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 *AMICUS CURIAE* OF THE HEARTLAND INSTITUTE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE [1]

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SUMMARY OF ARGUMENT

This Brief focuses on the last element in the Question Presented to this Court, whether the D.C. Code provisions at issue "violate the Second Amendment Rights of Individuals . . . who wish to keep handguns and other firearms for private use in their homes." These provisions do violate those Second Amendment protections because they unreasonably interfere with the rights of law-abiding individuals to possess, in their homes, arms commonly used for self-defense. This is the Second Amendment test we propound based on the strong historical and interpretive evidence that a basic right of self-defense underlies the Second Amendment's guarantee that the "right to keep and bear arms shall not be infringed."

The Second Amendment's protections descended from the primary right of self-defense and the long

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The amicus has given the parties at least seven days notice of its intention to file this brief.

history behind it. This history is one of unwavering respect for the right of self-defense from Seventeenth Century England right up through ratification of the United States Constitution and adoption of the Bill of Rights. The right to possess firearms for self-defense in the home gives effect to this basic right of self-defense.

Taking its cues from this history, *amicus* in this Brief offers a workable constitutional standard: firearm restrictions violate the Second Amendment if they unreasonably interfere with possession, in the home, of arms commonly used for self defense. This approach provides an interpretation of the Second Amendment that is both faithful to its history and compatible with reasonable regulation.

Based on this test, the District of Columbia's gun control laws at issue in this case are unconstitutional, as handguns are commonly used for self defense and the District's handgun ban unreasonably interferes with the rights of law-abiding citizens to possess such arms, in the home, for self-defense. By completely banning home possession of handguns, rather than merely regulating them, the District has violated the Second Amendment per se. Thus remand would serve no purpose in this case, other than to needlessly delay restoring the Respondent's constitutional rights.

ARGUMENT

I. THE SECOND AMENDMENT MANIFESTS THE RIGHT OF SELF-DEFENSE THAT AMERICAN LAW HAS ALWAYS EMBRACED

A. English Antecedents

The ideals of English law heavily influenced early American thought and culture. This Court has recognized that "the language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex Parte Grossman*, 267 U.S. 87, 108 (1925). Observing English culture's influence on early America, de Tocqueville wrote that there was "not an opinion, custom, or law . . . which the point of departure [from England] will not easily explain." Alexis de Tocqueville, *Democracy in America* 32, (George Lawrence trans., 1969) (1835).

The individual right of self-defense was central to the English Declaration of Rights. Proclaimed in 1689, the Declaration begins by admonishing James II for violating "the laws and liberties of th[e] kingdom" by, among other things, "causing good subjects, being Protestants, to be disarmed, at the same time that papists were both armed and employed, contrary to law." 1 W. & M., Sess. 2, c. 2 (1689). The Declaration restored such "ancient rights and liberties" by allowing Protestants "to have arms for their defence suitable to their Conditions and as allowed by law." *Id.* Although the law was initially used to restrict a Catholic's right to bear arms, the same parliament would later enact a

law protecting his right to "have or keep . . . necessary weapons . . . for the defense of his house or person." 1 W. & M., Sess. 1, c. 15, § 4 (1689). Thus, the right of self-defense in England transcended even the most sharply felt social distinctions.

English law extolled the right of self-defense through gun ownership. In 1706, Parliament amended the old Game Acts, which had restricted firearms to the upper classes, noting that the individual must be allowed to keep arms "for the defence of his house and family." 5 Ann., c. 14 § 3 (1706). Seventeenth and Eighteenth Century English common law cases frequently expressed the fundamental importance of self-defense, particularly in the home. *See, e.g. Semayne's Case*, 77 Eng. Rep. 194, 195 (K. B. 1603); Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 239-240 n.151, 154 (1983) (collecting English common law cases).

William Blackstone's *Commentaries on the Laws of England* recognized both the "primary" right of self-defense and the individual liberty to keep and bear arms that effectuates it. His *Commentaries* held great weight in the American Colonies and Blackstone was "the most cited English author" by American political writers in the years leading up to the revolution. Joyce Malcolm, *To Keep and Bear Arms: Origins of the Anglo-American Tradition* 142 (1994). According to Blackstone, the "principal or primary . . . rights of the people of England" included "the right of *personal security*, the right of personal liberty, and the right of private property." William Blackstone, 1 *Commentaries on the Laws of England* at 121 (1765) (emphasis supplied).

The right to bear arms gives practical effect to this primary right of self-defense. Blackstone listed five "auxiliary rights" that served "to protect and maintain inviolate the[se] three great and primary rights." Blackstone, *Commentaries*, *supra*, at 136. Included therein was the "right of the subject . . . of having arms for their defence suitable to their condition and degree, and such as are allowed by law." *Id.* at 141.

To Blackstone, the people were at liberty to arm themselves in self-defense against criminals. The right to private arms was "a public allowance, under due restrictions, of the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at 144. English subjects were thus at liberty to "hav[e] and us[e] arms for self-preservation and defense," and firearm ownership was the traditional means by which individuals protected themselves in the absence of immediate government assistance. *See id.* at 140.

B. Philosophical Underpinnings

English liberal philosophers, who espoused a basic right of armed self-defense, heavily influenced the Framers' thinking. Thomas Hobbes and John Locke set out principles of enlightened government to which the U.S. Constitution was written to adhere. To Hobbes, "[t]he right of nature . . . is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own life . . ." Thomas Hobbes, *Leviathan* 91 (Richard Tuck ed., 1996). Applying this general principle, Hobbes

wrote, "[a] covenant not to defend my selfe from force, by force, is alwayes voyd." *Id*. at 117. While Hobbes generally embraced government power, this right of self-defense was a right of nature that one did not give up upon joining a society ruled by government because self-protection is necessary to fill the security vacuum that arises when the law fails to achieve complete security for all.

For Locke, the right of self-defense was paramount. "[I]f any law of nature would seem to be established among all as sacred in the highest degree . . . surely this is self-preservation, and therefore some lay this down as the chief and fundamental law of nature." John Locke, 5 *Essays on the Law of Nature*, in Political Essays 106, 112 (Mark Goldie ed., 1997). As Blackstone noted, individuals have a private right to possess arms for self-defense to secure this "chief and fundamental law of nature." *See* Blackstone, *Commentaries, supra,* at 141.

C. The Federalist Debates

Both sides of the federalist debates endorsed the right to have and use guns for self-defense. "The unanimity with which Federalists and Anti-Federalists supported an individual right to arms is a reflection of their shared philosophical and historical heritage." Kates, *supra*, 82 Mich. L. Rev. at 225-26. Alexander Hamilton wrote of the "original right of self-defense which is paramount to all positive forms of government . . ." The Federalist No. 28. To James Madison, this right expressed the framers' faith in the judgments of individuals, whereas he described governments that do not protect such rights as being "afraid to trust the

people with arms." The Federalist No. 46. Madison proposed that the right to bear arms be placed among the various individual rights protections in Article I, following the habeas corpus protection and bills of attainder prohibition. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 169-70 (N. Corgan ed. 1997). John Adams also recognized the importance of the right to armed self-defense. While Adams was generally opposed to the use of armed military power outside government-controlled channels, even he acknowledged the legitimacy of "arms in the hands of citizens, to be used . . . in private self-defence." John Adams, *A Defence of the Constitutions of Government of the United States* 475 (1787).

The Pennsylvania minority, a vocal group of Anti-Federalist state delegates who opposed Pennsylvania's ratification of the Constitution without a bill of rights proposed an amendment stating that "the people have a right to bear arms for the defense of themselves and their own State or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them unless crimes committed, or real danger of public injury from individuals . . ." Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971). Because of its members' prominence and the force of their argument, "[t]he amendments proposed by the Pennsylvania minority bear a direct relation to those ultimately adopted as the federal Bill of Rights." Schwartz, *supra*, at 628.

D. Early Interpretations of the Second Amendment

Prominent early interpreters of the Second Amendment found that it protects an individual right of self-defense. In 1803, Professor and Judge St. George Tucker edited Blackstone's *Commentaries* with notes on parallel provisions in American law. In his annotations to Blackstone's discussion of the right to possess arms for "self preservation," Tucker observed that "in America this right had been constitutionalized by the enactment of the Second Amendment." 1 St. G. Tucker, *Blackstone's Commentaries with Notes of Reference to the Constitution and Law of the Federal Government* at 143 (1803). Thus, the Framers directly incorporated Blackstone's interpretation of the English rights to bear arms, cited above, into the Constitution of the United States. Tucker wrote that the Second Amendment's protections "may be considered as the true palladium of liberty . . . The right of self-defence is the first law of nature." *Id.* at 300. In his authoritative *Commentaries on the Constitution of the United States,* Justice Story used Tucker's language in referring to the "right of the citizens to keep and bear arms" as the "palladium of the liberties of a republic." 3 J. Story, *Commentaries on the Constitution of the United States* 746 (1833).

E. Early State Constitutional Provisions

Many early state constitutions defined the right to bear arms in terms of individual self-defense. *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & P. 191 (2006) (listing state constitutional provisions for the right to keep and bear arms). Eighteenth Century state constitutions

commonly used language such as "[t]hat the people have a right to bear arms for defence of themselves and the State." *See, e.g.* Pa. Const. Declaration of Rights, art. XIII (1776); Vt. Const. ch. 1, § 15 (1777); OH Const. art. VIII, § 20 (1802). Some state constitutional provisions used even stronger language to protect the natural right of armed self-defense, such as "the right of the citizens to bear arms in defence of themselves and the State shall not be questioned." *See, e.g.* Pa. Const. art. IX, § 21 (1790); Ky. Const. art. XII, § 23 (1792).[2]

These state constitutional provisions provide crucial insight into the meaning of the Second Amendment to the federal Constitution, reflecting the widely held understanding that it protects a private right of armed self-defense. Even scholars opposed to the individual rights interpretation admit that "the Second Amendment was copied from right to arms provisions in state constitutions, and the debates at the time reveal no suggestion that the scope of the right changed when adopted into the federal Bill of Rights." David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment,* 101 Yale L.J. 551, 590 (1991).

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2. In such provisions, the term "themselves" referred to private individuals, rather than the collective citizenry, just as "themselves" referred to individuals in the nearby search-and-seizure provisions of those same state constitutions, such as that of the 1776 Pennsylvania Declaration of Rights, which stated that "the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure." *See* Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 Tex. L. Rev. 237, 259 (2004).

F. Early state case law

During the Nineteenth Century, state courts used the right of self-defense to define the scope of the Second Amendment's protections. In *State v. Reid*, 1 Ala. 612, 1840 WL 229 (1840), the Alabama Supreme Court applied both the Second Amendment and the State's constitutional declaration that "every citizen has a right to bear arms, in defence of himself and the State" to a law that banned possession of concealed guns and knives in public. After analyzing the history behind the right to bear arms, the court held that firearms restrictions were constitutional as long as they still allowed individuals to have and use their arms for self-defense. "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.* at *3. Thus, regulations prohibiting the possession of guns for self-defense and those that would render them "useless" for that purpose contravene the constitutional right to keep and bear arms.

In *Nunn v. State*, 1 Kelly 243, 1846 WL 1167 at *7 (1846), the Georgia Supreme Court relied on the *Reid's* self-defense rationale to reverse a defendant's conviction for openly carrying a pistol. After examining its history and roots, the *Nunn* court determined that the Second Amendment's right to keep and bear arms and the rights more generally protected by the State's constitution both secured individual rights of armed self-defense. *Id.*

However, the court made clear that those rights were subject to reasonable regulation. "The Constitution, in declaring that every citizen has the right to bear arms, in

defence of himself and the State, has neither expressly nor by implication denied to the Legislature the right to enact laws in regard to *the manner* in which arms shall be borne." *Id.* at *8 (emphasis supplied). Thus, arms commonly used for self-defense are subject to reasonable regulation, but not outright prohibition, just as the time, place, and manner of speech are subject to regulation, but the content itself is not subject to outright prohibited under the First Amendment. *See Ward v. Rock of Racism*, 491 U.S. 781 (1989). Other early Second Amendment cases similarly held that the private right to bear arms in self-defense can be regulated but such arms cannot be prohibition. *See*, *e.g.*, *Bliss v. Commonwealth*, 12 Ken. (2 Litt.) 90, 92 (1822) (striking down a ban on carrying concealed arms), overruled on grounds other than the individual nature of the right by Ky. Const. art. XIII, § 25 (1850) (expressly providing that "the general assembly may pass laws to prevent persons from carrying concealed arms," thus allowing regulation of gun possession but not prohibition).

II. THE SECOND AMENDMENT PROHIBITS UNREASONABLE INTERFERENCE WITH THE RIGHT OF INDIVIDUALS TO POSSESS, IN THEIR HOMES, ARMS COMMONLY USED FOR SELF DEFENSE

The Second Amendment's historical self-defense purpose should be used to define the scope of its protections. In our view, the Second Amendment protects the right to own firearms of a kind that are commonly used for self-defense by law-abiding individuals. We do not doubt that the government can outlaw private ownership of unusually destructive or exotic weapons. But private ownership of all handguns cannot be prohibited because handguns are the kind of weapon best suited for and most commonly owned for the purpose of self-defense.

A. The *Miller* Framework Provides The Starting Point For Modern Second Amendment Jurisprudence

This Court's most recent holding on the Second Amendment defined the scope of its protections in light of one of its historical purposes, but it erred in focusing exclusively on the militia purpose. In *United States v. Miller*, 307 U.S. 174, 179 (1939), the Court held that because it was not within judicial notice that short-barrel shotguns have a reasonable relationship to preserving a well regulated militia, the Second Amendment does not protect a right to keep and bear them. *See id.* at 178. *Miller* characterized the militia as "civilians primarily, soldiers on occasion," who were "expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 179.

The Second Amendment did protect the militia's ability to arm itself, and may still do so today, but its purpose is also to protect the right of armed self-defense. The *Miller* Court's approach, which focused only on the relationship between the regulated arms at issue and the Second Amendment's militia purpose was flawed because that approach would *only* allow individuals to possess arms suited for military use. Such an approach is obviously troublesome if it would allow private ownership of modern military arms. Moreover, if, as the District argues, the militia to which the Constitution refers no longer exists today, then limiting the Second Amendment's application to the militia reduces the Amendment to a dead letter.

The flaw in *Miller* can be corrected, and *Miller*'s basic approach can still be employed by instead employing the Second Amendment's self-defense purpose to define the scope of its protections.

B. The Self-Defense Test

Applying this purpose-based approach to the Second Amendment's historical self-defense rationale yields a moderate and sensible interpretation of the right to keep and bear arms: the Second Amendment prohibits unreasonable government interference with the rights of competent, law-abiding individuals to possess, in their homes, arms commonly used for self-defense. As a necessary corollary, individuals must be allowed to possess such arms in a reasonably effective condition to carry out the purpose of self defense. Gun control laws that undermine this constitutionally protected self-defense function are tantamount to back door prohibitions, rather than mere regulations. *See State v. Reid*, *supra*, 1840 WL 229 at *3.

The self-defense test's common use requirement allows the Second Amendment to keep pace with the development and use of new technology, without altering the underlying rights that it protects. As new generations of weapons become commonly used for self-defense, they gain the potential for protection under the Second Amendment.

The reasonableness of non-prohibitory regulations of arms commonly used for self defense can be analyzed in the same way that courts determine the reasonableness of government burdens on other individual constitutional protections. A reasonableness review here would balance

factors such as the degree to which the law impinges on the exercise of self-defense, the strength of the asserted government interest and whether the restriction is properly tailored to meet the government's need without unnecessarily burdening the right of self-defense. *Cf. Tashjan v. Republican Party of Connecticut*, 479 U.S. 208, 213-14 (1986) (applying this approach in the context of voting rights under the First and Fourteenth Amendments).

C. The Self-Defense Test Permits Reasonable Regulation

The test we propose allows for reasonable regulation that does not prohibit the home possession of arms commonly used for self-defense by competent, law-abiding adults. It allows for complete prohibition of dangerous weapons which are not commonly used for self-defense, such as anti-aircraft missiles, hand grenades, or machine guns. Likewise, armor piercing bullets are more commonly used for criminals to defend themselves against police, rather than by law-abiding individuals to defend themselves against criminals. *See* Kates, *supra*, 82 Mich. L. Rev. at 261-62. Criminals do not usually wear body armor and thus it is not reasonably necessary for law-abiding citizens to own armor-piercing bullets to protect themselves from crime.

By its very terms, the test also allows for restrictions that exclude children and felons from gun ownership. The right to bear arms does not – as it should not – extend to many whom the common law has traditionally deemed incompetent, such as children. By further limiting the protection to "law-abiding" individuals, the

test naturally excludes various types of criminal convicts from gun ownership. This limit addresses the imbalance created by arms prohibitions like the laws at issue in the present case, which disarms the law-abiding, leaving criminals with a monopoly on force in the absence of complete public protection.

The self-defense test also allows for reasonable waiting periods. Brief waiting periods, such as those necessary to fully check the applicant's criminal record, are proper because they help ensure that the arms will be used for constitutionally protected self-defense purposes, without unduly interfering with those purposes. Waiting periods are reasonable if they allow otherwise legally qualified individuals to exercise their Second Amendment rights in a timely manner.

This test permits other regulations aimed at reducing the dangers of firearms, such as the risk of accidents, provided that such regulations are not tantamount to prohibitions of home possession for self-defense purposes, and are reasonable in light of the government interests involved. Outright bans or disassembly requirements that render guns useless for self-defense in the home would not be constitutional under the test, particularly as applied to homes without any children, as such laws would be tantamount to a prohibition and inadequately tailored to meet the government's purposes in those cases.

III. THE CHALLENGED LAWS VIOLATE THE SECOND AMENDMENT AS UNREASONABLE INTERFERENCES WITH THE INDIVIDUAL RIGHT TO POSSESS ARMS COMMONLY USED FOR SELF-DEFENSE

A. The District's gun control laws effectively outlaw private handgun ownership.

The challenged D.C. Code provisions effectively ban ownership and use of handguns in the District of Columbia. Under the challenged provisions, only those individuals permitted to own handguns prior to September 24, 1976 can be licensed to purchase additional handguns. *See* D.C. Code § 7-2502.02. This restriction denies the availability of handgun ownership and use for self-defense to everyone who did not have a permit prior to that time which ultimately effects a complete ban on handguns. *See id.*

B. Handguns Are the Epitome of Arms Commonly Used For Self-Defense

Handguns are in common use for self-defense. The vast majority of American gun owners prefer handguns to other firearms for self-defense. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. Crim. L. & Criminology 150, 164 (1995). Self-defense is the leading reason for handgun purchases and handguns are the leading firearms used in self-defense. *Id.* at 175. In its 2005 annual report, the FBI found that handguns accounted for over 83 percent of all firearms used in legally justified defensive homicides by private citizens,

while shotguns and rifles together accounted for less than 7.5 percent of such. *See* U.S. Department of Justice, *Crime in the United States*, Expanded Homicide Data Table 14 (2007).

Handguns are well-suited for self-defense. Because of their utility in situations in which every second counts, "handguns are particularly effective for self-defense." Calvin Massey, *Guns, Extremists, and the Constitution*, 57 Wash. & Lee L. Rev. 1095, 1127 (2000); *see also* Kleck and Gertz, *supra*, at 164. Handguns are more maneuverable because of their size and can quickly be readied for defensive use. The successes of local self-defense initiatives reflect the effectiveness of handgun ownership and training. *See* Gary Kleck & David Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 L. & Pol'y Q. 271, 284 (1983) (citing an 88% drop in rapes committed in Orlando after the city implemented a handgun training program for women, while the overall rate of rapes increased by 5% in Florida and 7% nationwide during the same period).

C. The District's Limited Allowance For Shotguns And Rifles Cannot Shield Its Handgun Ban from Constitutional Challenge

While it bans handguns, the D.C. Code does permit individuals to possess shotguns or rifles, in their homes, provided that such "long guns" remain disassembled or trigger-locked at all times. *See* D.C. Code § 7-2507.02. This meager allowance for defensive firearms cannot save the District's handgun ban from constitutional attack for several reasons.

First, if the handgun ban violates the Constitution as a threshold matter, then that should end the inquiry. Other laws permitting the possession of other kinds of arms are not constitutionally relevant precisely because they pertain to other kinds of arms. Just as the First Amendment does not allow government to ban one book just because it permits the reading of another, the Second Amendment does not allow the District to ban one constitutionally protected type of firearm just because it permits limited ownership of another.

Second, the District requires that rifles and shotguns be kept in a condition unsuitable for self-defense. *See* D.C. Code § 7-2507.02.[3] "A gun stored for personal protection must be available for immediate use," which is why the vast majority of those who own guns primarily for self-defense prefer to keep them loaded and unlocked.[4] Gary Kleck & Don B. Kates, *Armed: New Perspectives on Gun Control* 300-301 (2001).

Third, limiting private gun ownership to shotguns and rifles results in more frequent and lethal accidents,

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3. Though the handgun ban should be struck down outright, this provision might be a suitable candidate for remand under the standards set forth in the Justice Department's Brief, to determine whether it unreasonably interferes with the self-defense function of protected arms. *See* Brief for the United States as Amicus Curiae at 27-31.

4. Because many gun owners perceive that handguns are more effective than rifles or shotguns for self-defense, 80% of defensive firearm uses are with handguns. *See* Kleck & Gertz, *supra*, at 175. Long guns such as rifles and shotguns are heavier, less maneuverable, and require considerably more strength to use than handguns because of their recoil.

perversely offsetting the handgun ban's purported safety benefits. A shotgun or rifle is "much more likely to suffer accidental discharge than is a handgun [and] . . . [a] long gun is also much more difficult than a handgun to lock or hide away from inquisitive children." Kates, *supra*, 82 Mich. L. Rev. at 263. "[B]ecause handguns are innately far safer than long guns, if a handgun ban caused defensive gun owners to keep loaded long guns instead . . . thousands more might die in fatal gun accidents annually." Don B. Kates, et. al, *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda*, 62 Tenn. L. Rev. 513, 578 (1995). Thus, the D.C. law at issue does not provide clear alternatives for protecting the right of self-defense that sufficiently offset the impact of its complete ban on handguns.

D. The Link Between Handguns And Crime IsA Constitutional Red Herring

The link between handgun legality and aggregate crime levels has little constitutional significance. The purpose of the Second Amendment's right to keep and bear arms is to allow individuals to privately protect themselves, not to reduce overall crime rates or curb gun-related accidents. *See* Lund, *supra*, 39 Ala. L. Rev. at 112 n.24. The Framers knew that an individual right to keep and bear arms would carry with it the risks of crime and accidents, just as an individual right to speak freely carries with it the risk of libel. Faced with these trade-offs, the Framers deliberately chose a form of government that can accept such risks as the price for protecting individual liberties. "Those who would give up essential liberty to purchase a little temporary safety

deserve neither liberty nor safety." *An Historic Review of the Constitution and Government of Pennsylvania* at 1 (1759) (commonly attributed to Benjamin Franklin). Just as studies showing the dangers of prejudice and error in jury trials should not undermine a criminal defendant's Sixth Amendment rights, neither should studies purporting to show the dangers of private gun ownership undermine law-abiding individuals' Second Amendment rights.

The District and its supporters also err in extolling the supposed virtues of a world without guns, and condemning the vices of a world without gun regulations. In doing so, they set up a false set of choices. A world without guns is not an option, because hundreds of millions of guns are already in private hands and readily available across either the Virginia or Maryland borders; and even if all handguns in America magically vanished, criminals could still illegally saw off shotguns and rifles to produce concealable weapons that would be more lethal than most handguns. Thus, the District can only hope to dry up the supply of handguns for the law abiding, while criminal access to handguns remains virtually unlimited. It is against this real-world backdrop, and not against that of a utopian gun-free world, that the District's position must be assessed.

By the same token, the standard we advocate still allows for reasonable regulations designed to address many of the District's legitimate safety concerns, provided that such restrictions not unreasonably interfere with the self-defense rights of law-abiding adults. In sum, the handgun ban District's laws cannot provide the results that the District's arguments assume,

and a reasonably understood right to possess guns for self-defense will not lead to the outcomes that the District's arguments would lead us to fear.

Even if the link between guns and crime is constitutionally significant, the mere potential for an armed citizenry deters violent crime in several related ways. First, knowledge that prospective victims may have handguns deters some perpetrators from committing crimes in the first place. *See* Don B. Kates, *The Value of Civilian Arms Possession as Deterrent to Crime or Defense Against Crime*, 18 Am. J. Crim. L. 113 (1991). Second, awareness that potential victims may have handguns leads criminals to forego violent confrontational crimes. *Id.* Third, if the victim has a handgun, the perpetrator is far less likely to successfully complete the crime. *Id.*; *See also* James D. Wright & Peter H. Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* 237 (1986) (citing a prison study in which approximately 40% of the inmates interviewed reported that they chose not to commit a particular crime because they feared that their victim would be armed).

The legal availability of handguns reduces the frequency and severity of violent crime. When the citizenry is potentially armed with handguns, criminals are more likely to choose non-violent, non-confrontational alternatives, which "radically decrease the likelihood of victim death or injury." Kates, *supra*, 18 Am. J. Crim. L. at 113. The risk of confronting armed victims is a stronger deterrent to would-be criminals than the risk of harsh legal consequences. T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. Crim. L. & Criminology 764, 789 (1995). When violent

confrontations do take place, victims armed with handguns are thirty percent more likely to leave the conflict uninjured than victims who are unarmed. Michael Rand, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft*, Bureau of Justice Statistics Report Number NCJ-147003 (1994) (revised through 2002).

E. The District's Handgun Ban Should Be Struck Down In This Proceeding; Remand Is Not Necessary Here

Because handguns are the most commonly used and effective type of firearm for self-defense, an outright ban on handguns is unconstitutional per se, just as a complete ban on all firearms would be unconstitutional per se. *See* Section IIB. No balancing test is needed, because the Second Amendment has done the balancing required in this area: While regulations that reasonably interfere with handgun ownership should be upheld, bans categorically fail any suitable Second Amendment test.

Moreover, remand would offer no benefits to the development of Second Amendment jurisprudence. While the Justice Department's Brief lists general reasons why remanding a case can be useful, none of those reasons apply in the case of a complete prohibition. *See* Brief for the United State as Amicus Curiae at 27-31. The Court's choice to decide this case on the merits in the first instance will not affect the development or percolation of Second Amendment issues in the lower courts because the law at issue here – a total ban – will already be easily distinguished from other regulations where the reasonableness of interference with the right of self-defense will be contestable. Here, where the

District has not just regulated but completely banned the most common and well-suited firearm for self-defense, nothing will be gained by forestalling the inevitable conclusion that its laws violate the Second Amendment.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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