

IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA and
ADRIAN M. FENTY, Mayor of the District of Columbia,
Petitioners,
v.
DICK ANTHONY HELLER,
Respondent.

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

**AMICI CURIAE BRIEF OF DISTRICT ATTORNEYS
IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICI CURIAE*

The Hons. Edward S. Berberian, Richard A. Brown, Daniel F. Conley, Richard A. Devine, Bonnie M. Dumanis, Michael O. Freeman, Kamala D. Harris, Paul L. Howard, Jr., Charles J. Hynes, Glenn F. Ivey, Robert M.A. Johnson, Robert T. Johnson, Robert M. Morgenthau, Thomas J. Orloff, P. David Soares, Jeffrey Tuttle, Craig T. Watkins, and Kym L. Worthy (collectively, the “District Attorneys”) respectfully submit this *amici curiae* brief in support of Petitioners. Consent of Petitioners’ counsel and Respondent’s counsel has been obtained for the filing of this brief.¹

Amici are elected District Attorneys, the highest law enforcement officials charged with the protection of, collectively, more than 27 million Americans residing in their jurisdictions. The District Attorneys individually and collectively place a high priority on the successful prosecution of criminals who commit gun-related offenses. They therefore have a compelling interest in the outcome of this appeal because an affirming opinion is likely to cast doubt upon the constitutionality of criminal gun laws *Amici* believe to be critical to public safety. Therefore, joining in this brief are the following elected law enforcement officials:

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* and their counsel made such a monetary contribution.

- The Honorable Edward S. Berberian is a career prosecutor and the elected District Attorney of Marin County, California. He represents a population of 250,000 residents.
- The Honorable Richard A. Brown was recently elected to his fifth term as District Attorney of Queens County in the City of New York. He represents the approximately 2.3 million residents in the County of Queens.
- The Honorable Daniel F. Conley is in his second term as District Attorney for Suffolk County in Massachusetts. Including the city of Boston, New England's largest city, he represents a population of approximately 690,000. Suffolk County operates a specially designated "Gun Court." He serves as Vice-President on the Board of Directors for the National District Attorneys Association.
- The Honorable Richard A. Devine is serving his third term as the elected State's Attorney for Cook County, Illinois, the nation's second largest state prosecutor's office. He represents the 5.3 million residents of the nation's second largest county, which includes the City of Chicago and its suburbs.
- The Honorable Bonnie M. Dumanis is the elected District Attorney of San Diego County, California. She represents the nation's sixth-largest county with a population of 3 million people.

- The Honorable Michael O. Freeman is serving his third term as the elected County Attorney of Hennepin County, Minnesota. He represents 1.2 million residents of Minnesota's largest county, which includes the City of Minneapolis and its suburbs.
- The Honorable Kamala D. Harris is serving her second term as the elected District Attorney of San Francisco County, California. She represents approximately 775,000 residents of the fourth-largest city in California.
- The Honorable Paul L. Howard, Jr. is serving his third term as the elected District Attorney of Fulton County, Georgia. He represents approximately 1 million residents, including the City of Atlanta, which has long been beset by gun violence.
- The Honorable Charles J. Hynes is serving his fifth term as District Attorney of Kings County (Brooklyn), New York. Brooklyn, with a population of approximately 2.5 million people, has a court specifically dedicated to the adjudication of felony-level gun cases.
- The Honorable Glenn F. Ivey is serving his second term as the elected State's Attorney for Prince George's County, Maryland. The County covers the eastern border of Washington, D.C. and has 860,000 residents.

- The Honorable Robert M.A. Johnson has been the prosecutor and corporate counsel for Anoka County, Minnesota since 1982. He represents a population of 320,000 residents and is the past president of the National District Attorneys Association.
- The Honorable Robert T. Johnson has been the District Attorney of Bronx County, New York since 1989. The Bronx, with a population of over 1.3 million, is one of the five counties contained within New York City.
- The Honorable Robert M. Morgenthau has served as the District Attorney for New York County since 1974. As the District Attorney for Manhattan, he represents more than 1.6 million people.
- The Honorable Thomas J. Orloff is serving his fourth term as the elected District Attorney of Alameda County, California, which includes the City of Oakland. He represents 1.5 million residents.
- The Honorable P. David Soares is the elected District Attorney of Albany County, New York. Elected in 2004, he represents 300,000 residents.
- The Honorable Jeffrey Tuttle was first elected District Attorney of Calaveras County, California in 2002. Now in his second term, he represents a population of 50,000 residents.

- The Honorable Craig T. Watkins is the elected District Attorney of Dallas County, Texas. He represents 2.3 million residents in the nation's ninth-largest city.
- The Honorable Kym L. Worthy is the elected Prosecuting Attorney of Wayne County, Michigan, which includes the city of Detroit. Elected in 2004, she represented approximately 2.2 million residents.

SUMMARY OF ARGUMENT

The District Attorneys respectfully submit that the three D.C. Code provisions at issue in this appeal do not violate the Second Amendment, thus necessitating a reversal of the lower court's decision. The District Attorneys do not focus on the reasons for the reversal, however, leaving these arguments to Petitioners and other *amici*. Instead, the District Attorneys urge the Court to consider the potentially negative, unintended, and wholly unnecessary consequences of an affirming opinion. In short, an affirmance could inadvertently call into question the well settled Second Amendment principles under which countless state and local criminal firearms laws have been upheld by courts nationwide.

For nearly seventy years, courts have consistently sustained criminal firearms laws against Second Amendment challenges by holding that, *inter alia*, (i) the Second Amendment provides only a militia-related right to bear arms, (ii) the Second Amendment does not apply to legislation passed by state or local governments, and (iii) the restrictions bear a reasonable relationship to protecting public safety and thus do not violate a

personal constitutional right. The lower court's decision, however, creates a broad private right to possess any firearm that is a "lineal descendant" of a founding era weapon and that is in "common use" with a "military application" today. Under this vague standard, a vast range of criminal laws nationwide, including laws where possession of a firearm is an element of an offense, could be subject to a new round of constitutional challenges. As detailed below, regardless of their outcome, these challenges could create substantial uncertainty in the lower courts and strain the already slim resources of the courts and the criminal justice system. Significantly, while the courts struggle to determine the scope and application of the Second Amendment, prosecutors could be hindered in their ability to enforce criminal laws they have long understood to be valid and compromised in their continuing efforts to combat gun violence in their communities.

Indeed, Second Amendment challenges to criminal laws have already begun. A felon convicted of criminal firearm possession recently challenged a New York gun possession statute based on the D.C. Circuit's opinion below, saying he wanted to see "how far [he] could ride this pony." If upheld, such challenges could decriminalize a breathtakingly broad range of dangerous conduct. These future constitutional challenges can and should be avoided either through this Court's reversal of the decision below or through a narrow opinion that removes any confusion as to its scope, which should be limited to the discrete question presented. In addition to minimizing unnecessary constitutional attacks, a narrow opinion will allow prosecutors to continue enforcing violent crime laws without any uncertainty about their validity.

ARGUMENT

I. THE COURT SHOULD REVERSE THE DECISION BELOW

The District Attorneys respectfully join in the arguments set forth in Petitioners' brief. For all the reasons set forth by Petitioners, as well as the various reasons advanced by the *amici* in support of Petitioners, the three statutes at issue in the D.C. Code do not violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia.

II. THE COURT SHOULD LIMIT ITS OPINION TO THE NARROW QUESTION PRESENTED BY THE THREE D.C. STATUTES AT ISSUE

A. The Court Should Not Unintentionally Provoke Constitutional Challenges Of Criminal Gun Laws Nationwide By Introducing Uncertainty Into A Well Settled Area Of The Law

1. Gun Laws Have Been in Effect for Centuries

For centuries, jurisdictions throughout the nation have had criminal gun laws. In the eighteenth century, state statutes frequently provided for the confiscation of firearms from persons unwilling to take an oath of allegiance to the state, restricted the use of firearms within the context of militia obligations, and regulated the storage of gunpowder. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 506–

12 (2004). By the nineteenth century, when the supply and demand for handguns had increased dramatically, firearms laws became far more prevalent, with some states prohibiting the carrying of concealed weapons, the firing of a gun under certain circumstances, and the sale of weapons. Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 Stan. L. & Pol’y Rev. 571, 582–86 (2006); Cornell & DeDino, 73 Fordham L. Rev. at 514 & nn.182–83.

States and local governments have continued to modify criminal gun laws, tailoring them to meet the specific needs of each jurisdiction.² For example, many states have enacted enhanced criminal charges and penalties for felony crimes if the perpetrator possesses a firearm during the commission of those crimes.³

2. In addition, numerous states and local governments require a license and registration in order to possess a firearm. *See, e.g.*, Cal. Penal Code §§ 12800–12802; Conn. Gen. Stat. §§ 29-33, 29-36i; 430 Ill. Comp. Stat. 65/1–65/14; Iowa Code §§ 724.16–724.17; Md. Code Ann., Crim. Law § 4-203; Mass. Gen. Laws ch. 140, § 129C; N.Y. Penal Law § 400.00.

3. *See, e.g.*, Ark. Code Ann. § 5-12-102 (robbery without gun punishable by 20 years in prison), § 5-12-103 (robbery with gun punishable by life in prison); Cal. Penal Code § 12022 (imposing additional prison terms for anyone “armed with a firearm in the commission” of specified felonies so long as the arming is not an element of the offense); La. Rev. Stat. Ann. § 14:95(E) (providing for enhanced sentence where offender “uses, possesses, or has under his immediate control any firearm, or other instrumentality customarily used or intended for probable use

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In addition, a number of states and local governments have determined that, to protect public safety, certain exceptionally dangerous firearms, including assault weapons, assault pistols, and/or handguns, should be banned altogether.⁴ Some states have enacted an outright ban on carrying concealed weapons.⁵

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as a dangerous weapon, while committing or attempting to commit a crime of violence or while in the possession of or during the sale or distribution of a controlled dangerous substance”); Md. Code Ann., Crim. Law § 4-204 (enhancing sentence by 5 to 20 years for the use of a handgun during the commission of a crime of violence or any felony), § 5-621(b), (c) (same for using, wearing, carrying, or transporting a firearm during and in relation to a drug trafficking crime); Mass. Gen. Laws ch. 265, § 18B (minimum of five years for possessing a firearm in the commission of a felony); Mich. Comp. Laws § 750.88 (robbery without gun punishable by 15 years in prison), § 750.89 (robbery with gun punishable by life in prison); Nev. Rev. Stat. § 200.471 (involvement of gun increases assault from misdemeanor to felony).

4. *See, e.g.*, Cal. Penal Code §§ 12275–12290 (banning assault weapons); Conn. Gen. Stat. §§ 53-202a–53-202o (banning assault weapons); Md. Code Ann., Crim. Law §§ 4-301–4-306 (banning assault pistols); Mass. Gen. Laws ch. 140, §§ 121, 123, 131M (banning assault weapons); N.Y. Penal Law §§ 265.00–.03, .08–.10 (banning assault weapons); Chi., Ill., Mun. Code §§ 8-20-030(h), 8-20-050(e) (banning assault weapons); Chi., Ill., Mun. Code §§ 8-20-040, 8-20-050(c) (banning handguns).

5. *See, e.g.*, 720 Ill. Comp. Stat. 5/24-1(a)(4); Wis. Stat. Ann. § 941.23. Other states require a license to carry a concealed weapon. *See, e.g.*, Cal. Penal Code §§ 12025, 12050–12054, 12590; Fla. Stat. §§ 790.01, 790.015, 790.06; R.I. Gen. Laws §§ 11-47-8–11-47-18; Tex. Penal Code Ann. §§ 30.06, 46.035; Va. Code Ann. § 18.2-308.

2. Criminal Firearms Laws Have Withstood Repeated Second Amendment Challenges in State and Federal Courts

The federal and state courts have upheld state and local firearms laws, as well as criminal convictions thereunder, against Second Amendment challenges on three primary grounds. In holding the D.C. laws at issue to be unconstitutional, the decision below undermines each of these grounds, which also could be cast into doubt by an affirmance in this case.

First, courts nationwide have upheld criminal gun laws on the basis that the Second Amendment provides only a militia-related right to bear arms. *See, e.g., Scott v. Goethals*, No. 3-04-CV-0855, 2004 WL 1857156, at *2 (N.D. Tex. Aug. 18, 2004) (affirming conviction under Texas Penal Code § 46.02 for unlawfully carrying a handgun because Second Amendment does not provide a private right to keep and bear arms); *Silveira v. Lockyer*, 312 F.3d 1052, 1087 (9th Cir. 2003) (holding that California residents challenging constitutionality of California’s Assault Weapons Control Act lacked standing because Second Amendment provides militia-related right to keep and bear arms); *State v. Brecunier*, 564 N.W.2d 365, 370 (Iowa 1997) (upholding firearm sentence enhancement because defendant “had no constitutional right to be armed while interfering with lawful police activity”).

Second, courts have upheld state and local firearms laws on the basis that the Second Amendment applies only to federal legislation, not to legislation of the states or local governments. *See, e.g., People v. Handsome*, 846

N.Y.S.2d 852, 854–55 (N.Y. Crim. Ct. 2007) (denying motion to dismiss criminal complaint, charging defendant with the unlawful possession of a firearm, because the “Supreme Court has repeatedly held [that the Second Amendment] limits only the power of Congress. . . . The right has never been found applicable to states, either directly or through the Fourteenth Amendment, and provides no bar to state regulation”); *Justice v. Town of Cicero*, No. 06 C 1108, 2007 WL 2973851, at *4 (N.D. Ill. Oct. 10, 2007) (upholding firearms registration ordinance because the “Second Amendment regulates only the activities of the federal government – not those of the states or their subdivisions”).⁶ Indeed, this Court has stated on at least two occasions that the Second Amendment limits the power only of the federal government, not the state or

6. See also *Taylor v. Cuomo*, No. CV-07-2138(CPS), 2007 WL 3540351, at *5 (E.D.N.Y. Nov. 14, 2007) (upholding N.Y. Penal Law § 265.02(1), Criminal Possession of a Weapon in the Third Degree, against Second Amendment challenge), *reconsideration denied*, 2008 U.S. Dist. LEXIS 341 (E.D.N.Y. Jan. 3, 2008); *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005) (upholding New York’s handgun licensing scheme); *Scott v. State*, No. 05-02-01023-CR, 2003 WL 21384652, at *2 (Tex. App. June 17, 2003) (upholding conviction under Texas Penal Code § 46.02 for unlawfully carrying a handgun); *Sklar v. Byrne*, 727 F.2d 633, 636–37 (7th Cir. 1984) (upholding prohibition of certain handguns in Chicago); *Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 269–71 (7th Cir. 1982) (holding that prohibition of the possession of handguns within a village’s borders does not violate the Second Amendment); *People ex rel. Darling v. Warden of City Prison*, 139 N.Y.S. 277, 283 (N.Y. App. Div. 1913) (upholding conviction for possession of pistol without permit); *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886) (upholding conviction for carrying concealed deadly weapon).

local governments. *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (“[The Second Amendment] is one of the amendments that has no other effect than to restrict the powers of the national government. . . .”); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (holding the same).

Third, courts have upheld state and local firearms laws as reasonable limitations to promote public safety. *See, e.g., Britt v. State*, 649 S.E.2d 402, 408 (N.C. Ct. App. 2007) (upholding North Carolina law prohibiting possession of certain firearms by felons because “[o]ur case law has consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation”) (internal quotation omitted); *Rohrbaugh v. State*, 607 S.E.2d 404, 413–14 (W. Va. 2004) (holding that West Virginia Code § 61-7-7, which barred persons convicted of a felony sexual offense from petitioning for restoration of firearms rights, did not violate the federal or West Virginia Constitutions because it was a “proper exercise of the Legislature’s police power to protect the citizenry of this State and impose reasonable limitations on the right to keep and bear arms to achieve this end”); *Zieman v. City of Chicago*, No. 02 C 6616, 2004 WL 1793410, at *2 (N.D. Ill. Aug. 3, 2004) (upholding conviction for possessing unregistered firearms under § 8-20-040(a) of the Chicago Municipal Code because it was “rationally related to the state’s police power”).⁷

7. *See also State v. Blanchard*, 776 So.2d 1165, 1168–74 (La. 2001) (holding that Louisiana statute providing for enhanced sentence where individual has a firearm under his immediate control during the commission of a drug offense was a reasonable restriction for a legitimate state purpose); *People v. Bland*, 898 P.2d 391, 400 n.6 (Cal. 1995) (upholding enhanced sentence for

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3. An Affirmance of the Lower Court’s Decision Could Generate Substantial Uncertainty and Spur a Wave of Second Amendment Litigation Nationwide

The lower court’s sweeping reasoning undermines each of the principal reasons invoked by those courts that have upheld criminal firearms laws under the Second Amendment time and again. First, under the lower court’s analysis, the Constitution protects a broad “individual” constitutional right, one that is not militia-related, to possess firearms. *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007). Second, according to the court below, this private right is nearly plenary, extending to the possession of any weapon that is a “lineal descendant” of a weapon used in colonial times, that is in “common use” and that has a “military application” today. *Id.* at 397–98. Third, the lower court applies these novel and poorly defined Second Amendment principles to invalidate local, rather than federal, legislation. *Id.* at 399–401. Finally, the court suggests that existing criminal firearms laws may be rescued with the same “sort of” legitimate “time, place or manner” restrictions that apply to free speech rights under the First Amendment. *Id.* at 399.

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being armed with assault rifle during the commission of drug offenses, and stating that “imposing an additional term of imprisonment when a person possesses cocaine base for sale and keeps an assault rifle handy to the stash of illegal drugs would not violate the Second Amendment to the federal Constitution”); *State v. Buzzard*, 4 Ark. 18 (1842) (holding that Arkansas statute, which prohibited possessing concealed weapons except when traveling, was a reasonable regulation that did not violate the Second Amendment).

Adopting the lower court's novel reasoning would likely result in great uncertainty about the constitutionality of a broad range of criminal firearms laws, further deluging already overburdened criminal courts.⁸ Laws open to challenge could include, for example, (1) any criminal offense where possession of a firearm is an element, (2) bans on the possession of particular types of firearms, and (3) prohibitions on carrying concealed or loaded weapons. Criminal defendants, both present and future, may also challenge the heightened penalties imposed on certain crimes of violence, such as assault and robbery, where the defendant was carrying or had access to a firearm as compared to those who commit the same crime without

8. It is uncontroverted that the lower courts have a backlog of civil and criminal cases. A 2002 Department of Justice survey of the 75 largest U.S. counties found that, on average, roughly 30% of felony cases were not yet adjudicated six months after arrest, and 13% were still not adjudicated after one year. U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2002*, at 23 (2006), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf>. In addition, criminal backlogs are significantly longer at the appellate level in many states. *See, e.g.*, Judicial Council of Cal., *2007 Court Statistics Report: Statewide Caseload Trends 1996-1997 through 2005-2006*, at 17 (2007) (California – median time from notice of appeal to opinion over one year in 2005-2006), *available at* <http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf>; Admin. Office of the Courts, *Arkansas Judiciary Statistical Supplement, Calendar Year 2006*, at 11 (2007) (Arkansas – average time from end of trial to decision on appeal over one year in 2004-2006), *available at* http://courts.state.ar.us/06_calReport/2006_Annual_Report_Printable_Version.pdf.

a firearm.⁹ Similarly, sentencing enhancements based on the possession of a firearm also would likely be challenged.¹⁰

Moreover, the test articulated by the lower court raises more questions than it answers. For example, the court's nod to "time, place or manner" restrictions only injects further uncertainty into the viability of long-standing criminal gun statutes, as the lower court does not cite any "time, place or manner" cases under the Second Amendment that could guide other courts in determining the constitutionality of existing criminal firearms laws. Indeed, this dicta underscores how little direction the lower courts will have when asked to decide whether particular firearm-related conduct is illegal or constitutionally protected.¹¹

9. *See, e.g.*, Mass. Gen. Laws ch. 265, § 17 (minimum of five years for robbery while armed with a firearm), § 18(a) (minimum of ten years for assault with intent to rob or murder while armed with a firearm); Mich. Comp. Laws § 750.88 (robbery without gun punishable by 15 years in prison), § 750.89 (robbery with gun punishable by life in prison); Ark. Code Ann. § 5-12-102 (robbery without gun punishable by 20 years in prison), § 5-12-103 (robbery with gun punishable by life in prison); Nev. Rev. Stat. § 200.471 (involvement of gun increases assault from misdemeanor to felony); Tex. Penal Code § 22.01 (assault if no gun involved), § 22.02 (higher charge of aggravated assault if gun involved).

10. *See, e.g.*, 42 Pa. Cons. Stat. Ann. § 9712; Wis. Stat. Ann. § 939.63.

11. As discussed below, the consequences of this uncertainty will be even more severe for prosecutors and law enforcement, who would have to determine, *in the field*, whether particular

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An affirmance of the lower court's unworkable test would likely cause state and local courts nationwide to struggle with the sheer number of these Second Amendment challenges. Recent data suggests that tens of thousands of such challenges could be brought, as in 2006 alone more than 157,000 robberies and 160,000 aggravated assaults were committed where a firearm was present at the crime. U.S. Dep't of Justice, F.B.I., *Crime in the United States, 2006*, at tbls. 21-22 (Sept. 2007), *available* at http://www.fbi.gov/ucr/cius2006/offenses/violent_crime/index.html.

4. Constitutional Challenges Have Already Begun, and More Are Being Planned

The District Attorneys' concern about the impact of renewed Second Amendment challenges is more than mere supposition. Criminal defendants have already invoked the lower court's decision in attacks on criminal gun laws nationwide, and others are openly planning to bring new constitutional challenges.

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firearms-related conduct is criminal or constitutionally protected under this new regime. Without clear guidance, law enforcement could either refrain from acting, with negative consequences for public safety, or act in potential violation of a suspect's newly-minted constitutional rights. The possibility of a wave of related civil rights claims against prosecutors and law enforcement throughout the country, pursuant to 42 U.S.C. § 1983, is real.

Explicitly relying on the decision below, one repeat felony offender recently sought to set aside a guilty verdict in connection with unlawful possession of a firearm:

[Petitioner] moves to have the verdict set aside and the charges dismissed because both the indictment and trial verdict violate his right to “bear arms” as guaranteed by the Second Amendment to the United States Constitution. . . .

Put in simple terms [Petitioner] advances the proposition that *both* the authority of Congress to enact and the authority of this Court to adjudicate the possession of firearms by anyone, ***including a convicted felon***, are prohibited by Article I and the Second Amendment to the Constitution. . . .

[A]mending the Constitution is precisely what Congress did ***in the enactment of every federal gun law since 1934, and that . . . is clearly prohibited.***

Motion to Set Aside the Verdict and Dismiss the Charges at 3, 10–12, *United States v. Lucky*, No. 05-CR-33 (D.G.T.) (E.D.N.Y. Dec. 7, 2007) (emphasis added). A multitude of similar constitutional challenges have been brought across the country. *See, e.g., Andrews v. United States*, 922 A.2d 449, 455–56 (D.C. 2007) (considering argument by convicted murderer that related conviction arising from use of firearm during violent crime violated his individual Second Amendment rights as construed by the court below); *Handsome*, 846 N.Y.S.2d at 854–61

(considering argument that, based on reasoning of court below, state law prohibiting possession of weapon violated Second Amendment); Defendant Deshawn Gopie’s Motion to Dismiss Count 5, *United States v. Gopie*, No. 07-60159-CR-Cohn/Snow, 2007 WL 3214410 (S.D. Fla. Aug. 13, 2007) (challenging indictment for knowing possession of a firearm in furtherance of a drug trafficking crime, citing opinion below as support); Appeal from the Judgment of the Superior Court of Plymouth County, *Tucci v. Wareham Police Dep’t*, No. 2007-P-1409, 2007 WL 4101445, at *6–10 (Mass. App. Ct. Oct. 24, 2007) (citing opinion below as authority for claim that denial of application for firearm license violated individual right to keep and bear arms).

Members of the criminal defense bar have similarly expressed a plan – which necessarily would be emboldened by a broad affirmance of the decision below – to “see how far we can ride this pony.” Joseph Goldstein, *Convicted Felon Tests Second Amendment*, N.Y. Sun, Dec. 27, 2007, at 2.

B. The Court Should Not Needlessly Hinder Prosecutors’ Ability To Enforce Criminal Firearms Laws By Injecting Uncertainty About Their Constitutionality

An affirmance of the lower court’s decision could adversely impact prosecutors’ ability to enforce existing criminal firearms laws across the country. Until the opinion below, prosecutors have been able to enforce criminal firearms laws with the settled understanding — reinforced by a long line of cases—of their constitutionality. Relying on the unbroken line of cases

upholding the constitutionality of these criminal laws, *Amici* have placed a high priority on the prosecution of gun crimes. They have not had to consider whether or not a criminal sentence could be enhanced based on the “lineage” of the firearm at issue. They have not had to determine whether the firearm involved in drug trafficking was in sufficiently “common use” today to enjoy some constitutional protection. They have not had to worry about whether the violated statute at issue satisfied the “sort of” time, place or manner restrictions that could support a conviction. An affirmance of the decision below could needlessly compromise prosecutors’ ability to rely on and enforce current firearms laws, as well as disturb their allocation of resources to combating gun crimes.

The most immediate impact of an affirmance would be on negotiated dispositions of pending firearms charges.¹² At least ninety-five percent of all state felony convictions nationwide result from guilty pleas. U.S. Dep’t of Justice, *Felony Sentences in State Courts, 2002*, at 8 (2004), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf>; *see also* Judicial Council of Cal., *2007 Court Statistics Report*, at 52 (97% of felony cases in California resolved before trial in 2005-06).¹³ In each of

12. As an example of the prevalence of firearm cases, in 2007, there were over 800 gun crime cases in Bronx County, New York alone.

13. The percentage of weapons-related cases that are plea bargained is comparable. U.S. Dep’t of Justice, *State Court Sentencing of Convicted Felons 2004*, at tbl. 4.1 (2007), *available at* <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04401tab.htm>. This is also on par with state court systems nationwide. *See* U.S. Dep’t of Justice, *Felony Defendants in Large Urban Counties, 2002*, at 24 (in 75 largest U.S. counties, only approximately 4% of felony cases went to trial).

these cases, prosecutors would be required to consider whether the statute or sentencing guideline at issue may be susceptible to attack. Prosecutors may be forced to offer more lenient pleas to account for the risk of a successful Second Amendment challenge, either by offering a lower sentence or not pursuing certain charges or sentence enhancements that otherwise could be pursued.¹⁴ Even if prosecutors were confident that the statutes were not infirm, they could be forced to reduce a sentence simply due to a lack of sufficient resources to effectively defend against each such challenge.¹⁵ Some defendants would take their chances at trial, hoping that an affirmance in this case would extend to the statute they violated.¹⁶

14. Similarly, prosecutors could forgo bringing potentially suspect charges in the first instance, even before the plea bargaining stage, for fear of difficulty in obtaining a conviction. For example, they could charge a defendant for dealing drugs, but decide not to pursue enhancements for possessing a firearm while dealing drugs. Cal. Penal Code § 12022(a) (“[A]ny person who is armed with a firearm in the commission of a felony or attempted felony should be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless the arming is an element of that offense.”).

15. Criminal defendants who previously pleaded guilty to weapons possession or other felonies based on involvement of a firearm could receive windfall grounds to withdraw and/or challenge the constitutionality of their pleas. Prosecutors, who had previously relied on the constitutionality of gun laws in agreeing to the plea, would be forced to defend such appeals and habeas petitions, adding an additional burden to prosecuting the nation’s most violent offenders.

16. This additional incentive to bring cases to trial would create another significant burden on the lower courts. For

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The impact of an affirmance on pending prosecutions would be especially troubling given the constitutional right articulated by the court below. Unlike decisions requiring additional proceedings that conform with the rule announced in the decision, *see, e.g., Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment requires exclusion of unconfrosted “testimonial hearsay”), and *United States v. Booker*, 543 U.S. 220, 267 (2005) (addressing the constitutionality of federal sentencing guidelines), an affirmance in this context could suggest that the defendant’s *conduct* was not criminal and that prosecution is, in fact, constitutionally barred. Projected over the tens of thousands of firearms prosecutions conducted annually in America, and the serious threat to public safety posed by many defendants’ conduct involving firearms, a broad affirmance in this case could impair prosecutors’ ability to protect public safety.

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example, in a full year, less than 6,500 felony cases went to trial in California. Judicial Council of Cal., 2007 Court Statistics Report, at 52. Given that there were more than 19,000 arrests in 2005 on felony weapons charges in California alone, if even an additional 10 to 20% of such defendants opted for trial based on uncertainty about the constitutionality of charges, California’s criminal justice system would be strained to the breaking point. *See* Cal. Dep’t of Justice, *Crime in California 2005*, at 122 (2006), available at <http://ag.ca.gov/cjsc/publications/candd/cd05/dataTables.pdf>.

C. The Court Should Tailor Its Opinion To The Three D.C. Code Provisions At Issue

In an unbroken line of cases stretching back to 1885, the Court has repeatedly upheld the policy of judicial restraint in considering constitutional questions.¹⁷ As the Court recently stated, “We have long ‘rigidly adhered’ to the tenet ‘never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied’ for ‘[t]he nature of judicial review constrains us to consider the case that is actually before us.’” *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 192 (2003) (citation omitted). The Court must “decide constitutional questions only when necessary to the disposition of the case at hand” and “such decisions will be drawn as narrowly as possible.” *Sweatt v. Painter*, 339 U.S. 629, 631 (1950); *see also Air Courier Conference of Am. v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring) (“Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available.”).

17. *See Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947) (“[C]onstitutional issues affecting legislation will not be determined . . . in broader terms than are required by the precise facts to which the ruling is to be applied.”); *Coffman v. Breeze Corp.*, 323 U.S. 316, 324–25 (1945) (“[T]he Court will not pass upon the constitutionality of legislation . . . until it is necessary to do so to preserve the rights of the parties.”); *Liverpool, N.Y. & Phila. Steam-Ship Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885) (This Court “is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”).

In light of the negative and wholly unnecessary consequences to the enforcement of other jurisdictions' firearms laws that could result from an affirmance, the District Attorneys respectfully request that the Court exercise judicial restraint and explicitly limit its decision to the three discrete provisions of the D.C. Code on which it granted certiorari. This would avoid needless confusion and uncertainty about the continued viability and *stare decisis* effect of this Court's—and other courts'—prior Second Amendment jurisprudence. A narrow opinion also would help to discourage the inevitable flood of constitutional challenges that otherwise would ensue from the uncertainty engendered by an affirmance and provide the guidance necessary for the lower courts to properly analyze those challenges that are mounted. This also would allow the District Attorneys and other prosecutors to enforce the existing laws that are not before the Court today and to continue to protect public safety.

CONCLUSION

For all the foregoing reasons, *Amici* respectfully submit that the decision below should be reversed and that the Court's opinion be strictly limited to the narrow question presented.

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Respectfully submitted,

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