No. 07-290

IN THE

Supreme Court of the United States

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

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

PARTIES TO THE PROCEEDING

Petitioners District of Columbia and Mayor Adrian M. Fenty were defendants-appellees below. Mayor Fenty was substituted automatically for the previous Mayor, Anthony A. Williams, under Federal Rule of Appellate Procedure 43(c)(2).

Respondent Dick Anthony Heller was the only plaintiff-appellant below held by the court of appeals to have standing. The other plaintiffs-appellants were Shelly Parker, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon.

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JURISDICTION

The court of appeals entered judgment on March 9, 2007, and denied *en banc* review on May 8, 2007. PA89a. A petition for certiorari was filed on September 4, 2007, and granted on November 20, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The Militia Clauses of the Constitution, art. I, § 8, cls. 15-16, empower Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

Relevant portions of the D.C. Code provide:

> § 7-2502.02. Registration of certain firearms prohibited.
>
> (a) A registration certificate shall not be issued for a:
>
> (1) Sawed-off shotgun;

(2) Machine gun;

(3) Short-barreled rifle; or

(4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply to 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 or to a police officer who has retired from the Metropolitan Police Department.

(b) Nothing in this section shall prevent a police officer who has retired from the Metropolitan Police Department from registering a pistol.

* * *

§ 7-2507.02. Firearms required to be unloaded and disassembled or locked.

Except for law enforcement personnel described in § 7-2502.01(b)(1), each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

* * *

§ 22-4504. Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty.

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any

deadly or dangerous weapon capable of being so concealed. . . .

STATEMENT OF THE CASE

This case involves a Second Amendment challenge to the District of Columbia's longstanding gun-control laws. The divided court below was the first federal court of appeals ever to invalidate a law under that Amendment. Its decision is wrong for three separate reasons, each of which independently warrants reversal and entry of judgment for the District.

1. The Nation's capital has regulated guns for two centuries. In 1801, the then-Town of Georgetown forebade firing guns in its "inhabited parts." Town of Georgetown Ordinance of Oct. 24, 1801. In 1809, the City of Washington similarly made it unlawful to fire guns "within four hundred yards of any house . . . or on the Sabbath." Act of the Corporation of the City of Washington ("City Act") of Dec. 9, 1809. The city later exempted militiamen "on days of mustering, training or rejoicing, when ordered so to shoot or fire by their commanding officer." City Act of Mar. 30, 1813.

In 1857, the city made it unlawful to carry "deadly or dangerous weapons, such as . . . pistol[s]." City Act of Nov. 8, 1857; *see* City Act of Nov. 18, 1858. In 1892, Congress similarly barred persons throughout the District from having such weapons "concealed about their person" outside of the person's "place of business, dwelling house, or premises." Act of July 13, 1892, ch. 159, 27 Stat. 116. In 1932 and 1943, Congress prohibited possession of machine guns and sawed-off shotguns in the District and required licenses for carrying pistols and other concealable weapons outside one's home or place of business. Act of July 8, 1932, ch. 465, 47 Stat. 650; Act of Nov. 4, 1943, ch. 296, 57 Stat. 586.

Police regulations subsequently required registration of all firearms, including pistols. D.C. Police Regs. art. 50-55 (1968).

In 1976, the Council of the District of Columbia concluded that existing laws did not adequately curb gun-related violence. As a consequence, it enacted a comprehensive new law regulating firearms. The principal provision at issue here prohibits most residents from registering (and thus possessing) any pistol not registered before the law became effective. D.C. Code §§ 7-2502.01, 7-2502.02. "Pistol" is defined as a gun "originally designed to be fired by use of a single hand." *Id.* § 7-2501.01(12). As Mayor Walter Washington emphasized in signing the law, it "does not bar ownership or possession of shotguns and rifles." PA116a. Resolutions to disapprove the act were introduced in the House of Representatives but were unsuccessful. *See McIntosh v. Washington*, 395 A.2d 744, 747 (D.C. 1978).

The Council targeted handguns because they are disproportionately linked to violent and deadly crime. In its report accompanying the bill, the Council cited national statistics showing that "handguns are used in roughly 54% of all murders, 60% of robberies, 26% of assaults and 87% of all murders of law enforcement officials." PA102a. Handguns were also particularly deadly in other contexts: "A crime committed with a pistol is 7 times more likely to be lethal than a crime committed with any other weapon." *Id.*

These dangers were even more pronounced in the District, where handguns were used in 88% of armed robberies and 91% of armed assaults. PA102a, 104a. In 1974, handguns were used to commit 155 of 285 murders in the District. PA102a. In the same year,

every rapist in the District who used a firearm to facilitate his crime used a handgun. Evening Council Sess. Tr. 11:4-5, June 15, 1976.

The Council also recognized that the dangers of handguns extend beyond acts of determined criminals. It found that guns "are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities," and that many "murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion, or intoxication." PA102a. The Council also focused on the link between handguns and accidental deaths and injuries, particularly to young children who can wield only smaller weapons: of the "[c]lose to 3,000 accidental deaths . . . caused by firearms" annually, children were particularly vulnerable—"1/4 of the victims are under 14 years of age." PA101a-02a.

In enacting the handgun ban, the Council found that less restrictive approaches would not be adequate. Safe-storage provisions standing alone would be insufficient to accomplish the District's goal of reducing gun injuries and deaths. Guns stolen from even the most law-abiding citizens enable criminal gun violence. Afternoon Council Sess. Tr. 35:10-20, 42:4-10, May 3, 1976. Ready availability of guns in the home also made them "easy for juveniles to obtain." PA103a.

The legislature concluded that "the ultimate resolution of the problems of gun created crimes and gun created accidents . . . is the elimination of the availability of handguns." Afternoon Council Sess. Tr. 3:22-24, May 18, 1976. The Council thus chose to "freez[e] the pistol . . . population within the District

of Columbia." PA104a. As the Council summed up, "the bill reflects a legislative decision" that handguns "have no legitimate use in the purely urban environment of the District of Columbia." PA112a.

As part of its gun-control program, the Council also enacted a trigger-lock provision to promote gun safety at home. D.C. Code § 7-2507.02. A firearm must be kept "unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at [a] place of business, or while being used for lawful recreational purposes." The provision's author noted not only that 3,000 deaths resulted annually from firearm accidents, but also that loaded weapons are often misused against family members in moments of passion. Evening Council Sess. Tr. 21:1-15, Jun. 15, 1976. He explained that trigger locks may be unlocked in less than a minute. *Id.* at 42:11-18, 49:8-16.

In 1994, the Council extended the prior requirement that those who "carry" concealable weapons in public be licensed. A license is now required regardless of where such a weapon is carried. D.C. Code § 22-4504(a). The licensing requirement, which enables the District to prevent felons and other dangerous persons from keeping concealable weapons, is separate from the registration requirement applicable to all firearms. Absent the handgun ban, District residents could register handguns and then apply for licenses to "carry" them.

2. Respondent Heller owns handguns and long guns (*i.e.*, rifles and shotguns) but stores them outside the District. Joint Appendix 77a. He and five other individuals challenged the District's longstanding laws as infringements of their asserted right to pos-

sess guns for self-defense. Because they did not assert membership in any organized militia, the district court granted the District's motion to dismiss the complaint. "[I]n concert with the vast majority of circuit courts," it concluded that this Court's decision in *United States v. Miller*, 307 U.S. 174 (1939), "reject[s] an individual right to bear arms separate and apart from Militia use." PA75a. The district court also noted that this Court "has twice been presented with the opportunity to re-examine *Miller* and has twice refused to upset its holding." PA75a.

3. A divided panel of the court of appeals reversed. After finding that only respondent had standing, the majority held that "the Second Amendment protects a right of individuals to possess arms for private use." PA14a-17a, 44a. The majority also rejected the District's argument that the Second Amendment is not implicated by local legislation governing only the Nation's capital. PA44a-48a.

The court then held that, because a handgun is an "Arm" under the Amendment, banning handguns is *per se* invalid. PA53a. The majority dismissed as "frivolous" the District's contention that its regulatory scheme is reasonable because other weapons, such as shotguns and rifles, fully vindicate residents' interests in self-defense. PA53a.

The majority also invalidated the licensing law. It ruled that individuals have not only a constitutional right to possess a handgun, but also an ancillary right to move it about their homes for self-defense. PA54a. Although the District construes D.C. Code § 22-4504(a) as a licensing provision, not a flat prohibition on the use ("carrying") of handguns, the majority held it facially unconstitutional on its contrary reading.

The majority further invalidated the trigger-lock requirement. The District construes D.C. Code § 7-2507.02, which has never been interpreted by local courts and appears never to have been enforced, to permit a lawfully owned gun to be used for self-defense. The majority nevertheless read it to forbid that use and on that reading held the provision facially unconstitutional. PA55a.

Judge Henderson dissented. In her view, *Miller*—"the only twentieth-century United States Supreme Court decision that analyzes the scope of the Second Amendment"—compels the conclusion that "the right of the people to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual States." PA57a-60a (footnote omitted). She also emphasized that the Amendment was intended to guard against a perceived threat to the states from the federal government. PA65a. She noted that if the District's militia is treated as a state militia, then the Amendment would not apply because it "does not apply to gun laws enacted by the States." PA66a n.13.

SUMMARY OF ARGUMENT

1. The text and history of the Second Amendment conclusively refute the notion that it entitles individuals to have guns for their own private purposes. Instead, it protects the possession and use of guns only in service of an organized militia.

The first clause—"[a] well regulated Militia, being necessary to the security of a free State"—speaks only of militias, with not a hint about private uses of firearms. A well-regulated militia is the antithesis of an unconnected group of individuals, each choosing uni-

laterally whether to own a firearm, what kind to own, and for what purposes.

The second clause—"the right of the people to keep and bear Arms, shall not be infringed"—equally addresses the possession and use of weapons in connection with militia service. In 1791, "Arms" and "bear Arms" were military terms describing the use of weapons in the common defense, and the word "keep" was used in connection with militiamen's possession of the arms necessary for militia service.

Taken together, the two clauses permit only a militia-related reading. To conclude that the Framers intended to protect private uses of weapons, the majority below read the entire first clause to be extraneous and the second to be in tension with the natural, military meaning of "bear Arms." If that had been the Framers' intent, they would have omitted the first clause and used non-military language in the second.

History confirms the District's reading. The primary concerns that animated those who supported the Second Amendment were that a federal standing army would prove tyrannical and that the power given to the federal government in the Constitution's Militia Clauses could enable it not only to federalize, but also to disarm state militias. There is no suggestion that the need to protect private uses of weapons against federal intrusion ever animated the adoption of the Second Amendment. The drafting history and recorded debate in Congress confirm that the Framers understood its military meaning and ignored proposals to confer an express right to weapon possession unrelated to militia service.

2. The court of appeals erred for the independent reason that the Second Amendment does not apply to

District-specific legislation. Such legislation cannot implicate the Amendment's purpose of protecting states and localities from the federal government.

That conclusion follows from the history underlying the Constitution's Seat of Government Clause. In 1783, disgruntled soldiers surrounded the State House in Philadelphia, causing the Continental Congress to flee because the local authorities would not protect it. The Framers created a federal enclave to ensure federal protection of federal interests. They could not have intended the Second Amendment to prevent Congress from establishing such gun-control measures as it deemed necessary to protect itself, the President, and this Court when similar state legislative authority was not constrained.

3. Finally, the judgment must be reversed for the separate reason that the laws at issue here are reasonable and therefore permissible. This Court has long recognized that constitutional rights are subject to limitations. Indeed, the majority below purported to recognize that gun-control laws are constitutional if they are "reasonable regulations."

The majority nevertheless found that the Council's findings regarding handguns' unique dangers in an urban environment were irrelevant because, in its view, a ban on handguns is *per se* unreasonable under the Second Amendment. Equally irrelevant was the fact that the District allows residents to keep rifles and shotguns for private purposes. The majority instead concluded that the Second Amendment precludes the District from limiting a resident's choice of firearms so long as the firearm chosen is in common use, has a military application, and is a lineal descendant of a type of arm used in 1791. That test is un-

workable. It also has no basis in the Second Amendment and would implausibly give the right to keep and bear arms a uniquely privileged position in the Bill of Rights.

The District's gun-control measures should be upheld under a proper reasonableness analysis. In enacting the laws at issue here, the Council responded to the serious dangers created by ownership of guns, considered various alternatives, and sensibly concluded that the handgun ban, plus trigger-lock and licensing requirements, would reduce crime, suicide, domestic violence, and accidental shootings. Preventing those harms is not just a legitimate goal; it is a governmental duty of the highest order. Moreover, those regulations do not disarm the District's citizens, who may still possess operational rifles and shotguns. The laws at issue, adopted after extensive debate and consideration, represent the District's reasoned judgment about how best to meet its duty to protect the public. Because that predictive judgment about how best to reduce gun violence was reasonable and is entitled to substantial deference, it should be upheld.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS ONLY MILITIA-RELATED FIREARM RIGHTS.

Almost seventy years ago, this Court held that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [the state-regulated militias] 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. The text and history of the Second Amendment confirm that the right it protects is the

right to keep and bear arms as part of a well-regulated militia, not to possess guns for private purposes. The Second Amendment does not support respondent's claim of entitlement to firearms for self-defense.

A. The Language Of The Entire Amendment Is Naturally Read To Protect The Keeping And Bearing Of Arms Only In Service Of A Well-Regulated Militia.

1. Both clauses of the Second Amendment, read separately or together, establish the Amendment's exclusively military purpose.

"A well regulated Militia, being necessary to the security of a free State, . . . "

Unique in the Bill of Rights, the Second Amendment begins by stating the reason for its existence: to support a "well regulated Militia." Militias are the state- and congressionally-regulated military forces described in the Militia Clauses (art. I, § 8, cls.15-16). Their function is to safeguard the states and to be available "to execute the Laws of the Union, suppress Insurrections and repel Invasions." *Id.*; *Miller*, 307 U.S. at 178; *see also* U.S. Const. art. II, § 2 (President commands "the Militia of the several States, when called into the actual Service of the United States"), amend. V (cases arising in "the Militia, when in actual service in time of War or public danger" excepted from grand jury requirement).

The words "well regulated" underscore that the "Militia" contemplated by the Framers were organized and trained fighting forces. As *Miller* explained, a militia is a "body of citizens enrolled for military disci-

pline." 307 U.S. at 179. The language chosen in the Second Amendment was not new. The Articles of Confederation had required "every State" to "keep up a well-regulated and disciplined militia, sufficiently armed and accoutered." Articles of Confederation art. VI. Most states passed detailed laws setting forth requirements for membership and discipline, generally requiring men of certain ages to appear periodically for muster and training under the supervision of state-appointed officers.[1] The laws called for highly organized bodies, specifying company and regiment size, number and rank of commissioned and non-commissioned officers, and the like. *E.g.*, Georgia Militia Law 4-5. Those men were expected to obtain specified weaponry, normally muskets and rifles, and present them when directed. *See Miller*, 307 U.S. at

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[1] Prior to the drafting of the Second Amendment, twelve of the thirteen original colonies and Vermont had enacted legislation regulating their state militia along similar lines. *See* An Act for forming, regulating, and conducting the military Force of this State (1786) (Connecticut) [hereinafter Connecticut Militia Law, with subsequent citations similarly abbreviated]; Act for Establishing a Militia, 1785 Laws of Delaware 57 (June 4, 1785); Act for Regulating the Militia of the State, and for Repealing the Several Laws Heretofore Made for That Purpose, 1786 Georgia Session Laws (Aug. 15, 1786); Act to Regulate the Militia, 1777 Maryland Laws Chap. XVII (June 16, 1777); Act of Nov. 3, 1783, 1783 Maryland Laws Chap. I; Act of Mar. 10, 1785, 1785 Mass. Acts 1; Act of June 24, 1786, 1786 N.H. Laws 1; Act of Jan. 8, 1781, 1781 N.J. Laws, Chap. CCXLII; Act to Regulate the Militia of New York, 1786 N.Y. Laws 1 (Apr. 4, 1786); Act for Establishing a Militia, N.C. Sess. Laws, Chap. XXII (Nov. 18, 1786); Act for the Regulation of the Militia, 1780 Pa. Laws 1 (Mar. 20, 1780); Act for the Regulation of the Militia, 1784 S.C. Acts 68 (1784); Act Regulating the Militia, 1787 Vt. Acts & Resolves 1 (Mar. 8, 1787); Act of Oct. 17, 1785, 1785 Va. Acts, Chap. I.

179-82. Failure to appear for training, properly armed, was punishable. *E.g.*, Georgia Militia Law 1; New Hampshire Militia Law 8.

The Second Militia Act, enacted by Congress a year after the Second Amendment's ratification, shows that the Framers similarly understood a "well regulated Militia" to be an organized and trained military force, led by state-chosen officers. It called for musters and training, and it specified particular weaponry all militia members were required to possess. *See* Act of May 8, 1792, ch. XXXIII, 1 Stat. 271. It placed special emphasis on military discipline. *See id.* §§ 6-7, 10-11.[2]

The remaining words of the first clause further support the point that the Second Amendment contemplates service in a military organization. The Framers specified that a well-regulated militia exists for the common defense—"being necessary" (not optional) "to the security of a free State." This language recognizes that the militia forces exist not only to help the federal government "execute the Laws of the union, suppress Insurrections and repel invasions" (art.

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[2] Congress's power under the Militia Clauses to "organiz[e]" the militias buttresses the point that the Second Amendment applies to participants in organized military entities. Since 1903, the militia has consisted of two parts, the National Guard and an "unorganized militia" including all able-bodied males, and some females, of certain ages. *Perpich v. Dep't of Defense*, 496 U.S. 334, 341-46 (1990); 10 U.S.C. § 311. The unorganized militia has no duties and receives no training, discipline, or supervision by state-appointed officers. *Id.*; *see also* D.C. Code § 49-401 (District militia law). If language is to have meaning, membership in an unorganized militia is not membership in a "well regulated" militia. Because he is sixty-six (PA120a), respondent is not a member of any statutory militia.

I, § 8, cl.15), but also to serve as the primary protectors of the states. Nothing about this language or the opening clause as a whole so much as hints that the Amendment is about protecting weapons for private purposes.[3]

". . . the right of the people to keep and bear Arms, shall not be infringed."

The second clause standing alone also has a distinctly military cast. The crucial words are those that define the "right of the people" that the Amendment protects: "to keep and bear Arms."

"Arms" are military weapons. The term historically meant "[i]nstruments of offence used in war; weapons," and the Oxford English Dictionary notes a 1794 dictionary that understood "arms" as "those instruments of offence generally made use of in war." 1

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[3] Some read the "free State" language to mean that the Amendment was intended to ensure that people could rise up outside the context of any governmental organization against a tyrannical federal army in order to be "free." Fear of federal abuse animated some opponents of the Constitution, but construing the Second Amendment as a right to rebel is inconsistent with the Treason Clause and the Militia Clauses, which specifically authorize the use of militias to "suppress Insurrections." The Framers of this "more perfect Union" did not include the Second Amendment to "undo [their] hard work at Philadelphia." Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 Chi.-Kent L. Rev. 195, 222 (2000). The reference to "State" in the Amendment is to a governmental unit, as elsewhere in the text of the Constitution, including its amendments. It was also common in that era for legislatures to declare the need for a militia to secure a "free government," "the Commonwealth," or a "free State." See Delaware Militia Law; Maryland Militia Law; Virginia Militia Law.

Oxford English Dictionary 634 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

In *Miller*, this Court held that a weapon is not a protected "Arm" absent proof that "at this time [it] has some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178. The Court rejected a Second Amendment challenge to an indictment for possession of a short-barreled shotgun because the defendant had not provided that proof. At a minimum, the weapon must be "part of the ordinary military equipment" or have the potential to "contribute to the common defense." *Id.* The Court discussed eighteenth-century militias at length (*id.* at 179-82) but made no mention of weapons for personal uses.

Moreover, "bear Arms" refers idiomatically to using weapons in a military context. This was the only sense in which the young Congress and its predecessors ever used the phrase. Paragraph 28 of the Declaration of Independence notably castigated George III for "constrain[ing] our fellow citizens . . . to bear arms against their country." And in recorded congressional debates from 1774 through 1821, *every* one of the thirty uses of the phrase matched the idiomatic meaning of the day. David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 Mich. L. Rev. 588, 618-21 (2000). For decades after the adoption of the Second Amendment, the military sense of "bear arms" was "overwhelmingly dominant." *Id.*

The word "keep" is consistent with that military sense. As noted above, the expectation of the Framers was that members of militias would bring the weap-

ons required for service. When the Second Amendment was ratified, numerous state militia laws used the word "keep" to refer to the *requirement* that militiamen have arms so they could bring them to musters. *E.g.*, Delaware Militia Law at 3; New Jersey Militia Law at 169; Virginia Militia Law at 2. Securing their right to "keep" those arms would ensure that they could "bear" them. *See, e.g.*, Mass. Const., art. XVII ("The people have a right to keep and to bear arms for the common defense.").

2. In concluding that the Second Amendment protects a right to gun ownership for private uses, the majority below misread the Amendment's text in multiple ways.

First, the majority read the opening clause out of the Amendment. But "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). That is particularly true for this clause, which is unique in the Bill of Rights. The Framers plainly expected it to give meaning to the whole Amendment. *See* 1 William Blackstone, *Commentaries on the Laws of England* 60 (1765) ("If words happen to be still dubious, we may establish their meaning from the context . . . . Thus the proeme, or preamble, is often called in to help the construction . . . ."); *see also* David T. Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "The Right of the People to Bear Arms"*, 22 Law & Hist. Rev. 119, 154-57 (2004) (discussing eighteenth-century uses of preambles). The majority nevertheless proposed that the first clause merely states "the right's most salient political benefit." PA35a. Treating the Amendment's first clause as

merely stating *a* benefit of the Amendment—as opposed to *the* benefit the Amendment was enacted to realize—is both ahistorical and inconsistent with *Miller*'s directive that the "declaration *and* guarantee of the Second Amendment" be read in light of its "obvious purpose." 307 U.S. at 178 (emphasis added).

Second, despite the contemporaneous evidence of what the Framers understood a "well regulated Militia" to be, the majority below implausibly asserted that a well-regulated militia can consist of people who are merely "*subject* to organization by the states (as distinct from actually organized)." PA33a. Everyone is *potentially* subject to organization, but an unorganized group is not regulated at all, let alone well-regulated. Under the majority's understanding, even those who refused to appear for muster would still be part of a well-regulated militia. That is not how the words were understood. *See, e.g.*, The Federalist No. 29, at 180-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (citizens must "go[] through military exercises and evolutions" before "acquir[ing] the degree of perfection which would entitle them to the character of a well-regulated militia"). Indeed, states that set forth the discipline and organization required of their militias did so while specifically invoking their need for "well regulated" militias. *E.g.*, Maryland Militia Law Chap. I ("Whereas a well regulated militia is the proper and natural defence of a free government . . . .").

Third, the majority read the phrase "bear Arms" unnaturally. "[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1,

188 (1824), and "[o]ne does not bear Arms against a rabbit" or an intruder, Garry Wills, *To Keep and Bear Arms*, N.Y. Rev. of Books, Sept. 21, 1995, at 63; *see Aymette v. State*, 21 Tenn. (1 Hum.) 154, 157 (1840).

The majority did not dispute that in 1791 this phrase normally meant carrying weapons in military service; rather, it stated that this usage was not "exclusive[]" or "absolute." PA23a. The majority then held that the words should not be read based on their common meaning because of supposed tension with the word "keep" in the second clause. PA26a-27a. But the notion that these capable draftsmen meant to create an Amendment with such internal tensions that it could not be read naturally and harmoniously as a whole is unpersuasive.

There is no tension in the text if "bear Arms" is read in its military sense. The District does not contend that individuals may not "keep" their "Arms," but that they may keep them only if they have a militia-related reason for doing so. The majority's assertion that "keep" must mean "keep for private use," *id.*, simply begs the question of whether the Second Amendment protects only militia-related rights.

Fourth, the majority below also emphasized that the Second Amendment protects a "pre-existing right" and that guns were used in the founding era for private purposes. PA20a-22a. There is no persuasive reason, however, to believe that the Amendment protects all such uses, rather than retaining that role for the common law or state constitutions. *See United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (the right to bear arms "is not a right granted by the Con-

stitution. Neither is it in any manner dependent upon that instrument for its existence.").

Fifth, the majority relied on the words "right of the people" (PA18a-19a, 27a), but recognizing such a right does not define its scope. The question is not whether individuals can enforce the right protected by the Second Amendment. The question instead is whether this right is limited to the possession of militia-related weapons.[4]

The majority suggested that the language chosen was "passing strange" if the "sole concern [was] for state militias." PA14a. Far "strange[r]," however, was the majority's supposition that the Framers would have written the Amendment this way to protect private uses of weapons. Respondent seeks to own a handgun for self-defense in his home. If the Framers had intended the Amendment to protect that use beyond whatever rights existed at common law or in state constitutions, they would have omitted the opening clause entirely and used non-military language rather than "bear Arms."

The Framers' phrasing of the Second Amendment was in fact a natural way to protect a militia-related right. As the majority itself emphasized, the surrounding amendments are part of "a catalogue of cherished individual liberties." PA22a. Given the context,

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[4] As the majority noted, this Court has on several occasions referred to the Second Amendment in passing when construing other constitutional provisions and statutes. PA37a-39a. The District's position is fully consistent with the dicta cited to the effect that the Amendment protects a "right of the people." The dicta do not speak to the nature of the right.

it made perfect sense to speak of "the right of the people" to describe what rights the people held against the federal government. Entitling individuals to exercise this right only as part of a state-regulated militia was consistent with the Framers' recognition that the states and the people would defend each others' interests. *See* The Federalist No. 29 (Hamilton), No. 45, (James Madison), No. 46 (Madison).

That understanding is also consistent with the Militia Clauses in the body of the Constitution, Art. I, § 8, cls.15-16. Clause 15 allows Congress to call forth the militia into federal service, while Clause 16 makes clear that the federal government shall provide for "organizing, arming [as in "bear Arms"], and disciplining, the Militia [so that they will be well-regulated]." They further reserve to the states the appointment of officers and the training of the Militia "according to the discipline prescribed by Congress." The natural reading of the Second Amendment in light of these clauses is that it ensures that, despite the broad powers given to Congress, it could not disarm the people serving in state militias.

The history discussed next confirms that reading. The Bill of Rights limited the federal government to protect both individual liberty and states' rights. In the context of the Second Amendment, both causes were served by establishing a check on a powerful new federal government that might otherwise disarm the people serving in state militias under the powers granted by the Militia Clauses. Of equal significance, history also shows that the Framers made deliberate drafting choices to address this particular concern, while evidencing no support for any other purpose.

B. The Historical Context And Drafting History Of The Second Amendment Confirm The Framers' Military Purpose.

Reading the text of the Second Amendment as a unified whole to protect only militia-related firearm rights reflects the concerns expressed by the Framers from the time of the Constitutional Convention through adoption of the Amendment by the First Congress. The Amendment was a response to related fears raised by opponents of the Constitution: that Congress would use its powers under the Militia Clauses to disarm the state militias; and that states and their citizens would be forced to rely for protection on a national standing army, widely feared as a potential oppressor.

The District focuses on the development of the Amendment's language. It traces the Amendment from proposals by the Virginia ratifying convention through James Madison's adaptation of that language and later revisions in the First Congress. This approach avoids the unsound use of remote events and widely scattered expressions by individuals not directly involved in drafting the language. This properly focused review of the history confirms that the Second Amendment is only a militia-related provision.

1. The Second Amendment was a response to the Constitutional Convention's decision to permit Congress both to establish a standing army and to exert substantial control over state militias. The Confederation militia system had proven to be a source of instability, most notably during Shays's Rebellion in 1786. Angry farmers, joined by militia units drawn

from the area, threatened civil war in Massachusetts. The rebellion was suppressed using state-officered militia units, but it gravely concerned the men at the Constitutional Convention in 1787. *See* Finkelman, *supra*, at 211-12; 1 *Records of the Federal Convention of 1787*, at 18-19 (Max Farrand ed., Yale Univ. Press 1937) (1911); 2 *id.* at 332; *cf.* The Federalist No. 21, at 140 (Hamilton) (citing rebellion as forerunner of ruin of law and order). Accordingly, the Framers provided that the national government would have a professional army and gave Congress powers over state militias, including the power to "provide for organizing, arming, and disciplining" them. U.S. Const. art. I, § 8, cls.12-16; *see Perpich*, 496 U.S. at 340 (Framers "recogni[zed] . . . the danger of relying on inadequately trained [militia] soldiers as the primary means of providing for the common defense").

The Militia Clauses were denounced by Anti-Federalist delegates to the Constitutional Convention and produced a "storm of violent opposition" at state ratifying conventions. Frederick B. Wiener, *Militia Clauses of the Constitution*, 54 Harv. L. Rev. 181, 185 (1940); 1 Records, *supra*, at 330-31, 385, 387, 388; 3 *id.* at 209. One particular concern was that a federal standing army would prove tyrannical, especially if the state militias became ineffective counterweights. Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 41-50 (Oxford Univ. Press 2006). American experiences under the Crown had made standing armies objects of fear and revulsion. *Id.* at 9-13; *see* The Declaration of Independence para. 13 ("He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures."). The shift from to-

tal state control of the militias to concurrent control with federal preeminence disturbed convention delegates, but "there is precious little evidence that advocates of local control of the militia shared an equal or even secondary concern for gun ownership" for personal uses. R. Don Higginbotham, *The Federalized Militia: A Neglected Aspect of Second Amendment Scholarship*, 55 Wm. & Mary Q. 39, 40 (1998); *see* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103, 153-54 (2000); H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi.-Kent L. Rev. 403, 480-95 (2000).

The fear that the Militia Clauses give Congress *exclusive* power to arm the militias and thus the power to "disarm" them, by failing to provide arms, engendered particularly contentious debates at the Virginia ratifying convention. George Mason warned that Congress could use its militia powers to compel reliance on a standing army:

> The militia may be here destroyed . . . by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them . . . . Should the national government wish to render the militia useless, they may neglect them and let them perish . . . .

3 John Elliot, *Debates in the Several State Conventions on the Adoption of the Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 379 (2d ed. 1836). Patrick Henry con-

curred (*id.* at 51-52, 257) and Mason asked for "an express declaration that the state governments might arm and discipline them." *Id.* at 380. When Madison responded that Congress's power to provide for arming the militias posed no threat to the militia because the states shared authority to arm the militia under the Militia Clauses (*id.*), Henry disagreed. *Id.* at 386.

To deflect demands to convene a second constitutional convention before ratification, the Virginia Federalist delegates agreed to append proposals for changes to the Constitution for Congress to consider at the first opportunity. Kenneth R. Bowling, "*A Tub to the Whale*": *The Founding Fathers and the Adoption of the Federal Bill of Rights*, 8 J. Early Republic 223, 227 (1988); 3 Elliot, *supra*, at 657-62. Without debate, the convention unanimously adopted forty additions and changes presented by a committee (to which Madison, Mason, and Henry belonged) including:

> 17th. That the people have a right to keep and bear arms; that a well regulated militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free state; that standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power.
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> * * *
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> 19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon

> payment of an equivalent to employ another to bear arms in his stead.

Id. at 659. Separately, the convention proposed amending the Militia Clauses directly: "11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same." *Id.* at 660.[5]

No one at the Virginia ratifying convention mentioned a need to protect weapons for personal use from federal (or state) regulation. Instead, the persistent Anti-Federalist theme concerned arms to protect the state and its citizens against domestic and foreign enemies, including (in 1789) a potentially oppressive federal government using a standing army.

2. When the Anti-Federalists failed to prevent ratification of the Constitution, they shifted tactics and urged the addition of a Bill of Rights that they hoped would limit federal power, including the power over state militias. The Federalists in control of the First Congress were unwilling to undo what they had achieved, but were willing to make clear that the federal government could not violate certain rights or trump reserved state powers. With respect to the Second Amendment, that meant clarifying that the federal government could not deny the people the right to keep and bear arms in service of state militias.

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[5] The Virginia convention's concerns with arms for the militia and the perceived threat from a standing army were mirrored at the North Carolina and New York conventions, which suggested similarly worded amendatory language. 4 *id.* at 242-47; *The Bill of Rights: A Documentary History* 912 (Bernard Schwartz ed., 1971).

The language used in the Second Amendment originated from the amendments proposed at the Virginia ratifying convention, but the wording changed during the drafting process in the First Congress. Madison, the initial drafter of the Amendment, made several changes to the Virginia proposals, notably merging the conscientious objector provision (19th) with the right to bear arms and militia provisions (17th):

> 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: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

1 *Gales & Seaton's History of Debates in Congress* ("Debates") 451 (1789). Although the conscientious-objector clause did not survive, the initial inclusion of the "bear arms" phrase in both the first and third clauses strongly supports the conclusion that Madison understood the Amendment as a whole to relate to military service alone.

Madison's draft was revised to make the Amendment's exclusively military focus even clearer. A select House committee meeting in executive session transposed the first two clauses, making the reference to a "well regulated Militia" more prominent, and substituted a comma for the semi-colon, underscoring the connection between the two clauses. *Id.* at 170. The new structure and punctuation reflected the fact that the need to protect the right followed from the need for the militias. The committee shifted the militia's role from ensuring "the security of a free country" to

"the security of a free State," highlighting the role of the militia in defending the state. *Id.*

All remarks recorded in the House's debate related to military service; none pertained to private use of weapons, including self-defense. 1 Debates, *supra*, at 778-81; *see* Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const. L.Q. 961, 995 (1975). Members of the House also debated the conscientious-objector clause, and their comments show that House members understood the Amendment as a whole to relate to military service. 1 Debates, *supra*, at 778-80. For instance, Elbridge Gerry opined: "If we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provision on this head." *Id.* at 779.

The Senate, meeting in closed session without recorded debate, altered the House draft to the present language and retained the direct connection between explicit purpose and right. Beyond striking the conscientious-objector clause, the Senate eliminated the House's description of the militia as "composed of the body of the people." 1 *Journal of the First Session of the Senate* ("Journal") 71 (Gales and Seaton 1789). That phrase might have been seen to undermine Congress's power under the Militia Clauses to decide how to organize the state militias. Rakove, *supra*, at 125. The Senate substituted "necessary for the security" in place of "the best security" (Journal, *supra*, at 77) but that substitution changed neither the clause's subject (the militia) nor its object (the security of a free State) and so left the military import intact.

The Senate rejected an amendment to add "for the common defence" after "Arms." Journal, *supra*, at 77. Such an amendment, while consistent with one purpose of the Militia Clauses, could have been thought inconsistent with another purpose: using the militias for law enforcement. Rakove, *supra*, at 126. The change also could have been understood to refer to common defense of the Nation and thus to detract from the guarantee that the militia also existed to protect the security of individual states. In any event, especially given the opening clause, the Amendment's "military sense is the obvious sense. It does not cease to be the obvious sense if something that might have been added was not added." Garry Wills, *A Necessary Evil: A History of American Distrust of Government* 64 (Simon & Schuster 1999).[6]

3. In addition to this affirmative history of what was said and done, common understandings of state

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[6] The Senate defeated a proposal that would have amended the Militia Clauses to make explicit that states could not only arm but also regulate and discipline their militias if Congress failed to do so. 2 Schwartz, *supra*, at 1151-1153. That was one of twenty unsuccessful amendments offered by Virginia's two Anti-Federalist senators. *Id.* at 1151-53, 1186-87. Respondent has argued that this proposal shows that the Second Amendment was not directed at ensuring the availability of arms for the militia; otherwise the two senators would have considered its inclusion unnecessary. Whatever Virginia's senators may have contemplated, their proposal went much farther than the Second Amendment. It would not only have revised the body of the Constitution, which the Federalists opposed doing, but also have provoked disputes about whether Congress had regulated and disciplined the militias so insufficiently as to warrant state intervention. The Senate may also have concluded that the Second Amendment made the minority's proposal redundant.

arms provisions at the time further support the conclusion that the right recognized by the Second Amendment relates only to arms for the common defense.

In 1789, several state constitutions and declarations of rights included provisions recognizing a right to arms only for that purpose. Massachusetts explicitly recognized the right of the people to "keep and bear arms for the common defence." *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 183 (Neil H. Cogan ed., 1997). North Carolina had materially similar wording. *Id.* at 184. These provisions were coupled with declarations that standing armies are "dangerous to liberty" and should not be "maintained" or "kept up." *Id.*

Other state constitutions did not address arms possession directly but stressed the need for militia—and, by extension, privately owned military arms—for the common defense in place of a standing army. With minor variations, the Delaware, Maryland, and Virginia constitutions recognized that "well-regulated militia" provide "the proper, natural, and safe defence" of a "free State" or "free government" and that "standing armies are dangerous to liberty." *Id.* at 183-85. New York's constitution stated that it was the "Duty of every Man to be prepared and willing to defend [the State]" and therefore the "Militia of the State at all times . . . shall be armed and disciplined and in Readiness for Service." *Id.* at 183. If there was a right associated with these declarations, it was only to have arms for common defense, making a standing army unnecessary. Robert Hardaway, *The Inconven-*

ient Militia Clause of the Second Amendment, 16 St. John's J. Legal Comment. 41, 82 (2002).[7]

Article XIII of Pennsylvania's 1776 declaration of rights is another example of the dominant focus of these provisions on communal defense:

> That the people have a right to bear arms for the defense of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up: And that the military should be kept under strict subordination to, and governed by, the civil power.

Cogan, *supra*, at 184. There is strong support for the proposition that Article XIII protects only a right to bear arms for communal (rather than personal) self-defense. Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 39 Rutgers L.J. 1041 (forthcoming 2008) (discussing how Article XIII originated from dispute between frontiersmen seeking state support for community self-defense organizations and Quaker-dominated legislature that refused to provide it); *see* Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 495-96, 498 (2004). More sig-

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[7] New Hampshire's 1783 constitution exempted persons "conscientiously scrupulous of bearing arms" for the common defense from being "compelled thereto" but had no other provision on arms. *Id.* at 183. Georgia's constitution directed that each county with men "liable to bear arms" should form battalions or companies. *Id.* New Jersey's and South Carolina's constitutions did not mention either arms or militias. Connecticut and Rhode Island had no constitutions.

nificantly, the specific language in Article XIII—"defense of themselves"—is not in the Second Amendment.[8]

While state provisions differed, "the meaning was the same. Only the citizenry, trained, armed, and organized in the militia, could be depended on to preserve republican liberties for 'themselves' and to ensure the constitutional stability of 'the state.'" Lawrence D. Cress, *An Armed Community*, 71 J. Am. Hist. 22, 29 (1984).

Subsequently, many states adopted constitutions that protect some right to bear arms. *See generally* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191 (2006). They are far from uniform, with a few tracking the Second Amendment, others explicitly protecting self-defense, others focusing on common defense, and some specifically including a right to hunt. These provisions illustrate how easy it would have been to provide for a right to own guns for private use and to decouple that right from the preservation of state militias. They also illustrate how guaranteeing some right to gun ownership has been considered vital in some, but not all, jurisdictions.

4. Not only were there extant state constitutional provisions that informed the drafters of the Second Amendment, but three proposals were introduced at state ratifying conventions that would have expressly protected a right to arms for personal use. *See* 2 Schwartz, *supra*, at 761 ("Congress shall never disarm

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[8] Vermont was not yet a state, but its 1777 and 1786 declarations of rights had similar language. Cogan, *supra*, at 184-85.

any Citizen unless such as are or have been in Actual Rebellion") (New Hampshire); *id.* at 658-59 ("That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . .") (Pennsylvania minority); *id.* at 675, 707 ("that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms") (Massachusetts minority). Only New Hampshire's proposal gained ratifying convention approval.

Madison culled his proposals from a 1788 pamphlet entitled *The Ratifications of the New Federal Constitution, Together with the Amendments, Proposed by the Federal States*. 11 *The Papers of James Madison* 299 (C.F. Hobson *et al.* eds., 1977). Had any of these alternative formulations been used by Congress, a right to weapons possession for private purposes would have been established, but none was debated, much less adopted. That Congress ignored these alternatives and instead tied the right to the militia strongly suggests that Congress's exclusive intent was to protect a militia-related right.

5. This history firmly supports the District's reading of the Second Amendment: seeing a problem—the possibility of disarmed state militias—the Framers acted to address it. They did so by protecting the right of citizens to own guns to support those militias, but they never saw private gun ownership as a need to be addressed, and they did not accept those proposals

that would have expressly protected a right to self-defense.

The majority below suggested that its view was also compatible with this history, on the theory that securing a broad right to possess weapons for private purposes would enable states to summon armed militiamen to muster. PA44a. But the fear that Congress might disarm the citizenry *outside the context of militia service* was never expressed by any person known to be involved with the passage of the Second Amendment. Indeed, it is doubtful that Congress's limited powers, as understood in 1791, would have been thought to encompass any power over firearms outside the militia context. *See United States v. Lopez*, 514 U.S. 549 (1995). If the majority were correct, that would imply that the Framers held a surprising view of congressional authority and adopted an overbroad solution to the problem that they identified.

Moreover, the Framers likely would have feared that a broad constitutional right to possess weapons for private purposes might undermine their avowed end. Actions by individuals, unilaterally deciding what weapons to keep and how and when to use them for one's own purposes, do not ordinarily promote "the security of a free State." Events like Shays's Rebellion were vivid reminders that such actions could endanger state security. The Framers of the Second Amendment therefore placed their trust specifically in the "well regulated Militia" rather than armed individuals acting on their own.

That decision is apparent not only from the Amendment's text, but also the care both the House and the Senate took in crafting it. They were particu-

larly meticulous regarding what became the first clause; indeed, the second clause as enacted has the same words as Madison's draft. Their efforts surely were purposeful, and should not be ignored two centuries later. History refutes the view of the majority below that all this attention was directed to a clause that does no more than announce *one* of the purposes of the Second Amendment.

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In sum, in light of the language and history, the best construction of the Second Amendment is one that is consistent with *Miller*'s interpretive principle and that recognizes a right having "some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178. The Amendment does not protect—and was never intended to protect—a right to own guns for purely private use. Because respondent does not assert a right to keep or bear arms in connection with militia duties, he has no Second Amendment claim.

II. THE SECOND AMENDMENT DOES NOT APPLY TO LAWS LIMITED TO THE DISTRICT OF COLUMBIA.

The judgment must be reversed for the independent reason that the Second Amendment was intended as a federalism protection to prevent Congress, using its powers under the Militia Clauses, from disarming state militias. The Amendment thus "is a limitation only upon the power of Congress and the National government" and does not constrain states. *Presser v. Illinois*, 116 U.S. 252, 265 (1886). Laws limited to the District similarly raise no federalism-type concerns, whether passed by Congress or the Council, and so do

not implicate the Second Amendment. The majority concluded otherwise by asserting that the entire Bill of Rights applies to the District, but that reason does not support its conclusion.

Although many of the concerns expressed in the Bill of Rights apply to the actions of governments generally, the primary goal of those who demanded it as a condition of ratification of the Constitution was to control the federal government, which had been given powers previously belonging to the states. That is especially true with respect to the inclusion of the Second Amendment, which was prompted by fear of the federal government's standing army and control over state militias. There was no expressed concern that states might disarm their citizens; the Amendment was enacted to *protect* states' prerogatives, not constrain them. Thus, even if this Court were to read the Second Amendment to protect private uses of firearms, the right should be limited in application to constraining federal legislation that could implicate the Amendment's "obvious purpose to assure the continuation and render possible the effectiveness of" state militias. *Miller*, 307 U.S. at 178.

Legislation limited to the District, where federal-state relations are not at issue, cannot implicate this obvious purpose. National limitations on what firearms may be possessed privately could conflict with a state's ability to call forth a militia armed as the state sees fit. As the majority below recognized, the Amendment ensures "that citizens would not be barred from keeping the arms they would need when called forth for militia duty." PA44a. But for the District there could be no conflict because Congress retains ultimate legislative power over whether and how

to arm any militia, even when it delegates power to the District's local government. *See Sandidge v. United States*, 520 A.2d 1057, 1059 (D.C. 1987) (Nebeker, J., concurring).

Whatever the scope of the Second Amendment's protections in other contexts, its Framers could not have intended Congress to be more constrained in the seat of federal power than a state would be in its own territory. The Framers established a federal enclave in large part because of an incident in 1783 in which disgruntled, armed soldiers surrounded the State House in Philadelphia, forcing the Continental Congress to flee. Kenneth R. Bowling, *The Creation of Washington D.C.: The Idea and Location of the American Capital* 30-34, 76 (1991). Congress then depended on its host government for protection, and when "an angry regiment of the Continental Army demanding back pay" disrupted its proceedings, it asked Pennsylvania's Executive council to "call out the militia" to restore control. Lawrence Delbert Cress, *Whither Columbia? Congressional Residence and the Politics of the New Nation, 1776 to 1787*, 32 Wm. & Mary Q. 581, 588 (1975). The council refused, and Congress had to leave the city. *Id.*

In response, Madison declared that the federal government needed "complete authority over the seat of government" because, without it, "the public authority might be insulted and its proceedings interrupted." The Federalist No. 43, at 272 (Madison). The Framers therefore included the Seat of Government Clause, U.S. Const. art. I, § 8, cl.17, which provides Congress with plenary authority over this jurisdiction and explicitly allows the "Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful

Buildings," to ensure that the new government could defend itself.

Particularly given that concern, the Framers could not have intended to deprive the federal government of the most important power of self-protection it has under the Seat of Government Clause by disabling Congress from enacting firearms regulations. To the contrary, they would have expected that Congress had the power to enact the types of laws at issue here under that clause. It is not plausible to think that Congress intended to restrict itself in regulating firearms in the jurisdiction in which federal interests like the White House, the Capitol, and this Court had to be most secure.

That view is particularly illogical because it suggests that the Framers *uniquely* disabled firearm regulation in the District and other federal enclaves, such as the territories and military bases. This Court has squarely held that the Second Amendment was adopted as a limitation on only federal, not state, legislation. *Presser*, 116 U.S. at 265. Although the majority below suggested that the Second Amendment may subsequently have been incorporated against the states through the Fourteenth Amendment (PA37a-38a n.13), there is no dispute that the Second Amendment did not limit the states' regulatory authority over firearms when enacted.[9]

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[9] Although this case does not present the question of incorporation, there is no reason to think that a right to possess guns for personal use is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" and "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Moreover, incorporation against the

As noted above, some states have chosen to adopt constitutional provisions on gun rights and some have not. If the majority below were correct, neither Congress nor the Council would have comparable ability to choose whether similar constraints on legislative authority to enact gun-control laws are appropriate for the District. There is no reason for Congress and the Council to have less authority in the District than a state legislature would have.

Indeed, the claim below that every provision of the Constitution that restricts the national powers of Congress automatically applies when it acts pursuant to the Seat of Government Clause is simply wrong. *See Loughboro v. Blake*, 18 U.S. (5 Wheat.) 317, 318 (1820). For instance, before the Sixteenth Amendment was ratified, this Court enforced the limitation on Congress's power to impose a "Capitation, or other direct, Tax" in Article I, § 9, Clause 4, just as it enforces the Bill of Rights. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). Nonetheless, the Court held that the limitation did not apply to a real estate tax enacted by Congress limited to the District. *Gibbons v. District of Columbia*, 116 U.S. 404 (1886). And if precise parallelism were a constitutional mandate, it would suggest that the judges of the District's local court system would merit the protections of Article III, although this Court has held otherwise. *Palmore v. United States*, 411 U.S. 389, 397-98, 407-10 (1973). If the Second Amendment is read in light of the Constitution as a whole and in historical context,

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states would be curious since the Second Amendment was enacted to protect state prerogatives.

it too does not constrain Congress's authority over the District.

The fact that the laws in question here were enacted by the Council rather than Congress makes all the more clear that the laws do not implicate the concerns animating the Second Amendment. Congress established the Council as a local legislature that may enact legislation only for the District. D.C. Code § 1-203.02. The Council lacks the power to raise and maintain a standing army, let alone to affect militias or gun rights in the states. There is no reason to think that the Framers were worried about local entities like the District, acting through locally elected legislators, disarming their citizens, with no impact beyond their borders.

The Second Amendment thus has no bearing on what the District can do in the area of firearms regulation, just as it has no bearing on what the states can do. The routes to those conclusions differ, because the applicable constitutional doctrines are different. But the result should be the same: the District is subject to no more restrictions under the Second Amendment than are the states and localities acting under them. Thus, even if the Second Amendment protects possession of guns for personal purposes, that protection does not extend to a law limited to the District.

III. THE DISTRICT'S REASONABLE GUN-CONTROL LAWS DO NOT INFRINGE THE RIGHT TO KEEP AND BEAR ARMS.

In any event, the laws at issue should be upheld for the independent reason that they represent a permissible regulation of any asserted right. The rights protected by the Bill of Rights have "from time imme-

morial been subject to certain well-recognized exceptions arising from the necessities of the case." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). After concluding that existing laws were insufficient, the Council reasonably found that it could substantially reduce the tragic harms caused by guns by regulating which weapons are available to District residents, how residents should store lawfully owned weapons, and who should be licensed to carry concealable weapons. The Council properly acted to reduce those harms without functionally disarming residents. Its reasonable legislative judgment should be upheld even if the Second Amendment is construed to protect the possession of firearms for self-defense in the District.

A. The Constitution Permits Reasonable Restrictions On The Ownership And Use Of Guns.

As the majority below purported to accept, governments may impose "reasonable restrictions" on the exercise of any Second Amendment right. PA51a. The United States agrees that "reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse" are constitutional. Brief for the United States in Opposition at 20 n.3, *Emerson v. United States*, 536 U.S. 907 (2002) (No. 01-8780). State courts interpreting their state constitutions uniformly uphold reasonable regulations as well.[10] Adam Winkler, *Scrutinizing the Second*

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[10] *See, e.g.*, *State v. Cole*, 665 N.W.2d 328, 336-37 (Wisc. 2003); *Robertson v. Denver*, 874 P.2d 325, 328 & nn.15-16 (Colo. 1994); *Arnold v. Cleveland*, 616 N.E.2d 163, 172-73 (Ohio 1993); *State v. LaChapelle*, 451 N.W.2d 689, 690-91 (Neb. 1990); *State v. Hamlin*, 497 So. 2d 1369, 1371 (La. 1986); *State v. McAdams*,

Amendment, 105 Mich. L. Rev. 683, 686-87 (2007). As one court explained, the constitutional text is subject to a rule of reason because the common law right to self-defense is subject to that rule. *Benjamin v. Bailey*, 662 A.2d 1226, 1232-35 (Conn. 1995).

To strike down reasonable regulations of guns would flout a long legal tradition. Our legal system has historically permitted reasonable regulation of guns for public safety purposes. That was true in England and in the colonies, and remains true in the states. *See* Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 35-36 (2000); Cornell, *supra*, at 26-30. For example, Pennsylvania and Delaware passed acts prohibiting the firing of guns in cities and towns. Act of Feb. 9, 1750, ch. CCCLXXXVIII, 1750-1751 Pa. Laws 108; Act of Feb. 2, 1812, ch. CXCV, 1812 Del. Laws 522. Massachusetts prohibited Boston citizens from keeping loaded firearms in their homes. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218. State and local legislatures (including in the District) later began to regulate weapons more heavily, banning concealed weapons or even the sale of concealable weapons. *E.g.*, Act of Feb. 1, 1839, no. 77, 1839 Ala. Laws 67; Act of Feb. 10, 1831, ch. XXVI, § 58, 1831 Rev'd Laws of Ind. 180, 192; Act of Jan. 27, 1838, ch. 137, 1837-1838 Tenn. Pub. Acts 200; *see supra* pages 2-3. Federal regulation of gun possession and use was added in the twentieth century. *E.g.*, National Firearms Act, Act of June 26, 1934, Pub. L. No. 73-474, 48 Stat. 1236.

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714 P.2d 1236, 1237-38 (Wyo. 1986); *Kalodimos v. Morton Grove*, 470 N.E.2d 266, 273 (Ill. 1984).

As the authorities, history, and practical realities all indicate, the Second Amendment affords elected officials substantial discretion to regulate guns. As guns have become cheaper and more lethal, state and local governments and Congress have matched the threat with increased regulation. The government must be allowed to respond appropriately to the threats posed by guns. That is particularly so regarding local laws like this one. Even if the Second Amendment were intended to apply to such laws, the Framers' overarching desire to support state prerogatives (consistent with basic concepts of federalism) requires that the Amendment at a minimum allow local governments to make different tradeoffs based on local conditions.[11]

The District does not suggest that gun regulations should be subject to mere rational basis review. Instead, if the Second Amendment is found to protect a right of gun ownership for purposes of self-defense, a reasonableness inquiry would consider the legislature's actual reasons for enacting a law limiting exercise of the right. Furthermore, whatever those reasons, a law that purported to eliminate that right—for instance, by banning all gun possession, or allowing

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[11] Heightened scrutiny might be appropriate if Congress overrode the explicit command of the Second Amendment by barring a member of a well-regulated militia from possessing a weapon required to meet militia obligations. The asserted right to own and use a gun for private purposes is, however, not a fundamental right, *see supra* note 9, and individuals who wish to own and use guns for their own purposes are not a suspect class, *see Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). They have no difficulty in protecting their interests in political arenas.

only a firearm that was so ineffective that the law effected functional disarmament—could not be reasonable. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (land use regulation constitutes "taking" only when it eliminates essentially all use for property); *People v. Blue*, 544 P.2d 385, 391 (Colo. 1975) (state may not render state constitutional right to bear arms "nugatory"). But at least where a legislature has articulated proper reasons for enacting a gun-control law, with meaningful supporting evidence, and that law does not deprive the people of reasonable means to defend themselves, it should be upheld. *See* Winkler, *supra*, at 716-19 (describing how state courts apply this type of deferential standard).

B. The Court Of Appeals Applied The Wrong Standard, Created An Unworkable Test, And Misconstrued Relevant Precedent.

Although the majority below purported to recognize the "reasonableness" standard, the rule it adopted makes the reasonableness of the legislature's judgment irrelevant: "Once it is determined . . . that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." PA53. But this Court has never adopted such a *per se* rule for any provision in the Bill of Rights. The rights it protects are not absolute, and the "necessities of the case"—particularly public safety concerns—may justify the regulation of a protected right. *Robertson*, 165 U.S. at 281; *see also Maryland v. Buie*, 494 U.S. 325 (1990) (Fourth Amendment does not require endangering safety of law enforcement officers); *New York v. Quarles*, 467 U.S. 649 (1984) (same for Fifth Amendment). "[W]hile the Constitution protects against invasions of individual rights, it is not a sui-

cide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Nothing in the Second Amendment's text or history suggests that it precludes legislatures from protecting their citizens by banning particularly dangerous types of weapons.

Rather than consider the "necessities of the case" or the legislature's careful judgment, respondent argues that any weapon "in common use" that has a "military application" is an arm that cannot be banned no matter what other weapons remain available for self-defense. Response to Petition for Certiorari 24-26. The court of appeals' equally inflexible and categorical rule would also require that the weapon be a "lineal descendant" of a "founding-era weapon." PA51.

This test is neither meaningful nor workable. Is the assault rifle a lineal descendant of the musket? How "common" must the weapon's use be, and in what locations and in what populations would the test be run? Because every firearm has *some* military application, how well-suited must it be? If the majority's test had any limits to it, handguns might not be "arms." *See United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 n.8 (7th Cir. 1982).

More important, the test leads to tragic results. It suggests, for instance, that Congress could ban the private ownership of a particularly dangerous weapon right after its invention, before it grows into common use, yet not if its dangerousness becomes clear only after its use becomes widespread. This impractical and coldhearted result does not follow even from a self-defense reading of the Second Amendment. As the majority below recognized, "the government's in-

terest in public safety" allows it to bar certain members of "the people" (such as felons) from exercising any Second Amendment rights. PA52a. The same interest should allow the government to bar particularly dangerous arms, whether or not they are "lineal descendants" of far less powerful "Arms" from 1791.

The majority below was mistaken in its view that *Miller* supports the *per se* test it crafted. The logical result of the holding in *Miller*—that Congress may ban all short-barreled shotguns—in fact suggests that the District's handgun ban is constitutional. It is hard to see why short-barreled shotguns would not have *some* military application, and they were in sufficiently common use then for Congress to see a need to ban them. As for the lineal-descendant requirement, a short-barreled shotgun seems at least as related to its forebears as modern automatic handguns are to the pistols used by the militia in 1792.

Miller did not in fact define certain categories of "arms" that are entitled to Second Amendment protection; rather, it required that "possession or use" of the weapon in question "at this time ha[ve] some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178. This establishes that a weapon must have at least potential militia use for the Second Amendment even to be implicated. *Miller* says nothing, however, about what are protected "arms" under a self-defense theory of the Amendment never mentioned in the case. Moreover, *Miller* never suggests that if a weapon is of the type that might be kept by someone in the militia, its potential status as an "arm" would be sufficient to render the weapon immune to proscription.

Indeed, the holding below that the Constitution bars the District from choosing which particular arms to allow is precisely backwards, as the Militia Clauses and the Second Amendment contemplate that choosing among arms is the government's *duty*. Again, those mustering for militia service were required to bring those weapons chosen by the legislature. *See supra* pages 13-14. If the opening clause of the Second Amendment has any meaning, the rule adopted below—which pays no heed to whether a particular arm would meet a militiaman's obligations—cannot stand.

The majority's attempt to draw support by analogy to the First Amendment also fails. PA51a-52a. On a fundamental level, the analogy is inapt. Regulating dangerous weapons is at the heart of any government's traditional police power. Unlike speech restrictions, gun regulations raise no risk of viewpoint discrimination and no specter of silencing the views of the opposition. And, of course, the First Amendment does not have an opening clause comparable to that in the Second.

But even if the First Amendment analogy were applicable, it would confirm that the District's gun regulations are entitled to great deference and are constitutional. The decision below anomalously provides that no arm may be banned under the Second Amendment even though some forms of speech and some religious practices can be banned under the First. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968) (speech mixed with conduct); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Employment Div. v. Smith*, 494 U.S. 872, 876-82 (1990) (ingesting peyote). In particular, speech can be banned when it creates sufficient risks to public order or safety. *See, e.g.*,

Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement to "imminent lawless action"); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words"). It is difficult to imagine that the practical men who wrote the Bill of Rights meant to allow banning potentially harmful speech, but not particularly dangerous firearms.

Moreover, as the panel majority recognized, protected speech may be subjected to "time, place, or manner" restrictions. PA51a (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Although handguns are banned in the District, rifles and shotguns are not. So long as homeowners have a means of defending themselves, the handgun ban can be understood to be the Second Amendment analog to a time, place, or manner restriction properly tailored to the District's unique status as an urban jurisdiction. Indeed, First Amendment jurisprudence makes clear that "alternative" means of exercising a right need not be precisely equivalent to the banned or burdened means. *See, e.g.*, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986). If the Second Amendment has a self-defense purpose, it is concerned with the practical realities of functional disarmament—not guaranteeing a choice among whatever weapons fit the labels in the court of appeals' test. *Cf. NAACP v. Button*, 371 U.S. 415, 429 (1963).

C. The District's Gun Regulations Satisfy The Reasonableness Standard.

In 1976, the District's elected representatives determined that existing gun-control laws needed to be made more effective. The much-debated and carefully-crafted legislative solution included both a ban

on handguns and a trigger-lock requirement for firearms kept at home. It was the reasonable judgment of the District's political representatives that such a comprehensive package best promoted public safety while respecting private gun ownership. In addition, the District has a longstanding gun licensing requirement that works with these provisions to promote public safety. The Second Amendment should not be read to give the courts the authority to overturn those reasoned judgments.

1. The Handgun Ban Limits the Unique Harms Posed by Handguns in an Urban Environment.

a. The Council adopted a focused firearm restriction: it banned private possession of handguns, but not rifles and shotguns. Based on the evidence before it, the Council reasonably found that a handgun ban would mitigate the very serious problem of handgun violence in the District, including the use of handguns in crimes and their misuse by normally law-abiding citizens. By their nature, handguns are easy to steal and conceal, and especially effective for robberies and murders. The dangers those weapons cause are particularly acute in the District. As Councilmember Clarke noted, "The District of Columbia is a unique place. . . . [O]ur area is totally urban. There is no purpose in this city for . . . handguns other than to shoot somebody else with." Morning Council Sess. Tr. 73:9-12, May 3, 1976; *see also* Morning Council Sess. Tr. 47:20-21, May 18, 1976.

The evidence on which the Council relied was more than sufficient to justify its decision to act. *See supra* pages 4-6. The Council had a manifestly reasonable

basis to conclude that handguns are uniquely dangerous, and that the dangers to others, both in the home and outside of it, justify the handgun ban. Moreover, its predictive judgment—that the deaths and serious injuries that handguns would cause would more than offset any benefits from allowing residents to keep handguns in their homes—is precisely the kind of reasoned assessment that legislatures rather than courts are tasked with making in our democracy.

The Council carefully balanced the costs and benefits of its regulations, *see supra* pages 4-5, and its determinations are entitled to substantial deference. *See Gonzales v. Carhart*, 127 S. Ct. 1610, 1636 (2007) (legislature should receive deference in absence of expert consensus). This Court "accord[s] substantial deference" to legislatures' predictive judgments. *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Turner Broad. Sys. v. FCC* (*Turner I*), 512 U.S. 622, 665 (1994) (plurality opinion)). Its "sole obligation is 'to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.'" *Id.* (quoting *Turner I*, 512 U.S. at 666). The Council has done so here.

b. In any event, subsequent evidence supports the Council's judgment that banning handguns saves lives. Many cities, states, and nations regulate or ban handguns based on the unique dangers of those deadly weapons.[12] Those dangers exist even when the gun is

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[12] *E.g.*, Chicago Mun. Code §§ 8-20-040, 8-20-050(c); Legal Community Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws* (2006), http://www.lcav.org/library/re-

kept at home and the owner is generally law-abiding and responsible.

First, handguns are vulnerable to theft, and thus often fall into the hands of criminals. Far more handguns than other firearms are stolen—hundreds of thousands per year. Caroline W. Harlow, U.S. Dep't of Justice, Bureau of Justice Statistics, *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders* 1-3 (Special Rep. Nov. 2001), http://www.ojp.usdoj.gov/bjs/pub/pdf/fuo.pdf; Marianne W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Firearms, Crime, and Justice: Guns Used in Crime* 3 (July 1995), http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf.

Inmates report (and statistics demonstrate) that the handgun is their "preferred firearm." Harlow, *supra*, at 1-3. Handguns are the weapon most likely to be used in street crimes. Although only a third of the Nation's firearms are handguns, they are responsible for far more killings, woundings, and crimes than all other types of firearms combined. Zawitz, *supra*, at 2. Eighty-seven percent of all guns used in crime are handguns. Craig Perkins, U.S. Dep't of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime* 3 (Special Rep. Sept. 2003), http://www.ojp.usdoj.gov/bjs/pub/pdf/wuvc01.pdf.

Handguns pose particular dangers to police officers, including when executing warrants, pursuing felons, quelling domestic violence, and otherwise en-

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ports_analyses/regulating_guns.asp; Wendy Cukier & Victor W. Sidel, *The Global Gun Epidemic: From Saturday Night Specials to AK-47s* 144 (2006).

tering into private homes. Of the 55 police officers killed in felonies in 2005, 42 deaths were from handguns. *See* Federal Bureau of Investigation, *Uniform Crime Report—Law Enforcement Officers Killed and Assaulted*, at tbl.28 (2005), http://www.fbi.gov/ucr/killed/2005/table28.htm.

A study of the District's handgun ban concluded that it coincided with an abrupt decline in firearm-caused homicides in the District but no comparable decline elsewhere in the region. Colin Loftin *et al.*, *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991). More recently, researchers found that a 10% increase in handgun ownership increases the homicide rate by 2%. *See* Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1095-98 (2001). Not surprisingly, other countries have had success with handgun bans and near-bans. Cukier & Sidel, *supra*, at 178-205.

Second, all too often, in the heat of anger, handguns turn domestic violence into murder. Seventy-two percent of women killed in firearm homicides in 2004 were killed by handguns. Violence Policy Center, *When Men Murder Women: An Analysis of 2004 Homicide Data*, at 3 (Sept. 2006), http://www.vpc.org/studies/wmmw2006.pdf. People who live in houses with firearms, particularly handguns, are almost three times more likely to die in a homicide, and much more likely to die at the hands of a family member or intimate acquaintance than people who do not. *See* Arthur L. Kellermann *et al.*, *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084 (1993).

Third, handguns cause accidents, frequently involving children. The smaller the weapon, the more likely a child can use it, and children as young as three years old are strong enough to fire today's handguns. David Hemenway, *Private Guns, Public Health* 32 (2004). Every year, the majority of people killed in handgun accidents are young adults and children, including dozens under the age of 14. *See* National Center for Health Statistics, *Trend C Table 292: Deaths for 282 Selected Causes*, at 1888 (2006), http://www.cdc.gov/nchs/data/statab/gm292_3.pdf.

Fourth, handguns are easy to bring to schools, where their concealability and capacity to fire multiple rounds in quick succession make them especially dangerous. In urban areas, as many as 25% of junior high school boys carry or have carried a gun. Jack M. Bergstein *et al.*, *Guns in Young Hands: A Survey of Urban Teenagers' Attitudes and Behaviors Related to Handgun Violence*, 41 J. Trauma 794 (1996). In the recent Virginia Tech shooting, a single student with two handguns discharged over 170 rounds in nine minutes, killing 32 people and wounding 25 more. Reed Williams & Shawna Morrison, *Police: No Motive Found*, Roanoke Times, Apr. 26, 2007, at A1.

Fifth, handguns enable suicide. A study was conducted comparing the District to nearby Maryland and Virginia immediately after the District's handgun ban was enacted, when no changes were made in the Maryland and Virginia laws. There was a 23% drop in suicides by firearms in the District and no increase in other suicide methods. Loftin, *supra*. Moreover, the District's overall, youth, and firearms-related suicide rates have consistently been the lowest in the Nation. *See* National Center for Injury Prevention and Con-

trol, WISQARS Injury Mortality Reports, 1999-2004, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (interactive database). Handguns pose a higher suicide risk than other firearms; indeed, purchasing a handgun correlates to a doubled risk that the buyer will die in a homicide or a suicide. *See* Hemenway (*Private Guns*), *supra*, at 41; Peter Cummings *et al.*, *The Association Between the Purchase of a Handgun and Homicide or Suicide*, 87 Am. J. Pub. Health, 974, 976–77 (1997).

The Council had good reason to conclude that other less restrictive measures were insufficient by themselves. PA104a. Safety mechanisms, while helpful, do not always work as designed, and compliance, even with mandatory safety laws, is imperfect. *See* Cynthia Leonardatos *et al.*, *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 Conn. L. Rev. 157, 169-70, 178-80 (2001). Furthermore, safe-storage policies are of no help where the handgun owner is determined to kill a family member or himself.

Although there are competing views today, just as in 1976, the Council acted based on plainly reasonable grounds. It adopted a focused statute that continues to allow private home possession of shotguns and rifles, which some gun rights' proponents contend are actually the weapons of choice for home defense. Dave Spaulding, *Shotguns for Home Defense: Here's How to Choose and Use the Most Effective Tool for Stopping an Attack*, Guns & Ammo, Sept. 2006, at 42; Clint Smith, *Home Defense*, Guns Mag., July 2005, at 50

(preferring rifles). The Second Amendment inquiry requires no more.[13]

2. The Trigger-Lock Requirement Is A Reasonable Safety Regulation.

Like the handgun ban, the trigger-lock requirement in D.C. Code § 7-2507.02 is a reasonable regulation designed to prevent accidental and unnecessary shootings, while preserving citizens' ability to possess safely stored firearms. And as with the ban, the Council debated the trigger-lock requirement extensively and carefully considered opposing viewpoints. *E.g.*, Afternoon Council Sess. Tr., May 18, 1976, at 31-33; Evening Council Sess. Tr., Jun. 15, 1976, at 33-34. Only then did it enact a trigger-lock requirement based on the predictive judgment that it would save lives. *See supra* page 6.

That conclusion is confirmed by subsequent studies. In 1991 the U.S. General Accounting Office found that 8% of accidental shooting deaths resulted from shots fired by children under the age of six, which could have been prevented by child-proof safety locks. U.S. Gen Accounting Office, *Accidental Shootings:*

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[13] The majority independently erred in its determination of the proper relief to be accorded respondent. Finding no disputed issue of material fact, it ordered that summary judgment be entered in favor of respondent. PA55a. The facts it found relevant depended, however, on its mistaken adoption of a *per se* rule. If it had properly considered the challenged laws' reasonableness, it should have affirmed the dismissal of the complaint given the facts as found by the Council, as confirmed by subsequent studies. At a minimum it should have remanded for further proceedings to allow the parties and the district court to address reasonableness in the first instance. In any event, the record is sufficient for this Court to order entry of judgment for the District.

Many Deaths and Injuries Caused by Firearms Could Be Prevented 17-19 (1991), http://161.203.16.4/d20t9/143619.pdf. Nor are adults immune from the kind of accidental shootings that send 15,000 people per year to hospital emergency rooms. Karen D. Gotsch *et al.*, *CDC Surveillance Summary No. SS-2, Surveillance for Fatal and Nonfatal Firearm-Related Injuries—United States 1993-1998* 2 (Apr. 13, 2001), http://www.cdc.gov/mmwr/pdf/ss/ss5002.pdf.

Respondent does not argue, and the majority below did not find, that it is unconstitutional for the District to require trigger locks on guns under normal circumstances. C.A. Br. 59; PA55a. Rather, respondent's argument—which the panel embraced as a corollary of its invalidation of the handgun ban—is that the trigger-lock requirement is unconstitutional because it does not specifically contain a self-defense exception. According to respondent, even if he lawfully possessed a handgun, the District would prohibit him from unlocking it to defend himself against a sudden intruder in his home. If respondent were correct, the District agrees that the law would be unreasonable.

Respondent is wrong. Such an exception is fairly implied in the trigger lock requirement, just as it is in many of the District's other laws. *See, e.g.*, *United States v. Bailey*, 444 U.S. 394, 410-11 (1980) (noting existence of duress and necessity defenses in common law); *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) (recognizing the necessity defense in criminal cases). As Councilmember Wilson noted, "it would have to be a very irresponsible and unintelligent judge" who would punish a person for unlocking and using a gun to defend herself against a rapist. Evening Council Sess. Tr. 26:22-28:8, Jun. 15, 1976.

This Court should not accept respondent's invitation to create an unnecessary constitutional question. Federal courts should construe statutes to avoid serious constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Furthermore, the District's courts have not yet interpreted section 7-2507.02, and local courts normally should have the first opportunity "to avoid constitutional infirmities." *New York v. Ferber*, 458 U.S. 747, 768 (1982).

Moreover, respondent's assertion that the law *might* have unconstitutional consequences under some narrow and hypothetical circumstances is insufficient to render it wholly invalid in this facial challenge. The law may be struck down only if there is "no set of circumstances" under which it would be constitutional, *United States v. Salerno*, 481 U.S. 739, 745 (1987), a burden that respondent cannot meet.

In any event, even if the lack of a specifically enumerated self-defense exception were enough to render the trigger-lock requirement unconstitutional, the proper remedy would be for this Court to disapprove only that limited application of the trigger-lock requirement and leave the remainder of the District's laws intact. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-30 (2006).

3. The Licensing Requirement Does No More Than Properly Limit Those Who May Carry Handguns.

As an additional corollary to its holding on the handgun ban, the majority invalidated D.C. Code

§ 22-4504(a), which requires a license to carry concealable weapons in the District, seemingly on the theory that it eliminates respondent's right to use handguns for self-defense in his home. However, licensing laws ensure that only law-abiding, competent individuals have access to dangerous weapons. The majority recognized that the Second Amendment permits governments to deny firearms to felons and the insane and to test for firearm proficiency and responsibility. PA52a; *see Lewis*, 445 U.S. at 65 n.8 (felons). Such laws legitimately "promote the government's interest in public safety" and are "consistent with a 'well regulated militia.'" PA52a.

Nonetheless, the majority concluded that section 22-4504(a) functions as a complete ban on using handguns for self-defense at home because one cannot obtain a license for a handgun. PA54a-55a. But if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified. Once he did, nothing in District law would prevent him from "carrying" his gun in his home when needed for self-defense.

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The Second Amendment was not intended to tie the hands of government in providing for public safety. Reasonable regulations of firearms have been commonplace since the founding of the Republic. Consistent with this tradition, the Council enacted gun-control legislation tailored to the unique problems presented by the District's urban environment. The contrary holdings of the court of appeals were premised upon reasoning with no basis in law or logic. This Court should restore the District's laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

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