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 AMICUS CURIAE OF ORGANIZATIONS AND SCHOLARS CORRECTING MYTHS AND MISREPRESENTATIONS COMMONLY DEPLOYED BY OPPONENTS OF AN INDIVIDUAL-RIGHTS-BASED INTERPRETATION OF THE SECOND AMENDMENT IN SUPPORT OF RESPONDENT

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MISCELLANEOUS

INTERESTS OF AMICUS CURIAE[1]

The Citizens Committee for the Right to Keep and Bear Arms, a non-profit organization, seeks to preserve Second Amendment rights through education and advocacy. It strives to ensure that the Amendment is not misinterpreted in derogation of the people's right to keep and bear arms for self-defense and other constitutional purposes.

The Evergreen Freedom Foundation is a non-partisan, public policy research, 501(c)(3) organization, based in Olympia, Washington. The foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. Its efforts focus on state budget and tax policy, labor policy, welfare reform, education, citizenship, and governance.

David T. Beito, Ph.D., is an Associate Professor of History at the University of Alabama. Douglas B. Rasmussen, Ph.D., is a Professor of Philosophy at St. John's University. Steve Russell, J.D., M.L.S., is an Associate Professor of Criminal Justice at Indiana University. Lynn D. Wardle, J.D., is a Professor of Law at Brigham Young University Law School. Robert E. Wright, Ph.D., is a clinical associate professor of

[1] The parties were notified of the intention to file this brief seven days prior to its due date as per the consent letters filed in this matter. No counsel for a party authored this brief in whole or in part. No person other than *amici curiae,* their members, or counsel made a monetary contribution to its preparation or submission.

economics at New York University.[2] All amici wish to expose common historical myths about the Second Amendment and the efficacy of arms prohibitions perpetuated by the District of Columbia ("District") and its amici.

INTRODUCTION

This brief endeavors to correct common misconceptions about the Second Amendment and gun control that persist in the media and academia and to expose how the District of Columbia ("District") and its amici misstate and decontextualize history and contemporary research to perpetuate such myths. These common myths are numerous, but generally fall under two headings: (1) that the right to keep and bear arms pertains only to the National Guard (the collective rights theory); and (2) that gun ownership is dangerous and owners are more likely to be injured in accidents or have their guns used against them than to successfully defend themselves. This brief cannot address all popular misconceptions or every misstatement in this case. Rather, it focuses on the most egregious and specific errors presented by the District and its amici.

[2] Institutional affiliations of professors are provided only for identification.

ARGUMENT

I. The District Falsely Claims That The Right To Keep And Bear Arms Is Only For Militia

A. The District Takes *United States v. Cruikshank* Out Of Context To Argue That The Right To Keep And Bear Arms Is Not Constitutionally Protected

The District cites *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), to argue that the right to bear arms "is not a right granted by the Constitution" and, therefore, does not protect private uses enjoyed during the founding era. (Brief for Petitioners ("Pet.Br.") 19-20.) That statement is taken out of context to support principles contrary to those embraced by the Court. *Cruikshank*'s statement was in the context of holding that "[t]his is one of the amendments that has no other effect than to restrict the powers of the national government." *Id.* *Cruikshank* treated the rights of assembly and petition in the same way and added that they pre-exist the Constitution:

> It is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 211, 'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists. ***It was not, therefore, a***

right granted to the people by the Constitution.

Id. at 551 (emphasis supplied). Thus, *Cruikshank* means that certain rights are not granted by the Constitution because they pre-existed it in natural law. *Cruikshank* does not take the untenable position implied by the District that the right to keep and bear arms is not constitutionally protected or that it may be legislatively defined out of existence. This Court treated the rights of assembly and petition and the right to keep and bear arms the same way in *Logan v. United States*, 144 U.S. 263, 286-87 (1892).

B. The Brady Brief Turns The 1181 Assize Of Arms And The English Bill Of Rights On Their Heads

The Brady Brief incorrectly insists that the 1181 Assize of Arms and the English Bill of Rights included a right of arms only for soldiers. (Brief for Brady Center to Prevent Gun Violence, et al., ("Brady Brief") 17-18 n.6.) The Assize required "every free layman" and "the whole community of freemen" to have armor and weapons. The Assize of Arms (1181), *reprinted in Sources of English Constitutional History* 85-87 (Carl Stephenson & Frederick George Marcham, eds., 1937). The Assize did not initially treat the "villata" as an organized entity. 1 Sir Frederick Pollock & Frederick William Maitland, *The History of English Law Before the Time of Edward I* 565 (Legal Classics Library 1982) (1895). Thus, the concept of a people armed for the defense of self and community

predates any formal organization. The ordinances of 1252, 1253, and the Statute of Winchester formally organized the militia. *Id.* The Statute of Winchester required that "every man shall have in his house arms for the keeping of the peace according to the ancient assize." Statute of Winchester (1285), *reprinted in Sources of English Constitutional History*, *supra,* at 174.

The English Bill of Rights provided:

> [T]hat raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law; that the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law[.]

1 W. & M., 2 c. 2 (1689). The suggestion that the English Bill vested the right to "have arms" only in the military is patent nonsense. The English Bill resulted from the revolution that overthrew King James II and declared him guilty of "keeping a standing army within this kingdom in time of peace without consent of parliament" and "causing several good subjects being Protestants to be disarmed[.]" *Id.* As the eminent English historian, G.M. Trevelyan, wrote:

> The root of all [King James'] errors in method was the complete reliance placed by him on his soldiers. Monmouth's rebellion enabled him to become a military despot. The regulars in England were raised from 6,000 to nearly 30,000. A great camp of 13,000 was formed at Hounslow and Heath

> to overawe the capitol. . . . In the neighborhood of London, robberies and murders were plentifully laid at their door. Reports were readily believed against them, for civilians of all parties hated the camp at Hounslow, rightly regarding it as a menace to their liberties and their religion.

G.M. Trevelyan, *A History of England Under the Stuarts* 359 (19th ed. Meuthen & Co. 1947); *see* Winston S. Churchill, *The New World* 383, 391, 398 (Barnes & Noble 1956).

The Brady Brief incorrectly claims that the right to have arms was merely for Protestants to serve in the army. (Brady Brief 17-18 n.6.) The concern of the English Bill, however, was that a Catholic King, in an overwhelmingly Protestant country, disarmed Protestants while developing a "great standing army, largely officered by Catholics[.]" Trevelyan, *supra*, at 360; Churchill, *supra*, at 391. The Peers' invitation to William of Orange to remove King James and assume the throne explained that the plan relied on rallying non-military people and forming them into an insurgent force:

> ***[T]he people*** are so generally dissatisfied with the present conduct of the government, in relation to their religion, liberties and properties (all of which had been greatly invaded) and they are in such expectation of their prospects being daily worse, that your Highness may be assured there are ***nineteen parts of twenty of the people*** throughout this kingdom who are desirous of a change;

> and who we believe, would willingly contribute to it if they had such protection to countenance their rising, as would secure them from being destroyed, before they could get in a posture to defend themselves. . . . if such a strength could be landed as were able to defend itself and them, ***till they could be got together into some order***, we make no question but that ***strength would quickly be increased to a number double to the army*** here, although all their army should remain firm to them[.]

The Invitation to William (1688), *reprinted in The Eighteenth Century Constitution* 8 (E.N. Williams, ed., 1977) (emphasis supplied). After William landed in England, his army swelled daily. 2 Simon Schama, *A History of Britain* 318 (2001). The District's claim that the right to have arms was for Protestants to serve in the King's army misunderstands the history. It was mistrust of the army in the context of a popular revolution that spawned the English Bill. The framers of the Bill directly considered whether to provide that the subjects' right to have arms was for "their common defence" and, instead, used the language "for their defence," supporting the right of self-defense and the right of rebellion. Joyce Lee Malcolm, *Guns & Violence: The English Experience* 59-60 (Harvard Univ. Press 2002).

During the American founding era, Blackstone[3] interpreted the right to have arms as a "right of the subject" and part "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." 1 William Blackstone, *Commentaries* *138-39 (emphasis supplied). Blackstone clearly understood the right to have arms as part of the right of self-defense and the right to resist oppression, as in the revolution of 1688. Samuel Adams interpreted the English Bill the same way:

> At the revolution [of 1688], the British constitution was again restor'd to its original principles, declared in the bill of rights; which was afterwards pass'd into law, and stands as a bulwark to the natural rights of the subjects. "To vindicate these rights, says Mr. *Blackstone*, when actually violated or attack'd, the subjects of England are entitled . . . **to the right of *having and using arms for self-preservation*** *and defence*." These he calls "auxiliary and subordinate

[3] This Court has said, "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." *Schick v. United States*, 195 U.S. 65, 69 (1904). The volume of Blackstone's Commentaries dedicated to the rights of persons was published only eleven years before the Declaration of Independence and was widely read in the American colonies. Edmund Burke, Speech on Conciliation with the Colonies (March 22, 1775), *reprinted in The Essential Bill of Rights* 170, 173 (Gordon Lloyd & Margie Lloyd, eds., 1998) ("I hear that [booksellers] have sold nearly as many of Blackstone's 'Commentaries' in America as in England").

> rights, which serve principally as *barriers* to protect and maintain inviolate the three primary rights of *personal security, personal liberty* and *private property*": And that of *having arms for their defence* he tells us is "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*."

Samuel Adams, *Untitled Article*, Boston Gazette, Feb. 27, 1769, *reprinted in The Essential Bill of Rights* 150 (Gordon Lloyd & Margie Lloyd, eds., 1998) (bold emphasis added; italics original). Adams was clear that these rights were not purely military, writing that "[e]very one knows that the exercise of military power is forever dangerous to civil rights; and we have had recent instances of violences that have been offered to private subjects[.]" *Id.*

C. The District Falsely Claims That The Right To Keep And Bear Arms Is Exclusively For The Common Defense

The District asks this Court to embrace the common misconception that the right to keep and bear arms is only for the "common defense." (Pet.Br. 9, 14, 30.) However, the first Senate explicitly considered and rejected a proposal to insert the words "for the common defense" after the words "bear arms." 1 Journal of the Senate 77 (1789) (*see also* Pet.Br. 29).

D. The District Falsely Claims That The Right To Keep And Bear Arms Is Only For The Military, Ignoring The Original Definition Of The "Militia" As The Body Of The People

The District strenuously argues that the Second Amendment's right to keep and bear arms is limited to the National Guard. (Pet.Br. 11-35.) In keeping with English tradition, the Virginia Declaration of Rights, adopted less than a month before The Declaration of Independence, defines the term "militia" as "composed of the body of the people." Virginia Declaration of Rights art. 13 (1776). John Adams similarly called for "[a] militia law, requiring all men, or with very few exceptions[.]" John Adams, *Thoughts on Government* (1776), *reprinted in* 1 *American Political Writing During the Founding Era* 1760-1805 401 (Charles S. Hyneman & Donald S. Lutz, eds., 1983). Thomas Jefferson noted that, in Virginia, "[e]very able-bodied freeman, between the ages of 16 and 50, is enrolled in the militia," even though not all participated. Thomas Jefferson, *Notes on the State of Virginia* 88 (U. of North Carolina Press 1982) (1787). Joel Barlow similarly wrote that "every citizen is a soldier and every soldier will be a citizen[.]" Joel Barlow, *Letter to His Fellow Citizens* (1801), *reprinted in* 2 *American Political Writing During the Founding Era, supra,* at 1124.

One revolutionary pamphleteer wrote that "armies should always be composed of the militia or body of the people[.]" Theophilus Parsons, *The Essex*

Result (1778), *reprinted in* 1 *American Political Writing During the Founding Era*, *supra*, at 501. Several documents from state ratifying conventions utilized the clause:

> That the people have a right to keep and bear arms; that a well-regulated militia, ***including the body of the people*** capable of bearing [or trained to] arms, is the proper, natural, and safe defence of a free state.

Ratification of New York (1788), 1 *Elliot's Debates* 328 (J.B. Lippincott 1901); Ratification of Rhode Island (1790), 1 *Elliot's Debates, supra,* at 335; Ratification of Virginia (1787), 3 *Elliot's Debates, supra*, at 659; Proposed Declaration of Rights in North Carolina Convention (1788), 4 *Elliot's Debates, supra*, at 244.

When the Bill of Rights, including the Second Amendment, refers to "the people" it is a term of art, signifying members of the national community. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). The "right of the people" in the Second Amendment refers to all members of the national community. *Id.* This is consistent with the definition of the militia as composed of the body of the people, rather than a military organization.

E. The District Falsely Claims That Congress Can Change The Constitution By Adopting A Limited Definition Of The Term "Militia" And That Congress Did So

Notwithstanding the history of the terms "militia" and "the people," the District contends that because Mr. Heller is not a member of the National Guard, he is not part of the "militia" and does not have Second Amendment rights. (Pet.Br. 14 n.2 and text.) In other words, the District suggests that Congress can use a statute to re-define the words of the Constitution and limit the scope of our rights. As this Court held in *Boerne v. Flores*, 521 U.S. 507, 519 (1997), "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." If Congress adopted a more limited definition of the term "militia" than historically applied, it has no impact on the meaning of the Second Amendment. Furthermore, Congress has not re-defined the term "militia." The National Guard is not the constitutional militia. It was organized under the Army Clause and not the Militia Clause of the Constitution, because the Militia Clause authorizes activities only within the United States. David T. Hardy, *Armed Citizens, Citizen Armies*, 9 Harv. J. of L. & Pub. Pol'y 559, 625-26 (1986).

F. The District Falsely Claims That The Pennsylvania Declaration of Rights Does Not Include Keeping Arms For Self-Defense

The District claims that the Pennsylvania Declaration of Rights includes an "example of the dominant focus of these provisions on communal defense[.]" (Pet.Br. 31.) However, the Declaration states that "the people have a right to ***bear arms for the defense of themselves*** and the state[.]" Pennsylvania Declaration of Rights art. 13 (1776). James Wilson, a delegate to the Federal Convention and Pennsylvania Supreme Court Justice, stated that the right to bear arms was related to "the great natural law of self preservation," and that it "is one of our many renewals of the Saxon regulations. 'They were bound,' says Mr. Selden, to ***keep arms for the preservation*** of the kingdom, and ***of their own persons***.'" James Wilson, *The Works of the Honourable James Wilson* 84-85 (Lorenzo Press 1804) (emphasis supplied). Far from suggesting that the right to bear arms was primarily military, the text and history of the Pennsylvania Declaration embraced the familiar purpose of self-defense.

At the Pennsylvania Ratifying Convention, the dissenters proposed a bill of rights, including a provision likely based on the Pennsylvania Declaration:

> 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 for crimes committed, or real danger of public injury from individuals[.]

Dissent of the Minority (December 18, 1787) Pennsylvania Ratifying Convention (emphasis supplied), *reprinted in The Essential Bill of Rights, supra,* at 309. This provision envisioned an individual right, with a self-defense component and a military component, and was intended to prevent laws from disarming the people "or any of them."

During America's founding era, in both America and England, the idea of helplessly waiting for the police to come to the rescue was not familiar. There were no professional police. It was the duty of free people to arm and defend themselves and their communities. Don B. Kates, *The Second Amendment and the Ideology of Self-Protection* 9 Constitutional Comment. 87, 92 (1992).

G. The District Misuses *The Oxford English Dictionary* To Support An Artificially Narrow Definition Of "Arms"

The District quotes selectively from definition 2.a. of the word "arm" in the *Oxford English Dictionary* ("*OED*") to suggest that the term "arms" only includes war weapons. (Pet.Br. 15.) The full definition is:

> Instruments of offence used in war; weapons. ***fire-arms***: those for which gunpowder is

> used, such as guns and pistols, as opposed to swords, *spears*, or *bows*. ***small-arms***: those not requiring carriages, as opposed to artillery. ***stand of arms***: a complete set for one soldier.

1 *OED* 634 (2d ed. 2000). This definition includes the term "weapons" as well as "fire-arms," which makes no reference to military uses, and "small-arms" which defines small weapons "as opposed to artillery," contrasting a military weapon. While war weapons are covered by the definition, two of its subparts require no military context.

The District quotes a 1794 reference in the *OED* mentioning arms used in war. (Pet.Br. 15.) However, this is only one of several references. A reference prior to the Bill of Rights was, "1650 T. B. *Worcester's Apophth*. 97 They were come to search his house for Armes." 1 *OED*, *supra*, at 634. While a military application of the term "arms" is one possibility, it is not the exclusive meaning. The District's argument ignores several general definitions. For example, definition III.10, from a 1641 reference: "Arms, ***in the understanding of law*** is extended to any thing that a man, in his anger or fury, **takes** in his hand to cast at or strike another." *Id.* (emphasis supplied).

H. The Linguist's Amicus Brief Misuses Webster's 1828 Dictionary To Project A Military Meaning On The Second Amendment

The Linguist's Brief cites two definitions in Webster's 1828 dictionary, for "arms" and "keep" in order to project an exclusively military meaning onto the Second Amendment. (Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners 20 n.18, 27.) However, Webster also defines the term "arms" more generally and includes a broad legal definition:

> 1. Weapons of offense, or armor for defense and protection of the body.
>
> . . . .
>
> 4. ***In law***, arms are any thing which a man takes in his hand in anger, to strike or assault another.

1 Noah Webster, *American Dictionary of the English Language* 13 (1828) (emphasis supplied). None of the definitions of "keep" suggests a military context. 2 *id.* at 2. Noah Webster understood that the role of arms was not only military. During the Constitution ratification debates, Webster said:

> Before ***a standing army*** can rule, ***the people*** must be ***disarmed***; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole ***body of the***

> ***people are armed***, and constitute a force superior to any ***band of regular troops*** that can be, on any pretence, raised in the United States.

Noah Webster, *Examination into the Leading Principles of the Federal Constitution* (1787), *reprinted in Pamphlets on the Constitution of the United States* 24, 55-56 (Paul Leicester Ford, ed., 1888) (emphasis supplied). The principle of "the people" being "armed" to counterbalance a "standing army" was well-understood in the founding era.

I. The District Denies The Sovereignty Of The People By Falsely Claiming That The Second Amendment Permits Them To Be Disarmed In Favor Of An Exclusive Military Class

The broad distribution of arms among "the great body of the people" served the democratic purpose of preventing an undue concentration of armed power in an exclusive military class, making the people vulnerable to tyranny. As founding era writer Joel Barlow observed:

> If it be wrong to trust the legislative power of the state for a number of years, or for life, to a small number of men; it is certainly more preposterous to do the same thing with regard to military power. Where the wisdom resides, there ought the strength to reside, in the ***great body of the people***; and neither the one nor the other ought ever to be

> delegated, but for short periods of time, and under severe restrictions. This is the way to preserve a temperate and manly use of both; and thus, by trusting only to themselves, ***the people*** will be sure of a perpetual defence against the open force, and the secret intrigues of all possible enemies at home and abroad.

Joel Barlow, *A Letter to the National Convention of France on the Defects in the Constitution of 1791* (1792), *reprinted in* 2 *American Political Writing of the Founding Era*, *supra,* at 837 (emphasis supplied). The use of the term "the people" is unmistakable and repeatedly teaches that an armed citizenry is necessary to ensure that power ultimately remains in them. Tench Coxe explained, ten days after the Bill of Rights was proposed in the House of Representatives, that the right to keep and bear private arms existed to protect the people against tyranny:

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed . . . in their right to keep and bear their private arms[.]

Federal Gazette, June 18, 1789, at 2, col. 1 (*quoted in* Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 Geo. Mason U. Civ. Rts. L.J. 105, 123 (1995)). While arguing for majority rule at the 1788 Virginia

Constitutional Convention, James Madison said that "[a] government resting on a minority is an aristocracy and not a Republic . . . and could not be safe with a numerical and physical force against it, without ***a standing army***, an enslaved press, ***and a disarmed populace***." Ralph Ketcham, *James Madison: A Biography* n.94, at 640 (U. of Virginia Press 1995) (emphasis supplied) (quoting James Madison, *James Madison's Autobiography*, 2 Wm. & Mary Q. 208 (1945)). A "disarmed populace" serves the interests of tyranny as Justice Story described:

> One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by ***disarming the people, and making it an offence to keep arms***, and by substituting a regular army in the stead of a resort to the militia.
>
> . . . .
>
> ***The right of the citizens to keep and bear arms*** had justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpations and arbitrary power of rulers; and it will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Joseph Story, *A Familiar Exposition of the Constitution of the United States*, 319 (Regenery 1986) (1859) (emphasis supplied). The District's statute makes it an offense to keep arms and attempts to disarm the people. The idea that the Second Amendment is

merely a right for the army, but permits the disarmament of the people, turns the Second Amendment on its head.

The District claims that the framers did not craft the Second Amendment to undo all of their hard work by sanctioning insurrection. (Pet.Br. 15 n.3.) This betrays a fundamental misunderstanding of the founding era. Like the Declaration of Independence itself, on June 2, 1784, the New Hampshire Constitution embraced a right of revolution as a last resort:

> Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

N.H. Const. part. 1, art. X (1784). The District unwisely trusts that the founders established a government so foolproof that it could never succumb to tyranny.

In the Declaration of Independence, Jefferson wrote that revolution should not be undertaken lightly because "[p]rudence, indeed, will dictate that governments long established should not be changed

for light and transient causes." The Declaration of Independence para. 3 (U.S. 1776). Thus, the people should not foment revolution over minor disagreements about policy. History has proven that an armed populace in America does not attempt to overthrow the government over minor issues. However, as Jefferson eloquently wrote:

> [W]hen a long train of abuses and usurpations begun at a distinguished period and pursuing invariably the same object, evinces a design to reduce [the people] under absolute despotism, it is their right, it is their duty to throw off such government, and to provide new guards for their future security.

Id. In the end, the only statistic that matters in Second Amendment discussions is that at least sixty million (and perhaps over one hundred million) people were murdered by their own governments during the twentieth century. Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995, 1025 (1995) (book review). In America today, the necessity of exercising the last resort of revolution appears remote. But a Constitution is not for the moment – it is for the ages. The people's right to alter or abolish a despotic government is fundamental to their sovereignty. The means to exercise that right should not be entrusted to an exclusive military class, any more than the freedom of speech should be entrusted only to government spokespersons.

II. The District Makes Numerous Historical, Legal, And Statistical Misrepresentations In Attempting To Justify Disarming Its People

A. The District Falsely Claims That Its Law Permits People To Assemble And Load Long Guns For Self-Defense

The District falsely claims that its prohibition of handguns is reasonable because it allows the people to keep long guns for self-defense (Pet.Br. 49) and suggests that its trigger-lock and storage requirement is not an unreasonable infringement of the right to keep and bear arms. (Pet.Br. 55-57.) There is no exception in D.C. Code § 7-2507.02 permitting a weapon to be loaded and unlocked for self-defense.

The District argues, without citing a single example, that a self-defense exception may be "implied" and that there may be judicial lenience in self-defense cases. (Pet.Br. 56.) However, there is an explicit exemption in the statute for firearms at a place of business. D.C. Code § 7-2507.02. Thus, in a future case, the District may well rely on the rule articulated by the District's Court of Appeals that "the express inclusion of one (or more) thing(s) implies the exclusion of other things from similar treatment." *Castellon v. United States*, 864 A.2d 141, 149 (2004) (citations omitted). In *McIntosh v. Washington*, 395 A.2d 744, 755 (D.C. App. 1978), where the District's Court of Appeals upheld the exception for places of business against an equal protection challenge, there was no mention of a self-defense exception for assembling and loading a weapon.

Based on the foregoing analysis, it is not at all clear that the District's courts would be lenient in excusing the loading and enabling of a weapon for self-defense. Even when the District has applied statutory self-defense exceptions in other arms-related statutes, it has applied the exception only during the act of self-defense and not before or after. *Logan v. United States*, 402 A.2d 822, 826 (D.C. 1979). This has permitted courts to excuse the use of the firearm for self-defense, but then convict the person for carrying the weapon in the first place. *Cooke v. United States*, 275 F.2d 887, 888 (D.C. Cir. 1960). The court recognized the irrationality of that result, writing that "[t]here does appear to be an inconsistency between acquitting a man of assault on grounds of self-defense, and convicting him for carrying the instrument used in that defense[.]" *Id.* However, the court upheld the conviction because the statute did not provide a self-defense exception to the prohibition against carrying. *Id.* In another case, the District prosecuted an individual for possession of an unlicensed firearm after the individual shot an intruder. The District contended that, while the self-defense was excused, the possession of the weapon was not:

> The government acknowledges that this case presents a difficult sentencing decision for the Court. On the one hand, the defendant fired his gun at a burglar. The safety of his home had been violated. Certainly, if the burglar were inside the home there would be no question that the defendant had the right to defend himself (although he would still

> face the current charge of CWPL because ***self-defense would only excuse the use of the weapon, not the possession of the weapon***).

Government's Memorandum in Aid of Sentencing, *United States v. Plesha*, Criminal No. F-5775-07, at 3 (Sup. Ct. D.C., October 29, 1997) (emphasis supplied). Despite the District's promises to the contrary, it is likely that the District would prosecute the loading or assembly of a weapon prior to self-defense.

If a person threatened to kill an estranged spouse, it is doubtful that the spouse could legally load a weapon, even if a self-defense exception applied. This concern is compounded because carrying an unloaded and disassembled weapon is prohibited. *Rouse v. United States*, 391 A.2d 790 (D.C. 1978). One may be prosecuted for a self-defense use, even when s/he is carrying the arm for a lawful purpose. *Cooke v. United States*, 275 F.2d 887, 889 n.3 (D.C. Cir. 1960) (holding that a violation of D.C. Code § 22-4504 does not require the defendant to intend to use the arm unlawfully); *Carey v. United States*, 377 A.2d 40, 43 (D.C. 1977). There is no exception for a weapon to be made operational for self-defense. Even if the court created a self-defense exception, it is unlikely that the exception would protect the unlocking or loading of the weapon prior to self-defense. The District's so-called support of the common law right of self-defense is disingenuous when it simultaneously denies law-abiding citizens the means of protecting themselves.

B. The District Falsely Asserts That Other Jurisdictions' Laws Are Comparable To The District's Law

Using only the example of Chicago, the District asserts that "[m]any cities, states and nations regulate or ban handguns based on the unique dangers of those deadly weapons[.]" (Pet.Br. 50.) However, D.C. Code § 7-2502.02 is not a gun regulation – it is an outright prohibition. When arguing that its regulations are "reasonable," the District cannot compare its outright prohibition to handgun regulations in other jurisdictions. The District's examples at the petition stage included Europe and Canada. (Petition for Writ of Certiorari 23, 27.) The District's own source material reveals that at least fifty of the sixty-nine countries studied (seventy-one percent) permit handguns for the defense of persons and property. Wendy Cukier & Victor W. Sidel, *The Global Gun Epidemic: From Saturday Night Specials to AK-47's* 144 (2006). "District of Columbia [firearm laws] are stricter than almost any European state." James B. Jacobs, *Can Gun Control Work?* 35 (Oxford U. Press 2003). In Canada, a permit is required but may be issued to any law abiding adult. Safe storage is required, but any "lawful excuse," including home defense, is a valid reason for loading a handgun in the home.[4]

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[4] "Every person commits an offence who, without lawful excuse, uses . . . transports or stores a firearm . . . or any ammunition . . . in a careless manner or without reasonable

(Continued on following page)

C. The District Relies On Deeply Flawed Research And Evidence Taken Out Of Context To Claim That Its Handgun Ban Has Reduced Homicide Rates

The District inaccurately claims that its gradual handgun ban caused an abrupt decline in firearm-related homicides. (Pet.Br. 49, 53.) In support of that conclusion, the District cites the discredited study by Colin Loftin et al., *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991). The Loftin study is the only data cited by the petitioner that is specific to the District, and it has been thoroughly discredited by two subsequent studies, described as follows by Professor Kleck:

> Consider, for example, a study of D.C.'s gradual ban on handguns in 1976. The study's authors, Loftin, et al. (1991), compared trends in gun homicide and nongun homicide in D.C. with trends in the city's suburbs, and concluded, using very strongly worded terms, that the law caused an abrupt decrease in the gun homicide rate. Kleck, Britt, and Bordua requested their data for reanalysis and were flatly refused by Loftin. We obtained the data independently, performed the reanalysis, and found that the authors' conclusions collapsed as soon as any of three improvements were made: (1) extending the

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precautions for the safety of other persons." Criminal Code, R.S.C., ch. C-46, § 86(1) (1985) (Can.).

> time period studied to include more postintervention time points, (2) comparing D.C. with a control area, Baltimore, that was far more similar to D.C. than its suburbs, and (3) use of a more theoretically appropriate statistical model that assumed that a slow-motion handgun ban should have a gradual effect rather than an abrupt one. Any one of these changes reversed the Loftin et al. conclusions, supporting the hypothesis that the D.C. handgun ban had no impact on homicide[.]

Gary Kleck, *Targeting Guns: Firearms and Their Control* 355 (1997); Chester Britt III et al., *A Reassessment of the D.C. Gun Law: Some Cautionary Notes On the Use of Interrupted Time Series Designs For Policy Impact Assessment*, 30 Law & Soc'y Rev. 361 (1996)).

If disarming law abiding people was effective, one would expect that, after thirty years of the most restrictive handgun prohibition in America, the District would have a below average murder rate. In fact, in 2006 the District's murder rate was more than double that of comparable cities and five times the national average. Federal Bureau of Investigation, *Crime in the United States 2006* (2007), *available at* http://www.fbi.gov/ucr/cius2006/data/table_01.html (national data), http://www.fbi.gov/ucr/cius2006/data/table_08_dc.html (D.C. data), http://www.fbi.gov/ucr/cius2006/data/table_16.html (data on cites with populations between 500,000 and one million) (statistics compiled by Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms:*

One Hard Question? scheduled for publication in Geo. Mason U. Civ. Rts L.J.).

The District cited Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1095-98 (2001), for the proposition that "a 10% increase in handgun ownership increases the homicide rate by 2%." (Pet.Br. 52.) The Brief of the Claremont Institute exposes many flaws in this research, which need not be repeated here. It is interesting to note that, like Loftin, Mr. Duggan has repeatedly refused to share his data for verification. Florenz Plassman & John R. Lott, Jr., *More Readers of Gun Magazines, But Not More Crimes*, Soc. Sci. Research Network 3 (July 2, 2002), *available at* http://ssrn.com/abstract=320107; John R. Lott, *The Bias Against Guns* 233, 246 (2003).

The District cites Cynthia Leonardatos et al., *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 Conn. L. Rev. 157, 169-70, 178-80 (2001), for the proposition that "[s]afety mechanisms, while helpful, do not always work as designed, and compliance, even with mandatory safety laws, is imperfect." (Pet.Br. 54.) While this citation is technically accurate, it is taken out of context and ignores the well-supported conclusions of the article, which are that the District's measures are ineffective in reducing the misuse of arms and interfere significantly with self-defense:

> Legislative mandates for gun storage, and legislative mandates for gun personalization

> initially seem attractive because they promise to reduce gun misuse by unauthorized persons. But when these mandates are closely examined, their practical ability to reduce unauthorized use seems rather small, and is outweighed by the increased dangers that result from interference with lawful defensive uses, and by the widespread resistance that will be encountered, from both police and civilians.

Id. at 219. Thus, far from concluding that the District's trigger-lock and storage requirements are reasonable, the Leonardatos article actually suggests that they are unreasonable.

D. The District Falsely Asserts That Handguns Are Deadlier Than Long Guns

The District claims that handguns are the most common weapons in street crimes. (Pet.Br. 51.) However:

> 54-80% of homicides occur in circumstances in which long guns could be substituted for handguns, that most surveyed felons say would carry a sawed-off long gun if they could not get a handgun, and that the deadliness of the substituted long guns would almost certainly be at least 1.5-3 times greater than that of handguns.

Gary Kleck, *Point Blank: Guns and Violence in America* 92 (1991). Even if a handgun ban could be perfectly enforced, it would not make a significant

difference. Making the realistic assumption that substituted long guns would be twice as lethal as handguns, the substitution rate would have to be less than forty-four percent in order for the ban to provide any improvement. *Id.* The conclusion of this analysis is that "controls aimed solely at handguns or at small, cheap handguns are a mistake because they encourage substitution of more lethal types of guns." Kleck, *Targeting Guns, supra,* at 139, 303.

E. The District Incorrectly Asserts That Handguns Are Dangerous In The Hands Of Ordinary Citizens

It is important to confront the persistent falsehood that a privately-owned firearm is more dangerous to the law abiding owner than a potential intruder. In reality, "[a] fifth of the victims defending themselves with a firearm suffered an injury, compared to almost half of those who defended themselves with weapons other than a firearm or who had no weapon." U.S. Dep't of Justice, Bureau of Justice Statistics, *Crime Data Brief* (April 1994, revised Sept. 24, 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/hvfsdaft.txt. Similarly, "[r]esistance with a gun appears to be the most effective in preventing serious injury" to the victim. Jungyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Actions on the Outcomes of Crimes*, 42 Criminology 861, 902 (2004). It strains reason and ignores statistics to claim that an unarmed victim is safer than an armed one. It is also insulting to the character of a free

people to suggest that they surrender to the demands of violent criminals in the timid hope of appeasing them, rather than arming themselves to resist.

The District further claims that prison inmates prefer handguns. (Pet.Br. 51.) However, law-abiding citizens purchasing weapons for self-protection also prefer handguns. U.S. Dep't of Justice, Nat'l Inst. of Justice, *Guns in America: National Survey on Private Ownership and Use of Firearms* 3, 4, 7 (May 1997), *available at* http://www.ncjrs.gov/pdffiles/165476.pdf. Unlike law-abiding citizens, inmates report that if they could not get a handgun they would resort to highly lethal sawed-off shotguns. Gary Kleck, *Point Blank, supra,* at 92.

The District cites Arthur L. Kellerman et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084 (1993), for the proposition that people in households with guns are more likely to die in a homicide. (Pet.Br. 52.) As Professor Kleck stated:

> This finding was a largely or entirely spurious association that failed to control for risk factors that increase the likelihood both of owning guns for self-protection and of becoming homicide victims, including being a drug dealer (as distinct from a mere user) and being a member of a street gang. The association also becomes insignificant if one adjusts for a level of error which Kellerman has acknowledged affects surveys. Further, the finding was also confined to the high homicide

> areas of just three urban counties, and thus could not be generalized to any larger population.

Kleck, *Targeting Guns*, *supra,* at 22, 57, 60, 216-18, 244-47.

F. The District Falsely Asserts That Accidental Handgun Deaths Of Children Are Frequent

The District claims that handguns frequently cause accidents involving children and that "dozens" are killed annually. (Pet.Br. 53.) The mental picture of a child shooting himself or a playmate with an improperly stored gun is wrenching. However, Americans are extremely careful when it comes to safeguarding children against such accidents. Each year, approximately forty-eight children under thirteen years old die from reported handgun accidents in the United States. Kleck, *Targeting Guns, supra*, at 299. This statistic is likely overstated, because some of these are almost certainly extreme abuse incidents where the abuser claims that the death was an accident. *Id.*

Compared to other hazards of daily life, gun ownership is relatively safe. For example, swimming pools annually account for 350-500 deaths of children under five years old and 2,600 injuries, some resulting in permanent brain damage. Consumer Product Safety Commission, *Backyard Pool: Always Supervise Children, Safety Commission Warns*, CPSC Document

#5097, *available at* http://www.cpsc.gov/cpscpub/pubs/5097.html. This is so, even though there are only five-million home swimming pools compared to forty-three million households with guns. Kleck, *Targeting Guns, supra,* at 296. Thus, the risk of fatal accidents is over one hundred times greater for a household with a pool than a household with a handgun. Each year in America there are approximately one thousand deaths related to bicycles, and approximately one million emergency room visits. Consumer Product Safety Commission, *Bicycle Study*, CPSC Document #344 at 1, *available at* http://www.cpsc.gov/cpscpub/pubs/344.pdf. These casualties cause losses of approximately eight billion dollars annually. *Id.*

The Brief of the American Academy of Pediatrics relies on U.S. Dep't of Justice, Nat'l Inst. of Justice, *High School Youths, Weapons and Violence: A National Survey* 6 (1998), *available at* http://www.ncjrs.gov/pdffiles/172857.pdf, for the proposition that "there is simply no way to make guns 'safe' for children – gun safety programs have little effect in reducing firearms death and injury." (Brief of the American Academy of Pediatrics, et al., at 7). In fact, the cited report says no such thing. U.S. Dep't of Justice, Nat'l Inst. of Justice, *supra*, at 6. While every accidental loss of a child is tragic, the small number lost in handgun accidents demonstrates that Americans are conscientious about their safety.

G. The District Overstates The Impact Of Handguns In The Schools

The District claims that a significant percentage of middle school students in some areas claim to have carried a gun to school. (Pet.Br. 53.) There are approximately seven school shooting deaths per year in the United States. Gary Kleck, *Targeting Guns, supra,* at 203-04 (1997). While each one of these deaths is a tragedy, a greater number of deaths occur annually as a result of high school football. Frederick O. Mueller et al., *Catastrophic Injuries in High School and College Sports*, 8 HK Sport Science Monograph Series 42, 47 (1996).

H. The District Falsely Claims That State Law Permitted Significant Gun Control In An Early Period

The District suggests that restrictive gun control was tolerated in an early period to infer that such controls must be constitutional. (Pet.Br. 42.) However, each of the example statutes is regulatory and not prohibitive of the possession of arms or the loading and use of arms for self-defense. None of these statutes prohibited carrying a weapon, although two prohibited carrying it concealed.

1. Massachusetts

The District cites a 1783 Massachusetts statute to suggest a tradition of firearm regulation. (Pet.Br. 42; *see also* Brief for Amici Curiae DC Appleseed

Center for Law & Justice, et al. ("Appleseed Brief"), 12.) However, the District's Statute is a prohibition and not a regulation. The prefatory clause indicated that it was intended to protect firefighters:

> *WHEREAS the depositing of loaded Arms in the Houses of the Town of* Boston*, is dangerous to the Lives of those who are disposed to exert themselves when a Fire happens to break out in the said Town:*

An Act in Addition to the several Acts already made for the Prudent Storage of Gun-Powder within the town of Boston, Act of Mar. 1, 1783, ch. 8, 1783 Mass. Acts 218-19. To that end, the statute made it illegal to:

> take into any dwelling House, Stable, Barn, Out-house, Ware-House, Store, Shop, or other building, within the town of *Boston*, any Cannon, Swivel, Mortar, Howitzer, or Cohorn, or Fire-Arm, loaded with, or having Gun Powder in the fame, or shall receive into any Dwelling-House, Stable, Barn, Out-house, Store, Warehouse, Shop, or other Building, within the said Town, any Bomb, Granade, or other Iron Shell, charged with, or having Gun-Powder in the same[.]

Id. The foregoing did not prohibit the loading, carrying or use of pistols or other arms for self-defense. It was intended to prevent fire hazards resulting from storing explosives inside buildings.

2. Alabama

The District cites Act of Feb. 1, 1839, no. 77, 1839 Ala. Laws 67 ("Alabama Statute"), as an example of an early gun control law. (Pet.Br. 42.) This statute makes it a crime to "carry concealed about his person any species of firearms[.]" It has nothing to do with outlawing handguns or preventing the loading of a gun for self-defense or having a loaded gun in one's home.

3. Indiana

The District cites the Act of Feb. 10, 1831, ch. 26, § 58, 1831 Rev'd Laws of Ind. 180, 192 ("Indiana Statute"), as another example of an early gun control law. (Pet.Br. 42.) It prohibits "wearing" certain weapons "concealed[.]" It does not outlaw handguns or prevent loading or using a gun for self-defense and, in fact, exempts "travellers" from its requirements. *Id.*

4. Tennessee

The District cites Act of Jan. 27, 1838, ch. 137, 1837-1838 Tenn. Pub. Acts 200 ("Tennessee Statute"), as a further example of early gun control. (Pet.Br. 42.) The Chicago Brief claimed that it "banned the sale of any concealable weapon, including all pistols, 'except such as are used in the army and navy of the United States, and known as the navy pistol.'" (Brief of the City of Chicago and the Board of Education for the City of Chicago ("Chicago Brief") 13-14.) No portion of this quote appears in the Tennessee Statute, nor

does it contain any reference to the army or navy. It banned the sale of "any Bowie knife or knives, or Arkansas toothpick," or other knives resembling these. It is revealing that to support its thin historical claims, the District cited a narrowly tailored knife regulation.

5. Georgia

Several amici supporting the District cited the Georgia Act of Dec. 25, 1837, 1837 Ga. Laws 90, banning pistols, in order to imply that handgun prohibitions do not violate the Constitution. (Chicago Brief 14; Brief of Law Professors Erwin Chemerinsky and Adam Winkler 18; Appleseed Brief 13.) However, these amici inexplicably failed to disclose that Georgia's pistol ban was held unconstitutional as violating the natural right of self-defense and the Second Amendment's right to bear arms, which included, "[t]he right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description[.]" *Nunn v. State*, 1 Ga. 243, 251 (1846) (state could constitutionally prohibit concealing a pistol but not prohibit carrying it).

I. The Appleseed Brief Mis-Cites State Cases To Argue That It Is Constitutional To Ban An Entire Class Of Weapons

The Appleseed Brief cites a series of state cases to argue that it is constitutional to ban an entire class

of weapons. (Appleseed Brief 26.) Seven of these eight cases are severely over-claimed, and at least two cases directly contradict the principles for which they are cited.

In *State v. Swanton*, 629 P.2d 98, 99 (Ariz. App. 1981), the Arizona Court of Appeals held that "nunchakus" were not "arms" under Arizona's Constitution, let alone a class of arms. *Id.* Even if nunchakus were arms, the "class" would be blunt weapons, not one anachronistic blunt weapon. The court specifically refused to apply the Second Amendment. *Id.*

In *Benjamin v. Bailey*, 662 A.2d 1226, 1235 (Conn. 1995), the Connecticut Supreme Court upheld a ban on certain assault weapons. However, this was based, in part, on holding that "there are many firearms [that] fit the general designation of 'assault weapons,' and [that] are virtually identical to the banned weapons, but [that] do not appear on the list [of proscribed weapons]." *Id.* Thus, notwithstanding the Appleseed Brief, *Benjamin* did not countenance banning of a class of arms.

In *Robertson v. Denver*, 874 P.2d 325, 329-30 (Colo. 1994), the Colorado Supreme Court upheld an assault weapons ban, but found that the subcategory of banned weapons was infinitesimally small and affected weapons that were not for self-defense:

> Denver has sought to prohibit the possession and use of approximately forty firearms. The evidence also established that currently there are approximately 2,000 firearms available

> for purchase and use in the United States. Given the ***narrow class of weapons regulated*** by the ordinance, we have no hesitancy in holding that the ordinance does not impose such an onerous restriction on the right to bear arms as to constitute an unreasonable or illegitimate exercise of the state's police power: there are literally hundreds of alternative ways in which citizens may exercise the right to bear arms in ***self-defense***. While carving out a ***small category of arms*** which ***cannot be used for purposes of self-defense*** undoubtedly limits the ways in which the right to bear arms may be exercised, the barriers thereby created do not significantly interfere with this right. To the contrary, as the evidence plainly shows, there are ample weapons available for citizens to fully exercise their right to bear arms in ***self-defense***.

Id. (emphasis supplied). Unlike the present case, where the prohibition covers a very large class of weapons ideally suited for self-defense, the Denver ordinance affected a narrowly tailored subclass within the larger class (rifles) and represented a tiny fraction of that class.

In *Commonwealth v. Davis*, 343 N.E.2d 847, 848-50 (Mass. 1976), the Massachusetts Supreme Court upheld a prohibition on short-barreled shotguns, a small subclass within a larger class (shotguns).

In *People v. Brown*, 235 N.W. 245, 246-47 (Mich. 1931), the Michigan Supreme Court held that every

individual had a right to possess a "revolver" for self-defense, but upheld a narrow prohibition of a single revolver, the blackjack, and not all handguns. This holding is directly at odds with a general ban on handguns.

In *State v. LaChapelle*, 451 N.W.2d 689, 690-91 (Neb. 1990) (quoting *State v. Fennell*, 382 S.E.2d 231 (1989)) (emphasis supplied), the Nebraska Supreme Court held that a prohibition against sawed off shotguns was constitutional, in part, because:

> Although Fennell argued that the statute absolutely prohibited possession of any "short-barreled shotguns," the court observed that the questioned statute "***does not completely ban a class of weapons*** protected by the Constitution"; rather, the statute allowed possession of any shotgun with a barrel length of 18 inches or greater.

The court also held that short-barreled rifles, short barreled shotguns and machine guns were weapons of crime and would not ordinarily be possessed by law abiding citizens and, therefore, could be banned. *Id.* at 691. This ruling is directly at odds with the claim that banning an entire class of arms is constitutional.

In *Morrison v. State*, 339 S.W.2d 529, 531-32 (Tex. Crim. App. 1960), the court held that a "machine gun is not a weapon commonly kept, according to the customs of the people and appropriate for open and manly use in self defense" and is "ordinarily used for criminal and improper purposes." *Id.* This ruling

cannot justify a ban on a "commonly kept" class of weapons with numerous legal purposes, including self-defense.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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