No. 07-290

In The
Supreme Court of the United States

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

V.

DICK ANTHONY HELLER,
Respondent.

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

BRIEF OF AMICUS CURIAE THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

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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.

INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over its 25 year history. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens.

One of the purposes of The Rutherford Institute is to preserve the most basic freedoms our nation affords its citizens—in this case, the constitutional right to bear arms.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of the brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

STATEMENT OF FACTS

Amicus incorporates by reference the statement of facts set forth in the brief of Respondent Dick Anthony Heller.

SUMMARY OF ARGUMENT

The Framers of the Constitution enacted the Bill of Rights in the aftermath of the War of Independence, fought as a consequence of the tyranny of the British Empire. The American colonists understood very well what it meant to live under an oppressive governmental regime. To them, tyranny was more than a word. It was a condition of life in a state of martial law. While the threat of tyranny that led to the inclusion of the Second Amendment in the Bill of Rights may not yet be of the magnitude it was in 1776, as Judge Kozinski of the Ninth Circuit reminds us, "However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once." *Silveira v. Lockyer*, 328 F. 3d 567, 570 (9th Cir. 2003).

To those brave Americans who framed the founding documents, the right to own a weapon was an essential ingredient to remaining free. In fact, to them, their rifles were a fundamental symbol of freedom. More than merely symbolic, however, was the fact that their guns remained the guarantor of the liberty they had fought so hard to achieve. To the Founders, therefore, their rifles were the means by which liberty was born, and the Second Amendment

represented the medium through which it would be forever protected.

Since then, firearms have remained illustrative of the freedom of the United States, both literally and symbolically. As David B. Kopel, one the leading authorities on the Second Amendment, points out, "guns effectuate and symbolize individualism and self-reliance—two traits in which Americans outpace the rest of the industrial world."[2] Thus, it is not surprising that firearms have become both an enabler and a symbol of these inherently American values. Kopel further points out that the symbol of American heroism is the cowboy, whose contrast with his Canadian, British and Japanese equivalents shows the significance of the "common" gun. The classic cowboy carries a mass-produced handgun, such as a Colt .45, while the Canadian mounted policeman carries a special government-issued gun; the Japanese samurai carries a hand-crafted, exquisite sword; and the British knight wears expensive armor.[3] Such an example is illustrative of the values from which the United States was born, and which have been indelibly imparted into the American psyche.

Far from being solely romantic symbolism, the necessity of the right to bear arms has been exposed on numerous occasions. The history of the United States has shown multiple examples of attempts to repress the rights of others subsequent to 1776 and in contemporary times. "Tyranny" has been, and continues to be, practiced against certain groups in American society—in particular, African-

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[2] David B. Kopel, *The Ideology of Gun Ownership and Gun Control in the United States*, 18 Q. J of Ideology 3, 5 (1995).
[3] *Id.*

Americans—albeit in different forms. Therefore, individuals—American citizens—still necessarily need the right to guard against tyranny, whatever form it might take. By removing the basic protection that the Second Amendment affords individuals, both in theory and practice, an essential barrier against a potentially oppressive government would be eviscerated.

ARGUMENT

I. The Framers Of The Constitution Intended The Second Amendment To Apply To Individuals, To Serve As A Guarantor Against Tyrannical Government

The great legal and historical scholars across the political spectrum generally conclude that the Framers of the Constitution intended the Second Amendment to create an individual right.[4] There have been recent attempts, however, to subvert this fundamental right and make it more palatable with "modern" cultural values. But constitutional rights are not to be dictated by opinion polls or political correctness. Instead, the Second Amendment should remain applicable in an individual context, as it was intended to be, acting as the guarantor of all other rights and as the enduring symbol of freedom and liberty. As this Court has held:

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[4] *See* Randy E. Barnett and Don B. Kates, *Under Fire: the New Consensus on the Second Amendment,* 45 Emory L.J. 1139 (1996). *See also* GEORGE P. FLETCHER, A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 156 (Free Press 1988).

> The values of the Framers of the Constitution must be applied in any case construing the Constitution. Inferences from the text and history of the Constitution should be given great weight in discerning the original understanding and in determining the intentions of those who ratified the Constitution. The precedential value of cases and commentators tends to increase, therefore, in proportion to their proximity to the adoption of the Constitution, the Bill of Rights or any other amendments.

Powell v. McCormack, 395 U.S. 486, 547 (1969).

The Framers of the Constitution viewed the individual ownership of firearms as the ultimate check on the power of the government because an armed citizenry is in a better position to resist tyrannical behavior. In drafting the founding documents of the new republic, the Framers were heavily influenced by their English common law heritage. As this Court has held, "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex parte Grossman*, 267 U.S. 87, 108-109 (1925).

In particular, the writings of William Blackstone on the imperative need for an armed

citizenry were extremely influential.[5] According to Blackstone, only with the weight of privately-held arms could the people vindicate their other rights if they were suppressed.[6] Such was the importance of an armed citizenry in free society that Blackstone stated: (a) the cardinal and inalienable natural right is the right to self-defense; (b) the right of each person to have arms for personal defense is an indispensable, inalienable ingredient in the right to self-defense; and (c) the three cornerstones of constitutional liberty are the right to petition for redress of grievance, the right to arms, and due process.[7]

Blackstone recognized that without the right to bear arms, the people would be unable to fully exercise their other rights. He explained, "[i]n vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the [English] Constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property."[8]

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[5] Blackstone was the most cited English writer by major American political writers between 1760 and 1805, second only to Baron de Montesquieu overall. *See* Donald Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, The American Political Science Review 78, March 1984, at 194.

[6] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *139-40 (1st ed. Oxford 1765).

[7] *Id.* at 143-44.

[8] *Id.* at 140-41.

Blackstone further argued that the right to bear arms was necessary to prevent tyranny, noting, "[t]he fifth and last auxiliary right of the subject… is that of having arms for defence… [for] the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[9] These principles found their way into the U.S. Constitution and Bill of Rights, codifying inviolate the rights of the new republic's citizens.

The recognition that individuals had the right to bear firearms furthered the concept that the government was subservient to the people and that it was the duty of the government to serve the people, rather than vice versa. Symbolically and practically, therefore, firearms represented the relationship between the government and the people, and the subordination of the former to the latter. As historian Joyce Lee Malcolm notes, "[t]he Second Amendment amplified the tradition of the English Bill of Rights for the purpose of preserving and protecting government by and for the people."[10]

James Madison explained this concept in *The Federalist No. 46*: "Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are

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[9] *Supra* note 7.

[10] Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q., 285, 314 (1983).

appointed, forms a barrier against the enterprises of ambition…"[11]

Madison further contrasted the free experience of Americans with their European counterparts: "Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this alone they would not be able to shake off their yokes."[12]

Even during the debate between the Federalists and Anti-Federalists over ratification of the Constitution, there was little argument over the right to bear arms and the nature and necessity of it. The prominent Anti-Federalist Richard Henry Lee, for example, believed: "[t]o preserve liberty, it is essential that the whole body of the people always possess arms…"[13] This Court has also held that, "the remarks of Richard Henry Lee are typical of the rejoinders of the Antifederalists… The concerns voiced by the Antifederalists led to the adoption of the Bill of Rights… The fears of the Antifederalists were well founded." *Minneapolis Star v. Minnesota Comm. Of Rev.*, 460 U.S. 575, 584-85 (1983).

Early American legal scholarship, written with the benefit of contemporaneous thought and knowledge, supported such an interpretation of the Second Amendment. St. George Tucker, who edited the works of Blackstone to make them relevant to

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[11] THE FEDERALIST NO. 46, at 242 (James Madison) (Bantam Classic ed. 1982).

[12] *Id.*

[13] RICHARD HENRY LEE, ADDITIONAL LETTERS FROM THE FEDERAL FARMER, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 341-42 (Herbert J. Storing ed. 1981).

the United States, interpreted the Second Amendment as an individual right. He indicated that when the right to keep and bear arms is prohibited, liberty stands "on the brink of destruction."[14] Tucker argued that the right to bear arms was among the individual's "most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation…"[15]

This philosophy was incorporated into the highly influential commentaries of Justice Joseph Story and Judge Thomas M. Cooley, both of whom were cited approvingly by this Court in *United States v. Miller*, 307 U.S. 174 (1939). For example, Justice Story stated, "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[16]

Judge Cooley supplemented this argument, by stating, "The right declared [the right to keep and bear arms] was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of

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[14] 1 WILLIAM BLACKSTONE, COMMENTARIES app. at 300 (St. George Tucker ed. 1803, Lawbook Exchange, Ltd. 1996), quoted at David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1377-78 (1998).

[15] 1 ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 43 (1831).

[16] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 646 (5th ed. 1891).

regaining rights when temporarily overturned by usurpation."[17]

The Second Amendment stands today, as it has throughout the history of the United States, as the guarantor of all other rights, and of the Constitution itself. As important as the Second Amendment's practical implications are its symbolic implications. The firearm in the hands of the citizen symbolizes that we, the people, are our own masters, and we do not exist at the whim of the government.

History has shown on numerous occasions that a disarmed society almost always becomes an obedient and complacent society when faced with a tyrannical government. Such fears were paramount in the minds of the Framers of the Constitution, who had experienced, first-hand, the tyranny of King George III and his attempts to disarm them. Indeed, such fears of government tyranny have been present since time immemorial. Moreover, these fears were by no means unique to the eighteenth century; nor have they been reduced with the passage of time. Even as late as the twentieth century, more people were killed at the hands of government than in all of the centuries that preceded it combined.[18]

The right of individuals to bear arms still represents the ultimate insurance policy against tyranny and gives meaning, rather than just rhetoric, to the intentions of the Framers. Firearms in the hands of private individuals affords Americans the confidence and security to enjoy their other rights, safe in the knowledge that they are free

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[17] THOMAS COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW 281 (2d ed. 1891).

[18] *See generally* RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT (Transaction Publishers 1994).

from the risk of government oppression. American citizens are better able to defend themselves, their families, and their possessions with firearms than without. This is entirely within keeping with the great American traditions and values of individualism and self-reliance.

It must be remembered that the Second Amendment is, as Judge Kozinski put it, "a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed." *Silveira*, 328 F. 3d at 570. Just because that day has not come, and hopefully never will, it does not mean that the Second Amendment's meaning and purpose have changed. Consequently, the citizens of the United States must not have their greatest—perhaps only true—defense against tyranny taken away from them. To do so would be a disservice to the intentions of the Framers, based solely on the pendulum of public opinion. The Framers' intent, rather than current public opinion, is what should guide constitutional interpretation. Such has been the policy of this Court, which has held that, "when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone." *Minneapolis Star*, 460 U.S. 575 at n. 6 (1983).

It has only been in recent years that any challenges to the meaning and purpose of the Second Amendment have arisen. Perhaps it is more the "embarrassing" nature of the Second Amendment in the often politically correct twenty-first century mind that leads opponents of the individual nature of the Second Amendment to attempt to attribute alternative meanings to it. The meaning and purpose of the Second Amendment remains as clear

today as it did at the time the Bill of Rights was ratified; what has changed is that the Second Amendment no longer receives the universal support that it once did.

II. The Militarization Of Police Forces Represents A Modern-Day Standing Army

One of the paramount fears of the Founding Fathers was the presence of a standing army. The Framers had experienced the oppression that went with standing armies during the times of King George III, and they were regarded as an instrument of tyranny. The Continental Congress specifically charged the maintaining of a standing army as a specific abuse of King George III: "Resolved, … 9. That the keeping of a Standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law."[19] The Framers' distrust of standing armies was shown, for example, by James Madison: "A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence agst. foreign danger, have been always the instruments of tyranny at home…"[20]

Such fears and emotions were eloquently captured by Patrick Henry's rhetorical question: "A standing army we shall have, also, to execute the execrable commands of tyranny; and how are you to

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[19] 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 70 (Oct. 14, 1774) (W.C. Ford ed. 1904-1907).

[20] JAMES MADISON, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 465 (M. Farand ed. 1911).

punish them? Will you order them to be punished? Who shall obey these orders? Will your mace-bearer be a match for a disciplined regiment? In what situation are we to be? ..."[21]

In consequence of the threats that standing armies posed, the Second Amendment was adopted as a crucial check to preserve the liberty of the individual states. James Madison explained that, "As the greatest danger is that of disunion of the states, it is necessary to guard against it by sufficient powers to the common government; and as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia."[22]

The militia in the eighteenth century, of course, was not the same as the modern equivalent. To the Framers, the militia consisted of all able-bodied male citizens, rather than what it would be considered today—the National Guard, which is itself a standing army. An armed citizenry, the Framers thought, was the best means of guarding against the possibility of tyranny that was inherent with standing armies.

Today, these principles are still applicable. The standing armies of King George III have been replaced by an encroaching police state, which is also capable of tyranny. Indeed, there is little *material*

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[21] Spoken at the Virginia Convention, 3 STATE DEBATES 51-59, quoted at Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of The Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 990 (1975).

[22] ARTHUR TAYLOR PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION: A REARRANGEMENT OF MADISON'S NOTES GIVING CONSECUTIVE DEVELOPMENT OF PROVISIONS IN THE CONSTITUTION OF THE UNITED STATES 524 (Louisiana State University Press 1941).

difference between the standing armies so abhorrent to the Framers and many modern police forces. Over the past quarter of a century, the U.S. military has supplied intelligence, equipment and training to the police, spawning a culture of paramilitarism in some law enforcement agencies.[23] Moreover, there has been an increased deployment of military forces domestically. In 1998, for example, the Indiana National Guard leveled 42 "crack houses" in and around the city of Gary.[24] Not since Reconstruction has the U.S. military been so intimately involved in U.S. law enforcement.[25]

This militarization would have alarmed the Framers, given their concerns over the concentration of power that accompanied standing armies. Such developments clearly illustrate that the ideology behind the Second Amendment retains its significance and that the right to bear arms continues to remain as a guarantor against the possibility of oppressive government encroachment.

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[23] *See* Diane Cecilia Weber, *Warrior Cops: The Ominous Growth of Paramilitarism in American Police Departments* (The Cato Institute, Washington, D.C.), August 26, 1999, *available* at http://www.cato.org/pubs/briefs/bp50.pdf.

[24] *Drug House Razed with Federal Money*, N.Y. TIMES, January 19, 1998., *available at* http://query.nytimes.com/gst/fullpage.html?res=9902E7D71238F93AA25752C0A96E958260

[25] *Supra* note 23 at 5.

III. African-American Experiences Show The Necessity Of The Individual Right To Bear Arms

A. Historical Abuses

The Second Amendment is often seen by its detractors as an anachronism, an embarrassing remnant of an earlier age. However, the experiences of African-Americans in the two centuries after Independence suggest that tyranny can take more than one form and that the necessity of the right to bear arms to oppose it and to protect constitutionally guaranteed rights remains a vital ingredient of freedom.

The history of gun control in the United States has a symbiotic relationship with racism. Prior to the abolition of slavery, oppressors needed a disarmed African-American population that could be enslaved without resistance. The "tyranny" that African-Americans faced did not come from King George III's abuses, nor was it a philosophical concern over the potential for abuse of powers by the federal government. Rather, it came from the institution of slavery and, after the Civil War, mob violence and inactive state governments.

As Judge Kozinski noted in *Silveira*, "... tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South." 328 F. 3d at 569.[26] Judge Kozinski

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[26] *Citing* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 338 (1991).

further augments this argument by contrasting the northern states, where African-Americans were better able to keep and bear arms, and thus protect their constitutional rights from mob violence.

By its very nature, the institution of slavery required a class of people who lacked the means to resist. In the antebellum period, the southern states limited the rights not only of slaves to bear arms, but also of free blacks. More often than not, slave statutes restricting access to firearms were aimed primarily at free blacks.[27] As free blacks were not under the close scrutiny of whites, there was a concern that they would pose a greater danger to society. Florida, for example, repealed all provisions for firearm licenses for free blacks in February, 1831.[28] After Nat Turner's revolt in Virginia six months later, other southern states immediately followed suit by passing legislation against free blacks possessing firearms.[29] Florida went even further in 1833, enacting a statute authorizing white citizen patrols to seize arms found in the homes of slaves and free blacks and providing for summary punishment for those without proper explanation.[30]

Before the enactment of the Fourteenth Amendment, therefore, southern states passed discriminatory weapons restrictions as an instrument of racial subjugation.[31] Alabama, for

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[27] *Id.* at 336.
[28] *Id.* at 337-38.
[29] *Id.* at 338.
[30] *Id.*
[31] *See* Robert J. Cottrol and Raymond T. Diamond, "*Never Intended to be Applied to the White Population*": *Firearms Regulation and Racial Disparity – The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1328 (1995).

example, made it unlawful for any black "to own fire-arms, or carry about his person a pistol or other deadly weapon."[32] By disarming African-Americans, the southern states were able to maintain this "peculiar institution" and a racially-ordered society thriving, with little alternative for blacks, both free and slave, but to submit.

Despite the dismantling of slavery after the Civil War and the passage of the Fourteenth and Fifteenth Amendments granting equality, African-Americans continued to be treated as second-class citizens, particularly in the South. For example, various "Black Codes" were enacted, which prohibited African-Americans from bearing arms.[33] As before, the southern states also passed legislation that prohibited African-Americans from carrying firearms without a license, a requirement to which whites were not subjected.[34] The purpose of such nefarious legislation can be shown as late as 1941, for example, in the Florida Supreme Court case of *Watson v. Stone*, 4 So. 2d 700 (Fla. 1941), which concerned the challenge of an African-American man's conviction for having his firearm in the glove compartment of his automobile. Justice Buford's opinion in this case could just as easily have been

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[32] *Id.* at 1329, quoting *The Reconstruction Amendments' Debates*, 209 (Alfred Avins ed. 1967).

[33] Stephen P. Halbrook, *The Fourteenth Amendment and the Right to Keep and Bear Arms: The Intent of the* Framers, originally published as SENATE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE OF THE JUDICIARY, 97TH CONG., THE RIGHT TO KEEP AND BEAR ARMS ("OTHER VIEWS") 70 (Comm. Print 1982), quoting W.E. B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 167, 172 & 223 (New York 1962).

[34] *Supra* note 26 at 344.

applied to numerous laws passed to discriminate against African-Americans bearing arms:

> The statute was never intended to be applied to the white population and in practice has never been so applied. We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute... there has never been, within my knowledge, any effort of enforce the provisions of this statute as to white people.

Id. at 703.

African-Americans in the northern states, by contrast, were better able to defend themselves against race riots and mob violence through their ownership of firearms, which were not as restricted to them. Private militia groups consisting of African-Americans, such as the African Greys of Providence, Rhode Island, were created to protect African-Americans from racial violence. It is not clear whether such private black militia groups ever marched on a white mob, but that they may never have been called on to do so may be a measure of their success.[35] The importance of arms to African-Americans in order to prevent racial violence is shown by the words of the abolitionist Cassius Marcellus Clay, one of the Republican Party's

[35] *Id*. at 341.

founders: "The pistol and the Bowie knife are to us as sacred as the gown and the pulpit."[36]

As the twentieth century progressed and African-Americans were able to obtain arms more easily in the southern states, they began to resist racial oppression through the ownership and use of firearms in the South as well. During the civil rights marches and protests of the 1960s, firearms in the hands of African-Americans served a useful purpose in protecting civil rights workers and blacks from mob and terrorist activity.[37] For many, according to Professors Robert Cottrol and Raymond T. Diamond, firearm ownership became "a means of survival in the face of private violence and state indifference."[38]

B. Modern-Day Abuses

Today, gun control measures still target African-Americans (and, increasingly, Hispanics) disproportionately, but on a more facially neutral basis. In the late twentieth century, gun control measures moved from having an overtly racist intent to having a discriminatory effect. Facially neutral gun control legislation, however, often has the greatest impact on marginalized groups in society.

Firearm prohibitions deny all law-abiding citizens the right to effective self-defense. However, they have the greatest effect on poor and minority citizens because of the higher rate of crime in poorer communities and the fact that police presence is

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[36] *Supra* note 33, at 69, quoting 7 THE WRITINGS OF CASSIUS MARCELLUS CLAY 257 (H. Greeley ed. 1848).
[37] *Supra* note 26 at 355.
[38] *Id*. at 349.

often lower than in more affluent neighborhoods.[39] The greater exposure to criminality, combined with less state protection, makes the necessity of firearm ownership even more important in poorer communities. Gun control has a far greater impact on these citizens, especially as gun control legislation does not have a tangible impact on criminal ownership of firearms.[40]

The type of firearms targeted for restriction often bears the imprint of discrimination as well, which can be evidenced in the present case. The District of Columbia's ban on handguns is not dissimilar to previous bans on "Saturday night specials"—cheap firearms that are more readily accessible to minorities. Numerous "economic" bans on these types of firearms have previously been passed by several states.[41] Gun control measures that target cheaper firearms, and therefore prevent poor citizens from obtaining a firearm for self-defense, are particularly discriminatory given the realities of these citizens' lives. Such discriminatory impact was emphasized in *Delahanty v. Hinckley*, 686 F. Supp. 920, 928 (D.D.C. 1986):

> The fact is, of course, that while blighted areas may be some of the

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[39] *See* Stefan B. Tahmassebi, *Gun Control and Racism*, 2 Geo. Mason U. Civ. Rts. L. J. 67, 68 (1991).

[40] *See* T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. Crim. L. & Criminology 764 (1995), discussing the volume of illegally available firearms (at 772) and the ease of manufacturing firearms illegally (at 774).

[41] *See* http://www.pbs.org/wgbh/pages/frontline/shows/guns/maps/state.html.

> breeding places of crime, not all residents of are so engaged, and indeed, most persons who live there are lawabiding but have no other choice of location. But they, like their counterparts in other areas of the city, may seek to protect themselves, their families and their property against crime, and indeed, may feel an even greater need to do so since the crime rate in their community may be higher than in other areas of the city. Since one of the reasons they are likely to be living in the "ghetto" may be due to low income or unemployment, it is highly unlikely that they would have the resources or worth to buy an expensive handgun for self defense.

Other legislation has revealed the real purpose behind such "economic" bans, as most notably shown by the Gun Control Act of 1968. This, according to the anti-gun journalist Robert Sherrill, was "passed not to control guns but to control blacks… Congress did not want to do the former but were ashamed to show that their goal was the latter…"[42]

Whatever the intentions of such policies, the reality is that those impacted by them are the same groups that have traditionally been deemed "untrustworthy" to own firearms. Such legislation represents a continuation of the racial trend in

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[42] ROBERT SHERRILL, THE SATURDAY NIGHT SPECIAL 280 (Penguin 1972).

American gun control legislation, but in the legislation's effect rather than its overt intent.

CONCLUSION

The District of Columbia's ban on handguns strikes at the very heart of the fundamental right of the individual—enshrined in the Second Amendment—to keep and bear arms. To argue or insinuate that the Second Amendment is only a collective right is a grave misreading of the Framers' intentions, while subverting the very basis upon which our rights as a free people depends.

For the aforementioned reasons, therefore, the Court should affirm Respondent's claim and uphold the Court of Appeals for the District of Columbia's ruling.

Date: February 7, 2008

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