No. 07-290

In the Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,
Petitioners

v.

DICK HELLER,
Respondent

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

BRIEF FOR AMICI CURIAE XX MEMBERS OF UNITED STATES SENATE AND XXX MEMBERS OF UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions — D.C. Code secs. 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?

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STATEMENT OF INTEREST OF AMICI CURIAE

The Amici Curiae include Senator Kay Bailey Hutchison, the lead member, and xx other members of the United States Senate, together with xxx members of the United States House of Representatives. See Appendix herein. As elected members of Congress, we have a fundamental interest in protecting the constitutional rights of our constituents and the American people in general.[1]

The Congress has a long history of protecting the right of the people to keep and bear arms. Like the rest of the Bill of Rights, the Second Amendment was proposed to the States by the Congress in 1789. On several occasions, in different epochs of American history, the Congress enacted statutory texts which explicitly declared its understanding of the Second Amendment as guaranteeing fundamental, individual rights.

Congress interprets the Constitution in deciding what laws to pass. As on other issues, this has historically been the case regarding the Second Amendment and the District of Columbia. "In the

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[1]No counsel for any party to this case authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity other than the *Amici Curiae* or their counsel made such a monetary contribution. This brief is filed with the written consent of all parties.

performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *Nixon v. Administrator of General Services*, 433 U.S. 425, 703 (1977).

The Amici Curiae wish to bring their unique perspective to this Court's attention to explain to the Court the historical meaning of the Second Amendment as understood by the Congress, and why the District's firearms prohibitions at issue infringe on the rights of the law-abiding citizens of the District of Columbia as guaranteed by the Second Amendment.

SUMMARY OF ARGUMENT

The Second Amendment provides: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." Congress adopted that wording and proposed it to the States in 1789. It became part of the Bill of Rights which the States ratified in 1791. As the text and the drafting history demonstrate, the Amendment was intended to guarantee the right of individuals to possess and keep ordinary firearms.

Following the abolition of slavery, Congress sought to end the incidents of slavery, including prohibitions on possession of firearms by African Americans. In 1866, over two-thirds of Congress passed the Freedmen's Bureau Act, which declared

protection for the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate . . ., including the constitutional right to bear arms . . . ."

In passing firearms regulations for the District, Congress has been sensitive to Second Amendment concerns. An 1892 enactment prohibiting the carrying of concealed weapons exempted one's place of business and dwelling house. In 1906, Congress empowered the District to pass "such usual and reasonable police regulations" deemed necessary to regulate firearms, which today remains the District's only delegation to regulate firearms. A ban on handguns is both unusual and unreasonable. In 1932 Congress passed a comprehensive firearms act which remains largely in place. As the Senate report for that act stated, "the right of an individual to possess a pistol in his home or on land belonging to him would not be disturbed by the bill."

In 1941, Congress enacted the Property Requisition Act, which authorized the President to requisition certain types of property. The Act declared that it must not be construed "to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport" unless prohibited or already required to be registered, or "to impair or infringe in any manner the right of any individual to keep and bear arms . . . ."

The Gun Control Act of 1968 declared that "this title is not intended to discourage or eliminate the

private ownership or use of firearms by law-abiding citizens for lawful purposes." And in the Firearms Owners' Protection Act of 1986, over two-thirds of Congress found that the rights of citizens "to keep and bear arms under the second amendment to the United States Constitution" as well as other constitutional rights "require additional legislation to correct existing firearms statutes and enforcement policies."

Attempts to ban handguns through litigation led Congress to enact the Protection of Lawful Commerce in Arms Act in 2005. Approximately two-thirds of Congress found that the Second Amendment "protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms." The Act precludes lawsuits against the lawful industry "to preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes . . . ."

Confiscations of firearms in the wake of Hurricane Katrina led Congress in 2006 to amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act to forbid seizures of lawful firearms in disasters. Over two-thirds of the House enacted Findings that the seizures violated citizens' Second Amendment rights to have firearms for protection in the home and elsewhere. The Findings were deleted when the bill was added to an appropriations bill in the Senate, but its underlying basis in the Second Amendment remained understood.

The "District of Columbia Personal Protection Act," a bill which passed the House in 2004 and is

currently pending, includes the Finding that: "Legislation is required to correct the District of Columbia's law in order to restore the fundamental rights of its citizens under the Second Amendment . . . ."

In sum, historically Congress has interpreted the Second Amendment as recognizing the right of law-abiding individuals to keep and bear arms. This Court should give due deference to the repeated findings over different historical epochs by Congress, a co-equal branch of government, that the Amendment guarantees the personal right to possess firearms.

The District's prohibitions on mere possession by law-abiding persons of handguns in the home and having usable firearms there are unreasonable per se. No purpose would be served by remanding this case for further fact finding or other proceedings. This Court should affirm the decision below, *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

ARGUMENT

I. ORIGINAL INTENT AND EARLY INTERPRETATION

A. The Text: Rights of the People vs. State Powers

The Second Amendment provides: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear

arms, shall not be infringed." This declares a political principle and then guarantees a substantive right. The term "the people" is in juxtaposition to the government, federal or State. Only individuals have "rights," while the United States and the States have "powers."

The phrase "the right of the people" also appears in the First Amendment – "Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble, and to petition the government for a redress of grievances." The Fourth Amendment guarantees: "*The right of the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

The Ninth Amendment uses the same phraseology: "The enumeration in the Constitution, of certain *rights*, shall not be construed to deny or disparage others retained by *the people*."[2] These guarantees protect individuals from government action, and do not delegate or reserve powers to governmental bodies.[3]

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[2]*See also* U.S. Const., Amend. VI ("the accused shall enjoy *the right* to a speedy and public trial"); Amend. VII ("*the right* of trial by jury shall be preserved").

[3]It violates ordinary word usage to say that "the people" means only such persons as the government selects, and that one has a "right" to do something only if commanded by the government. Yet these are the premises of the "collective rights" view.

The constitutional text distinguishes between "the people," "the militia," and the "States." The Second Amendment refers to "a well regulated militia," but the right to keep and bear arms is guaranteed to "the people." The Fifth Amendment requires indictment by a grand jury except "in the Militia, when in actual service in time of War or public danger," a class that contrasts with "the people" who may bear
arms under the Second Amendment. The Tenth Amendment refers to powers "reserved to the states respectively, or to the people."

The Second Amendment refers to the right to "keep" arms (such as at home) as well as to "bear" arms (meaning to carry them). Protected arms include commonly-kept firearms that one can keep and carry for lawful purposes, such as ordinary rifles, handguns, and shotguns, and not crew-served or heavy weapons.

The Amendment declares a well regulated militia to be necessary to the security of a "free State," which means a free country, and is not restricted to a State government.[4]

Article I, § 8, declares the "powers" of Congress, including its sharing of power over the militia with the

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[4]The First Amendment too has "free State" aims. "The liberty of the press is indeed essential to the nature of a free state . . . ." 4 WILLIAM BLACKSTONE, COMMENTARIES *151-152. "Faithful members of a free State" signed the Memorial and Remonstrance Against Religious Assessments. 8 PAPERS OF JAMES MADISON 298-99 (1973).

States,[5] and the Tenth Amendment declares undelegated "powers" to be reserved to the States or to the people. No "rights" are delegated to the United States or reserved to the States. Only "the people" – individuals – have "rights."

Where a State power is reserved or restricted, the Constitution names the State as the subject entity. It does not name the people the State may employ or conscript as the subject entity, other than in describing the State power. For instance, Congress has power to provide for organizing the militia, "reserving to the States respectively, the Appointment of the Officers . . . ." U.S. Const., Art. I, § 8, cl. 16. It is not declared that "the right of the Officers of the militia to be appointed by the States shall not be infringed." Similarly, the Second Amendment does not declare that "the right of the persons in the militia to be armed as required by the States shall not be infringed." Instead, it recognizes that "the right of the people to keep and bear arms, shall not be infringed."[6]

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[5]U.S. Const., Article I, § 8, clause 16 provides that "Congress shall have power":

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .

[6]The lone militiaman compelled by law to render service would have little or no incentive or means to take political or

In sum, the Second Amendment guarantees an individual right to keep and bear arms. Recognition of that right promotes the well regulated militia necessary for a free State's security.

B. Drafting the Amendment in 1789

On June 8, 1789, Rep. James Madison introduced what would become the Bill of Rights in the House of Representatives, stating that it would "expressly declare the great rights of mankind secured under this constitution."[7] In a draft of his speech, Madison referred to the rights of "freedom of press – Conscience . . . arms" as "private rights."[8] His draft of the arms guarantee stated: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously

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legal action to protect any such State power. If the States are the beneficiaries of constitutional protection, they would have the incentive and the means to guard their prerogatives. When analyzed closely, the "collective rights" reading of the Second Amendment is simply implausible.

[7] 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 820 (1992).

[8] 12 PAPERS OF JAMES MADISON 193-94 (1979).

scrupulous of bearing arms shall be compelled to render military service in person."[9]

Ten days later, Federalist Tench Coxe explained: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms."[10] Madison endorsed Coxe's analysis.[11]

Madison's draft was referred to a House Select Committee. Roger Sherman, a committee member, drafted his own amendments, including that "The militia shall be under the government of the laws of the respective states, when not in the actual service of the United States . . . ."[12] The Committee reported a

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[9]4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 10 (1986).

[10]FEDERAL GAZETTE, June 18, 1789, at 2, col. 1.

[11]12 PAPERS OF JAMES MADISON 239-40, 257 (1978).

[12]18 James C. Hutson, *The Bill of Rights: The Roger Sherman Draft*, *in* THIS CONSTITUTION 36 (1988). Even so, in debate on the militia bill the following year, Sherman "conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made. The particular states, like private citizens, have a right to be armed . . . ." 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 92-3 (1995).

revised version of Madison's draft: "A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."[13]

While "a free country" was changed to "a free state," the adjective "free" was retained, thus differentiating other textual uses of "State" to denote the State governments.

In House debate, disagreement was expressed to the wording of the militia declaration.[14] The final clause was amended to provide that the religiously scrupulous would not be compelled to bear arms "in person."[15] No objection was expressed to the phrase

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[13]4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 28 (1986). One writer saw the Committee amendments as reflecting the proposals by Samuel Adams in the Massachusetts ratification convention, which included "that the said constitution be never construed to authorize Congress . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms . . . ." 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1453 (2000).

[14]Elbridge Gerry argued: "A well regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one." 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1287-88 (1992).

[15]*Id*. at 1309. *See also id*. at 1285-86.

"the right of the people to keep and bear arms."[16]

The Senate revised the House language to render the militia clause more concise and delete the objector clause: "A well regulated militia, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed."[17] The Senate rejected a proposal to add "for the common defence" after "bear arms,"[18] making clear that the right was not limited to that purpose. The Senate changed "the best security of a free state" to "necessary to the security of a free state."[19] The Amendment had reached its final form.

Separately from the bill of rights, the Senate considered structural amendments that affected the federal-state balance. It rejected the following: "That

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[16]House Speaker Frederick A. Muhlenberg wrote that the House version "takes in the principal Amendments which our Minority had so much at Heart." CREATING THE BILL OF RIGHTS 280 (1991). The Minority in the Pennsylvania convention proposed in part: "That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . ." 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623-24 (1976).

[17]JOURNAL OF THE FIRST SESSION OF THE SENATE 71 (1820).

[18]*Id.* at 77.

[19]*Id.*

each state, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same . . . ."[20] This highlights the distinction between the right of the people to have arms and the state militia power.

In sum, the Second Amendment guarantees "the right of the people," which includes residents of the seat of government, to keep and bear arms. This in turn promotes a well regulated militia, seen as necessary for a free state's security.

C. The Freedmen's Bureau Act of 1866

Abolition of slavery nationwide by the Thirteenth Amendment in 1865 did not end the incidents of slavery, which Congress sought to eradicate in 1866 with passage of the Civil Rights Act and the Freedmen's Bureau Act. The latter declared protection for the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate . . ., including the constitutional right to bear arms . . . ."[21] That text and the debates on both are key to understanding how Congress interpreted the Second Amendment only 75

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[20] *Id.* at 75.

[21] 14 Stat. 173, 176 (1866).

years after it became part of the Constitution in 1791.[22]

On January 5, 1866, Senator Lyman Trumbull introduced S. 60, the Freedmen's Bureau Bill, and S. 61, the Civil Rights Bill.[23] Both included among "civil rights or immunities" the right "to have full and equal benefit of all laws and proceedings for the security of person and estate."[24]

To exemplify their concerns, Rep. Zachariah Chandler endorsed the view that freedom for the slaves required, among other things: "'The right of the people to keep and bear arms' must be so understood as not to exclude the colored man from the term 'people.'"[25] Senator Charles Sumner noted a petition of black South Carolinians "that they should have the constitutional protection in keeping arms . . . and in complete liberty of speech and of the press."[26]

After the Senate passed S. 60, the House amended it to protect the civil right to "the security of person and estate, including the constitutional right to

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[22]*See* A. Amar, *The Bill of Rights & the Fourteenth Amendment*, 101 YALE L.J. 1193, 1245 n.228 (Apr. 1992); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, & THE RIGHT TO BEAR ARMS, 1866-1876, 1-55 (1998).

[23]CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866).

[24]*Id*. at 209, 211 (Jan. 12, 1866).

[25]*Id*. at 217 (Jan. 12, 1866).

[26]*Id*. at 337 (Jan. 22, 1866).

bear arms."[27] Senator Trumbull recommended that the Senate concur, noting that the reference to the right to bear arms "does not alter the meaning."[28]

As passed by both Houses, the Freedmen's Bureau Bill provided that where judicial proceedings were interrupted, military protection would be extended to protect all person's "civil rights or immunities," including "the right . . . to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms . . . ."[29]

President Andrew Johnson vetoed the Freedmen's Bureau Bill, although his objections were irrelevant to the right to bear arms.[30] An override vote barely failed.[31]

Meanwhile, the Fourteenth Amendment was working its way through Congress. Senator Samuel Pomeroy noted "safeguards of liberty," including: "He

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[27]*Id*. at 654 (Feb. 5, 1866), 688 (Feb. 6, 1866).

[28]*Id*. at 743 (Feb. 8, 1866).

[29]*Id*. at 748 (Feb. 8, 1866), 775 (Feb. 9, 1866) (passage); 1292 (Mar. 9, 1866) (text). Rep. William Lawrence quoted a military order that "civil rights and immunities" included: "The constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed . . . ." *Id*. at 908-09 (Feb. 17, 1866).

[30]*Id*. at 916 (Feb. 19, 1866).

[31]*Id*. at 943 (Feb. 20, 1866).

should have the right to bear arms for the defense of himself and family and his homestead."[32]

In debate on the Civil Rights Bill, Rep. Bingham explained that the provisions of the Freedmen's Bureau Bill "enumerate the same rights and all the rights and privileges that are enumerated in the first section of this bill . . . ."[33] As passed, the Civil Rights Act recognized the right of each "to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ."[34]

On May 23, Senator Jacob Howard introduced the Fourteenth Amendment, referring to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[35]

Also on May 23, the second Freedmen's Bureau

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[32]*Id*. at 1182 (Mar. 5, 1866).

[33]*Id*. at 1291-92 (Mar. 9, 1866).

[34]14 Stat. 27 (1866). This remains the law today. *See* 42 U.S.C. § 1981.

[35]CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (May 23, 1866).

Bill, H.R. 613, was debated.[36] Rep. Eliot observed that § 8 – which recognized "the constitutional right to bear arms"[37] – "simply embodies the provisions of the civil rights bill."[38] He recited a report about black soldiers returning home to Kentucky: "Their arms are taken from them by the civil authorities . . . . Thus the right of the people to keep and bear arms as provided in the Constitution is infringed . . . ."[39] This rendered the freedmen "defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders."[40]

On May 29, the House passed the Freedmen's Bureau Bill and then took up the Fourteenth Amendment.[41] As explained by Rep. George W. Julian, the constitutional amendment was needed to uphold the Civil Rights Act, which

> is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry

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[36] *Id*. at 2773 (May 23, 1866). The bill had been reported by Rep. Eliot on behalf of the Select Committee on Freedmen's Affairs. *Id*. at 2743 (May 22, 1866).

[37] *Id*. at 3412 (June 26, 1866).

[38] *Id*. at 2773 (May 23, 1866).

[39] *Id*. at 2774.

[40] *Id*. at 2775.

[41] *Id*. at 2878 (May 29, 1866).

> weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.[42]

Both Houses passed the second Freedmen's Bureau Bill, which was again vetoed. The House overrode the veto by 104 to 33, or 76%,[43] and the Senate did so by 33 to 12, or 73%.[44] As finally passed into law, § 14 of the Freedmen's Bureau Act provided that in States where judicial proceedings were interrupted or which had not been restored to the Union:

> the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery.[45]

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[42] *Id*. at 3210 (June 17, 1866).

[43] *Id*. at 3850 (July 16, 1866).

[44] *Id.* at 3842.

[45] 14 Stat. 173, 176-77 (1866).

The same section extended military jurisdiction to all cases "concerning the free enjoyment of such immunities and rights."

The same more than two-thirds of Congress which enacted this language also approved the more general language of the Civil Rights Act and the Fourteenth Amendment. Congress viewed the Second Amendment as recognizing individual rights to all, including freed slaves, and as not being limited to militias, some of which violated such rights.

II. CONTINUATION OF A CONSISTENT READING

A. Regulation in the District of Columbia

In legislating for the District of Columbia, Congress has been sensitive to Second Amendment rights.[46] In 1892, Congress made it an offense in the District to carry a pistol concealed about one's person, with exemptions for one's place of business and dwelling house, and a concealed carry permit available on showing the "necessity" thereof.[47]

Quoting the Second Amendment, Senator Roger

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[46]*See generally* Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEORGE MASON UNIVERSITY CIVIL RIGHTS LAW JOURNAL, Nos. 1 & 2, 105 (1995).

[47]27 Stat. 116 (1892). "Necessity" would be changed to "necessary self-defense." 31 Stat. 1328 (1901).

Q. Mills objected: "You render the citizens of the country more defenseless by depriving them of the natural right to carry the arms which are necessary to secure their persons and their lives."[48] Senator Edward O. Wolcott responded that "this bill is intended to apply to the criminal classes. . . . It is not intended to affect the constitutional right of any citizen who desires to obey the law."[49]

In 1906, Congress authorized the District to pass "all such usual and reasonable police regulations . . . as they may deem necessary for the regulation of firearms," which remains the sole enabling legislation empowering it to regulate firearms.[50] Yet the District's prohibitions at issue are highly unusual and unreasonable.[51]

Congress passed a comprehensive firearms act for the District in 1932.[52] It prohibited carrying a concealed pistol on or about one's person without a license, which would be issued to a person with good reason to fear injury to his person or property or other

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[48]CONG. REC. 5788 (July 6, 1892).

[49]*Id*. at 5789.

[50]34 Stat. 808, 809 (1906). Codified at D.C. Code § 1-303.43.

[51]Other than the District, Chicago is the only other city nationwide which bans handguns. In addition, not a single State bans handguns.

[52]47 Stat. 650 (1932).

proper reason.[53] A person who was convicted of a crime of violence could not possess a pistol.[54]

The Senate report noted that "the right of an individual to possess a pistol in his home or on land belonging to him would not be disturbed by the bill."[55] The House report stated that it would "meet the legitimate needs of all who are charged with the duty of protecting and defending life and property as well as those citizens who require firearms for protection or for sport . . . ."[56]

The 1932 act has remained in place with various amendments. In 1943, Congress made it unlawful for a person to "carry either openly or concealed on or about his person" a pistol, with exceptions for one's home and business or under a permit.[57] In 1953, Congress extended the prohibition on possession of pistols to all felons and to drug addicts.[58]

Elements of the above provisions passed by Congress remain in Chapter 45 of the D.C. Code. The provisions at issue were enacted by the District, and they upset the balance enacted by Congress.

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[53]*Id*. at 651.

[54]*Id*.

[55]Senate Report 575, 72d Cong., 1st Sess., 3 (1932).

[56]House Report 767, 72d Cong., 1st Sess., at 2 (1932).

[57]57 Stat. 586 (1943).

[58]67 Stat. 93, 94 (1953).

B. The Property Requisition Act of 1941

The Property Requisition Act of 1941, passed just weeks before the attack on Pearl Harbor, authorized the President to requisition property for national defense. The Act declared that it must not be construed "to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law)," or "to impair or infringe in any manner the right of any individual to keep and bear arms . . . ."[59] The Report of the House Committee on Military Affairs included this explanation:

> It is not contemplated or even inferred that the President, or any executive board, agency, or officer, would trespass upon the right of the people in this respect. There appears to be no occasion for the requisition of firearms owned and maintained by the people for sport and recreation, nor is there any desire or intention on the part of the Congress or

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[59] P.L. 274, 55 Stat. 742 (Oct. 16, 1941). *See generally* Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENNESSEE LAW REVIEW 597, 618-31 (Spring 1995).

> the President to impair or infringe the right of the people under section 2 [*sic*] of the Constitution of the United States, which reads, in part as follows: 'the right of the people to keep and bear arms shall not be infringed.' However, in view of the fact that certain totalitarian and dictatorial nations are now engaged in the willful and wholesale destruction of personal rights and liberties, our committee deem it appropriate for the Congress to expressly state that the proposed legislation shall not be construed to impair or infringe the constitutional right of the people to bear arms. . . . [T]here is no disposition on the part of this Government to depart from the concepts and principles of personal rights and liberties expressed in our Constitution.[60]

In debate, Rep. Edwin Arthur Hall of New York noted: "Before the advent of Hitler or Stalin, who took power from the German and Russian people, measures were thrust upon the free legislatures of those countries to deprive the people of the possession and use of firearms, so that they could not resist the encroachments of such diabolical and vitriolic state police organizations as the Gestapo, the Ogpu, and the

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[60]Rpt. No. 1120 [to accompany S. 1579], House Committee on Military Affairs, 77th Cong., 1st Sess., at 2 (Aug. 4, 1941).

Cheka." He opposed taking away "the individual rights and liberties of citizens of this Nation by depriving the individual of the private ownership of firearms and the right to use weapons in the protection of his home, and thereby his country."[61] Senator Tom Connally of Texas favored "safeguarding the right of individuals to possess arms."[62]

The conference committee deleted the ban on registration, but kept the declaration against infringing the right to bear arms.[63] Rep. Paul Kilday of Texas warned that "registration of firearms is only the first step. It will be followed by other infringements of the right to keep and bear arms until finally the right is gone."[64] The Second Amendment protects "our right to bear arms as private citizens," Rep. Lyle H. Boren of Oklahoma stated.[65]

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[61]87 CONG. REC., 77th Cong., 1st Sess., 6778 (Aug. 5, 1941).

[62]*Id.* at 6811 (Aug. 6, 1941).

[63]*Id.* at 7097 (Aug. 13, 1941). Even so, Rep. A.J. May of Kentucky explained that "the right to keep means that a man can keep a gun in his house and can carry it with him . . . and the right to bear arms means that he can go hunting . . . ." *Id.* at 7098.

[64]*Id.* at 7101.

[65]*Id.* *See also id.* at 7102 (Rep. John W. Patman of Texas) ("The people have a right to keep arms; therefore . . . they can properly protect themselves."); *id.* at 7103 (Rep. John J. Sparkman of Alabama) ("The Constitution guarantees to every

A motion to recommit the bill to committee passed by 154 to 24,[66] and the committee restored the prohibition on firearm registration.[67] As enacted into law, the Property Requisition Act conditioned the President's power to requisition property with military uses as follows:

> Nothing contained in this Act shall be construed –
>
> (1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law), [or]
>
> (2) to impair or infringe in any manner the right of any individual to keep and bear arms . . . .[68]

Once again, at a critical time in American history, the Congress clarified its understanding that the Second Amendment guarantees individual rights.

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citizen the right to keep and bears arms").

[66]*Id*. at 7164 (Aug. 13, 1941).

[67]Rpt. No. 1214, Conference Report [to accompany S. 1579], 77th Cong., 1st Sess., at 2 (Sept. 25, 1941).

[68]P.L. 274, 55 Stat. 742 (1941).

C. The Firearms Owners' Protection Act of 1986

In enacting the Gun Control Act of 1968, Congress provided comprehensive regulations, but rejected bills to prohibit or to require registration of firearms.[69] The Act declared:

> it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.[70]

When experience proved the need for reform, Congress enacted the Firearms Owners' Protection Act of 1986 (FOPA). In doing so, Congress again declared by law the individual character of the rights protected by the Second Amendment:

> The Congress finds that--

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[69] *E.g.*, 114 CONG. REC. 22248-49 (July 19, 1968) (rejection by House of bill to require registration of handguns); 27427 (Sept. 18, 1968) (rejection by Senate of bill to require registration of firearms).

[70] § 101, P.L. 90-618, 82 Stat. 1213 (1968).

> (1) the rights of citizens--
>
> (A) to keep and bear arms under the second amendment to the United States Constitution; [(B)-(D) deleted] . . . require additional legislation to correct existing firearms statutes and enforcement policies . . . .[71]

The finding that the Second Amendment guarantees "the rights of citizens" to keep and bear arms was supported by a scholarly report by the Senate's Subcommittee on the Constitution, which concluded that "the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner."[72]

The legislative record is replete with expressed intentions to protect the Second Amendment rights of

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[71]§1(b), P.L. 99-308, 100 Stat. 449 (1986). It also reaffirmed the above 1968 declaration.

[72]*The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution*, Senate Judiciary Committee, 97th Cong., 2d Sess., 12 (1982). See also David Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URBAN L.J. 31 (1976), reprinted in 131 CONG. REC. S8692 (June 24, 1985); Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N.KY.L.REV. 13 (1982), reprinted in 131 CONG. REC. S9105 (July 9, 1985).

individuals. As an example, FOPA preempted state laws which prohibit interstate travel with lawful firearms.[73] Senator Steve Symms of Idaho explained: "The intent of this amendment . . . is to protect the second amendment rights of law-abiding citizens wishing to transport firearms through States which otherwise prohibit the possession of such weapons."[74] Similarly, Rep. Tommy Robinson of Arkansas stated that "our citizens have a constitutional right to bear arms . . . and to travel interstate with those weapons."[75]

The Firearms Owners' Protection Act passed the Senate by a vote of 79 to 15, or 84%.[76] The bill passed the House by a vote of 292 to 130, or 69%.[77]

III. LEGISLATION IN THE 21ST CENTURY

A. Protection of Lawful Commerce in Arms Act

In the Protection of Lawful Commerce in Arms Act of 2005 ("PLCAA"), Congress once again declared the individual character of Second Amendment rights

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[73]18 U.S.C. § 926A.

[74]131 CONG. REC. S9114 (July 9, 1985).

[75]132 CONG. REC. H1695 (Apr. 9, 1986).

[76]131 CONG. REC. S9175 (July 9, 1985).

[77]132 CONG. REC. H1753 (Apr. 10, 1986).

and sought to preclude firearms, particularly handguns, from being banned through litigation.[78] Municipalities sued the firearms industry claiming that the *lawful* manufacture and distribution of firearms is a public nuisance. PLCAA begins with the following Findings:

> (1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.
>
> (2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.[79]

The lawsuits sought damages and injunctive relief against the firearms industry for injuries caused by criminals and other third parties who misuse firearms.[80] Yet the manufacture, possession, sale, and use of firearms is strictly regulated by law.[81] Besides unreasonably burdening interstate and foreign commerce, imposition of liability "threatens the diminution of a basic constitutional right and civil

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[78]P.L. 109-92, 119 Stat. 2095 (2005).

[79]*Id.*, § 2(a).

[80]*Id.*, § 2(a)(3).

[81]*Id.*, § 2(a)(4).

liberty."[82]

Purposes of PLCAA include "to preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting."[83]

Senator John Thune of South Dakota noted that the bill protected law-abiding gun owners, dealers, and manufacturers "who are having that second amendment right infringed upon by those who are trying to destroy an industry that, for a couple of centuries now, has provided quality workmanship in accordance with Federal and State laws."[84] The bill passed the Senate by a vote of 65 to 31, or just under 68%.[85]

Rep. Sam Graves of Missouri noted: "This law is necessary to prevent a few state courts from undermining our Second Amendment rights guaranteed by the Constitution."[86] Rep. Joe Schwarz of Michigan averred that the Second Amendment's purposes are: "First, to ensure that citizens would have the tools to protect their families and their homes and, second, to ensure that an armed militia could be

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[82] *Id.,* § 2(a)(6).

[83] *Id.*, § 2(b)(2).

[84] 151 CONG. REC. S9378 (July 29, 2005).

[85] *Id.* at S9396.

[86] 151 CONG. REC. H9006-07 (Oct. 20, 2005).

called up to defend the country in emergencies."[87] The bill passed the House by a vote of 283 to 144, or just over 66%.[88]

B. Disaster Relief & Emergency Assistance Act Amendment

In 2006, Congress amended the Robert T. Stafford Disaster Relief and Emergency Assistance Act to forbid confiscation of lawful firearms in disasters.[89] The enactment prohibits any federal agent or person receiving federal funds from seizing "any firearm the possession of which is not prohibited under Federal, State, or local law," from requiring "registration of any firearm for which registration is not required by Federal, State, or local law"; and from prohibiting a firearm "in any place or by any person where such possession is not otherwise prohibited by Federal, State, or local law."[90] An exception exists for the temporary surrender of a firearm for entry in transportation for rescue or evacuation.[91] An

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[87] *Id.* at H9009.

[88] *Id.* at H9010.

[89] Department of Homeland Security Appropriations Act, 2007, Title IV, § 557, P.L. 109-295, 120 Stat 1355, 1391, 1392 (2006), codified at 42 U.S.C. § 5207.

[90] 42 U.S.C. § 5207(a).

[91] 42 U.S.C. § 5207(b).

individual aggrieved by a violation of this provision has a private right of action against a person who subjects the individual "to the deprivation of any of the rights, privileges, or immunities secured by this section."[92]

The bill passed the House as H.R. 5013, the Disaster Recovery Personal Protection Act, by a vote of 322 yeas and 99 nays,[93] or 76%. As passed, the bill included Findings recounting that in the wake of Hurricane Katrina, law enforcement was overwhelmed and citizens were threatened by criminal violence, adding:

> (4) Many of these citizens lawfully kept firearms for the safety of themselves, their loved ones, their businesses, and their property, as guaranteed by the Second Amendment, and used their firearms, individually or in concert with their neighbors, for protection against crime.
>
> (5) In the wake of Hurricane Katrina, certain agencies confiscated the firearms of these citizens in contravention of the Second Amendment, depriving these citizens of the right to keep and bear arms and rendering them helpless against criminal activity.

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[92] 42 U.S.C. § 5207(c).

[93] 152 Cong. Rec. H5755, H5814 (July 25, 2006).

> (6) These confiscations were carried out at gunpoint by nonconsensual entries into private homes, by traffic checkpoints, by stoppage of boats, and otherwise by force. . . .
>
> (11) These confiscations and prohibitions, and the means by which they were carried out, deprived the citizens of Louisiana not only of their right to keep and bear arms, but also of their rights to personal security, personal liberty, and private property, all in violation of the Constitution and laws of the United States.[94]

H.R. 5013 was referred to the Senate and was then inserted as an amendment to an appropriations bill.[95] As a drafting practice, appropriations bills do not include findings, and the Findings in this bill were thus deleted. But the bill remained grounded in the Second Amendment. As explained by chief sponsor Senator David Vitter (La.), "the language we do have on the Senate floor . . . protects fundamental second

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[94] *Id*.

[95] 152 Cong. Rec. S7455, S7489 (July 13, 2006) (amendment No. 4615 to H.R. 5441, which passed as the Department of Homeland Security Appropriations Act, 2007, *supra*).

amendment rights."[96]

In sum, this is yet another instance in which the Congress enacted legislation to protect the fundamental, individual right of law-abiding citizens to keep and bear arms.

C. The D.C. Personal Protection Act Bill

Bills have been pending in Congress that would repeal the provisions at issue here. The "District of Columbia Personal Protection Act," a bill to restore Second Amendment rights in the District of Columbia, passed the House by a vote of 250 to 171 in 2004.[97] In the current session of Congress, similar pending bills include S. 1001, sponsored by Senator Kay Bailey Hutchison (R-Tex.), and H.R. 1399, sponsored by Reps. Mike Ross (D-Ark.) and Mark Souder (R-Ind.).[98]

The Findings set forth in § 2 of each version of the above bills include: "The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to

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[96] *Id*. at S7494. He added: "It [the Katrina emergency] is exactly that very reason that this second amendment right to bear arms and use legally possessed firearms in defense of yourself, your life, and your property is so crucial . . . ." *Id*.

[97] 150 Cong. Rec. H7758, H7777 (Sept. 29, 2004).

[98] S. 1001 currently has 44 bipartisan cosponsors, and H.R. 1399 currently has 242 bipartisan cosponsors

keep and bear arms." The District's law-abiding citizens are deprived of handguns that are commonly kept by law-abiding persons throughout the United States for lawful defense, which exacerbates the District's high murder rate. The Federal Gun Control Act and the District's criminal laws currently punish possession and use of firearms by felons. The Findings conclude: "Legislation is required to correct the District of Columbia's law in order to restore the fundamental rights of its citizens under the Second Amendment to the United States Constitution and thereby enhance public safety."

Although the above bills have not been enacted into law, the Findings represent yet another instance in which a House of Congress expressed the view that the Second Amendment protects individual rights.

IV. A HANDGUN BAN IS UNREASONABLE ON ITS FACE, RENDERING A REMAND FOR FURTHER PROCEEDINGS UNNECESSARY

Congress has historically viewed the Second Amendment as protecting from infringement the right of the people at large to keep and bear arms. It has further regarded ordinary, commonly-possessed rifles, handguns, and shotguns to be constitutionally-protected arms. It has also passed regulations for engaging in firearms businesses and to require background checks on firearm transferees, and has restricted certain dangerous categories of persons from

possession of firearms.[99] None of these laws is called into question by the lower court's limited holding.

The standard for whether a right is "fundamental" is whether it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). The right of the people to keep arms is obviously such a right. Yet even if this Court applied a lower "reasonableness" test as the standard of review, the District's handgun ban is unreasonable on its face. The lower court's categorical approach in holding a prohibition on handguns to be unconstitutional per se was correct.

Where Congress has sought to restrict certain firearms, some of which may have other characteristics which overlap with handguns, it has defined them in terms of specific categories.[100] A holding by this Court that the District's pistol ban violates the Second Amendment would not apply to such firearms which are restricted under other categories.

This case involves nothing more than the right of law-abiding persons to keep common handguns and usable firearms for lawful self-defense in the home. Accordingly, no purpose would be served by remanding this case for further fact finding or other proceedings.

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[99] 18 U.S.C. § 923 (licencing), § 922(t) (background checks), and § 922(g) (prohibited persons).

[100] *E.g.*, 18 U.S.C. § 922(o) (non-grandfathered machineguns), § 922(p) (firearms not detectable by X-ray).

CONCLUSION

This Court should affirm the decision of the court of appeals.

Respectfully submitted,

XX MEMBERS OF THE UNITED STATES SENATE AND XXX MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES
AMICI CURIAE

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APPENDIX:

MEMBERS OF CONGRESS JOINING IN AMICI CURIAE BRIEF

The following members of the United States Congress join in this amici curiae brief: