No. 07-290

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA
and
ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK HELLER,

Respondent.

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

BRIEF OF
MARICOPA COUNTY ATTORNEY'S OFFICE
AND OTHER PROSECUTOR AGENCIES
AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions – D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 – violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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INTEREST OF *AMICI CURIAE*

This amicus curiae brief is submitted on behalf of the Maricopa County Attorney's Office led by County Attorney Andrew P. Thomas (the " Maricopa County Attorney's Office") along with several other state prosecutorial agencies nationwide.[1] The Maricopa County Attorney's Office is one of the largest state prosecutorial agencies in the nation with 15 specialized bureaus and over 900 attorneys, investigators, administrators, paralegals, victim advocates, and support staff. It prosecutes approximately 40,000 criminal cases every year in Maricopa County, Arizona. "Over the last few years, the number of threats to prosecutors and prosecutor staff [in Maricopa County] has increased. Prosecutors in the Homicide and Gang/Repeat Offender Bureaus, particularly, have been targeted." Maricopa County Attorney's Office, General Office Administrative Procedures, Procedure 6.24.[2] The Maricopa County Attorney's Office therefore has a policy in place allowing county prosecutors and prosecutor staff to provide sufficient means of protecting themselves from physical harm, including the carrying of a firearm. *Id.* Pursuant

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[1] The other amici who are signatories on this brief are set forth on the signature page after the conclusion of the brief. Pursuant to Supreme Court Rule 37(3)(a), this amicus brief has been filed with the consent of all parties. In accordance with Supreme Court Rule 37(6), amicus curiae affirm that no party's counsel has authored this brief, in whole or in part, and that no party has made a monetary contribution to the preparation or submission of this brief to the Court.

[2] On file with Maricopa County Attorney's Office, Phoenix, Arizona.

to this policy, Maricopa County Attorney prosecutors who receive specific threats are eligible to receive a firearm, firearms training, and appropriate permits. *Id.* at 2.

The Maricopa County Attorney's Office's experience of an increased rate of violence directed at its prosecutors and prosecutorial staff is not uncommon among large state prosecuting agencies across the United States. In 2005, 40% of all prosecutor offices reported receiving work-related threats or actual assaults on their staff members. Reported threats include threatening letters, threatening calls, face to face threats, and physical assaults. Among large prosecutor offices, the percentage of agencies reporting violent threats rose to 84%. *See* Bureau of Justice Statistics, Prosecutors in State Courts, 2005 at 7, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/psc05.pdf. Security measures employed by prosecuting agencies are therefore high. Overall, 20% of the chief prosecutors carry a firearm for personal protection and 44% of assistant prosecutors in large prosecutor offices carry a firearm for protection, commensurate with the high rate of violent threats those large offices receive. *Id.* The seriousness of the danger faced by prosecutors nationwide has been the subject of recent commentary. *See generally* Patricia L. Fanflik, *Forgotten Victims: Workplace Aggression Encountered By Prosecutors*, 39-OCT Prosecutor 36 (Sept./Oct. 2005); Stephen D. Kelson, *Violence in the Legal Profession: Methods of Protection and Prevention*, 49-May Advocate (Idaho) 19 (May 2006). Consequently, the Maricopa County Attorney's Office and the other amici prosecutor agencies joining in this brief have a significant interest in the proper construction of the Second Amendment.

SUMMARY OF THE ARGUMENT

For the last two centuries, the questioned scope of the Second Amendment has been debated, frequently upon a social or political basis, without a Constitutionally-based answer from this Court. The text of the Second Amendment and its celebrated history as the "true palladium of liberty," however, beg to be finally recognized. That text and history support the proposition that the "right to keep and bear arms" belongs, not to an undefined or no longer existent state governed militia force, but to "the people." Despite the speculation that recognizing this empirical truth will somehow dismantle centuries of gun control legislation, the only answer must be that which is determined to be the correct answer guided by the text and history of the amendment alone. Moreover, the anxious musings of the politically motivated have been disproved. Countless cases upholding various firearms regulations, even under a strict scrutiny standard of review, defy the argument that a ruling in favor of heightened scrutiny (assuming the right is recognized as individual) will put the final nail in the coffin of all gun laws alike. The state's compelling interest in ensuring public safety will safeguard long-standing, narrowly tailored regulations. Only those laws, like the District of Columbia Code provisions at issue here, which amount to an outright prohibition on the private right to possess firearms, will be subject to reprisal and possible invalidation. Accordingly, this Court should affirm the opinion of the District of Columbia Circuit in its entirety.

ARGUMENT

I.

SPECULATION ON HOW THIS COURT'S DECISION MAY IMPACT EXISTING REGULATIONS ON FIREARMS IS IRRELEVANT.

Several of the amici curiae briefs filed in support of the Petitioner, the District of Columbia (the "District"), contend that their unsupported speculation on the potential impact this Court's decision may have on existing state and federal statutes involving the regulation of guns is a sufficient basis on which to reverse the District of Columbia Circuit's ("D.C. Circuit") opinion. Notwithstanding the great fears enumerated by special interest groups of every make and model, this Court need not stand as a policymaker on the issue of gun control. Rather, the purpose of this decision is to settle a long-standing debate on what right the Second Amendment was designed to protect and whether that right is infringed by a complete prohibition on the possession of handguns. This determination should rest on a textual interpretation of the amendment using well established tenets of statutory construction. The Constitution "must be interpreted according to its text." *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

II.

THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS.

The proper starting point in determining the scope of the right protected is to look to the text itself: "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. Unique among

its fellow amendments contained in the Bill of Rights, the Second Amendment contains two clauses, "the first is prefatory, and the second is operative." *Parker v. District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007). Both the prefatory and the operative clauses of the amendment support the notion that the right protected therein is individual, not "collective" or otherwise limited to militia-related arms use.

A. Textual Analysis of the Operative and Prefatory Clauses, in Tandem, Supports The Adoption of the Individual Rights Model.

The D.C. Circuit properly addressed each clause in turn, but focused its analysis primarily on the language of the operative clause – *i.e.*, "the right of the people to keep and bear arms shall not be infringed." *Id.* Though the prefatory clause should not be unnecessarily ignored, a well-recognized canon of statutory construction requires that the operative language of this and any other legislative enactment be given precedence over introductory language where the operative language is not ambiguous. *E.g.*, *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 483 (2001) (inappropriate to look at title of section to create ambiguity if text is clear; the clear text "eliminates the interpretive role of the title, which may only shed light on some ambiguous word or phrase in the statute itself"); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290-91 (2000) (rejecting language of preamble of local ordinance as definitive for First Amendment challenge); *Fidelity Federal Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 158 n.13 (1982) (look to the preamble only for the administrative construction of the regulation, to which deference is due). *See generally* 2A Sutherland, Statutes & Statutory

Construction § 47.04, at 146 (N. Singer 5th ed.1992). The rationale for elevating the operative portion of the amendment over more specific purposes set forth in introductory language is sound. Prefatory language in legislative texts is more often than not, underinclusive. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 505-06 (1999) (citation omitted). The D.C. Circuit's orderly analysis gave the appropriate emphasis to the language, which so unequivocally guarantees to "the people" that their "right to keep and bear arms" is safe from governmental encroachment.

1. The Operative Clause

Because there is no question that the Second Amendment guarantees "the right to keep and bear arms" to someone, the only question truly presented here is, to whom? That question is answered by reference to the phrase "the people," which this Court has uniformly recognized as indicative of an individual rather than a civic protection:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." *See also* U.S. Const., Amdt. 1 ("Congress shall make no law ... abridging

> ... *the right of the people* peaceably to assemble") (emphasis added); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*") (emphasis added). While *this textual exegesis* is by no means conclusive, it *suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to 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.*

United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (additional emphasis added). In particular, *Verdugo-Uriquidez's* choice to compare the language of the First and Fourth Amendments with the Second (all of which protect the right of "the people") acknowledges that the three amendments should be construed consistently when determining what rights and whose rights they were enacted to protect. This is consistent with language in other cases referencing these amendments as identifying individual protections.[3] As properly

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[3] *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) (citation omitted) (emphasis added) ("[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on."); *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (same as above) (citation omitted); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406-07 (1856) (same as

[footnote continued]

recognized by the D.C. Circuit, apart from the Second Amendment, "it has never been doubted these provisions were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation." *Parker*, 478 F.3d at 381. Put simply, if the phrase "the people" connotes an individual guarantee in the First and Fourth Amendments, it logically follows that the same term, used in the same document (the Bill of Rights), in the same series of amendments within that document, should also be construed as guaranteeing the preservation of an individual, not "collective" right.

The next portion of the operative clause necessary to the determination of whose right the Second Amendment protects is the sentence predicate – "shall not be infringed." This language indicates that "the right to keep and bear arms" was not *created* in the Amendment, but rather *preserved* by it. *Id*. at 382. The right to keep and bear arms was viewed at the founding as a natural right that preexisted the formation of the national government. Thus, the Second Amendment was guaranteeing its preservation by providing that it "shall not be infringed." Case law from the late-nineteenth century expounding on the purpose for the Bill of Rights supports this interpretation of its plain meaning. "The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of

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above); *Duncan v. Louisiana*, 391 U.S. 145, 166-67 (1968) (Black, J., concurring) (emphasis added) ("[T]hese privileges and immunities, whatever they may be -- for they are not and cannot be fully defined in their entire extent and precise nature--to these should be added *the personal rights guarantied and secured by the first eight amendments of the Constitution; such as* the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; *the right to keep and to bear arms*.").

government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). This simple interpretation also finds support in legal prose written during the founding era:

> This may be considered as the true palladium of liberty . . . . *The right of self defence is the first law of nature*: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. *Wherever* standing armies are kept up, and *the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction*.

1 St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia, 300 (1803) (emphasis added).

Analysis of the Second Amendment's operative clause is complete (and completely supports the view that it provides for an individual guarantee) when one evaluates its use of the term "the right." As recognized by the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 228 & n.24 (5th Cir. 2001), "as used throughout the Constitution, 'the people' have 'rights' and 'powers,' but federal and state governments only have 'powers' or 'authority' never 'rights.'" *Emerson* correctly observes that if the Second Amendment is misinterpreted as providing for a "collective" or a "militia-related" right only, then it would stand in stark contrast to the meaning of

the words "the right" as they are used in every other article or amendment to the Constitution. *Compare* U.S. Const. amend. I (emphasis added) ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or *the right of the people* to peaceably assemble . . . ."); U.S. Const. amend. II (emphasis added) ("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 IV (emphasis added) ("*The right of the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."); U.S. Const. amend IX (emphasis added) ("The enumeration in the Constitution, of certain *rights*, shall not be construed to deny or disparage others retained by *the people*."); U.S. Const. amend. X (emphasis added) ("*The powers* not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Language employed by the Founders to convey an individual protection in other portions of the Constitution and its amendments should instruct the proper interpretation of that same language as employed in the Second Amendment. The words "the right" have consistently been construed as preserving individual guarantees.

2. The Prefatory Clause

While the Framers' inclusion of an introductory clause in the Second Amendment sets it apart from other amendments contained in the Bill of Rights, Petitioner and *amici* supporting the "collective rights" theory seek to extend the significance of that inclusion beyond its logical

limits. As recognized by one commentator, the practice of including a preamble or "statement of purpose" was not unusual in the Founding Era. "Many contemporaneous state constitutional provisions are structured similarly." Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793, 794 (1998). More importantly, the phrase "a well regulated militia, being necessary to the security of a free state," read plainly, does not directly limit the breadth of the operative clause; it merely states a singular (but not exclusive) purpose, which the amendment was designed to serve. Additionally, as noted above, long-standing rules of statutory construction require that the prefatory language be treated as just that – a preface – which can be used to guide the construction of the operative provision if necessary, but which must yield to unambiguous operative language.

Moreover, even if one entertains the argument that the preamble to the Second Amendment could limit the effect of the operative clause, then resort to history is useful. The historical context supports an individual right.

B. Historically, and as Construed by this Court in *Miller*, the Term "Militia" as Used in the Second Amendment Presupposed that Militia Members Would Arm Themselves.

It is clear from a review of Second Amendment jurisprudence and scholarly musings as a whole that the individual/collective theory divide arises from a single word used in the prefatory clause. While some unpersuasive attempts are made at construing the term "bear arms" and "keep and bear arms" as being purely

militaristic locutions,[4] the word "militia" as used in the prefatory clause of the Second Amendment seems to have carried the day for those cases where the collective rights theory has prevailed. *See, e.g.*, *Silveira v. Lockyer*, 312 F.3d 1052, 1063 n.11 (9th Cir. 2003). This Court's decision in *United States v. Miller*, 307 U.S. 174 (1939) has been cited to support that position. *Miller*'s definition of the term "militia" as used in the Second Amendment, however, shows that the framers presupposed that the "well regulated militia" would be comprised of a *self* armed public:

> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised *all males* physically capable of acting in concert for the common defense. . . . And further, that ordinarily when called for service these men *were expected to appear bearing arms supplied by themselves* and of the kind in common use at the time.

Id. at 179 (emphasis added). It defies common sense to argue that, although the militia consisted of all self-armed males in the United States at the time the Constitution was ratified, the term "militia," as used in the Second Amendment, was limited to a small subset of individuals formally affiliated with a governmental organization. The D.C. Circuit properly dismissed this argument as

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[4] The Petitioner argues that the term "bear arms" was historically understood as an exclusively militaristic phrase and argues that "keep and bear Arms" should be read together and construed to support the collective theory they propose overall. The D.C. Circuit properly labeled these arguments "outlandish." *See Parker*, 478 F.3d at 385-86 (applying dictionary meanings to context).

implausible given the analysis in *Miller* and the historical texts discussed and relied on therein. *See Parker* at 389.

In short, the Second Amendment's operative clause is not ambiguous and does not waver in its support for the "individual right" interpretive model adopted by the D.C. Circuit. Resort to the prefatory clause and the strain needed to misconstrue its textual meaning and historical significance is nothing more than a poorly veiled attempt to force the legal means which satisfy a political end. By contrast, the D.C. Circuit's opinion is based on a sound and reasonable interpretation of the Constitutional text. To that end, its decision should be affirmed.

III.

NOT ONLY IS THE RIGHT INDIVIDUAL, IT IS FUNDAMENTAL; LAWS INFRINGING THE RIGHT SHOULD THEREFORE BE SUBJECT TO STRICT SCRUTINY.

Assuming this Court recognizes the Second Amendment as protecting an individual right, the next necessary step in determining the outcome of this case is what level of scrutiny should be applied to laws affecting the individual right it protects.

A. The Right to Bear Arms is "Deeply Rooted in this Nation's History."

It is rather well established that the Due Process and Equal Protection clauses of the Fourteenth Amendment prohibit federal or state infringement on certain fundamental liberties. "[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in

the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). It is equally well recognized that to protect those fundamental liberties from undue infringement, governmental regulations seeking to limit or restrict their exercise are subject to "more searching judicial inquiry." *United States v. Carolene Prods.*, 304 U.S. 144, 152-53 n.4 (1938). The history behind the right to keep and bear arms demonstrates that the right is indeed "deeply rooted in this Nation's history," so much so that it has been ordained as "the true palladium of liberty." Blackstone's Commentaries, *supra*; *see also* Joseph Story, *Commentaries on the Constitution of the United States*, 708-09 (1833) (Carolina Academic Press 1987) ("The right of the citizens to keep and bear arms has justly been considered the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."). Commentary in the Federalist papers confirms that the protection of this right was indeed at the forefront of the Framers' concerns.

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

The Federalist, No. 46 (James Madison) (1788). Federalists like Madison and Hamilton used this right,

which at the time they viewed as a uniquely "American" liberty, to placate Anti-Federalist concerns regarding the potential for tyranny and oppression by approving the formation of a strong national government. It was and continues to be "implicit in the concept of ordered liberty," that the people themselves stand as a last resort to defending against a tyrannical government, self-armed against oppression:

> If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpations of the national rulers, may be exerted with infinitely better prospect of success than against those of the rulers of an individual state. . . . The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair.

The Federalist Papers, No. 28 (Alexander Hamilton) (1787). A review of these founding texts does not leave open for serious debate the question of whether the "right to keep and bear arms" is deeply embedded in our national history. As noted by both the D.C. Circuit here and the Fifth Circuit in *Emerson*, the right to bear arms preexisted the formation of the national government and was believed to be derived from a natural right of self-preservation. "The premise that private arms would be used for self-defense accords with Blackstone's observation, which had influenced thinking in the American colonies, that the people's right to arms was auxiliary to the natural right of self-preservation." *Parker*, 478 F.3d at 383. "The history we have recounted largely speaks for itself." *See Emerson*, 270 F.3d at 259.

In this case, the Court finally may say what has been assumed but has gone without being said for the last two centuries – the Second Amendment right to keep and bear arms is among the fundamental freedoms on which there can be no government infringement without a compelling, narrowly tailored justification.

B. Its Inclusion Within the Bill of Rights is Also Significant.

The Second Amendment's placement in the original Bill of "fundamental" rights is also, itself, strong evidence that the right is deserving of heightened protection. Though a long-standing scholarly and juridical debate has developed regarding what liberties should be construed as "fundamental,"[5] it is agreed that at *least* those freedoms expressly enumerated by the Bill of Rights fall into the "fundamental rights" group. At the birth of the "strict scrutiny" standard of review, it is these first ten amendments that prompted Justice Harlan to opine in his famous footnote that they may be subject to a heightened standard of judicial review: "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, *such as those first ten Amendments*." *Carolene Prods.*, 304 U.S. at 152-53 n.4 (emphasis added). The coupling of heightened scrutiny with the bill of enumerated rights has survived the evolution of "substantive" due process and the

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[5] In addition to those rights expressly protected in the first ten amendments, the court has applied heightened scrutiny for other rights it construes as "implicitly" protected. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to use contraception); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to have children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to direct the education and upbringing of one's children).

development of various levels of judicial scrutiny. "The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights." *Casey*, 505 U.S. at 929. In addition to the long history and tradition of self-armament in America, the inclusion of the Second Amendment in the Bill of Rights, is itself proof that the right should be construed as "fundamental."

Because the Second Amendment invokes a fundamental, individual guarantee, it should be subject to heightened judicial review. "It is settled law that no government official in this Nation may violate these fundamental constitutional rights." *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 590 (1989). "In the face of an interest this powerful a State may not rest on threshold rationality or a presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted." *Glucksberg*, 521 U.S. at 766. "[S]ubstantive due process" . . . forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (emphasis added).

IV.

RECOGNITION OF THE RIGHT AS INDIVIDUAL, FUNDAMENTAL, AND SUBJECT TO HEIGHTENED SCRUTINY DOES NOT THREATEN THE VALIDITY OF ALL GUN CONTROL REGULATIONS.

The primary argument against the application of strict scrutiny appears to be the surmise that strict scrutiny will prove to be "fatal in fact" to most if not all federal and state laws regulating the possession and use of firearms. This conjecture is unwarranted. Though the time honored epithet "strict in theory and fatal in fact" has "effectively defined the strict scrutiny standard in the minds of lawyers," the phrase has been subject to recent challenge and for good reason. Adam Winkle, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts*, 59 Vand. L. Rev. 793, 795 (2006). In his study, Professor Winkle surveyed application of strict scrutiny in several different contexts (due process, equal protection, "fundamental rights," and more). Winkle's "empirical" evidence showed that "strict scrutiny" is not necessarily fatal. "Contrary to the Gunther myth, laws can (and do) survive strict scrutiny with considerable frequency." *Id.* This Court has echoed these sentiments in recent years. "To say that restrictions on a right are subject to strict scrutiny is not to say that the right is absolute." *Casey*, 505 U.S. at 929. "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995).

In the context of gun control, the major concern appears to be that several state and federal statutes aimed at regulating the use and possession of firearms will be *ipso facto* invalid if strict scrutiny is adopted as the standard of review. A review of cases applying a strict or

heightened standard of judicial scrutiny, however, undercuts the hypothesis that strict scrutiny will be fatal to gun control as we currently know it.

Arizona, for example, is one of the 42 states where the individual right to bear arms is protected by the state constitution. In Arizona, "[t]he right of the individual citizen to bear arms in defense of himself or the State shall not be impaired." Ariz. Const. art. 2 § 26. Several Arizona cases have been called upon to construe certain local statutes and ordinances seeking to regulate firearms use and possession in light of the foregoing constitutional protection. In so doing, Arizona courts apply a heightened standard of review requiring that such laws be "narrowly drawn and . . regulate[] only the manner in which individuals may exercise their right to bear arms" to survive judicial scrutiny. *State v. Moerman*, 182 Ariz. 255, 259, 895 P.2d 1018, 1022 (Ct. App. 1994). Even under this heightened standard, every Arizona gun control statute challenged to date has survived judicial review. *See, e.g.*, *State v. Rascon*, 110 Ariz. 338, 519 P.2d 37 (1974) (state statute prohibiting probationer from possessing firearm did not infringe state constitutional right to bear arms); *City of Tucson v. Rineer*, 193 Ariz. 160, 971 P.2d 207 (Ct. App. 1998) (ordinance prohibiting possession of handguns in public park held constitutional); *Moerman*, 182 Ariz. at 255, 895 P.2d at 1018 (misdemeanor statute prohibiting "misconduct involving weapons" held constitutional); *Dano v. Collins*, 166 Ariz. 322, 802 P.2d 1021 (Ct. App. 1990) (state law prohibiting the carrying of a concealed weapon did not violate state constitutional right to bear arms).

Several federal cases published after the Fifth Circuit's decision in *Emerson* similarly illustrate that

pervasive forms of existing gun control will survive even the most rigorous standard of judicial review. For example, in *United States v. Henry*, 288 F.3d 657 (5th Cir. 2002), the Fifth Circuit reaffirmed its holding in *Emerson* by upholding Henry's conviction for violating 18 U.S.C. § 922(g)(8), which prohibits a person subject to a restraining order from possessing a firearm. According to the Fifth Circuit in *Henry*, the law prohibiting firearms possession by those subject to restraining orders is narrowly tailored to serve a compelling government interest in protecting public safety. "Ultimately . . . the nexus between the firearm possession by the party so enjoined and the threat of lawless violence was sufficient . . . to support the deprivation of the enjoined party's Second Amendment right to keep and bear arms." *Id.* at 664. Thus, Henry's attempt to use the Second Amendment to avoid a criminal conviction was entirely unsuccessful. Other federal courts outside the Fifth Circuit have expressly approved of its analysis in this regard. *See, e.g., United States v. Lippman*, 369 F.3d 1039, 1044 (8th Cir. 2004) (assuming Second Amendment protects individual right to bear arms, federal statute prohibiting possession by one subject to restraining order for domestic violence would survive strict scrutiny); *United States v. Miles*, 238 F. Supp. 2d 297 (D. Maine 2002) (statute prohibiting possession by persons subject to protective order "is a narrow and reasonable [restriction] and it passes constitutional muster even under a strict scrutiny test.").

Similarly, in *United States v. Everist*, 368 F.3d 517 (5th Cir. 2004), the Fifth Circuit again upheld a conviction over a defendant's Second Amendment challenge. There the court held that a federal statute prohibiting possession of firearms by convicted felons was constitu-

tional notwithstanding its application of the strict scrutiny standard of review:

> *Irrespective of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others.* He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens. *Accordingly, § 922(g)(1) represents a limited and narrowly tailored exception to the freedom to possess firearms,* reasonable in its purposes and consistent with the right to bear arms protected under the Second Amendment. *Everist's constitutional challenge to § 922(g)(1) fails.*

Id. at 519 (citations omitted) (emphasis added). *See also United States v. Darrington*, 351 F.3d 632 (5th Cir. 2003) (same). While possession-by-felon statutes may seem too obvious an example to truly placate the fear that strict scrutiny will be fatal in fact to more subtle forms of gun control, other examples may finally assuage other amici's stated concerns. For example, in *United States v. Patterson*, 431 F.3d 832 (5th Cir. 2005), the Fifth Circuit upheld a provision of 18 U.S.C. § 922, which prohibits possession of a firearm by an unlawful user of a controlled substance. Just like defendants Emerson, Everist, and Henry, defendant Patterson challenged his conviction by arguing that the statute was unconstitutional under the Second Amendment. Just like Emerson, Everist, and Henry before him, however, Patterson's conviction was also upheld despite the Fifth Circuit's application of strict scrutiny:

> Prohibiting unlawful drug users from possessing firearms is not inconsistent with the right to bear arms guaranteed by the Second Amendment as construed in *Emerson* and *Everist*. Like the

> classes of criminals in *Emerson* and *Everist*, *unlawful users of controlled substances pose a risk to society if permitted to bear arms. Section 922(g)(3) survives Patterson's constitutional challenge.*

Id. at 836 (emphasis added). One other federal case bears further discussion. In *Dickerson v. City of Denton*, 298 F. Supp. 2d 537, 540 (E.D. Tex. 2004), the defendant filed a civil lawsuit arguing that police officers violated his Second Amendment rights when they confiscated weapons from his home pursuant to an allegedly unlawful search and seizure. The district court permitted Dickerson to proceed with his Fourth Amendment claim, but granted the government's motion to dismiss the Second Amendment claim for failing to state a claim upon which relief could be granted. In so doing the court reasoned that the Second Amendment gave way to a lawful search compliant with the Fourth Amendment:

> So long as the requirements of the Fourth Amendment are met, police officers may search a premises and confiscate guns that they believe have been used to commit a crime. Such a search and seizure is a reasonable, necessary restriction on an individual's Second Amendment right to bear arms.

Id. at 540-41.

Thus, whether in the context of lawful searches and seizures or in the context of criminal prosecutions for unlawful firearms possession, these cases illustrate that strict scrutiny of Second Amendment impacts will not serve as a barrier to the orderly prosecution of criminal conduct. In a variety of different contexts, convictions have been consistently upheld despite a series of Second Amendment challenges post-*Emerson* and despite the Fifth Circuit's proper application of the strict scrutiny standard of review. This is because, of course, existing

criminal and regulatory laws restricting private arms use are often justified by perhaps the most significant of all "compelling interests" – the protection of public safety and welfare. "It is axiomatic that a government has a compelling interest in providing for the safety of its citizens." *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1267 (11th Cir. 2004). Indeed, narrowly tailored regulations affecting other constitutional rights have consistently been upheld when the public's safety is at issue. This is so even though those restrictions are not nearly tied so directly to public safety as current gun control regulations assuredly are.[6]

Accordingly, criminal and regulatory statutes aimed at regulating the time, manner, and place for the possession and use of firearms are not in danger of invalidation merely by recognizing that a heightened standard of scrutiny applies under the Second Amendment. Countless criminal and civil cases testing their sufficiency show that such laws can and will survive even the strictest scrutiny. Only those laws (like the D.C.

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[6] *See, e.g., Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971) ("The state may restrict religious acts if it can be shown that they pose 'some substantial threat to public safety, peace or order.'"); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768 (1994) ("The State also has a strong interest in ensuring the public safety."); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) ("In sum, we believe the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm. We hold that the testing of these employees is reasonable under the Fourth Amendment."); *Houston Chronicle Pub. Co. v. City of League City*, 488 F.3d 613, 622 (5th Cir. 2007) (upholding statute because it "serves a compelling interest at the heart of government's function: public safety.").

Code provisions at issue here) amounting to an outright prohibition rather than a narrowly tailored regulation, can and should be struck down under the heightened standard.

V.

D.C. CODE §§ 7-2502.02(A)(4), 22-4504(A), AND 7-2507.02 DO NOT PASS CONSTITUTIONAL MUSTER.

As set forth above, not all governmental restrictions on the right to bear arms are invalid under the strict scrutiny test. This Court has long recognized that certain narrowly tailored restrictions premised on compelling governmental interests (*i.e.*, public safety) will survive judicial review:

> In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons.

Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897). Nevertheless, when a law amounts to an outright prohibition on the free exercise of a fundamental right, the judiciary must intervene. "[T[he Fifth and Fourteenth Amendments' guarantee of 'due process of law' . . . forbid[] the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

The D.C. Code provisions at issue here all amount to an essentially absolute prohibition on the use and possession of handguns within the District. The D.C. Circuit properly concluded that they were, therefore, unconstitutional.

A. D.C. Code § 7-2502.02

This provision prohibits the registration of a pistol not already registered prior to 1976. In other words, apart from the limited number of owners who registered this type of weapon over thirty years ago, all others wishing to lawfully register a handgun are prohibited from doing so. The District's sole argument in support of this complete ban on handguns is that they only ban one type of firearm - handguns - so many other types of weapons are still available for registration. As noted by the D.C. Circuit, however, the presence of available alternatives does not render the restriction on one type of weapon "narrowly tailored" to achieving a governmental interest. *See Parker*, 478 F.3d at 401. If anything, the prohibition on one, but not all weapons demonstrates the arbitrary effect of the law. As the D.C. Circuit properly recognized here, "[o]nce it is determined . . . that handguns are "Arms" referred to in the Second Amendment, it is not open to the District to ban them." *Id*.

B. D.C. Code § 22-4504

Similarly, § 22-4504 restricts separately the carrying of a pistol. Because the provision contains no narrowing exceptions, it must be construed as broadly as its reads. Thus, this provision, if left intact, would ban an individual from moving his or her handgun from one room to another in his or her own house. The net effect of this

law is to prohibit any private individual from possessing a handgun altogether even within the confines of one's own home. The restriction bears no rational relationship (much less a narrowly tailored relationship) to the District's goal of reducing violent crime. Indeed, "[s]uch a restriction would negate the lawful use upon which the right was premised – *i.e.*, self-defense." *Parker*, 478 F.3d at 401.

C. D.C. Code § 7-2507.02

Lastly, § 7-2507.02 requires that a registered firearm be kept "unloaded and disassembled or bound by a trigger lock or similar device, unless such firearm is kept at [a] place of business, or while being used for lawful recreational purposes within the District of Columbia." This provision bars private District citizens from lawfully using a handgun for self protection in the home. If handguns kept in the home must remain disassembled at all times, they can be of absolutely no use in defending one's self on short notice from physical attack. Thus, by virtue of this enactment, even weapons not prohibited by the registration or carrying requirements of the first two provisions at issue, would still be rendered wholly useless to their lawful owners. As such, this provision was also properly struck down. *See Parker*, 478 F.3d at 401.

CONCLUSION

For these reasons, the Maricopa County Attorney's Office and the other amici prosecutor agencies request that this Court affirm the decision of the D.C. Circuit below.

Respectfully submitted,

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