No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA AND
MAYOR ADRIAN M. FENTY,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

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

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Second Amendment guarantees law-abiding, adult individuals a right to keep ordinary, functional firearms, including handguns, in their homes.

LIST OF PARTIES

Although only Respondent Heller is listed in Petitioners' caption, Shelly Parker, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon were parties in the proceedings below and are Respondents before this Court per Sup. Ct. R. 12.6. Respondents initiated this case by filing a complaint against Petitioner District of Columbia and its former Mayor, Anthony Williams, in the United States District Court for the District of Columbia. Respondents appealed the District Court's ruling to the United States Court of Appeals for the District of Columbia Circuit.

Petitioner Adrian Fenty was substituted for Anthony Williams by the court of appeals upon his succession to the Mayoralty.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution is reproduced on page one of the petition. D.C. Code §§ 7-2501.01(12), 7-2502.01, and 7-2502.02 are reproduced in the appendix to the petition. Pet. App. at 91a-98a. D.C. Code §§ 7-2507.02, 7-2507.06, 22-4504, and 22-4515 are reproduced in the appendix to the cross-petition. Cross-Pet. App. at 39-41.

SUMMARY OF ARGUMENT

Respondents welcome Petitioners' effort to have this Court review the nature of Second Amendment rights. This case presents the Court a unique opportunity to correct a persistent misconception that the people do not actually enjoy a right that is specifically enumerated in the Constitution. "The people" – individuals in our country – retain the right to keep and bear arms.

This case raises a profound constitutional law question in the context of a stark split of authority among the lower federal courts and state courts of last resort. Indeed, the local court of last resort and the federal circuit court within the nation's capital are divided on the nature of Second Amendment rights, an untenable situation should individuals unconstitutionally convicted in the city's Article I courts seek habeas corpus review.

The case is further suitable for review because the question it presents is quite narrow. Contrary to Petitioners' tendentious formulation of the question presented in their petition, the question presented by this case is whether the Second Amendment secures an individual right to keep basic functional firearms, including ordinary handguns, within the home. In resolving that narrow, specific question, this Court need not decide the full extent of Second Amendment rights nor even determine the appropriate level of constitutional scrutiny for regulations that implicate the Second Amendment.

This case does not involve any laws that merely regulate the possession of firearms. As the court of appeals found, the code provisions at issue amount to a complete prohibition of the possession of all functional firearms within the home. The challenged laws are thus an absolute negation of the people's right to keep arms. If the right exists, the laws must yield.

The split of authority among lower courts on an issue of profound importance – not Petitioners' emotional appeal grounded in flawed social science, nor Petitioners' premature argument on the merits – warrants the granting of the petition for certiorari.

Respondents are not required to argue the merits of their case at this stage, nor are Respondents bound to rebut Petitioners' characterization of the social science record. Respondents will comprehensively describe the Second Amendment's individual character

and rebut all of Petitioners' theories should certiorari be granted.

At this stage, it suffices to point out that the court of appeals' decision is neither unprecedented nor outside the norms of American jurisprudence. Courts have long struck down legislative enactments on account of the Second Amendment and its analogs in various state constitutions. This Court has repeatedly indicated that the Second Amendment secures individual rights. In so doing, this Court has agreed with long-held views of the amendment dating from the Framers.

Respondents will confine their responses to misstatements of law and fact that bear on the issues that would be before the Court were certiorari granted. Sup. Ct. R. 15.2.

Petitioners certainly have broad latitude to criticize the court of appeals' decision, but they are not free to mischaracterize that holding, or claim that their laws permit conduct that the D.C. Circuit specifically found the laws to forbid. Should the Court grant the petition, Respondents respectfully urge the Court to frame the question presented anew. The question in this case is not merely whether the city may ban handguns as a subclass of firearm; the question is whether a law that prevents people from keeping functional firearms – of any kind – in their homes violates the "right to keep and bear arms" recognized by the Second Amendment. Thus, unlike Petitioners' formulation, the question presented by

Respondents fairly and accurately reflects *all* the laws adjudicated by the courts below.

Even taking Petitioners' framing of the question presented on its own terms – namely, that District of Columbia law merely bans handguns – Petitioners' arguments in support of handgun prohibition share a common defect: none is grounded in law.

The petition does not claim that the court of appeals misapplied the test for determining whether particular arms are within Second Amendment protection, nor does the petition suggest any alternative test for making such determinations. Rather, Petitioners claim that the law is desirable, and allege they have complied with the Constitution by not forbidding other arms. Such logic could sustain any constitutional violation. It is not a serious means of legal argument.

Respondents strongly disagree with Petitioners' assertion that the laws at issue have made the District of Columbia a safer or less violent place, which they manifestly have not. In any event, that argument is simply not relevant to the resolution of what is a purely legal question.

Moreover, Respondents are troubled by the underlying suggestion that regardless of what the Constitution requires, the government is free to act in any manner that it believes has social utility. That reasoning would not logically stop at the abrogation of Second Amendment rights, but render obsolete the

entire constitutional enterprise of delegated powers and retained rights. In any event, even a cursory examination of the evidence demonstrates that gun prohibition in the District of Columbia has utterly failed.

Finally, Respondents are constrained to respond to the remarkable declaration that "[w]hatever right the Second Amendment guarantees, it does not require the District to stand by while its citizens die." Pet. at 30. The statement suggests, contrary to Petitioners' consistent litigating position in other cases, that citizens are generally entitled to rely upon the city for police protection.

Neither Petitioners' sympathy for crime victims nor their effectiveness (or ineffectiveness, as the case might be) at preventing violent crime are properly at issue. However, Petitioners' suggestion that the wholesale violation of people's right to defend themselves in their homes with functional firearms is necessary to protect those very citizens cannot be sustained.

ARGUMENT

I. The Court Should Provide Essential Guidance to Courts That Misconstrue the Second Amendment.

While there exists a broad array of federal and state laws regulating the possession and use of firearms, even partial firearms prohibition is rare. The

District of Columbia's complete ban on functional firearms is unique.

If a court were to conclude that the Second Amendment secures individual rights, adjudicating a blanket prohibition on the possession of functional firearms within the home would not require announcing or clarifying any constitutional standards. The mere existence of the Second Amendment right would clearly be sufficient to dispose of the city's general ban on functional firearms. And plain application of this Court's test for protected weapons, announced in *United States* v. *Miller*, 307 U.S. 174 (1939), is sufficient to dispose of the city's specific prohibition on the possession of handguns. In applying those principles, the decision below is unremarkable.

Even were the Court inclined to offer guidance as to the level of scrutiny to be applied in Second Amendment cases, a case involving mere regulation – rather than complete abrogation of Second Amendment rights – might be a better vehicle for that purpose. In such a case, the governmental interest in public safety would necessarily be balanced against the individual liberty interest at stake.

Unfortunately, a majority of federal circuit courts of appeal fail to acknowledge the requisite first element of Second Amendment analysis: the existence of an individual right. Clarifying that the Second Amendment secures individual rights would enable

courts to properly analyze firearms regulations, even if the unusual facts of this case are unlikely to be repeated.

As Petitioners note, there is a profound split of authority among the federal appellate courts on the question of whether the Second Amendment secures individual rights. The split arises from a misreading of this Court's only direct Second Amendment precedent in *Miller*. As a rule, the more cursory the citation to *Miller*, the more likely a court has erred in its Second Amendment analysis. See, e.g., Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretation of* United States v. Miller *and the Second Amendment*, 26 Cumb. L. Rev. 961 (1996). Contrary to the persistent myth repeated by Petitioners, *Miller* is consistent only with the individual rights model of the Second Amendment.

Miller raised a Second Amendment challenge to his indictment under the National Firearms Act for transporting an unregistered and untaxed sawed-off shotgun across state lines. Rather than focus on the nature of the substantive right claimed by Miller, the Supreme Court focused on the sawed-off shotgun to which Miller claimed a right.

As the Second Amendment contains a prefatory justification clause providing, "A well regulated Militia being necessary to the security of a free State," U.S. Const. amend. II, *Miller* reasoned that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such [militia]

forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Miller*, 307 U.S. at 178.

"With that end in view," this Court set out to define "the militia," concluding that "militia" referred simply to members of the public capable of bearing arms in defense of the government if called upon to do so. *Miller*, 307 U.S. at 178-79. Reviewing "the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators," this Court determined

> that the Militia *comprised all males physically capable of acting in concert for the common defense*. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time.

Miller, 307 U.S. at 179 (emphases added). The "militia system . . . implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence." *Miller*, 307 U.S. at 179-80 (citation omitted).

This Court's treatment of the issue in *Miller* indicates that the militia "referred to the generality of the civilian male inhabitants . . . and to their personally keeping their own arms, and not merely to individuals during the time (if any) they might be

actively engaged in actual military service or only to those who were members of special or select units." *United States* v. *Emerson*, 270 F.3d 203, 226 (5th Cir. 2001).

Miller's membership in the "Militia," as that term was used in the Second Amendment, was unquestioned. "Had the lack of [militia] membership or engagement been a ground of the decision in *Miller*, the Court's opinion would obviously have made mention of it. But it did not." *Id.* at 224 (footnote omitted). The court below made the same point, Pet. App. at 40a, as has Judge Kozinksi. *Silveira* v. *Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc). Instead, the case turned on whether the sawed-off shotgun in question was a weapon in ordinary use suitable for common defense. Given the peculiar nature of the weapon at issue, this Court remanded the case for an evidentiary determination as to whether it had military utility. *Miller*, 307 U.S. at 178.

Had Miller survived to offer evidence on that point, he might well have been acquitted on Second Amendment grounds. It is surprising that this case, which so clearly assumed the individual nature of Second Amendment rights and explicitly declared that the "militia" is composed of ordinary citizens expected to have their own private arms, continues to be invoked on behalf of the collectivist theory.

Allegations that the Court has adopted the collectivist interpretation of the Second Amendment are still more surprising considering that the Court has consistently suggested the opposite view.

> "The people" protected by the Fourth Amendment, and by the First *and Second Amendments*, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, 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.

United States v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (citation omitted) (emphasis added).

Finding that enemy combatants outside the United States are not entitled to claim constitutional rights, this Court rejected the notion "that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, *right to bear arms as in the Second*. . . ." *Johnson* v. *Eisentrager*, 339 U.S. 763, 784 (1950) (emphasis added).

A century earlier, the infamous *Dred Scott* case reasoned that no Southern state would have adopted a constitution obligating it to respect privileges and immunities of citizenship held by African-Americans, including "the full liberty of speech in public and in

private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went*." *Scott* v. *Sandford*, 60 U.S. 393, 417 (1857) (emphasis added).

While *Scott*'s odious holding is an aberration, its recognition of the fact that citizens enjoy a personal right to keep and bear arms certainly was not. This Court and its members have spoken approvingly of

> "the *personal rights* guarantied and secured by the *first eight* amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; *the right to keep and to bear arms*. . . . "

Duncan v. *Louisiana*, 391 U.S. 145, 166-67 (1968) (Black, J., concurring) (quoting statement of Sen. Howard, Cong. Globe, 39th Cong., 1st Sess., 2765-2766 (1866)) (emphases added).

This Court "has rejected the view" that "liberty encompasses no more than those rights already guaranteed *to the individual* against federal interference by the express provisions of the *first eight* Amendments." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 847 (1992) (emphases added). Thus,

> "[t]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific

> guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on."

Id. at 848 (quoting *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (emphasis added); see also *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (same).

Finding no support in this Court's decisions for the collectivist notion of Second Amendment rights, Petitioners offer an elaborate interpretation of the amendment's ratification history and original meaning. Notably missing from this exercise is a single 18th-century voice explaining the Second Amendment in collectivist terms.

> If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.

Stephen Halbrook, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 83 (1984). Yet contrary evidence from the period is overwhelming. Only a few examples should suffice:

Patrick Henry demanded an amendment of which "[t]he great object is that every man be armed. . . . Everyone who is able may have a gun." 3 Jonathan Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 45 (2d ed. 1836). Sam Adams demanded that "the said constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms." 2 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675 (1971). As Tench Coxe put it,

> Their swords, and every other terrible implement of the soldier, are the birth right of an American. . . . [The] unlimited power of the sword is not in the hands of either the federal or state governments, but where I trust in God it will ever remain, in the hands of the people.

Halbrook, *supra*, at 69 (quoting Tench Coxe, PENNSYLVANIA GAZETTE, Feb. 20, 1788).

Likewise, every notable constitutional commentator of the 19th Century understood the Second Amendment as securing individual rights. Justice Story called the right protected by the amendment "a right of the citizens" and noted that "[o]ne of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms. . . ." Joseph Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES, 264-65 (1842).

St. George Tucker, the earliest prominent commentator on the Constitution, regarded the Second Amendment right as equivalent to Blackstone's "right of the subject," protecting "[t]he right of self defence [which] is the first law of nature." 1 St. George Tucker, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, 143, 300 (1803). William Rawle, in his 1829 treatise, also affirmed the individual rights view, declaring that the amendment's wording was broad enough to protect the right from state infringement as well as federal. William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125-26 (2d ed. 1829) (Da Capo Press 1970).

While Petitioners' collectivist views are not without adherents, the individual rights model continues to dominate the legal academy.[1] As Professor Tribe writes, the Second Amendment

> achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually

[1] See, e.g., William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236 (1994); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193 (1992); Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983).

> strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes . . . a right that directly limits action by Congress or by the Executive Branch. . . .

1 Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 902 n.221 (3d ed. 2000).

The federal government argued that the Second Amendment secures an individual right to keep and bear arms as early as 1875. *United States* v. *Cruikshank*, 92 U.S. 542 (1875). This is the current understanding of the Executive Branch. Steven Bradbury, Howard Nielson, Jr., and Kevin Marshall, *Whether the Second Amendment Secures an Individual Right*, http://www.usdoj.gov/olc/secondamendment2.pdf (Aug. 24, 2004) (last visited Sept. 29, 2007); see also Opposition to Petition for Certiorari in *United States* v. *Emerson*, No. 01-8780, at 19 n.3 (2001), and Appendix A thereto.

By no means did the decision below break new ground by affirming that the Second Amendment secures individual rights. In addition to the Fifth Circuit, at least ten state appellate courts have reached the same conclusion, starting 161 years ago. *State* v. *Williams*, 148 P.3d 993, 998 (Wash. 2006); *Brewer* v. *Commonwealth*, 206 S.W.3d 343, 347 & n.5 (Ky. 2006); *Rohrbaugh* v. *State*, 607 S.E.2d 404, 412

(W. Va. 2004); *State* v. *Blanchard*, 776 So. 2d 1165, 1168 (La. 2001); *Stillwell* v. *Stillwell*, 2001 Tenn. App. LEXIS 562 (Tenn. Ct. App. July 30, 2001); *State* v. *Anderson*, 2000 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Jan. 26, 2000); *Hilberg* v. *F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. Ct. App. 1988); *State* v. *Nickerson*, 247 P.2d 188, 192 (Mont. 1952); *In re Brickey*, 70 P. 609 (Idaho 1902); *Nunn* v. *State*, 1 Ga. 243, 250 (1846).[2]

Nor was the court below the first to strike down a law on Second Amendment grounds. *Nunn*, 1 Ga. at 250; *Brickey*, 70 P. at 609.[3] And if cases are considered in which laws were struck down based on state constitutional analogs to the Second Amendment, the decision below is not exceptional. See, e.g., *State ex rel. City of Princeton* v. *Buckner*, 377 S.E.2d 139 (W. Va. 1988); *State* v. *Delgado*, 692 P.2d 610 (Or. 1984); *City of Lakewood* v. *Pillow*, 501 P.2d 744 (Colo. 1972); *Las Vegas* v. *Moberg*, 485 P.2d 737 (N.M. App. 1971); *State* v. *Rosenthal*, 55 A. 610 (Vt. 1903).

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[2] Some of these decisions may "simply mention[ ] the Second Amendment in passing, with no analysis," Pet. at 8 (footnote omitted), but that is not to say the Second Amendment was not a grounds of adjudication. See, e.g., *Stillwell*, at *11-13. Petitioners are correct, however, in pointing out that courts need not labor long to distill an individual right from the Second Amendment's plain text.

[3] Petitioners' blanket assertion that "[s]tate courts that have in fact separately addressed the meaning of the Second Amendment have rejected the approach used by the court below," Pet. at 10 (footnote omitted), is thus demonstrably false.

Although the decision below is the first of a federal appellate court to strike down laws on Second Amendment grounds,[4] that may simply be a function of these laws' extreme nature. And while federal courts have not subjected state laws to Second Amendment review for lack of incorporation, Pet. at 9, that anomaly will presumably be addressed in a future case. As Judge Reinhardt observed, this Court's Reconstruction Era opinions refusing to incorporate Second Amendment rights against the states "rest on a principle that is now thoroughly discredited." *Silveira* v. *Lockyer*, 312 F.3d 1052, 1066 n.17 (9th Cir. 2002) (citing *Emerson*, 270 F.3d at 221 n.13).

This case is sufficiently worthy of certiorari owing to the widespread misapprehension of the nature of Second Amendment rights and the intra-jurisdictional conflict within the District of Columbia. Petitioners need not support their petition with gross mischaracterizations of the D.C. Circuit's holding, to the effect that it "drastically departs from the main-stream of American jurisprudence." Pet. at 8.

Considering the Second Amendment's text, the overwhelming weight of scholarship, the long history of judicial enforcement of the Second Amendment and

[4] Respondents do not agree that the laws at issue are in the nature of "gun-control," Pet. at 8, a term that implies regulation rather than prohibition.

its state analogs, and the consistent characterization of the Second Amendment by this Court and its members as protecting an individual right – including *United States* v. *Miller* – it is the "collective rights" theory, not the individual right to arms, that "departs from the mainstream of American jurisprudence."

II. The Question Presented by Petitioners Misrepresents the Court of Appeals' Holding and the Central Issue in This Case.

The question presented by Petitioners bears scant resemblance to the actual issues litigated in the court below. The question is not whether the District of Columbia may ban handguns "while allowing possession of rifles and shotguns," Pet. at i, any more than it is whether the District of Columbia may ban handguns while "allowing" possession of bricks, baseball bats, kitchen knives, or any other implement that can be used as a weapon. Rather, the question is whether the District of Columbia may ban *all* functional firearms, including handguns, without violating "the right of the people to keep and bear arms." U.S. Const., amend. II.

Petitioners gloss over the fact that the court of appeals struck down their statute banning the possession of all functional firearms, D.C. Code § 7-2507.02, not even citing that provision as relevant to the case. Sup. Ct. R. 14.1(f). The provision requires that all firearms (i.e., rifles, shotguns, and pre-ban handguns) be "unloaded and disassembled or bound

by a trigger-lock or similar device unless such firearm is kept at [a] place of business, or [is] being used for lawful recreational purposes within the District of Columbia."

The court of appeals explained that allowing individuals to possess only non-functional firearms inside their home is tantamount to prohibiting such weapons outright. "As appellants accurately point out, § 7-2507.02 would reduce a pistol to a useless hunk of 'metal and springs.'" Pet. App. at 55a. Notwithstanding the fact that the D.C. Circuit struck down the functional firearms ban, Petitioners now claim Respondent Heller may possess such weapons for self-defense. Pet. at 28.

Yet the court of appeals found D.C. Code § 7-2507.02 "amounts to a complete prohibition on the lawful use of handguns for self-defense," Pet. App. at 55a, and the law plainly covers *all* firearms. Under the plain text of the statute, Heller could only use such a gun in self-defense by throwing it at an assailant, or by wielding it as a club. Heller could never actually possess a working firearm in his home, even while engaging in lawful self-defense.

Petitioners' only reference to the functional firearms ban struck down by the court of appeals appears in a footnote: "The District does not . . . construe this provision to prevent the use of a lawful firearm in self-defense." Pet. at 7 n.2. But it is unclear how Petitioners would define the term "lawful firearm." Any firearm lawfully possessed in one's

home automatically becomes unlawful per D.C. Code § 7-2507.02 when it is rendered functional.

That lack of clarity simply will not do. If a woman were beaten and threatened by her husband, would that be sufficient cause for having a functional firearm? See *Morgan* v. *District of Columbia*, 468 A.2d 1306 (D.C. 1983) (en banc) (wife repeatedly complained of abusive police officer husband; city not liable when officer subsequently shoots wife, son, other officer, murders father in law). Or what if a woman obtains a protective order against an abusive spouse, but reasonably doubts the government's willingness or ability to enforce it? *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748 (2005) (police fail to enforce protective order, man murders three children).

May a citizen take the initiative of loading her shotgun or rifle in violation of D.C. Code § 7-2507.02 if she hears strange noises outside her door, or gunshots? What if she does so on a day in which a front-page headline reads, "Police Chief Declares D.C. Crime Emergency?" Allison Klein, WASHINGTON POST, July 12, 2006, at A1.

What if a woman is repeatedly targeted by criminals for her anti-drug civic activism, and sustains a pattern of crime culminating in a drug dealer's attempt to break into her home at night, vowing to kill her? These are the uncontested facts of Respondent Parker's circumstances. Not once have Petitioners suggested that Parker may ignore

D.C. Code § 7-2507.02. To the contrary, Petitioners vowed to prosecute her were she to violate the challenged laws. See Cross-Pet. at 4-5.

Had the city council wished to permit an exemption to § 7-2507.02 for home self-defense, it knew how to do so: the statute's plain text contains exemptions for keeping functional firearms at a place of business, or while engaged in recreational shooting. And had the city wanted merely to require "safe storage," it could easily have done so – by requiring the safe storage of functional firearms, e.g., in a child-proof safe.[5]

Because the city represented to this Court that a legal environment exists in the District of Columbia in which rifles and shotguns are "allowed" – an environment in which the functional firearms ban no longer exists – Respondent Heller moved the court of appeals to lift the stay of the mandate with respect to that provision.

Opposing Heller's motion, Petitioners reiterated that they disagree with the court of appeals' interpretation of D.C. Code § 7-2507.02, and offered that the section should remain enjoined "[b]ecause [Petitioners] have presented arguments that would result in a ruling of constitutionality if the Supreme Court agrees with them." Opp'n to Mot. to Lift Stay, D.C. Cir. No. 04-7041, Sept. 24, 2007 at 4-5.

[5] Ironically, the functional firearms ban does nothing to prevent a child or a thief from assembling and loading a firearm.

In denying Heller's motion, the court of appeals reasoned that should this Court accept the premise that a handgun ban would be valid if long guns were permitted, this Court "would necessarily be obliged to consider the impact of Section 7-2507.02, since a disassembly or trigger lock requirement might render a shotgun or rifle virtually useless to face an unexpected threat." *Parker* v. *District of Columbia*, 2007 U.S. App. LEXIS 22872 at *5 (D.C. Cir. Sept. 25, 2007) (per curiam) (footnote omitted).

Petitioners admitted that their "question presented is based on the premise that rifles and shotguns are available to District residents for use in self-defense." Opp'n to Mot. to Lift Stay, *supra*, at 4 (footnote omitted). But this was not the premise of Respondents' case, and it was not the premise of the court of appeals' decision.

Indeed, it was not even the premise of Petitioners' defense below. "The truth is that neither the [D.C.] Code nor the District, in this litigation, ever suggested that a rifle or shotgun, as opposed to a handgun, could be legally employed in self defense." *Parker*, 2007 U.S. App. LEXIS 22872 at *6 n.3. Petitioners' newly invented right of self-defense lacks legal support, lacks credibility, and contradicts the plain language of the statute.

Petitioners conceded that should this Court question their premise with respect to the availability of long guns, "it has broad authority to add to or

reframe the question presented." Opp'n to Mot. to Lift Stay, *supra*, at 4 n.3 (citing Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 313-14 & 416-17 (8th ed. 2002)).

Reframing the question presented is plainly called for, along the lines suggested at the outset of this brief. Petitioners may still argue that they can prohibit all handguns, regardless of whether handguns are a class of arms the individual possession of which is constitutionally guaranteed under the *Miller* test. And of course, Petitioners may still present arguments that might be construed by some courts to save the functional firearms ban; namely, arguments that the Second Amendment does not secure individual rights.

But Petitioners cannot recast their draconian laws, or the nature of this case, by creative presentation of the question at issue.

III. Whether the Second Amendment Forbids Handgun Prohibition Is a Discrete Constitutional Question That Must Be Answered on Its Own Terms.

The question whether handguns are arms whose possession by individuals is secured by the Second Amendment must be answered under the test laid out for this purpose in *Miller*, or under whatever new test the Court might fashion.

This task was correctly performed by the court of appeals. Pet. App. at 51a. The court's finding that handguns are constitutionally protected arms within the meaning of the Second Amendment was consistent not only with the Fifth Circuit's individual rights precedent in *Emerson*, 270 F.3d at 227 n.22, but also with the First Circuit's collectivist interpretation of the right to arms, which acknowledged that handguns would pass the *Miller* test. See *Cases* v. *United States*, 131 F.2d 916, 922-23 (1st Cir. 1942).

Petitioners cannot establish that handguns fail either prong of the *Miller* test. Handguns are plainly arms of the type that would be in common use absent (and even despite) their prohibition, such that individuals may be expected to keep them for ordinary, legitimate purposes. And handguns just as plainly have military application. Indeed, as the court of appeals found, handguns were specifically defined as militia arms by the second Congress. Pet. App. at 49a-50a.

Petitioners are apparently unable either to argue that handguns fall outside of *Miller*'s protection, or to posit any other standard for determining whether particular arms are protected by the Second Amendment. Petitioners thus attempt to save their prohibition by alleging that they respect gun rights in other ways, and by claiming that handguns pose an unacceptable risk to society. Neither argument is remotely relevant.

The city's handgun ban is not rendered constitutional simply because the city claims (mistakenly) to

refrain from violating the Constitution in other ways, e.g., by not banning rifles and shotguns. The court of appeals aptly described that argument as "frivolous." Pet. App. at 53a. By Petitioner's logic, the city could ban the practice of religions it believes foment a disproportionate level of violence so long as it "allowed" an array of other religious practices that still satisfy spiritual needs.

Handguns are "arms." Their possession is either within or without the protection of the Second Amendment, owing to their particular characteristics, without regard to whether the city prohibits other arms.

The notion that handguns may be forbidden because they are alleged to be harmful is equally spurious. That the city's police power allows it to regulate firearms in the interest of public safety is unquestioned. But the police power is checked by the Second Amendment, just as it is checked by other constitutional rights. In questioning whether a law is constitutional, it is no answer to respond that the law's rationale is simply that public safety is a proper interest of government. That sort of argument does not resolve constitutional questions, it ignores them. "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure . . . . [W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to

regret it." *Skinner* v. *Ry. Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

Should this Court review Petitioner's handgun ban, it need consider only whether the court of appeals correctly determined that handguns, as a class of arms, come within the Second Amendment ambit as per *Miller*.

IV. The City's Policy and Social Science Arguments Are Irrelevant and Factually Baseless.

The rights secured by the Second Amendment are not negated by the various policy preferences masquerading as social science in Petitioners' brief. The city is not required to approve of the freedoms guaranteed by the Second Amendment. The city is not required to believe such rights are efficient or well-advised, or contribute to the formation of a wholesome society. The city is required only to obey the Constitution.

There is not one individual right secured by the Constitution that cannot be challenged in some manner on policy grounds. The fact that some may think those values unwise, or even unsafe, does not mean they may simply be ignored. Indeed, the whole point of enshrining certain rights in a constitution is to ensure that the liberties they protect not be subject to competing, evolving – and often, as in this case, misinformed – policy views of government officials. And if policy benefits could be invoked to ignore

constitutional provisions delegating power to the government, this Court would soon be asked to adjudicate the existence of everything from the postal monopoly to the income tax.

Petitioners' opinions of the normative policy choices reflected in the Constitution, as ratified and still operable today, are irrelevant. Whatever a court of social science might say about the city's firearms prohibitions, this is a court of law. As eloquently described in the opinion below, the law is very clear.

Although policy arguments are wholly irrelevant to the questions of whether the Second Amendment secures an individual right and whether handguns satisfy this Court's two-prong test for protected Second Amendment arms in *Miller*, Respondents are compelled to address the claim that the city's gun ban reduces violence. Clearly, it does no such thing.

As an initial matter, the propositions that "handguns cause accidents," Pet. at 25, "violence [is] caused by handguns," Pet. at 2, or that there exist "firearms-caused homicides," Pet. at 27, are true only in the sense that cars cause motor vehicle accidents. Likewise, "handguns enable suicide," Pet. at 26, just as matches enable arson. But while there is little available data as to whether match prohibition would reduce arson, the real-world results of the city's 31-year experiment with gun prohibition are quite stark: It has been a complete failure.

According to the FBI's Uniform Crime Reports, the city experienced 26.8 murders and 1,481.3 violent

crimes per 100,000 inhabitants in 1976, the year before gun prohibition began. The crime rate has skyrocketed since then. In 12 of the years between 1980 and 1997, including all nine years from 1989 through 1997, the violent crime rate in the District exceeded 2,000 per 100,000 inhabitants, reaching a high of 2,921.8 in 1993. The high point represented a 97 percent increase in violent crime, 17 years after law-abiding citizens were forbidden from defending themselves with firearms. Moreover, the murder rate climbed as high as 80.6 per 100,000 inhabitants in 1991 – triple the pre-prohibition level. The murder rate is still 32 percent above the 1976 pre-prohibition level.[6]

Rather than confront the cold, hard rates of crime, Petitioners provide creative or incomplete statistical analyses to promote a Potemkin facade of success. For example, Petitioners cite to a study claiming that the gun ban "coincided with an abrupt decline in firearms-caused homicides in the District." Pet. at 26-27 (citation omitted). A cursory glance at the actual crime statistics, *supra* n.6, indicates something quite different. The District recorded 188 murders in 1976, but 223 murders in 1981. By the early 1990s, the city was recording nearly 500 murders a year.

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[6] FBI UCR Data compiled by Rothstein Catalog on Disaster Recovery and The Disaster Center, available at http://www.disastercenter.com/crime/dccrime.htm (last visited Sept. 27, 2007).

Perhaps the best evidence of gun prohibition's failure comes from Petitioners' 2006 ANNUAL REPORT ON GUNS IN THE DISTRICT OF COLUMBIA, http://mpdc.dc.gov/mpdc/frames.asp?doc=/mpdc/lib/mpdc/publications/2006_AR_Guns_in_DC.pdf (last accessed Sept. 27, 2007). Petitioners' report acknowledges that "Guns [Are] Still Readily Accessible. . . . [d]espite the limitations on gun possession and use under District of Columbia law." *Id.* at 4. Indeed, just last year, "2656 firearms were recovered by law enforcement." *Id.*

The social science benefits of gun prohibition are, at best, debatable. Yet that debate is not the sort of "case or controversy" that this Court is tasked with resolving under Article III. Even were the city's gun ban effective in reducing crime, which it certainly does not appear to have been, it would still be unconstitutional.

V. Citizens Under Criminal Attack Are Not Required to Stand By and Die Awaiting Police Protection.

Petitioners correctly note that the Second Amendment "does not *require* the District to stand by while its citizens die." Pet. at 30 (emphasis added). Yet the city consistently fights to secure its *right* to stand by while its citizens are victimized by crime. For example, the city has successfully defended its right to "stand by while its citizens" are raped, kidnapped from their homes, and further abused. *Warren*

v. *District of Columbia*, 444 A.2d 1 (D.C. 1981) (en banc). The city has likewise successfully defended its right to "stand by" in the face of the worst urban rioting in our nation's history. *Westminster Investing Co.* v. *G.C. Murphy Co.*, 434 F.2d 521 (D.C. Cir. 1970).

The city has even defended its right to "stand by while its citizens die" when the perpetrator is a police officer. *Morgan* v. *District of Columbia*, 468 A.2d 1306 (D.C. 1983) (en banc). Indeed, the city has asserted its right to "stand by while its citizens die" in the course of volunteering their assistance to the police. *Butera* v. *District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001).

Petitioners cannot be begrudged their arguments that they are under no general obligation to protect citizens from violent crime. As a matter of tort law, Petitioners' position is consistent with accepted notions of sovereign immunity and the public duty doctrine. And as a matter of constitutional law, citizens do not enjoy any positive right to police protection. *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989); *Castle Rock*, 545 U.S. 748.

Petitioners' sincere desire to reduce violent crime is unquestioned. And Petitioners' consistent assertion of immunity for failing to police the city is valid policy, borne of the regrettable truth that even the best police force cannot perfectly protect the general population against violence. Accordingly, the people's need for Second Amendment rights is inevitably,

regardless of Petitioners' best intentions, a matter of life and death.

Because of Petitioners' demonstrated – even if understandable – inability to police the entire city, local government cannot substitute for the right of individuals to keep functional firearms in their homes. Washington, D.C. is, after all, the same city whose police chief once lowered his aspirations to solve only 50.9 percent of homicides because "[i]t's more encouraging. . . . You get these stretch goals [65 percent], and when you don't even come near it, you get hammered for it." David A. Fahrenthold, *D.C. Police Cut Goals on Closing Homicides: Ramsey Calls New Target for Solving Cases Realistic*, WASHINGTON POST, June 25, 2002, at B1.[7] The failure to timely solve homicides allows perpetrators to commit additional murders, for which the city is, of course, not liable. See, e.g., *Varner* v. *District of Columbia*, 891 A.2d 260 (D.C. 2006).

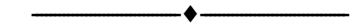
Data on police response times are no more encouraging than data on crime closures. While there has been some improvement in recent years, the

[7] Petitioners' homicide closure rates are calculated by excluding unsolved homicides committed in prior years but available for closure in the current year, while including solved homicides which occurred in prior years. The true closure rates are thus much lower than the claimed numbers would suggest. Charles C. Maddox, Inspector General, AUDIT OF CONTRACT PERFORMANCE MEASURES AND THE MAYOR'S SCORECARD MEASURES, Audit Report No. OIG-00-2-12MA (Mar. 20, 2001).

response time to a "Priority 1 call in fiscal 2003 was 8 minutes, 25 seconds, up over a minute from the prior year. Matthew Cella, *Police Response to 911s Slowing; D.C. Cops Take a Minute More*, WASHINGTON TIMES, May 10, 2004, at A1. No doubt the city's police force would be more effective if it were adequately staffed. But "D.C. police routinely staff neighborhood patrols below their own minimum standards, with some areas having just one officer or none at all." David A. Fahrenthold, Craig Timberg and Clarence Williams, *D.C. Patrol Staffing Falls Short; Some Areas Get Just One Officer*, WASHINGTON POST, May 4, 2003, at A1.

If the city does not wish to "stand by while its citizens die," it has many opportunities to act without infringing upon the Bill of Rights. "[U]ntil issues like onerous requirements for officers to appear in court, outmoded technology, counterproductive work rules and lax attitudes are fixed, residents won't see dramatic change." *Shuffling the Force*, WASHINGTON POST, Sept. 29, 2007, at A18.

In the meantime, people need not stand by and die while waiting for Petitioners to provide a safe city in which to live. The Second Amendment guarantees to citizens something that Petitioners have expressly and consistently disclaimed any legal obligation to provide: an effective means of preserving their lives.



CONCLUSION

The Court should grant certiorari on the question as presented by Respondents.

Respectfully submitted,

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