

No. 07-290

IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM 2007

DISTRICT OF COLUMBIA, et al.,
Petitioners,

v.

Dick Anthony HELLER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

Round #1, 4:00 p.m.
November 5, 2007

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QUESTION PRESENTED

Are the District of Columbia's handgun restrictions constitutional regulations on the individual use of dangerous firearms where the Second Amendment does not confer an individual right to bear arms and does not apply to the District of Columbia?

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

JURISDICTION

The Court has jurisdiction to review cases in the courts of appeals by writ of certiorari. 28 U.S.C. § 1254 (1). The District of Columbia Circuit Court of Appeals reversed and remanded the district court decision on March 9, 2007. This Court granted the District of Columbia's petition for writ of certiorari on August 15, 2007.

STANDARD OF REVIEW

This Court reviews questions of law de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

STATEMENT OF THE CASE

Preliminary Statement

This is an action to address the constitutionality of handgun regulations enacted in the District of Columbia (“District”) to prevent violence and facilitate safe handgun use. On February 10, 2003, Shelly Parker, Dick Anthony Heller, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon [hereinafter Plaintiffs] filed suit against the District and the District Mayor (collectively, “Petitioners”). (J.A. 2-4.) Plaintiffs brought two causes of action: 1) an injunction against three firearms regulations allegedly violating the Second Amendment; and 2) a declaration that the respective regulations constitute a violation of an individual’s Second Amendment right to keep and bear arms. (J.A. 2-4, 8.) On March 14, 2003, Petitioners filed a motion to dismiss. (J.A. 11.) In response, Plaintiffs filed a motion for summary judgment. (J.A. 14.) The district court rejected Plaintiffs’ position, and held the Second Amendment does not grant an individual right to bear arms “separate and apart from Militia use.” *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 107 (D.D.C. 2004). Plaintiffs did not allege association with, or membership in, a militia so the district court granted Petitioners motion to dismiss for failure to state a claim. (J.A. 110.).

Plaintiffs appealed to the District of Columbia Circuit Court of Appeals. (J.A. 36.) Over a strong dissent, a divided court reversed and remanded. *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007). The court denied standing to five of the six plaintiffs, but granted standing to Dick Anthony Heller [hereinafter Respondent] because the District denied

his handgun registration application. *Id.* at 378. A divided panel held the Second Amendment does permit an individual the right to bear arms absent connection to the militia. *Parker*, 478 F.3d at 382. Petitioners sought rehearing en banc, denied by a divided court on May 8, 2007. (J.A. 79.)

Petitioners filed a motion to stay issuance of the mandate, which this Court granted on May 24, 2007. (J.A. 80.) Petitioners subsequently filed a petition for writ of certiorari, which this Court granted on August 15, 2007. (J.A. 110.)

Statement of the Facts

A. Parties

Petitioners are the District of Columbia and the District Mayor in their official capacities. (J.A. 11.) Petitioners seek to reverse the appellate decision enjoining enforcement of the three District gun-safety measures. (J.A. 110.)

Respondent is a resident of the District and wants to keep a handgun for personal use. (J.A. 3.) Respondent applied to register a personal handgun, but Petitioners rejected the application pursuant to D.C. Code section 7-2502.02(a)(4). (J.A.3, 16-17.) Respondent does not allege membership in the District militia, or that other legally available firearms are unsuitable for personal use. (J.A. 2-3.)

B. District Gun-Safety Regulations

The District gun safety regulations at issue are: D.C. Code section 7-2502.02(a)(4) (“Registration Law”), D.C. Code section 7-2507.02 (“Safe-Storage Requirement”), and D.C. Code section 22-4504 (“Licensing Law”). The Registration Law bans registration of dangerous firearms, including handguns. D.C. Code § 7-2502.02(a)(4). The Safe-Storage Requirement requires gun owners to equip firearms with a safety trigger-lock, or similar safety device, while

stored. D.C. Code § 7-2507.02. The Licensing Law prohibits carrying a handgun without a license. D.C. Code § 22-4504.

Current District law permits possession of registered firearms. D.C. Code § 7-2502.01. Aspiring gun owners may register and possess rifles, shotguns, and other firearms despite the safety regulations at issue. D.C. Code § 7-2505.02. The three safety provisions do not prevent existing gun owners from using registered handguns in accordance with District law. *See* D.C. Code § 22-4504; D.C. Code § 7-2502.02(a)(4); D.C. Code § 7-2507.02. Over two hundred firearms remain available for possession and use within the District. (J.A. 69.)

1. The Registration Law and Safe-Storage Requirement

On September 24, 1976, the District of Columbia Congress enacted the Firearms Control Regulations Act of 1975 (“Firearms Control Act”). D.C. Law 1-85, title I, § 101 (1976). The Firearms Control Act received unanimous approval by the District Mayor, the Council of the District of Columbia, and the District of Columbia Committee on the Judiciary and Criminal Law (“Judiciary Committee”) as a necessary measure to reduce handgun-related death and violence in the District. H.R. Comm. on the Judiciary and Criminal Law, 94th Cong., Report on Bill No. 1-164 (1976), *reprinted in the Firearms Control Regulations Act of 1975: Hearing on H.R. Res. 694 Before the H. Comm. on the Dist. of Columbia*, 94th Cong. 24-41 (1976) [hereinafter *Hearing*]. The Firearms Control Act was codified, in relevant part, as D.C. Code sections 7-2502.02(a)(4) and 7-2507.02.

The District Council enacted the Firearms Control Act because existing regulations did not adequately address the District handgun-related violence epidemic. *See Hearing, supra*, at 24-41. The Judiciary Committee informed the Council that handguns contributed disproportionately to crime within the District. *Hearing, supra*, at 24-41. Handguns caused

fifty-four percent of murders in the District, and were used in eighty-eight percent of robberies and ninety-one percent of assaults. *Hearing, supra*, at 25. All rapes implicating firearms involved handguns. *Id.*

The District Council considered the accidental misuse and discharge of firearms potentially curbed through safe-storage regulations. Tr. of Council Session., May 18, 1976 (afternoon) at 31, 33; Jun. 15, 1976 (evening) at 33-34 [hereinafter Session]. The Judiciary Committee reported that gun-related accidents significantly outnumber foiled home intrusions, and children under fourteen account for twenty-five percent of all accidental deaths. *Hearing, supra*, at 25. Furthermore, most murders are committed by law abiding citizens during moments of passion, intoxication, or suicidal impulse. *Id.* at 26. A trigger lock prevents accidental deaths, and averts crimes of passion, but does not ultimately disable firearm use because it can be unlocked in less than one minute. Session, *supra*, at 49.

The purpose behind the Registration and Safe-Storage Laws was twofold: 1) reduce gun-related crimes and deaths within the District and 2) enable the municipal government to monitor firearm traffic within the District. *Hearing, supra*, at 25. These laws aim to accomplish the legislative objectives by: 1) restricting eligibility for possession of firearms; 2) limiting types of permissible firearms for possession within the District due to their disproportionate impact on violence; 3) creating regulations on permissible uses of firearms; and 4) placing more expansive reporting (licensing) duties on firearm owners and dealers to prevent trafficking. *Id.* at 25-26

2. The Licensing Law

In 1994, the District amended D.C. Code section 22-3204, to strengthen restrictions on personal carriage of a handgun without a license. D.C. Code § 22-4504; 1990 District of Columbia Laws 8-120 (Act 8-129). The District amended the legislation because handguns

present a unique public safety concern. Handguns are easily concealed, and contribute disproportionately to violence. 1990 District of Columbia Laws 8-120 (Act 8-129).

SUMMARY OF ARGUMENT

The District's handgun regulations are constitutional because the Second Amendment only protects a collective right to bear arms for a state militia and not a right to bear arms for personal use. The text, purpose, and historical context demonstrate the Framers' intent to exclusively protect a state from a tyrannical federal government through an armed militia. The historical context of firearms regulations, contemporaneous to ratification, indicates the Framers never envisioned the Second Amendment as a limit on regulation of personal firearm use.

This Court in *United States v. Miller* held that a ban on a specific type of firearm does not violate the Second Amendment because the amendment does not bestow an individual right to bear arms absent connection to a state militia. This decision created great reliance in lower courts and the state and federal legislatures on a collective right interpretation of the Second Amendment. If this Court interprets the Second Amendment as an individual right to bear arms, this Court will call into question over 20,000 firearms regulations nationwide. *Stare decisis* requires special force in these circumstances.

Furthermore, the Second Amendment protects a state right to bear arms; as such, it does not apply to the District because the District is not a state. The aim and purpose of the Second Amendment is to ensure protection for the sovereign states from the federal army. The District is the seat of the federal government, and its army is the federal army. It would be nonsensical to apply the Second Amendment: the District cannot logically need to be protected from itself.

Even if this Court defines the District as a state, the Second Amendment does not apply because it has never been incorporated against the states. This Court only incorporates a

provision of the Bill of Rights if the amendment is fundamental to the American scheme of justice and an individual right to bear arms is not a fundamental right.

Assuming the Second Amendment does apply to the District, the District's handgun regulations are constitutional under both the reasonable regulation test and the strict scrutiny test. This Court should follow the majority of state courts and apply the reasonable regulation test because handguns are inherently dangerous, and personal firearm use has always been subject to broad regulation. Applying the reasonable regulation test, the District's regulations are reasonable: each of the District's gun-safety regulations is fair and not arbitrary. The government's interest in public safety far outweighs the District's narrow restrictions on Respondent's right to keep a gun in his home for personal use. Even if this Court were to apply the strict scrutiny test, the regulations are constitutional because of the overwhelming governmental interest in reducing gun-related crimes and death. The regulations are tailored specifically to achieve the purpose, and address only uniquely dangerous firearms: handguns.

ARGUMENT

The text, purpose, legislative history and historical context of the Second Amendment define the right to bear arms as a collective right to arm a state militia, and not an individual right to possess firearms for personal use. The Second Amendment exclusively prohibits federal disarmament of a state military force. The Second Amendment does not relate to, or limit, a local or state government's right to regulate the individual use of firearms. Firearms regulations, throughout a broader historical context, have been initiated, upheld, and widely supported by the people, legislatures, and the judiciary. The very state legislatures that ratified the Second Amendment created and enforced regulatory schemes regarding individual firearm use. Early legislatures did not view the Second Amendment as a limit to state police power.

This Court has created legislative and judicial reliance on a collective right interpretation of the Second Amendment through its collective right jurisprudence. The vast majority of local, state and federal courts, historically and contemporarily, interpret the right to bear arms as a collective right and not an individual right based on this Court's rulings. Consequently, state and federal legislatures have relied on this interpretation. A ruling that the Second Amendment guarantees an individual right to possess firearms for personal use, absent connection with a state militia, will call into question countless well-established state and federal regulatory schemes. In these instances, *stare decisis* requires increased deference.

I. THE SECOND AMENDMENT ONLY PROTECTS A COLLECTIVE RIGHT TO BEAR ARMS FOR THE STATE MILITIA, AND THEREFORE THE DISTRICT OF COLUMBIA'S REGULATIONS ON PERSONAL HANDGUN USE ARE CONSTITUTIONAL.

The text of the Second Amendment reads: "A well-regulated Militia, being necessary to the security of a free State, a right of the people to keep and bear arms, will not be infringed."

U.S. Const. amend. II. The Second Amendment debate revolves around two interpretations of the Second Amendment: the collective right and the individual right theories. Collective right theorists interpret the right to bear arms as a state right to effectuate a state militia. *See generally* H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi.-Kent L. Rev. 403 (2000) [hereinafter Uviller and William].

Individual rights theorists believe the right to bear arms is a right to possess arms for private uses; a right analogous to free speech or freedom of religion. *Id.* A hybrid theory, the "sophisticated collective right theory," is almost identical to the collective right theory in that "individuals *qua* individuals" do not have standing under the Second Amendment but do have a right through their membership in a militia. *Id.* The issue in the instant case hinges on whether or not an individual has a right to bear arms for personal use, absent connection with a militia.

Accordingly, the result under the collective and the sophisticated collective right model is the same for the purposes of the question presented.

A. The Text and Construction of the Second Amendment Indicate a Sole Purpose to Protect the Proper Functioning of a State Militia, Creating an Exclusively Collective Right to Bear Arms for State Militia Purposes.

The purpose of the Second Amendment is articulated in its text: to create a state military check against a federal standing army. The term “militia” in the prefatory clause establishes the context, breadth, and scope of the amendment. The grammatical structure of the Second Amendment expressly limits the right “to keep and bear arms” to the condition in the prefatory clause: the right of the states to maintain a well-regulated militia. The Second Amendment prevents federal disarmament of the state militia, but does not protect disarmament of the citizenry at large.

1. The prefatory clause of the Second Amendment defines the breadth and scope of the right to bear arms as a state right to maintain a “well-regulated” militia.

The Second Amendment creates a state collective right to arm citizens against the federal government through an organized militia. The prefatory clause, “a well-regulated Militia, being necessary to the security of a free state,” defines the scope of the operative clause, “the right of the people to keep and bear arms,” as a right limited to the effective maintenance of a state militia. *See Silveira v. Lockyer*, 312 F.3d 1052, 1068 (9th Cir. 2002).

The military-centric language of the prefatory clause explicitly highlights the “obvious purpose” behind the Second Amendment: to ensure the maintenance and effective functioning of a state militia. *United States v. Miller*, 307 U.S. 174, 178 (1939). The Second Amendment, in its entirety, “must be interpreted and applied with that end in view.” *Id.* The text of a statute is the “best evidence” a statute’s purpose. *W. Va. Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). The term “militia” is used unequivocally throughout the Constitution and the

Declaration of Independence to refer to an organized military body. U.S. Const. art 1, § 8, cls. 12-14; 15; *see also* The Declaration of Independence para. 28 (U.S. 1776); *see also* U.S. Const. amend. V. The language “necessary to the security of a free state” highlights the Framers sole object of the amendment: the state. U.S. Const. amend. II. The adjective *well-regulated* before *militia* highlights that the Framers expected the states to thoroughly regulate the various functions, duties, constitution and requirements of the militia.

The military purpose of the prefatory clause limits and modifies the operative clause for three reasons. First, the prefatory clause, as a “purpose clause,” is necessarily prescriptive and mandatory, not descriptive. *Regan v. Time, Inc.*, 468 U.S. 641, 649 n.5 (1984). Second, the grammatical structure of the amendment mandates that the prefatory clause limit the scope of the operative clause. *See* Uviller and Merkel, *supra*, at 550. The amendment’s structure creates an “indissoluble link” between the clauses, and “grammatically subjects” the operative clause to the prefatory scope. *Id.* Therefore, the military purpose of the prefatory clause modifies the substance and creates the condition of the operative clause. *Id.* An interpretation of the clauses as discrete concepts violates the ordinary rules of English grammar, contrary to established rules of textual interpretation. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). Third, the prefatory clause alone does not create a “right” and therefore cannot stand alone as a discrete statement. *See generally* Uviller & Merkel, *supra*, at 550-51. If read alone, the prefatory clause is entirely superfluous. This contradicts the doctrine of constitutional interpretation against “surplusage”: all words in the statutory command must have meaning. *Marbury v. Madison*, 5 U.S. 137, 174 (1803) (a construction that dismisses words is “inadmissible”); *Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840) (“every word” must have “due force” because “no word was unnecessarily used, or needlessly added”); *Permanent Mission of*

India to the United Nations v. City of N.Y., 127 S. Ct. 2352, 2357 (2007) (an interpretation cannot “ignore” first sentence of a two-sentence statutory provision). The plain meaning of the text of the prefatory clause, the ordinary rules of English grammar, and the Second Amendment’s unique construction, demand that the prefatory clause and operative clause be read together and that the prefatory clause define the text of the operative clause.

The text and military language of the Second Amendment lead to an unambiguous interpretation of the prefatory clause as the “obvious purpose” and condition of the right to bear arms: maintenance of a state militia. *Miller*, 307 U.S. at 178. As the text and grammatical structure dictate, the Second Amendment right to the establishment, maintenance, and proper functioning well-regulated militia, not an individual right to possess firearms.

2. The composition of the state militia was not universal so as to create a *de facto* individual right to possess firearms.

A term militia historically represented a well-regulated, discriminating military body, and not the general public. The militia disqualified a majority of the country’s adult citizens—men over forty-five, the infirm of all ages, and all women—from participation. *See generally* Saul Cornell, *Common Place or Anachronism: The Standard Model, the Second Amendment and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Comment. 221, 235 (1999); *see also* Carl T. Bogus, *What does the Second Amendment Restrict? A Collective Right Analysis*, 18 Const. Comment. 485, 488 (2001). Some militias were more exclusive, proscribing participation by felons, drunkards, political rebels, and the blind. *Id.* Each state determined who was excused from service, how militia-members would be armed, and what weaponry citizens were required to procure. *Id.* A group of men did not become a militia unless organized by the state in the common defense. *See generally* Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 Chi.-Kent L. Rev. 883 (2006). This

distinction was clear at the ratification debates: “when a militia is formed; the people in general may be disarmed.” 2 *Documentary History of the Ratification of the Constitution* 509 (Merrill Jenson, ed., 1976) (John Smilie, at the Pennsylvania State Convention, Dec. 6, 1787).

Although a state militia drew from a broad population, it was not indiscriminate. Participation in the militia was limited and exclusive. Therefore the right to arm a militia was not synonymous with a *de facto* right to arm the unorganized citizenry at large.

3. Even if the prefatory clause does not modify the operative clause, the term “keep and bear arms” connotes the exclusively military nature of the right to bear arms.

The operative clause text is inconsistent with an individual right interpretation even if the prefatory clause does not modify the operative clause. The copious official records of the ratification debates reveal the term “bear arms” was used exclusively in relation to the military. *A Century of Lawmaking*, Library of Congress, available at <http://lcweb2.loc.gov/cgi-bin/query> (last visited Oct. 18, 2007) [hereinafter *A Century of Lawmaking*]. The word “arms” in the Framers era had a uniquely military meaning and did not encompass the personal use of firearms: “arms” were “weapons of offence generally made use of *in war*” whereas “weapons” referred to “instruments of other kinds.” *Oxford English Dictionary* 634 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (citing a 1794 dictionary) (emphasis added).

Nineteenth century judges always interpreted the term “bear arms” in a purely military context. *Aymette v. State*, 21 Tenn. (2 Hump.) 154, 161 (1840) (“[t]he phrase ‘bear’ arms . . . has a military sense and no other . . . a man in the pursuit of deer, elk and buffaloes, might carry his rifle every day for forty years, and, yet, it would never be said of him that he had *borne* arms.”) (emphasis in original); *English v. State*, 35 Tex. 473, 476 (1873) (the word ‘arms’ . . . in the Constitution . . . refers to the arms of a militiaman or soldier); *Hill v. Georgia*, 53 Ga.472 (1874)

(“[t]he language of the ... [constitution] guarantees only the right to keep and bear the ‘arms’ necessary for a militiaman.”); *In re Ramirez*, 193 Cal. 633, 651-52 (1924) (“[the Second Amendment] refers only to the bearing of arms by the citizens in defense of a common cause”); *see generally State v. Buzzard*, 4 Ark. 18 (1842). The term “bear arms” had a purely military meaning when enacted, and therefore the text of the operative clause supports a collective right interpretation of the Second Amendment.

The popular usage of the term “bear arms” at ratification exclusively supports the collective right interpretation of the Second Amendment. This Court determines the meaning of a word using the popular usage of a term at the time of adoption. *Permanent Mission*, 127 S. Ct. at 2356. Only a modern reader could understand the phrase “bear arms” as encompassing individual gun ownership unrelated to military use. An individual did not, at the time of ratification, “bear arms” for personal use. This is true regardless of the military condition in the prefatory clause. The operative clause does not logically protect an individual right to possess firearms for personal use in light of the exclusively military meaning of the text.

The word “keep” in the phrase “keep and bear arms” does not broaden the scope of the right beyond military weapons for the militia. The statutory language is conjunctive, not disjunctive; therefore, “keep” and “bear” must be read together. *City of Rome v. United States*, 446 U.S. 156, 172 (1980); *Crooks v. Harrelson*, 282 U.S. 55, 58 (1930). Traditional interpretive canons limit the meaning of the general word, here “keep,” to the specific meaning of the word used in conjunction with it. *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). The term “bear” was never used in connection with the personal use of firearms, and as a limited word with specific meaning, this term defines the breadth of the term “keep.” *Id.*

The text of the operative clause articulates the purpose of the Second Amendment: to protect the state militia from federal disarmament. The text of the operative clause alone highlights the purely military purpose of the Second Amendment. The phrase “bear arms” was never used in connection with individual firearm use. Furthermore, the term militia, a discriminating military body, thoroughly regulated by the states, was not a synonym for all citizens. A right to arm a state militia, therefore, was not a *de facto* right for the general public to keep and bear arms for personal use.

B. The Historical Context and Legislative History of the Second Amendment Unambiguously Support a Collective Rights Interpretation of the Amendment.

This Court looks to the historical context of an enactment to confirm a textual interpretation. *Permanent Mission*, 127 S. Ct. at 2358 n.2. A purpose and scope analysis of an enactment must consider the “events and passions of the time at which it was enacted.” *District of Columbia v. Carter*, 409 U.S. 418, 425 (1973); *City of Newport v. Fact Concerts*, 453 U.S. 247, 258 (1981). The “events and passions” surrounding the Second Amendment reiterate that the Second Amendment did not confer an individual right to possess firearms for two reasons: First, the legislative history of the Second Amendment demonstrates a textual evolution to actively limit the right to bear arms. Second, the historical context of the Second Amendment highlights the Framers’ intent to create a military check-and-balance between the sovereign states and the federal government. Both the legislative history of the text and the historical context of the amendment demand a collective right interpretation.

1. The legislative history of the Second Amendment text reveals the Framers’ intent to create a collective right to bear arms for service in a state militia and exclude individual firearm use from protection under the Second Amendment.

The text of the Second Amendment was not adopted in a haphazard, isolated, or extra-legislative process. To the contrary, the text was decidedly selected, through a deliberative

process, after a series of well-attended debates. Therefore, the text must be afforded a meaning faithful to the deliberate intention of the Framers. Therefore, the text, and not the statements of individual legislators during the enactment process, is controlling. *Casey*, 499 U.S. at 98-99.

The evolution of the text highlights the Framers' intent to link the right to bear arms to the armament of a state militia, and specifically limit the right to military. Over 100 hundred different textual variants of the Second Amendment were suggested during the eight state ratification debates. See Bernard Schwarz, *The Great Rights of Mankind: A History of the Bill of Rights, 1776-1791* 329 (1955). James Madison considered the versions, and proposed the original draft of the Second Amendment on June 8, 1789 to Congress:

[T]he 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 Annals of Cong. 451 (Joseph Gales & William Seaton eds., 1789). The select committee made noteworthy changes to the original text prior to ratification. First, the committee moved "well-regulated militia" to the front of the sentence, clarifying the purpose of the amendment. *Id.* at 730-44. Second, they substituted the word "country" for "State." *Id.* This careful word choice emphasizes the Framers' intent to create a state, and not an individual, right in the Second Amendment.

Both the House and the Senate considered other textual versions of the Second Amendment but expressly rejected them. *Id.* at 451. The Free Exercise Clause, the Free Press and Speech Clauses, the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments were all incorporated, almost word-for-word from the proposals resulting from the Pennsylvania Ratifying Convention. Paul Finkelman, *Fresh Looks: "A Well-regulated Militia": The Second Amendment in Historical Perspective*, 76 Chi.-Kent. L. Rev. 195, 207 (2000) [hereinafter

Finkelman]. The draft of the Second Amendment, however, was emphatically rejected because of its connection with rights of self-defense and hunting. *See* Finkelman, *supra*, at 207.

Therefore, the deliberate intention of the Framers was to create a collective right to bear arms.

2. The historical context of the Bill of Rights underscores the Framers' intent to arm the states against a tyrannical federal government and not the individual for personal use.

The sole purpose behind the Second Amendment was to prevent the federal government from disarming the state militia. U.S. Advisory Comm'n on Intergovernmental Relations, Pub. No. A-124, *The National Guard: Defending the Nation and the States* 8 (1993) (footnote omitted) ("Defending the Nation"). Early America consisted of two primary political entities, the Federalists and the Antifederalists. Uviller & Merkel, *supra*, at 474. The Federalists favored a stronger federal government, and the Antifederalists favored extensive state sovereignty. *Id.* at 475-78. The Bill of Rights, including the Second Amendment, was written to quell Antifederalist concerns about a tyrannical federal government. *See generally* Finkelman, *supra*. After constitutional ratification, the Antifederalists lobbied for amendments focused on limiting the potentially over-broad federal power created by the constitution. *Id.* Both the Antifederalists and Federalists never considered creating an individual right to possess firearms. *Id.*

At the time of ratification, traditional Antifederalist ideology considered a standing federal army a threat to the liberties of a free people. *See generally* John Phillip Reid, *In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution* (1981). They considered a militia the "only stable security of a free government." 1 *The Papers of George Mason* 212 (Robert A. Rutland ed., 1970). The Constitution, in contrast, created a standing army. U.S. Const. art. 1, § 8, cls. 11-16. Antifederalists feared the Federalists might disarm the state militias in favor of concentrating

military power in the national standing army and wanted to strictly subordinate federal military power to the states. *See* Finkelman, *supra*, at 214; *Pa. Const. of 1776, A Declaration of Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania art. XIII*, reprinted in *5 The Federal and State Constitutions Colonial Charters, and Other Organic Laws* 3082, 3083 (Francis Newton Thorpe ed., 1909). Consequently, the Antifederalists urged ratification of the Second Amendment to prevent the federal concentration of military power. Finkleman, *supra*, at 223-26.

George Mason, the most prominent Antifederalist leader, never mentioned an individual right to possess firearms in his personal writings. In the entire list of his “objections,” Mason never discussed a need to secure an individual right to possess firearms in the Bill of Rights. *See* George Mason, *Objections to this Constitution of Government*, reprinted in *2 The Records of the Federal Convention of 1787*, 637, 637-40 (Max Farrand ed., 1911). Mason did, however, explicitly indicate a fear of a federal threat to state sovereignty. *Id.* Notably, Mason’s enumerated list of objections constituted nearly all of the major principles that eventually formed the Bill of Rights. *Compare* Mason *supra*; The Bill of Rights, U.S. Const. amends. I-IV (U.S. 1776). The primary advocate of the Bill of Rights promoted state sovereignty, but never addressed the individual right to bear arms. This indicates the Antifederalist’s lack of intent to create an individual right to bear arms through the Second Amendment.

The copious legislative records from the state ratifications debates demonstrate active measures tying the Second Amendment to the maintenance of the militia, and rejecting individual gun use. *See* Finkelman, *supra*, at 230; *see generally* A Century of Law Making, *supra*. The states considered and intentionally rejected many of the proposed amendments put forth by the original states. *See* Finkelman, *supra*, at 207. Formulations of the Second Amendment that would have constitutionalized a private right to arms were affirmatively rejected by the states, and not even discussed in the later ratification debates. For example,

Pennsylvania Antifederalists proposed four discrete amendments related to weapon possession: the right of self protection through ownership of weapons, the right to serve in the militia, the right to hunt and fish, and the prevention of a standing army—the Second Amendment analogue. *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, Pa. Packet & Daily Advertiser, Dec. 18, 1787, reprinted in 2 *The Documentary History of the Ratification of the Constitution* 618, 623-24 (Merrill Jensen ed., 1976). The Second Amendment analogue was ratified by the state, and not the broader provisions. See Finkelman, *supra*, at 207. New Hampshire was the only state to ratify a prohibition on congressional disarmament disconnected from the militia. *Id.* at 198-204. Mason, the states, the House, and Senate approved the Second Amendment “right to bear arms” as intentionally qualified by the terms “well-regulated militia.” U.S. Const. amend. II. As such, the legislative records reject broadening the scope to include an individual right to possess firearms.

The records of the congressional ratification debates, unlike the state ratification debates, are completely and significantly silent regarding individual firearm use. After the state ratification debates, the Second Amendment was never discussed in connection with an individual right to bear arms. See generally Finkelman, *supra*; *A Century of Lawmaking, supra*.

Prior to the congressional ratification debates, the states emphatically rejected Second Amendment proposals to broaden the right to bear arms beyond the militia context. The Second Amendment was discussed and debated at the subsequent congressional ratification debates, but the Framers never mentioned individual firearm use in connection with the Second Amendment. If the Framers contemplated an individual right to bear arms as central, or even connected to, the Second Amendment, the voluminous legislative records would undoubtedly make mention to the individual and private use of firearms.

The Framers did not create the Second Amendment with the purpose to protect an individual right to bear arms; to the contrary, in considering the state ratified proposals, the

Framers never considered an individual right to bear arms. Even if possession of firearms were commonplace at the time of ratification, common practice does not equate with constitutionally protected conduct. The historical context and legislative history of the Second Amendment demonstrate a purpose to protect the states from federal disarmament, not an intent to create an individual right to bear arms for personal use.

C. The Individual Rights Theory Is Inconsistent with the Broader Historical Context of National, State, and Local Firearms Regulations.

Firearms, including handguns, have been regulated for centuries. There are over 20,000 current firearms regulations nationwide, enacted through local, state, and federal legislatures. Firearms regulations were enacted contemporaneously with ratification of the Second Amendment. Time, place, and manner restrictions on individual firearm use have been consistently enacted, upheld, and popularly supported. More restrictive regulations, including prohibitions on certain types of weapons, have also been upheld. This Court ruled in *Miller* that the Second Amendment was enacted with the “obvious purpose” to effectuate a state militia. 307 U.S. at 178. Legislatures have consistently interpreted this jurisprudence to limit federal disarmament of state militias, but never as an impediment to regulation on individual firearm use. Firearms regulations have been enacted under color of state police power consistently and constitutionally for centuries.

1. Firearms were heavily regulated contemporaneously with Second Amendment ratification because regulation on individual firearm use remained within the state police powers.

Firearms regulations were prevalent throughout the eighteenth and nineteenth centuries and therefore no individual right to possess a firearm can be found at the time the Second Amendment was adopted. Restrictive regulations of individual firearm use, on citizens and non-

citizens alike, were common and accepted. *See* Saul Cornell & Nathan DeDino, “A Well-Regulated Right”: *The Early American Origins of Gun Control, Symposium: The Second Amendment and the Future of Gun Control*, 73 *Fordham L. Rev.* 487, 501-16 (2004) [hereinafter *Origins of Gun Control*]. As an example, many early states broadly disarmed those likely to “disrupt” society. *See* N.J. Laws, § 2 1799 N.J. Laws at 562; § 1, 1797 N.J. Laws at 179 (giving state broad power to disarm “disorderly persons” and “armed [citizen] assemblies”). The Pennsylvania Test Act of 1777 disarmed forty percent of the citizenry. *See Origins of Gun Control, supra*. State legislatures used internal state police power to regulate the time, manner, and place in which Americans could use their guns. Such provisions limited acceptable uses of arms, who could possess firearms, what type of firearms could be possessed, regulated the way owners had to keep and store arms, and regulated when they could be used. *See generally Origins of Gun Control, supra; see* Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627 (concerning the safe storage of gunpowder). State provisions fined militiamen who used public arms for private uses. *See Origins of Gun Control, supra*, at 502-16. Early colonial regulation specifically prohibited the use, and possession, of handguns. *See* Act of June 10, 1799, ch. DCCCVI, § 2, 1799 N.J. Laws 561, 562 (punishing persons who were apprehended while carrying offensive weapons “such as” pistols).

Nineteenth century restrictions regulated the right to carry concealed weapons, sell weapons, and created outright prohibitions on certain types of weapons. *See generally* Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulations, and the Lessons of History*, 25 *Law & Hist. Rev.* 197 [hereinafter *Firearms Regulations*]. Although military weapons enjoyed broader protection, the ability to possess arms of military use was consistently limited in nature. *See* Act of Dec. 25, 1837, 1837 Ga. Laws 90 (prohibiting the sale of pistols). Even if the Second Amendment does provide

expanded regulation for arms related to and used in conjunction with military use, pistols and handguns, based on these provisions, were not “related” to the military according to colonial and early state governments. *See generally Firearms Regulations, supra*. Furthermore, personal use of any weapon was freely and strictly regulated. *Id.*

These restrictive firearms regulations indicate that the early colonial state legislatures, the very supporters of the Second Amendment, did not consider the Second Amendment a restriction on state regulation of individual firearm use. As this Court declared, the Second Amendment does not “restrict the traditional police powers of the state” to regulate firearms. *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886). Decades after ratification, the United States saw increased, not decreased, levels of regulation. Freedom of Speech and Freedom of Religion, were never regulated to the same degree, or granted such a limited interpretation, as the right to bear arms. The Second Amendment was rarely, if ever, interpreted by early state courts as conferring an individual right to possess firearms; gun-control regulation was within the broad purview of state legislators to regulate as required for public safety. *See Lucilius Emery, The Constitutional Right to Keep and Bear Arms* 28 Harv. L. Rev. 473, 476 (1915). Even if military arms received broader protection, handguns were not considered military weapons within the early colonies. After the Second Amendment, state governments remained free and empowered to regulate the individual firearms use under the police power; therefore, there is no support of an individual right to bear arms under the Second Amendment.

D. This Court Has Created Legislative and Judicial Reliance on a Collective Right Interpretation Through this Court’s Jurisprudence and a Change of Course Would Wreak Havoc on Countless State and Federal Regulatory Schemes.

For over sixty-five years, this Court has not revisited the well-established collective right jurisprudence. The vast majority of lower state and federal courts interpret this Court’s jurisprudence as supporting a collective right interpretation of the Second Amendment. Therefore, this Court has created a reliance on the collective right interpretation of the Second Amendment within the state and national judiciaries and legislatures. An individual rights

interpretation would disrupt the over 20,000 existing firearms regulatory schemes. Strong *stare decisis* is required to avoid disrupting vast firearms regulatory schemes.

1. This Court has consistently held that the Second Amendment guarantees an exclusively collective right to bear arms for a militia purpose.

This Court historically created, and continues to support, collective right jurisprudence. This Court unanimously held that an outright prohibition on a type of firearm is constitutional if the firearm does not bear a “reasonable relationship to the preservation or efficiency of a well-regulated militia.” *United States v. Miller*, 307 U.S. 174, 179 (1939). The Second Amendment was specifically adopted “with the obvious purpose” to assure and render effective the state militia, and “it must be interpreted and applied with that end in view.” *Miller*, 307 U.S. at 179. *Miller* articulates the relationship between the “right to bear arms” and the state militia. Furthermore, *Miller* concludes, at a minimum, that some weapons are definitely beyond the purview of Second Amendment protection. *Id.* at 179.

This Court’s only significant post-*Miller* reference corroborates a collective right interpretation of *Miller*. See *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980). This Court dismissed a Second Amendment challenge to a prohibition of firearm possession within a certain class of individuals because outright bans on individual use do not “trench upon constitutionally protected liberties.” *Id.* This Court cited lower court collective right decisions with approval. *Id.* This Court’s pre-*Miller* precedent also supports the collective right interpretation of the Second Amendment. In *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), this Court held the Second Amendment “has no other effect” than to restrict the regulatory powers of the “national” government. The Court also held that there is no individual right to possess firearms granted within the Constitution. *Id.* *Cruikshank* highlighted that “municipal” and “state” governments, in contrast, are empowered to regulate gun control laws. *Id.* at 543. *Miller* did not

conflict with or expand this notion. *Presser* emphatically dismissed the notion that the Second Amendment limits non-federal regulations of firearms: the Second Amendment “is a limitation only upon the power of congress and the national government, and not upon the state.” 116 U.S. at 265. Another unanimous Supreme Court rejected a Texas law forbidding the carrying of certain weapons. *Miller v. Texas*, 153 U.S. 535 (1894). This Court dismissed appellant’s Second Amendment cause of action because it “is well settled” that the Second Amendment “has no reference” to state firearms regulations. *Id.* at 538.

This Court has rarely spoken on the scope of the Second Amendment. However, throughout this Court’s Second Amendment jurisprudence, this Court has consistently interpreted the Second Amendment as a collective right to arm a state militia, and not an individual right to possess firearms for personal use. In the above cases, this Court upheld broad firearms regulations, and consistently emphasized the military connection and purpose behind the Second Amendment. *Heller*’s personal use of a firearm is not protected by this Court’s existing jurisprudence on the Second Amendment.

2. This Court has created state and federal, judicial and legislative reliance on a collective rights interpretation of the Second Amendment.

If this Court alters its well-established, locally and federally integrated interpretation of the Second Amendment as a collective right, the decision will wreak havoc on numerous existing firearms regulations throughout the country. Interpreting the Second Amendment as an unfettered individual right to possess firearms for personal use, will called into question over 20,000 federal and state firearms regulations. *Id.*; *see e.g.*, 18 U.S.C. § 922 (licensing and registration requirements; outright bans on specific firearms, including assault rifles); *see also* Cal. Pen. Code § 12280 (West 2007) (requiring trigger locks); Chi. Mun. Ord. § 8-20 (1999) (outright ban on handguns) (analogous Illinois provision constitutional in *Kalodimos v. Vill. of*

Morton Grove, 103 Ill. 2d 483 (Ill. 1984)); Colo. Const. art. II, § 13 (bans possession, sale, and manufacture of assault weapons). Nearly all firearms regulations will be disrupted if this Court changes course on its Second Amendment jurisprudence.

State and Federal courts consistently and repeatedly interpret the Second Amendment as a collective right, citing this Court's Second Amendment precedent. Most federal appellate courts have considered and concluded that the Second Amendment only confers a collective right to arm a state militia. *See e.g. Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Rybar*, 103 F.3d 273, 286 (3d. Cir. 1996). The vast majority of state courts echo the federal court interpretation of a collective right to bear arms. *See e.g., Commonwealth v. Davis*, 369 Mass. 886 (1976); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980). This Court has declined to revise or inform this consistent interpretive trend. To the contrary, this Court has denied of certiorari for the past sixty-five years. (J.A. 25.) Consequently, state and federal legislatures have relied on this Court's collective right interpretation as well-settled precedent in enacting complex firearms regulations. *See e.g.*, 18 U.S.C. § 921; *see also Compendium of Firearms Laws: The National Rifle Association Institute for Legislative Action*, available at <http://www.nrila.org/media/PDFs/Compendium.pdf> (last visited Oct. 11, 2007).

Stare Decisis weighs heavily in any area of statutory construction because it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the perceived integrity of the judicial process. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Stare Decisis* has added force when the legislature and citizens have acted in reliance on a previous decision, and where, as in this instance, the decision would "dislodge expectations" and require "extensive legal response." *Hilton v. So. Carolina*

Pub. Railways Com'n, 502 U.S. 197, 202 (1991). The fact that a principle or case had been followed and cited numerous times by this Court and lower courts is evidence of well-established legal precedent. *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2731 (2007) (Breyer, J., dissenting). Those who wish to challenge a well-established legal precedent bear a higher burden of proof. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

In the wake of increasing violence, legislatures have enacted extensive regulations on the time, place, and manner in which firearms may be used. These regulations are almost all analogues to the provisions in the District. State and federal judiciaries have faithfully interpreted this Court's ruling in *Miller* as a collective right interpretation. A change of course in Second Amendment jurisprudence would cause considerable legislative hurdles: it would disrupt over 20,000 firearms regulations, and alter the expectations of the vast majority of courts, legislatures, and people that have urged firearms regulations as a necessary solution to increased firearm violence.

II. THE SECOND AMENDMENT DOES NOT APPLY TO THE DISTRICT OF COLUMBIA BECAUSE THE DISTRICT IS NOT A STATE.

The Second Amendment does not apply to the District for three reasons. First, the Second Amendment only applies to states, and the District is not a state. *See Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 238 (D.D.C. 2004); *see also Sandidge v. United States*, 520 A.2d 1057, 1059 (1987) (Nebeker, J., concurring). Further, the Second Amendment's "character and aim" is to protect states from a tyrannical federal army and thus it is nonsensical to protect the District, the head of the federal government, from itself. Last, even if the District is a state within the meaning of the Second Amendment, the Second Amendment does not apply because it has never been incorporated against the states and should not be incorporated because it does not meet this Court's doctrinal requirements for incorporation.

A. The Second Amendment Does not Apply to the District Because the Second Amendment Protects a State Right to Keep an Armed Militia, and the District of Columbia Is not a State.

The Framers, including James Madison, never viewed the District as the constitutional equivalent of the state. *Adams v. Clinton*, 90 F. Supp. 2d 35, 50 n.25 (D.C. Cir. 2000) *affirmed*, 531 U.S. 941 (2000) (citing *The Federalist No. 43*) (James Madison). The District is not a state, and therefore the Second Amendment does not apply. The District, unlike a state, is the seat of the national government. U.S. Const. art 1, § 8, cl. 17. This Court frequently acknowledges the unique nature of the District. *See District of Columbia v. Murphy*, 314 U.S. 441, 452 (1941) (the District as an “exceptional community”); *O’Donoghue v. United States*, 289 U.S. 516, 538-39 (1933) (the District is “the very heart... of the Union itself” to be maintained as the ‘permanent’” house of all the “supreme” federal departments governing the forty-eight states). Additionally, every circuit court, except for the Second and Fifth Circuit, has held that the District is not considered a state under the Second Amendment. *See Seegars, supra*, at 239, *aff’d* in part, *rev’d* in part *sub nom.*; *Seegars v. Gonzales*, 396 F.3d 1248, *reh’g en banc denied*, 413 F.3d 1 (2005); *see also Silveira*, 312 F.3d at 1076.

Further, Congress has unique control over the District, including legislative powers otherwise exclusively endowed to state government. *Carter*, 409 U.S. 418, 430 (1973). As an example, Congress has plenary power over the District and its officials. *Id.* at 429. Consequently, Congress has local, and not just federal, jurisdiction over the District. *O’Donoghue*, 289 U.S. at 538-39.

The unique characteristics of the District affect the citizens of the District and the District’s local government. For example, the citizens of the District have no constitutional right to vote for members of Congress, despite this Court’s declaration that voting is one of the most

fundamental rights. *Adams*, 90 F. Supp. 2d at 46-50, 84, 101 (supporting conclusion with “text” of Constitution, status of the District, and “purpose” of the provision *at the time of* the District’s creation) (emphasis added). This Court adamantly dismissed a theory of all constitutional rights for District citizens via a theory of “residual” state citizenship. *Id.*

The Second Amendment is not an anomaly in its inapplicability to the District. Although the Constitution applies to the District, several amendments and constitutional provisions do not apply because of the District’s unique status as a non-state entity. The District remains under the “aegis of the Constitution.” *O’Donoghue*, 289 U.S. at 541. However, the Tenth, Eleventh, and Fourteenth Amendments all do not apply to the District. *See Carter*, 409 U.S. at 424, citing *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954) (Fourteenth Amendment does not apply to the District because it is not a ‘State’); *LaShawn v. Barry*, 87 F.3d 1389, 1384 (D.C. Cir. 1996) (the Eleventh Amendment does not apply to the District because it is not a ‘State’); *Lee v. Flintkote Co.*, 593 F. 2d 1275, 1278 n.14 (D.C. Cir. 1979) (Tenth Amendment, reserving power to the “states,” does not apply in the District because it is not a state).

Constitutional provisions do not apply to the District if they are specific, unique, or exclusively applicable to the sovereign states or the federal government. The Second Amendment only limits the federal government, and therefore does not apply to the District.

B. The “Character and Aim” of the Second Amendment Is to Protect States from the Federal Army, and Therefore the Second Amendment Does not Apply to the District.

Whether the District constitutes a ‘state’ within the meaning of a constitutional provision depends upon the “character and aim” of the specific provision. *Carter*, 409 U.S. at 420; *see also Downes v. Bidwell*, 182 U.S. 244, 292 (1901) (application to states requires determination of whether or not “provision relied on is applicable”). This Court considers the words, context, and purposes of a law in order to make this categorization. *Carter*, 409 U.S. at 420; *see also Atlantic*

Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932) (if words have several meanings the Court should apply the meaning that “meets the purposes of the law”). The Second Amendment—a collective right to arm a state militia against the federal government—expressly and logically only applies to the sovereign states.

1. The text “security of a free state” limits application of the Second Amendment to the sovereign states.

The text of Second Amendment protects a state right to protect the “free state” through a civilian militia from an oppressive federal government. *See Seegars*, 297 F. Supp. 2d at 238. The prefatory clause of the Second Amendment, “a well-regulated Militia, being necessary to the security of a free State,” affirms the Amendment’s “obvious purpose” to limit federal interference with state militias. *Miller*, 307 U.S. at 178; *see also Casey*, 499 U.S. at 98-99. Further, the text “free state” exclusively refers to individual sovereign states, and excludes other territorial entities. *See Hepburn & Dundas v. Ellzey*, 6 U.S. 445, 452-53 (1805); *see De Geofroy v. Riggs*, 133 U.S. 258, 269 (1890); *compare Hurd v. Hodge*, 334 U.S. 24, 21 (1984) (statutory text specifically provides for “all citizens ... in every state *and territory*” should apply to the District) (emphasis added); *Talbott v. Board of Com’rs of Silver Bow County*, 129 U.S. 438, 443 (1891) (section providing compensation to examines ‘in the states or Oregon, California, and Nevada, or in the territories’ should apply through the entire territorial limits of the country). Further, the word “state” is used 119 times throughout the Constitution, and 116 times the term unambiguously refers to the sovereign states of the union. *See Parker*, 478 F.3d at 405 (citing the U.S. Const. in its entirety). Where the language of an enactment is clear, the words employed are to be taken as the final expression of the meaning intended. *United States v. Mo. Pac. R. R. Co.*, 278 U.S. 269, 278 (1929). Because the word state only refers to the states of the union, the word “state” does not include the District.

2. The historical context of the Second Amendment, and contemporaneous fear of a standing federal army, indicates that the Second Amendment was never intended to apply to the District.

The context of the Second Amendment exemplifies a state-specific analysis of the amendment. The Antifederalist political minority feared an “intolerable threat” to the sovereignty of the “separate states.” *See Perpich v. Dep’t of Def.*, 496 U.S. 334, 340 (1990). This led to compromises at the Constitutional Convention and to the creation Second Amendment. *Id.* The Second Amendment, providing the sovereign states with a military check against an armed federal government, quelled Antifederalist fear of a standing federal army. *Id.* The Antifederalists never contemplated, nor were they concerned with, arming the seat of the federal government against itself. The Framers deliberately altered the text of the Second Amendment, changing the word “country” to “state,” to clarify that the Amendment applied to the states, and not the larger polity of the country, the territories, or the citizens at large. *1 Annals of Cong.* at 730-44. Therefore, the drafters intended the Second Amendment “state” to refer solely to the states and not the District.

3. The purpose of the amendment, to protect a “free state” from the federal government, renders application to the District nonsensical.

The purpose of the amendment, protecting a “free state” from the federal government through a state military force, renders application to the District illogical. The militia of the District is the federal government itself. *See Seegars*, 297 F. Supp. 2d at 238. Applying the Second Amendment to the District would violate the absurdity doctrine and render the Second Amendment meaningless. *See Sturges v. Crownshield*, 17 U.S. (4 Wheat.) 122, 203 (1819); *see also Clinton v. City of N.Y.*, 524 U.S. 417, 429 (1998). The District, as the seat of the federal government, cannot logically need to be protected from itself. *Id.*

This Court should not define the District as a ‘state’ for the purposes of the Second Amendment because the “character and aim” of the provision does not support this analysis. The three elements of a “character and aim” analysis, the text, context, and purpose, do not support an interpretation of the District as a ‘state.’ In contrast, the Second Amendment, textually, contextually, and purposively, makes clear that the Second Amendment never applied, nor was it intended to apply, to the District. Application to the District is illogical, deviates from the purpose of the Amendment, and would produce absurd results. Such an interpretation must be avoided where other interpretations, consistent with legislative purpose and context, are available. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982). The Second Amendment applies to each “free state,” as intended with the character and aim of the provision, but does not apply to the District.

C. Even if the District Is a ‘State’ Within the Meaning of the Second Amendment, the Second Amendment Should not Be Incorporated Because the Individual Right to Possess Weapons Is not a Fundamental Right.

The Second Amendment fails this Court’s requirements for incorporation, and therefore should not be incorporated against the states. This Court endorses selective, not total, incorporation of the Bill of Rights against the states. *Palko v. Connecticut*, 302 U.S. 319, 323 (1937). This Court incorporates a right against a state only if the right is fundamental to the “American scheme of justice.” *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). In *Duncan*, this Court established a four factor test to evaluate whether a provision is fundamental, and therefore should be incorporated against the states. *Id.* This Court considers the history of the right, the existence of the right in the original state constitutions, “popular support” for the right, and the purposes served by the right in determining whether a right is fundamental. *Id.* at 148-49; *see* David A. Lieber, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second*

Amendment from the Court's Modern Incorporation Doctrine, 95 J. Crim. L. & Criminology 1079, 1103 (2005) [hereinafter Lieber]. An amendment only provides protection against state regulation once it becomes incorporated against the state. *Benton v. Maryland*, 395 U.S. 784, 795 (1969). Otherwise, only the federal government is limited by the provision. *Id.*

1. There is no historical evidence supporting an individual right to possess firearms.

The history of the Second Amendment does not support an individual right to possess firearms. The Second Amendment was ratified to “protect the states against a potentially oppressive federal government,” not to grant an individual right to possess firearms. *Seegars*, 297 F. Supp. 2d at 230. Further, the Framers never mentioned individual firearm use in connection with the Second Amendment, and the congressional ratification debates are completely silent regarding extra-military firearm use. *See Finkelman, supra*, at 208. In contrast, the Second Amendment was discussed and debated at length, with profuse references a purpose of protecting the sovereign states from the federal standing army. *Id.* Furthermore, the states emphatically rejected versions of the amendment that would have created an individual right to possess firearms. *Id.* Prior to establishment of the incorporation doctrine, this Court acknowledged the Second Amendment had not historically applied to the states. *See Cruikshank*, 92 U.S. at 553 (“[the Second Amendment] is one of the amendments that has no other effect than to restrict the powers of the national government”).

To date, this Court has chosen not to incorporate the Second Amendment against the states. Even if firearm use were common throughout the era of ratification, individual firearm use was not the purpose, nor was it a right, granted by the Second Amendment. Congress never considered nor acknowledged individual firearm use while drafting the amendment.

2. An individual right to possess firearms unrelated to militia service only existed in one of the original state constitutions.

The overwhelming majority of the original state constitutions did not create or protect an individual right to possess firearms for personal use. In *Duncan*, this Court incorporated the right to a jury trial in criminal matters because twelve of the thirteen original state constitutions embraced the right. 391 U.S. at 153. The individual right to possess firearms, in contrast, lacks this “critical mass” of state support at the time of ratification. See Lieber, *supra*, at 1112. Of the thirteen original state constitutions, only one state constitution protected an individual right to possess firearms unrelated to military use. *Id.* Every other state constitution either provided firearm use only in connection to arming the militia or in the “common defense.” Lieber, *supra*, at 1112. One state does not constitute a “critical mass,” and therefore the individual right to possess firearms was not, and remains, unrelated to the American scheme of justice. Based on this Court’s incorporation doctrine analysis, the right was therefore not fundamental to the “American scheme of justice.”

3. The states have widely regulated firearms possession and use, and therefore the right is not fundamental to the American scheme of justice.

Unlike the right to a jury trial, or freedom of speech, the states and federal government have repeatedly and substantively modified the right to possess firearms. In *Duncan*, this Court noted that, at the time of consideration, state laws continued to guarantee a right to a jury, no state had dispensed with the right, and there were no procedural trends to move away from the right. 391 U.S. at 154. This Court valued these indices as support that a right to a jury trial is a fundamental right. In contrast, an individual right to possess firearms has been widely regulated at the local, state, and national level. There are at least 20,000 existing firearms regulations, ranging from licensing laws, to outright bans on specific firearms, including handguns. See

“Compendium of Firearms Laws”: The National Rifle Association Institute for Legislative Action, *available at* <http://www.nraila.org/media/PDFs/Compendium.pdf> (last visited Oct. 11, 2007) (firearms regulations by state). Popularly elected legislators enact firearms regulations, and Americans endorse, support, and respect them. Lieber, *supra*, at 1122. Only an insignificant number of laws have been held unconstitutional under the Second Amendment nationally, and only twenty state gun control regulations have ever been invalidated for violating a state constitutional right to possess firearms. Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 712-18 (2007) [hereinafter Winkler]. It is unlikely that American’s would support similar restrictions on speech, religion, and other fundamental rights. These varied and profuse restrictions on personal firearm use undermine the notion that individual possession of firearms is a popularly supported, fundamental right.

4. The purpose of the Second Amendment, to protect sovereign states from a tyrannical federal government, does not support incorporation against the states.

The Second Amendment should not be incorporated against the states because incorporation does not serve the amendment’s purpose of limiting federal military power through a state militia. The Second Amendment was specifically adopted “with the obvious purpose” to assure a state right to arm a militia. *Miller*, 307 U.S. at 179. The Framers did not intend to arm citizens absent relationship to the militia. *Id.* The Second Amendment is aimed directly at preserving the balance of powers between the federal and state governments. It is nonsensical to incorporate the Second Amendment, and arm citizens absent a military connection, because this will not serve the purpose of protecting the state against the federal government.

An individual right to possess firearms is not fundamental to the American scheme of justice. Therefore, the right does not meet this Court’s requirements for incorporation. Because

this Court upholds selective incorporation of the Bill of Rights, the Second Amendment, like the Third, Fifth, Ninth, and Tenth Amendments, should not be incorporated against the states.

The Second Amendment does not apply to the District because the District is not a state. The purpose of the Second Amendment is to protect states from federal interference; therefore, it cannot apply to the District because the District is not a state. Even if the Second Amendment applies to the District, this Court should not incorporate the Second Amendment because individual firearm use is not fundamental to the American scheme of justice.

III. **EVEN IF THE SECOND AMENDMENT GUARANTEES AN INDIVIDUAL RIGHT TO POSSESS FIREARMS, THE DISTRICT'S GUN-SAFETY REGULATIONS ARE CONSTITUTIONAL BECAUSE THEY ARE REASONABLE PUBLIC SAFETY RESTRICTIONS ON DANGEROUS HANDGUNS.**

This Court should use the reasonable regulation standard to determine the constitutionality of the District gun-safety regulations because guns are inherently dangerous, and create one of the most significant public safety concerns in society. Even states with broad individual rights to possession subject firearms regulations to a reasonable review standard. *See Lieber, supra*, at 1020; *see State v. Comeau*, 448 N.W.2d 595, 598 (Neb. 1989); *see also State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886).

Under reasonable regulation standard, an opponent bears the burden of proof of demonstrating the individual right at issue outweighs the government's interest and that the regulation is unfair or entirely arbitrary. In order to determine whether gun-safety regulations are reasonable under the reasonable regulation standard, the Court must decide "whether the challenged law is a reasonable method of regulating the right to bear arms." *See Winkler, supra*, at 717. Under a strict scrutiny test a regulation must serve a compelling government interest and be narrowly tailored to survive constitutional review. The District's sole objective with the handgun regulations at issue is to protect District citizens from gun-related deaths and violence;

therefore, the District's interest in public safety outweighs an individual's right to possess firearms for personal use.

A. This Court Should Follow the Majority of State Courts and Apply the Reasonable Regulation Standard to Evaluate the Constitutionality of Gun-Safety Regulations.

This Court should follow the vast majority of courts and apply the reasonable regulation standard to evaluate the constitutionality of gun-safety regulations. State courts “have universally rejected” the ‘strict scrutiny’ test, even if a state courts applies a strict scrutiny standard to fundamental constitutional rights. Jeffrey Monks, Comment, *The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws*, 2001 Wis. L. Rev. 249, 290 (2001). This deferential review has been applied to firearms regulations for “well over a century.” Winkler, *supra*, at 716. In interpreting a constitutional provision from the founding era, the state courts have consistently chosen to apply relatively light scrutiny to gun control and only an insignificant number of state courts have invalidated gun control laws for violating the right to bear arms. *Id.* at 712. Indeed, firearm related violence, as a legitimate safety concern, demands reasonable regulation review if challenged on constitutional grounds.

Regardless of state decisions, this Court should apply the reasonable regulation standard for four reasons. First, gun control laws are generally motivated by legitimate public safety concerns rather than invidious purposes; second, the text of the amendment characterizes regulation as fundamental and necessary; third, the history of the right in the broader historical context recognizes an appropriate role for regulation; and fourth, a strict scrutiny standard would invalidate most current firearms regulations and “substantially disrupt” settled state and federal

firearms laws. *Id.* at 712-13, 727. Further, a reasonable regulation standard is used with other provisions of the Bill of Rights, including the Fourth Amendment, that involve significant balance between rights and legitimate government interests. *Id.* at 693.

B. Under the “Reasonable Regulation” Standard, the District’s Gun-Safety Regulations Represent a Reasonable Method for Limiting the Availability of Firearms, Thereby Securing the Government Interest in Improving Public Safety.

The District handgun regulations are reasonable under the reasonable regulation standard because they reasonably limit availability of handguns, strengthen qualifications for handgun possession, and mandate safe-storage requirements, thereby furthering the legitimate government interest of public safety. Handguns pose a disproportionate risk to public safety, and the District regulations address this public safety threat.

Courts will only hold a gun control law unconstitutional in the extreme circumstances where (a) the law or its application is so profoundly unfair as to be arbitrary and irrational, or (b) the law or its application is so restrictive as to be effectively a destruction or nullification of the right. *See Winkler, supra*, at 723. Licensing laws, possession bans, prohibitions on carrying of concealed weapons, bans on carrying loaded weapons, bans on handguns and other types of firearms are routinely upheld under the reasonable regulation standard. *Id.* Indeed, time, manner, and place regulations have been enacted, supported, and constitutionally justified since the eighteenth century. *See generally Firearms Regulations, supra*, at 164.

The District’s gun-safety regulations are not arbitrary or irrational. Furthermore, they would not abridge an individual right to bear arms if the Second Amendment confers this right. The District’s Registration Law only bans registration of handguns after 1976. D.C. Code §7-2502.02(a)(4). The legislative history of the act shows that handguns are uniquely dangerous,

because of their portability and concealability, and are involved in a disproportionate number of murders, accidents, rapes, and suicides. *See Hearing, supra*, at 25. Therefore, the District's overwhelming interest in reducing handgun-related death and injury greatly outweighs Heller's asserted need to own a particular type of weapon for personal use. Over 200 weapons remain available within the District for personal use and self-defense. (J.A. 69.)

The District's Safe-Storage Law requires that all firearms be kept unloaded, disassembled, or bound by a trigger lock or similar safety device. D.C. Code § 7-2507.02. The legislative history shows that most murders are committed in situations where spontaneous violence is generated by anger, passion or intoxication. *See Hearing, supra*, at 25-26. Twenty-five percent of these murders occur within families. *Id.* Most significantly, the District enacted this safety-storage requirement to reduce the number of accidental deaths cause by improper use of firearms. *See Hearing, supra*, at 25-26. A safety device takes only one minute to take off, but dramatically reduces accidental deaths or maiming by handguns. *See Session, supra*, at 49. The District's interest in reducing accidental and emotionally motivated firearm-related deaths far outweighs an individual's right to keep a firearm without a similar safety device.

The District's Licensing Law prohibits carrying an unregistered handgun. D.C. Code § 22-4505. The code was enacted to reduce the improve handgun trafficking throughout the District, and strengthen restrictions of personal carriage of a handgun. *See Hearing, supra*, at 24-26. Handguns, as mentioned above, pose a unique threat because of their portability and concealability. *See Hearing, supra*, at 24-41. The licensing law does not regulate the vast majority of firearms that remain available to citizens of the District. (J.A. 69.)

The District enacted the gun-safety regulations to reduce handgun related crime. Handguns were involved in a disproportionate volume of violent crime and homicides. The

District congress created the Registration Law and Licensing Law reduce availability of firearms, and consequently reduce handguns use in violent crime. The licensing laws also help the municipal police force track unwanted handguns. The Safe-Storage Requirement prevents accidental firearm discharges and thereby significantly reduces the likelihood of accidental death and the impulsive use of firearms. Since enactment, District burglaries have decreased from 1,954 to 600 per 100,000 and violent crime has gone down from 1,603 to 1,459 per 100,000. *See* U.S. Department of Justice, *Bureau of Justice Statistics*, available at <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/statebystaterun.cfm?stateid=9> (last visited Oct. 21, 2007). The District now has one of the lowest rates of burglaries in the nation and the rate is decreasing steadily. *Id.* The objective of the regulations, to reduce availability and access to firearms and thereby reduce gun-related violence, clearly satisfies the legitimate purpose required by the reasonable regulation test.

The District's regulations do not infringe on an individual right to bear arms because the regulations do not restrict an individual's right to bear arms. The regulations are limited to restricting access, possession, and use of handguns, a unique dangerous firearm. There are many other weapons that an individual may possess. Because the regulations are reasonable, serve a legitimate government purpose, and do not infringe on an individual right, the regulations withstand constitutional review under the reasonable regulation standard.

C. Even if this Court Applies the 'Strict Scrutiny' Standard, the District Gun-Safety Regulations Are Constitutional Because the Government's Interest in Public Safety Far Outweighs an Individual Right to Possess a Firearm for Personal Use.

A regulation survives a strict scrutiny challenge if a regulation is narrowly tailored to achieve the governmental purpose. *Fed. Election Com'n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007). The strict scrutiny test is a two prong test: the first prong requires

establishment of a compelling government interest, and the second prong requires that the regulation is properly tailed to achieve the desired purpose. *Id.* Applying the first prong, the District has a compelling interest to reduce homicides, violence, and illegal handgun trafficking. Accordingly, the District regulations satisfy the first prong of the test. The second prong is satisfied because the regulations restrict possession only one type of firearms: handguns. The Safe-Storage Requirement specifically provides a solution to accidental and impulsive violence without disabling legally possessed firearms. As such, the regulations are narrowly tailored to address the disproportionate risk of violence and death caused by handguns.

CONCLUSION

The District's gun regulations are constitutional restrictions on deadly handguns. For the foregoing reasons, the District respectfully requests that this Court REVERSE the District of Columbia Circuit Court of Appeals' injunction on the District gun-safety regulations.

Dated: October 25, 2007

Respectfully Submitted,

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