No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA, et al.,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

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

BRIEF OF DR. SUZANNA GRATIA HUPP, D.C. AND LIBERTY LEGAL INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amicus **Dr. Suzanna Gratia Hupp, D.C.**, is a former Texas state representative. She is also, of more consequence, the mother of two children and survivor of the second deadliest mass shooting in U.S. history, second only to the recent killing spree at Virginia Tech. She desires only the right to protect her children both from the unthinkable fate that befell her parents that day in Killeen, Texas, and the scars their grisly deaths wrought on her own life.

In 1991, Dr. Hupp and her parents were enjoying lunch at a cafeteria in Killeen, Texas. Without warning, a deranged man crashed his truck through the window of the cafeteria and opened fire on the entire crowd. Dr. Hupp's first thought was her .38 caliber revolver which she had been forced to leave in her car due to the restrictive gun laws then in effect. As Dr. Hupp and her father overturned their table to provide themselves and her mother some protection, the killer continued to shoot and kill cafeteria patrons at will. When it became evident that the man would continue his killing spree unless stopped, Dr. Hupp's father rose and charged at the man. He had gone only a few steps before the killer shot him in the chest at

[1] All counsel of record received notice of amici's intention to file this brief at least ten days before this brief was due. Amici state that no portion of this brief was authored by counsel for a party and that no person or entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

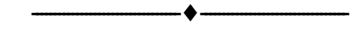
point blank range. Seeing an opportunity to escape out the rear of the restaurant, Dr. Hupp grabbed her mother and rushed toward an open window, arriving safely in the parking lot. Her mother, however, did not. Instead of escaping with Dr. Hupp, her mother turned back and cradled her dying husband in her lap. The killer approached Dr. Hupp's mother, raised his gun and shot her point blank in the head.

That deranged man would kill over 20 people in the restaurant before finally killing himself. Not a day goes by that Dr. Hupp does not wonder how differently that day would have turned out had she, or any number of other patrons, not been prevented by law from carrying their private firearms, and how many lives might have been spared because of it.

Amicus **Liberty Legal Institute** ("LLI") is a non-profit civil rights law firm dedicated to the preservation of freedoms enumerated in the Bill of Rights. LLI focuses most of its civil rights practice on the preservation of First Amendment liberties, including the vigorous protection of free speech. Whether LLI agrees with the specific speech or religious practice in question, LLI and its attorneys have consistently argued for the broadest possible protection for speech and religious practice afforded by the First Amendment. *See*, *e.g.*, *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (LLI represented Respondent seeking to preserve the right of candidates to public debate forums); *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (LLI filed an amicus brief seeking to preserve student speech protections); *Gonzales v.*

O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006) (LLI filed a brief seeking to strengthen strict scrutiny analysis under the Religious Freedom Restoration Act).

In the present case, LLI is concerned that the erosion of the right to bear arms, a specifically enumerated right under the Second Amendment, through the introduction of a sweeping intermediate scrutiny test poses a significant danger both to that right and other enumerated rights, as well. Thus, LLI seeks to respond to the amicus brief filed by the United States in this case and introduce a workable framework for analyzing restrictions on Second Amendment activities that has served this nation so well in the First Amendment arena.



SUMMARY OF ARGUMENT

The Second Amendment right at issue in this case should receive the same judicial treatment as other enumerated individual rights within the Bill of Rights. Amicus United States posits an intermediate scrutiny test as an all-encompassing test for analyzing *any* restriction on the Second Amendment right. The United States cites the need to prohibit "machineguns" and the maintenance of other tertiary regulations of gun ownership and gun commerce for its advocacy of the intermediate scrutiny test. This is the equivalent of advocating that, because of the proliferation of adult book stores or out of control

commercial speech, the intermediate scrutiny tests employed for such expressive activity should be transposed to regulations of core political and religious speech or even outright bans on First Amendment activities altogether. Fortunately, this Court has distinguished the exercise of First Amendment freedoms and the context of the expression of those freedoms.

It is unnecessary for a lesser level of scrutiny to cast a long shadow across core protected Second Amendment activity. Instead, the scope of Second Amendment protection is determined by the type of firearm and the activity for which the firearm is used. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 420 (1992) (Stevens, J., concurring in judgment) ("The scope of the First Amendment is determined by the content of expressive activity. . . ."). First, categorical bans on all gun ownership are per se unconstitutional. Second, regulations of core protected firearms, such as those descendent from the firearms regularly carried and employed by citizens in the founding era, should receive strict scrutiny analysis. Finally, there are categories of speech that this Court has deemed unprotected speech. Petitioners and Amicus United States attempt to seize upon a perceived aversion to machine guns and other weapons beyond this case in order to justify applying a lesser level of judicial scrutiny to all gun bans. That is the equivalent of arguing that because there are words such as fighting words or obscenity, all speech regulations should be analyzed using diluted scrutiny. This is not the law.

There is no need for the Court to reinvent the wheel when analyzing the Second Amendment with decades of established individual rights analysis at its disposal. Adopting a 'one size fits all' approach instead of implementing the precision analytical tools already established by and available to the Court would lead to unartful analysis and an unnecessary loss of freedom.

I. Introduction

This brief presupposes the Second Amendment secures the fundamental individual right to the ownership and use of firearms independent of service in or affiliation with any militia. The Court of Appeals for the District of Columbia Circuit (the "DC Circuit"), Respondent and various amici, perhaps most notably Amicus in Support of Petitioner The United States (the "United States"), have exhaustively established this both in law and in fact by text, history, practicality and reason.

As a supplement to that establishment, this brief provides a comprehensive analytical framework for determining the parameters of this individual right, in answer both to the D.C. Circuit's accurate albeit necessarily incomplete analysis and the important questions and concerns raised by the United States. If adopted, this framework would allow the Court both to secure the individual rights guaranteed by the Second Amendment and guard against the threat to public safety the unregulated ownership and use of

firearms may present, and do so without the regulation of the right unnecessarily hindering its exercise.

II. An outright ban on traditional firearms is the equivalent of an unconstitutional ban on all First Amendment activity.

At issue in the case at bar is a series of gun laws which, though couched as mere *regulation* of firearms, in the aggregate affect an outright *ban* on the private ownership and use of the pistol (or handgun) within the District of Columbia (the "District"). Such a categorical ban on this traditional class of firearms is completely inconsistent with the enumerated fundamental right secured by the Second Amendment.

Under the First Amendment, the government may not ban all First Amendment activity. *See Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). In fact, just as the LAX airport sought to create a "First Amendment Free Zone," it is conceivable that certain governmental jurisdictions, most notably municipalities, would seek to convert the entire city into a gun free zone. Under the Second Amendment, any such government attempt to ban all firearms within its jurisdiction should be met with the same short shrift afforded LAX and its broad ban on First Amendment activity. *See id.* at 575 ("We think it obvious that such a ban cannot be justified . . . because no conceivable governmental interest would justify such an absolute prohibition of speech").

Traditional firearms consist of three classifications of arms that are the modern day equivalents of individual "founding-era weapon[s:]" the rifle, the shotgun and the pistol. *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007). The "pistol is the most preferred firearm in the nation to 'keep' and use for the protection of one's home and family." *Id.* at 400. The government's total ban on all such traditional firearms is the equivalent of the "First Amendment Free Zone."

Beyond such categorical bans is the multitude of regulations that impose restrictions on First or Second Amendment activity that fall short of a total ban, but nevertheless are substantial in their effect on the rights being exercised. Strict scrutiny applies to such regulations that target core First Amendment activity such as political and religious speech just as it applies to core Second Amendment activity such as the use of traditional firearms protected under the Second Amendment.

III. The regulation of core Second Amendment rights demands the same exacting scrutiny, strict scrutiny, as the regulation of core political or religious speech.

While the government retains some ability to regulate the ownership and use of traditional firearms under strict scrutiny, the United States has recommended this Court apply no more than intermediate scrutiny to any law affecting a regulation or

restriction of the Second Amendment. This recommendation appears based primarily on concerns regarding, the ownership of machine guns. The United States raises important questions that require careful consideration. Its proffered solution, however, casts too long a shadow over the rights secured by the Second Amendment, a right the United States recognized as "central to the preservation of liberty." *Brief for the United States as Amicus Curiae* 17 (hereinafter "*U.S. Brief*"). Indeed, regulations governing the ownership of traditional firearms are very different from regulations governing the ownership of hand grenades and rocket launchers, just as there is a deep chasm between the regulation of core political speech and nude dancing. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) ("[S]ociety's interest in protecting [sexually explicit films] is of a wholly different, and lesser, magnitude than [its] interest in untrammeled political debate.").

First Amendment protection is "at its zenith" when government regulates core political speech. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Thus, strict scrutiny is applied to regulations of core political speech. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (restrictions on political speech "must be subjected to the most exacting scrutiny"). Likewise, the possession of traditional firearms is at the center of the core of Second Amendment protection. Strict scrutiny should apply to regulations of gun ownership in the same manner as it applies to regulations of core political and religious speech.

The Court routinely applies strict scrutiny when striking down regulations of entire categories of speech. *See*, *e.g.*, *R.A.V.*, 505 U.S. at 392-95 (applying strict scrutiny to a regulation banning "fighting words"); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760-61 (1995) (plurality) (applying strict scrutiny to a restriction on religious advocacy); *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (applying strict scrutiny to a law barring flag desecration).

Such sweeping categorical bans on speech are the equivalent of sweeping bans on categories of traditional firearms. Thus, a sweeping ban on the possession of pistols must be analyzed under strict scrutiny. This alleviates any concerns the United States raised concerning misunderstandings regarding the meaning of traditional firearms because the United States or any other governmental authority is not without recourse if a machine gun is classified as a traditional firearm. Even in such an extreme case, possession of a machine gun could be regulated if the government identified a compelling governmental interest and provided the necessary nexus to the regulation while identifying the chosen regulation as the least restrictive means of achieving the interest.

There is one caveat to the strict scrutiny analysis – time, place and manner regulations. It is conceivable that the government would like to prohibit even traditional firearms from certain locations such as visitor areas in jails, public libraries, public schools and courthouses. These government facilities typically

have government police protection to a greater degree than private places of commerce or private dwellings. Such place regulations are certainly of concern to governments. In addition, some local governments may desire their citizens to carry their firearms in a concealed manner. Finally, there may be times firearms are restricted, such as no hunting at night for deer or no hunting at night within so many feet of a residential community. These time, place and manner regulations are the equivalent of time, place and manner regulations the D.C. Circuit alluded to when it cited *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *Parker*, 478 F.3d at 399.

However, the District attempts to make a logical leap to conclude that the total ban of pistols is a time, place and manner restriction. *Brief for Petitioners* 48. That is the equivalent of stating that a ban on all political speech on a public sidewalk is a valid time, place and manner restriction because it denies a speaker any time, any place and any manner for political speech. The District's reliance on the urban nature of its district is an important point, but it is not a fog to cloud all logic. The District may have regulations that prohibit the discharge of a pistol unless in self-defense, provide that all training be conducted in gun clubs, or require citizens to conceal the weapons they carry on their person. Such regulations are legitimate time, place and manner regulations. However, a mere citation to "time, place and manner regulations" is not a panacea for entire bans, which should be subject to strict scrutiny.

IV. Weapons beyond the scope of this case should not serve as a basis for lowering the standard of scrutiny for all bans on firearms.

The D.C. Circuit correctly limited the scope of its opinion to the category of firearms at issue in this case – traditional firearms. *See Parker*, 478 F.3d at 397-99. This categorical approach to reviewing the firearms restrictions at issue in this case, and not extending the analysis beyond, is consistent with this Court's long-standing practice in reviewing restrictions on the fundamental freedom of speech. *See Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring) ("Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.").

Some forms of speech are routinely categorized as falling outside of the protections of the First Amendment. As this Court so held, "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinksy v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *see also Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *Schenk v. United States*, 249 U.S. 47 (1919). Words that are "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to

incite an immediate breach of the peace" are unprotected. *Chaplinsky*, 315 U.S. at 572.

Likewise, there may be categories of firearms that are not protected. This is not the case to draw those distinctions and diluting the level of scrutiny in anticipation of future cases does nothing more than wash the starch out of the protection that is so vital to the preservation of freedom. Amicus United States raises questions for future cases regarding the application of the rule in this case to those categories of arms, such as machine guns, which are not at issue in this case. This Court should not entertain an invitation to reduce the level of scrutiny applied to a fundamental right because there may be categories of expression of that right in the future that are justifiably excluded from protection. Any abandonment of the fundamental right analysis is unnecessary and as dangerous as concluding that all speech regulations are governed by intermediate scrutiny because of the threat of obscenity.

CONCLUSION

The D.C. Circuit, in keeping with the limited issues presented in *Parker*, provided a precedent-rich analysis helpful for determining both the nature of the "arms" covered by the Second Amendment and the proper response to an outright ban on any of these arms. Amici encourage the Court to draw upon its vast experience in First Amendment jurisprudence

to inform its analysis and formulation of the legal framework for resolving this case.

The Court should affirm that the Second Amendment secures the individual right to own and use firearms and affirm the court below.

Respectfully submitted,

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