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 ANTHONY HELLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF PINK PISTOLS AND GAYS AND LESBIANS FOR INDIVIDUAL LIBERTY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Pink Pistols is an unincorporated association established in 2000 to advocate on behalf of lesbian, gay, bisexual and transgendered (hereinafter LGBT) firearms owners, with specific emphasis on self-defense issues.[1] There are 51 chapters in 33 states and 3 countries. Membership is open to any person, regardless of sexual orientation, who supports the rights of LGBT firearm owners. Pink Pistols is aware of the long history of hate crimes and violence directed at the LGBT community. More anti-gay hate crimes occur in the home than in any other location, and there are significant practical limitations on the ability of the police to protect individuals against such violence. Thus, the right to keep and bear arms for self-defense in one's home is of paramount importance to Pink Pistols and members of the LGBT community.

Gays and Lesbians for Individual Liberty ("GLIL") is a non-partisan organization founded in 1991. GLIL is an international organization of persons committed to the political philosophy of individual liberty, both generally and as it affects lesbians,

[1] Pursuant to Supreme Court Rule 37.3(a), *amici curiae* states that the parties have consented to the filing of this brief and have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief.

gay men and bisexual persons. GLIL seeks to advance the principles of the free market, individual responsibility and non-interference by government in the private lives of all citizens. GLIL seeks to educate members of the gay and lesbian community about these principles, while at the same time promoting tolerance and acceptance of gay men and lesbians among members of the wider society. GLIL is based in Washington, D.C., with members across the United States and in several foreign countries. To achieve its goals, GLIL sponsors lectures, debates, panel discussions, fundraisers for charitable organizations, and social events. In 1993 GLIL sponsored a Second Amendment event. The speaker's remarks, which have been posted on GLIL's website[2] ever since, explain why the right to possess firearms for self-protection is of critical importance to gay men and lesbians. Pink Pistols and GLIL urge this Court to confirm that LGBT individuals have a Second Amendment right to keep and bear firearms for their own protection within the confines of the home.

SUMMARY OF THE ARGUMENT

Laws that prevent the use of firearms for self-defense in one's own home disproportionately impact those individuals who are targets of hate violence due

[2] Austin Fulk, *Gun Control vs. Our Freedom, available at* http://glil.org/archives/articles/1993_12-fulk-guns.html (last visited February 6, 2008).

to their minority status, whether defined by race, religion, sexual orientation, or other characteristic. Even in their homes, LGBT individuals are at risk of murder, aggravated assault and other forms of hate violence because of their sexual orientation. In fact, the home is the most common site of anti-gay violence. Thus, for certain LGBT individuals, the possession of firearms in the home is essential for a sense of personal security – a fact generally lost in the majoritarian debate about restricting individual's access to, and use of, firearms. As shown below, not only do members of the LGBT community have a heightened need to possess firearms for self-protection in their homes, the Second Amendment clearly guarantees this most basic right. This Court should not permit the democratic majority to deprive LGBT individuals of their *essential* and constitutional right to keep and bear arms for self-defense in their own homes. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997) (recognizing "the countermajoritarian implications of judicial review").

Indeed, Petitioners' arguments seeking to limit the right to keep and bear arms to persons who are actively serving in militias would produce absurd results irreconcilable with the purpose of the Bill of Rights and the plain language of the Second Amendment. Interpreting the Second Amendment as recognizing a right conditioned upon military service, where eligibility for military service is defined by the Government, prevents the Amendment from acting as any constraint on Government action at all. Such a result is contrary not only to the literal text of the

Amendment, but to the intentions of the Framers. Further, in light of the current "Don't Ask, Don't Tell" policy, such an interpretation would completely eradicate any Second Amendment right for members of the LGBT community. Petitioners' strained construction should be rejected.

ARGUMENT

I. THE SECOND AMENDMENT GUARANTEES LGBT INDIVIDUALS THE RIGHT TO KEEP AND BEAR ARMS TO PROTECT THEMSELVES IN THEIR HOMES.

Almost five years ago this Court held that the Due Process Clause protects the right of gay men and lesbians to engage in consensual sexual acts within the privacy of their own homes, "without intervention of the government." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The exercise of that right, or even the non-sexual act of having a certain "appearance," however, continues to put members of the LGBT community at risk of anti-gay hate violence and even death. Since *Lawrence* was decided, at least 58 members of the LGBT community have been murdered and thousands of others have been assaulted, many in their own homes (the most common site of anti-gay hate crimes), because of their sexual orientation.[3] The

[3] *See* National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence (2003-2006).

question now presented is whether LGBT individuals have a right to keep firearms in their homes to protect themselves from such violence. Because LGBT individuals cannot count on the police to protect them from such violence, their safety depends upon this Court's recognition of their right to possess firearms for self-protection in the home.

A. Recognition Of An Individual Right To Keep And Bear Arms Is Literally A Matter Of Life Or Death For Members Of The LGBT Community.

The need for individual self-protection remains and is felt perhaps most pointedly by members of minority groups, such as the LGBT community. Minority and other marginalized groups are disproportionately targeted by violence, and have an enhanced need for personal protection. In 2005 alone, law enforcement agencies reported the occurrence of 7,163 hate crime incidents. Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2005 Edition (2006).[4] Members of the LGBT community are frequent targets of such violence. Indeed, for the years 1995-2005, law enforcement agencies reported more than 13,000 incidents of hate violence resulting from sexual-orientation bias. *See* Federal Bureau of Investigation, Uniform Crime

[4] The FBI collects data for only 82.6% of the nation's population. Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2005 Edition (2006).

Report, Hate Crime Statistics (1995-2005). The individual stories of brutality underlying those statistics are horrific:

- On April 19, 2005, Adam Bishop was bludgeoned to death with a claw hammer in his home because he was gay. He was hit at least eighteen times in the head and then left facedown in a bathtub with the shower running.[5]
- On May 13, 1988, Claudia Brenner and Rebecca Wight were shot eight times – in the neck, the head and the back – and left for dead while hiking the Appalachian Trail, because they were lesbians. Rebecca died.[6]
- On December 31, 1993, Brandon Teena, Lisa Lambert and Philip De Vine were murdered in a farmhouse in rural Richardson County, Nebraska in an act of anti-LGBT violence. Brandon and Lisa were both shot execution style, and Brandon was cut open with a knife.[7]

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[5] Paul Peirce, *Witnesses Testified, Bishop Thought His Brother Was Gay*, Tribune-Review, June 5, 2002, *available at* http://www.tampabaycoalition.com/files/607brotherslayssiblingthoughthewasgay.html (last visited January 31, 2008).

[6] Gregory M. Herek & Kevin T. Berrill, Hate Crimes: Confronting Violence Against Lesbians and Gay Men 11-15 (Diane S. Foster ed., 1992).

[7] Katherine Ramsland, *A Grisley Find, available at* http://www.crimelibrary.com/notorious_murders/not_guilty/brandon/1.html

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- On the night of October 6-7, 1998, Matthew Shepard was pistol-whipped, tortured, tied to a fence in a remote area and left to die. He was discovered eighteen hours later, still tied to the fence and in a coma. Matthew suffered a fracture from the back of his head to the front of his right ear. He had severe brain stem damage and multiple lacerations on his head, face and neck. He died days later.[8]

- On February 19, 1999 Billy Jack Gaither was set on fire after having his throat slit and being brutally beaten to death with an ax handle. In his initial police confession, Gaither's murderer explained "I had to 'cause he was a faggot."[9]

- On November 19, 2006, Thalia Sandoval, a 27-year-old transgender Latina woman, was stabbed to death in her

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(last visited January 31, 2008). *See also* Gender Education and Advocacy, *Remembering Brandon, available at* http://www.gender.org/remember/people/brandon.html (last visited January 31, 2008).

[8] The Matthew Shepard Renga Project, *The Matthew Shepard Story, available at* http://www.public.asu.edu/~aarios/renga/page2.html (last visited January 31, 2008). *See also* From Hate Crimes to Human Rights: A Tribute to Matthew Shepard 2 (Mary E. Swigonski, et al. eds. 2001).

[9] Assault on Gay America, *The Life and Death of Bill Jack Gaither, available at* http://www.pbs.org/wgbh/pages/frontline/shows/assault/billyjack/ (last visited February 5, 2008).

> home in Antioch, California. The death was reported as a hate crime.[10]

In fact, anti-gay violence is even more prevalent than the FBI statistics indicate. "Extensive empirical evidence shows that, for a number of reasons, anti-lesbian/gay violence is vastly under-reported and largely undocumented." LAMBDA Services Anti-Violence Project (March 7, 1995) at ii. The U.S. Department of Justice estimates that only 49% of violent crimes (rape, robbery, aggravated assault, and simple assault) are reported to the police.[11] Many incidents of anti-lesbian/gay violence are not reported to police because victims fear secondary victimization, hostile police response, public disclosure of their sexual orientation, or physical abuse by police.[12] Further, investigative bias and lack of police training also contribute to underreporting of anti-LGBT hate crimes.[13] For these reasons, incidents of anti-gay

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[10] National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2006.

[11] U.S. Department of Justice, Bureau of Justice Statistics Reporting Crimes to the Police, 1992-2000 (Ref. No. NCJ-195710).

[12] *See* LAMBDA Services Anti-Violence Project (March 7, 1995) at 15-16; National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998 (April 1999) at 22 (reasons given for not reporting anti-gay violence include "shame . . . fear of reprisal by the criminals, fear of being 'outed' (about their sexual orientations) and fear of the police itself"). *See also* From Hate Crimes to Human Rights: a Tribute to Matthew Shepard, *supra*, at 3.

[13] *See* LAMBDA Services Anti-Violence Project (March 7, 1995) at 16 ("[M]ost local police officers have never received

(Continued on following page)

violence reported by the FBI represent a small fraction of those reported to LGBT community anti-violence programs. During 1994, for example, "for every incident classified as anti-lesbian/gay by local law enforcement, community agencies classified 4.67 incidents as such."[14] Similarly, while the FBI reported only 26 anti-gay homicides in the ten-year period 1995-2005,[15] the National Coalition of Anti-Violence Programs reported three times that number in half that time (78 anti-gay homicides in the five year period 2002-2006). *See* National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence (2003-2006). Studies have shown that approximately 25% of gay males have experienced an anti-gay physical assault. *See* From Hate Crimes to Human Rights: A Tribute to Matthew Shepard, *supra*, at 157.

Hate crimes based on sexual orientation are the most violent bias crimes. *See* From Hate Crimes to Human Rights: A Tribute to Matthew Shepard, *supra*, at 2 ("Anti-LGBT crimes are characterized as the most violent bias crimes."). *See also* LAMBDA Services Anti-Violence Project (March 7, 1995) at 20 ("The reported [anti-gay] homicides were marked by

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specific training on identifying bias crimes, let alone the additional skills and knowledge required to respond appropriately to anti-lesbian/gay crime.").

[14] *See* LAMBDA Services Anti-Violence Project (March 7, 1995) at 15.

[15] *See* Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics (1995-2005).

an extraordinary and horrific level of violence with 49, or 70%, involving "overkill," including dismemberment, bodily and genital mutilation, multiple weapons, repeated blows from a blunt object, or numerous stab wounds."); Gregory M. Herek & Kevin T. Berrill, Hate Crimes: Confronting Violence Against Lesbians and Gay Men 25 (Diane S. Foster ed., 1992). ("A striking feature . . . is their gruesome, often vicious nature.").

Anti-gay hate crimes are also the most likely to involve multiple assailants. LAMBDA Services Anti-Violence Project (March 7, 1995) at 7 ("[A]nti-lesbian/gay offenses involve a higher number of offenders per incident than other forms of hate crime."). In 1994 "[n]ationally, 38% of the incidents involved two or more perpetrators." *Id.* "One-quarter involved between two and three offenders, and 12% involved four or more offenders. Nationally, there were at least 1.47 offenders for each victim." *Id.*

While the District of Columbia's gun laws preclude LGBT residents from possessing in their homes firearms that can be used for self-protection, *see* D.C. Code § 7-2507.02, the laws do not protect LGBT residents from gun violence. To the contrary, "when a weapon was involved [in an anti-gay attack] in the D.C. area, that weapon was three times more likely to be a gun" than elsewhere in the nation. Gay Men & Lesbians Opposing Violence, *Anti-Gay Violence Climbs 2% in 1997, available at* http://www.glaa.org (last visited January 31, 2008). "Firearms accounted for 33% of all D.C.-area [anti-gay] assaults involving weapons, compared to 9% nationally." *Id.*

Laws, such as D.C. Code § 7-2507.02, that prevent the use of firearms for self-protection in the home are of particular concern to members of the LGBT community, because historically hate crimes based on sexual-orientation bias have most commonly occurred in the home or residence. *See, e.g.*, Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2002 Edition (2003) at 7 ("Incidents associated with a sexual-orientation bias (1,244) most often took place at homes or residences – 30.8 percent. . . ."); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2003 Edition (2004) at 8 ("Incidents involving bias against a sexual orientation also occurred most often in homes or residences – 30.3 percent of the 1,239 incidents reported in 2003."); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2001 Edition (2002) at 7 ("The data indicated that of the 1,393 hate crime incidents motivated by sexual-orientation bias, 33.4 percent of the incidents occurred at residences or homes."); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2005 Edition (2006) at Table 10 (reporting more anti-gay incidents in a home or residence than in any other location). Thus, members of the LGBT community have an acute need for this Court to recognize their right to possess firearms to protect themselves from hate violence in their homes.

B. The Police Have No Duty To Protect And Do Not Adequately Protect LGBT Individuals From Hate Violence That Occurs In Their Homes.

Members of the LGBT community often must rely upon themselves for protection against hate violence in their homes. Police are seldom able to respond quickly enough to prevent in-home crimes. Worse, as this Court has held, the police have no mandatory legal duty to provide protection to individuals. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 760-61 (2005). To the contrary, police officers are granted discretion in determining when and where to exercise their authority:

> A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.
>
> "In each and every state there are long-standing statutes that, by their terms, seem to preclude nonenforcement by the police . . . However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally . . . [T]hey clearly do not mean that a police officer may not lawfully decline to . . . make an arrest. . . ."
>
> . . . . It is, the [*Chicago v. Morales*, 527 U.S. 41 (1999)] Court proclaimed, simply "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances."

Id. *See also DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 191-93 (1989) (substantive component of the Due Process Clause does not "requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors").

Moreover, police have historically exercised their discretion in a manner that disfavored the protection of members of the LGBT community. *See* Lillian Faderman, Odd Girls Out and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America 194-95 (Richard D. Mohr, et al., eds. 1991). In fact, in 1997 the National Coalition of Anti-Violence Programs reported that, in anti-gay violence "[t]he number of reported *offenders who were law enforcement officers* increased by 76% nationally, from 266 in 1996 to 468 in 1997." *See* Gay Men & Lesbians Opposing Violence, *Anti-Gay Violence Climbs 2% in 1997, available at* http://www.glaa.org (last visited January 31, 2008) (emphasis added). *See also* National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998 (April 6, 1999) at 24 ("[T]here were very dramatic increases in 1998 in reports of verbal and/or physical abuse by police in response to victim's attempts to report a bias crime. . . . [O]ne in five victims of an anti-gay bias incident in 1998 who attempted to report it to police were treated to more of the same. Almost one in 14 became victims of actual (and in some cases, further) physical abuse."). As a consequence, members of the LGBT community have a

heightened need for this Court to recognize their individual right to possess firearms to protect themselves.

The triple-murder of Brandon Teena and two others in a rural farmhouse in 1993 starkly illustrates this need. Brandon, his girlfriend and a male friend were murdered in an anti-LGBT hate crime, after police failed to arrest the two men who had previously kidnapped, raped and assaulted Brandon:

> On December 31, 1993, John Lotter and Marvin Thomas Nissen murdered Brandon, Lisa Lambert and Philip De Vine in a farmhouse in rural Richardson County, Nebraska. These multiple murders occurred one week after Lotter and Nissen forcibly removed Brandon's pants and made Lana Tisdel, whom Brandon had been dating since moving to Falls City from Lincoln three weeks earlier, look to prove that her boyfriend was "really a woman." Later in the evening of this assault, Lotter and Nissen kidnapped, raped, and assaulted Brandon. Despite threats of reprisal should these crimes be reported, Brandon filed charges with the Falls City Police Department and the Richardson County Sheriff, however, Lotter and Nissen remained free. Lotter and Nissen have [since] both been convicted. . . . [16]

[16] Gender Education and Advocacy, *Remembering Brandon, available at* http://www.gender.org/remember/people/brandon.html (last visited January 31, 2008)

Brandon, Lisa and Philip were home when their anti-gay attackers broke in and shot them execution-style. In D.C. they would have been prevented by law from possessing a firearm in the house that they could have used in self-defense to save their own lives. This Court should not adopt a reading of the Second Amendment that would leave LGBT individuals helpless targets for gay-bashers. *See United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982) ("The right to defend oneself from a deadly attack is fundamental."); *United States v. Henry*, 865 F.2d 1260, 1988 WL 142975, at *5 (4th Cir., Dec. 27, 1988) (same).

II. LGBT INDIVIDUALS HAVE A SECOND AMENDMENT RIGHT TO POSSESS FIREARMS TO PROTECT THEMSELVES FROM HATE VIOLENCE IN THEIR HOMES.

Not only do LGBT individuals have a need to possess firearms for their own self-protection, the Second Amendment clearly guarantees that right. Petitioner and certain *amici* argue that the justification clause ("A well regulated Militia, being necessary to the security of a free State") that precedes the Second Amendment's operative clause ("the right of the people to keep and bear Arms, shall not be infringed") either vests the government with this right, or redefines "the people" as only those serving the government in a military capacity. Brief of Petitioners at 12, 14. Petitioner's argument has three critical flaws. First, so limiting the scope of those possessing

the right requires turning the very structure and purpose of the Bill of Rights on its head. Second, the proposed construction is incompatible with the manifest intent of the Founders. Third, Petitioner's approach would permit excessive government intrusion into spheres of privacy this Court has long recognized are protected by the Bill of Rights.

A. The Bill Of Rights Protects The Rights Of Individuals From Governmental Encroachment.

A "growing body of scholarly commentary" which marshals "an impressive array of historical evidence," *see Printz v. United States*, 521 U.S. 898, 938-39 & n. 2 (1997) (Thomas, J. concurring)[17] has convincingly reinforced what is apparent from the Second Amendment's plain language. The Second Amendment acknowledges an individual right to keep and bear private arms, and restricts governmental infringement of that right, in order to help secure the liberty of individuals – "the people" – within a free society. And as is evident from the text of the Second

[17] *See, e.g.,* references collected at Laurence Tribe, American Constitutional Law 897 & n. 211 (3d ed. 2000). Professor Tribe concludes that "perhaps the most accurate conclusion that one can reach with any confidence is that the core meaning of the Second Amendment is a populist/republican/federalism one [and] . . . the amendment achieves its central purpose . . . through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes." *Id.* at 902 & n. 221.

Amendment, the history of its adoption, and this Court's prior cases, Petitioner's argument is not only wrong, it turns the basic structure of the Bill of Rights on its head.

As the Court of Appeals correctly recognized, the basic structure of the Bill of Rights acknowledges individual rights in "the people," and concomitantly limits governmental infringement of those rights. *Parker v. Dist. of Columbia*, 478 F.3d 370, 383 (D.C. Cir. 2007). *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) (discussing "rights guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution"); *United States v. Guest*, 383 U.S. 745, 771 (1966) ("the Bill of Rights, designed to protect personal liberties, was directed at rights against governmental authority") (Harlan, J., concurring in part, dissenting in part); *Nelson v. County of Los Angeles*, 362 U.S. 1, 10 (1960) ("The basic purpose of the Bill of Rights was to protect individual liberty against governmental procedures. . . .") (Black, J. and Douglas, J., dissenting). This structure is a direct result of the events that led to the enactment of the Bill of Rights. The Constitution sent to the states for ratification in 1787 lacked a Bill of Rights, and its absence presented a major obstacle to ratification. The Documentary History of the First Federal Elections 1788-1790, Vol. 3:119-120 (Gordon DenBoer, et al. eds. 1986). Opposition by anti-Federalists to ratification without a Bill

of Rights led several state ratifying conventions separately to endorse rights declarations.[18]

Although Federalists and Anti-Federalists debated whether an express articulation of rights would best serve to protect the liberties embraced in those rights, they were united in their view that the rights were both fundamental and individual, and operated as a limitation on governmental power. *See* Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, *supra,* at 65-80. As Thomas Jefferson observed, "[A] bill of rights is what the people are entitled to *against* every government on earth, general or particular, and what no just government should refuse, or rest on inference." The Writings of Thomas Jefferson, Memorial Edition Vol. 6:388-389 (Albert Ellery Bergh, et al., eds. 1903-1904); The Papers of Thomas Jefferson 12:440 (Julian B. Boyd, et al., eds. 1955)) (emphasis added).

The Second Amendment fits this structure of "the entire Bill of Rights . . . [which] concerned restrictions upon federal power" counterpoised against "basic and fundamental rights which the

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[18] These declarations largely resembled the amendments that James Madison ultimately submitted to the first House of Representatives in 1789. Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, *supra*, at 65-76; *The Fourteenth Amendment and the Right to Keep and Bear Arms: The Intent of the Framers, Report of the Subcommittee on the Constitution, Committee on the Judiciary, The Right to Keep and Bear Arms, U.S. Senate*, 97th Cong., 2d Sess. 68-82 (1982) (Statement of Stephen P. Halbrook).

Constitution guaranteed to the people." *Griswold v. Connecticut*, 381 U.S. 479, 490-93 (1965) (Goldberg, J., concurring). The Second Amendment right to keep and bear arms is not a Bill of Rights "outlier," rather it is one of the "specific guarantees . . . provided in the Constitution," *Casey*, 505 U.S. at 848 (*quoting Poe v. Ullman*, 367 U.S. 497, 543 (1961)), which this Court, rightly, has on numerous occasions placed in the same category of other individual rights in the Bill of Rights. *See, e.g.*, *Robertson v. Baldwin*, 165 U.S. 275, 280 (1897); *Casey*, 505 U.S. at 848.

The essential tension between individual rights and governmental restrictions that creates the equilibrium of the Bill of Rights itself makes clear why the justification clause cannot support the "collective right" theory.[19] Petitioner's argument that the right is

[19] The "collective right" theory also requires adoption of the dubious position that the framers intended a drastically different definition of "the people" in the Second Amendment, one much different from how this Court interprets the phrase in other parts of the Bill of Rights. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) ("the people" are individuals who are part of the national community, or who have otherwise developed sufficient connection with this country to be considered part of that community). As Professor Tribe has noted, it would be "hard to sustain the position" that "the people" whose rights are protected in the Second Amendment are not the same individuals who, in the Preamble to the Constitution, are recognized to have "ordained and established" it, who are protected in the First Amendment from governmental infringement of their right to peaceably assemble, acknowledged in the Fourth Amendment to have the right to be free from unreasonable searches and seizures, and who retain non-enumerated

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vested in some governmental collective, whether a state or a state's militia, requires that the very government restricted from infringing the right become the right holder. It also supposes that a "right" can somehow exist in a whole, but not in any of its parts. This Orwellian juxtaposition is not only repugnant to the Amendment's text, it is directly contrary to the important commonalities in the political philosophy of the leaders of the emerging nation, as well as the history of events leading to the ratification of the Bill of Rights, which make clear that self-defense was the foundation of the right.

B. The Second Amendment Guarantees The Right To Possess Firearms For Self-Defense.

John Locke and Algernon Sidney unquestionably were important expositors of the 17th century English Republican natural rights theory expressed in the Declaration of Independence, the Bill of Rights, and in the founders' letters and debates leading to ratification. Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 1, 5-6, 59-60, 80-86 (University Press of Kansas 1985); Donald S. Lutz, The Origins of American Constitutionalism 112-119, 139-143 (Louisiana State University Press 1988).

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rights under the Ninth Amendment and certain non-delegated powers under the Tenth Amendment. Laurence H. Tribe, American Constitutional Law, *supra,* at 898-99 n. 213.

See also, 1 Laurence Tribe, American Constitutional Law, *supra* at 6-7. Jefferson made both Locke and Sidney required reading at the University of Virginia.

> [A]s to the general principles of liberty and the rights of man, in nature and in society, the doctrines of Locke, in his 'Essay Concerning the true original extent and end of civil government', and of Sidney in his 'Discourses on government', may be considered as those generally approved by your fellow citizens of this, and the United States . . .

Caroline Robbins, Algernon Sidney's Discourse Concerning Government, 4 Wm. & Mary Q. 267, 269 (3d Series 1947); Saul K. Padover, The Complete Jefferson 1112 (New York, 1943).

To Locke, the right to use arms to protect oneself was foundational. Private persons "have a right to defend themselves and recover by force what by unlawful force is taken from them . . . " John Locke, Second Treatise of Civil Government 1690, 14:174 (1955) (1764). That right presupposes the ability to preserve one's own life by using arms, because "the law could not restore life to my dead carcass." *Id.* at 173. Sidney's liberty calculus also hinged on the right of "every man [to be] armed" because "[s]words were given to men, that none might be Slaves, but such as know not how to use them." Algernon Sidney, Discourses Concerning Government 157 (1698). *See generally*, Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, *supra,* at 28-35. The same fundamental, individual

right was recognized by Blackstone and Montesquieu, who were favorites of early American political authors. *See, e.g.*, Donald S. Lutz, The Origins of the American Constitution, *supra*, at 142-43. In Book 1, entitled "Of the Rights of Persons," Chapter One, entitled "Of the Absolute Rights of Individuals," Blackstone said that the right of the people to be armed "protect[ed] and maintain[ed] inviolate the three great and primary rights, of personal security, personal liberty, and private property," and described the right to have weapons as "a natural right of resistance and self preservation." William Blackstone, Commentaries on the Laws of England, I:136-139 (1st ed. 1979) (1765-1769. Charles Montesquieu described self-defense as "a duty superior to every precept," and stated "[i]t is unreasonable . . . to oblige a man not to attempt the defense of his own life." Charles Montesquieu, The Spirit of the Laws 2:64, 60 (T. Nugent transl. 1899) (Hafner Publishing Co. 1949).

The view that the right of armed self defense was a first law of nature both preceded enactment of the Constitution, and continued to prevail in the decades following its enactment. Shortly before the Revolutionary war commenced, Blackstone confirmed that every Englishman had the right of "arms for their defence," which stemmed from "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." William Blackstone, Commentaries on the Laws of England 139 (Legal

Classics Library 1983) (1765).[20] William St. George Tucker, regarded as "America's Blackstone," was the first major legal commentator on the U.S. Constitution. His works have been cited at least forty times by this Court. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev., 1359, 1371, 1376 (1998). Tucker described the right of self defense as "the first law of nature," protected by the Second Amendment as "the true palladium of liberty." William Blackstone, 1 Commentaries *app. D 300.

Given the nature of the abuses that led to the American Revolution, it is not surprising that references to self-defense often appear in the context of the actions of oppressive governments and their standing militaries.[21] But by using the term militia in the justification clause, the framers were not making a qualitative distinction, conditioning the right depending on whether the loss of liberty might happen at the

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[20] England's Bill of Rights of 1689 had guaranteed for nearly a century "[t]hat the Subjects, which are Protestants, may have Arms for their Defence, suitable to their conditions, as allowed by law." http://www.yale/edu/lawweb/Avalon/England.htm (last visited February 5, 2008). The right reflected in that statute was indeed an ancient component of common law tradition. *See*, Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, *supra,* at 54.

[21] That fact notwithstanding, the personal and foundational nature of the right of armed self-defense was repeatedly referenced in writings and speeches during the ratification process, and Madison's proposals were understood to concern individual rights. Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, *supra,* at 76.

hands of one, or of many, from a single attacker or a tyrant with a powerful standing army. Rather, as Hamilton recognized in The Federalist, No. 28, the source of the right to keep and bear arms which protects against the loss of liberty, whether by the tyrant or ordinary criminal, is the "original right of self-defense which is paramount to all positive forms of government." The Federalist No. 28 (Alexander Hamilton). Similarly, in The Federalist, No. 46, Madison railed against any government "afraid to trust the people with arms," because the ability to "defend the rights of which they would be in actual possession" hinges on "the advantage of being armed, which the American People possess over the people of almost every other nation." The Federalist No. 46 (James Madison). Introducing the Bill of Rights in Congress, Madison acknowledged that "the rights of conscience, of bearing arms [etc.] . . . are declared to be inherent in the people." Works of Fisher Ames 54 (Seth Adams, ed., Boston, Little Brown & Co. 1854) (letter of Massachusetts Congressman Fisher Ames). John Adams' contemporaneous analysis of state constitutions similarly describes "self-defence" as "the primary canon of the law of nature," as he confirmed the right that "arms in the hands of citizens [may] be used at individual discretion . . . in private self defence . . . " John Adams, A Defence of the Constitutions of Government of the United States of America 3:475 (London 1787-1788) (1971). And far from envisioning that the use of the term "militia" in the justification clause as a means by which the government could disarm citizens, the founding fathers were

adamant that the government lacked any such power. Thomas Jefferson proposed that the Virginia Constitution declare that "No free man shall ever be debarred the use of arms." Thomas Jefferson, *Draft Constitution for Virginia, available at* http://www.yale.edu/lawweb/avalon/jeffcons.htm (last visited February 5, 2008). Indeed, Jefferson quoted criminologist Cesare Beccaria's 1764 book "On Crimes and Punishment, in voicing opposition to "[l]aws that forbid the carrying of arms . . . [because they] disarm only those who are neither inclined nor determined to commit crimes . . . Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man." The Commonplace Book of Thomas Jefferson 314 (Gilbert Chinard ed. 1926).[22]

[22] It is inconceivable that Jefferson and others would not have protested mightily at any suggestion that the Second Amendment's justification clause trumped the individual right or provided a means to disarm ordinary citizens. During the ratification process in Massachusetts, Samuel Adams expressly cautioned against any such construction. "The Constitution be never construed to authorize Congress to . . . prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Samuel Adams, Debates and Proceedings in the Convention of the Commonwealth of Massachusetts, 86-87 (Peirce & Hale, eds., Boston, 1850). So too did Tench Coxe in "Remarks on the First Part of the Amendments to the Federal Constitution." Writing under the pseudonym "A Pennsylvanian" in the Philadelphia Federal Gazette, June 18, 1789 at 2 col. 1 he stated: " . . . the people are confirmed by the article in their right to keep and bear their private arms." Notably, there is no

(Continued on following page)

C. The Second Amendment Guarantees The Right To Possess Firearms In One's Home.

The right to preserve one's life from the illegal acts of others is the foundation of liberty. The need to exercise that right will undeniably be influenced both by one's "victim potential," as well as the animus that one's station invokes among members of society who commit crimes. Thus petitioner's proposed interpretation, which would exclude those most in need of exercising the right, must be rejected. Moreover, the statutes at issue infringe the right in the most unreasonable way possible, by denying it even in the very inner sanctum of liberty, the home.

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, 505 U.S. at 847. Nowhere is governmental infringement of any liberty right (much less the foundational liberty right of armed self defense) more suspect than the home. As this Court explained in *Lawrence*: "Liberty protects the person from unwarranted government intrusions into a

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indication that any participant urged that "the people" in the Second Amendment had a dramatically different meaning that in other provisions of the Bill of Rights, that the Second Amendment secured a right not on behalf of "the people" but of much feared select militias, that the individual right armed self-defense was not subsumed within the right acknowledged, or that the Amendment would somehow provide a means for governments to disarm law abiding citizens. Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, *supra*, at 76-84.

dwelling or other private places. In our tradition the State is not omnipresent in the home." *Lawrence*, 539 U.S. at 562. Nowhere are vital liberty interests more protected from governmental infringement than the "unambiguous physical dimensions of an individual's home." *Payton v. New York,* 445 U.S. 573, 589, 597 & n.45 (1980). The home is a person's "castle and fortress" for the "defence against injury and violence." *Wilson v. Layne*, 526 U.S. 603, 609 (1999), (quoting *Semayne's Case*, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B.)). Thus, the government's power to regulate private conduct is more circumscribed there than its power to regulate public conduct. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 558 (1969) (while "the States retain broad power to regulate obscenity that power simply does not extend to mere possession by the individual in the privacy of his own home"). Given these two propositions, governmental prohibition of the right to possess firearms usable for self-defense within the sanctuary of the home must certainly be a "no entry zone."

Petitioner correctly observes that the right specifically guaranteed was not "created" by the Second Amendment, *United States v. Cruikshank*, 92 U.S. 542, 551 (1875) ("neither is it in any manner dependent upon that instrument for its existence"), but fails to appreciate the consequences. Because the right pre-existed the Bill of Rights and the Second Amendment (and, like other Bill of Rights Amendments, was enacted both to acknowledge the right and to protect "the people's" exercise of the right from

governmental infringement) the common law principles at the time of ratification surely inform the nature of the right. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . . .' *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Part of the ancient common law right that was acknowledged in the Second Amendment is necessarily contained in the maxim *et domus sua cuique est tutissimum refugium* ("and where shall a man be safe if it be not in his own house?"). Sir Edward Coke, The First Part of the Institutes of the Laws of England, or, A Commentary on Littleton 162 (F. Hargrave and C. Butler, ed. 1832). This doctrine has been repeatedly emphasized in this Court's decisions – the home is the sanctuary of personal liberty. *See, e.g., Lawrence*, 539 U.S. at 562; *Stanley v. Georgia*, 394 U.S. 557 (1969) (recognizing right to possess obscenity in one's own home); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (describing protected interest in right to privacy and emphasizing the protected space of the marital bedroom).

III. THE SECOND AMENDMENT MUST RECOGNIZE AN INDIVIDUAL RIGHT OF "THE PEOPLE" TO AVOID DISQUALIFYING LGBT INDIVIDUALS FROM ANY ENJOYMENT OF THAT RIGHT.

An interpretation of the Second Amendment as a guarantee of an individual, rather than collective

right of the states, is required if the Second Amendment is to have any application to LGBT individuals. Because the law effectively prevents members of the LGBT community from offering military service, reading the Second Amendment as Petitioners urge – to confer a collective right to keep and bear arms, based upon the condition of membership in "state and congressionally regulated military forces" (*see* Brief of Petitioners at 8-9, 12-14) – renders that right meaningless to LGBT individuals. Moreover, interpreting the Second Amendment as recognizing a right conditioned upon military service, where eligibility for military service is defined by the Government, prevents the Amendment from acting as a constraint on Government action. Such a result is contrary not only to the literal text of the Amendment, but to the intentions of the framers, who would not have guaranteed the right to possess firearms solely to those eligible for military service, while denying the right to possess firearms, for self-defense, from those groups most in need.

A. If The Right Recognized In The Second Amendment Is Conditioned Upon Membership In State And Congressionally Regulated Military Forces, LGBT Individuals, And Others, Are Excluded From The Right To Bear Arms.

The definition of persons eligible for military service is far narrower than "the People." *See*, *e.g.*, 10 U.S.C. § 311 (1994) (The "Militia Act") (the militia

consists of "all able-bodied males at least 17 years of age and . . . under 45 years of age [some National Guard re-enlistees to age 64] who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard"). *See also* 10 U.S.C. § 654 ("Policy Concerning Homosexuality in the Armed Forces") ("A member of the armed forces shall be separated from the armed forces if . . . the member has engaged in . . . a homosexual act or acts" or "the member has stated that he or she is a homosexual or bisexual, or words to that effect" or "the member has married or attempted to marry a person known to be of the same biological sex."). Even if the Court's decisions on sex equality, including *United States v. Virginia*, 518 U.S. 515 (1996) and *Craig v. Boren*, 429 U.S. 190 (1976), are applied to the Militia Act to include able-bodied women between the ages of seventeen and forty-four, individuals of any gender over forty-four years of age, those whose professions exempt them, or open members of the LGBT community remain excluded from eligibility for military service.

While such eligibility restrictions are discriminatory, this Court has made clear its deference to the judgment of Congress on issues of "national defense and military affairs" when applying an apparently relaxed form of rational basis review. *See Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). Indeed, "perhaps in no other area has the Court afforded Congress greater deference." *Id*. at 64-65. The Court has

described the "constitutional power of Congress" to "raise and support armies and to make all laws necessary and proper to that end" as "broad and sweeping," (*id*. at 65 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968))), while describing its own "lack of competence" on issues relating to the regulation of the armed forces as "marked." *Id*. at 65-66 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.")). *See also Parker v. Levy*, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society.")

Relying on this Court's decisions and the extreme deference afforded to Congress in a rational basis review of issues related to military regulation, federal courts considering the constitutionality of 10 U.S.C. § 654 and its prohibitions on the service of open members of the LGBT community in the military have found those prohibitions constitutional. *See, e.g*., *Thomasson v. Perry*, 80 F.3d 915, 927 (4th Cir. 1996) (upholding 10 U.S.C. § 654 and noting that "'[t]he special status of the military has required, the Constitution has contemplated, Congress has created, and [the Supreme] Court has long recognized' that constitutional challenges to military personnel

policies and decisions face heavy burdens," and that "[i]t is with those burdens in mind that we address appellant's particular arguments"); *Able v. United States*, 155 F.3d 628, 632 (2nd Cir. 1998) (upholding 10 U.S.C. § 654, emphasizing the "narrow" rational basis review and "great deference" applied to "Congressional judgments affecting the military"); *Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996) (upholding 10 U.S.C. § 654 and noting the "especially deferential" rational basis review applied to due process challenges of "military policy"); *Selland v. Perry*, 905 F.Supp. 260, 264 (D. Md. 1995) (upholding 10 U.S.C. § 654 and noting the "general principle of deference" and thus "relaxed restrictions" of the First Amendment in military settings); *Witt v. United States Dep't of Air Force*, 444 F.Supp.2d 1138, 1145 (W.D. Wash. 2006) (upholding 10 U.S.C. § 654, explaining that "review of Congressional enactments is especially deferential in the military context"); *Cook v. Rumsfeld*, 429 F.Supp.2d 385, 397-98 (D.Mass. 2006) (upholding 10 U.S.C. § 654 under a rational basis review, noting that "[d]eference to Congressional judgment is of even greater importance in a case such as this one where the legislation challenged was enacted pursuant to Congress' authority over the national military forces"). These cases effectively find, as Congress pronounced in its findings supporting the "Don't Ask, Don't Tell" policy, that "[t]here is no constitutional right to serve in the armed forces." 10 U.S.C. § 654(a)(2).

Consequently, under Petitioner's construction of the Second Amendment, which conditions the right to keep and bear arms upon membership in an organized military force, the exclusion of older individuals and openly LGBT individuals from military service would necessarily exclude them from the right to keep and bear arms in their own self-defense. Such an interpretation unacceptably robs from those groups most vulnerable, the means to protect themselves in their own homes.

B. Because The Government Defines Eligibility For Service In Regulated Military Forces, Interpreting The Second Amendment As A Right Conditioned Upon Membership In A Regulated Military Force, Prevents The Amendment From Constraining Government Action.

Interpreting the justification clause as a condition on the existence of the right would render the Second Amendment nugatory. The Amendment, specifically its operative clause, is useful only if it provides some meaningful constraint on government action. It fails to provide such constraint if it the right is conditioned on military service, since, as demonstrated above, the government is permitted to limit eligibility for military service as it sees fit. Indeed, if the scope of the right recognized in the operative clause is limited by the justification clause's reference to the militia, which the government can define, then the Second Amendment provides no meaningful check

against government power. Such a reading cannot be squared with the purpose behind the Bill of Rights. While the justification clause may aid interpretation of the operative clause where there are ambiguities, it cannot take away what the operative clause clearly gives. Furthermore, a construction of the right recognized by the Second Amendment which ties that right to eligibility for military service renders the right and the Amendment devoid of any fixed meaning, as military eligibility requirements are ever-changing. Such a construction would also permit modification of the scope of a Constitutional right *via* statute – *e.g.*, 10 U.S.C. § 654 ("Policy Concerning Homosexuality in the Armed Forces").

C. Conditioning Second Amendment Rights Upon Membership In A Regulated Military Force, Which Excludes LGBT And Other Individuals From Enjoying The Right To Self-Defense, Is Contrary To The Intentions Of The Framers.

Construing the Second Amendment to recognize a right of "the People," rather than merely those recognized as eligible for formal military service is consistent with the intentions of the Constitution's framers. The text of the Amendment, itself, indicates that the framers acknowledged the right to inhere in "the People," not just those "militia eligible." Had the framers meant to limit the acknowledged right only to those militia-eligible, they could have easily done so. *See, e.g.*, Militia Act of May 8, 1792, ch. 33, § 1, a

Stat. 271 (repealed 1903) (limiting military service members to white, able-bodied male citizens between the ages of eighteen and forty-five). Rather, the choice not to limit the right to possess firearms, acknowledged in the Second Amendment, to only those "militia eligible" follows logically from the framers' belief that the right to self-preservation and self-defense, through the possession of arms, if necessary, was a right conferred upon each individual by natural, rather than positive, law. *See supra*, § II.B.

To read the Second Amendment as Petitioners insist, as a right which turns solely upon militia eligibility, would mean that the framers guaranteed the right to self-defense through the possession of arms to those who needed such defense the least, while leaving the groups most vulnerable to attack helpless to defend themselves even in their own homes. While Jefferson feared that laws preventing persons from bearing firearms would "serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man,"[23] reading the Second Amendment as acknowledging a collective right, and upholding the D.C. law at issue, here, accomplishes the same. By effectively preventing LGBT individuals from defending themselves through possession of firearms in their own homes, persons motivated to attack

[23] The Commonplace Book of Thomas Jefferson 314 (Gilbert Chinard ed. 1926).

LGBT individuals may do so with the confidence that their intended victims will be unarmed. Such a result not only conflicts with the natural law right of man to act in his own self-defense, as recognized by the framers, but jeopardizes the privacy rights of LGBT individuals recognized by this Court in *Lawrence*, when the exercise of such rights makes one an unarmed target.

CONCLUSION

For the foregoing reasons, *amicus* respectfully request that this Court affirm the decision of the Court of Appeals and confirm that LGBT individuals have a Second Amendment right to keep firearms in their homes for their own self-protection.

Respectfully submitted,

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