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 FOR NEW YORK, HAWAII, MARYLAND, MASSACHUSETTS, NEW JERSEY, AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF PETITIONERS

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
MICHELLE ARONOWITZ
Deputy Solicitor General
SASHA SAMBERG-CHAMPION
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

Attorneys for Amici Curiae

* *Counsel of Record*

[Additional Counsel Listed on Signature Page]

213440

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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Interest of the Amici States

Amici States file this brief in support of their traditional authority to protect the safety of their residents by enacting laws governing the possession and use of firearms. While the Amici States do not defend the specific handgun ban at issue in this case and do not as a matter of public policy endorse it, preserving state sovereignty in this area is of paramount importance to the States. For more than two centuries, as contemplated by the Constitution's Framers, the States have been the primary regulators of firearms. Preserving that role was a fundamental purpose of the Second Amendment. Accordingly, this Court has consistently held that the Second Amendment limits only the authority of the federal government to regulate weapons in the States. If that rule were now called into question, the States would confront federal litigation over every detail of their statutory schemes, depriving them of authority over policy decisions that have always been reserved to them.

Summary of Argument

As this Court, the lower federal courts, and the state courts have consistently and correctly stated for more than a century, the Second Amendment has no application to state laws. This Court so held more than a century ago, and there is no reason for it to change course now.

The Second Amendment was drafted and ratified to ensure that the federal government would not disarm state militias and thereby strip States of a critical component of their reserved sovereignty. It was intended

to protect state sovereignty by restricting the federal government's ability to regulate gun ownership in ways that would interfere with state militias. To transform the Second Amendment into a limitation on the police power of the States, thus *reducing* state autonomy vis-a-vis the federal government and the federal courts, would dramatically alter the Amendment's meaning and turn its federalism-grounded purpose on its head. Moreover, the settled constitutional understanding of this point is consistent with numerous other decisions of this Court recognizing that the Framers left the primary responsibility for firearms regulation with the States.

For these reasons, while the Amici States do not endorse the handgun ban at issue — indeed, neither New York (or its subdivisions) nor any of the other Amici States has enacted a law banning handguns — they urge this Court to reaffirm its long-standing and correct interpretation of the Second Amendment as imposing restrictions only on the federal government.

ARGUMENT

I. The Second Amendment Does Not Apply to State Laws.

This Court has made clear that, even after the passage of the Fourteenth Amendment, the Second Amendment remains "a limitation only upon the power of Congress and the National government, and not upon that of the States." *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *accord United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (Second Amendment "has no other effect than to restrict the powers of the national government").

This rule has been in place for more than a century, and this Court has declined numerous times to revisit it.[1] Adhering to a prior decision is "the preferred course." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Accordingly, any departure from the doctrine of stare decisis "demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1983).

No such special justification exists to revisit *Presser* and *Cruikshank*. Although these cases were decided prior to this Court's incorporation of other rights into the Due Process Clause of the Fourteenth Amendment, they have not had their "underpinnings eroded, by subsequent decisions of this Court." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). That is because the Second Amendment simply is not susceptible to being incorporated against the States in the same manner as the rights that have been so incorporated.

Many other provisions in the Bill of Rights simply state individual rights against governments. In such cases, it makes sense to consider whether, although the Framers created a right only against the federal government, the right is fundamental to ordered liberty and was therefore made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968).

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1. *See, e.g.*, *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269-71 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *Burton v. Sills*, 53 N.J. 86, 100, 248 A.2d 521, 528 (1968), *dismissed for want of a substantial federal question*, 394 U.S. 812 (1969).

The Second Amendment, by contrast, has a distinctive federalism-based purpose, and therefore it cannot be applied against the States without a fundamental change in its purpose and meaning. Rather than simply recognizing a right to keep and bear arms in isolation, the Amendment links that right to a "well regulated Militia," which in turn is deemed "necessary to the security of a free State." U.S. Const. amend. II. A principal purpose of the Second Amendment is to function as a bulwark against federal intrusion into state sovereignty over militias. That purpose would be undermined, rather than supported, by interpreting the Amendment to authorize federal judicial review of state laws regulating weapons.

As this Court has recognized, the Second Amendment's "obvious purpose" is "to assure the continuation and render possible the effectiveness" of state militias, and so the right it confers "must be interpreted and applied with that end in view." *United States v. Miller*, 307 U.S. 174, 178 (1939). The amendment was ratified in response to fears that the new Constitution, which authorized the federal government to form a standing army under exclusively federal control, would lead to the demise of state militias. This increased reliance on a federal standing army, some feared, would dramatically increase the federal government's military and political power vis-a-vis the States and their people. The Second Amendment's guarantee of a right to bear arms was meant, at least in part, to prevent this scenario from unfolding.

The Constitution represented a "compromise" between proponents and opponents of a federal standing

army, authorizing such a federal army while also providing a continuing role for state militias. *See Perpich v. Dep't of Defense*, 496 U.S. 334, 340 (1990). Specifically, the Constitution granted Congress the powers to "raise and support Armies," U.S. Const. art. I, § 8, cl. 12, to "call[] forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions," *id.* cl. 15, and to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States," *id.* cl. 16. Meanwhile, the Constitution reserved to the States the appointment of militia officers "and the Authority of training the Militia according to the discipline prescribed by Congress." *Id.*

While the Constitution provided for the continued existence of the state militias, it also placed those militias under certain specified forms of federal control. As a result, questions arose as to whether the States retained the authority necessary to maintain the militias adequately and to prevent them from being either neglected or coopted into the standing army.[2] As George

2. Exactly how much, and under what circumstances, the federal government could control the state militias remained controversial throughout the nineteenth century. For example, during the War of 1812, two States refused to allow the federal government to call up their militias, and even those militias that reported for duty refused to follow orders that they regarded as beyond the federal government's authority, such as venturing beyond United States borders into Canada. *See* Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 188-89 (1940). Not until the early Twentieth Century did Congress organize the state militias into the National Guard. *Id.* at 193-203.

Mason pointedly told the Virginia Convention, "[t]here are various ways of destroying the militia." *See* Debates of the Virginia Convention, June 14, 1788, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 401 (David E. Young ed., 2d ed. 1995).

Were the States thus to lose access to an effective armed force under their own control, military power would be centralized in a way that, it was contended, could lead to monarchy and would greatly diminish the States' reserved sovereignty. *See* Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 985-89 (1975). Accordingly, "to anti-federalists, the continued viability of the militia was the only means of rendering an army palatable." H. Richard Uviller & William G. Merkel, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 90 (2002). Moreover, States' recent experience with internal insurrections such as the Shays Rebellion gave them reason to believe that the maintenance of strong state militias that were fully controlled by state authority was essential to their security. *See* David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "The Right of the People to Keep and Bear Arms*," 22 LAW & HIST. REV. 119, 148-50 (2004).

Thus, the Second Amendment was drafted and ratified in response to intense debate over whether the States or the federal government should have the responsibility for arming the militia. This debate included requests by the Virginia Convention (and then

other States' ratifying conventions) for an amendment to the body of the Constitution that would explicitly clarify that "each State respectively shall have the power to provide for organizing, arming and disciplining it's [sic] own Militia, whensoever Congress shall omit or neglect to provide for the same." Amendments Proposed by the Virginia Convention, June 27, 1788, *reprinted in* Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 279 (1999). In this context, it is clear that the Second Amendment's text was drafted to reflect a focus on preserving state sovereignty.[3]

The brief public debate over the wording of the Second Amendment further demonstrates that the drafters were concerned primarily with restricting the power of the federal government and federal courts to control the militias of the several States. Most of the debate was confined to the question of whether the Amendment should contain a provision exempting those with religious scruples from military service. *See* House of Representatives Debates, Aug. 17, 1789 and Aug. 20, 1789, *reprinted in* THE ORIGIN OF THE SECOND

3. This was recognized by the Second Amendment's staunchest supporters in the years immediately after its ratification. *See* Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1125, 1130 (2006) (describing views of St. George Tucker, who first described the Second Amendment as "the true palladium of liberty"); *id.* at 1131 (Joseph Story also "recognized that originally the Second Amendment had been part of a compromise between Federalists and Anti-Federalists designed to reaffirm state control of the militia and neutralize the fear that the militia might be disarmed").

AMENDMENT, *supra*, at 695-98, 702-03. Madison's original proposal contained such a provision, but it was removed after fears were expressed that it would (1) permit the federal government, under guise of religious exemption, to exclude a vast number of citizens from state militia service, and (2) result in endless litigation "on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not." *Id.* at 696-97; *see* Uviller & Merkel, *supra*, at 98-99. Thus, by deleting the provision the drafters of the Second Amendment sought to protect state militias from federal interference.

This understanding of the Second Amendment is consistent with other decisions of this Court observing that the Framers left the primary responsibility for firearms regulation with the States. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Bass*, 404 U.S. 336 (1971).

II. The States Have Established Workable Rules to Protect an Individual Right to Bear Arms.

Interpreting the Second Amendment to restrict state as well as federal laws would not only subvert the Amendment's purpose and require overruling long-standing precedent, but also unnecessarily entangle the federal courts in the minutiae of state and local firearms regulation. States and their courts have long been the protectors of an individual right to own firearms for private purposes, and have proven fully capable of protecting the legitimate interests of firearms owners while leaving room for reasonable regulation of

weaponry. For over two centuries, state judicial and political processes have balanced these competing interests, in the process developing a coherent and consistent doctrine. The principle established by *Presser* and *Cruikshank* — that the Second Amendment limits the authority of the federal government only — has not proven "unworkable" in any way, and therefore there is no occasion to revisit that ruling. *See Payne*, 501 U.S. at 827. To overrule it now would merely invite the federal courts to substitute their judgments for those of the States.

Most States have constitutional or statutory provisions pertaining to the right to bear arms. *See* Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions*, http://www.law.ucla.edu/volokh/beararms/statecon.htm (collecting text of all forty-four state constitutional provisions); N.Y. Civ. Rights Law § 4. Unlike the Second Amendment, many of these provisions explicitly guarantee an individual right to own a gun for specified private purposes. *See, e.g.*, Wisc. Const. art. I, § 25 ("The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."); W. Va. Const. art. III, § 22 ("A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use."). Moreover, and also unlike the Second Amendment, many of these provisions contain explicit reservations on the individual right conferred to ensure that the State in question retains the necessary regulatory authority. *See, e.g.*, Utah Const. art. I, § 6 ("The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful

purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms."); Tenn. Const. art. I, § 26 ("That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.").

It is unsurprising that these state provisions speak more clearly than the Second Amendment to the kinds of questions that arise in evaluating the constitutionality of state firearms regulations. Many of them were drafted far more recently or have been updated in recent years. *See* David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. Ky. L. Rev. 827, 828 (2002) (observing that twenty States had enacted or modified these constitutional provisions since 1963).[4] Moreover, unlike the Second Amendment, these provisions were drafted with judicial review of state regulations in mind, and so more clearly articulate the necessary balancing of an individual right and state police power that such review entails. Indeed, some of them explicitly address specific questions that are relevant to contemporary public policy disputes in the State, allowing judges to resolve such disputes through

4. For example, the Maine Constitution of 1819 originally provided: "Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned." Art. I, § 16. In 1987, after the Supreme Judicial Court of Maine held that this provision did not establish an individual right to bear arms, the people of Maine adopted an amendment to their constitution that deleted the words "for the common defence" from the provision. *See State v. Friel*, 508 A.2d 123, 125 (Me. 1986); *State v. Brown*, 571 A.2d 816, 816 (Me. 1990).

conventional textual analysis and examination of drafting history, with less resort to judicial guesswork and discretion. *See, e.g.*, Idaho Const. art. I, § 11 ("The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm."); *State v. Cole*, 2003 WI 112, P35-P42, 264 Wis. 2d 520, 547-53, 665 N.W.2d 328, 341-44 (2003) (discussing drafting history of Wisconsin's amendment, which made clear that amendment was not meant to repeal existing concealed-weapons laws).

These state constitutional provisions are thus superior vehicles for determining whether a particular state law adequately respects an individual right to own a firearm. They also have benefitted from years of judicial interpretation and application, and that experience should not lightly be discarded in favor of developing a new federal-court jurisprudence. State courts largely have coalesced around a "reasonable regulation" standard for evaluating the constitutionality of gun regulations. *See Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004) (collecting cases from various States); *Robertson v. City & County of Denver*, 874 P.2d 325, 329-30 (Colo. 1994) (same). In applying this standard, state courts "balance the conflicting rights of an individual to keep and bear arms for lawful purposes against the authority of the State to exercise its police power to

protect the health, safety, and welfare of its citizens." *State v. Hamdan*, 2003 WI 113, P45, 264 Wis. 2d 433, 463, 665 N.W.2d 785, 800 (2003). For example, while courts may uphold laws that restrict the means or manner by which the right to bear arms is exercised, they stand ready to strike down or give narrowing interpretations to laws that leave individuals with no "realistic alternative means to exercise the right," *id.* at 808, or that "sweep unnecessarily broadly," *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 149 (W. Va. 1988).

Interpreting the Second Amendment as a check on state as well as federal legislation would subject to intensive federal-court review state licensing regimes, safe-storage requirements, and other regulations that go to the heart of state police power authority. *Cf. Sandin v. Conner*, 515 U.S. 472, 482 (1995) (overturning as unworkable precedent that resulted in "the involvement of federal courts in the day-to-day management of [state] prisons, often squandering judicial resources with little offsetting benefit to anyone"). Federal courts are well suited to police the federal government's compliance with the federalism concerns inherent in the Second Amendment, particularly given the relatively small volume of federal firearms legislation.[5] But they have

5. Most federal law in this area "may be traced to two enactments," the National Firearms Act of 1934, ch. 757, 48 Stat. 1236, 1240, and the Federal Firearms Act of 1938, ch. 850, 52 Stat. 1250, now repealed, the provisions of which, as amended and supplemented, have been carried forward to chapter 44 of Title 18, 18 U.S.C. §§ 921 et seq. *See United States v. Lopez*, 2 F.3d 1342, 1348 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995); *id.* at 1348-60

(Cont'd)

no special competence to review the day-to-day practicality, local need, or effectiveness of the laws enacted by the several States. *Cf. United States v. Rybar*, 103 F.3d 273, 294 n.6 (3d Cir. 1996) (Alito, J., dissenting) (federal judges "are not experts on firearms, machine guns, . . . or crime in general").

The state courts and political systems have proven themselves eminently capable of protecting an individual right to own and use a weapon for private purposes. An additional layer of federal-court review would be redundant if federal courts simply adopted the established state-court jurisprudence; if they did not, then federal judicial review would introduce massive uncertainty into the law. Moreover, it would "foreclose[] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

(Cont'd)
(discussing at length the history of federal firearms legislation). Until 1934, the federal government had never regulated firearms at all, and even now "the general control of simple firearms possession by ordinary citizens" remains "a state responsibility." *Id.* at 1364.

CONCLUSION

This Court should reaffirm the principle that the laws of the several States are outside the domain of the Second Amendment.

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
MICHELLE ARONOWITZ
Deputy Solicitor General
SASHA SAMBERG-CHAMPION
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

Attorneys for Amici Curiae

* *Counsel of Record*

MARK J. BENNETT
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

DOUGLAS F. GANSLER
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6300

MARTHA COAKLEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108
(617) 727-2200

ANNE MILGRAM
Attorney General
State of New Jersey
The Hughes Justice Complex
P.O. Box 080
25 Market Street
Trenton, NJ 08625
(609) 292-8740

ROBERTO J. SANCHEZ-RÁMOS
Secretary of Justice
Commonwealth of Puerto Rico
GPO BOX 9020192
San Juan, PR 00902-0192
(787) 724-3380