Br. at 9, did not intend to leave the fox in charge of the henhouse. The risk of conditioning a right to keep and bear arms on federal regulation of the Militia was foreseen by George Mason, who warned "Congress may neglect to provide for arming and disciplining the militia * * * 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 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). Thus, the Second Amendment guarantees a *right* to *the people* for a reason. However Congress elects to organize the Militia at any given time, "the right of *the people* to keep and bear arms" was enshrined in the Constitution to ensure that the people would always remain a bulwark for "the security of a free State."

4. In addition to contending that the Second Amendment does not protect any individual right to keep and bear arms for private purposes, Petitioners assert that the Amendment simply does not apply to any regulation by the District or by state and local governments. See Pet. Br. at 35–40; see also, *e.g.*, Brief of Amici Curiae Major American Cities, *et al.*, in Support of Petitioners at 12–24 ("Pets' Cities Br."). This argument is meritless.

Petitioners' and their supporting *amici*'s argument is based primarily upon this Court's pre-incorporation holding in *Presser* v. *Illinois*, 116 U.S. 252, 265 (1886), that the Second Amendment does not limit state authority. It is also based on the obvious point that, at the time of the Framing, the Bill of Rights, including the First Amendment, the Second Amendment, and the rest, was intended to protect against the abuse of federal authority. See, *e.g.*, Brief of the City of Chicago *et al.* in Support of Petitioners at 4–13 ("Chicago Br.").

The latter point is rendered moot by the incorporation of the Bill of Rights which occurred throughout the last century. While the Framers, in adopting the Second Amendment, were concerned (among other things) with the possibility of federal oppression, they also were concerned particularly with federal oppression in adopting, *e.g.*, the First Amendment's Establishment Clause ("*Congress* shall make no law respecting an establishment of religion"), which of course has been incorporated against the States. See, *e.g.*, *Elk Grove United School Dist.* v. *Newdow*, 542 U.S. 1, 8 & n. 4 (2004).

As to the pre-incorporation decision in *Presser*, while the Court did conclude that the Second Amendment was inapplicable to state legislation, the

Court simultaneously and unambiguously stated that States cannot deprive individuals of their right to keep and bear arms:

> It is undoubtedly true that *all citizens capable of bearing arms* constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, *the states cannot, even laying the constitutional provision in question* [*i.e.*, the Second Amendment] *out of view, prohibit the people from keeping and bearing arms*, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

116 U.S. at 584 (emphases added). While *Presser* explained that the restriction on States disarming the people was a structural constraint implicit in the Militia Clauses, following incorporation it makes more sense to ground that restriction in the Second Amendment. In either case, *Presser*, far from supporting Petitioners, instead confirms that state governments are not free to infringe the right of the people to keep and bear arms.

Petitioners go on to argue that the District's status as the seat of the national government somehow precludes the District's residents from enjoying Second Amendment rights. See Pet. Br. at 36–38. It has, however, long been held that residents of the District enjoy the same constitutional rights as every other American. As the Court explained in *O'Donoghue* v. *United States*, "[p]rior [to formation of the District] its inhabitants

were entitled to *all the rights*, guaranties, and immunities of the Constitution * * *. We think it is not reasonable to assume that the cession stripped them of these rights." 289 U.S. 516, 540 (1933) (emphasis added). Thus, the Second Amendment rights of residents of the District, much like their First Amendment rights, are no less than those of persons living merely across an intersection in Bethesda or a bridge in Arlington.

5. All told, Petitioners' reading of the Second Amendment is inconsistent and incompatible with the text of the Amendment; is not even compelled by the singular purpose they identify; and would permit Congress to wholly abrogate the right to keep and bear arms by declining to organize the Militia. In light of the Amendment's text and history, the only sensible conclusion is that it protects an individual right to keep and bear arms that is enforceable against all levels of government.

II. Laws Infringing Second Amendment Rights Should Be Subject to Strict Scrutiny and Facial Invalidation Where Overly Broad

The Petitioners and their supporting *amici*, as well as the United States, argue that laws regulating firearms should not be subjected to strict scrutiny, but at most to intermediate-level scrutiny (as asserted by the United States) or possibly even a "reasonableness" review (as Petitioners and various other *amici* appear to prefer). See Pet. Br. at 41–48; Brief of the United States at 20–25; see also, *e.g.*, Brief of Law Prof. Chemerinsky *et al.* in Support of Petitioners ("Chemerinsky Br."). Petitioners further argue that laws regulating firearms should only be declared facially invalid if they are incapable of

constitutional application. On each of these points, Petitioners are in error.

1. Traditionally, this Court has applied "strict scrutiny" to laws that regulate "fundamental" rights, such as the right to political speech. See generally *Burson* v. *Freeman*, 504 U.S. 191 (1992); *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc*., 127 S.Ct. 2652 (2007). Such a law may only be upheld if it is "necessary to serve a compelling state interest and * * * it is narrowly drawn to achieve that end." *Burson*, 504 U.S. at 198 (internal quotation marks and citation omitted).

In arguing that strict scrutiny should not be applied to laws infringing rights guaranteed by the Second Amendment, Petitioners assert that Second Amendment rights are not "fundamental." See Pet. Br. at 38–39 & n. 9, 43 & n. 11. In this, Petitioners could not be more mistaken.

As the Framers made clear in the *very text* of the Second Amendment, they considered the right to keep and bear arms "*necessary* to the security of a free State." Under this Court's First Amendment jurisprudence, this explicit connection between the right to keep and bear arms and the preservation of democratic self-government compels a conclusion that the Amendment guarantees a "fundamental" right.[4] For example, as the Court explained in *Schneider* v. *New Jersey*:

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[4] A "free State," in Framing-era parlance, referred to a polity free from government oppression. See Volokh, Necessary to the Security of a Free State, 83 Notre Dame L. Rev. 1, 5 (2007) ("In eighteenth-century political discourse, 'free state' was a commonly used political term of art, meaning 'free country,' which is to say the opposite of a despotism").

> This Court has characterized the freedom of speech and that of the press as *fundamental* personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights *lies at the foundation of free government by free men.*

308 U.S. 147, 161 (1939) (emphases added); see also *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940) ("The safeguarding of these [First Amendment] rights * * * is essential to *free government*" (emphasis added)). The link between rights "at the foundation of free government by free men" and strict scrutiny was expressed clearly by this Court in *United States v. Robel*, where it stated:

> Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms. The Constitution and *the basic position of First Amendment rights in our democratic fabric* demand nothing else.

389 U.S. 258, 267–68 (1967) (citation and footnote omitted) (emphasis added).

Just as the First Amendment, with its "basic position * * * in our democratic fabric," has always been deemed to guarantee "fundamental" rights, so too does the Second Amendment, with the right to keep and bear arms, alone among all the rights guaranteed by the Bill of Rights, singled out in the text of the Constitution as "necessary to the security

of a free State." It would be fanciful to posit that the Framers, having recently fought a war of independence against oppressive British rule that relied upon the participation of citizen soldiers bearing personal arms, would not deem the right to keep and bear arms a right fundamental to democratic self-rule. Indeed, James Madison, in the Federalist No. 46, specifically relied upon an armed citizenry to discount the possibility of federal oppression. After noting that the armed body of the American people would greatly outnumber any possible federal standing army, Madison went on to observe:

> To [the federal army] would be opposed a militia of amounting to near half a million of citizens with arms in their hands, officered by men chosen among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility.

Federalist No. 46 at 299 (James Madison) (C. Rossiter ed. 1961). Madison then referred immediately to "the advantage *of being armed*, which *the Americans*"—not merely some select body of them—"possess over *the people*"—again, a reference to the general populace—"of almost every other nation * * *." *Ibid.* (emphases added).

Amici supporting Petitioners contend that not all laws restricting "fundamental" rights are subjected to strict scrutiny, and assert that laws burdening Second Amendment rights should, like some other "fundamental" rights, be examined under a lower standard of review. See Chemerinsky Br. at 25–30. The *amici* fail to note the distinction, however, between rights that are fundamental to democratic self-government, such as political speech and the right of the people to keep and bear arms, and those protections of the Bill of Rights that, in the course of being incorporated through the Fourteenth Amendment against the States, were deemed "fundamental" to the American system of justice.[5] Whatever the varying tests applied to laws touching on the criminal justice and due process provisions in the Bill of Rights, laws burdening rights fundamental to our democracy, such as political speech, are reviewed under strict scrutiny. See *Wisconsin Right to Life*, 127 S. Ct. at 2663–64; see also, *e.g.*, *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1986) (analyzing law burdening First Amendment associational interest of political party members under strict scrutiny).

In summary, the Second Amendment guarantees a fundamental right as that term has always been used by this Court. Moreover, the Amendment protects not any fundamental right, but a right that is fundamental to our democratic self-government. For that reason, laws infringing the Second Amendment should be the subject of strict scrutiny by a reviewing court, not the lower levels of scrutiny

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[5] See, *e.g.*, Chicago Br. at 16 (contending that the "fundamental to the American scheme of justice" test is the only test for recognizing "fundamental" rights).

sought by Petitioners, their supporting *amici*, and the United States.

2. In arguing against strict scrutiny for laws infringing Second Amendment rights, various *amici* supporting Petitioners contend that a lower standard of review is necessary in light of the scores of federal and state laws and regulations concerning possession of firearms such as sawed-off shotguns; the possession of firearms by felons, the insane, or minors; or the use of arms in the commission of a crime. See, *e.g.*, Chemerinsky Br. at 7–10; cf. Brief of the American Bar Association at 11–17 (listing various gun control laws and warning, without explanation, that "it is more than plausible" that "many" would be repealed or revised). The obvious *in terrorem* purpose of this argument is to suggest that if the Court holds that laws burdening the fundamental right to keep and bear arms are subject to strict scrutiny, governments may be powerless to stop insane convicted felons from using sawed-off shotguns to commit crimes in this very Court, or even to punish them in the aftermath.

Missing from these arguments on Petitioners' side is a listing of which, if any, of the many laws they have collected would fail to pass muster under strict scrutiny. That is to say, are Petitioners and their supporting *amici* truly concerned that longstanding laws barring the insane from owning firearms are at risk of being found not narrowly tailored to serve a compelling government interest? It seems clear that the real purpose of their cataloguing of firearms laws is to leverage a false concern regarding most such laws into support for application of a vague "reasonableness" test to such extreme laws as the

District's handgun ban. This effort to muddle the issue must be seen for what it is and rejected.

Amici in support of Petitioner also rely upon their roll call of firearms legislation, and this Court's decision in *City of Cleburne* v. *Cleburne Living Center*, *Inc.*, 473 U.S. 432 (1985), to argue that, because there are many valid restrictions on the right to keep and bear arms—bans on ownership by felons, the insane, et cetera—courts should not feel the need to examine firearms laws with any form of heightened scrutiny. See Chemerisnky Br. at 6. This argument by sheer number of valid laws is misguided: strict scrutiny is applied to laws burdening the right to political speech, even though that right is hedged about with a multitude of constitutionally-acceptable time, place, and manner restrictions. See, *e.g.*, *Wisconsin Right to Life*, 127 S. Ct. at 2663–64. The notion that *any* burdens on the exercise of a fundamental right, no matter how severe—indeed, in the instant case, a complete ban—may be approved under a reasonableness test simply because many less severe regulations exist is obviously not the law.

3. Petitioners, in arguing against application of strict scrutiny, suggest in an *ipse dixit* that "[u]nlike speech restrictions, gun regulations raise no risk of viewpoint discrimination and no specter of silencing the view of the opposition." Pet. Br. at 47. They provide no basis for their sanguine view and, in fact, their collective-right position would provide governments substantial opportunity to ban arms from the political opposition.

Petitioners insist that only members of a well-regulated militia have any Second Amendment right to keep and bear arms, and that only military

organizations, such as the National Guard, count as such militias. See *supra* at 12. Under Petitioners' view of things, governments may, through their decisions concerning *how* to organize the militia and *who* to appoint as officers in the militia, decide who has any right to keep and bear arms. State governments could seek to disarm opponents by naming only supporters as militia officers; the federal government could focus the organization of militia units in regions of the country supporting the party in power. History and logic suggest that an oppressive regime will be at least as concerned with disarming its opponents as it will be with abridging their speech.

4. Petitioners argue that laws infringing Second Amendment rights only should be found facially invalid if they are incapable of constitutional application. See Pet. Br. at 57; see also generally, *e.g.*, *United States* v. *Salerno*, 481 U.S. 739 (1987) (articulating the "no set of circumstances" test for facial invalidity). In this, again, Petitioners are mistaken.

While most laws are subject to facial invalidation only if they are incapable of constitutional application, this Court has long made an exception for laws burdening rights "fundamental to democracy," generally free-speech rights. For such fundamental democratic rights, this Court has employed facial invalidation whenever a law is "overly broad." See, *e.g.*, *Goodling* v. *Wilson*, 405 U.S. 518, 521 (1972) (allowing facial invalidation of laws burdening First Amendment rights if they are "overly broad"); *Robel*, 389 U.S. at 265 ("[i]t has become axiomatic that precision of regulation must be the touchstone in an area so closely touching our

most precious freedoms" (internal quotation marks and citation omitted).

This Court often also has premised the use of "overbreadth" analysis for First Amendment rights on the existence of a "chilling effect" with respect to free speech. Overbreadth review, the Court has said, "is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute capable of application to protected expression." *Goodling*, 405 U.S. at 521.

Each of these bases for application of overbreadth analysis is met with respect to the Second Amendment right to keep and bear arms. For the reasons given above, Second Amendment rights, like First Amendment rights, were deemed by the Framers to be fundamental to our democratic self-government. See *supra* at 17–19. Moreover, like speech, the decision whether to keep and bear an arm is subject to a substantial chilling effect. Law-abiding citizens wishing to keep a firearm for self-defense in their own homes may fear prosecution should they actually use their arms to protect themselves against violent criminals. For example, Petitioners argue that there is no Second Amendment right to possess firearms for "private purposes" and admit that on their face the D.C. Code provisions in question make the use of firearms for self-defense unlawful. See, *e.g.*, Pet Br. at 11–12 (arguing that Second Amendment does not protect right to possess firearms for "private purposes"); *id.* at 31 (arguing that the Pennsylvania antecedent to the Second Amendment "protects only a right to bear arms for communal (rather than personal) self-

defense"); *id.* at 56 (conceding that a right to unlock firearms for use in self-defense is at best a "fairly implied" exception to the trigger-lock requirement). Given such uncertainty about their right to use firearms in self-defense, many D.C. residents, fearful of criminal prosecution, may hesitate to lawfully use a firearm at the very moment when their lives, and the lives of their loved ones, are most in danger.

Overly broad firearms regulations, such as each of the provisions at issue in this case, burden the exercise of fundamental rights and risk chilling the Constitutionally-protected activities of law-abiding citizens. This Court should strike down these, and other such overly broad laws, and require governments wishing to regulate firearms to use laws narrowly tailored to address any truly compelling government interests that Petitioners, and other government actors, identify.

III. The District's Handgun Ban and Licensing and Trigger-Lock Provisions Are Unconstitutional Infringements of Second Amendment Rights

Applying strict scrutiny to the District's handgun ban and licensing and trigger-lock provisions, and analyzing whether those laws are overly broad restrictions on the Second Amendment rights of law-abiding citizens, the only conclusion that can be drawn is that they are unconstitutional and must be struck down in their entirety.[6] The District can disarm criminals and punish the use of firearms in violent crime using already existing laws narrowly

[6] These laws should be struck down under any level of review, for the reasons given by Respondent. See Respondent's Brief at 41–42.

tailored toward achieving those ends, the same type of laws relied upon by nearly every other jurisdiction in America.

1. In seeking to justify the District's laws, Petitioners and their supporting *amici* assert that there is a compelling government interest in protecting citizens from the criminal misuse of handguns and from firearms accidents. The laws in question, however, are not narrowly tailored to meet either purpose. What Petitioners never even attempt to confront is the fact that the *vast* majority of handguns are owned by law-abiding citizens and the overwhelming majority of firearms are *never* used in the commission of a crime or involved in an accident.

Thus, Petitioners invoke "national statistics" gathered by the D.C. Council in 1976 showing that "handguns [were] used in 54% of all murders, 60% of robberies, 26% of assaults and 87% of all murders of law enforcement offers." Pet. Br. at 4–5. The total *number* of violent crimes committed with handguns is, however, far more analytically significant. In 2004, for example, according to the Centers for Disease Control's National Center for Health Statistics ("NCHS"), there were 11,624 murders committed with any firearm.[7] There are, on the other hand, an estimated 200 million firearms lawfully owned by private citizens in the United States, including approximately 60–65 million handguns. Thus, that handguns were used in some percentage of murders is no more analytically significant than the fact that ski masks or pantyhose

[7] For NCHS statistics on causes of death in 2004, see Deaths: Final Data for 2004, Table 12, available at http://www.cdc.gov/nchs/fastats/deaths.htm.

are worn by criminals in the vast majority of bank robberies. The use of firearms for private purposes by law-abiding citizens vastly exceeds and outweighs their unlawful use by criminals.

Petitioners also seek to paint the lawful possession of firearms as exceedingly dangerous, noting that firearms are involved in accidental deaths. See, *e.g.*, Pet. Br. at 5. According to NCHS, 649 deaths in 2004 were caused by the accidental discharge of firearms. By way of comparison, however, nearly 45,000 Americans died in automobile accidents that year and over 3,300 from drowning. Moreover, the 649 firearms-related deaths must be placed in the context of the 200 million privately-owned firearms in America; only an infinitesimally small percentage of firearms ever are involved in an accidental death. Comparatively speaking, the nation's 250 million vehicles are far more often involved in fatal accidents.[8]

All told, legislation barring wholesale the lawful possession and use of all functional firearms by law-abiding citizens cannot survive any level of scrutiny, let alone strict scrutiny. As this Court recently explained in the First Amendment context, "the desire for a bright-line rule * * * hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom," and "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech." *Wisconsin Right to Life*, 127 S. Ct. at 2672 (internal

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[8] For statistics on the number of registered vehicles, see Bureau of Transportation Statistics, National Transportation Statistics Table 1-11, available at www.bts.gov/publications/national_transportation_statistics/#chapter_1.

citations omitted; emphasis in original). Jurisdictions including the District already have the tools they needs to disarm criminals, including laws banning convicted felons from owning firearms and punishing the use of firearms in the commission of violent crimes. See, *e.g.*, 18 U.S.C. §§ 922(g), 924. The District cannot, however, bar law-abiding citizens from owning handguns, or prohibit them from maintaining and using functional firearms in their homes.

2. If a complete handgun ban *were* a narrowly tailored means of addressing the crime and accidental deaths trumpeted by Petitioners, then one might expect States and other major American cities to have enacted similar bans. In fact, however, no State has a complete ban on the ownership of handguns akin to the District's, and of major cities, only San Francisco and Chicago have done so—and San Francisco's ban recently was struck down on state-law preemption grounds. See *Fiscal* v. *San Francisco*, 158 Cal. App. 4th 895 (2008).

To the extent the District's handgun ban was intended to reduce murder and other violent crime in the District it has been a complete failure, disarming law-abiding citizens while leaving criminals as dangerous as ever. In 1975, the year before the District enacted its handgun ban, there were approximately 1,774 violent crimes committed in the District for every 100,000 residents, including 32.8 murders. While the violent crime rate dipped from 1976 to 1979, it was greater than the 1975 rate in 14 of the following 18 years, peaking at 2,920 violent crimes per 100,000 in 1993—nearly 65% higher than in 1975. Likewise, the District's murder rate exceeded the 1975 rate each year from 1987 through

2005, and was commonly more than twice as high. In 1991—*fifteen years* after the handgun ban was enacted—the District's murder rate, at 80.6 per 100,000, was 146% higher than in 1975.[9]

Perhaps most revealing, in 2006—*three decades* after the handgun ban was enacted—the District's murder rate remained 29.1 per 100,000, only 11.3% lower than the 1975 rate of 32.8. The nationwide murder rate, on the other hand, fell from 9.6 to 5.7 per 100,000 during this period, a far greater decline of 40.6%. Murder rates in the District are not only far higher than in the nation as a whole (in 2006, the District's rate was more than five times the national average), they are also greater than in most other comparably-sized cities. The District's murder rate of 29.1 per 100,000 in 2006 was third highest among the 48 jurisdictions with more than 500,000 residents; only four other comparably-sized cities that year had a murder rate even as high as 20.

All told, whatever the District's expectations in enacting the handgun ban in 1976, three decades of evidence conclusively demonstrate that it has been an absolute failure. It has burdened the Second Amendment rights of the District's residents to very little, if any, effect. It is long past time for the District's experiment, at the expense of law-abiding citizens, to end.

3. To sidestep the fact that handguns and other functional firearms are overwhelmingly kept in the

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[9] For data concerning the District's violent crime rates over time and in comparison to other cities, see Bureau of Justice Statistics, Crime Trends, State and National Crime Trend Estimates and Large Local Agency Crime Trends, available at http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/Crime.cfm.

home for lawful purposes, Petitioners rely in part upon the statement by the D.C. Council that handguns "have no legitimate purpose in the purely urban environment of the District of Columbia." Pet. Br. at 6. Petitioners do not explain what, if any, support the Council had for this audacious statement, nor do they provide any of their own. That should, perhaps, be unsurprising, because of course handguns and other firearms, kept in a functional state free from trigger locks, have substantial legitimate uses in the District.

To take one salient example, the flipside of the violent crimes upon which Petitioners place so much stock is the hoary right of individuals to defend themselves in their own home. And there are no better tools to aid that right than firearms, including handguns.

The Framers were familiar with the right of individuals to employ deadly force in self-defense, particularly within the home. The "castle doctrine" was firmly established in the common law at the time of the founding. See, *e.g. Semayne's Case*, 5 Co. Rep. 91a (K.B. 1603) ("The house of every one is his castle, and if thieves come to a man's house to rob or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is no felony and he shall lose nothing").

A corollary to the castle doctrine was the right to keep firearms in the home in order to repel invaders. Coke, for instance, wrote that "in some cases a man may use force and *arms* * * * for a man's house is his castle * * * for where shall a man be safe if it be not his house? And the laws allow *arms* to be taken against an armed foe." 3 Coke, Institutes of the

Laws of England (2d ed. 1648), at 161–62 (emphases added).

The essential right to self-defense, including defense of the home, has always been engrained in American jurisprudence. In *Beard* v. *United States*, 158 U.S. 550, 564 (1895), for instance, this Court concluded that a person who is attacked "[i]s entitled to stand his ground and meet any attack made upon him with a deadly weapon." And state courts continue to this day to refer to the individual's right to employ deadly arms in self-defense. See, *e.g.*, *Moseby* v. *Devine*, 851 A.2d 1031, 1043 n.7 (R.I. 2004) (declaring that there is no "duty to retreat before one may employ deadly force to repel an attack" in one's home); *State* v. *Hamdan*, 264 Wis. 2d 433, 443 (2003) (ruling unconstitutional a state statute outlawing the carrying of a concealed weapon as applied to a defendant storeowner who kept a concealed handgun near the cash register).

The right to home defense using deadly force would be illusory if one was not entitled to keep functional firearms, including handguns, in the home. This Court has previously acknowledged the suitability of handguns for self-defense. See *Patsone* v. *Pennsylvania*, 232 U.S. 138, 143 (1914) (in upholding conviction of an alien for owning a shotgun, finding statute constitutional in part because it did "not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense"). This observation has also been made by various state courts, see, *e.g.*, *Matthews* v. *State*, 237 Ind. 677, 686–87 (1958) (upholding provision of state licensing law on the ground that the Act did not "prohibit * * * [anyone] from having a pistol in his home or 'fixed place of business' for the defense of

himself"), and by commentators, see, *e.g.*, Dorfman & Koltonyuk, When The Ends Justify The Reasonable Means, 3 Tex. Rev. L. & Pol. 381 (Spring 1999).

Overwhelming evidence shows that firearms, including handguns, are the most effective and safe means of deterring burglars and other home invaders. See Ikeda *et al.*, Estimating Intruder-Related Firearm Retrievals in U.S. Households, 1994, 12 Violence and Victims 4, 363 (Winter 1997) (according to CDC, an estimated 497,646 homeowners believed that they scared away an intruder using a firearm in 1994); Kopel, Lawyers, Guns, and Burglars, 43 Ariz. L. Rev. 345, 346 (Summer 2001). Victims who resist with a firearm are less likely than other victims to lose their property to a burglar. See Kleck & Gertz, Armed Resistance To Crime: The Prevalence and Nature of Self-defense with a Gun, 86 J. Crim. L. & Criminology 150, 151 (Fall 1995); Tark & Kleck, Resisting Crime, 42 Criminology 861, 882 (Nov. 2004). In the majority of cases, the burglar flees as soon as he discovers the victim is armed, and before a shot is ever fired. See Kleck & Gertz, *supra*, at 164 (explaining survey data showing 2.2 million to 2.5 million defensive gun uses annually in the United States, most without firing a shot, and the vast majority are handgun uses).

Notably, aware of high rates of home ownership of firearms, burglars in the United States have a strong tendency to forego intrusion when homeowners are likely to be present. See Kopel, *supra*, at 346. By contrast, British and other European homeowners, who are generally subject to stricter gun control laws, are three times as often as

American homeowners to be home when burglaries occur. See Dorfman & Koltonyuk, *supra*, at 395; Kopel, *supra*, at 346.

Because they are easy to handle effectively, firearms, especially handguns, are proven defensive arms. See Caplan & Wimmershoff-Caplan, Postmodernism and the Model Penal Code v. The Fourth, Fifth, and Fourteenth Amendments—And the Castle Privacy Doctrine in the Twenty-First Century, 73 UMKC L. Rev. 1073, 1105 (2004–2005) (arguing that, "in modern times, effective self-defense implies a handgun; long-guns can also be very effective * * * but in some homes they may be unwieldy or awkward to use."); Dorfman & Koltonyuk, *supra*, at 392 (observing that handguns function as the "great equalizer," because of their small size, effectiveness, and relative simplicity). For many people, including especially many women, a handgun, which is smaller, lighter and causes less recoil than a rifle or shotgun, may be the safest and most effective means of self-defense.

The need for functional firearms, including handguns, to defend oneself in one's own home is no less today than when the right to self-defense was first articulated centuries ago. The threat of home invasion, for example, is ever present in the District and has become a problem of pressing concern. See, *e.g.*, McLaughlin, Death-Penalty Deliberations to Begin, Washington Times, 6/5/07, at B01 (trial involving double murder in home invasion); Knott, Slain Journalist's Family Gives City Wake-Up Call, Washington Times, 1/18/07, at B02 (city is accustomed to home invasions in broad daylight). In the face of such threats, and the lack of an enforceable duty under District law for the police to

actually protect District residents, the need for firearms for self defense is even more important. See*, e.g., Morgan* v. *District of Columbia*, 468 A.2d 1306, 1308 (D.C. 1983) (police have no duty "to protect individual citizens from crime"); cf. *Riss* v. *City of New York*, 22 N.Y.2d 579, 584–85 (1968) (Keating, J., dissenting) ("What makes the city's position particularly difficult to understand is that, in conformity, to the dictates of the law, Linda did not carry any weapon for self-defense (former Penal Law, s 1897). Thus, by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her").

In summary, the notion that handguns can serve "no legitimate purpose" in the District is simply wrong. Law-abiding citizens in the District, like citizens nearly everywhere else in our nation, have a substantial legitimate need for functional firearms, including handguns, for self-defense. The District's handgun ban and use and trigger-lock restrictions, on the other hand, serve no legitimate purpose and must be struck down.

CONCLUSION

For the foregoing reasons, the holding of the D.C. Circuit should be affirmed.

Respectfully submitted,

STEPHEN D. POSS
Counsel of Record
KEVIN P. MARTIN
CHRISTINA E. NOLAN
SCOTT B. NARDI
NICHOLAS W. PILCHAK
MICHAEL P. SUGRUE
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
(617) 570-1000
Counsel for the Amici

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