No. 07-290

IN THE
Supreme Court of the United States

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 BRADY CENTER TO PREVENT GUN VIOLENCE, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, MAJOR CITIES CHIEFS, INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES, HISPANIC AMERICAN POLICE COMMAND OFFICERS ASSOCIATION, NATIONAL BLACK POLICE ASSOCIATION, NATIONAL LATINO PEACE OFFICERS ASSOCIATION, SCHOOL SAFETY ADVOCACY COUNCIL, AND POLICE EXECUTIVE RESEARCH FORUM AS AMICI CURIAE SUPPORTING PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The **Brady Center to Prevent Gun Violence** is a non-profit organization dedicated to reducing gun vio-

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk.

lence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that the Second Amendment is not misinterpreted as a barrier to strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous briefs amicus curiae in cases involving the constitutionality of gun laws. A sixty-page critique of the D.C. Circuit's decision has been published at www.bradycenter.org.

The law enforcement amici listed here have a compelling interest in ensuring that the Second Amendment does not stand as an obstacle to gun laws that help the police protect the public from gun crime and violence.

The **International Association of Chiefs of Police** is the largest organization of police executives and line officers in the world, representing more than 20,000 members in 112 countries.

The **Major Cities Chiefs** is composed of police executives heading the fifty-six largest police departments in the United States, protecting roughly forty percent of America's population.

The **International Brotherhood of Police Officers** is the largest police union in the AFL-CIO, representing more than 50,000 members.

The **National Organization of Black Law Enforcement Executives** represents 3,500 members nationwide, primarily police chiefs, command-level officers, and criminal justice educators.

The **Hispanic American Police Command Officers Association** represents 1,500 command law enforcement officers and affiliates from municipal police

departments, county sheriffs' offices, and state and federal agencies.

The **National Black Police Association** represents approximately 35,000 individual members and more than 140 chapters.

The **National Latino Peace Officers Association** is the largest Latino law enforcement organization in the United States, with a membership including chiefs of police, sheriffs, police officers, parole agents, and federal officers.

The **School Safety Advocacy Council**, a national organization with expertise on school-based policing, trains law enforcement and school officials to address issues of child safety at school and in the community.

The **Police Executive Research Forum** is a national membership organization of progressive police executives dedicated to improving policing through research and involvement in public policy debate.

SUMMARY OF ARGUMENT

I. In holding that the Second Amendment protects ownership of handguns for private purposes such as hunting and self-defense, the lower court read out of the Amendment its first thirteen words, thus violating the fundamental rule that the Constitution must be interpreted to give meaning to all of its words. The lower court's conclusion is also contrary to *United States* v. *Miller*, 307 U.S. 174, 178 (1939), which held that the "declaration and guarantee" of the Second Amendment "must be interpreted and applied" in accord with its "obvious purpose" to "assure the continuation and render possible the effectiveness" of the militia.

The lower court's account of the "well regulated Militia" as a collection of unorganized individuals is contrary to the nature and function of the founding-era militia. The militia was a system of compulsory military service imposed on much of the adult, male population. As made plain in the Second Militia Act of 1792, militiamen were governed by strict rules of discipline and training. Far from being "well regulated," as was the militia known to the Framers, the militia posited by the court below is not regulated at all.

Contrary to the lower court, the Framers did not envision the guarantee of a right to possess guns for private purposes as the means of arming the militia. The arming of the militia was a matter of government command, not individual choice, and was regulated by statute. The lower court's dangerous claim that the right of persons in the "unorganized militia" to be armed for "self-defense" extends to armed resistance to a government perceived as "tyrannical" is contradicted by the Second Amendment's own expressed objective of ensuring "the security of a free State," and by the Militia Clauses of Article I, which give Congress the power to call out the militia to "suppress Insurrections."

As the Amendment's legislative history shows, "keep and bear Arms" is a military phrase that matches the Amendment's militia-related purpose. Madison's initial proposal to the First Congress contained a conscientious objector clause allowing persons "religiously scrupulous of bearing arms" to be exempt from compelled military service, thus establishing that the term "bear Arms" refers exclusively to military service. The debates in the First Congress confirm that Congress understood the Amendment as addressing possession of arms solely in connection with militia service. "Keep

and bear Arms" denoted that militiamen were required by law to acquire and "keep" militia guns at home, as well as to "bear" them in militia service.

Contrary to the lower court's view, guaranteeing a right to keep and bear arms to "the people" does not imply that the right extends to private purposes unrelated to militia service. The issue is not to whom the right extends, but rather the nature and scope of the right guaranteed.

II. Two hundred years of constitutional tradition support interpreting the Second Amendment to guarantee a limited right to be armed in service to an organized militia, while allowing elected legislatures, without judicial interference, to regulate private possession of guns. Legislatures are far better suited than courts to decide the difficult and hotly contested policy issues raised by the continuing tragedy of gun violence in our society. This Court should not grant the judiciary the unprecedented power to interfere with the life-and-death decisions of the people's elected representatives in the control of deadly weaponry.

ARGUMENT

I. THE SECOND AMENDMENT GUARANTEES NO RIGHT TO POSSESS FIREARMS UNLESS IN CONNECTION WITH SERVICE IN A STATE-REGULATED MILITIA

> 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.

U.S. Const. amend. II.

The Second Amendment guarantees individuals the right to be armed only as participants in an organized militia that serves the security needs of the States.

The lower court's contrary conclusion is inconsistent with fundamental principles of constitutional interpretation, prior rulings of this Court, and the Amendment's legislative history.

A. Read To Give Meaning To All Its Words, The Amendment Connects The Right Guaranteed To The Well Regulated Militia

This Court has described as "the first principle of constitutional interpretation" the rule that the Constitution must be interpreted to give meaning to each of its words, and that constructions which would render some of its words "mere surplusage" must be avoided. *Wright* v. *United States*, 302 U.S. 583, 588 (1938); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Because the D.C. Circuit's reading of the Second Amendment renders its first thirteen words of no legal effect, that reading cannot be squared with this fundamental principle.

In *Marbury*, this Court applied this principle in rejecting an interpretation that would have permitted Congress to grant original jurisdiction to the Court in categories of cases other than those enumerated in the Constitution. Such a reading, the Court explained, would have rendered without effect the Constitution's provision that "[i]n *all* other cases [those in which the Court does not have original jurisdiction], the supreme court shall have appellate jurisdiction." *Marbury*, 5 U.S. at 174 (emphasis added). This Court has often reiterated the principle. *See, e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479, 490-491 (1965) (invoking the canon in refusing to adopt an interpretation of the Ninth Amendment that would have "give[n] it no effect whatsoever"); *Myers* v. *United States*, 272 U.S. 52, 151-152 (1926) (invoking "the usual canon of interpretation of [the Constitution], which requires that real effect

should be given to all the words it uses"). This rule is grounded in the great care with which the Constitution was written. "Every word appears to have been weighed with the utmost deliberation, and its full force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning." *Holmes* v. *Jennison*, 39 U.S. 540, 571 (1840).

The decision below violates this "first principle" by rendering of no "force and effect" the Second Amendment's first thirteen words. The lower court concluded that the Amendment's assertion that a "well regulated Militia" is necessary to the "security of a free State" conveys merely a "principle of good government," Pet. App. 34a, that is narrower than the right guaranteed. It held that the right extends to persons who have not even an "intermittent" connection to a militia, and who use guns for activities unrelated to militia service, such as "hunting and self-defense." *Id.* at 44a. While the court below acknowledged that militia service could be *one* of the purposes for gun use protected by the Amendment, its interpretation still renders the Amendment's opening clause of no legal "force and effect" because the constitutional validity or invalidity of any gun law challenged under the Amendment would be the same if the opening clause were disregarded.

The lower court's sole source was a law review article that claims it was a common drafting technique in founding-era state constitutions to include such introductory clauses, whose content allegedly does not affect the meaning of the provisions in which they appear. Pet. App. 34a (citing Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998)).

The lower court's argument suffers from two fundamental flaws. First, unlike the state constitutions cited by Professor Volokh, the Bill of Rights features no such superfluous "principles of good government." Given that "principles of good government" also were served by other provisions of the Bill of Rights, why would the First Congress confine their expression to the Second Amendment? The lower court cited not a single additional example in the entire Constitution of a clause that is merely "prefatory" and of no legal effect. On the contrary, in interpreting the one other constitutional provision that includes a statement of purpose, the Copyright and Patent Clause,[2] this Court has held that statement of purpose to be limiting and binding on Congress. *Graham* v. *John Deere Co.*, 383 U.S. 1, 5-6 (1966) (Congress "may not overreach the restraints imposed by the stated constitutional purpose" which is "[t]o promote the Progress of Science and useful Arts"); *see also Eldred* v. *Ashcroft*, 537 U.S. 186 (2003) (recognizing the "'constitutional command' … that Congress, to the extent it enacts copyright laws at all, [must] create a 'system' that promote[s] the Progress of Science.'"). *Graham*'s holding stands in stark contrast to the lower court's view that the first half of the Second Amendment is meaningless. Pet. App. 34a-36a.

Second, unlike the Second Amendment, most of the clauses collected by Professor Volokh have general statements of purpose that would be incapable of defin-

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[2] The Copyright and Patent Clause provides: "The Congress shall have Power … To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8.

ing any specific, enforceable limitation on the right conferred.[3] Moreover, neither the court below, nor Professor Volokh, cites a single case holding that any of the

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[3] For example, the article cites the New Hampshire Ex Post Facto Article, which provides:

> Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.

N.H. Const. pt. I, art XXIII (1784); Volokh, 73 N.Y.U. L. Rev. at 805. Of the thirty-seven clauses listed by Professor Volokh, twenty-five simply state the desirability of the right conferred, without reference to other values or purposes. *See, e.g.*, N.C. Const. Decl. of Rights art. XV (1776) ("[T]he freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained."). The Second Amendment's opening clause is different from these clauses because it sets forth an independent reason for the right to keep and bear arms. Another seven of the listed clauses are themselves statements of individual rights that encompass the specific individual right conferred by the provision. *See, e.g.*, Pa. Const. Decl. of Rights art. X (1776) ("[T]he people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations … are contrary to that right."); Volokh, 73 N.Y.U. L. Rev. at 817, n.85. The Second Amendment does not switch between levels of generality: the right to keep and bear arms is not presented as subsidiary to some broader individual right. Finally, five more clauses are irrelevant because they set forth the purpose of an administrative rule, not an individual right.

With respect to all of the clauses, Professor Volokh simply provides no reason to believe that the statements of purpose would be irrelevant to the interpretation of the clauses. *See also* Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People To Keep and Bear Arms,"* 22 Law & Hist. Rev. 119, 153-156 (2004) (documenting tradition of examining preamble of a statute to help construe it).

statements of purpose in early constitutional provisions was in fact merely "prefatory" and did not impose a substantive limitation. The lower court's assertion that the first half of the Second Amendment may safely be ignored therefore stands utterly devoid of support.

When the Framers wanted to guarantee an unambiguously broad right, they knew how to do so, as the First Amendment plainly shows. *See* U.S. Const. amend. I ("Congress shall make no law … abridging the freedom of speech."). The Framers could have adopted a similar formulation in the Second Amendment. They did not do so.

Indeed, the Framers could have adopted the language proposed by one of the contemporaneous, albeit "marginal voices call[ing] out for a private right to arms" unconnected to militia service. Uviller & Merkel, *The Militia and the Right to Arms* 82 (Duke 2002). They could have adopted, for example, the proposed amendment offered by the New Hampshire ratifying convention, which made no reference to the militia, and provided: "Congress shall never disarm any Citizen unless such are or have been in Actual Rebellion." *The Complete Bill of Rights: The Drafts, Debates, Sources and Origins* 181 (Cogan ed. 1997) ("*Debates*").

Alternatively, had the Framers intended an armed militia to be only one of several "salutary" purposes of the right to keep and bear arms, as the lower court imagined, they could have adopted language expressing those multiple purposes. For instance, the dissenting delegates from the Pennsylvania ratifying convention proposed in their *Reasons of Dissent* pamphlet: "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." *Debates* 182 (emphasis added). That language was not even adopted by the Pennsylvania ratifying convention. Uviller & Merkel, *supra*, at 83.

The lower court thought it "passing strange" that the drafters would have chosen the language of the Second Amendment if the right guaranteed were limited to "the protection of state militias," instead of choosing a "more direct locution." Pet. App. 14a, 34a. What is truly "passing strange" is the lower court's conclusion that, of the various "locutions" they had to choose from, the Framers sought to guarantee a non-militia right by choosing language emphasizing the importance of a militia, while avoiding other available "locutions" making no reference to the militia at all.

B. *United States* v. *Miller* Establishes That The Amendment's Expressed Militia Purpose Limits The Scope Of The Right Guaranteed

In its most extensive discussion of the Second Amendment, this Court implicitly applied the *Marbury* principle in holding that the "declaration *and* guarantee" of the Second Amendment "*must* be interpreted and applied" in accord with its "obvious purpose" "to assure the continuation and render possible the effectiveness" of the militia. *United States* v. *Miller*, 307 U.S. 174, 178 (1939) (emphasis added).

In *Miller*, this Court considered whether the National Firearms Act's prohibition on transporting unregistered short-barreled shotguns in interstate commerce violated the defendants' Second Amendment rights. The Court concluded that because there was no evidence that the possession or use of a short-barreled

shotgun "has some reasonable relationship to the preservation or efficiency of a well regulated militia," the defendants' conduct was not protected by the Second Amendment. 307 U.S. at 178.

The lower court misconstrued *Miller* by suggesting it held that the first half of the Second Amendment modified only the term "Arms" in its second half. *See* Pet. App. 36a. It thus concluded that *Miller* was concerned only with the type of weapon at issue. *Id.* at 40a-42a. This reading of *Miller* is flawed in three respects.

First, the lower court's argument cannot withstand *Miller*'s clear instruction that the entire Amendment—its "declaration and guarantee" and not simply the term "Arms"—"must be interpreted and applied" with the militia "end in view." *Miller*, 307 U.S. at 178. Second, if, as the lower court insisted, the right to be armed extends to private purposes like hunting and self-defense, then why doesn't the *Miller* Court's allegedly "weapons-based" focus consider the suitability of short-barreled shotguns for such purposes? Third, the lower court's reading suggests that the defendants' possession and use of firearms would have been constitutionally protected if only their weapons had been employable in military service. This would imply the absurd result that the Amendment protects a constitutional right to possess military weapons such as machine guns or grenade launchers, even by persons with no connection to a lawfully-sanctioned military force.

Given the absence of support for such a view in the *Miller* opinion itself, the lower court purported to find it in the government's brief. *See* Pet. App. 40a-42a. The court cited no support for its methodology of ascertaining the meaning of a judicial opinion in the briefs

considered by the court. Moreover, neither the government's brief nor the *Aymette* decision on which the government and the *Miller* Court relied, argued that evidence of a weapon's military suitability would be sufficient to trigger Second Amendment protection. *See* Appellants' Br. 4-5, *Miller*, 307 U.S. 174; *Aymette* v. *State*, 21 Tenn. 154, 1840 WL 1554, at *5 (1840). Both the brief and *Aymette* made clear that the requirement that the arms involved be militia-suitable is independent of the requirement that the right be exercised in the context of militia service. The government argued, first, that the Second Amendment "right has reference only to the keeping and bearing of arms by the people *as members of the state militia or other similar military organization provided for by law*." Appellants' Br. 4-5, *Miller*, 307 U.S. 174 (emphasis added). Only then did it contend that "[t]he 'arms' referred to in the Second Amendment are, *moreover*, those which ordinarily are used for military or public defense purposes." *Id.* at 5 (emphasis added). In *Aymette*, the Tennessee Supreme Court similarly created a dual requirement: "[a]s the object for which the right to keep and bear arms is secured, is of general and public nature, to be exercised by the people in a body, for their *common defence*, so the *arms*, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment." *Id.* (emphasis in original).

Consistent with the government's argument and the *Aymette* ruling, the *Miller* Court held that the military utility of a gun is a necessary condition for constitutional protection, but not a sufficient condition in the hands of someone with no connection to a militia. The lower court's ruling that the right to be armed can be

"interpreted and applied" in light of private purposes like hunting and self-defense is contrary to *Miller*.

C. The "Well Regulated Militia" Is An Organized Military Force, Not An Unorganized Collection Of Individuals

Implicitly recognizing that the reference to a "well regulated Militia" in the Second Amendment cannot be ignored altogether, the lower court struggled to show that a right to own guns for private purposes is nonetheless consistent with the Amendment's language. According to the lower court, the founding-era militia was "the raw material from which an organized fighting force was to be created" for which there was "no organizational condition precedent." Pet. App. 30a. It was, therefore, merely a collection of individuals "*subject* to organization by the states (as distinct from actually organized)." *Id.* at 33a (emphasis in original). The lower court's account of the militia is both self-contradictory and a distortion of the nature and function of the militia.

Even the lower court acknowledged that membership in the founding-era militia involved "enrolling" by "providing one's name and whereabouts to a local militia officer." Pet. App. 30a. However, because enrollment, by this definition, presupposes the existence of an organization with which individuals must formally affiliate themselves, the lower court's recognition of that requirement contradicts the court's own assertion that the militia had no "organizational condition precedent." *Id.* Moreover, nothing in the record remotely suggests that plaintiff Heller provided his "name and whereabouts to a local militia officer." Thus, even under the lower court's account, Heller has no affiliation with a militia.

Contrary to the lower court, the militia of the founding era was a system of compulsory military service imposed on much of the free, adult, male population, for which "enrollment" was only the beginning of the individual's military obligation to the government. The Second Militia Act of 1792, cited by the lower court in support of its account of the militia, in fact undermines it. In addition to requiring that citizens enroll in the militia, the Act provides that officers will "cause the militia to be exercised and trained" in accordance with specified "rules of discipline" and contemplates that militia members will be "called out on company days" to train. Second Militia Act of 1792, ch. xxxiii, 1 Stat. 271, 273; *see also* Webster, *American Dictionary of the English Language* (1828 ed.) ("The militia of a country are the able bodied men organized into companies, regiments and brigades … and required by law to attend military exercises[.]"), *available at* http://1828.mshaffer.com.[4] In *Perpich* v. *Department of Defense*, 496 U.S. 334, 348 (1990), this Court described the "traditional understanding of the militia as a part-time, nonprofessional *fighting force*," consisting of 'a body of citizens *trained to military duty*.' " (quoting *Dunne* v. *People*, 94 Ill. 120 (1879)) (emphasis added). This concept is a far cry from the lower court's "raw

[4] Another early statute dealing with the militia gives the President the power, "whenever the United States shall be invaded, or be in imminent danger of invasion[,] . . . to call forth . . . the militia of the . . . states." Act of Feb. 28, 1795, ch. xxxvi, 1 Stat 424. The founding-era militia thus had to be ready to go into combat at a moment's notice. The untrained collection of individuals contemplated by the lower court would have been worse than useless in response to an imminent, much less an actual, invasion.

material from which an organized fighting force was to be created." Pet. App. 30a.

Even if it were possible for a militia to consist only of the "raw material" of some future fighting force, the lower court's description cannot account for the Second Amendment's reference to a "well regulated" militia. The phrase "well regulated" resolves any doubt that the militia of the Second Amendment is an organized body governed by a set of rules.[5]

Significantly, the lower court conceded that the term "well regulated" implies that "the militia was a collective body designed to act in concert," but then argued that the term does not convert the "popular militia" of the founding era into "a 'select' militia that consisted of semi-professional soldiers like our current National Guard." Pet. App. 32a. The court of appeals incorrectly assumed that a "popular militia"—in which large segments of the population are "enrolled"—cannot also be organized and regulated. The founding-era militia was both. In contrast, the lower court's account posits a "well regulated Militia" that is not regulated at all.

The lower court argued that guaranteeing a right to keep weapons for private purposes such as hunting and self-defense was "the best way to ensure that the militia could serve when called." Pet. App. 33a. This assertion defies common sense and is, once again, historically inaccurate. Guaranteeing a right to possess

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[5] The Oxford English Dictionary defines "regulated" as: "[g]overned by rule, properly controlled or directed," or "of troops: Properly disciplined." *The Oxford English Dictionary* 524 (2d ed. 1989).

guns for private purposes is neither necessary nor sufficient as a means for arming state militias. It is not necessary, since the Constitution gave Congress the power to require the possession of guns for militia purposes, nor is it sufficient, because it makes the effective arming of the militia dependent on the uncertain choices of private citizens about whether to arm themselves and what arms to possess. Rather than leave the arming of the militia to the whims of individual gun owners, the founding-era Congress chose to regulate gun ownership for militia purposes. Pursuant to its Article I power "[t]o provide for … arming … the Militia," U.S. Const. art. I, § 8, Congress spelled out in detail the exact arms, ammunition, and gear that militia members, as well as officers, were required to possess. *See* Act of May 8, 1792, 1 Stat. 271-272. The Second Militia Act of 1792, enacted one year after ratification of the Bill of Rights, *required* that each militiaman "within six months" after enrollment "provide himself with a good musket or firelock." *Id.* at 271. Militia members were even required to keep their weapons "exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes," thus recognizing that the government's continuing interest in militia weapons deprived them of some of the attributes of private property. *Id.* at 273. This legislation would have been superfluous if the framers had contemplated that a right to own arms for private purposes would be the primary method of arming the militia. The arming of the militia was a matter of government command, not individual choice.[6]

[6] It was true, as noted by the lower court, Pet. App. 21a, that guns acquired for militia purposes could also be used for private

The *reductio ad absurdum* of the lower court's treatment of the militia is its suggestion that the right of the people in an unorganized militia to possess guns for "self-defense" also entails the right to use those guns "to resist and throw off a tyrannical government." Pet. App. 21a, 44a (embracing private use of arms for resistance to the "depredations of a tyrannical government"). This insurrectionist view of the "well regulated Militia" puts the Second Amendment at odds with itself, and with the rest of the Constitution. First, it is contradicted by the Amendment's own words, which describe the necessity of the militia to "the security of a free State." By these words, the Second Amendment itself establishes that the militia served the security

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purposes. But this says nothing about whether guns having no connection with militia service, possessed and used for purposes not mentioned in the Second Amendment, are constitutionally protected. The lower court's further observation that the reference to "*the* right … to keep and bear Arms" suggests that the right "preexisted the Constitution," Pet. App. 20a (emphasis in original), also says nothing about whether the right is independent of the militia. The militia system also predated the Constitution, as the Articles of Confederation had provided that "every State shall always keep a well-regulated and disciplined militia, sufficiently armed and accoutered." Articles of Confederation art. VI. Indeed, the militia system in England dated to the Assize of Arms in 1181. *See* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const. L.Q. 130, 133 (1975). The lower court cited the English Bill of Rights of 1689 as a source of this preexisting right, but misinterpreted it to guarantee a private right to possess guns, when it rather "laid down the right of a class of citizens, Protestants, to take part in the military affairs of the realm. Nowhere was an individual's right to arm in self-defense guaranteed." Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. Am. Hist. 22, 26 (1984). *Accord* Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chicago-Kent L. Rev. 27, 59 (2000).

interest of the States,[7] not the interest of individuals in taking up arms against the government should they decide it has become a tyranny. Second, the Constitution expressly gives Congress power to call out the militia "to execute the Laws of the Union … [and] suppress Insurrections." U.S. Const. art. I, § 8. The militia was regarded not as an instrument of rebellion, but as a bulwark against it.

To the extent that the Framers saw the militia as deterring government tyranny, it was as a state-organized military force serving as a deterrent to the tyrannical threat of a federal standing army consisting of professional soldiers, as distinct from the part-time citizen soldiers of the militia. Thus, Madison's Federalist No. 46, often misrepresented to endorse an insurrectionist vision of the Second Amendment, speaks of the potential for a threatening "regular army" to be repelled by "*the State governments* with the people on their side," and of the militia composed of "citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and *united and conducted by governments* possessing their affections and confidence." (emphasis added).

The lower court's insurrectionist view of the militia and the Second Amendment has disturbing implications for public safety and the rule of law. *See generally* Henigan, *Arms, Anarchy and the Second Amendment*,

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[7] The lower court's suggestion that the term "a free State" refers to "a hypothetical polity" rather than "an actual political unit of the United States, such as New York," cannot survive a reading of the remainder of the Constitution, which throughout uses the term "State" or "States" to refer to the States of the Union. *See generally* Pet. App. 60a-63a (Henderson, J., dissenting).

26 Valparaiso L. Rev. 107, 122-129 (1991). The danger of individuals and groups purporting to exercise their right of armed resistance against perceived government tyranny has been illustrated throughout our history—from Shays' Rebellion to the paramilitary activity of the Ku Klux Klan[8] to the Oklahoma City bombing. Members of the amici law enforcement groups have first-hand experience with the tragic consequences of political violence. The lower court's insurrectionist reading of the Second Amendment may well limit the government's power to punish political violence after the fact, and surely would curb the government's power to prevent the stockpiling of weapons, the organization and training of private armies, and other activities exposing government officials to an ever-present threat of violent dissent. In contrast, this Court has "reject[ed] any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy." *Dennis* v. *United States*, 341 U.S. 494, 501 (1951).

D. The Phrase "Keep And Bear Arms" Has An Exclusively Military Meaning

The lower court's approach to interpreting the phrase "keep and bear Arms" is to separate the phrase "bear Arms" from "keep Arms," and then to take both phrases out of their context in the Second Amendment in order to discover possible meanings unconnected with militia service. The issue, however, is not whether

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[8] *See Vietnamese Fishermen's Ass'n* v. *Knights of Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982) (rejecting argument that an injunction against the military training activities of the Ku Klux Klan violated the Second Amendment).

there are contexts in which "bear Arms" and "keep Arms" could have such non-militia meanings. The question is the meaning of the phrase "keep and bear Arms" as used by the framers and ratifiers of the Second Amendment.

The debates surrounding adoption of the Second Amendment, and in particular Madison's initial proposal to the First Congress, make clear that the framers understood the right to "keep and bear Arms" to refer only to military purposes. The word "keep" does not inject a private purpose into the Second Amendment, but rather merely refers to the practice of keeping at home the arms that were to be used in militia service.

1. The Second Amendment was drafted to respond to Anti-Federalist fears that Congress would fail to arm the militia

During the debates over ratification of the Constitution, Anti-Federalists expressed the fear that Congress's newly-granted power to "provide for organizing, arming and disciplining, the Militia" might be interpreted to deprive the States of the power to organize and arm their militias should Congress fail to do so. In the key Virginia ratification debates, George Mason argued that Congress's new power would allow Congress to destroy the militia by "rendering them useless—by disarming them … Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them." 3 Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 379 (2d ed. 1941). Patrick Henry echoed this concern, in a passage often misleadingly excerpted. Henry announced that: "The great object is, that every

man be armed.... Every one who is able may have a gun." *Id.* at 386. His next sentences, often omitted by advocates for the "private rights" view, show he was referring to the need to arm the militia and the danger that Congress may fail to do so: "But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress … how will your militia be armed?" *Id.* The Federalists responded by asserting that the Constitution did not bar the States from arming their own militias, with John Marshall observing: "If Congress neglect our militia, we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into the hands of her militia-men?" *Id.* at 421. The Anti-Federalists were unpersuaded. Mason asked for "an express declaration that the state governments might arm and discipline" state militias. *Id.* at 380. The debates make clear that the continued viability of the militia was at the core of the Framers' concerns when they discussed a right to be armed.

The Virginia debates, ignored by the lower court, have not a word about the need to guarantee a right to be armed for hunting or self-defense, or to resist a tyrannical government. *See* Cornell, *A Well-Regulated Militia* 55 (2006). Moreover, they show that Anti-Federalists and Federalists alike took it for granted that arming of the militia was a governmental function, not a matter left to the choice of individual citizens. The issue was whether the Constitution adequately protected the people's right to be armed in a state-organized militia. That concern gave rise to Madison's initial proposal to the First Congress.

2. Madison's initial proposal treated "bearing arms" as synonymous with "rendering military service"

The lower court's error in interpreting "bear Arms" is made plain by examining the text of Madison's initial proposal to the First Congress, which, as even the lower court conceded, used the phrase "'bearing arms' in a strictly military sense." Pet. App. 23a-24a. While similar to the ratified version, the proposal included a conscientious objector clause:

> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

Debates 169.

The conscientious objector clause treated "bearing arms" as synonymous with "render[ing] military service"—that is, participating in a well regulated militia. If the right was to own and use guns for private purposes, there would have been no need for such a provision. After all, private gun possession and use, in contrast to militia use, was a matter of choice. Moreover, there is no evidence or interpretive principle that would support giving "bearing arms" a military meaning in the conscientious objector clause, while giving "bear Arms" a different meaning when referring to the right. As the debate engendered by his proposal shows, the First Congress also understood the term "bear Arms" in this way. Indeed, that debate was premised upon the understanding that the subject matter of the Second Amendment was service in an armed militia.

3. The debates in the First Congress reflect the Framers' view that the Second Amendment related only to militia use

Every speaker who participated in the debates about the Second Amendment in the First Congress treated "bear[ing] Arms" as referring to participation in the militia. *Debates* 186-190. If anyone believed that the Second Amendment protected a right to be armed for private purposes, those views were kept hidden. *See* Uviller & Merkel, *supra*, at 103.

Indeed, the debates, which focused on the conscientious objector clause, are incomprehensible if a right to use arms for private purposes were at issue. The only objections to the clause related to its effect on the militia. *See* Uviller & Merkel, *supra*, at 98-100. For example, Rep. Elbridge Gerry argued that the clause would enable the government to "declare who are those religiously scrupulous, and prevent them from bearing arms. What, sir, is the use of the militia? It is to prevent the establishment of a standing army, the bane of liberty." *Debates* 186. Rep. Thomas Scott argued that if those religiously scrupulous could not be "called upon for their services," "a militia can never be depended upon." The lack of an effective militia, he explained, "would lead to the violation of another article in the Constitution, which secures to the people the right of keeping arms." *Id.* at 189. That right could only relate to militia use, for Scott argued that if it were violated, "recourse must be had to a standing army." *Id.* at 189-190. Moreover, if Scott were referring to a right to keep arms for private purposes, "it is difficult to see how that right could be violated by exempting Quakers and other professing pacifist sectarians from the right and obligation of militia service," as provided by the

conscientious objector clause. Uviller & Merkel, *supra*, at 101-102.

The conscientious objector clause eventually was dropped, presumably because of the expressed fear that it would be used to weaken the militia by exempting large numbers of individuals from service. There is no evidence to suggest that by striking the clause for these reasons the right was transformed to encompass a private right to arms unrelated to militias. On the contrary, the fact that the militia clause was retained—and was even moved to be the first words of the Amendment—suggests that the right retained its necessary connection to the militia.

Thus, the lower court's search for other contexts in which "bear Arms" could have a non-military meaning is simply irrelevant, in light of the direct evidence that Madison and the First Congress understood the phrase, in the context of the Second Amendment, to have an exclusively military meaning.

4. The phrase "keep and bear Arms" refers to possession and use of weapons for military purposes

While the lower court thought it self-evident that the word "keep" injects a private, non-militia purpose into the Amendment, there is no historical or textual basis to believe that while the right to "bear Arms" is military, the right to "keep and bear Arms" is not. There are, of course, multiple contexts in which "keep" has an "obvious individual and private meaning[]." Pet. App. 27a. It does not, however, have that meaning as part of the phrase "keep and bear Arms" in a constitutional provision referencing the importance of a "well regulated Militia."

To the Framers, "keep and bear Arms" was a military phrase. For example, Article XVII of the Massachusetts Bill of Rights provided that "[t]he people have a right to keep and bear arms for the common defense," while warning of the dangers of peacetime armies, and urging strict civilian control of the military. Uviller & Merkel, *supra*, at 82. Similarly, as the Tennessee Supreme Court recognized in its 1840 *Aymette* decision, in guaranteeing the right of the people to "keep and bear Arms," "[n]o private defence was contemplated." *Aymette*, 1840 WL 1554, at *2.

Understood in its context, the word "keep" in the phrase "keep and bear Arms" refers to the common practice of that era, codified in the Second Militia Act of 1792, for militiamen to acquire their militia arms, as prescribed by law, and keep them at home. To provide for an effective militia, the Framers ensured that the people would have the right to "keep and bear Arms," as militiamen could be called on to "keep" their militia arms, so as to be prepared to "bear Arms" in military service.

E. The Guarantee Of The Right To "The People" Is Entirely Consistent With The "Militia Purpose" Interpretation

The lower court held that the Second Amendment's use of the term "the people" implies a right to gun ownership for private purposes. Pet. App. 17a-18a. The court noted that "the people" appears in the First, Second, Fourth, Ninth, and Tenth Amendments, which "were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation." *Id.* at 18a (emphasis in original). Citing to dicta from *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), the court held that "the people" has a common

definition across the Constitution, and that the Second Amendment therefore also protects an individual right, by granting a right to ownership and use of guns for private purposes. Pet. App. 18a-19a.

This conclusion contains an unwarranted deductive leap from a statement about "who" has the right to "what" that right involves. Neither the term "the people" itself nor *Verdugo-Urquidez* describes the substantive contours of the right to keep and bear arms. There is no question that the right protected by the Second Amendment extends to "the people"; the question is how that right is defined: "[T]o keep and bear arms for what?" *Aymette*, 1840 WL 1554, at *3. Under the "militia purpose" view, the Second Amendment guarantees an individual's right to keep and bear arms to the extent the person is engaged, or seeks to be engaged, in the conduct sanctioned by the text, *i.e.*, possessing and using arms as part of a well regulated militia.[9] There is nothing about the use of the term "the people" in the Second Amendment that contradicts this interpretation.

Verdugo-Urquidez is perfectly consistent with this view. In that case, the Court held that the defendant, a citizen and resident of Mexico, lacked standing to challenge the search of his house in Mexico under the Fourth Amendment. "The people" protected by the

[9] This account of the Second Amendment right does not involve the claim that the right belongs to "the States" instead of to "the people," a straw man that the lower court eagerly knocked down. Pet. App. 18a. As the text makes clear, the interest served by the Second Amendment is the security of the States as political entities, but the right to be armed in a well regulated militia is nevertheless a "right of the people."

Fourth Amendment and other constitutional provisions, the Court held, are "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. at 265. The Court held that the defendant was not a part of this protected class. *Verdugo-Urquidez* says nothing about the substance of the Fourth Amendment—let alone the substance of the Second Amendment. "The people" defines the class of persons who are entitled to claim the benefit of the constitutional right, not the nature of the right itself.[10]

Looking at *whom* an amendment protects to determine *what* right it guarantees has no analogue in other constitutional doctrines. The lower court complicated the issue by creating a false dichotomy between "individual" and "collective" rights. Pet. App. 19a. Other constitutional provisions employing the term "the people" demonstrate that the "individual" versus "collective" question has no bearing on the substance of the right. In the First Amendment, for example, "the right of the people peaceably to assemble" guarantees individuals the right to engage in constitutionally protected conduct that necessarily involves the participation of others. Yet no one reads the First Amendment as protecting only the "small subset" of people who

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[10] *Verdugo-Urquidez* hardly stands for the proposition that "the people" cannot connote a "subset" of all individuals, as the lower court suggested. Pet. App. 18a-19a. This Court's own definition of "the people" creates a subset: "*a class* of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265 (emphasis added).

tend to assemble with each other. The Second Amendment, like the Assembly Clause, is written to protect a category of conduct, not a category of people.

II. THE COURT SHOULD CONTINUE TO ENTRUST GUN REGULATION TO ELECTED LEGISLATIVE BODIES AS IT HAS FOR MORE THAN TWO HUNDRED YEARS

The constitutional issues raised by this case must be considered in light of an extraordinary fact of constitutional history: never before in the more than two hundred years of our Republic has a gun law been struck down by the federal courts as a violation of the Second Amendment. This acknowledgment of the authority of States, municipalities, and the federal government to enact regulations limiting the private ownership and use of firearms is not just a jurisprudential curiosity; it is itself an important aspect of the Second Amendment's history. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."). Given the long tradition of vesting the elected representatives of the people with the authority to decide the complex and hotly contested questions at the heart of the gun debate, this Court should not grant courts the unprecedented power to second-guess legislative decisions on the control of deadly weaponry.

A. Federal, State, And Local Legislatures Have Regulated Gun Ownership In The Interest Of Public Safety Since The Founding

The regulation of gun ownership in America is not a modern invention; it was a practice accepted by the founding generation. Firearms were commonly subject

to police-power regulation in the States. *See* Cornell & DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 505 (2004). Early gun regulation even extended to free white male citizens, who generally enjoyed the full panoply of political rights. A 1783 Massachusetts statute, for example, prohibited keeping a loaded firearm in "any Dwelling-House, Stable, Barn, Out-house, Warehouse, Store, Shop or other Building" in the "Town of Boston." *Id.* at 512 (internal quotation marks omitted). The punishment was a fine and forfeiture. Pennsylvania, through the Test Acts of 1776, disarmed those who refused to take a loyalty oath. *Id.* at 506-509. The guns used in state militias were also subject to regulation: militiamen were required to bring their firearms and present them for inspection when "mustering" for service. *Id.* at 510.

The tradition of broad legislative authority over gun possession and use has continued to this day, with demonstrable public safety benefits. The evidence shows that gun laws, crafted with the guidance and support of the law enforcement community, help to keep guns out of the hands of dangerous people. For example, since the Brady Law went into effect in 1994, background checks have prevented over 1.4 million felons and other legally prohibited buyers from purchasing guns.[11] The percentage of violent, nonfatal crimes committed with guns declined 45 percent in the decade after the law was enacted[12]—a percentage that had

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[11] U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, *Background Checks for Firearms Transfers, 2005* (Nov. 2006).

[12] U.S. Dep't of Justice, Bureau of Justice Statistics, *Key Facts at a Glance, Nonfatal Firearm-Related Violent Crimes*,

been increasing in the five years prior to enactment.[13] Between 1994 and 2004, the total number of gun homicides dropped 35 percent,[14] and the number of nonlethal violent gun crimes dropped 74 percent.[15]

State gun laws also have helped to keep guns out of the hands of those likely to misuse them. Strong state laws requiring safe home storage of guns have substantially reduced the number of children killed by gunfire,[16] and gun registration and licensing systems have had an impact on criminals' access to guns.[17] Other state laws have curbed the exporting of guns from States with weaker gun laws. Virginia's restriction on multiple handgun purchases, for example, has sharply reduced Virginia's relative contribution to the gun problem in the Northeast.[18] These successes argue

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1993-2005, *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/firearmnonfataltab.htm (last visited Jan. 10, 2008).

[13] U.S. Dep't of Justice, Bureau of Justice Statistics, *Key Facts at a Glance, Crimes committed with firearms, 1973-2005*, *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/guncrimetab.htm (last visited Jan. 10, 2008).

[14] *Id.*

[15] *Nonfatal Firearm-Related Violent Crimes*, *supra* n.12.

[16] Webster et al., *Association Between Youth-Focused Firearms Laws and Youth Suicides*, 292 JAMA 594 (2004) (state child access prevention laws associated with 8% decline in youth suicide rates).

[17] Webster, Vernick & Hepburn, *Relationship between licensing, registration, and other gun sales laws and the source state of crime guns*, 7 Injury Prevention 184-189 (2001).

[18] Weil & Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759 (1996).

strongly for continuing to give legislators wide-ranging authority to protect their constituents from gun violence.

B. This Court Should Exercise Caution Before Giving The Judiciary Unprecedented Authority Over Issues Like Gun Control Historically Addressed By Legislatures

Legislatures, not courts, are best positioned to respond to the will and moral values of the people. The Constitution accordingly grants legislatures significant leeway to determine the public interest in complex and intensely contested policy matters.

This Court has exercised caution in fields historically handled by legislatures, which are superior arbiters of the public interest. In takings challenges, for example, judicial review is limited because, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman* v. *Parker*, 348 U.S. 26, 32 (1954). In this context, "empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 242-243 (1984).

Legislatures are "far better equipped" than courts "to amass and evaluate the vast amounts of data bearing upon an issue." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 665 (1994) (citation and internal quotation marks omitted). Thus, under their traditional powers, state legislatures have "great latitude" to enact regulations "protect[ing] the lives, limbs, health, comfort, and quiet of all persons." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted). Legislatures' superior capacity

"to amass the stuff of actual experience and cull conclusions from it," *United States* v. *Gainey*, 380 U.S. 63, 67 (1965), counsels against judicial intervention in an area long the province of popular regulation.

Because gun policy must reconcile widely divergent visions of the public interest and answer hotly contested empirical questions, legislatures must have leeway to regulate in this field, which lies at the core of the police powers. Gun regulation, undeniably, is a matter of life and death. Eighty Americans die from gunshots every day, on average.[19] Members of the police amici face gun-wielding criminals on a daily basis. From 1997 through 2006, there were almost 20,000 firearm assaults on law enforcement officers,[20] taking the lives of 562 officers.[21] Gunshot wounds account for 92% of police deaths from felonious assaults.[22] Well aware of these statistics, legislatures are developing effective ways to prevent gun violence, drawing from the fierce political and empirical debates raging in the background. This Court's long-standing constitutional tradition counsels judicial restraint to "permit[] this debate to continue, as it should in a democratic society." *Washington* v. *Glucksberg*, 521 U.S. 702, 735 (1997).

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[19] National Center for Injury Prevention and Control, Centers for Disease Control, WISQARS, *Injury Mortality Reports* (2004 data).

[20] Federal Bureau of Investigation, Uniform Crime Reports, Table 68, Law Enforcement Officers Assaulted.

[21] Federal Bureau of Investigation, Uniform Crime Reports, Table 27, Law Enforcement Officers Feloniously Killed, Type of Weapon, 1997-2006.

[22] *Id.*

The Framers' careful drafting of the Second Amendment to guarantee a limited right to be armed in service to organized state militias, while allowing the people's elected representatives to take the action they deem necessary to protect the public from gun violence, should be respected and enforced.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted.

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