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

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

This brief is respectfully jointly submitted by Jeanette Moll on behalf of similarly situated Ohio Concealed Carry Permitholders and the U.S. Bill of

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[1] Party attorneys were duly notified of the filing in writing seven days in advance pursuant to the requirement. No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to its preparation or submission.

Rights Foundation. Amicus curiae U. S. Bill of Rights Foundation is a non-partisan public interest law policy development organization seeking remedies at law on targeted legal issues that contravene the Bill of Rights and related constitutional law.

SUMMARY OF ARGUMENT

In the law, it is the slippery slope that we must be careful not to start down without an understanding of where that slope will lead. The founders of our nation crafted the Bill of Rights and Constitution with an eye to the tyranny they had experienced in their native England. The rights they sought to ensure had been trampled in their homeland. These rights included privacy rights, freedom of speech and the freedom of religion. Natives of a land with a government sponsored church, they were well aware of the need to keep government out of church so that they could freely worship. It was this overreaching governmental intrusion that formed the basis of the laws that formed our nation.

The right to keep and bear arms was fundamental among these. Our founders deemed it so important that this right was placed at number two in the Bill of Rights. How can an individual be free if he is unable to secure his own home? Never did the founding fathers intend our citizenry to be

reliant on an overreaching, all inclusive government to protect our individual rights. Rather, the powers of the government were to be limited so that the government served the people, not that the people served the government.

Should we choose to undercut any of these rights which were reserved to the people, we start down a path that will lead to the tyranny of colonial England where our rights and freedoms are infringed upon.

The well reasoned Court of Appeals decision in *Parker v. District of Columbia*, 478 F.3d 370, 381-382 (D.C. Cir. 2007) focuses on the meaning of "the people" but an equally relevant point to be considered in the instant case is the intent of our founders to ensure that we, the people, are secure in our own homes. The right to keep and bear arms is but one example of this. The Third Amendment states that "[n]o soldier shall, in the time of peace be quartered in any house, without the consent of the owner." U.S. Const. amend. III. Moreover, the Fourth Amendment provides for "[t]he right of the people to be secure in their persons, [and] houses...against unreasonable searches and seizures." U.S. Const. amend IV.

The Bill of Rights as contained within the United States Constitution laid out individual rights. These rights recognize our right to control

our homes and the governmental activity that occurs there in. The law at issue in this case is an egregious infringement upon those rights. Law abiding citizens are restricted from moving their own belongings within their own homes and are controlled in the manner in which they keep their personal belongings in their homes. The District of Columbia has clearly overstepped its authority by trampling on the rights that we have held inviolate since our nation's inception.

ARGUMENT

I. THE SECOND AMENDMENT IS AN INDIVIDUAL RIGHT

A. Only "People" Have Rights, Government Has Authority

The Second Amendment states, "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.

In *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the Court held that the "Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons..." *Id.* at 264. The analysis was thorough and steeped in the

historical logic and tradition that makes this country great.

The Court outlines the three most popular interpretive models of the Second Amendment: collective right, a hybrid of individual and collective rights and an individual right. *Id.* 218-220. Admittedly, the Court states that none of their "sister circuits" adhere to the individual right model as they do. The individual right model recognizes that the Second Amendment directs the right to keep and bear arms to the individual.

There is no special meaning attached to the word "people" according to the individual right model. *Emerson* at 227. The Court determines that there is no evidence to support that this word in the Second Amendment has a different connotation than it does elsewhere in the Constitution. When taken as a whole, the text of the Constitution highly proposes that "the people" has the exact same meaning in the Second Amendment as the other places in the Constitution. All through the Constitution in fact, "people" have "rights" and also "powers" while state and federal governments have "authority" or "powers" but never "rights." *Id.* at 228. Therefore, rights are reserved for individuals.

The phrase "bear arms" has been used in conjunction with civilians on numerous occasions, which include the declarations of rights and initial

constitutional provisions of a minimum of ten states. This illustrates that the common usage of these words were not exclusive to bearing arms during military service; they could refer either to civilian or military situations. *Id.* at 229-231.

To "keep...arms" continues the Court, is an individual right reflecting the plain meaning of those words. *Id.* at 232.

The Court deems that the Second Amendment's preamble: "A well regulated Militia, being necessary to the security of a free State..." is clearly an individual right since it would be inconsistent with the "substantive guarantee's text, its placement within the Bill of Rights and the wording of the other articles thereof and of the original Constitution as a whole" to consider this phrase under any other model. *Id.* at 233.

From the unambiguous logic and analysis of the Court, there can be no uncertainty that the right conveyed by the Second Amendment is an individual one.

B. The Second Amendment as a Collective Right Results in the Loss of an Amendment in the Bill of Rights

Justice Kleinfeld's analysis of the Second Amendment as an individual right in *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003) (dissenting from denial of rehearing en banc) is unequivocal and influential. He states that the panel's collective right interpretation is "an odd deviation from the individualist philosophy of our Founders." *Id.* at 571. The opinion of the panel does not address whom the states would sue or even what a claim could be should they try to enforce their collective right. *Id.* He stresses that the 9th Circuit has in effect, repealed the Second Amendment "without the democratic protection of the amendment process, which Article V requires." *Id.* at 571. This results in the loss of one of the amendments in the Bill of Rights and threatens the remainder of the Constitution for all those who live within the Circuit's jurisdiction. *Id.* at 571, 572.

The panel's collective interpretation of "the people" in the Second Amendment has no "logical boundary" and thus threatens all rights guaranteed to "the people" in the Constitution. *Id.* at 572. The collective right applied to "the people" by the panel is inconsistent with the Supreme Court's decision in *United States v.Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). There, the Court stated that "the people" was a term of art that is used in the Constitution's Preamble, Article I § 2, the First, Second, Fourth, Ninth, and Tenth Amendments and had the same meaning every place it is used. *Silveira* at 576. It is

unimaginable that the panel would similarly repeal the First Amendment's right of "the people" to the freedom of assembly, or the Fourth Amendment's protection of "the people's" right to be secure against an unreasonable search and seizure. *Id.* Accordingly, if logic dictates, there can be no other conclusion than to read the phrase "the people" consistently throughout *all* of the amendments in which it appears with the full understanding that these rights are possessed by the individual.

II. A MAN'S HOME IS HIS CASTLE

This notion transcends the actual physical invasion into one's private home by the government. The District of Columbia's gun control laws infringe on the liberties of law abiding citizens only, those who desire to be safe in their home and be able to defend themselves and their family against an intruder. These citizens are not criminals attempting to conceal contraband. The Fourth Amendment sets forth the boundaries of the government while allowing law enforcement to conduct their business of properly apprehending criminals and their contraband from a private home. It states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons

or things to be seized." U. S. Const. amendment IV. The Founders were all too aware that government will invade into all areas of the individual's life unless it is given firm, unyielding limitations. We, as citizens of the United States, must at some point stop the slow and ultimately painful loss of our freedoms. There is a long history of landmark Fourth Amendment cases decided on by this Court. Government needs to be kept in check constantly because of its propensity to ooze into our private lives.

In more recent history, the Court settled the issue that a Fourth Amendment search actually occurs when the government violates society's reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 361 (1967). The importance of the home, the sanctity of a residence, whether one owns the property, rents or is a mere overnight guest is illustrated repeatedly in the Fourth Amendment cases the Supreme Court hears.

A. Governmental Presence, Whether Tangible or Intangible, Has No Place In Our Homes

In *Kyllo v. United States*, 533 U.S. 27 (2001), the Supreme Court stated at the crux of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id.* (quoting

Silverman v. United States, 365 U. S. 505, 511 (1961)). Fourth Amendment protections come into play when the government violates a person's expectation of privacy that society deems reasonable *Id.* at 33. When we return to our home, we shelter ourselves from the outside world and expect to be safe, to know our government must respect our privacy there and that we will be free from governmental infringement.

Illustrating again the inviolability of one's home, the Court states that governmental intrusion into the interior of a home is the "most commonly litigated area of protected privacy" and the measure of the minimal expectation of privacy that is acknowledged to be reasonable has deep roots from the common law. *Id.* at 34. If that minimal protection is extracted from our expectation, then our protected privacy the Fourth Amendment assures would be eroded. The interior of a home is a constitutionally protected area. *Id.*

The government claimed the thermal scan of the home in *Kyllo* did not detect any private actions happening in private places. The Court stated, "In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." *Id.* at 37. This should hold true for an intangible government presence in our homes as well, such as the government dictating to us, as law abiding citizens, what we can keep in

our homes. The Fourth Amendment delineates "a firm line at the entrance to the house." *Id.* at 40 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

Understandably, there is a balance that needs to be struck between an individual's rights and privacy with protecting public concerns. The Court writes, ""The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."" *Id.* (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

B. English Origins of the Fourth Amendment and the Sanctity of One's Home

In the Fourth Amendment case of *Wilson v. Layne,* 526 U.S. 603 (1999), the Court discusses the often quoted origins of our Fourth Amendment by noting that an English court in 1604 observed that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Id.* at 609-610 (quoting Semayne's Case, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B.)). This illustrates that for centuries, the home has been revered, deemed exceptional and needing protection against government

infringement. Additionally, William Blackstone stated in his Commentaries on the Laws of England, that "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome." *Id.* at 610 (quoting William Blackstone, 4 Commentaries on the Laws of England 223 (1765-1769)). He also wrote that he thought it was the right of every Englishman to have "arms for their defence" and that right stemmed from one's "natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Silveira v.Lockyer,* 328 F.3d 567, 576 (quoting 1 William Blackstone, Commentaries on the Laws of England 139 (Legal Classics Library 1983) (1765)). The arms were not only for self defense but for the resistance to tyranny as well. *Id.* at 576. Accordingly, respondent Heller desires to avail himself of the right to defend himself in his home. The Founders exemplified this "centuries-old principle of respect for the privacy of the home" when penning the Fourth Amendment. *Wilson* at 610. Additionally, the *Wilson* Court reminds us that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)). Continuing on, the Court points out the "overriding respect for the sanctity of the home that has been embedded in

our traditions since the origins of the Republic..." *Id.* (quoting *Payton v. New York*, 445 U.S. 573, 602 (1980)). The government's claims of the *Wilson* case ignore the importance of the "right of residential privacy at the core of the Fourth Amendment." *Wilson* at 612.

We must be cognizant of the fact that the government can invade a home in other ways rather than physical entry. Step by step they erode the sanctity. We as a country must operate in concert to be ever vigilant in protecting our homes from government encroachment whether as individuals, community or through the judiciary. We must also remember our roots, the origins of our protections we possess as documented in our Constitution.

CONCLUSION

For the reasons set forth above, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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