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

BRIEF OF *AMICUS CURIAE* GRASS ROOTS OF SOUTH CAROLINA, INC. IN SUPPORT OF RESPONDENT

J. TODD KINCANNON
R. JEFFORDS BARHAM*
MATTHEW G. GERRALD
BARNES, ALFORD,
STORK & JOHNSON, LLP
1613 Main Street (29201)
P.O. Box 8448
Columbia, SC 29202
(803) 799-1111
* *Counsel of Record*

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INTEREST OF THE *AMICUS CURIAE* [1]

Grass Roots of South Carolina, Inc. ("Grass Roots") is a nonprofit, nonpartisan organization whose mission is to protect the rights of law-abiding persons to possess and use firearms. Grass Roots advocates in favor of gun rights in both the legislative and judicial spheres. Grass Roots has several thousand members and contributors, most of whom are gun owners who stand to be directly affected by the Court's interpretation of the Second Amendment. Further, most Grass Roots members are members of the unorganized militia of South Carolina pursuant to S.C. Code Ann. § 25-1-60.

Grass Roots' specific interest in this case concerns the nature of the right conveyed by the Second Amendment. Grass Roots respectfully submits that its substantial experience regarding gun rights issues will be of aid to the Court. Further, Grass Roots' members' status as firearm-owning members of an unorganized militia provides a unique perspective which may be useful to the Court.

This brief will focus upon a single narrow issue: the question of how the Bill of Rights' penumbral right to privacy shapes the contours of the rights conveyed by the Second Amendment.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least seven days prior to the due date of the *amicus curiae*'s intention to file this brief. 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 the preparation or submission of this brief.

STATEMENT OF THE CASE

This case involves a citizen of the District of Columbia who wishes to keep and utilize firearms privately in his home for self defense. The laws of the District, specifically D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02, prohibit such use.

The question before the Court is whether these provisions 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.

SUMMARY OF ARGUMENT

The Constitution is not an exclusive repository of all rights possessed by the residents of the United States. The right to keep and bear arms in the privacy of one's home is a preexisting right much like the right to marry. It is unabridged by the Constitution and resolves this controversy in favor of the Respondent.

But the right to keep and bear arms in the privacy of one's home is additionally protected by the Constitutional right to privacy, a penumbral right without an explicit textual anchor. The right to privacy gives life and substance to the guarantees of the Bill of Rights.

A careful analysis of the text of the Second Amendment resolves this case in favor of the Respondent. But even if the text were viewed as preserving a collective rather than individual right to keep and bear arms, the Respondent would nonetheless retain the right to keep and utilize

firearms in the privacy of his home even though the Respondent is unconnected to a state militia.

The Second Amendment right of the people to keep and bear arms is amplified by the right to privacy such that mere possession and use of firearms in the privacy of the home cannot be constitutionally outlawed. This remains true regardless of whether the possession and use of firearms is connected to militia service.

Finally, the Second Amendment applies to the District of Columbia. The District's argument that the Second Amendment applies only to states is faulty. The Second Amendment does not operate to protect the rights of the several states to field armed militia against an encroaching federal government. The Militia Clauses[2] confirm that the states have never had a right to engage in armed resistance against the national government. The argument that the Second Amendment protects this unconstitutional "right" must accordingly fail.

An individual right to keep and bear arms in the privacy of one's home is a pre-Constitutional natural right both expressly protected by the plain text of the Second Amendment and implicitly protected by the penumbral right to privacy.

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[2] U.S. Const. art. I, § 8, cls. 15-16.

ARGUMENT

I. THE RIGHT TO KEEP AND BEAR ARMS IN THE PRIVACY OF THE HOME IS A NATURAL RIGHT UNABRIDGED BY THE CONSTITUTION.

This Court has long recognized unenumerated rights. The concept of unenumerated rights was a familiar one to the generation that drafted and ratified the Constitution and the Bill of Rights.[3] The concept was the animating force behind the Tenth Amendment and, arguably, the Ninth. In fact, much opposition to the Bill of Rights was by those who argued that all rights should generally remain unenumerated and that the attempt to enumerate rights would wrongly disparage the existence of other, unenumerated rights.[4]

Applying this principle to the case at bar, even if there had been no Second Amendment, the people would still retain the right to keep and bear firearms in the privacy of their own homes. The language of the Second Amendment, which declares that "the

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[3] The Declaration of Independence similarly contains the familiar construction: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). Just as Thomas Jefferson did not endeavor to name each and every natural right, neither did the drafters and ratifiers of the Bill of Rights.

[4] *E.g.*, Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Tex. L. Rev. 597, 603-10 (2005); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331, 333-40 (2004); *see also* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004).

right of the people to keep and bear arms shall not be infringed," demonstrates a preexisting right.[5]

The question, therefore, is whether this pre-Constitutional right, a natural right, protects the right to keep and use arms in the privacy of one's home. Comparing the laws of the District of Columbia to other American jurisdictions, the District is clearly an outlier with regard to restrictive gun laws. In practically every other jurisdiction, no law would bar the Respondent from what he seeks: to possess and use a firearm in the privacy of his home.

While the District of Columbia's outlier status is certainly not determinative of whether its laws infringe upon a natural right, such a fact is nonetheless relevant to the national view of the contours of that right. Almost all other American jurisdictions have chosen not to criminalize the possession and use of firearms in the privacy of the home. This is strongly suggestive of a national consensus that the right to keep and bear arms in the privacy of the home is a natural right.

Whatever one's view regarding the source of natural or fundamental rights, the inescapable fact is that the Framers believed in the existence of such rights and likewise believed these rights should be protected even in the absence of explicit language in the Constitution providing such protection.

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[5] *E.g.*, Stephen P. Halbrook, *Rationing Firearms Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. Va. L. Rev. 1, 11-37 (1993).

In this context, the right to keep and bear arms in the privacy of the home may be usefully compared to the right to marriage. Nowhere in the Constitution is the right to marry explicitly protected. However, the right to marry was rightly found to be a fundamental right. *E.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967). "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* at 12 (citing, *inter alia*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

The right to keep and use arms in the privacy of the home is equally fundamental to the very existence and survival of the human race. One need not be an anthropologist to recognize the place that weapons have played in human history. The use of arms in defense of self and others has taken place since the beginning of history, establishing this activity as a natural right.

Early man did not survive merely through marriage and procreation. The necessity to defend the home was ever-present. The right to marry, the right to procreate, and indeed the right to life are all hollow if not underpinned by the right to maintain and use arms in defense of the home.

The use of weapons for defense is what separates man from animal. Common experience informs this point: brute force is the way of life for the uncivilized. The use of tools as defensive weapons evens the odds, providing civilization an opportunity to flourish. While the law of the jungle is that "might makes right," a civilized society understands that might does not make right. When tools are employed as

weapons, the physically weak are no longer subject to the force of the strong.

This is particularly true with firearms. The right to use a firearm enables those with a bare minimum of physical ability to ably defend themselves against all but the most skilled aggressors.

The counterpoint may be made that whatever the extent of the right to use tools in self defense, the state retains the power to ban the use of any specific class of tools. This argument fails because the right to use tools in self defense is meaningless if the right does not extend to the tools reasonably likely to be effective when put to use. Otherwise, the right is without substance. The natural right is to use effective weapons in the defense of self and home. No weapon has proven more effective in the defense of self and home than a personal firearm.[6] The natural right to use effective tools in self defense therefore extends to firearms.

Finally, there is another useful comparison between the right asserted in this case and the right to marry. The District of Columbia, the United States, and other amici assert that a ruling by this Court in favor of the Respondent could deal a deadly blow to gun regulation in the United States, conjuring absurd images of private citizens fielding tanks and rocket launchers. But reasonable marriage regulations did not fall in the wake of cases like *Skinner* and *Loving*, nor will reasonable gun

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[6] *See generally* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. Crim L. & Criminology 150 (1995).

regulations fall in the wake of this case should the Respondent prevail.

Because the regulations in this case burden a fundamental right, they must be subjected to strict scrutiny. Because the government has no interest in prohibiting law-abiding citizens from keeping and using firearms defensively and in the privacy of the home, the laws at issue must be struck down.

II. THE PREEXISTING RIGHT TO KEEP AND BEAR ARMS IS PROTECTED BY THE RIGHT TO PRIVACY EMANATING FROM THE SECOND AMENDMENT.

The above-described natural right to keep and bear arms is protected by the plain text of the Second Amendment. But even if the text of the Second Amendment were interpreted as securing only a "collective right" rather than an individual right, the individual right to keep and bear arms in the privacy of one's home would nonetheless be protected by the right to privacy.

The right to privacy underlies the great majority of the individual rights protected by the Bill of Rights. The First Amendment's religious liberties, freedom of speech, and freedom of assembly all have privacy components. The Third Amendment's prohibition on quartering soldiers in private homes obviously has a privacy aspect. The Fourth Amendment is plainly directed at privacy, while the Fifth and Sixth Amendments each have dimensions of privacy as well.

In fact, the only components of the Bill of Rights which do not have a clear privacy aspect are the

Seventh, Eighth, Ninth, and Tenth Amendments, which do not relate in any specific way to a right to privacy. Put simply, in the context of the Bill of Rights, where a privacy right can be inferred, it has been inferred by this Court and others.

This case revolves around questions of privacy. Not presented here is the question of whether the Second Amendment conveys a right to carry firearms outside the privacy of the home. Instead, this case implicates the issue of whether a government regulation may, for all intents and purposes, bar a citizen from keeping and utilizing a functional firearm in his own home for the defense of himself and his family.

This Court has repeatedly refused to allow government to meddle in the affairs of citizens conducted in the privacy of the home. Nowhere is the presumption against governmental power stronger than behind the closed door of a private residence. Here, the District of Columbia seeks not only to meddle in the privacy of the Respondent's home, but the District seeks to meddle in such a way that deprives the Respondent of his natural and constitutionally guaranteed right to keep and bear effective arms in the defense of himself and his family.

The privacy right protects a great many activities which are not expressly mentioned in the Constitution, including contraception,[7] abor-

[7] *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

tion,[8] homosexuality,[9] and the right to refuse medical treatment,[10] among others. Severe inconsistency would result with a holding that a right with a textual basis, the individual right to keep and bear arms, is not protected by the right to privacy while the aforementioned non-textual rights are so protected.

It is true that government has a much freer hand in regulating private activity when that activity revolves around contraband. However, firearms are not, as a class, contraband, nor are they contraband in the District of Columbia. Further, *United States v. Miller*, 307 U.S. 174 (1939), strongly suggests that firearms fit for militia use may not be constitutionally designated as contraband. There is no dispute in this case that the District of Columbia's firearm regulations at issue apply to a great many weapons fit for militia use.

In sum, this Court has thus far found a privacy dimension in all of the individual rights in the Bill of Rights that could conceivably have a privacy dimension. There is no reason that the Court should take a different approach to the Second Amendment. A privacy element is inherent in the right to "keep" anything, and the question presented here deals only with conduct inside the Respondent's home. Accordingly, the Court should find that the right to privacy extends to the Second Amendment and

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[8] *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

[9] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[10] *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

provides an individual right to keep and bear arms in the privacy of the home.

III. THE RIGHT TO KEEP AND BEAR ARMS IN THE PRIVACY OF THE HOME EXTENDS TO THE DISTRICT OF COLUMBIA.

The District of Columbia maintains the position that whatever rights are conveyed by the Second Amendment do not apply to it. The District's argument is that the aim of the Second Amendment was to provide the states with the right to maintain state militias for defense against the national government. For this argument, the District relies on the prefatory clause of the Second Amendment; specifically, the District points to the "security of a free State" language.

The District argues that "State," as used in the Second Amendment, refers to the states comprising the United States. The District's argument is that the purpose of the Second Amendment was to endow the several states with the right to maintain an armed militia for use against an encroaching national government. Therefore, the District's position is that the "State" reference in the Second Amendment refers only to the several states. This leads to the District's conclusion that whatever rights are conveyed by the Second Amendment are not conveyed to Americans who live outside one of the several states.

As explained in the District's brief, the District's position is inextricably bound to the idea that state militias could be legally used against the national government. This notion was rather soundly rejected by the Civil War. While this legal question

was settled on the battlefield, the legal basis for such a conclusion is sound. The use of a state militia against the national government is necessarily unconstitutional.

If the states had the legal right to take up arms against the national government, the President would not have the unilateral authority to call the state militias into the service of the United States as granted by the Commander-in-Chief Clause.[11] The necessary implication of the grant of authority to the President to command the state militias is that the same state militias may not be used in opposition to the national government of the United States. The Constitution does not simultaneously provide the authority to the President to command the state militias and the right of the militias to attack other American military units.

Because state militias could not be constitutionally used in opposition to the national government, the Second Amendment could not possibly have been intended to protect that "right." The District's argument that the Second Amendment is limited to the protection of the states' rights to form militias accordingly fails.

The failure of the "collective right" theory necessarily settles this case in the Respondent's favor. But, as described above, even if the text of the Second Amendment should be interpreted to protect only a collective right, an individual right to keep and bear arms in the privacy of the home still finds

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[11] U.S. Const. art. II, § 2, cl. 1.

protection both in the penumbral right to privacy and as a natural, pre-Constitutional right.

CONCLUSION

For the foregoing reasons, Grass Roots of South Carolina, Inc. respectfully requests that this Court affirm the judgment of the court of appeals.

Respectfully submitted,

J. TODD KINCANNON
R. JEFFORDS BARHAM*
MATTHEW G. GERRALD
BARNES, ALFORD,
STORK & JOHNSON, LLP
1613 Main Street (29201)
P.O. Box 8448
Columbia, SC 29202
(803) 799-1111
* *Counsel of Record*

Counsel for Grass Roots of South Carolina, Inc.

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