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

PETITIONERS' REPLY TO BRIEF IN RESPONSE

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The decision below has created a square conflict concerning the central meaning of the Second Amendment. As the petition explains, the decision is wrong because the District of Columbia's longstanding law banning handguns—a uniquely dangerous weapon in the urban context—while allowing private possession of rifles and shotguns does not infringe the militia-based right protected by the Amendment.

Respondent Heller agrees that the petition should be granted, although he disagrees with the question presented and he asks the Court to decide *more* than the petition presents. The District first addresses his arguments on the meaning of the Second Amendment, then explains why this Court should grant certiorari on the question in the petition and not take Heller's suggestion to decide questions not actually at issue in this case. Finally, the District shows why Heller's proffered *per se* rule is inappropriate and why the Court should not disregard the serious consequences of eliminating the handgun ban that the District's legislature decided would save lives.

1. Despite prevailing below, Heller correctly recognizes that the Court should grant the petition given the "profound constitutional law question" involved and the "stark split of authority" (both within and outside the District) on the question presented. Brief in Response (Resp.) 1. He takes issue with the petition's assertion that the divided decision below departs drastically from settled constitutional decisions, but he errs in asserting that the view of the panel majority—rather than the square holdings of *nine* other courts of appeals and numerous state courts—represents "the mainstream of American jurisprudence." *Compare* Resp. 7-18 *with* Pet. 8-11. He nonetheless concedes that the decision below is the first by any federal appellate court to strike down a law on Second Amendment grounds. Resp. 17; *see* Pet. 1-2, 8.

Heller mischaracterizes the relevant authorities in trying to make the panel majority's decision appear ordinary rather than extreme. He disparages as "persistent myth" the proposition that *United States v. Miller*, 307 U.S. 174 (1939), supports the

view that the Second Amendment protects a civic right tied to a state-regulated militia. Resp. 7-9. This reading is indeed "persistent," as nearly all courts that have followed *Miller* have read it as the District does and as Judge Henderson did in dissent. *E.g.*, *United States v. Rybar*, 103 F.3d 273, 285-86 (3d Cir. 1996); Pet. App. 57a-60a. That is the best reading precisely because *Miller* recognizes that the "obvious purpose" of the Second Amendment is to ensure the effectiveness and continuation of the militias that are the subject of the Militia Clauses. 307 U.S. at 178; *see* Pet. 12-13.[1]

Heller also cites other decisions of this Court that mention the Second Amendment in passing but concern distinct issues, such as *Dred Scott v. Sanford*, 60 U.S. (1 How.) 393 (1857).[2] Resp. 10-12. The District's position is fully consistent with the *dicta* he quotes to the effect that the Amendment protects a

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[1] Heller posits that *Miller* determines that the "militia" at issue was not an actual state-regulated force but "the generality of the civilian male inhabitants." Resp. 8-9 (quoting *United States v. Emerson*, 270 F.3d 203, 226 (5th Cir. 2001)). That argument disregards the words "well regulated" in the Second Amendment and *Miller*'s reference to the fact that militias consist of members "enrolled for military discipline." 307 U.S. at 179. It also fails to account for the Militia Clauses, which *Miller* stressed and which authorize Congress to organize the militia, so that the composition of the militia is subject to congressional control, not fixed in constitutional understanding. *Id*. at 178-79; *see* U.S. Const. art. I, § 8, cls. 15-16. Heller's suggestion that the *Miller* Court understood the militia as a unitary entity unaffected by political distinctions also overlooks the fact that *Miller* addresses the militia in the plural—the "forces" of the states. 307 U.S. at 178; *see* U.S. Const. art. II, § 2 (referring to "Militia of the several States").

Heller also asserts that the Court's language should not be taken as written because the opinion does not address whether Miller was a member of the militia. Resp. 9. Having concluded that he had not demonstrated that his weapon was subject to Second Amendment protection, however, the Court had no need to inquire whether Miller himself qualified.

[2] There is, of course, reason to doubt that Chief Justice Taney's views of constitutional liberty remain authoritative. Heller's reliance on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), is similarly suspect since it was enumerating rights the respondents were held *not* to possess.

"right of the people." The crucial difference between the District's view of the right and Heller's is not whether it is "individual" or "collective"—the terminology Heller favors—but instead whether the right protects uses of firearms for private purposes or only uses related to service in state-regulated militias. The cases cited do not speak to that difference.

Next Heller quotes various eighteenth- and nineteenth-century figures while avoiding the most relevant material: the text of the Second Amendment, the drafts and debates relating to its passage, and the reasons for its existence. *Compare* Pet. 11-16 *with* Resp. 13-14. His quotations are taken out of context, and none of those he quoted was even involved in drafting the Amendment.[3] His representation about the extent to

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[3] Nothing in the quoted language from Patrick Henry and Tench Coxe suggests that either thought someone in Heller's position had an inalienable right to own an arm for private purposes. In the quoted passage, Henry was ridiculing Madison's argument that Congress and the States would have concurrent power to arm the militia. His speech deals only with the use of arms for military applications. 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*, 382, 386 (2d ed. 1836). Coxe had no known role in formulating the Second Amendment; he was in any event discussing the limits on congressional power under the Militia Clauses over military matters. Tench Coxe, *A Pennsylvanian III*, Pa. Gazette, Feb. 20, 1788.

Samuel Adams did indeed propose a constitutional amendment, including language that Heller cites. But that language never made it into the Constitution (or out of the Massachusetts ratifying convention). *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 181 (Neil H. Cogan ed., Oxford Univ. Press 1997).

Heller also distorts nineteenth-century writings. Justice Story's analysis of the Second Amendment, written a half-century after its adoption, reflects a classic civic, not individual, interpretation. Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. Am. Hist. 22, 42 (1984). Story saw the Amendment as protecting the militia's role as primary military defender against invasion, insurrection, and usurpation. 3 Joseph Story, *Commentaries on the Constitution* §§ 1889-1890 (1833). He lamented that the Amendment's intent was being undermined by "growing indifference to any system of militia discipline."

which the legal academy supports his position (Resp. 14-15) is likewise overstated. *See, e.g.*, Pet. 13 n.10. *See generally* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 Chi.-Kent L. Rev. 3 (2000).

Citing *United States v. Cruikshank*, 92 U.S. (4 Otto) 542 (1875), Heller next suggests that the federal government's current position on whether the Second Amendment secures a right to use weapons for private uses is longstanding. Resp. 15. Nothing in *Cruikshank* substantiates that claim. On the contrary, the current position of the federal government is notable precisely *because* it departs from settled views. *See* Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. Ky. L. Rev. 705, 747-68 (2002).

Finally, Heller relies on various state court decisions. Resp. 15-16. As the petition explains and Heller does not dispute, the panel majority exaggerated the support found from such decisions regarding the Second Amendment. Pet. 9-10. Moreover, though Heller relies on state court decisions dealing with supposed state constitutional "analogs," Resp. 16, every case cited involved provisions that differ materially from the Second Amendment by, for instance, explicitly protecting weapons used for self-defense or hunting.[4]

In any event, the most important question before this Court if review is granted will not be what fine parsing of *Miller* or

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Id. § 1890. Similarly, Heller excerpts St. George Tucker's writing without relevant context. Tucker "approached the right to bear arms as both a right of the states and as a civic right." Saul Cornell, *St. George Tucker and the Second Amendment*, 47 Wm. & Mary L. Rev. 1123, 1126-27 (2006). More significantly, he located the right of individual self-defense in the common law, not the Second Amendment. *Id*.

[4] *E.g.*, *State ex rel. Princeton v. Buckner*, 377 S.E. 2d 139, 141 (W. Va. 1988) (applying provision that "[a] person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use"); *State v. Delgado*, 692 P.2d 610, 610 (Or. 1984) (applying provision that "[t]he people shall have the right to bear arms for the defence of themselves, and the State").

any other case may reveal, or what state courts have decided, or what commentators think the Second Amendment covers, but what its words mean, construed in light of their history, purpose, and place in this Nation's tradition. On that inquiry the authorities the petition cites strongly support a militia-related, not a private-use, interpretation.

2. Although Heller agrees that this Court should decide "whether the city may ban handguns as a subclass of firearm," he contends that the question should reflect his broader assertion that the District's laws in fact ban the possession of any "functional" firearm. Resp. i, 3, 18-23. This Court should reject his suggestion that it reframe the question presented.

First, the District may petition on a question it frames "as broadly or as narrowly as [it] sees fit." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). The petition identifies three errors below that warrant reversal—first, the right protected by the Second Amendment is limited to weapons possession and use in connection with service in state-regulated militias; second, laws limited to the District do not violate the Amendment; and third, the District's handgun ban does not infringe the right to keep and bear arms under any view of the Amendment. Pet. 11-30. Heller does not dispute that all of these errors are properly before the Court. *E.g.*, Resp. 23.[5]

Second, the District does not in fact ban all "functional" firearms. As the petition explains, District residents may use lawfully registered rifles and shotguns in self-defense. Pet. 7 n.2, 28. Heller misreads D.C. Code § 7-2507.02, which prescribes how a gun registrant "shall keep any firearm in his possession" under normal circumstances, but says nothing about

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[5] Heller does not expressly address whether laws limited to the District implicate the Second Amendment but quotes with approval Professor Tribe's understanding that it "achieves its central purpose by assuring that the *federal* government may not disarm individual citizens without some unusually strong justification *consistent with the authority of the states to organize their own militias*." Resp. 14-15 (quoting 1 Laurence H. Tribe, *American Constitutional Law* 902 n.221 (3d ed. 2000)) (emphasis added).

use during an emergency. The section merely requires firearms kept at home to be kept safely—for instance, with a trigger lock, a mechanism that, like a password on a computer, allows the owner access in time of need. As reflected by the fact that the District's Council enacted this requirement secure in the knowledge that "locked guns can be ready for use in under a minute" (C.A. Br. 17 (quoting legislative history); *see* Pet. App. 116a), it is incorrect to read Section 7-2507.02 to prohibit use of a gun in self-defense in an emergency. Both the D.C. Circuit and the D.C. Court of Appeals "have long recognized exceptions to general law under exigent circumstances." C.A. Br. 17 (citing *Wilson v. United States*, 198 F.2d 299, 300 (D.C. Cir. 1952), and *Emry v. United States*, 829 A.2d 970, 972 (D.C. 2003)).[6]

Third, broadening the question to address the effect of Section 7-2507.02 would needlessly complicate the case. The panel majority construed this provision to forbid ever unlocking guns, such that it "amounts to a complete prohibition on

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[6] The District made the quoted arguments in the court of appeals. In a recent order denying Heller's motion to lift the stay of the mandate in part, the panel majority stated that the District had never suggested that shotguns and rifles could lawfully be used in self-defense. Reply App. 2ra-3ra. (Judge Henderson joined only in the order's result.) Heller argues the same. Resp. 22. But that contention is demonstrably incorrect. *E.g.,* C.A. Br. 15-18 ("Outlawing a particular type of weapon because its harms outweigh its benefits does not frustrate the core purposes of constitutional arms provisions—whether to promote the common defense, the militia, *or* self-defense—so long as other arms remain available to serve those purposes."). The panel majority below in fact acknowledged that the District made that argument. *See* Pet. App. 53a ("The District contends that since it only bans one type of firearm, 'residents still have access to hundreds more,' and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament."). Indeed, the District's view predates this litigation. *See, e.g.*, Brief for the District of Columbia in *Seegars v. Gonzales*, D.C. Cir. Nos. 04-5016 & 04-5081, at 34. Moreover, there are no reported decisions involving prosecutions under Section 7-2507.02 for the use of firearms in self-defense, nor is the District aware of any.

the lawful use of handguns for self-defense." Pet. App. 55a. Rather than adopt this erroneous reading in order to hold that the provision violates the Second Amendment, the panel majority surely should have avoided the constitutional question by adopting a readily available statutory interpretation that would not violate the Amendment. The point, however, is largely academic because the District and the panel majority *agree* that Section 7-2507.02 should not be applied as a "functional firearms ban."[7] Thus, far from "mischaracteriz[ing]" the decision below, as Heller contends (Resp. 3), the question presented reflects the fact that the District has no cause to seek this Court's review of that particular aspect of the decision.

By contrast, as his wish list of hypotheticals for this Court to address shows (Resp. 20-21), Heller in essence seeks a broad advisory opinion on questions not legitimately at issue given the District's authoritative position on Section 7-2507.02. Especially since he could petition the District for clarifying rulemaking if he thinks the provision unclear, *see* D.C. Code § 2-505(b), there is no reason for this Court to consider how the District *might* apply Section 7-2507.02 in factual scenarios not presented here.

3. Other points merit only brief response at this stage.

a. Heller reads *Miller* to establish a *per se* rule for Second Amendment jurisprudence even broader and less defensible than that suggested by the panel majority. Under Heller's rule, if a firearm is "in common use" and has "military application," it is an "Arm[]" subject to the Second Amendment and cannot be banned no matter what other weapons remain available for self-defense and other private uses. Resp. 24-26. The panel

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[7] In its recent order, the panel majority also wrote: "our opinion does not specifically address the constitutionality of [Section 7-2507.02] as it applies to shotguns and rifles . . . ." Reply App. 2ra. Although it did not specifically address shotguns and rifles, the panel majority's reasons for holding Section 7-2507.02 unconstitutional as to pistols are equally applicable to other weapons. Pet. App. 55a.

majority would also require that the weapon be a "lineal descendant" of a "founding-era weapon." Pet. App. 51a. Either way, Heller does not respond to the point in the petition that nothing in *Miller* indicates that a weapon that qualifies as an "Arm" should have absolute protection. Pet. 29.

Nor does Heller's proposed rule find support in this Court's constitutional jurisprudence. He argues that outlawing a particularly dangerous type of weapon should be as impermissible as outlawing a particular religious practice. Resp. 25. That analogy is inapt. The very core of the Free Exercise Clause is choice. By contrast, the right to "keep and bear Arms" serves a specified end, "the security of a free State" (or even, in Heller's view, self-defense); free choice of weapons is not a constitutional end in itself. In any event, particularly harmful religious practices, like particularly harmful guns, *can* be outlawed. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872, 876-82 (1990) (smoking peyote is not immunized from general criminal law even when a key element of religion); *Reynolds v. United States*, 98 U.S. 145, 164-67 (1878) (polygamy).[8]

b. The Council found that the easily concealable handgun is disproportionately involved in gun violence, both accidental and deliberate, and is a criminal's weapon of choice. Pet. 3-5. Subsequent studies confirm those judgments. Pet. 21-30.[9]

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[8] Particularly harmful speech may also be restricted. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*) (incitement to imminent lawless action); *Watts v. United States*, 394 U.S. 705, 707 (1969) (*per curiam*) (true threats); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-74 (1942) (fighting words); *see also Morse v. Frederick*, 127 S. Ct. 2618 (2007) (school may restrict pure speech reasonably viewed as promoting illegal drug use). Furthermore, as the panel majority recognized, protected speech may be subjected to "time, place, or manner" restrictions. Pet. App. 51a (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

[9] Heller's suggestion that the District has presented merely policy arguments that are not "grounded in law" (Resp. 4, 26-27) is mistaken. As the petition explains and the panel majority recognized, the right protected

Heller does not contest that the Council had a reasonable basis to enact the handgun ban in 1976. Indeed, it makes no difference to him how much good the ban might do; he asserts that "[e]ven were the city's gun ban effective in reducing crime . . . it would still be unconstitutional." Resp. 29. He argues nonetheless that the ban has been shown ineffective by post-enactment crime statistics. Resp. 27-28. Of course, legislatures can act only on the information then available. Whatever one's view of the Second Amendment, this type of judgment is one legislatures must make in the real world, and one fundamentally ill-suited to post-hoc judicial determination.

In any event, Heller's crime statistics do not undermine the reasonableness of the District's law for two basic reasons. First, handguns cause significant harm to the public safety and welfare that has nothing to do with crime. For instance, the petition demonstrates handguns' unique responsibility for accidents and suicides, often involving children and youth. Pet. 25-26; *see also* Amicus Br. of American Academy of Pediatrics *et al.* 4-15. Heller does not respond.

Second, even if it were proper to focus only on crime, Heller's statistics are misleading. He notes that rates of violent crime, particularly homicide, rose between 1980 and 1997. Resp. 27-28. This sad truth shows nothing about the District's handgun ban. The rise in violent crime rates was a nationwide phenomenon.[10] Moreover, that rise was attributable to in-

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by the Second Amendment is not infringed by laws that reasonably regulate the right. Pet. 21-22; Pet. App. 51a. Courts consider the reasons why the legislature enacts particular laws not because they are engaging in naked policy analysis, but because they must determine (under whatever level of scrutiny is appropriate) whether those laws infringe constitutional rights.

[10] *See* James A. Fox & Marianne W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States*, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf; FBI, *Crime in the United States: 2006*, tbl. 1, *available at* http://www.fbi.gov/ucr/cius2006/data/table_01.html; FBI, *Crime in the United States: 1996*, at 62 tbl. 1, *available at* http://www.fbi.gov/ucr/Cius_97/96CRIME/96crime2.pdf.

creased crime in large cities across the Nation due to factors like drug- and gang-related activity.[11] Given the evidence that handguns are criminals' favored weapon by an overwhelming margin, that more handgun ownership means more homicide, and that handguns are disproportionately used to murder police officers, victims of domestic violence, and children at school (Pet. 24-27), it is highly probable that crime would have been worse in the District if handguns had not been outlawed.[12]

Heller also uses the number of firearms recovered by law enforcement—which shows that the District vigorously enforces its ban—as evidence that the handgun ban is a failure. Resp. 29. There are few criminal laws that succeed so perfectly that they never need to be enforced. The handgun ban undisputedly lowers the number of handguns in the District and has a deterrent effect on handgun traffic.

c. Finally, Heller claims that the District's laws improperly prevent law-abiding citizens from protecting themselves given the inability of the police to provide complete protection. Resp. 29-32. But, again, the straightforward answer is that the District allows citizens to register rifles and shotguns and use them in self-defense. Pet. 28. The Council concluded that handguns pose dangers that far outweigh their utility. Nothing in the Second Amendment gives the courts a license to second-guess that eminently reasonable judgment.

CONCLUSION

For the reasons stated, the Court should grant the petition.

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[11] Fox & Zawitz, *supra*; Jeff Grogger & Michael Willis, *The Emergence of Crack Cocaine and the Rise in Urban Crime Rates*, 82 Rev. Econ. & Stats. 519 (Nov. 2000).

[12] Heller's crime statistics are also incomplete. He does not refer separately, for instance, to rape, one of the crimes the Council intended to address when banning handguns. Pet. 4. During the overall rise in violent crime that Heller identifies, rape rates in the District did not rise and in fact remained consistently lower than in 1976 and immediately preceding years. *See* District of Columbia Crime Rates 1960-2006, *available at* http://www.disastercenter.com/crime/dccrime.htm.

Respectfully submitted,

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OCTOBER 23, 2007

REPLY APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2007**

03cv00213

Filed On: September 25, 2007

[1069215]
Shelly Parker, et al.,
Appellants

v.

District of Columbia and Anthony A. Williams, Mayor of the District of Columbia,
Appellees

BEFORE: Henderson[1] and Griffith, *Circuit Judges*, and Silberman, *Senior Circuit Judge*.

O R D E R

Upon consideration of appellants' motion to lift stay of mandate and the opposition thereto, it is

ORDERED that appellants' motion to lift (partially) our stay of mandate be denied. Appellants' contention is that appellees' petition for certiorari concedes the unconstitution-

[1] Judge Henderson concurs in the denial of the motion.

ality of D.C. Code Section 7-2507.02 as it requires the disassembling of shotguns and rifles or the placement of trigger locks, making such arms practically useless for self defense.[2] Therefore, appellants argue, our mandate holding this provision unconstitutional should issue. But our opinion does not specifically address the constitutionality of that statute as it applies to shotguns and rifles because the only plaintiff we concluded had standing under our precedent was Dick Heller, who complained solely about the restrictions on ownership and use of a handgun. *Parker*, 478 F.3d 370, 373-76 (D.C. Cir. 2007). At least one other plaintiff (Gillian St. Lawrence) did address Section 7-2507.02 as it applied to shotguns but she did not have the same injury as Heller – the denial of a license. *Id*. To be sure, as our opinion suggested, the Supreme Court may well disagree with *Seegars*, 396 F.3d 1248 (D.C. Cir. 2005), and conclude that all the plaintiffs have standing.

In any event, the District's petition for certiorari makes an alternative argument not presented in our court – that the District's ban on handguns can be justified so long as rifles and shotguns can be utilized in the home for self protection. The Supreme Court, if it should reach argument – and conclude it was constitutional to ban handguns in the home if long guns were permitted – would necessarily be obliged to consider the impact of Section 7-2507.02, since a disassembly or trigger lock requirement might render a shot-

[2] Appellants' motion does not mention the other provisions we held unconstitutional with regard to handgun possession – D.C. Code Sections 22-4504 and 22-4506 – nor does the District in its opposition.

gun or rifle virtually useless to face an unexpected threat.[3]

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Nancy G. Dunn
Deputy Clerk

[3] The District of Columbia Council never contemplated the specific use of a rifle or shotgun in that situation. Had the Council contemplated such, it would, perforce, have had to consider the danger posed by a rifle's range and a shotgun's pellet spread, as well as the difficulty one would have handling such long weapons in enclosed spaces – particularly by smaller individuals. Appellees' brief at 17 did suggest that any gun (including a pre-1976 legal handgun) might be used in self defense in a "true emergency," otherwise described as "genuine imminent danger." But the Code does not allow for such, nor did the District ever specify how one would define the circumstances under which one could assemble or unlock a rifle or shotgun to face a "true emergency" (professionals might well be amused at such a hypothetical). The truth is that neither the Code nor the District, in this litigation, ever suggested that a rifle or shotgun, as opposed to a handgun, could be legally employed in self defense.