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 *AMICUS CURIAE* THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. LDF's first Director Counsel was Thurgood Marshall. Since its founding, LDF has been committed to transforming this nation's promise of equality into reality for all Americans, with a particular emphasis on the rights of African Americans. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

In densely populated urban centers like the District of Columbia (the "District"), gun violence deprives many residents of an equal opportunity to live, much less succeed. The effects of gun violence on African-American citizens are particularly acute; in 2004 alone, all but two of the 137 firearm homicide victims in the District were African Americans, most of them between the ages of fifteen and twenty-nine years old. *See* The Centers for Disease Control and Prevention, *WISQARS, Leading*

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[1] Counsel of record for all parties received notice of the *amicus curiae*'s intention to file this brief. Letters of consent by the parties to the filing of this briefing have been lodged with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Causes of Death Reports (1999-2004), http://webappa.cdc.gov/sasweb/ncipc/leadcaus.html. LDF thus has an interest in this case, which raises significant issues regarding the authority of locally elected officials to enact regulations intended to promote public health and safety by reducing gun deaths, gun injuries, and gun-related violence.

SUMMARY OF ARGUMENT

The Second Amendment to the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II. Throughout the history of the United States, this language has consistently been interpreted to permit Congress and the various State legislatures to enact regulations governing an individual's possession or use of firearms—including absolute prohibitions on particularly dangerous categories of firearms. This Court has never invalidated such a statute under the Second Amendment. Moreover, until this decade, despite many opportunities to do so, no federal Court of Appeals had ever recognized the existence of an individual right under the Second Amendment to "keep and bear Arms" for purely private purposes. Rather, this Court and the overwhelming majority of courts—both State and federal—that have addressed the issue have almost unanimously and correctly held that the right protected by the Second Amendment is one that exists only in the context of

a lawfully organized militia. To hold differently now—in the face of precedent, history, and an unmistakable public health and safety imperative—would constitute a radical and unwarranted departure from the jurisprudence of this Court.

Having litigated the cases leading up to and including *Brown v. Board of Education*, 347 U.S. 483 (1954), wherein this Court found its earlier precedent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), to be wrongly decided and inconsistent with the Equal Protection Clause of the Fourteenth Amendment, *amicus* is well aware that there are times when this Court must change course and depart from precedent, even where that precedent is clear and established. Indeed, *amicus* has previously urged this Court to alter or overrule precedent and would do so again if it were necessary and appropriate.

This case presents no such occasion. The type of radical departure from this Court's Second Amendment jurisprudence that is reflected in the opinion of the D.C. Circuit is not warranted. Although the type, use, cultural significance and regulations on the purchase, possession, and use of firearms vary from community to community, handguns—because they are portable and easy to conceal—are uniquely lethal instruments, which are involved in the vast majority of firearm violence in America. Handgun violence in the District exacts a particularly high toll on the District's African-American residents. Multiple municipalities, including the District, have placed significant restrictions on the possession and use of handguns, while permitting the registration of other weapons

such as shotguns and rifles. Nevertheless, in contravention of the almost unanimous authority of the State and federal courts nationwide, the D.C. Circuit interpreted the Second Amendment to invalidate those regulations. *See Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007). The D.C. Circuit's ruling threatens the viability of any regulation or prohibition on any particular category of firearm, no matter how deadly the weapon, how grave a threat it poses to public health and safety, or how reasonable the regulation.

This Court should reverse the decision below and reaffirm that its consistent and established Second Amendment jurisprudence remains firmly in place today.

ARGUMENT

I. A Radical Departure from This Court's Second Amendment Jurisprudence Is Not Warranted

Amicus recognizes the importance of principles of *stare decisis*, *see, e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992), but also acknowledges that a departure from prior precedent can be warranted under certain circumstances, *see, e.g.*, *Brown v. Bd. of Educ.* 347 U.S. 483, 492-93 (1954) (reexamining the meaning of the Fourteenth Amendment and overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), in light of the "full development and . . . present place [of public education] in American life"). This case does not present such circumstances. As summarized by Chief Justice Rehnquist in reaffirming this Court's

landmark ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966),

> While "'*stare decisis* is not an inexorable command,'" *State Oil Co. v. Khan*, 522 U.S. 3, 20, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991)), particularly when we are interpreting the Constitution, *Agostini v. Felton*, 521 U.S. 203, 235, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997), "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *United States v. International Business Machines Corp.*, 517 U.S. 843, 856, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996) (quoting *Payne*, *supra*, at 842 (Souter, J., concurring) (in turn quoting *Arizona v. Rumsey*, 467 U.S. 203, 212, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984))).

Dickerson v. United States, 530 U.S. 428, 443 (2000). *See also John R. Sand & Gravel Co. v. United States*, No. 06-1164, slip op. at 9 (Jan. 8, 2008) ("To overturn a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness would itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability. We have

not found here any factors that might overcome these considerations.").

No such "special justification" for departing from well-established precedent has been demonstrated here. The established understanding of the Second Amendment has not proven unworkable; rather, restrictions on certain categories of firearms are prevalent throughout the country and have been in place for decades. Furthermore, there have been no evolving principles of law that have rendered the established understanding of the Second Amendment "no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855; *see also Dickerson*, 530 U.S. at 443 (acknowledging that *stare decisis* is not controlling where "subsequent cases have undermined [a precedent's] doctrinal underpinnings"). Nor have there been fundamental shifts in any facts that would justify abandoning precedent. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S.Ct. 2705, 2721-25 (2007) (Kennedy, J.) (reversing *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) in light of new "widespread agreement" among economists); *Casey*, 505 U.S. at 854-55; *Brown*, 347 U.S. at 492-93. If anything, the contemporary epidemic of handgun violence in urban areas suggests that arguments in favor of a radical reinterpretation of the Second Amendment should be rejected.

A. The Second Amendment Does not Protect an Individual Right to "Keep and Bear Arms" for Purely Private Purposes

For over two hundred years, no federal court (without being reversed) has ever found that a

statute is facially invalid under the Second Amendment. This Court has never done so, and with the exception of the court below and the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the federal Courts of Appeals and the majority of the State appellate courts have been consistent with respect to the Second Amendment: it does not protect an individual right to possess or use firearms outside of the context of a lawfully organized militia. Indeed, the text of the Second Amendment itself does not provide for such a right (*see* Petitioners' Br. at 17-21), and for the Court to recognize an individual right to "keep and bear Arms"[2] would represent a radical departure from the consistent and long-established understanding of the Second Amendment.

This Court has never invalidated a challenged firearm restriction on Second Amendment grounds. *See Presser v. Illinois*, 116 U.S. 252, 265 (1886) (holding that the Second Amendment "is a limitation only upon the power of Congress and the National government, and not upon that of the States"); *Miller v. Texas*, 153 U.S. 535, 538 (1894) ("[I]t is well settled that the restrictions of these amendments operate only on the Federal power, and have no reference whatsoever to proceedings in state courts."); *Maxwell v. Dow*, 176 U.S. 581, 597 (1900) (citing *Presser*); *Twining v. New Jersey*, 211 U.S. 78,

[2] Although we will not repeat petitioners' and other *amici*'s extensive analysis of the Second Amendment's text, *amicus* agrees that the phrase "keep and bear Arms" must be read in the context of the preceding clause addressing a "well regulated Militia," *see* Petitioners' Br. at 17-21, and cannot be fairly read to recognize the right of an individual to "keep and bear Arms" for purely private purposes.

98 (1908) (same). Similarly, this Court has consistently held that specific restrictions on the ability of individuals to possess and use guns are permissible. *See, e.g.*, *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) ("the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons"); *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (law prohibiting felons from possessing guns does not "trench upon any constitutionally protected liberties").

This Court could not reinterpret the Second Amendment to protect an individual right to "keep and bear Arms" for purely private uses without overruling *United States v. Miller*, 307 U.S. 174 (1939). *Miller* clearly states that the Second Amendment's guarantee of the right to bear arms can be understood only in the context of the militia:

> The Constitution as originally adopted granted to the Congress the power—"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; 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, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *With obvious purpose to assure the continuation and render possible the effectiveness of such*

> *forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.*

Id. at 178 (emphasis added). Under *Miller*, any possession or use of a firearm not in that context would fall outside the scope of the Second Amendment.

Notably, even the D.C. Circuit recognized that the Amendment must be construed in light of its first clause, which explicitly refers to a "well regulated Militia." The D.C. Circuit reasoned that "[o]nly 'Arms' whose 'use or possession . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia' would qualify for protection" under the Second Amendment. *Parker*, 478 F.3d at 394 (quoting *Miller*, 307 U.S. at 177).[3] Under this interpretation of *Miller*, for an individual to assert successfully a Second Amendment right, he or she right need not participate in an organized militia, but the firearm that he or she "keep[s] and bear[s]" must be of the *type* that could be used in a militia. This represents a recognition that the concept of the militia places at least *some* substantive limits on the right to "keep and bear Arms" set forth in the Second Amendment.

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[3] This interpretation of *Miller* was also utilized by the only other federal Court of Appeals to conclude that the Second Amendment guarantees an individual right to possess and use firearms for purely private purposes, the Fifth Circuit in *Emerson*, *supra*, 270 F.3d at 224 (arguing that *Miller's* ruling was premised on the notion that a sawed-off shotgun "is not . . . one of the 'Arms' which the Second Amendment prohibits infringement of the right of the people to keep and bear").

Once this concession is made, the question is no longer whether the concept of a "militia" places *any* limits on the "right of the people to keep and bear Arms," but rather *how* it limits that right. Is the right guaranteed as to the *manner* in which the people "keep and bear Arms" (i.e., only in connection with the activities of a militia) or is the right related to the *types* of "Arms" that one may "keep" or "bear" (i.e., only those firearms that could actually be used in a militia)? As explained by the First Circuit only a few years after the Court rendered its ruling in *Miller*, the latter interpretation, which is the basis of the opinion below, would grant a "right" to the "possession or use by private persons not present or prospective members of any military unit, of distinctly military arms, such as machine guns, trench mortars, anti-tank or anti-aircraft guns," while permitting the government to regulate only those "weapons which can be classed as antiques or curiosities." *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

The drafters of the Second Amendment surely did not intend to protect an individual's right to "keep and bear" only the deadliest weapons technologically possible in a given era. And, indeed, the only reasonable interpretation of *Miller* is that it is just the nature of the "possession or use" of a weapon, not the character of the weapon itself, that must be related to a militia in order for Second Amendment rights to attach. *Miller*, 307 U.S. at 178. The D.C. Circuit has misinterpreted the case.

The Court's understanding of the rights conferred by the Second Amendment, as reflected in *Miller*,

has remained fairly constant over time, even though the Court has not had a more recent occasion to construe the Amendment itself. *See, e.g.*, *Lewis*, 445 U.S. at 65 n.8 ("[L]egislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." (citing *Miller*, 307 U.S. at 178)); *Adams v. Williams*, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting) ("There is no reason why all pistols should not be barred to everyone except the police."); *United States v. Lopez*, 514 U.S. 549, 603 (1995) (Stevens, J. dissenting) ("Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use. . . .").[4]

Other statements by former members of this Court support the same conclusion. In an interview after his retirement from the bench, Chief Justice Burger harshly criticized the argument that the Second Amendment recognizes an individual right to possess or use firearms for purely personal purposes, characterizing that argument as

> *one of the greatest pieces of fraud, I repeat the word "fraud,"* on the American public by special interest groups that I've seen in my lifetime.

[4] The majority opinion in *Lopez* appeared also to recognize that the federal firearm regulation at issue (the Gun Free School Zones Act, 18 U.S.C. § 922(q) (1990)) would have been within congressional authority had there been proven some connection between the regulated conduct and interstate commerce. *See* 514 U.S. at 559-61.

> The real purpose of the Second Amendment was to ensure that state armies—the militia—would be maintained for the defense of the state.

Warren E. Burger, *The Right to Bear Arms*, Parade Mag., Jan. 14, 1990, at 4, quoted in *Silveira v. Lockyer*, 312 F.3d 1052, 1063 (9th Cir. 2002) (emphasis added). Similarly, Justice Powell said in a speech before the American Bar Association: "[w]ith respect to handguns," in contrast "to sporting rifles and shotguns," it "is not easy to understand why the Second Amendment, or the notion of liberty, should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking number of murders in our society." Lewis Powell, Capital Punishment, Remarks Delivered to the Criminal Justice Section, ABA 11 (Aug. 7, 1988), quoted in Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 655 (1989).[5]

Although these statements do not carry the weight of precedent, they illustrate how radical the position taken by the D.C. Circuit truly is. A robust Second Amendment right to "keep and bear Arms" for purely private purposes has *never* been taken seriously by any majority of the members of the Court. Nor has the Court *ever* invalidated a restriction on firearms under the Second Amendment. To do so now would represent a radical

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[5] Erwin Griswold, former United States Solicitor General and dean of Harvard Law School has written, "[T]hat the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American Constitutional law." Erwin Griswold, *Phantom Second Amendment "Rights",* Wash. Post, Nov. 4, 1990, at C7.

and unwarranted departure from the Court's Second Amendment jurisprudence.

Significantly, the Court's Second Amendment jurisprudence has been consistently and effectively applied by both lower federal courts and State courts of last resort. The First,[6] Third,[7] Fourth,[8] Sixth,[9]

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[6] In *Cases*, 131 F.2d at 923, the First Circuit, focusing on the Second Amendment's first clause, rejected a criminal defendant's Second Amendment claim on the grounds that the defendant had produced no evidence that he "was or ever had been a member of any military organization" and that he acted "without any thought or intention of contributing to the efficiency of the well regulated militia . . . ."

[7] In *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996), the Third Circuit rejected a criminal defendant's argument that, because he was associated with an informally organized militia, his possession of a machine gun was protected by the Second Amendment. Then-Judge Alito dissented from the opinion, but only on the grounds that a federal prohibition on machine guns exceeded congressional authority under the Commerce Clause. *See id.* at 292 (Alito, J., dissenting). Then-Judge Alito observed that he "would view this case differently if Congress . . . had made a finding that intrastate machine gun possession, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce." *Id.*

[8] In *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995), the Fourth Circuit, relying on the first clause of the Second Amendment, rejected a Second Amendment claim brought by a citizen who had been denied an application to purchase a handgun. The Fourth Circuit concluded that "the Second Amendment preserves a collective, rather than individual right" that "must bear a reasonable relationship to the preservation or efficiency of a 'well-regulated militia'" (quoting *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (in turn quoting *Miller*, 307 U.S. at 178)).

[9] In *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976), the Sixth Circuit rejected a Second Amendment claim on the grounds that the Second Amendment "applies only to the

Seventh,[10] Eighth,[11] Ninth,[12] Tenth,[13] and Eleventh Circuits[14] have all concluded that the Second

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right of the State to maintain a militia and not the individual's right to bear arms" (quoting *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971)).

[10] In *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999), the Seventh Circuit rejected a Second Amendment challenge to 18 U.S.C. § 922 (g)(9), which prohibits individuals convicted of domestic violence from owning firearms, holding that the Second Amendment "inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia."

[11] In *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992), the Eighth Circuit did not explicitly hold that the Second Amendment does not protect an individual right, but held that, regardless of whether such a right exists, it cannot apply where the defendant's possession and use of a machine gun was not "reasonably related to the preservation of a well regulated militia" because the purpose of the Amendment was to restrain federal interference with the State militias. Like the Third Circuit in *Rybar*, the Eighth Circuit ruled that membership in an informal private militia was insufficient to trigger any protection under the Second Amendment. *Id.*

[12] In *Silveira v. Lockyer*, 312 F.3d 1092 (9th Cir. 2002), the Ninth Circuit, relying on an analysis of the text of the Second Amendment, the historical context of ratification, and relevant Supreme Court precedent, rejected the notion that the Second Amendment protects an individual right to possess or use firearms.

[13] In *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), the Tenth Circuit upheld a conviction for the knowing possession of an unlicensed machine gun, on the grounds that the defendant had shown no connection to the State militia. The Tenth Circuit based its analysis on the purpose of the Amendment, which it concluded was to preserve the effectiveness and assure the continuation of the state militia. The Tenth Circuit rejected the argument that, because "militia" under Kansas law was defined to include all able-bodied men between the ages of twenty-one and forty-five,

Amendment does not refer to an individual right to "keep and bear Arms" for purely private purposes.[15] Similarly, the majority of State appellate courts (and the courts of the District itself) considering this question have also concluded that there is no right to "keep and bear Arms" outside of the context of the activity of a lawfully organized militia.[16] Moreover, the vast majority of State appellate courts considering the question of whether the term "bear

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defendant was effectively a member of a "militia" for Second Amendment purposes. *Id.*

[14] In *United States v. Wright*, 117 F.3d 1265, 1272 (11th Cir. 1997), the Eleventh Circuit rejected a criminal defendant's Second Amendment claim on the grounds that he failed to demonstrate "a reasonable relationship between his possession of . . . machineguns and pipe bombs and 'the preservation or efficiency of a well regulated militia'" (quoting *Miller*, 307 U.S. at 177). As in *Oakes*, the Court rejected an argument based on the definition of "militia" under State law (in this case, under Georgia law). *Id.* at 1272-73.

[15] The Second Circuit has not directly addressed the issue of whether the Second Amendment protects an individual right to possess or use firearms. In *United States v. Toner*, 728 F.2d 115, 128-29 (2d Cir. 1984), however, the Second Circuit, citing *Miller*, held that firearm restrictions are subject only to rational basis review and, applying that standard, upheld a statute that prohibited gun ownership by undocumented aliens.

[16] *See, e.g.*, *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980); *Harris v. State*, 432 P.2d 929, 930 (Nev. 1967); *Burton v. Sills*, 248 A.2d 521, 526 (N.J. 1968); *In re Cassidy*, 51 N.Y.S.2d 202, 205 (N.Y. App. Div. 1944); *State v. Fennell*, 382 S.E.2d 231, 232 (N.C. Ct. App. 1989); *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976); *Masters v. State*, 653 S.W.2d 944, 945 (Tex. App. 1983); *State v. Vlacil*, 645 P.2d 677, 679-80 (Utah 1982); *Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987); *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 269 (Ill. 1984).

arms" can refer to non-military uses of firearms have concluded that it does not.[17]

To be sure, as the D.C. Circuit noted, several State appellate courts have referred to an individual "right" to possess and use firearms, but those

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[17] *See, e.g.*, *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840) (stating that "[a] man in pursuit of deer, elk and buffaloes, [sic] might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms*," and ruling that with the phrase "keep and bear arms," "[n]o private defence was contemplated") (emphasis in original); *English v. State*, 35 Tex. 473, 476 (1872) ("The word 'arms' in the connection we find it in the Constitution of the United States refers to the arms of the militiaman or soldier, and the word is used in its military sense."); *Hill v. Georgia*, 53 Ga. 472, 475 (1874) ("[T]he language of the constitution of this state, as well as that of the United States, guarantees only the right to keep and bear the 'arms' necessary for a militiaman."); *Fife v. State*, 31 Ark. 455, 459 (1876) (defining "arms" as "weapons [that] are adapted to the ends indicated above, that is, the efficiency of the citizen as a soldier, when called on to make good the defense of a free people," and upholding a prohibition on "any pistol of any kind whatever" as consistent with "the constitutional right of the citizens of the State to keep and bear arms for their common defense."); *State v. Workman*, 35 W. Va. 367 (1891) ("[I]n regard to the kind of arms referred to in the [Second A]mendment, it must be held to refer to the weapons of warfare to be used by the militia."); *City of Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905) (observing that it is "apparent from the [S]econd [A]mendment to the federal [C]onstitution" that the right to bear arms applies only to "a member of a well-regulated militia, or some other military organization provided for by law"); *In re Ramirez*, 193 Cal. 633, 651-52 (1924) ("[T]he right to keep and bear arms . . . refers only to the bearing of arms by the citizens in the defense of a common cause."); *cf. Ex parte Thomas*, 97 P. 260 (Okla. 1908) (interpreting Oklahoma Constitution) ("[T]he arms, the right to keep which is secured, are such as are usually employed in civilized warfare.").

decisions are in the minority, generally rely on State constitutional provisions, and contain no detailed analysis of the Second Amendment. Most important, none of those cases found a statute facially invalid for violating the Second Amendment.[18] Until the Fifth Circuit's 2001 ruling in *Emerson*, no federal court in this nation's history had ruled (without being reversed) that the Second Amendment protects

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[18] The D.C. Circuit discusses decisions in seven States that the D.C. Circuit interprets as recognizing an individual right to "keep and bear Arms." But all of the cases rely primarily on the various States' own constitutions, and none of the cases in question actually discuss or analyze the Second Amendment at any length. *See Brewer v. Commonwealth*, 206 S.W.3d 343, 347 (Ky. 2006); *State v. Williams*, 148 P.3d 993, 998 (Wash. 2006); *Rohrbaugh v. State*, 607 S.E.2d 404, 412-13 (W. Va. 2004); *State v. Blanchard*, 776 So. 2d 1165, 1168 (La. 2001); *Stillwell v. Stillwell*, 2001 Tenn. App. LEXIS 562, at *10-12 (2001); *State v. Anderson*, 2000 Tenn. Crim. App. LEXIS 60, at *19 n.3 (2000); *Hilberg v. Woolworth*, 761 P.2d 236, 240 (Colo. 1988); *State v. Nickerson*, 247 P.2d 188, 192-93 (Mont. 1952). Furthermore, three of these cases expressly acknowledged the authority of the State to restrict an individual's right to possess and use firearms in order to promote public health and welfare. *See Rohrbaugh*, 607 S.E.2d at 413; *Blanchard*, 776 So. 2d at 1168; *Hilberg*, 761 P.2d at 240. A fourth State appears to take such restrictions for granted. *See Williams*, 148 P.3d at 998. Of the eight decisions cited by the D.C. Circuit, only *one* decision actually overturned a law or reversed a judgment on the basis of an individual right to "keep and bear Arms." *See Stillwell*, 2001 Tenn. App. LEXIS 562, at *10-12. That unpublished decision, in which the court reversed a family court order forbidding a father to carry weapons while visiting his children, relies entirely on State law and State precedent. *See id.* Although the court mentions the Second Amendment in passing, the court does not analyze or discuss it. *See id.* In sum, therefore, the D.C. Circuit mischaracterizes the State precedent which it purports provides authority for an independent right to bear arms.

an individual right to the "keep and bear Arms" for purely private purposes. This Court should not lightly disregard the accumulated wisdom of two centuries of jurists interpreting the Second Amendment and ignore the significance of having clarity in this area of the law.

B. The Clear and Established Understanding of the Second Amendment Should Not Be Disturbed

1. Abandoning the clear and established understanding of the Second Amendment would produce substantial upheaval in the manner in which firearms have been regulated nationwide.

A recognition by this Court of an individual right to "keep and bear Arms" for purely private purposes would represent more than a mere doctrinal shift; as a practical matter, it would appear to require a massive change in the way firearms have been regulated for centuries. From pre-colonial times in England until today, reasonable regulations have been permitted on an individual's ability to obtain, possess, and use firearms. *See* Petitioners' Br. at 42-43.[19] The District itself has a history of firearms

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[19] Some early firearm regulations were facially discriminatory or were enacted with racially discriminatory intent. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991). Neither is the case with respect to the District's handgun ban. Furthermore, as a general principle, we dispute the contention that regulations on firearms do not serve the interests of many African-American communities, as discussed *infra*, pp. 25-33. To the extent that

regulations dating back to 1801. *See id.* at 3-4, citing, *inter alia*, Town of Georgetown Ordinance of Oct. 24, 1801; Act of the Corporation of the City of Washington of Dec. 9, 1809. The principal characteristic of the District's firearms legislation that is being challenged in this case—a rule that prohibits handguns while permitting shotguns and rifles (*see* D.C. Code § 7-2502.02)—was enacted over 30 years ago, in 1976, after the District Council received substantial evidence that handguns were disproportionately linked to violent and deadly crime, and posed unique risks in an urban setting. *See* PA101a-04a, 112a. In sum, the District's handgun regulations are reasonable, passed by a legislature, in line with long-standing historical practices and Supreme Court precedents, and recognizes the unique circumstances posed by the link between the District's high crime rate and the prevalence of handguns.[20]

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any particular regulation was or were to be enacted with racially discriminatory intent, that regulation would of course be subject to challenge under the Equal Protection Clause of the Fourteenth Amendment, or the Due Process Clause of the Fifth Amendment. *See*, *infra*, pp. 30-32.

[20] Although the D.C. Circuit purported to hold that "reasonable restrictions" on firearms are permissible under the Second Amendment, *Parker*, 478 F.3d at 399, the examples of "reasonable restrictions" recited in the opinion (and analogized to reasonable time, place and manner restrictions under the First Amendment) are trivial at best, *e.g.*, prohibitions on carrying weapons "when under the influence of intoxicating drink, or [bringing a firearm] to a church. . . ." *Id.* (quoting *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921)). The "reasonable restrictions" described by the majority opinion would apparently not include prohibitions for even obviously dangerous weapons such as machine guns or bazookas. The ability to impose "reasonable restrictions," as that term was employed by the D.C. Circuit, therefore,

Regulations restricting or prohibiting entirely the possession and use of certain types of weapons are not uncommon. Although the constitutionality of handgun prohibitions by non-federal actors is not presented on this appeal, at least ten municipalities, including Chicago and Oakland, have handgun regulations comparable to that of the District.[21] In addition to these municipalities, nine States, Puerto Rico, and at least eleven other municipalities have enacted bans on "assault weapons" or semi-automatic weapons.[22] Eighteen States, the District

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would allow little or no discretion to legislators in trying to address serious problems of health and safety. If, on the other hand, the term "reasonable restrictions" is meant to encompass bans on uniquely dangerous categories of weapons, then it is difficult to imagine why modern handguns, given their lethal nature—as demonstrated, for instance, in the recent Virginia Tech shootings in which a single individual wielding two handguns discharged over 170 rounds in nine minutes, killing thirty people and wounding twenty-five more, *see* Reed Williams & Shawna Morrison, *Police: No Motive Found*, Roanoke Times, April 26, 2006, at A1—should be treated any differently from the types of weapons discussed above.

[21] *See, e.g.*, Oakland, CA Municipal & Planning Codes §§ 9.36.400 – 9.36.440 (2007) (compact handguns); City of Chicago, IL Municipal Code §§ 8-20-030(k), 8-20-40, 8-20-50 (2007); City Code of the City of Evanston, IL § 9-8-2 (2007); Highland Park, IL City Code §§ 134.001 – 134.099 (2007); Morton Grove, IL Village Code §§ 6-2-1 – 6-2-3 (2007); Oak Park Village Code §§ 27-1-1, 27-2-1 (2007); Winnetka, IL Village Code § 9.12.020 (2007); Village of Wilmette, IL Code of Ordinances § 12-24 (2007); Cambridge Municipal Code §§ 9.16.20 – 9.16.50 (2006); Toledo, OH Municipal Code §§ 549.01(c), 549.25 (2007) (certain handguns).

[22] *See* Cal. Penal Law §§ 12275-12289.5 (2007); Conn. Gen. Stat. §§ 53-202a–j, m–o (2007); Haw. Rev. Stat. §§ 134-1, 134-4(e) (2007); Md. Code §§ 4-301 – 4-303 (2007); Mass. Gen.

of Columbia, Puerto Rico, and the federal government have prohibited armor-piercing or "cop-killer" bullets.[23] And numerous other States and the federal government have adopted categorical bans on other types of more potent weaponry, such as

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Laws ch. 140 §§ 121, 131M (2007); N.J. Stat. Ann. §§ 2C: 39-1(w), 39-5(f), 2C: 58-12 (2007); N.Y. Penal Law §§ 265.00(21-22), 265.10, 265.20(16) (2007); P.R. Laws Ann. tit. 25, § 456(m) (2005); Aurora, IL Code of Ordinances, § 29-49 (2007); City of Chicago, IL Municipal Code §§ 8-20-030(h), 8-20-40, 8-20-50 (2006); South Bend, IN Code of Ordinances §§ 13-94 – 13-99 (2007); Code of the City of Albany, NY §§ 193-13 – 193-16 (2007); Code of the City of Buffalo, NY §§ 180-1(b), (f) (2007); Administrative Code of the City of New York, NY §§ 10-301(16), 10-303.1 (2007); Code of the City of Rochester, NY §§ 47-5(b), (f) (2007); Cincinnati, OH Administrative Code § 708-37 (2007); Codified Ordinances of Cleveland, OH §§ 628.01-628.99 (2006); Columbus City, OH Codes §§ 2323.11(G)(1), 2323.31 (2007); Code of Ordinances of the City of Dayton, OH §§ 138.24 – 138.99 (2006); Toledo, OH Municipal Code §§ 549.01(x), 549.23, 549.25 (2007).

[23] *See, e.g.*, 18 U.S.C. §§ 921(a)(17)(B), 922(a)(7)-(8), 929 (2008); Cal. Penal Law § 12320 (2007); Conn. Gen. Stat. § 53-202l (2007); D.C. Code §§ 7-2501.01(13a), 7-2505.02 (2007); Fla. Stat. § 790.31 (2007); Haw. Rev. Stat. § 134-8(a) (2007); 720 Ill. Comp. Stat. § 5/24-2.1 (2007); Ind. Code § 35-47-5-11 (2007); Ky. Rev. Stat. §§ 237.060(7), 237.080 (2007); La. Rev. Stat. §§ 40:1810-12 (2007); Me. Rev. Stat. tit. 17-A, § 1056 (2007); Mich. Comp. Laws § 750.224c (2007); Miss. Code § 97-37-31 (2007); N.J. Rev. Stat. § 2C:39-3(f) (2007); N.Y. Penal Law §§ 265.00(18), 265.01(8); Okla. Stat. Ann. tit. 21 § 1289.19 (2007); Or. Rev. Stat. § 166.350 (2005); 18 Pa. Cons. Stat. § 6121 (2007); P.R. Laws Ann. tit. 25, § 455(j), 458(j), 459a (2005) ; R.I. Gen. Laws §11-47-20.1 (2007); Tx. Penal Code §§ 46.01(12), 46.05 (7) (2007). Wilmington, Delaware has prohibited armor-piercing bullets, although Delaware does not have a State-wide ban. *See* Wilmington, DE Code of Ordinances § 36-156 (2007).

machine guns, rocket launchers, and chemical and biological weapons.[24]

If the reasoning of the D.C. Circuit replaces the current state of the law, however, its effects could extend well beyond handgun regulations. The D.C. Circuit held that the District's handgun ban was unconstitutional because the Second Amendment guarantees an individual "right" to "keep and bear Arms," which includes any weapons that are in "common use" in a militia, or are the "lineal descendent[s]" of weapons that were in "common use" by militias during colonial times. *Parker*, 478 F.3d at 398. Ignoring the extent to which handguns are used today in the commission of violent crime, and absent any factual support, the D.C. Circuit concluded that "there can be no question" that handguns are among the type of "Arms" in "common use" today, and therefore that an individual's right to "keep and bear" handguns is protected under the Second Amendment. *Id.* at 397-98. The majority then adopted a categorical rule that any prohibition on the possession of any type of protected "Arm" is *per se* unconstitutional, without regard to the reasonableness of the regulatory scheme as a whole or the lethal nature of a particular class of weapons: "Once it is determined . . . that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." *Id.* at 400.

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[24] *See, e.g.*, 18 U.S.C. 922(o) (1948) (machine guns); Tx. Penal Code §§ 46.01(9), 46.05(2) (2007) (machine guns); Ga. Code §§ 16-11-120 – 16-11-125 (2007) (rocket launchers); Col. Rev. Stat. § 18-12-109 (2007) (chemical, biological, and radiological weapons); S.C. Code § 16-23-710 (2006) (nuclear weapons).

A Second Amendment jurisprudence where the right to "keep and bear Arms" is based on whether the weapon is a "lineal descendant" from Colonial weaponry would be entirely unworkable and unprincipled. The logic of the D.C. Circuit's rule would render unconstitutional not only regulations on the possession or use of handguns but also bans on other extremely dangerous categories of weapons, such as assault weapons, armor-piercing bullets, machine guns, and rocket launchers, assuming that a "lineal descent" can be demonstrated at trial. If today's lethal handguns are thought of as the "lineal descendents" of revolutionary-era "single-shot pistols," *id.* at 398, then it would follow that automatic or semi-automatic rifles are the "lineal descendents" of the revolutionary-era musket, and that armor-piercing bullets are mere "upgrades" over revolutionary-era bullets.

Equally unhelpful is the D.C. Circuit's reliance on the fact that handguns "are also in 'common use' today." *Id.* The scope of constitutional rights should not depend on the vagaries of ownership trends, and particularly not of those engaged in crime. Of greater concern is the fact that the D.C. Circuit, while providing no test for determining when a weapon is in "common use," also provided no limits whatsoever, implying that the Constitution protects an individual's inalienable right to "keep and bear" even "distinctly military arms." *Cases*, 131 F.2d at 922.

In holding that the Constitution does not permit any prohibition on particular categories of "Arms" in "common use," no matter how dangerous, the D.C. Circuit adopted an unnecessarily radical and

absolutist position. This position has never been taken seriously by policymakers because there are sound, common-sense bases for prohibiting the private use of certain types of weapons. For example, as President Reagan stated upon signing into law the original federal prohibition on armor-piercing bullets,

> H.R. 3132 [will] ban the production or importation of the so-called "cop-killer bullets," which pose an unreasonable threat to law enforcement officers who use soft body armor. This bill . . . recognizes that certain forms of ammunition have no legitimate sporting, recreational, or self-defense use and thus should be prohibited. Such action is long-overdue.

President Ronald Reagan's Statement Upon Signing H.R. 3132, 22 Weekly Comp. Pres. Doc. 1130 (Sept. 1, 1986). A *per se* rule barring prohibitions on essentially any category of firearms, regardless of the scope of the regulation, is not compelled by the Second Amendment or common sense. Abandoning this Court's clear and established understanding of Second Amendment jurisprudence would wreak havoc.

2. Abandoning the clear and established understanding of the Second Amendment unduly limits the ability of States and municipalities struggling to address the problem of gun violence, a problem of particular interest to this nation's African-American community

Firearm regulations like those of the District are one piece of a much larger puzzle—how to address the unacceptable levels of injuries and fatalities from gun violence in many communities across the nation. The fact that local firearm regulations alone do not solve this puzzle does not mean that such regulations have no place at all in the fight to ensure the safety of our nation's residents. States and localities must have flexibility to assess their public health and safety needs, and to determine the best means of achieving them. Accordingly, the degree of gun regulation may vary from place to place. Under these circumstances, the lower court's radical departure from this Court's clear and established Second Amendment jurisprudence should be reversed.

Legislatures enact firearm regulations to reduce crime and save lives threatened by the vexing problem of gun violence. African Americans, especially those who are young, are at a much greater risk of sustaining injuries or dying from gunshot wounds. The number of African-American children and teenagers killed by gunfire since 1979 is more than ten times the number of African-American citizens of all ages lynched throughout American history. *See* Children's Defense Fund, *Protect Children, Not Guns* 1 (2007), *available at*

www.childrensdefense.org/gunreport. Firearm homicide is the leading cause of death for fifteen to thirty-four year-old African Americans. *See* The Centers for Disease Control and Prevention, *WISQARS*, *Leading Causes of Death Reports (1999-2004)*, http://webappa.cdc.gov/sasweb/ncipc/leadcaus.html. Although African Americans comprise only thirteen percent of the United States population, African Americans suffered almost twenty-five percent of all firearm deaths and fifty-three percent of all firearm homicides during the years 1999 to 2004. *See The Centers for Disease Control, WISQARS Injury Mortality Reports (1999-2004)*, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html.

With respect to handguns specifically, African Americans again suffer disproportionately. From 1987 to 1992, African-American males were victims of handgun crimes at a rate of 14.2 per 1,000 persons compared to a rate of 3.7 per 1,000 for white males. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Crime Data Brief, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft* (Apr. 1994), *available at* www.ojp.usdoj.gov/bjs/pub/ascii/hvfsdaft.txt. During the same period, African-American women were victims of gun violence at a rate nearly four times higher than white women. *See id.* Overall, African-American males between sixteen and nineteen years old had the highest rate of handgun crime victimization, at a rate of forty per 1,000 persons, or four times that of their white counterparts. *See id.*

Gun violence also adds significant direct and indirect costs to America's criminal justice and

health care systems, while reducing the nation's overall life expectancy. *See generally* Phillip Cook & Jens Ludwig, *Gun Violence: The Real Costs* (Oxford Univ. Press 2002) (estimating medical expenditures relating to gun violence, with costs borne by the American public because many gun victims are uninsured and cannot pay for their medical care); Linda Gunderson, *The Financial Costs of Gun Violence*, 131 Annals of Internal Medicine 483 (1999) (noting that the American public paid about eighty-five percent of the medical costs relating to gun violence); Jean Lemaire, *The Cost of Firearm Deaths in the United States: Reduced Life Expectancies and Increased Insurance Costs*, (2005), *available at*: http://knowledge.wharton.upenn.edu/ papers/1294.pdf?CFID=48458188&CFTOKEN=83914080&jsessionid=a830d9608bc97d6668e1 (concluding, among other things, that the elimination of all firearm deaths would increase the male life expectancy more than the eradication of all colon and prostate cancers).

Although African Americans suffer from a disproportionate share of gun violence nationally, these disparities are significantly larger in the District. In 2004 alone, all but two of the 137 firearm homicide victims in the District were African-American, most of them between the ages of fifteen and twenty-nine years old. *See* CDC, *WISQARS*, *Injury Mortality Reports (2004)*, *supra*. African Americans make up approximately sixty percent of the District's population, but comprise ninety-four percent of its homicide victims. *See* D.C. Dep't of Health, Center for Policy, Planning, and Epidemiology, State Center for Health Statistics, Research and Analysis Division, *Homicide in the*

District of Columbia, 1995-2004 5 (Feb. 1, 2007), *available at* http://www.doh.dc.gov/doh/lib/doh/services/administration_offices/schs/pdf/5yrs_homicides_1995-2004 (final).pdf. Between 1999 and 2004, African Americans in the District died from firearm use at a rate 10.6 times higher than did whites, and suffered from firearm homicide at a rate 16.7 times higher than did whites. *See* CDC, *WISQARS*, *Injury Mortality Reports (1999-2004)*, *supra*. The vast majority of these deaths were the result of handgun violence. *See* Nat'l Public Radio (NPR), *D.C. Mayor Addresses Blow to Handgun Ban* (Mar. 13, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=7867355 (noting that 80 percent of homicides in the District are committed with handguns).

Given the prevalence of gun violence in the District and the devastating impact on its residents, the District Council had sound reasons to conclude that its handgun regulations would constitute a wise policy. Ultimately, the overall effectiveness of the District's handgun prohibition is not relevant to the Court, given the applicable legal standard as discussed above. However, we submit that, although the District's prohibition may not be a complete solution, especially because the absence of regional regulations permits guns to continue to flow into the District from neighboring jurisdictions, local efforts to reduce the number of handguns on the District's streets should be considered one piece of a larger solution. Indeed, the enactment of the handgun ban in the District thirty years ago was accompanied by an abrupt decline in firearm-caused homicides in the District, but not elsewhere in the Metropolitan area. *See* Petitioners' Br. 52 (*citing* Colin Loftin, et al.,

Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia, 325 New England J. Med. 1615 (1991)). A recent study revealed that a ten percent increase in handgun ownership causes a two percent increase in homicides. *See id.* (*citing* Mark Duggan, *More Guns, More* Crime, 109 J. Pol. Econ. 1086, 1095-98 (2001)). These trends underscore the importance of the District's efforts and certainly do not counsel in favor of an unwarranted jurisprudential break that could drastically limit or foreclose such efforts. This Court's settled precedents provide the necessary latitude for the District to best protect its citizens by making the policy decision that fewer handguns, not more, promote public health and safety.

In short, a decision by this Court upholding the D.C. Circuit's invalidation of the District's handgun regulations would interfere with legitimate efforts to save lives. Given the clear and established understanding of the Second Amendment, which would allow the District's firearm regulations to remain in place, there is no basis for this Court to issue such a ruling.

3. Abandoning the clear and established understanding of the Second Amendment would not address racial discrimination in the administration of criminal justice in general or the administration of firearm restrictions in particular

Concerns about this nation's past or present-day problems with racial discrimination do not provide a basis for invalidating the District's handgun

regulations. The solution to discriminatory enforcement of firearm laws is not to reinterpret the Second Amendment to protect an individual right to "keep and bear Arms" for purely private purposes, but rather to employ, as necessary, this Court's traditional vehicle for rooting out racial discrimination: the Equal Protection Clause of the Fourteenth Amendment, or, where the actions of the federal government are at issue, the Due Process Clause of the Fifth Amendment. *See United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (administration of a criminal law may be "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of enforcement and prosecution amounts to "a practical denial" of equal protection of the laws) (*quoting Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)); *see also Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in the selection of the grand jury violates Equal Protection); *Batson v. Kentucky*, 476 U.S. 79 (1986) (invalidating the use of race as a factor in the exercise of peremptory challenges).[25] To the extent the history surrounding the adoption of early gun control laws, or even the Second Amendment itself, is tainted by racial discrimination, *see* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998) (arguing that a major function of the "well regulated militia" of the Second Amendment during colonial and post-revolutionary times was the maintenance of slavery in the South and the suppression of slave rebellion); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment:*

[25] Consistent with this position, LDF filed briefs in all of these cases either as counsel for a party or as an *amicus*.

Toward an Afro-Americanist Reconsideration, 80 Geo. L.J. 309 (1991) (tracing the discriminatory intent of early firearms restrictions), then the Fourteenth Amendment is the appropriate vehicle for that bias to be ferreted out and eliminated.

Contrary to the assertions of some, the modern firearm regulations at issue in this case should not be confused with the Black Codes, other discriminatory laws that the Fourteenth Amendment invalidated, or more recent cases where Fourteenth Amendment protections have been implicated. The Fourteenth Amendment's protections rightly extend in the face of a colorable assertion that the District's firearm regulations (or those of any other jurisdiction) are racially discriminatory in origin or application, but such a showing has not been made here or even alleged by Respondents.

CONCLUSION

This Court, all but two of the federal Courts of Appeals, and the various State appellate courts have consistently held that the Second Amendment does not protect an individual right to "keep and bear Arms" for purely private purposes. Prior to the decision below, no federal court had ever found a statute facially invalid under the Second Amendment without subsequently being reversed. While evolution in the understanding of a Constitutional provision is sometimes warranted, nothing has changed in regard to the Second Amendment that would justify this Court in radically departing from its jurisprudence here; if

anything, the lethal nature of the modern handgun and the epidemic of handgun violence and its attendant effects on the African-American community in this country should cast doubt on the radical reinterpretation of the Second Amendment proffered by the D.C. Circuit.

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