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 AMICUS CURIAE OF GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, MARYLAND SHALL ISSUE, INC., VIRGINIA CITIZENS DEFENSE LEAGUE, GUN OWNERS OF CALIFORNIA, INC., LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENT

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MISCELLANEOUS

INTEREST OF AMICI CURIAE[1]

Gun Owners of America, Inc. ("GOA") (www.gunowners.org) was incorporated in California in 1976, and is exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). GOA is a citizens lobby to protect and defend the Second Amendment.

Gun Owners Foundation ("GOF") (www.gunowners.com) was incorporated in Virginia in 1983, and is exempt from federal income tax under IRC section 501(c)(3). Twenty-one years ago, GOF and the Center for Judicial Studies co-sponsored the only *amicus curiae* brief in the D.C. gun case, Sandidge v. U.S., 520 A.2d 1057 (D.C. 1987).

Maryland Shall Issue, Inc. ("MSI") (www.marylandshallissue.org) was incorporated in Maryland in 2005. It is an all-volunteer, non-partisan effort dedicated to the preservation and advancement of all gun owners' rights in Maryland, with a primary goal of reform to allow all law-abiding citizens the right to carry a concealed weapon and to educate the community to the awareness that "shall issue" laws have, in all cases, resulted in decreased rates of violent crime.

Virginia Citizens Defense League ("VCDL") (www.vcdl.org) was originally incorporated in Virginia in 1994 as the Northern Virginia Citizens Defense

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[1] The parties have filed blanket consents to the filing of amicus briefs, subject to seven-day notice, which was given. No counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

League and is exempt from federal income tax under IRC section 501(c)(4). VCDL is a non-partisan, grassroots organization dedicated to defending the human rights of all Virginians, the right to keep and bear arms.

Gun Owners of California, Inc. ("GOC") (www.gunownersca.com) was incorporated in California in 1982, and is exempt from federal income tax under IRC section 501(c)(4). Affiliated with GOA, GOC lobbies on firearms legislation in Sacramento and was active in the successful legal battle to overturn the San Francisco handgun ban referendum.

The Lincoln Institute for Research and Education ("Lincoln") (www.lincolnreview.com) was incorporated in the District of Columbia in 1978, and is exempt from federal income tax under IRC section 501(c)(3). Lincoln focuses on public policy issues that impact the lives of black middle Americans.

Conservative Legal Defense and Education Fund, ("CLDEF") (www.cldef.org) was incorporated in the District of Columbia in 1982, and is exempt from federal income taxation under IRC section 501(c)(3). CLDEF is dedicated to the correct construction, interpretation, and application of the law.

SUMMARY OF ARGUMENT

The issue in this case is whether three D.C. Code provisions violate a Second Amendment right to keep and bear arms for private use in one's home. Under long-standing rules limiting its jurisdiction, the Court should not entertain the Solicitor General's invitation

to assess the constitutionality of the whole array of the current federal firearms statutes. Nor, in response to Petitioners and the Solicitor General, should the Court craft a standard of review not supported by the text to permit "reasonable" gun control. Rather, the Court should apply a standard of review dictated by the words and principles embodied in the Second Amendment, as directed by America's founders.

According to its text, context, and historic setting, the Second Amendment protects an individual right to private possession and use of handguns in one's own home. The individual right to keep and bear arms is essential to a "well regulated militia" — a self-bodying, self-governing association of people privately trained to arms, modeled after the colonial militia that took up their privately-owned firearms to defeat a tyrannical effort to confiscate their arms. In turn, a "well regulated militia" ensures the preservation of a "free state" by allowing all members of the American polity to exercise, if necessary, the sovereign right of the "people" to reconstitute their government.

In order to ensure its purpose to preserve the people's liberties, the Second Amendment bans discriminatory legislation against classes of persons that, by nature, are rightful members of "the people." In order to ensure its means to defeat tyranny, the Second Amendment bans discriminatory legislation against firearms that are essential to a preserve those liberties. By discriminating against law-abiding D.C. citizens and against handguns, the D.C. Code provisions violate both of these standards and, therefore, unconstitutionally infringe upon the right of the people to keep and bear arms.

ARGUMENT

I. THE COURT SHOULD ADDRESS ONLY THE PRECISE FIREARMS ISSUES BEFORE IT, NOT FIREARMS LAWS GENERALLY AS THE SOLICITOR GENERAL HAS URGED.

As the Court has framed the issue in this case, the threshold question is whether the Second Amendment protects the "rights of individuals ... not affiliated with any state-regulated militia...." Before the Court is the thoughtful and exhaustively-researched opinion of the U.S. Court of Appeals for the District of Columbia, Parker v. District of Columbia, 478 F.3d 370 (2007). In his majority opinion, Judge Silberman has explained that — by this Court's refusal to decide United States v. Miller, 307 U.S. 174 (1939) on the ground that Miller had no Second Amendment right to keep and bear arms "which may be utilized for private purposes" — this Court has already "implicitly assume[d]" the "individual right position." *See* Parker, 478 F.3d at 392, 393. As the Parker ruling attests, the extensive scholarship conducted after Miller — including that of converts to the individual rights position, such as Harvard Law Professor Laurence Tribe — has demonstrated the wisdom of the Miller Court. *See* Parker, 478 F.3d at 380. Now, after a seven-decade hiatus, the Court has an opportunity to make explicit what is implicit in Miller: that the Second Amendment protects the individual right of the people to keep and bear arms, independent of any state-regulated militia.

The Court properly has phrased not only the opening question, but also the specific legal issue before it: Whether three designated provisions of the District of Columbia Code[2] violate "the Second Amendment rights of individuals ... who wish to keep handguns and other firearms for private use in their homes." In a politically-charged case such as this, the parties and their amici are tempted to address firearms and firearm regulations generally, instead of the specific firearms and code regulations in this case. To guard against this temptation, the Court has phrased the issue so as not to "'anticipate a question of constitutional law in advance of the necessity of deciding it,'" and so as not to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" according to the Court's "rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies [with] no power to give advisory opinions." *See* Ashwander v. TVA, 297 U.S. 288, 345-47 (1936) (Brandeis, J., concurring).

Succumbing to a temptation to stretch these rules, however, the Solicitor General has taken advantage of its amicus opportunity to pole vault the entire array of federal firearms laws into this case in an effort to persuade the Court not to adopt a constitutional standard that could invalidate one or more provisions of the current federal firearms code. *See* Brief for the

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[2] D.C. Code § 7-2502.02(a)(4) (barring the registration of any pistol); D.C. Code § 22-4504(a) (prohibiting the carrying of a pistol without a license); and D.C. Code § 7-2507.02 (requiring any firearm to be kept unloaded and disassembled or locked unless kept at the registrant's place of business).

United States as Amicus Curiae ("U.S. Br."), pp. 20-32. In making this sweeping argument, the Solicitor General not only has disregarded the limits on this Court's Article III powers, but also the limits placed by the Tenth Amendment on Congress's legislative powers, having erroneously asserted that "Congress [has] general authority to protect the public safety by identifying and proscribing particularly dangerous weapons,"[3] a power not delegated to it. As this Court has ruled, Congress has no plenary police power over firearms, having established that, even pursuant to its power to regulate commerce, Congress may not

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[3] U.S. Br., p. 21. It is especially noteworthy that the Solicitor General singles out "machineguns" for special mention as a legitimate exercise of Congress's nonexistent police power. *See* U.S. Br., pp. 21-22, 24. It is also noteworthy that Respondent does not seriously contest the Solicitor General's Second Amendment claims with respect to "machineguns." *Compare* U.S. Br., pp. 22-25 *with* Respondent's Brief ("Resp. Br."), pp. 50-52. It is a cardinal rule of constitutional litigation for this Court "not [to] pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding...." Ashwander, 297 U.S. at 346 (Brandeis, J., concurring). This rule would be well-served in this case in light of the complex and technical differences in definition and function between various types of firearms. *See, e.g.,* 26 U.S.C. § 5845. The difference between a semi-automatic rifle and a fully-automatic rifle is a technical matter, not relevant to a resolution of the issue presented, nor informed by the record below. Moreover, in some subsequent case, fully-automatic arms of the type currently used by the U.S. military easily could be found within the protective shield of the Second Amendment, either as "ordinary military equipment, or that its use could contribute to the common defense" (Miller, 307 U.S. 178), or as "a lineal descendant of ... founding-era weapon(s)" (Parker, 478 F.3d at 398).

establish gun-free school zones. *See* United States v. Lopez, 514 U.S. 549 (1995).[4]

While the scope of inquiry into the Second Amendment's principles and purposes is wide-ranging, the application of those principles and purposes is limited to the designated D.C. Code provisions and the facts of this case. Further, the Court must guard against the natural inclination to allow the "tail" of "practical" considerations to "wag the dog" of principle, as both the Petitioners and the Solicitor General have proposed. According to Petitioners, whatever the Second Amendment right to keep and bear arms may be, it must be subordinated to "reasonable regulations" justified by the "necessities" of "public safety." *See* Petitioners' Brief ("Pet. Br."), pp. 44-58. In essence, Petitioners would have this Court emasculate the Second Amendment so that it would read that "the right of the people to keep and bear arms shall not be infringed, unless the government has a reason to do so." Even the Solicitor General's proposed "heightened scrutiny" test does violence to the unconditional "no

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[4] Indeed, Justice Thomas observed in Lopez that the court "agree[d] in principle [that] the Federal Government has nothing approaching a police power." *Id.* at 584-85 (Thomas, J., concurring). Former U.S. Attorney General **Edwin Meese III**, who chaired the American Bar Association's Task Force on the Federalization of Criminal Law (The Federalization of Criminal Law (1998)), points out, "The drafters of the Constitution clearly intended the **states** to bear responsibility for public safety. **The Constitution gave Congress jurisdiction over only three crimes: treason, counterfeiting, and piracy on the high seas and offenses against the law of nations."** Edwin Meese III and Rhett DeHart, "How Washington Subverts Your Local Sheriff," Hoover Institute Policy Review, Jan. and Feb. 1996, No. 75 (emphasis added).

infringement" standard of the Second Amendment text, inviting this Court to "balance[] the impact of [a] challenged restriction[] on protected conduct and the strength of the government's interest in enforcement of [a] restriction" on the right to keep and bear arms. *See* U.S. Br., p. 27. In making this the standard of Second Amendment protection, the Solicitor General has "invite[d] the Supreme Court to uphold an individual right to bear arms in principle but would then allow politicians and judges to gut it in practice." Editorial, "Misfire at Justice," *Wall Street Journal*, Jan. 22, 2008, p. A18.

In a similar political context, the Supreme Court of Oregon, before addressing a state constitutional protection of the right to keep and bear arms, rejected such pragmatic temptations with the astute and still relevant observation:

> We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is **to respect the principles given the status of constitutional guarantees and limitations** by the drafters; it is not to abandon these principles when this fits the need of the moment. [State v. Kessler, 289 Ore. 359, 614 P.2d 94, 95 (1980) (emphasis added).]

Accordingly, the key to answering the question presented is to be found in the text of the Second Amendment, and in this Court's faithful search for its "authorial intent."[5] This search begins with the rule that "[i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning, for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840). The "appropriate meaning" of the Second Amendment text cannot be discovered by isolating it from: (a) the political principle upon which it was based; (b) its sister articles in the Bill of Rights in which it was placed; and (c) the state constitutional precursors from which it was derived — as this Court is being invited to do by both Petitioners and the Solicitor General. Rather, the right protected by the Second Amendment, like all of the rights stated in the Bill of Rights, must be examined in its textual, contextual, and historic settings.

II. THE SECOND AMENDMENT SECURES THE INDIVIDUAL AND UNALIENABLE RIGHT OF THE AMERICAN PEOPLE TO KEEP AND BEAR ARMS.

There is no dispute that "[t]he first ten amendments to the Constitution were a product of the intense struggle over the ratification of the Constitution." *See* Sources of Our Liberties 418 (R. Perry and J. Cooper, eds., Am. Bar Fdn., Rev. ed. 1978) (hereinafter

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[5] *See generally* E.D. Hirsch, Jr., Validity in Interpretation, Yale University Press (1967), pp. 24-25, 124-126, 212-16.

"Sources"). While it sailed smoothly through the first six state ratification conventions, the Constitution narrowly escaped rejection in the remaining seven, primarily on the ground that it did not contain a bill of rights. *Id.*, p. 420. To ensure ratification, the Federalists promised to "support a bill of rights when the First Congress [was] assembled." *Id.*, p. 421. To that end, James Madison introduced proposed amendments to the Constitution, the major portion of which was "based largely on the declarations of rights in the state constitutions, particularly that of Virginia." *Id.*, p. 422.

A. The Bill of Rights, as a Whole, Rests upon the Governing Principle that the People Embody the Nation's Sovereignty.

Drawing on the 1776 Virginia Constitution, Madison's original draft reiterated the trifold foundational principles upon which the new American nation was founded: (1) that "all power originally vested in ... the **people**"; (2) "that government is instituted ... for the benefit of the **people**"; and (3) that the **people** have the indubitable, unalienable, and indefeasible right to reform or change their Government...." *See* D. Young, The Origin of the Second Amendment: A Documentary History of the Bill of Rights 1787-1792, p. 654 (2d ed. 2001) (emphasis added). *See also* Virginia Constitution, Sections 2 and 3 (June 12, 1776), reprinted in Sources, p. 311. Thus, Madison reminded his House colleagues that the underlying political and legal foundations for the adoption of a national bill of rights were the same as those already expressed in earlier state constitutions that contained a declaration of rights.

See, e.g., 1776 Pennsylvania Constitution, Sections IV and V, Sources, p. 329; and 1780 Massachusetts Constitution, Articles V and VII, Sources, p. 375.

As was true of these previously-established state governments, the new national government was constituted by "We, the people of the United States," in accordance with the nation's Charter principles that: (a) governments are "instituted among Men, deriving their **just** powers from the consent of the governed"; (b) the purpose of civil governments is to "**secure**" the unalienable rights of the people; and (c) "whenever **any** Form of Government becomes destructive of these ends, it is the **right of the people to alter or to abolish it**, and to institute a new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." *See* Declaration of Independence, reprinted in 1 The Founders' Constitution, p. 10 (P. Kurland and R. Lerner, eds., U. of Chi. Press: 1987) (emphasis added).

As Madison explained in the Virginia ratifying convention:

> In the British government, the danger of encroachments on the rights of the people is ... confined to the executive magistrate:
>
> In the United States, the case is altogether different. **The people**, not the government, **possesses the absolute sovereignty**. The legislature, no less than the executive, is under the limitations of power.... Hence, in the

> United States, the great and essential rights of **the people** are secured against legislative, as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. [IV The Debates in the Several State Conventions, pp. 569-70 (Phila.: 1866), reprinted in Sources, p. 426 (emphasis added).]

As a member of the Virginia Commonwealth, Madison well knew that a first order of business of the people in constituting a new government was to secure to the people the right to reconstitute that government by whatever means necessary, lest they again fall under an absolute despotism.

B. The Individual Right of the People to Keep and Bear Arms Is Ultimately Necessary to Secure the Uniquely American Right of the Sovereign People to Reconstitute Their Government.

As needful as the bulwark of "the right of the people to keep and bear arms" is to "the security of a free state," that right is one among a panoply of "people's" rights, each of which plays a unique and integral part in "secur[ing] the Blessings of Liberty to ourselves and our Posterity," as proclaimed in the Constitution's Preamble.

1. The Rights of Americans Are Greater Than the Rights of Englishmen.

Like the First Amendment, the Second Amendment is not a simple reiteration of the common law rights of Englishmen. As Justice Black wrote in Bridges v. California, 314 U.S. 252 (1941), "[n]o purpose in ratifying the Bill of Rights was clearer than that of securing for the **people of the United States** much **greater freedom** of religion, expression, assembly and petition than the people of Great Britain had ever enjoyed."[6] *Id.*, 314 U.S. at 265 (emphasis added). What Justice Black observed about the First Amendment is equally applicable to the Second. *See* T. Cooley, The General Principles of Constitutional Law in the United States of America, p. 298 (Little Brown & Company, Boston: 1898) ("The [Second] amendment ... was adopted with some modification and enlargement from the English Bill of Rights of 168[9]....").

As St. George Tucker observed, the "right of bearing arms" in the English Bill of Rights was "confined to protestants, and the words suitable to their condition ... have been interpreted to authorize the prohibition of keeping a gun ... for the destruction of game ... to

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[6] The brief of the Amici AJC, et al. (pp. 27-31) in support of Petitioners offers evidence for the meaning of the Second Amendment in the laws of other countries, but James Madison made it clear America was different, pointing to "the advantage of being armed, which the Americans possess over the people of almost every other nation, [where] the governments are afraid to trust the people with arms." Federalist No. 46, reprinted in The Federalist, p. 247 (G. Carey and J. McClellan, eds.: Liberty Fund, 2001).

any person not qualified to kill game." St. George Tucker, View of the Constitution of the United States ("Tucker's View"), p. 239 (Liberty Fund: 1999). The American guarantee, however, like the First, Fourth, Ninth, and Tenth reaches all "persons who are part of [the] national community." United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990). Additionally, the American right is unconditional, not to be "infringed," whereas the English guarantee was subject to exceptions "allowed by law." *See* 1689 English Bill of Rights, reprinted in Sources, p. 246. Thus, Tucker celebrated the Second Amendment to be "the true palladium of liberty," in contrast to its English predecessor which had allowed "the [English] people [to be] disarmed," there being "not one man in five hundred [who] can keep a gun in his house without being subject to a penalty." Tucker's View, pp. 238-39.

2. An Examination of the Rights Secured in the First Amendment Is Necessary to Assess the Nature and Purpose of the Right Protected by the Second.

As important as the Second Amendment right is to the security of a free state, it was a right that the founders hoped the people would never be required to put to use. After all, the right of the people to secure their freedoms by force of arms was to be a **last resort,** to be exercised only "when a long train of abuses and usurpations ... evinc[ing] a design to reduce them under absolute Despotism." *See* Declaration of Independence, 1 The Founders' Constitution, p. 10. The first line of defense to maintain a "free state"is not the Second Amendment, but the five distinct freedoms

set forth in the First — religion, speech, press, assembly, and petition.

a. Freedom of Religion

Patterned after the Virginia free exercise of religion guarantee embodied in the 1776 Virginia Constitution,[7] the First Amendment religion guarantees were designed to set the people free from a government-enforced system of orthodoxy of opinion which Madison claimed was the very foundation of tyranny:

> Religion ... can[not] be subject to ... the Legislative Body. The latter are but the creatures ... of the [Society at large]. Their jurisdiction is both derivative and limited: ... with regard to the constituents. The preservation of a **free** Government requires [its powers not] be suffered to overleap the great Barrier which defends the **rights of the people**. **The Rulers** who are guilty of such an **encroachment**, exceed the commission from which they derive their authority, and are **Tyrants**. [J. Madison, Memorial and Remonstrance Against Religious Assessments, ¶ 2, reprinted in 5 The Founders' Constitution, p. 82 (emphasis added).]

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[7] *See generally* Reynolds v. United States, 98 U.S. 145, 163 (1879).

b. The Freedoms of Speech and of the Press

The freedom of speech had been secured in the English Bill of Rights, but only to the members of Parliament assembled[8] and the freedom of the press only by statute and the inaction of Parliament. *See* IV W. Blackstone, Commentaries on the Laws of England 151-52 (U. of Chi. Facsimile ed.: 1979). Madison contended, however, that the two freedoms must be constitutionally extended to the people, not just to protect the people "from previous restraint of the executive, as in Great Britain, but [from] legislative restraint also; and this exemption to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws." IV The Debates in the Several State Conventions, p. 570, reprinted in Sources, p. 426. Thus, this Court in New York Times v. Sullivan, 376 U.S. 254 (1964), ruled that the freedom of speech protected the people from seditious libel actions for criticism of government officials, vindicating thereby the **sovereignty of the people** over their government, just as Madison had stated: "'[T]he nature of Republican Government [is] that the censorial power is in the people over the Government, and not in the Government over the people.'" *Id.*, 376 U.S. at 275.

c. Right to Assemble and Petition

The First Amendment also secures "the right of the **people** peaceably to assemble, and to petition the **Government** for redress of grievances." (Emphasis

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[8] Sources, p. 247.

added.) In the English Bill of Rights, the right to petition was limited to appeals to "the King," and the right to assemble was omitted altogether, presumably on the ground that the people's rights were secured by the people's representatives in Parliament assembled. *See* Sources, p. 246. In the United States, however, "the very idea of a government, republican in form, implies the right on the part of the citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *See* United States v. Cruikshank, 92 U.S. 542, 552 (1875).

Indeed, prior to the Declaration of Independence, America's founders exercised the people's right to assemble and to petition the government for redress of grievances, producing the 1765 Resolutions of the Stamp Act Congress[9] and the 1774 Declaration and Resolves of the First Continental Congress.[10] In the 1774 Declaration and Resolves, however, the colonists claimed that their "assemblies have been frequently dissolved, contrary to the rights of the people" and their "reasonable petitions ... treated with contempt." Sources, p. 287.

Having exercised their freedoms of speech, press, assembly, and petition to no avail, the people resorted to their right to keep and bear arms to secure their right to a free state.

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[9] *See* Sources, pp. 261-71.

[10] *See* Sources, pp. 272-89.

d. Right to Keep and Bear Arms

In the Declaration of Independence, America's founders viewed armed resistance to tyranny as not only a "right," but a "duty." Having experienced the loss of their rights as Englishmen, the American people were not so sanguine to think that the new governments they were creating could not, themselves, devolve into despotism. Thus, the people of Virginia reaffirmed in their 1776 state constitution "that ... a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish" the very government created by such constitution "in such manner as shall be judged most conducive to the public weal." Sources, p. 311. *See also* 1776 Pennsylvania Constitution, Sources, p. 329. To that end, the Virginia Constitution guaranteed "a well-regulated militia, composed of the body of the people, trained to arms, [as] the proper, natural, and safe defence of a free State...." 1776 Virginia Constitution, Section 13, Sources, p. 312. To the same end, the Pennsylvania Constitution guaranteed to "the people [the] right to bear arms for the defence of themselves and the state...." 1776 Pennsylvania Constitution, Section XIII, Sources, p. 330.

C. The Right of the People to Keep and Bear Arms Is an Individual Right, Not a State's Right to Arm its Militia.

In the months and years prior to the ratification of the United States Constitution, the people of Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire adopted constitutions containing declarations of rights. With

respect to the right to keep and bear arms, Delaware, Maryland, and New Hampshire followed the lead of Virginia, securing this right as one reposed in a well regulated militia. Sources, pp. 339, 348, and 385. North Carolina, Vermont, and Massachusetts followed the lead of Pennsylvania, securing the right as one of self-defense. Sources, pp. 356, 366, and 376.

Madison's initial proposal to Congress combined the two, stating: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country...." Sources, p. 422. The final wording reflected Congress's understanding that the two phrases, taken together, secured a right of the people to keep and bear arms to the end that the people would be free to organize themselves into a militia to safeguard their liberties.

Petitioners would have this Court read the Second Amendment text differently, contending that "free State" means one of the independent and sovereign states of the federal union and, therefore, the Second Amendment protects only the right of each of the 50 states to arm its respective militia. *See* Pet. Br., pp. 12-15. This contention rests upon the mistaken assumption that the Second Amendment phrase, "well regulated militia," is derived from the unmodified term "Militia" in Article I, Section 8, Clauses 15 and 16. *See id.*, p. 12. But the genesis of "well regulated militia" is found in the 1776 Virginia, Delaware, and Maryland declarations of right, each of which utilize that term to describe a limit on the power of their respective state governments, not a grant of power to those governments. Indeed, the Virginia description of a

"well-regulated militia [is] composed of the body of the people, trained to arms..." (Sources, p. 312), fit the preexisting "self-embodying defensive military association" that had been voluntarily formed in Fairfax County in 1775 "composed of free men [who] elect[ed] their own officers, provid[ed] themselves with firearms, and train[ed] themselves for defense." *See* D. Young, The Founders' View of the Right to Bear Arms, pp. 45-46 (Golden Oak Books: 2007).

In stark contrast, the militia described in Article I, Section 8, Clauses 15 and 16 is one "organiz[ed], arm[ed], and disciplin[ed]" by the United States government, and staffed and trained by the States, ready to "be employed in the Service of the United States" "to execute the Laws of the Union, suppress insurrections and repel invasions." Sources, p. 411. To read the Second Amendment as a guarantee that such a government-organized and trained militia, as provided for in Article I, Section 8, would serve "as the primary protectors of the states,"[11] as Petitioners have argued, is to wrench the language not only from its historic context,[12] but, in effect, to rewrite it to read that the "right of a State to organize and arm its militia shall not be infringed."

Furthermore, Petitioners have failed to grasp the significance of the guarantee's right to "keep" arms, not just to "bear" them. According to Petitioners, the right to "keep" arms "refer[s] to the *requirement* that militiamen have arms so they could bring them to

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[11] Pet. Br., pp. 14-15.

[12] *See* Pet. Br., p. 15, n.3.

musters," as provided in "numerous state militia laws."[13] Thus, Petitioners conclude that the Second Amendment does not protect a right of private ownership or possession of a firearm for private use.[14] Such a reading of "keep" is contrary to its ordinary meaning — "[t]o hold, to retain in one's power or possession; not to lose or part with [or] [t]o have in custody for security or preservation." *See* N. Webster, American Dictionary of the English Language (1828).

Moreover, Petitioners' restrictive reading of "keep" is inconsistent with the Second Amendment's broader constitutional context which, in relation to the First Amendment, is based upon the premise that the Second Amendment right is to be exercised as a last resort to guard against tyranny, presupposing thereby that such arms as might be taken up in resistance to such a tyranny would ordinarily be used for private purposes. Additionally, following the Second Amendment are the Third and the Fourth

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[13] Pet. Br., p. 17.

[14] According to Petitioners' view, such private rights as self-defense are protected only by the "common law or state constitutions." *See* Pet. Br., pp. 19-20. Neither the common law nor the state constitutions, however, protect a D.C. resident's right to defend himself, his family or his home. The D.C. Code has effectively repealed the common law right of self-defense, leaving a D.C. resident at the mercy of armed intruders. And, if the Second Amendment does not apply to the District of Columbia, as Petitioners have vigorously argued (Pet. Br., pp. 35-40), then the people of the District have no constitutional protection. Consequently, all that a law-abiding resident of the nation's capital has to defend himself from an illegally-armed intruder is access to a 911 telephone call, hoping that the police will arrive in time to preserve his life, liberty, and property.

Amendments, each of which is designed for the protection of private property from government intrusions and control. The "plain object of [the Third] is to secure the perfect enjoyment of that great right at common law, that a man's house shall be his own castle, privileged against all civil and military intrusion." 2 J. Story, Commentaries on the Constitution of the United States, Section 1900, p. 647 (5th ed. 1891). And the Fourth Amendment "grew out of the use by British officials of general warrants ... to search for seditious publications." Sources, p. 427. Thus, the Fourth Amendment secures "the sanctity of a man's home and the privacies of life," protecting from government "invasion ... his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence...." *See* Boyd v. United States, 116 U.S. 616, 630 (1886).

D. The American Revolution Was Precipitated by Threats to the Colonists' Right to Keep and Bear Arms.

The authorial intent of the Second Amendment is further informed by an examination of the degree to which the American Revolution was precipitated by a series of British efforts to deprive the colonists of arms and powder. While the Respondent's Brief (pp. 20-25) covers some of this important story, other important details are chronicled herein:

1. The Powder Alarm.

On September 1, 1774, a detachment of 300 British troops marched to Charlestown and Cambridge, and

seized the gunpowder and cannons stored there. In response, hundreds of angry (and armed) locals gathered in Cambridge to protest the confiscation. Reports of the day's events, including some false reports of a British attack on civilians, led to an estimated 20,000-30,000 armed men marching on Boston.[15] This event ensured that no colony would side with the British empire.[16] After the "Powder Alarm," American Colonel Israel Putnam advised the citizens of Massachusetts to "keep a strict guard over the remainder of your powder; for that must be the great means, under God, of the salvation of our country."[17]

2. Powder Impoundment.

The following day, General Gage ordered that no powder be withdrawn from the Boston Magazine. This edict applied to stores belonging to the local militia, as well as that held by private persons. As much of the local powder had been stored in such a central location, it allowed Gage to effectively cut off the entire supply to the area.[18]

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[15] French, Alan, The Day of Concord and Lexington: The Nineteenth of April, 1775 (1937, reprinted by The Scholar's Bookshelf: 2006), p. 19.

[16] Richmond, Robert P., Powder Alarm: 1774 (Auerbach Publishers: 1971), p. 35.

[17] *Id*., p. 44.

[18] Young, David E., The Founders' View of the Right to Keep and Bear Arms, p. 37.

3. Cessation of Arms Imports.

On October 19, 1774, an order from the British Crown prohibited the importation of arms and ammunition to the colonies from Britain. On the same day, the colonies' royal governors were sent letters from the Earl of Dartmouth instructing them to "take the most effectual measures for **arresting, detaining and securing any Gunpowder or any sort of arms or ammunition,** which may be attempted to be imported into the Province under your Government...,"[19] including that which already had arrived.[20]

4. Leslie's Retreat.

On February 26, 1775, British troops moved into the Massachusetts town of Salem to seize colonial cannons and other arms rumored stored there. The colonists, however, who had maintained a watchful eye on all troop movements after the Powder Alarm, responded quickly, scurrying to hide the cannons and pulling up the town drawbridge, halting the British advance. The British troops retreated shortly before the arrival of armed companies of men from the nearby towns responding to the alarm.[21]

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[19] Earl of Dartmouth, letter to the governors of the colonies, as quoted in James, James Alton, Oliver Pollock; The Life and Times of an Unknown Patriot (Ayer Company Publishers: 1970), p. 61. (Emphasis added.)

[20] Young, The Founders' View, pp. 39, 56.

[21] *See* Coakley, Robert W. and Conn, Stetson, The War of the American Revolution: Narrative, Chronology, and Bibliography

5. Lexington and Concord.

On the evening of April 18, 1775, approximately 700 grenadiers and light infantry troops were secretly deployed by General Gage to hunt down colonial military provisions in Concord. Again, the locals were instantly aware of this and, by the next morning, a small group of 70 militiamen intercepted the British on Lexington Green, on the way to Concord.[22] Though the exact chain of events remain in question, the British were under orders from their commander to "**disarm**" the "rebels" but "on no account to fire, nor even attempt it without Orders."[23] Nevertheless, a shot was fired,[24] and at least one volley ripped through the militia ranks which, though determined not to be disarmed, "intended not to be the aggressors ..., [with the] intention, no matter what the circumstances, to wait to be attacked."[25] This beginning of hostilities, **precipitated by the confiscation of firearms**, the same as the previous September in Charlestown, had caused the entire countryside quite literally to be up in arms.

(Center of Military History, United States Army, 1975), p. 88.

[22] Young, The Founders' View, p. 51.

[23] French, The Day of Concord and Lexington, p. 105.

[24] If the firing on Lexington Green was started by the colonists, the colloquial saying would be true — that "the shot heard around the world was fired from an unregistered gun," one which would be illegal under D.C. law.

[25] French, The Day of Concord and Lexington, p. 49.

6. Williamsburg Magazine.

The events at Lexington and Concord were still unknown in Virginia when, in the middle of the night of April 20, 1775, a small force of Royal Marines, dispatched by Dunmore, the British colonial governor of Virginia, quietly emptied the Williamsburg arsenal and put the powder aboard an armed schooner. In the days that followed, Patrick Henry led the Hanover volunteers toward Williamsburg. Eventually, Governor Dunmore paid token restitution for the stolen powder without bloodshed.[26]

7. Boston Disarmament.

As the colonies readied for war, General Gage tried to solidify his hold over Boston through further confiscation of firearms on April 27, 1775. "Trapped within the town by the fortifications and British army after the Battles of Lexington and Concord, the people of Boston were blackmailed into giving up their personally owned firearms in exchange for the ability to leave the town...."[27] Upon receipt of the thousands of weapons, "reneged on his promise."[28] By June 1775, anyone in Boston "found in possession of arms" was "deemed an enemy of the King's Government" and imprisoned.[29]

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[26] Young, The Founders' View, p. 53.

[27] *Id*., p. 52.

[28] *Id*.

[29] *Id*., p. 57.

It was this pattern of British efforts to disarm the colonists, so as to prevent them from resisting an increasingly oppressive government, which coalesced colonists, leading directly to the American Revolution. The colonists may have been willing to continue to suffer "a long train of abuses and usurpations," but once those abuses "evince[d] **a design** to reduce them under **absolute Despotism** ... all having in **direct object** the establishment of an **absolute Tyranny**," it was **then** that our forefathers resolved "to throw off such Government...."[30] Patrick Henry reacted to Governor Dunmore's seizure of the Williamsburg Magazine in a way that reveals that British "gun control" was the one intolerable abuse leading to war: "You may in vain mention to them the duties upon tea, etc. These things, they will say, do not affect them. But tell them of the robbery of the magazine, and that the next step will be to disarm them, and they will be ready to fly to arms to defend themselves.'"[31]

As was then, so it is now, that the American people seek to discern the intentions of an increasingly powerful central government, watching their servants on this Court to see if they will honor and uphold, or dilute or negate, the written words of the nation's founders guaranteeing the right of a sovereign American people to "keep and bear arms."

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[30] Declaration of Independence, 1 The Founders' Constitution, p. 10 (emphasis added).

[31] Henry, William Wirt, I Patrick Henry: Life, Correspondence, and Speeches (Sprinkle Publications, Harrisonburg, Va. 1993), p. 279.

III. THE CHALLENGED D.C. CODE PROVISIONS IMPERMISSIBLY INFRINGE ON RESPONDENT'S PROTECTED SECOND AMENDMENT RIGHT TO THE PRIVATE OWNERSHIP AND USE OF A HANDGUN IN HIS HOME.

In 1840, Joseph Story forewarned that:

> One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by **disarming the people**, and **making it an offense to keep arms**, and by **substituting a regular army in the stead of a resort to the militia**. The friends of free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice ... [the Second Amendment's] powerful check upon **the designs of ambitious men**." [J. Story, A Familiar Exposition of the Constitution of the United States, § 450, p. 264 (Boston: 1840) (emphasis added).[32]]

Ignoring Story's warning, in the so-called interest of "public safety"[33] the D.C. government has enacted laws

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[32] History has demonstrated the legitimacy of the framers' concern that a government can turn against its own people. It is estimated that, in the 20th century, a person was much more likely to be killed by his own government as by war. R. Rummel, Death by Government, Transaction Publishers, 1994, p. 15.

[33] Petitioners believe that the D.C. gun restrictions address "the serious dangers created by ownership of guns" in an effort to "reduce crime, suicide, domestic violence, and accidental

which effectively (1) disarm the people, (2) make it an offense to keep arms, and then, in justification, (3) claims that a militia created by the very government that disarmed the people is the only safeguard of the liberty of the very people that it has disarmed.

Just as the colonial governors and British military justified their barrier to the importation and possession of arms and powder, the D.C. Council has its reasons to ban handguns.[34] Despite their purported "good" reasons, however, the D.C. gun laws

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shootings," asserting that "**[p]reventing those harms** is not just a legitimate goal; it is a governmental duty of the highest order." Pet. Br., p. 11 (emphasis added). However, Petitioners operate on a faulty understanding of the role of government, which should be focused instead on the punishment of evil, not its anticipation and prevention. "[G]overnors ... are sent by [God] for the punishment **of evildoers**, and for the praise of them that do well." 1 Peter 2:14 (emphasis added). *See also* Romans 13:4. Any government that assumes the burden of preventing crime inexorably creates a surveillance society with totalitarian powers, for only that type of government can know what people may do, and deny them of the means in advance.

[34] Petitioners unilaterally have asserted that the D.C. Council has unlimited power over firearms, because "[r]egulating dangerous weapons is at the heart of any government's traditional police power." *See* Pet. Br., p. 47. But the provisions at issue in this case — forbidding the keeping of a hand-gun and requiring the "unload[ing,]" "disassembl[ing]," or "trigger-locking" of allowable firearms in a persons' private home — are **not** the exercise of the legislative power delegated by Article I, Section 8, Clause 17. Rather, such "rule and regulations" are akin to those authorized by Article IV, Section 3 with respect to property owned by the government (*see* Ashwander v. TVA, 297 U.S. 288, 330 (1936)), not to private property owned by D.C. residents.

unconstitutionally infringe on the right of the people to keep and bear arms.

A. The Amendment's Preamble Establishes the Standard of Review

According to Petitioners and the Solicitor General, the standard by which a Second Amendment claim is to be measured is whether the government can show that a firearm regulation is reasonably related to the government's concern for community safety. *See* Pet. Br., p. 44; U.S. Br., pp. 20-21. While the Solicitor General adds to this test a weighing process purportedly to ensure that firearm regulations not go too far, neither he nor Petitioners anchor their tests to the Second Amendment text. Thus, neither standard takes into consideration the purpose of the right to keep and bear arms, even though the Amendment's preamble states both its purpose and the necessary means to achieve it, and in so doing, furnishes the key to the appropriate standard to guide the Amendment's application in particular cases. *See generally* New York Times v. Sullivan, 376 U.S. at 269-80.

As noted above, the ultimate purpose of the guarantee of the right of the people to keep and bear arms is to "secur[e] a free state." The very nature of a "free state" is that it is constituted by the people, that is, by the governed, not by the governors. As also noted above, the "necessary" means by which such a state is to remain free is a "well regulated militia," that is, a self-embodying, self-governing, armed populace trained to arms, not by the state but by the people themselves. Whether the right to keep and bear arms is violated, then, must turn on whether a

particular firearm regulations "infringes" either the class of persons who, by nature, constitute the "people" or the class of "arms" appropriate to a "well regulated militia."

By these two standards, both anchored in the constitutional text, the D.C. Code provisions unconstitutionally "infringe" on the Respondent's right to keep and bear arms.

B. D.C. Code Provisions Impermissibly Classify Persons Eligible to Possess a Firearm.

D.C. Code § 7-2502.02(a)(4) prohibits a D.C. resident from owning or possessing a "pistol" — with three notable exceptions: (1) persons who were in possession of a "validly registered" pistol prior to September 24, 1976; (2) "any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm during the employee's duty hours;" and (3) a "police officer who has retired from the Metropolitan Police Department." A resident of the District, Respondent fit none of these categories; he was denied a permit to keep a handgun in his home.

Failing even to mention the question whether the D.C. Code exceptions unconstitutionally discriminate against Respondent, Petitioners argue that handguns, as contrasted with rifles and shotguns, pose sufficiently serious dangers to the public safety so as to ban them. *See* Pet. Br., pp. 49-55. Notably, Petitioners make no attempt whatsoever to explain why, if the danger posed by handguns is so great, there

should be **any** exceptions to the ban. Indeed, Petitioners maintain that the Second Amendment inquiry requires no more than an inventory of the allegedly special dangers created by handguns, leaving it to the absolute discretion of the D.C. government to make whatever exceptions that it chooses.

But the Second Amendment protects the right of the **people** to keep and bear arms, not the right of any **special class** — such as retired D.C. police officers. As this Court has ruled in Verdugo-Urquidez, the "people" protected by the Second Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. at 265. On their face, the three exceptions carved out by the D.C. Code are not based upon a consideration that only those who fit within them "are part" of the D.C. "community." To the contrary, the three exceptions appear to single out for special privilege certain members of the D.C. community either on the basis of longevity of residence or of their association with a particular kind of employment.

This is the very kind of discriminatory policy that the Second Amendment was designed to end. Indeed, the distinctions made by the D.C. Code exceptions are reminiscent of the discriminatory practices in England where the right to keep and bear arms depended solely upon the discretion of those who happened to be in power. *See* Sources, p. 231. Instead, if any class of persons is to be denied such right, it must be based upon a classification demonstrating that the excluded class is not within the meaning of "the people," such as

an "[e]xcludable alien" who has attempted "to enter [the United States] forbidden by law." *See* Verdugo-Urquidez, 494 U.S. at 265, quoting from United States *ex rel*. Turner v. Williams, 194 U.S. 279, 292 (1904).

The Solicitor General, however, maintains that the Second Amendment would be governed by a different standard, one that would permit a "ban [on] the private possession of firearms by persons whom Congress deems **unfit** to keep such weapons." *See* U.S. Br., p. 25 (emphasis added). For this reason, the Solicitor General has argued, Congress may prohibit such persons as idiots, imbeciles, felons, and children from possessing any firearm whatsoever. *Id*. at 25-26. While the Second Amendment would not absolutely preclude exclusions, it does prohibit them if they rest upon the constitutionally impermissible ground of unfitness. Exclusions may only be based upon the foundation that the class of persons excluded are not part of the constituent "people" — *i.e.*, those persons who have authority to constitute and reconstitute the government — being either incapable of giving the requisite consent to be governed, such as children, or having forfeited their civil rights, such as a convicted violent felon. According to the republican political philosophy underpinning the Second Amendment, whether a person is "trained" in the use of a firearm, and thus fit to possess it, is a matter of self-government, not subject to any fitness regulation of the government.

In the past, blacks have been ignominiously denied their right to keep and bear arms because of the perceived danger to community safety or general unfitness. Initially, blacks were not U.S. citizens

entitled to the right to keep and bear arms. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 417 (1857). Following the Civil War, a number of states enacted "black codes," limiting firearms ownership by blacks that mimicked in many ways the restrictions that a number of states in the antebellum south had imposed on both slaves and black freedmen. *See* Cottrol, R. and R. Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration," 80 Geo. L.J. 309, 344-46 (Dec. 1991). Later gun control legislation was more subtle. Instead of overtly prohibiting blacks from having firearms, many laws passed between the end of the Civil War through well into the 20th century imposed high taxes on firearm sales, or banned inexpensive firearms, or gave authorities discretion in issuing licenses. Even some modern gun control was motivated in part by fear of black radicals and urban violence. *See* Robert Sherill (then Washington correspondent for *The Nation*), The Saturday Night Special, Penguin Books (1973) ("The Gun Control Act of 1968 was passed not to control guns but to control blacks...." p. 280.). Many facially neutral laws were aimed by many legislators at keeping certain segments of "the people" — including blacks and poor whites — out of the gun market. *See* Tahmassebi, S., "Gun Control and Racism," 2 G.M.U.C.R. L.J. 67, 75 (1991).

C. D.C. Code Provisions Impermissibly Classify Weaponry.

Petitioners have argued that the Second Amendment standard by a firearms ban or regulation is to be measured is whether the ban or regulation is reasonably related to public safety. *See, e.g.,* Pet. Br., p. 42. Although Petitioners purport to assure the

Court that its reasonableness standard could not be applied in such a way as to "effect[] functional disarmament," nevertheless Petitioners' "reasonableness" standard places the right to keep and bear arms in the discretionary bosom of the D.C. Council, leaving it up to the governors how far they can go before the people are functionally disarmed. *Id.*, pp. 43-44.

Petitioners' standard ignores the text which states — without exception reasonable or otherwise — that the specified right shall not be "infringed." According to its ordinary meaning,"infringe" means to "break, as contracts":

> to violate, either positively by contravention, or negatively by non-fulfillment or neglect of performance. A prince ... *infringes* [a] covenant by neglecting to perform its conditions, as well as by doing what is stipulated not to be done. [N. Webster, American Dictionary of the English Language (1828).]

In short, the argument that "the right of the people" is subject to reasonable regulation and restriction tramples on the very words of the Second Amendment, reading the phrase — "shall not be infringed" — as if it read "shall be subject only to reasonable regulation to achieve public safety."

The proposed reasonableness standard also disregards pertinent constitutional history. In the 1689 Bill of Rights, the English "subjects" were deemed to "have arms for their defence **suitable to**

their conditions and as allowed by law." (Emphasis added). According to Petitioners' standard of reasonableness, the right to keep and bear arms has been diminished by "practical realities," such as "guns hav[ing] become cheaper and more lethal." Pet. Br., p. 43. While such an analysis — that the Second Amendment guarantee changes with changing times — might be suitable if the 1791 American Bill of Rights read like its 1689 English counterpart, Petitioners' reasonableness standard has no place in a Constitution designed to secure the blessings of liberty not just to the generation which ratified the document but to their "posterity" — all succeeding generations.

Finally, Petitioners' reasonableness standard is inconsistent with this Court's ruling in United States v. Miller, in which the Court applied the standard whether the weapon at issue "has some reasonable relationship to the preservation or efficiency of a well regulated militia...." *Id.*, 307 U.S. at 178. Petitioners' Brief not only rejects this test, but belittles it. *See* Pet. Br., p. 46. Judged by the Miller standard, there is no question that a handgun is reasonably related to the preservation or efficiency of a well regulated militia, being a firearm well-suited to individual ownership and private use and training, a prerequisite for the kind of readiness, discipline, and skill should the people find it necessary to take up arms against a tyrant.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully Submitted,

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