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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

This Court should reverse the decision below for any of three independent reasons. First, only the District's view that the Amendment protects a militia-related right makes sense of its language, history, and purposes. Second, the Amendment was enacted to preserve state autonomy from federal interference and imposes no limitation on the District's laws. Third, the Amendment does not, in any event, confer a right to possess the weapons of one's choosing. The District's decision to ban a particularly dangerous weapon while permitting access to other weapons, including rifles and shotguns, should be upheld.

I. THE SECOND AMENDMENT PROTECTS ONLY MILITIA-RELATED FIREARM RIGHTS.

When the Framers submitted the Constitution to state ratifying conventions, the ensuing political debate was one of the most divisive in American history. By proposing to transfer authority from state governments to a distant national government, the Constitution seemed (to some) to threaten the democratic principles upon which the states had governed themselves in the decade since independence.

In particular, some were alarmed by the Constitution's grant of powers to the national government to create a standing army and exercise substantial control over state militias. Many viewed a professional standing army as a threat to liberty, preferring to keep military force in the hands of "the people," assembled as citizen-soldiers, "fighting for their common liberties, and united and conducted by governments possessing their affections and confi-

dence." Federalist No. 46 (James Madison). The militia—considered in this very real sense to be "the people"—would temporarily put aside their livelihoods to take up arms when called to defend their communities.

One clause of the Constitution was thus a lightning rod for criticism: Article I, § 8, cl.16, which gave Congress the power "to provide for organizing, arming, and disciplining, the Militia." The notion that the distant national government could "provide for [the] . . . arming" (and thus effectively the "disarming") of the militias became "a topic of serious alarm and powerful objection." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1201, at 84 (1833).

As its text makes clear, the Second Amendment directly responded to this grant of power. The Amendment prevents Congress from interfering with the right of the people of each state to arm a well-regulated militia composed not of professional soldiers, but of the people themselves.

Respondent and the United States offer competing readings of the Amendment which are not only unsupported by its text and history, but utterly at odds with both. Respondent's proposed right of insurrection turns history on its head: states wanted to maintain control over the arming of their militias to defeat, not to promote, rebellion. And the United States' reading engrafts onto the Amendment a free-standing personal liberty right unrelated to any state's ability to maintain a militia.

The Amendment's text and history make clear that the right the Amendment enshrines requires some connection to a state militia. The nature and

quality of the connection an individual must show to raise a successful challenge need not be resolved in this case. Respondent has not alleged—and cannot establish—*any* connection between his desire to own a handgun and a well-regulated militia.

A. The Amendment's Text, History, And Purposes All Support A Militia-Related Right.

The "declaration *and* guarantee" of the Amendment "must be interpreted and applied" "in view" of its "obvious purpose" of protecting state militias. *United States v. Miller*, 307 U.S. 174, 178 (1939) (emphasis added). The District's reading gives meaning to every word of the Amendment and comports with its history and "obvious purpose." *Id.*

1. The first half of the Amendment—"a well regulated Militia, being necessary to the security of a free State"—so plainly supports the District's position that respondent, like the United States and the court below, is reduced to arguing that it must be given *no* operative effect whatsoever. Respondent's Brief (RBr) 5; United States' Brief (USBr) 14; PA34a-35a. But reading half the Amendment out of the text cannot be reconciled either with this Court's repeated condemnation of interpretations that render constitutional language irrelevant, *see* Petitioners' Brief (PBr) 17; Brief of Brady Center (BCBr) 6, or with the considerable attention the Framers focused on this language during the Amendment's drafting, PBr27-29.

Respondent nevertheless contends that the Court should ignore the Amendment's declaration, which he calls the "preamble," because the second half of the Amendment is "clear and positive," requiring no

further elaboration. *See* RBr5-8. But that misstates the rule of construction on which respondent relies. *See, e.g.*, 1 Story, *supra*, § 459, at 443 ("[t]he importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded in all juridical discussions"). Giving effect to all of the Amendment's language is especially vital here because the declaration is not a separate preamble, but an absolute clause within the Amendment itself. Brief of Linguists (LingBr) 14; BCBr8-9; 1 James Kent, *Commentaries on American Law* 431-32 (1826).[1]

2. In any event, respondent cannot show that the second half of the Amendment "clear[ly] and positive[ly]" supports his position. Respondent cannot explain why a non-militia right so "clear[ly]" protected by the second part of the Amendment has nevertheless been overlooked by multiple adverse precedents, including *Miller*. The United States confirms the lack of clarity by offering an interpretation that differs from both its own longstanding position, *see* Brief of Former Department of Justice Officials 9, and *Miller* itself, *see* USBr20 n.4 (noting that *Miller* "differs in some respects" from the United States' position).

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[1] Respondent suggests that the Copyright Clause also contains a meaningless "preamble," but in *Graham v. John Deere Co.*, 383 U.S. 1 (1966), this Court held that this language is a "constitutional command" that "may not be ignored," *id.* at 6. *See also Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (Copyright Clause is "'both a grant of power and a limitation'" (quoting *Graham*, 383 U.S. at 6)); BCBr7-10 (discussing state constitutions).

a. Respondent and the United States argue that the Amendment's use of "the right" shows that it is enforceable by individuals. RBr9-10; USBr11. The District agrees. *Cf. Printz v. United States*, 521 U.S. 898, 918 (1997) (structural rights may be enforced by individuals). But that says nothing about *what* right individuals may enforce.

Nor does it advance respondent's position to argue that the phrase "*the* right" must be read to refer to some pre-existing right. *See* RBr18; *see also* USBr12. The right of the people to keep and bear arms in connection with militia service was a pre-existing right, recognized by states prior to the Founding in an effort to provide for their defense. Massachusetts and North Carolina, for instance, recognized the right of the people to "keep and bear arms for the common defense" and "to Bear Arms, for the Defense of the State." CertPet12; *see also* PBr30-31 (Delaware, Maryland, Virginia); PBr13 & n.1; Brief of American Jewish Committee (AJCBr) 9; Brief of Historians (HBr) 10-11. By contrast, *no* state recognized a right to "bear Arms" for private purposes. PBr30-31; HBr10. Contrary to respondent's suggestion that Pennsylvania protected a private right to arms, RBr12, its constitution separately protected hunting (without any mention of the right to "bear arms," HBr10 n.3), and the provision protecting the right to "bear arms for the defense of themselves and the State" encompassed only the right to engage in military defense on behalf of the community, PBr31. That is proven by its conscientious objector clause, which used the phrase "bearing arms" to refer exclusively to military service. *See The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 184 (Neil H. Cogan ed., 1997).

The Second Amendment was enacted precisely because Anti-Federalists feared that the Constitution's Militia Clauses, which authorize Congress to "organiz[e], *arm*[], and disciplin[e], the Militia," U.S. Const. art. I, § 8, cl.16 (emphasis added), threatened this pre-existing militia-related right. As George Mason explained at the Virginia Ratifying Convention, "[t]he militia may here be destroyed . . . by rendering them useless—by disarming them." PA24; *see also* AJCBr15-17, 80a. The Amendment directly and proportionately responded to these concerns by protecting the right of the people to be armed in connection with state militias.[2]

Respondent suggests that it is "strange" to limit "the right" to militia-related conduct entailing a duty to "obey orders." RBr10. But "rights" and "duties" were often linked at the Founding. *See, e.g.,* 1 Kent, *supra*, at 397-98; 2 *id.* 33-63; 1 William Blackstone, *Commentaries on the Laws of England* *119-23, *157, *237-38, *243-44 (1765); Pa. Const. art. VIII (1776). Respondent's authorities recognize that the "right" at issue involved the concomitant duty to defend the new republic. RBr13 ("The constitutions of most of our States assert" that it is the people's "right *and duty* to be at all times armed" (quoting Thomas Jefferson) (emphasis added)); *see also* HBr18.

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[2] Nineteenth-century scholars and jurists also accepted the principle that the Amendment protects a militia-related right. *See, e.g.*, CertReply3 n.3; 3 Story, *supra*, § 1890, at 746; Benjamin L. Oliver, *The Rights of an American Citizen* 176 (1832); Joel P. Bishop, *Commentaries on the Law of Statutory Crimes* § 792, at 497-98 (1883); *Louisiana v. Smith*, 11 La. Ann. 633, 633 (1856); *Arkansas v. Buzzard*, 4 Ark. 18, 19-20 (1842); BCBr13 (discussing *Aymette v. State*, 21 Tenn. 154 (1840)).

b. Respondent contends that, because it uses the phrase "the people," the Amendment's guarantee must sweep more broadly than its declaration, which refers only to "a well regulated Militia." In fact, the two phrases are tightly connected, because there was little space between "the people" and the "Militia" at the Framing. RBr15-16; USBr16. The militia consisted of citizen-soldiers drawn from the community, as opposed to full-time professional soldiers lacking allegiance to it. RBr15 (quoting Mason). "[T]he people" of the guarantee draws the same distinction: the Framers sought to distinguish the "Militia" from professional standing armies. BCBr27-29. As Federal Farmer explained, the "Militia" were "the people, immediately under the management of the state governments." AJCBr18-19; *see also* PBr20-21.

c. Most importantly, the phrase that defines the right—"to keep and bear Arms"—supports the District's position. The Framers used that phrase—as opposed to the formulations upon which respondent relies, *see* RBr11 ("bear . . . guns")—because this idiomatic expression referred to the use of arms in a military context. Every use of the phrase "bear Arms" in congressional debates from 1774 to 1821 supports the District's military reading. PBr16; LingBr18-27; *see also* Nathaniel Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. Pa. J. Const. L. 413, 416 (forthcoming 2008) (*available at* http://www.law.upenn.edu/journals/conlaw/articles/vol10num3/kozuskanich.pdf). Madison's original inclusion of a conscientious objector clause exempting "any person religiously scrupulous of bearing arms" confirms the point. LingBr23; BCBr23-25. Respondent's only response is that the

words "Arms" and "bear Arms" did not have a "uniquely" or "exclusive[ly]" military meaning at the Founding. RBr10-11. But even if that were so, respondent does not and could not argue that his reading of "keep and bear Arms" is the more natural one—let alone that the phrase "clear[ly] and positive[ly]" compels his non-military reading.

Seeking to elide that obvious problem, respondent argues that the words "keep" and "bear" "embody distinct concepts in the Second Amendment." RBr10. But ripping the words "keep" and "bear" out of their context deprives them of their natural meaning when read as part of the Amendment as a whole.

Respondent's claim that the word "keep" means "possess at home," RBr10, for example, says nothing about *why* arms could be kept at home. The purpose of the word "keep" was to ensure citizen-soldiers access to "Arms" so that, when called into service, they could "bear" them. *See, e.g.*, LingBr27; BCBr20-22&26. That was the meaning of "keep" in the most relevant authorities: contemporary state constitutions and militia laws. PBr16-17, 30. Respondent and his *amici* can point only to other statutes and contexts lacking the critical military language surrounding the word "keep" in the Second Amendment. RBr10-11; Brief of Cato Institute 12-14.

Respondent's argument that "bear" means "carry" has similar shortcomings. RBr11. Stripped of its context, it suggests to respondent that the Framers meant to ensure the people could possess ("keep") and carry ("bear") arms without expressly protecting *any* particular uses, even in militia service—a reading fundamentally at odds with the text and history

of the Amendment. The District's reading, by contrast, makes sense of the Amendment as a whole.

3. The Amendment's drafting history confirms that the right the Framers protected was militia-related. PBr27-29. Respondent asserts that Madison meant to incorporate proposals by the New Hampshire ratifying convention and by *dissenters* in Pennsylvania and Massachusetts. RBr37-38. The suggestion that Madison intended to endorse those decidedly atypical formulations, while studiously avoiding their language, is untenable. AJCBr20; PBr32-33.

The Amendment's drafters considered various proposals that would have altered the delicate compromise struck in Article One, which gave Congress authority to ensure the militias were capable of performing their responsibilities, while preserving to the individual states some control over them. For example, the Framers found it unnecessary to include the language "for the common defence," which might have been read to suggest that the militias could only be used for the Union's "common defence," thereby limiting the power of the individual states to use their militias to suppress localized insurrections like Shays' Rebellion. PBr29.

Federalists also rejected a Virginia proposal that would have given the states authority to "organiz[e], arm[], and disciplin[e]" the militia because they were unwilling to change the body of the Constitution and feared the proposal would give too much power to the states, preventing the federal government from ensuring that the militia were sufficiently well-regulated and disciplined. *See* PBr29 n.6; HBr3-4; RBr36. But they adapted the alternative Virginia

proposal, which recognized that "a well armed and well regulated militia [is] the best security of a free country." PBr27, 29 n.6. Only the District's position explains the language that was chosen, as well as the language that was not.

B. The Theories Offered By Respondent And The United States Are Contrary To The Amendment's Text, History, And Purposes.

Neither respondent nor the United States provides an account of the Amendment consistent with its text, history, and purposes. Under their views, the Amendment protects a broad right of gun ownership for private purposes, but it provides no protection to the militia *qua* militia.

1. Respondent contends that the Amendment protects the right of individuals and private "militias" to "resist tyranny" by engaging in armed insurrection against their government. RBr30; *see* RBr25, 28. In support of this view, respondent claims that the phrase "well regulated Militia" refers to private militias operating in defiance of government authority. RBr25.

a. The first problem with this claim is that the Constitution does not encourage treason, but criminalizes it. U.S. Const. art. III, § 3. Article One similarly explains that militias are needed to "suppress Insurrections," not cause them. *Id.* art. I, § 8, cl.15. And the Second Amendment itself states that a "well regulated Militia"—not, as respondent would have it, a militia "beyond the control of, [and] in direct challenge to" the government, *see* RBr25—is "necessary to the security of a free State," not necessary to overthrow it. PBr15 n.3. Respondent's view that armed

private citizens may decide for themselves when to rise up and "resist tyranny" is impossible to reconcile with these provisions.

Respondent's theory also has no support in the Amendment's history. Respondent fails to cite any evidence from the debates surrounding the Constitution or the Amendment that the Framers intended to facilitate armed insurrection against the government. Instead, respondent relies on events taking place before and during the Revolutionary War. RBr22-35. Even if those events were relevant, respondent's argument would fail: the colonists did not endorse private insurrection by individuals, but instead made every effort to give their actions legitimacy under law. *See* Letter from George Mason to Martin Cockburn (Aug. 22, 1775), *reprinted in* Kate Mason Rowland, *Life and Correspondence of George Mason* 206, 208 (1892).

More important, the Second Amendment was not enacted before or during the Revolutionary War, but only after a critical intervening decade had passed. During that period, militias were brought under extensive state control. *See* PBr12-14. They were also brought under substantial federal control in response to Daniel Shays' attempt to overthrow Massachusetts' purportedly "tyrannical" government and its debt collection efforts. PBr22-23; AJCBr12-13. And the Second Amendment then ensured that Congress could not disarm state militias. AJCBr11-13; HBr14-17, 32-33. Those who championed the "well regulated militia" at that time plainly did not have in mind pre-Revolutionary private militias acting in *defiance* of any and all governmental control.

Respondent also wrongly conflates the Framers' views of why resistance to British oppression was justified with their views of what rights Americans possessed against their new government under the Constitution. As early as 1776, states began taking steps to prevent insurrection by disarming individuals who refused to swear loyalty oaths. *See* AJCBr22-23 (Massachusetts, Pennsylvania); *see also* 4 Journals of the Continental Congress, 1774–1789, at 201-05 (1906) (Continental Congress recommendation that provincial legislatures disarm all persons "who are notoriously disaffected to the cause of America"). And in 1792, Congress passed two Militia Acts empowering the President to call out state militia to *quash* private rebellions (and to provide for discipline and organization so they would be effective in doing so), *see* PBr14; BCBr15, as George Washington did in 1794 in response to the Whiskey Rebellion, *see* AJCBr13. Accordingly, although the Framers believed that armed insurrection was justified against the British, they did not enshrine an individual right of insurrection against the "more perfect Union" they fought a war to create. PBr15 n.3; BCBr19-20.

b. Respondent's theory is also inconsistent with the Amendment's "obvious purpose." *Miller*, 307 U.S. at 178. The Framers thought the best protection against tyranny was the states, supported by their militias. *See* Federalist No. 46 (James Madison) ("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"); *see also* HBr32. That is why they pro-

tected militia-related, and only militia-related, rights under the Amendment. Some modern critics may believe that *private* gun ownership is necessary to prevent tyranny. But that was not the view of the Framers, who feared that the wrath of an unregulated and armed people would lead to anarchy. Under the Framers' vision, it was the people acting *through* the "well regulated Militia" who would instead safeguard against oppression.

2. The United States argues that the Amendment protects the "common-law right to possess firearms." USBr13. Its theory is based largely on the assertion that the Amendment protects a preexisting right. But, as already explained, the District's position is consistent with that view, as well as with the Amendment's text, history, and purposes. By contrast, the United States does not demonstrate that (1) the phrase "keep and bear Arms" is best read as protecting any common-law right; (2) the drafting and ratification history support that reading; or (3) the Framers were concerned that Congress could or would *infringe* that right. *See* Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 Md. L. Rev. 150, 161 (2007). The United States is therefore attempting to graft onto the Amendment a free-standing personal liberty interest unrelated to the Amendment's purpose of protecting the states' ability to maintain their militias.

The United States relies heavily on Blackstone in support of its position. USBr18-19. But even if Blackstone's writings could overcome the actual text, history, and purposes of the Amendment, they support the District's position for three reasons. First, Blackstone viewed arms ownership as a civic right of

subjects to participate in the common defense, not an individual right to own guns for private purposes, such as self-defense. S*ee* 1 Blackstone, *supra*, at *136-39 (describing the five "auxiliary" rights protecting British subjects against governmental oppression); *see also* HBr5-8.

Second, although this civic right limited the powers of the Crown, it did *not* limit Parliament's power. HBr8 ("we may venture to affirm, that the power of parliament is absolute and without control" (quoting 1 Blackstone, *supra*, at *157)). The United States effectively acknowledges this point, noting that "the right secured" was "the right of English subjects 'of having arms for their defense, *suitable to their condition and degree, and as such as are allowed by law*.'" USBr23 (quoting 1 Blackstone, *supra*, at *143-44 (emphasis added)); *see also* L.G. Schwoerer, *To Hold and Bear Arms*, 76 Chi.-Kent L. Rev. 27, 55-56 (2000) ("the phrase 'as allowed by law' invited recognition of parliament's law-making authority in the past, the present, and the future").

Third, this civic right did not permit individuals to decide for themselves when to resist tyranny. As Blackstone explained, "allow[ing] to every individual the right of determining [when resistance to government is appropriate] is . . . [a] doctrine productive of anarchy, and, in consequence, equally fatal to civil liberty, as tyranny itself." 1 Blackstone, *supra*, at *251.

For these reasons, regulation of firearms by Parliament remained pervasive in England long after the Bill of Rights. AJCBr12 n.3, 28-29; HBr5-7. Shortly after the English Bill of Rights was enacted, Parliament soundly rejected a proposal to "enable

every Protestant to keep a musket in his House for *his defence*," with opponents stressing that the proposal "savours of the politics to arm the mob, which . . . is not very safe for any government." Schwoerer, *supra*, at 50-51 (emphasis added).

Blackstone's *separate* discussion of the common-law right of self-defense, USBr19, also does not support the United States' position. The civic right discussed above was distinct from the common-law rights of (1) personal security, which encompassed a right to kill to prevent loss of "life and limbs," 1 Blackstone, *supra*, at *126; and (2) self-defense, which made excusable or justifiable any homicide committed to protect oneself from assault or capital crime, 4 *id.* at *184; *see also* 3 *id.* at *3-4. *See* HBr8; AJCBr12 n.3. Those distinct rights did not encompass any right to own firearms—let alone to "keep and bear Arms." 4 Blackstone, *supra*, at *183-88. The Court should reject any attempt to conflate what are two separate questions: "what an individual may rightly do when he is subject to imminent attack" and "what measures the legislature may properly take *ex ante* to protect the lives and safety of citizens." Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 Chi.-Kent L. Rev. 237, 245 (2000).

* * *

Respondent—who is not a member of any militia—nowhere suggests that there is any connection between his desired private use of handguns and any militia, let alone a well-regulated one. Nor could he. The necessary precondition for establishing the requisite connection to that militia would be a determination by the state that handgun ownership is con-

ducive to the establishment or maintenance of its militia. Here, the District not only has declined to require or even permit handgun possession for militia-related purposes; it has barred handgun possession for any private purpose.

II. LEGISLATION CONFINED TO THE DISTRICT, LIKE OTHER STATE AND LOCAL GUN REGULATION, DOES NOT INFRINGE THE SECOND AMENDMENT.

Any reading of the Amendment that recognizes a liberty interest unrelated to a state's ability to maintain a militia could lead to results completely at odds with the Amendment's protection of state autonomy. For example, some of respondent's *amici* contend that a right to gun possession is enforceable not only against national legislation but also against state and local laws. *See* Brief of Texas 23 n.6. That would turn the Amendment, which was designed to limit federal interference with state prerogatives, into a sword *federal* judges could use to strike down measures that *state* and local governments adopt to control the use of weapons within their borders. This is a case in point. *See* Brief of National Rifle Association 11 (contending that the District's laws are misguided because "[a]n *effective* militia cannot spring forth fully-formed from a people unfamiliar with firearms" (emphasis added)).

1. Even if the right the Amendment protects encompasses private uses of weapons, it does so as a vehicle to protect state authority as a counterbalance to federal power. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (the Framers' "discovery" was to "split the atom of sovereignty"); *New York v. United States*,

505 U.S. 144, 181 (1992) ("[s]tate sovereignty . . . secur[es] to citizens the liberties that derive from the diffusion of state power"). Because the Amendment was enacted to secure a means of protecting state governments, it makes no sense to hold that the Amendment limits the powers of state and local governments. *See* Brief of Major American Cities 12-24; Brief of City of Chicago (ChiBr) 4-31; AJCBr5-31; Brief of New York 2-13. The same holds for the District. PBr35-38.

The Amendment's history also shows that it is only concerned with the powers exercised by a distant federal government. *See* USBr17. The Constitution's creation of a standing army under the control of that government made the potential for oppression real, *see* PBr23; AJCBr80a; USBr17, resulting in calls for protection against it, *see* AJCBr64a. State and local governments, closer to the people and forbidden from maintaining standing armies, posed no similar threat. *See* U.S. Const. art. I, § 10, cl.3; PBr20-21. The Framers had no reason to constrain state and local government in making judgments about the arming of their citizenry, and no reason to constrain such judgments in the Seat of Government. PBr37-38; *see also* Laurence H. Tribe, *Sanity and the Second Amendment*, Wall St. J., Mar. 4, 2008, at A16.

For these reasons, "properly understood," the Amendment "is no limitation on arms control by the states." Antonin Scalia, *Response*, in *A Matter of Interpretation: Federal Courts and the Law* 137 n.13 (Amy Gutmann ed., 1997); *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

2. Unlike some of his *amici*, respondent contends that the question of incorporation is not before the Court. RBr64. He argues instead that the Bill of Rights is operative in the District. RBr62-65. Of course it is. But the question "is not whether the Constitution is operative [in the District], for that is self-evident, but whether the provision relied on is applicable." *O'Donoghue v. United States*, 289 U.S. 516, 542 (1933) (internal citation omitted). Constitutional provisions limiting federal *interference* with state authority do *not* apply to legislation confined to the District. *See, e.g., D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 6-7 (D.C. Cir. 1988) ("'the District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment'" (quoting *Lee v. Flintkote Co.*, 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979)). The District is a creation of the federal Constitution and, unlike the states, has no residual sovereignty to protect against federal encroachment. Rather, *Congress* exercises the powers of a state in asserting legislative control over the District. *See District of Columbia v. Carter*, 409 U.S. 418, 429 (1973) ("[T]he power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs" (quoting *Berman v. Parker*, 348 U.S. 26, 31 (1954)).

There can therefore be no structural concern that Congress will interfere with the District's independent sovereign authority here—and respondent asserts none. And although the United States is correct that the District "has a militia statute," USBr21 n.5, the militia it creates is "essentially a component of the federal government" under the exclusive control of the President. *Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 241 (D.D.C. 2004); *see also* D.C. Code

§§ 49-404, 405, 409. The statute does not (and cannot) provide the District with independent authority as a counterbalance to federal power.

Assuming the Amendment does not limit the states, respondent's position would uniquely disable the District from enacting gun-control regulations free of the constraints of the Amendment. Given the Framers' intent that the Amendment protect state autonomy from federal interference and, conversely, their desire to create a federal seat of government free of *state* interference, that outcome would be anomalous if not perverse. Legislation regulating guns that would raise no constitutional issue if adopted by the Commonwealth of Virginia or the City of Baltimore would be invalid if adopted for the District either directly by Congress or by the District's own government. That defies common sense.

III. THE DISTRICT'S LAWS ARE IN ANY EVENT PERMISSIBLE REGULATIONS OF RESPONDENT'S ASSERTED RIGHTS.

Even if the Amendment protects respondent's asserted right, the District's laws do not violate that right. The District bans particularly concealable and dangerous handguns while permitting access to other weapons, such as rifles and shotguns, for self-defense—a reasonable legislative decision balancing public safety against self-defense in an exclusively urban environment. Respondent asks the Court to embrace a categorical rule placing off-limits government proscriptions of dangerous weapons claimed necessary to allow individuals to rise up and "resist tyranny." RBr30. That view is unprecedented, unworkable, and unwise.

A. Respondent's Proposed Rules Are Insupportable.

1. Respondent contends that *any* government prohibition of an "Arm" within the meaning of the Second Amendment is necessarily invalid, without more. That *per se* rule of invalidity would create a constitutional right to own any "Arm," no matter how dangerous. RBr55 n.22. The United States agrees with the District that respondent's claim has no grounding in the text or history of the Amendment. PBr44-45; USBr22-23.

Respondent's rule is based largely on the court of appeals' misreading of *Miller*. PA53a. Although *Miller* held that the *absence* of a connection between the use of a weapon and maintenance of a well-regulated militia undermines a Second Amendment claim, 307 U.S. at 178, it did not hold or suggest the converse: that the private use of a protected arm is always immune from proscription. Respondent attempts to bridge that gap by arguing that categorical inquiries are "often a requisite *first step* in evaluating the constitutionality of governmental action." RBr41 (emphasis added). That is true. But what distinguishes respondent's proposed rule is that the categorical inquiry into whether a weapon is a protected "Arm" is both the first *and* last step in assessing the constitutionality of a gun ban. Respondent fails to identify a single other provision in the Bill of Rights that works that way.

Respondent's *per se* rule is made especially dangerous by the fact that it would seem to apply to an exceedingly broad swath of weapons. Respondent first contends that an arm is constitutionally protected if "it is of the type that (1) civilians would use,

such that they could be expected to possess it for ordinary lawful purposes (in the absence of, or even despite, legal prohibition), and (2) would be useful in militia service." RBr44. But because respondent later explains that the Second Amendment's protections should not be "limit[ed] . . . to arms that have military utility," *id.*, and that weapons used for "the protection of person and property" fall within his definition, *id.* 46, it appears that virtually any weapon falling into common use is immune from proscription, no matter how decisively its costs outweigh its benefits. *See* PBr45-46.

Respondent's organizing theory of the Second Amendment compels that conclusion. Although respondent attempts to sidestep the logical consequences of his position, it is surely the case that the weapons most likely to be useful to individuals and self-styled militia taking up arms against the government "should our Nation someday suffer tyranny again," RBr32, are those most capable of inflicting harm on a heavily fortified adversary—precisely the same powerful and dangerous weapons most destructive of public safety. Under respondent's conception of the Second Amendment, in other words, the grave threat to public safety that gives governments a paramount interest in *banning* especially dangerous weapons is precisely what operates to put those weapons off-limits to government proscription.

Respondent's test is also unworkable and illogical. It is unclear, for instance, how much of the population must own a particular weapon to make it "common" or what geographic unit determines com-

monness.[3] PBr45. More troubling is that respondent's proposed rule works in only one direction over time—it protects an ever-widening category of dangerous weapons once they grow into "common use," even if they do so "*despite* . . . legal prohibition." RBr44-46 (emphasis added). Respondent appears to contend that machineguns may already be entitled to categorical protection. RBr50-52 (noting 120,000 machineguns in lawful civilian possession). If weapons are constitutionally protected solely by virtue of their "commonness," despite government attempts to ban them, then our Nation lacks the fundamental police power to address the potentially catastrophic consequences of private ownership of increasingly dangerous, ever-proliferating weapons. *See* AJCBr29-31; CertPet23-24.

2. Respondent also urges application of strict scrutiny for all "gun laws," potentially including laws incidentally affecting gun rights, such as taxes, background checks, and licenses. RBr54-62. Respondent fails to explain why such incidental restrictions warrant the application of strict scrutiny. Given that the District's laws neither implicate the Amendment's core militia-related right nor effectuate functional disarmament, strict scrutiny would be inappropriate *here* even if it were appropriate for laws that intrude into that core. *See* PBr43-44 & n.11.

At any rate, strict scrutiny is inappropriate for the Second Amendment. *See Lewis v. United States*,

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[3] If the test depends on whether a weapon is commonly used in the Nation as a whole, that is reason to conclude that the Amendment only applies to national legislation. Otherwise, the Amendment would enable outlier jurisdictions to dictate what weapons other, dissimilar jurisdictions must allow.

445 U.S. 55, 65-66 & n.8 (1980). It would elevate the Second Amendment above almost all other provisions in the Bill of Rights, even though only the Second Amendment demands "regulat[ion]" to effectuate the right and even though *no* state employs strict scrutiny to protect its own state constitutional right to own firearms for private purposes. *See* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 Const. Comment. 227, 229 (2006) ("Two amendments trigger strict scrutiny; eight do not."); PBr47-48; Brief of Law Professors (LawProfBr) 4-30. And it would do so without justification under existing law, which limits strict scrutiny to racial and other invidious classifications, as well as content-based restrictions of speech, in order to root out illegitimate motivations behind laws the Constitution views as presumptively suspect. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005); *Burson v. Freeman*, 504 U.S. 191, 211-14 (1992) (Kennedy, J., concurring); *see also* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 146 (1980). Laws regulating dangerous weapons are not suspect in the same way, LawProfBr6-9, and respondent does not assert that the governmental interest here is a pretext for some other illicit motive.

Finally, the right to own particular weapons for private purposes is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental [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, 721 (1997) (citations and quotation marks omitted). Since the Founding, state governments have extensively regulated private uses of guns. Liberty and justice have survived for two cen-

turies despite the courts' consistent refusal to recognize as "fundamental" the right respondent asserts here. *See, e.g.*, *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (the "right to possess a gun is clearly not a fundamental right"). This Court should decline the invitation to protect that right and simultaneously elevate it to fundamental status. *See* ChiBr16-20 (not fundamental under selective incorporation doctrine).

B. The District's Laws Satisfy The United States' Proposed Standard.

The United States agrees that the standard adopted below is incorrect. USBr9. Instead of the reasonableness test it has supported in prior briefs, PBr41, the United States now proposes a two-tiered standard of review that would apply heightened scrutiny to any law that regulates arms "in a way that has no grounding in Framing-era practice." USBr23-24.

The Court should adopt the reasonableness test established in state law instead. PBr41-42. The United States' test would require reassessment of scores of laws that have long been deemed constitutional, particularly if the right in the Second Amendment is later incorporated against the states. *See* Brief of Members of Congress in Support of Reversal 5-9; Brief of American Bar Association 11-16; LawProfBr22-24. And even if national legislation warranted heightened scrutiny, the reasonableness standard is appropriate to review the District's exercise of local police power to protect safety and health.

In any event, the District's laws are permissible under the United States' test. The predicate for heightened scrutiny is not present because the laws

do have a "grounding in Framing-era practice." Long before the Founding, England banned the use of particular weapons. *See* ChiBr10; HBr6-7. Near the Founding, Boston enacted storage requirements that effectively banned the possession of loaded firearms within city limits. PBr42; AJCBr24 n.8. States took steps to disarm individuals refusing to enroll in militias or swear an oath of loyalty to the new republic. AJCBr22-23. And like the states, PBr42; AJCBr23-24, the District itself has carefully regulated weapons since its inception, barring firing weapons "within four hundred yards of any house," with an exception for militiamen ordered to fire. PBr3-4.

The District's laws also satisfy heightened scrutiny, which requires assessing the reasons for the laws and their impact on an individual's ability to have weapons for self-defense. USBr27. No one disputes that the general governmental interests in regulating dangerous weapons are "paramount." USBr25; RBr57. Those interests are especially compelling in the District, where there is a unique need to protect not only citizen safety but also national security. PBr35-40; *see also* Federalist No. 43 (James Madison) (noting that the federal government would have "complete authority" over the seat of government). The United States recognizes that the Amendment "may have *limited or no application* to special federal enclaves such as military bases," USBr21 n.5 (emphasis added), but fails to note that Article One allows Congress to "exercise like authority" over "Forts" and the "Seat of the Government," U.S. Const. art. I, § 8, cl.17.

The District's laws also directly further the kinds of "important regulatory interests" the United States

agrees are "typically sufficient to justify restrictions" on gun ownership. USBr24. The Council concluded that concealable and lethal handguns are responsible for a disproportionately high number of violent crimes, accidents, and suicides, particularly in an exclusively urban jurisdiction. *See* PBr49-55; Brief of Violence Policy Center (VPCBr) 13-32. It acted to target those weapons without unduly burdening any asserted right. For similar reasons, the United States contends that existing federal bans on "particular types of firearms," such as machineguns, "*readily* pass [heightened] scrutiny." USBr25 (emphasis added).[4] But as the United States acknowledges elsewhere, any purported distinction between the federal ban and the District's handgun ban is elusive at best. *Id.* at 21-22; VPCBr1a-4a. Like other federal laws the United States continues to enforce,[5] the District's handgun ban limits access to one particularly dangerous gun.

The United States suggests that the Court remand this case so that the lower courts can apply its new standards on a fuller record. USBr28-29. That evidentiary remand would apparently address the

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[4] Respondent argues that "federal law does not ban the private possession of machine guns," evidently referring to the "grandfathering" of machine guns in private possession at the time of the federal ban, *see* 18 U.S.C. § 922(o). But under that logic, the District's law likewise does not ban handguns because it also has a grandfathering exception. D.C. Code § 7-2502.02.

[5] The United States continues to enforce federal gun laws, including the very laws at issue in this case. *See* USBr1; *Andrews v. United States*, 922 A.2d 449, 456-57 (D.C. 2007). Unlike the District's handgun ban, existing federal restrictions on the manufacture, sale, and importation of firearms, USBr3, are *not* grounded in Framing-era practices.

"factual issue" whether handguns are easier for *some* individuals to use in self-defense than long-guns. USBr28-29, 31 & n.9. But the United States' speculation that handguns might better suit certain individuals with disabilities, for example, cannot remotely support a *facial* challenge to the District's laws. PBr57. And respondent himself can both "possess a functional long gun in his home," USBr31, and is perfectly capable of using it in self-defense, JA51a. His assertion that he has the "right to possess a functional, personal firearm, such as a handgun *or* ordinary long gun (shotgun or rifle) within the home," USBr5 (citing JA54a (emphasis added)), is not implicated by the District's laws. No further fact-finding is either necessary or warranted.[6]

C. The District's Laws Are Reasonable And Should Be Upheld.

1. Even if the Second Amendment otherwise protected a right of gun ownership for private purposes, reasonableness is the standard that most appropriately balances the rights of individuals with the historic exercise of widespread police power over private uses of guns. PBr41-44; HBr4-30; AJCBr21-26. It is a workable and tested standard that has accommo-

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[6] At the very least, the Court should not adopt a heightened scrutiny standard and find that the District's laws violate the Amendment without first permitting the District to develop a sufficient record before the district court. Even if respondent had offered a cognizable facial or applied challenge under the United States' test, the appropriate remedy would be to reverse the judgment and remand with instructions directing the district court to engage in appropriate fact-finding. *See* USBr28 (urging remand and noting that the district court "did not engage in intermediate scrutiny or indeed in any consideration (or fact-finding) on the constitutionality of the D.C. laws").

dated both undeniable public safety concerns and meaningful protection for private firearms possession. Respondent does not deny that state courts interpreting constitutions that (unlike the federal Constitution) create a right to own weapons for private purposes have long and uniformly employed reasonableness as the proper test to determine whether a legislature has overstepped its traditional authority to regulate dangerous weapons. PBr41-42; LawProfBr 4-30.

Nor does respondent deny that the predictive judgment of the District's Council on a quintessentially legislative matter—the decision to ban an easily concealable weapon that is uniquely dangerous in an urban context, while allowing rifles and shotguns for private use, *see* VPCBr11-32—is reasonable under the established state-court standard of review. PBr48-55.

Rather, respondent's only argument is that the District's laws are unreasonable because they ban *all* functional firearms. RBr52-54. That is not so. The District and the United States agree that the trigger-lock law should be read to contain an implicit exception for self-defense. USBr31 n.8; Brief of DC Appleseed 29-31.[7] Because respondent's *only* challenge to the trigger-lock provision is that it fails to

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[7] *McIntosh v. Washington*, 395 A.2d 744, 755 (D.C. 1978), is not to the contrary. RBr53-54. That case merely holds that there is no equal protection violation in having different rules for homes and businesses. Nor does the fact that guns may be kept unlocked at businesses limit the "established D.C.-law principles" that a self-defense exception is implicit irrespective of where the gun is located. USBr31 n.8.

contain an exception for self-defense, the judgment should be reversed.

Indeed, even if respondent's view of the trigger-lock provision were correct, the decision below should still be reversed for two reasons respondent fails to address. First, respondent's challenge is that the District *might* prosecute *someone* for disabling a trigger lock while being attacked in the home. That does not come close to satisfying this Court's requirements for a facial challenge. PBr57. Second, at the end of the day, even if respondent were correct in all other respects, the appropriate remedy would be limited to the trigger-lock law and would leave the rest of the District's laws intact. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-30 (2006). The Court should reject respondent's improper attempt to use the trigger-lock law as a vehicle to invalidate the District's handgun law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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