No. 07-290

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE GOLDWATER INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Goldwater Institute,[1] established in 1988, is a nonprofit, independent, nonpartisan research and educational organization dedicated to the study of public policy. Through its research papers, editorials, policy briefings and forums, the Institute advances public policies founded upon the principles of limited government, economic freedom and individual responsibility. A core purpose of the Goldwater Institute and its Center for Constitutional Litigation is the preservation of constitutional liberties, including the right to keep and bear arms. A substantial number of the Institute's members are gun owners.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses the government's failure of principle and logic in this case. The United States' brief (hereinafter "Gov't Br.") argues correctly that the Second Amendment protects a fundamental personal right to keep and bear arms, but then fails to acknowledge and advocate the simple and necessary conclusions that follow from that premise.

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[1] Pursuant to Rule 37.6, counsel for the Goldwater Institute states that no counsel for a party authored this brief in whole or in part and that no person, other than the Goldwater Institute, its members, or counsel, made a monetary contribution to the preparation or submission of this brief. General letters of consent to the filing of *amicus* briefs by both parties have been lodged with the Clerk of Court pursuant to Rule 37.3, and the Goldwater Institute gave timely notice to the parties of its intent to file pursuant to the terms of those letters.

The government correctly concludes that the Constitution establishes and requires this Court to protect the right to keep and bear arms as a personal right. The reasons provided by the D.C. Circuit, respondent, and the government itself support and compel this conclusion. Even so, the government urges this Court to apply a lower, "intermediate" or "heightened" standard of review to measures that impair this right, rather than the strict scrutiny that traditionally attaches to fundamental personal rights enumerated in the Constitution. The government also would have this Court decline to apply and vindicate the right, and instead leave that task to a lower court on remand.

No basis in law or logic supports those outcomes. The Second Amendment right does not deserve second class status, and this Court should perform its traditional role of deciding cases and giving meaningful guidance to the lower courts. Application of strict or even intermediate scrutiny should be straightforward: the Second Amendment right would be without meaning if a flat ban on the most prevalent and important form of the right's exercise were constitutional. This Court should apply the traditional constitutional standard to the simple facts and affirm the D.C. Circuit's judgment.

Until this case, the government accepted the necessary implications of the Second Amendment's recognition of a personal right to keep and bear arms. In November 2001, the Attorney General applauded the Fifth Circuit's implementation of its finding, in *United States* v. *Emerson*, 270 F.3d 203 (5th Cir. 2001), that the Second Amendment protects a personal right to keep and bear arms. He stated that "the *Emerson* opinion, and the balance it strikes, generally reflect the correct understanding of the

Second Amendment." Memorandum from the Attorney Gen. to U.S. Attorneys at 1 (Nov. 9, 2001) (hereinafter "AG Mem."). Soon thereafter, in urging this Court not to review *Emerson*, the government confirmed that the United States believed that "the Second Amendment more broadly protects the rights of individuals" and that *Emerson* applied "strict scrutiny" and "did not purport to apply a relaxed standard of review." Brief for the United States in Opposition at 19 n.3, 21, *Emerson* v. *United States*, 536 U.S. 907 (2002) (No. 01-8780) (hereinafter "Opp'n Br."). Without acknowledging its change of course to this Court, the government now advocates the very "relaxed standard of review" it declined to endorse before this Court just five years ago.[2]

The government's uncomfortable straddle—finding a personal, enumerated Constitutional right without finding that the courts should protect that right as such—rests, as one would expect, on a series of flawed arguments. *First*, the government's arguments crudely mischaracterize the D.C. Circuit's opinion. The government claims that the D.C. Circuit applied a "categorical" or "per se" test in striking

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[2] Indeed, the government now claims that the Attorney General in 2001 found that the Second Amendment right "is subject to reasonable restrictions," Gov't Br. at 3, which misleadingly invites the inference that the United States endorsed something less than strict scrutiny. But the government omits the words after "reasonable restrictions" in the Attorney General's memorandum and in filings before this Court; that reference was to "reasonable restrictions *designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse*." Opp'n Br. at 19 n.3 (emphasis added); AG Mem. at 1. These particular "reasonable restrictions" are entirely compatible with the strict judicial scrutiny mandated by *Emerson* and the D.C. Circuit in the decision under review. *See infra* at 13-17.

down the D.C. handgun ban. The government thus argues that the Court must adopt a more flexible standard that would enable this Court to consider a range of relevant factors and would not undermine various federal arms regulations not currently before this Court. Similarly, the government argues that a remand is necessary because the proper standard diverges markedly from the "per se" test. Yet the D.C. Circuit's opinion clearly shows that it adopted no such "per se" or "categorical" standard. Instead, it applied traditional strict scrutiny to the core right protected by the Second Amendment, while devoting pages to outlining the circumstances under which the government may regulate arms outside that core without offending the Constitution.

Properly understood, the D.C. Circuit's standard provides the flexibility for this Court to consider all relevant factors surrounding the right and regulations at issue, including those the government believes should be accommodated in the standard of review. Strict scrutiny, as applied by the D.C. Circuit and *Emerson*, would not automatically void reasonable, historically accepted restrictions such as, among others, those precluding certain classes of persons from securing arms. What strict scrutiny will guard against, however, are government prohibitions that "impair the core conduct upon which the right was premised." Pet. App. 52a. The D.C. handgun ban, because it flatly forbids citizens from using the most common means of exercising the right to defend one's home and family protected by the Second Amendment, is such a prohibition.

Second, the government's most important claims are unsupported or based on flawed premises. The government implicitly bases its "intermediate review" standard on the adverse implications of a "per se" or

"categorical" standard of review, but *not one sentence* in the brief addresses why strict scrutiny would not be appropriate. Similarly, the government's claim that a remand is required in this case fails to address the many instances in which this Court has applied new standards to reach final judgments, often in contexts far more fact-laden and employing far less traditional legal standards than either "heightened" or strict scrutiny. In fact, finally resolving this case should be straightforward under either strict or intermediate scrutiny: if the Court recognizes a personal right to keep arms, including handguns, in self-defense, then the Constitution cannot tolerate a measure that unqualifiedly prohibits such a common means of exercising the right. This point has been fully litigated in the courts below, and requires no fine determinations of fact to decide.

Third, the government's arguments reflect an extremely crabbed conception of this Court's role and capabilities in upholding the Constitution. The government would have this Court find that the Bill of Rights expressly protects a personal, fundamental right, and then decline to afford it the standard of judicial protection afforded to all other such rights. No other personal right, at its core, is protected through only "intermediate" scrutiny. Instead, that level of scrutiny is afforded in circumstances that less clearly implicate the essence of an enumerated personal right, or in circumstances where some *upward* adjustment to rationality review is required. Similarly, the government suggests that this Court is incapable of applying fact to law to resolve the case before it, and seeks a remand instead. This is so, the government argues, because a decision from this Court (but presumably not a lower court on remand) would risk "broad-based pronouncements" that "could

unduly skew the future course of Second Amendment adjudication." Gov't Br. at 30. Slightly more confidence in this Court and its ability to fashion appropriate principles of law suggests that applying the Constitution to the D.C. statute would provide guidance to lower courts and facilitate rather than "skew" the development of law in this area.

Part I of this brief addresses the government's claims that "intermediate" or "heightened" scrutiny applies. It argues that this Court should apply the traditional, strict scrutiny employed to protect other personal rights recognized by the Constitution, and that this standard, as articulated by the D.C. Circuit below, enables the Court to consider an appropriate range of factors and does not threaten the wholesale invalidation of federal firearms regulations suggested by the government. Part II addresses the government's argument for a remand. It shows that this Court's customary practice does not favor a remand and, together with other factors, supports this Court's straightforward affirmance of the D.C. Circuit's judgment—under any standard of review.

ARGUMENT

I. THE SECOND AMENDMENT RIGHT DESERVES PROTECTION EQUIVALENT TO OTHER FUNDAMENTAL INDIVIDUAL RIGHTS ENUMERATED IN THE BILL OF RIGHTS, NOT THE "INTERMEDIATE" SCRUTINY PROPOSED BY THE GOVERNMENT.

The government's advocacy of intermediate scrutiny fails to accept, much less address, the judiciary's role in protecting personal rights enumerated in the Constitution. Courts discharge that role by applying strict scrutiny to government

restrictions on the core aspects of such fundamental rights. See *infra* at 10-13. The right to self-defense is a natural and fundamental right that pre-dates its recognition in the Constitution, as the government recognizes. Gov't Br. 12-13. The Bill of Rights protects that right directly in the Second Amendment and in the protections it affords the home, property, liberty and other rights held by the people. See U.S. Const. amends. II-V. The right of the people to keep and bear arms, subject only to certain historically accepted, reasonable restrictions or those that serve compelling government interests in a narrowly tailored fashion, preserves not only the right to self-defense, but also the other liberties reflecting personal autonomy. As the Framers intended, see *The Federalist* No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961), federal courts have assumed a vital role in protecting individual constitutional rights. The government once endorsed this important role with respect to the Second Amendment as well as other, related rights, see *supra* at 2-3 & n.2, but now has changed its position for reasons unstated and would, for this one enumerated right, have this Court abandon that role.

The government's arguments for intermediate scrutiny proceed from mischaracterization of the D.C. Circuit's opinion. The government claims that the D.C. Circuit applied a "categorical" or "per se" test, and argues that the proper test is instead one that "does not render all laws limiting gun ownership automatically invalid." Gov't Br. at 8-9, 24. But this is not what the D.C. Circuit held, nor what its ruling would do.

The court of appeals' test readily allows courts to consider relevant factors that include a range of government interests, and provides an appropriate

framework to enable subsequent courts to address the principal federal regulations identified by the government, including the federal ban on machine guns. The D.C. Circuit's decision permits "reasonable restrictions" in a range of circumstances supported by our Nation's history and traditions, but prohibits measures that "impair the core conduct upon which the [Second Amendment] right was premised." Pet. App. 52a. This is the same standard applied by the Fifth Circuit in *Emerson*. No basis exists for providing the Second Amendment right with the second-class status the government recommends.

A. The D.C. Circuit Applied The Proper Standard Of Scrutiny For Fundamental Individual Rights, And Did Not Apply A "Per Se" Or "Categorical" Rule.

Claiming that the D.C. Circuit's decision "could be read to hold that the Second Amendment *categorically* precludes any ban on a category of 'Arms' that can be traced back to the Founding era," Gov't Br. at 9, and that the D.C. Circuit adopted a "per se" or "categorical" test, *id.* at 9, 21, 24-25, the government devotes the latter half of its brief to arguing that "the Second Amendment's protection of individual rights does not render all laws limiting gun ownership automatically invalid." *Id.* at 8.

The D.C. Circuit expressly disavowed the position the government attributes to it and instead applied the traditional test for measures impairing individual rights recognized under the Constitution. The court rejected the view "that the government is absolutely barred from regulating the use and ownership of pistols," and emphasized that "[t]he protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment." Pet.

App. 51a (citing *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)); see Pet. App. 51a-52a (canvassing such restrictions); *infra* at 13-17. The D.C. Circuit also recognized that the government is empowered to advance the "interest in public safety consistent with our common law tradition." *Id.* The court contemplated restrictions of weapons other than commonly used "lineal descendant[s]" of arms used in support of the Founding era militia. *Id.* at 51a.

These regulations are, however, subject to the traditional Constitutional principle that "they not impair the core conduct upon which the [Second Amendment] right was premised." *Id.* at 52a. The D.C. Circuit's decision reflects a straightforward application of that unexceptional principle. The court observed that "the pistol is the most preferred firearm in the nation to 'keep' and use for the protection of one's home and family," and that "the Second Amendment's premise is that guns would be kept by citizens for self-protection (and hunting)." *Id.* at 53a-54a. D.C.'s flat ban on handguns, even for home protection, fell far outside historically-supported forms of regulation and clearly "impair[ed]" the "core conduct" protected by the Constitution. *Id.* at 52a-55a.[3] As long as the Second Amendment protects a personal right, the D.C. ban could not be upheld.

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[3] Indeed, the government at points in its brief suggests that it agrees with this holding. *See* Gov't Br. at 9 ("Given that the D.C. Code provisions at issue ban a commonly-used and commonly-possessed firearm in a way that has no grounding in Framing-era practice, those provisions warrant close scrutiny under the analysis described above and may well fail such scrutiny."); *id.* at 27-28.

The court of appeals applied no "categorical," "per se," or "automatic[ ]" rule. See, *e.g.*, Gov't Br. at 8-9, 24. Indeed, its rule is indistinguishable from the one set forth in *Emerson*, which until this case the Department of Justice had endorsed. See *Emerson*, 270 F.3d at 261 (the Second Amendment right is subject to "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country"); *supra* at 2-3 & n.2. That rule is correct and should be affirmed.

B. Core Second Amendment Rights Should Be Accorded The Full Protection Due Other Individual Rights Enumerated In The Constitution.

The government acknowledges, as it must, that "the Second Amendment right is like rights conferred by the surrounding provisions of the Bill of Rights and enjoyed by individuals." Gov't Br. at 20. These fundamental rights are "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty," and are, at their core, subject to strict scrutiny, meaning they may be infringed only by government action that "is narrowly tailored to serve a compelling state interest." *Chavez* v. *Martinez*, 538 U.S. 760, 775 (2003) (internal quotation marks omitted). Such liberties include "'the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on. . . . [They] require particularly careful scrutiny of the state needs asserted to justify their abridgment.'" *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 848-49 (1992) (quoting *Poe* v.

Ullman, 367 U.S. 497, 543 (Harlan, J., dissenting on other grounds)) (emphasis added).

The government neither addresses nor distinguishes these and many other cases that "requir[e] strict judicial scrutiny" whenever a measure "impinges upon a fundamental right explicitly . . . protected by the Constitution." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 17 (1973). Indeed, strangely, when the government illustrates the review it believes appropriate, it cites authority that employs strict scrutiny. See Gov't Br. at 24 n.6 (endorsing approach of *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995), which adopts strict scrutiny).[4]

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[4] The government's sole justification for an intermediate standard of review is reliance, without explanation, on election-law cases. *See* Gov't Br. at 8 (citing *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992)); *id.* at 24 (citing *Burdick* and *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997)); *id.* at 27-28 (citing *Burdick*). Those cases are inapposite because they involve States' power and necessity, recognized by Article I, to regulate the manner in which elections are conducted. *See Burdick*, 504 U.S. at 433 ("[T]he right to vote in any manner and the right to associate for political purposes" is not "absolute" because "States retain the power to regulate their own elections" under Art. I, § 4, cl. 1.); *Timmons*, 520 U.S. at 357-58. Moreover, even in that unique context, strict scrutiny is appropriate when the burden imposed by the regulation is severe. *See Burdick*, 504 U.S. at 434 ("when those rights are subjected to 'severe' restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance" (internal quotation marks omitted)); *Timmons*, 520 U.S. at 358 ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest."). The government implicitly recognizes this sliding scale of review. *See* Gov't Br. at 8 ("the 'rigorousness' of the inquiry depends on the degree of the burden on protected conduct" (quoting *Burdick*, 504 U.S. at 434)); *id.* at 24, 27-28.

Thus, even though the government never addresses strict scrutiny in its brief, it indirectly acknowledges (as it must) that strict scrutiny applies to measures that threaten fundamental personal rights recognized by the Constitution. There is simply no other individual liberty enshrined in the Bill of Rights as to which the core aspects are categorically subject to lenient judicial protection in the manner suggested by the government for the Second Amendment.

Strict scrutiny is especially appropriate in the Second Amendment context. As both parties in this case agree, the Second Amendment is rooted in a singular distrust of the government. See, *e.g.*, Pet'r Br. at 9, 21-22; Resp. Br. at 3-4, 30-32. Indeed, the government itself recognizes that "Framing-era discussions of the need for the Second Amendment frequently described an armed citizenry as a deterrent to abusive behavior by the federal government itself." Gov't Br. at 18; see also *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel 71, 79-81, 83-84 (Aug. 24, 2004), http://www.usdoj.gov/olc/secondamendment2.pdf (hereinafter "OLC Opinion").

The government does not attempt to explain why the Second Amendment right should be a second-class right subject to wider legislative discretion than other fundamental rights. Nor could it do so. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943).

Here, of course, the burden on the protected right clearly is severe.

No less than other personal rights enshrined in the Bill of Rights, the right recognized by the Second Amendment is entitled to such protection.

C. Strict Scrutiny Will Not Automatically Invalidate Federal Firearms Regulation.

Having mischaracterized the court of appeals' holding as somehow imposing a "categorical" test for Second Amendment violations, the government launches a parade of horribles in the form of a list of federal arms regulations that might be "automatically invalid" if personal Second Amendment rights were accorded full protection. Gov't Br. at 8. This argument is wrong. The D.C. Circuit appropriately recognized that the right to keep and bear arms is "subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment." Pet. App. 51a. The court's decision shows that full Constitutional protection for core Second Amendment rights still allows state and federal firearms regulations when they are consistent with traditional limitations on the right or are otherwise narrowly tailored to serve compelling state interests. No denigration of the Second Amendment right is needed to achieve an appropriate balance.

As the court of appeals recognized, the speech right, like the right to keep and bear arms, is recognized by the Constitution as a fundamental right, but is nonetheless subject to a variety of restrictions. The "core" of the right is protected by strict scrutiny; the government may not interfere unless its action is narrowly tailored to achieve a compelling state interest. *McIntyre*, 514 U.S. at 345-47. There are, however, traditional and historical exceptions to this core right, and such speech is subject to lesser protections, *Central Hudson Gas & Elec. Corp.* v.

Public Serv. Comm'n of N.Y., 447 U.S. 557, 562-64 & n.5 (1980) (commercial advertising), or no protections at all, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942) ("the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"). Speech is also subject to reasonable "time, place, or manner" restrictions. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).

As with the First Amendment's free speech right, the Second Amendment's personal right is subject to a range of reasonable restrictions even though strict scrutiny applies to the core of the protected conduct. Despite this, the government attempts to contrast the supposed "per se rule suggested by the court of appeals" with a standard of review that allows a reviewing court to consider "the practical impact of the challenged restrictions on the plaintiff's ability to possess firearms for lawful purposes" and "the strength of the government's interest in enforcement of the relevant restriction." Gov't Br. at 24. As explained *supra* at 8-10, this dichotomy is false. Not only *can* a court consider these factors under the test set forth by the D.C. Circuit, but it *must* do so, allowing "reasonable restrictions" such as those derived from traditional common law limitations on the right to keep and bear arms; time, place, and manner regulations; and limitations relating to the regulation of the militia. See Pet. App. 51a-52a.

Under the D.C. Circuit's decision, a reviewing court would necessarily assess the strength of the government's interest underlying regulations going to the core of the right, and determine whether the government's chosen means of regulating was narrowly tailored to advance a compelling interest. This would, of course, be subject to well-understood historical exceptions and reasonable restrictions on

time, place, and manner—just as is the case with other constitutionally enumerated rights. In all events, the limiting principle on government regulation would remain whether the regulations are "consistent with our common law tradition" in that they do not "impair the core conduct upon which the [Second Amendment] right was premised." *Id.* at 52a. In this case, the D.C. Circuit undertook precisely that inquiry when it found that "the pistol is the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," meaning that D.C.'s categorical and untailored handgun ban impaired the Second Amendment's core function of enabling self-protection. *Id.* at 52a-55a.

There is no reason to suppose that the regulations the government canvasses—unlike the D.C. handgun ban—would be "automatically invalidated" by the fully protective standard enunciated by the D.C. Circuit. Gov't Br. at 8. The government repeatedly invokes the federal ban on machine guns, see *id.* at 2, 9, 21-25, but nothing in the D.C. Circuit's opinion or its standard of review suggests that the Second Amendment would undermine a machine gun ban. As a threshold matter, a machine gun would be very unlikely even to fall within the ambit of the Second Amendment's protection as an "Arm[ ]," since it fails both prongs of the *Miller* test the D.C. Circuit applied. See Pet. App. 48a-49a (citing *United States* v. *Miller*, 307 U.S. 174, 178-79 (1939)). Machine guns, unlike handguns, are not "a lineal descendent of [a] founding-era weapon" that was needed for "the preservation or efficiency of a well regulated militia," nor are they in common use today. Pet. App. 51a. The common law also exempted from the right to keep and bear arms "dangerous or unusual weapons,"

for they would "terrify[ ] the good people of the land." 4 William Blackstone, *Commentaries* *149.

Moreover, under the D.C. Circuit's reasoning, the government may regulate the time, place, and manner of firearm use, which includes prohibitions on use of weapons "in a manner calculated to inspire terror," Pet. App. 51a-52a, such as the everyday display or use of a machine gun. See also *Emerson*, 270 F.3d at 232 n.31 (there is no right of individuals to bear arms "'merely to terrify the people or for purposes of private assassination'" (quoting *Aymette* v. *State*, 21 Tenn. (2 Humph.) 154, 158 (Tenn. 1840))). More importantly, machine guns do not serve the function in today's society that handguns do for "the protection of one's home and family," and thus a ban on common ownership of machine guns would hardly "negate the lawful use upon which the [Second Amendment] right was premised—*i.e.*, self-defense." Pet. App. 54a-55a.

The other federal arms regulations cited by the government provide even less reason to depart from the D.C. Circuit's analysis or lessen the traditional protection afforded to the core aspects of fundamental individual liberties guaranteed by the Bill of Rights. The government argues at some length that certain classes of individuals, such as felons, were not entitled to the common law right to keep and bear arms at the time of the Founding and may be prohibited from possessing firearms. Gov't Br. at 25-26. This is hardly a challenge to the D.C. Circuit's reasoning, which clearly indicated that the personal right protected by the Second Amendment was subject to the limitations and regulations recognized at common law. The D.C. Circuit also understood this Court to have already decided that felons could be barred from possessing arms, Pet. App. 52a (citing

Lewis v. *United States*, 445 U.S. 55, 65 n.8 (1980)), and, in any event, held that the "reasonable restrictions" the government could undertake as part of its power to regulate the militia extended to regulating on the basis of "[p]ersonal characteristics, such as insanity or felonious conduct, that make gun ownership dangerous to society" (and "unsuitable for service in the militia"). *Id.*

Similarly, the government frets over the status of licensing requirements and "[g]overnment restrictions on the importation and interstate transportation of firearms." Gov't Br. at 26-27. The D.C. Circuit's discussion of "reasonable restrictions" expressly encompassed and approved of the government's power over the "registration of firearms," the regulatory powers recognized at the time of the Second Amendment's adoption, and other "regulations [that] promote the government's interest in public safety consistent with our common law tradition." Pet. App. 52a. This approach would readily accommodate traditional and adequately justified regulations.

In sum, there is simply no warrant for departing in this case from the level of judicial scrutiny and protection traditionally afforded to fundamental rights enumerated in the Constitution.

D. No Basis Exists For Adopting An "Intermediate" Level Of Scrutiny For Second Amendment Rights.

The government's attempt to support intermediate level review by distinguishing it from a "per se" standard it alleges the D.C. Circuit adopted, see Gov't Br. at 24, 28 ("intermediate scrutiny" is appropriate instead of "rul[ing] categorically," as the court of appeals did), is a complete *non sequitur*. There is, of

course, a standard between a "per se" rule and "intermediate review"—strict scrutiny—that courts traditionally apply to protect enumerated rights. The government's brief contains not one word addressing why strict scrutiny is inappropriate in this context.

As explained *supra* at 10-13, strict scrutiny is appropriate and essential to protecting the individual's fundamental right to keep and bear arms protected by the Second Amendment—a fundamental right the government acknowledges and supports. Intermediate scrutiny is reserved for use in very different contexts, not for protecting the core aspects of individual constitutional rights.

Although the Court has "never provided a coherent explanation of the characteristics which . . . trigger intermediate review," Laurence H. Tribe, *American Constitutional Law* § 16-33 (2d ed. 1988), the categories of cases in which intermediate scrutiny is typically applied are instructive. See, *e.g.*, *Clark* v. *Jeter*, 486 U.S. 456 (1988) (illegitimacy and parentage); *Craig* v. *Boren*, 429 U.S. 190 (1976) (gender); *Graham* v. *Richardson*, 403 U.S. 365 (1971) (alienage). None of these classifications relates to a specific textual constitutional right, and they would thus ordinarily be subject to rational basis review. See *Romer* v. *Evans*, 517 U.S. 620, 631 (1996); *Heller* v. *Doe*, 509 U.S. 312, 319-20 (1993). The recognition that they are "quasi-suspect," see *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985), leads to more searching review than would ordinarily be had.

At base, intermediate scrutiny is simply an extension of rational basis review. See *Plyler* v. *Doe*, 457 U.S. 202, 217 n.16 (1982) ("'intermediate' scrutiny permits us to evaluate the rationality of the legislative judgment" concerning quasi-suspect

classes). It raises the level of judicial scrutiny in areas where legislatures are otherwise free to regulate; it does not lower the protection given to rights that are meant to be immune from legislative infringement. Intermediate scrutiny is not, and is not intended to be, a substitute for strict scrutiny applied to core individual rights and liberties explicitly enumerated in the Constitution.

Rational basis and intermediate scrutiny, moreover, provide the legislature with varying (but not insubstantial) latitude in exercising its power. Rationality review confers "a strong presumption of validity" to legislative enactments, and almost any law will survive such a challenge. *Heller*, 509 U.S. at 319-20. Intermediate scrutiny requires more, but still affords the legislature substantial room to experiment and regulate, so long as the purpose is "important." *Clark*, 486 U.S. at 461.

This degree of legislative latitude is especially inappropriate and inadequate when dealing with rights and liberties enumerated in the Bill of Rights, including the Second Amendment. The Founders were so suspicious of legislative encroachments that they engrafted these specific, enumerated rights onto the Constitution in order to secure its ratification. Lenient judicial review is incompatible with this Court's traditional role in upholding fundamental rights that are, by definition and historical practice, held against the legislature.

II. THIS CASE SHOULD NOT BE REMANDED TO THE COURT OF APPEALS.

Remand from an appellate court may be appropriate "where justice demands that course in order that some defect in the record may be supplied"

and "evidence [is] to be taken or additional findings [are] to be made upon essential points." *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939). This case—decided on a full summary judgment record with no genuine dispute between the parties on the essential facts—does not require a remand. Once this Court determines that the Second Amendment sets forth a personal right to keep and bear arms, a straightforward application of any heightened standard of review (be it the traditional test or the government's relaxed standard) would lead to a finding that the D.C. laws at issue are unconstitutional. This Court can (and should) reach that conclusion as readily as the D.C. Circuit would on remand.

A. No Remand Is Necessary If The Court Applies Strict Scrutiny.

A remand would clearly be unnecessary if the Court affirms the standard of review applied by the court of appeals. The primary issues in this case are legal, concerning the scope of the individual right under the Second Amendment and the level of scrutiny applied to deprivations of that right. If this Court applies the same standard as the D.C. Circuit, it should readily reach the same conclusion.

It is unsurprising that the court of appeals devoted the lion's share of its opinion to deciding the legal issues before it, because the relevant facts supporting its legal conclusion are simple and undisputed. Handguns are the "lineal descendant[s]" of pistols, and citizens widely use them today in their self-defense. Pet. App. 51a. Officer Heller wishes to "keep" a handgun in his home, but he cannot lawfully do so under D.C.'s law forbidding handgun possession. Pet. App. 4a, 97a-98a. Even were he allowed to keep a handgun, he would still be required

to keep the firearm disassembled or trigger-locked in his home—and therefore of little use for the self-protective functions at the core of the right. *Id.* at 4a, 8a. These undisputed facts lead directly to the legal conclusion that the D.C. ban unconstitutionally interferes with the core right protected by the Second Amendment.

Strict scrutiny requires this result because a flat ban on a prevalent form of exercising the core personal right is clearly not narrowly tailored, nor could any state interest justify an infringement that effectively eliminates the right. The conceivable exercise of some alternative means of self-defense, such as use of long guns, does not change this outcome. See, *e.g.*, *McIntyre*, 514 U.S. at 341-42, 357 (protecting core right to anonymous pamphleteering, even though other forms of expression existed); *Texas* v. *Johnson*, 491 U.S. 397 (1989) (same for flag burning as political expression); *Cohen* v. *California*, 403 U.S. 15 (1971) (same for use of profanity as political expression). A contrary conclusion would be equivalent to holding that the First Amendment permits the government to ban newspapers because magazines and leaflets remain available as conduits of speech, to ban letters written to Members of Congress because email is available, or to ban collective prayer because other means of exercising one's religion exist.

B. No Remand Would Be Necessary Even If The Court Applied The Government's Proposed Standard Of Review.

Even if this Court were to apply intermediate scrutiny to measures affecting Second Amendment rights, affirmance would be required for similar reasons, and application of that standard would be equally straightforward on the record below. If D.C.'s

handgun ban were to be affirmed under intermediate scrutiny, then it is difficult to conceive of a restriction on personal gun ownership that would not also survive. Intermediate scrutiny would, if applied in this manner, afford no protection to the right and, in effect, serve to nullify it. Here, the infringement of the right is clear and broad, and that conclusion rests on precisely the factors considered by the D.C. Circuit. The nature of the government interest is, at base, a legal determination. And the factual predicate for that interest and the untailored nature of the ban have been addressed extensively in the proceedings below and rely on no complex or nuanced factual determinations. Each of the government's claims supporting a remand of this case is without merit.

1. A Remand Would Be Inconsistent With This Court's Customary Practice.

The government argues that a remand would be appropriate if the Court adopted a new, lax standard of review because that standard is "materially different from the more categorical approach[ ] . . . taken by the . . . court of appeals," and thus this Court's "customary practice" would support a remand. Gov't Br. at 28-29. Any honest reckoning of this Court's precedents reveals that the customary practice of this Court would *not* favor a remand in the circumstances of this case.

This Court routinely applies new legal standards and renders final judgments to provide concrete guidance to the lower courts, especially in relatively unsettled areas of law. It does so often in much more complicated, fact-laden disputes than that presented by this case, including in cases where the standard it applies differs from that of the court below far more

starkly than the departure suggested by the government.[5] This is often evident in cases concerning fundamental constitutional rights. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-85 (1964) (adopting a new "actual malice" standard for proving defamation, and "review[ing] the evidence in the present record to determine whether it could constitutionally support a judgment for respondent"); *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2612-23 (2006) (evaluating extensive evidentiary record to determine whether redistricting plan unconstitutionally diluted minority voting strength); *Grutter* v. *Bollinger*, 539 U.S. 306, 318-20, 335-39 (2003) (evaluating evidence and testimony at trial to conclude that law school's affirmative action plan was not an unconstitutional quota); *Casey*, 505 U.S. at 876, 880-94 (adopting an undue burden standard for regulation of abortion and reviewing the evidentiary record to determine whether state-law restrictions imposed such a

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[5] *See, e.g.*, *KSR Int'l Co.* v. *Teleflex Inc.*, 127 S. Ct. 1727 (2007) (overturning the Federal Circuit's test for obviousness as a ground for patent invalidity and examining an extensive record to determine whether the patent was invalid under the Court's new standard); *Volvo Trucks N. Am., Inc.* v. *Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (reviewing an extensive evidentiary record and reversing the court of appeals' determination that Reeder-Simco established a violation of the Robinson-Patman Act); *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999) (overturning the court of appeals' determination that the *Daubert* factors did not apply to non-scientific expert testimony, and reviewing the record evidence to determine whether the expert's testimony was admissible); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (reversing the court of appeals' determination of the proper bases for a primary-line injury claim under the Robinson-Patman Act, and reviewing the extensive record to determine that there was nonetheless sufficient evidence to affirm).

burden); *Miranda* v. *Arizona*, 384 U.S. 436, 445-56, 491-99 (1966) (reviewing extensive evidence of interrogation techniques, adopting a new Fifth Amendment standard governing custodial interrogations, and reviewing the evidence of record to determine compliance with this standard in several cases). The government does not explain why this case—with a thin record of simple, uncontested facts—should be an exception.

This Court has also routinely resolved the merits rather than remanding for application of a heightened standard of review. In *Loving* v. *Virginia*, 388 U.S. 1 (1967), for example, this Court reversed a state court decision upholding Virginia's anti-miscegenation statute under rational basis review and instead applied strict scrutiny, finding the law unconstitutional without remanding. The Court followed the same course in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (adopting strict scrutiny for state laws prohibiting the use of contraceptives, reversing a state court decision that applied rational basis review, and finding the state law unconstitutional with no remand); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (same for the right to procreate); and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (applying intermediate scrutiny to a federal medical benefits law that discriminated on the basis of gender and reversing, without remand, the district court's determination that the law survived rational basis review). Even when the Court thinks *lesser* scrutiny is warranted than that applied by the lower court, the Court still typically applies the law to the facts and reaches a judgment without remanding. See, *e.g.*, *Romer*, 517 U.S. 620 (rejecting the lower court's use of strict scrutiny and instead applying rational basis review to conclude

that Colorado's law barring protective legislation for homosexuals was unconstitutional).[6]

The government ignores these and many other cases like them, and instead cites only two cases in support of its claim that this Court's "customary practice" is to remand when adopting a "new legal standard." Gov't Brief at 28-29. Neither of those cases—*Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), and *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951)—supports the government's claim.[7] The government quotes dicta from *O'Leary* but neglects to mention that in the very next sentence, the Court rejected the government's argument and set forth a conclusion equally applicable to this case: "In this instance, however, we

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[6] Even in cases in which the Court has technically remanded after announcing a rule of constitutional law different from the one employed by the lower court, it has typically done so *after* applying the proper legal standard to the case and deciding whether the challenged action survives scrutiny. *See, e.g.*, *City of Cleburne*, 473 U.S. 432 (discrimination against mentally ill); *Mills* v. *Habluetzel*, 456 U.S. 91 (1982) (statute of limitations on paternity actions); *Reed* v. *Reed*, 404 U.S. 71 (1971) (gender discrimination); *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250 (1974) (durational residency requirement); *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (religious disqualification). The only apparent purpose of remanding in these cases is ministerial (*i.e.*, to enter judgment for the prevailing party).

[7] The government also cites, without explanation, *Merck KGaA* v. *Integra Lifesciences I, Ltd.*, 545 U.S. 193 (2005). *See* Gov't Brief at 32. The court of appeals in *Merck* rejected a sufficiency-of-the-evidence challenge to the jury's finding of patent infringement, relying on a statutory interpretation this Court concluded was inconsistent with the plain language and the jury's instruction. *Merck*, 545 U.S. at 208. This Court returned that evidentiary issue to the court of appeals for reconsideration. This case has virtually nothing in common with the circumstances in *Merck*.

have a slim record and the relevant standard is not difficult to apply; and we think the litigation had better terminate now." 340 U.S. at 508.

In *Adarand*, the Court remanded largely because "unresolved questions remain concerning the details of the complex regulatory regimes" at issue, and factual disputes over the way these regulations were applied "should be addressed in the first instance by the lower courts." 515 U.S. at 238-39. Such concerns are simply not present in this case. True, the Court also noted that the court of appeals applied the wrong level of scrutiny, but this was not the principal reason for a remand, and it does not come close to establishing a "customary practice" of remanding factually straightforward cases to apply new standards.

There are, of course, certain situations in which it *is* the usual practice of the Court to remand, but none pertains here. The Court, for example, may remand a case to a state court when state-law issues remain to be decided, *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 479-83 (1975), or when it is unclear whether the state court relied on state or federal law in reaching its decision, *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000). A remand may also be appropriate to allow the lower court to fashion a remedy, *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 310 (1964); to allow the petitioner to assert a new claim when her existing claim has been mooted by a "change in the legal framework governing the case," *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 482 (1990); or (under the Court's GVR procedure) to allow the lower court to reconsider its decision in light of an intervening change in law, *Lawrence* v. *Chater*, 516 U.S. 163, 166-67 (1996). And, as explained, it is sometimes appropriate to remand to

allow a lower court to resolve difficult factual disputes on essential points. See *Adarand*, 515 U.S. at 238-39; *Ford Motor Co.*, 305 U.S. at 373.

None of these circumstances is present here, and the government does not seriously argue otherwise. This Court can and should resolve this case, and affirm the judgment of the D.C. Circuit.

2. A Remand Would Undermine This Court's Role In Giving Guidance To The Federal Judiciary.

The government presents three reasons related to the supposedly limited capabilities of this Court that, in its view, should lead to a remand of this case. In fact, this Court is well equipped to resolve the issues at hand in a final decision. Indeed, considerations surrounding this Court's role in the administration of the judicial system strongly favor such an approach.

First, the government makes the curious argument that a remand is appropriate because "broad-based pronouncements in the context of adjudicating the details of a law that is far from typical could unduly skew the future course of Second Amendment adjudication." Gov't Br. at 30. This argument has the point exactly backward. This Court's "pronouncements" do not "unduly skew" the jurisprudence in any area the Court addresses. Instead, this Court's decisions, especially compared to the D.C. Circuit's on remand, provide authoritative guidance to lower courts across the nation. Applying principles of law in the concrete context of particular disputes provides far more help to lower courts in deciding future cases than mere general statements of standards. This Court could decide no cases if it acted on the belief that its "pronouncements" would

"skew" the law and that lower courts were more competent to shape constitutional law.

The government inconsistently urges that this Court address the very important issue whether the Second Amendment establishes a personal right, and establish the appropriate standard of review, but then shy away from a straightforward application of law to fact because that determination—in contrast to the others—is too momentous. Instead, the importance of an enumerated personal right, and the natural tendency of the government to construe the Second Amendment right narrowly in the absence of authoritative judicial guidance, make it all the more important that the Court itself address the issue directly and clearly. In applying the proper standard of scrutiny to resolve this case, this Court can readily craft principles of whatever breadth it believes appropriate and avoid "broad-based pronouncements" to the extent it desires.

Second, the government argues that remanding the case would "permit[ ] Second Amendment doctrine to develop in an incremental fashion as is necessary to decide particular cases that may arise." Gov't Br. at 29. A remand, in this view, would "[a]llow[ ] lower courts to develop doctrines to address issues concerning the scope of the Second Amendment" and, "[w]hen lower courts differ as to the proper resolution of concrete and particularized disputes, the Court can grant plenary review and develop the law incrementally, as it does in other contexts." *Id.* at 29-30.

Whatever force this argument might have had as a reason not to grant certiorari in this case, it is hardly a reason to avoid deciding this case now. This Court has before it a "concrete and particularized," and fully briefed, case or controversy. Nothing in this Court's

discharge of its usual Article III function of deciding cases prevents "Second Amendment doctrine [from] develop[ing] in an incremental and prudent fashion." Gov't Br. at 29-30. The point of taking the case was, presumably, to resolve rather than perpetuate the circumstances that led "lower courts [to] differ as to the proper resolution" of this "concrete and particularized dispute[ ]." *Id.* at 30; see Sup. Ct. R. 10(a). The process of having lower courts develop the law incrementally, subject to "plenary review" by this Court, would function far more effectively if this Court provided lower courts with concrete guidance regarding not only the right at stake and standard of review, but how that right and that standard are applied in this Court's resolution of this case. The "benefits of providing guidance concerning the proper application of [the] legal standard and avoiding the systemic costs associated with further proceedings" counsel in favor of applying the right in this case, rather than simply announcing its existence. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993).

Third, the government suggests that application of its proposed standard of review would implicate matters more appropriately considered by the D.C. Circuit on remand. Again, this argument understates the Court's capabilities considerably and calls on this Court to abdicate responsibility for determinations that it routinely makes and are well within its competence.

The government argues that a remand might reveal whether (a) the D.C. trigger-lock provision can "properly be interpreted . . . in a manner that allows respondent to possess a functional long gun in his home"; and (b) some people might be capable of effectively using a long gun rather than a handgun

for their self-defense. The first issue is a straightforward issue of law. The second is technically a question of fact, but one presented so hypothetically (*i.e.*, in an alternative universe without handguns, long guns might have evolved as a principal means of self-defense) and so readily resolved (some but not all persons, in some but not all circumstances, may be able to employ long guns for self-defense)[8] that it, too, provides no basis for remand.

More fundamentally, however, the government's suggestion on these points mistakes the nature of the issue posed by whether long guns might serve as an alternative means of self-defense. The answer rests on simple legal analysis rather than any detailed factual assessment: if the Court finds that the Second Amendment creates a personal right to keep and bear arms for purposes of self-defense and accepts, as it must, that handguns are "arms"—indeed, the most commonly used types of arms for self-defense, see Pet. App. 53a-54a—then D.C.'s broad prohibition on their being kept in the home must fail, under either strict or intermediate-level scrutiny. See *supra* at 20-22. That is, a flat ban on the most common exercise of the core, enumerated right

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[8] A long gun by definition is larger and heavier than a handgun and thus is harder to maneuver, especially in enclosed places like homes, and especially for smaller or weaker persons. This Court has repeatedly invoked common sense in resolving cases. *See*, *e.g.*, *United States Dep't of Justice* v. *Landano*, 508 U.S. 165, 175 (1993) (rejecting presumption because it does not "comport[ ] with 'common sense'" (citation omitted)); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 629-30 (1989); *United States* v. *Standard Oil Co.*, 384 U.S. 224, 225-26 (1966); *Preston* v. *United States*, 376 U.S. 364, 366-67 (1964) (considering "[c]ommon sense" in resolving Fourth Amendment question).

cannot be sufficiently tailored to meet an important or compelling state interest. Facts could be mustered to detail the nature of alternative forms of protected conduct, but the inquiry is beside the point: it fails to recognize the force and existence of a fundamental, personal right protected by the Constitution. The D.C. Circuit was right to term the long gun alternative as "frivolous" in this context. Pet. App. 53a. That conclusion is clearly right under strict scrutiny, and adopting intermediate scrutiny would not change matters. The Court can readily resolve these issues without remanding the case.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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