No. 07-290

In the Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

DICK ANTHONY HELLER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

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

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INTEREST OF THE UNITED STATES

Congress has enacted numerous laws regulating firearms. Those statutes include restrictions on private possession of types of firearms that are particularly susceptible to criminal misuse. The United States has a substantial interest in the constitutionality and effective implementation of those laws. The United States also is responsible for prosecuting adult defendants charged with violating D.C. Code § 22-4504(a) (prohibiting carrying of pistol without license), and has frequently prosecuted adults charged with violating D.C. Code § 7-2502.01(a) (prohibiting possession of unregistered firearms). See generally D.C. Code § 23-101(c)-(d).

STATEMENT

1. Congress has enacted numerous laws governing the sale, transportation, and possession of various categories of firearms.

a. Congress has generally prohibited the private possession of particularly dangerous types of firearms, including certain types of handguns. Possession of machineguns is generally prohibited by 18 U.S.C. 922(*o*), and the definition of "machinegun," see 18 U.S.C. 921(a)(23); 26 U.S.C. 5845(b), encompasses some weapons that fall within the D.C.-law definition of "pistol." See p. 4, *infra*. A similar restriction as to "semiautomatic assault weapon[s]" was in effect until 2004. See 18 U.S.C. 922(v)(1) (repealed 2004 pursuant to preexisting sunset provision). Federal law also restricts the possession of firearms—including handguns—that, under specified circumstances, are undetectable by metal detectors or x-ray machines. See 18 U.S.C. 922(p) (2000 & Supp. V 2005).

b. Federal law also restricts the possession of firearms by various categories of individuals whom Congress has deemed unfit to possess such weapons. The most frequently applied provision generally prohibits the possession of firearms by any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1). Section 922(g) also generally prohibits the possession of firearms by fugitives from justice; unlawful users of controlled substances; persons who have been adjudicated as mental defectives or committed to mental institutions; aliens illegally present within the United States; persons dishonorably discharged from the armed forces; persons who have renounced their United States citizenship; persons subject to restraining

orders that include a finding that the individual is a credible threat to the physical safety of an intimate partner or child; and persons convicted of misdemeanor crimes of domestic violence (unless such convictions have been expunged, etc.). 18 U.S.C. 922(g)(2)-(9).

In addition, Congress has prohibited the private possession of firearms at particular locations. See, *e.g.*, 18 U.S.C. 930 (2000 & Supp. V 2005) (federal government facilities); 40 U.S.C. 5104(e)(1)(A) (Supp. IV 2004) (Capitol Grounds and Capitol Buildings); 49 U.S.C. 46505(b)(1) ("concealed dangerous weapon" "when on, or attempting to get on, an aircraft").

c. Federal law also regulates the manufacture, sale, and importation of firearms. The Gun Control Act of 1968 (GCA), Pub. L. No. 90-618, 82 Stat. 1213, prohibits any person from engaging in the business of importing, manufacturing, or dealing in firearms without a license. See 18 U.S.C. 923 (2000 & Supp. V 2005); see also 18 U.S.C. 922(a) (2000 & Supp. V 2005). The GCA also substantially restricts the importation of firearms and prohibits the receipt of firearms imported in violation of law. See 18 U.S.C. 922(*l*).

d. In 2001, the Attorney General adopted the position that the Second Amendment protects an individual right to possess firearms for a lawful private purpose unrelated to service in a militia, and that such right—like other constitutional rights—is subject to reasonable restrictions. See U.S. Br. in Opp. at 19-20 n.3, *Emerson* v. *United States*, 536 U.S. 907 (2002) (No. 01-8780); *id.* at appendix (attaching Attorney General memorandum); U.S. Br. in Opp. at 5 n.2, *Haney* v. *United States*, 536 U.S. 907 (2002) (No. 01-8272). Consistent with that view and the Department's enforcement responsibilities, the Attorney General made clear that the United States

"can and will continue to defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws." Attorney General memorandum.

2. This case involves four related gun-control measures applicable only in the District of Columbia. First, D.C. Code § 7-2502.01(a) generally makes it unlawful for any person to possess an unregistered firearm within the District. Second, D.C. Code § 7-2502.02(a)(4), which was enacted by the D.C. City Council in 1976, generally bars the registration of any "[p]istol," which is defined as "any firearm originally designed to be fired by use of a single hand." D.C. Code § 7-2501.01(12). Together, those provisions effectively ban the private possession of handguns, with relatively minor exceptions not implicated here. Third, D.C. Code § 22-4504 prohibits carrying a pistol without a license. Fourth, D.C. Code § 7-2507.02 requires that all lawfully owned firearms—both pistols and long guns—must be kept "unloaded and disassembled or bound by a trigger lock or similar device unless [the] firearm is kept at [the registrant's] place of business."

3. Respondent is a District of Columbia special police officer who is permitted to carry a handgun while on duty as a guard at the Federal Judicial Center. Pet. App. 4a. Wishing to possess a handgun in his home for the purpose of self-defense, respondent applied for a registration certificate. *Id.* at 4a, 120a. Relying on D.C. Code § 7-2502.02(a)(4), the D.C. government denied that application. Pet. App. 4a, 120a. Respondent (along with five other plaintiffs whose claims are not at issue here) then filed suit in federal district court under 42 U.S.C. 1983, challenging the constitutionality of the D.C. laws discussed above. Pet. App. 4a, 71a.

Respondent alleged that he "presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by [petitioners'] active enforcement of unconstitutional policies." J.A. 51a. Respondent further alleged that the D.C. firearm provisions discussed above effectively prohibit "the private ownership and possession of handguns and functional firearms within the home" and therefore violate his rights under the Second Amendment. J.A. 57a. "At a minimum," he contended, "the Second Amendment guarantees individuals a fundamental right to possess a functional, personal firearm, such as a handgun or ordinary long gun (shotgun or rifle) within the home." J.A. 54a.

The district court granted petitioners' motion to dismiss the complaint. Pet. App. 71a-83a. The court held that the Second Amendment does not secure any "individual right to bear arms separate and apart from service in the Militia." *Id.* at 83a; see *id.* at 73a-83a. The court concluded that, "because none of the plaintiffs have asserted membership in the Militia, plaintiffs have no viable claim under the Second Amendment." *Id.* at 83a.

4. The court of appeals reversed. Pet. App. 1a-70a.

a. Looking to the text, context, and history of the Second Amendment, the court of appeals held that the Second Amendment protects an individual right to keep and bear firearms unrelated to militia operations. Pet. App. 12a-44a. The court held that the Second Amendment applies to legislation enacted by the D.C. City Council, reasoning that "the Bill of Rights are in effect in the District." *Id.* at 45a; see *id.* at 44a-48a. The court further held that, as applied to handgun possession in

the home, the District's handgun ban violates the Second Amendment. *Id.* at 48a-55a.

The court of appeals adopted a two-part test, under which a particular weapon is a Second Amendment "Arm[]" if it (i) bears a "reasonable relationship to the preservation or efficiency of a well regulated militia," and (ii) is "of the kind in common use at the time" the Second Amendment was adopted. Pet. App. 50a-51a (quoting *United States* v. *Miller*, 307 U.S. 174, 178, 179 (1939)). The court concluded that the handgun respondent sought to possess was covered under both of those prongs. *Id.* at 51a. The court rejected petitioners' contention that, because D.C. law allows respondent to possess other types of firearms, the ban on handguns does not violate the Second Amendment. *Id.* at 53a. The court explained: "Once it is determined—as we have done—that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." *Ibid.* The court further held that D.C. Code § 7-2507.02—the trigger-lock provision—is unconstitutional because it also "bars [respondent] from lawfully using a handgun for self protection in the home." Pet. App. 55a.[1]

b. Judge Henderson dissented. Pet. App. 56a-70a. She would have held that, because the District of Colum-

[1] The court of appeals observed that, because respondent did "not claim a legal right to carry a handgun outside his home," the court was not required to "consider the more difficult issue whether the District can ban the carrying of handguns in public, or in automobiles." Pet. App. 54a. The court also appeared to accept the legitimacy of D.C.'s requirement that privately-owned firearms be registered. The court observed that such registration requirements "might be thought consistent with a 'well regulated Militia'" because "[t]he registration of firearms gives the government information as to how many people would be armed for militia service if called up." *Id.* at 52a.

bia is not a "State" within the meaning of the Second Amendment, the Amendment does not apply to the District. See *id.* at 70a.

SUMMARY OF ARGUMENT

A. The court of appeals correctly held that the Second Amendment protects an individual right to possess firearms unrelated to militia operations. By its plain text, the Second Amendment secures a "right," a term that the Constitution consistently uses to refer to *individual* freedoms rather than state prerogatives. The text also makes clear that the right is not limited to members of a select body (like today's National Guard) but extends to "the people" generally. The Second Amendment's placement within the Bill of Rights, and its use of a phrase ("the people") that has acquired a settled meaning in surrounding constitutional provisions, reinforces the most natural reading of the Amendment's text.

The Second Amendment's prefatory language, which refers to the "necess[ity]" of a "well regulated Militia," does not negate the Amendment's operative guarantee. It was common in constitutional and statutory provisions at the time of the Framing for prefatory language to identify a goal or principle of wise governance narrower than the operative language used to achieve it. The logical connection between militia operations and a general right of private gun ownership was particularly clear when the Second Amendment was adopted, since the Framing-era "Militia" was not a select body like today's National Guard, but instead comprised the free white male citizenry of fighting age, whose members were expected to bring their own weapons when called to service.

B. Although the court of appeals correctly held that the Second Amendment protects an individual right, it did not apply the correct standard for evaluating respondent's Second Amendment claim. Like other provisions of the Constitution that secure individual rights, the Second Amendment's protection of individual rights does not render all laws limiting gun ownership automatically invalid. To the contrary, the Second Amendment, properly construed, allows for reasonable regulation of firearms, must be interpreted in light of context and history, and is subject to important exceptions, such as the rule that convicted felons may be denied firearms because those persons have never been understood to be within the Amendment's protections. Nothing in the Second Amendment properly understood—and certainly no principle necessary to decide this case—calls for invalidation of the numerous federal laws regulating firearms.

When, as here, a law directly limits the private possession of "Arms" in a way that has no grounding in Framing-era practice, the Second Amendment requires that the law be subject to heightened scrutiny that considers (a) the practical impact of the challenged restrictions on the plaintiff's ability to possess firearms for lawful purposes (which depends in turn on the nature and functional adequacy of available alternatives), and (b) the strength of the government's interest in enforcement of the relevant restriction. Cf. *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). Under that intermediate level of review, the "rigorousness" of the inquiry depends on the degree of the burden on protected conduct, and important regulatory interests are typically sufficient to justify reasonable restrictions. *Ibid.*

The court of appeals, by contrast, appears to have adopted a more categorical approach. The court's decision could be read to hold that the Second Amendment *categorically* precludes any ban on a category of "Arms" that can be traced back to the Founding era. If adopted by this Court, such an analysis could cast doubt on the constitutionality of existing federal legislation prohibiting the possession of certain firearms, including machineguns. However, the text and history of the Second Amendment point to a more flexible standard of review. Just as the Second Congress expressed judgments about what "Arms" were appropriate for certain members of the militia, Congress today retains discretion in regulating "Arms," including those with military uses, in ways that further legitimate government interests. Under an appropriate standard of review, existing federal regulations, such as the prohibition on machineguns, readily pass constitutional muster.

C. Given that the D.C. Code provisions at issue ban a commonly-used and commonly-possessed firearm in a way that has no grounding in Framing-era practice, those provisions warrant close scrutiny under the analysis described above and may well fail such scrutiny. However, when a lower court has analyzed a constitutional question under a standard different from the one adopted by this Court, the Court's customary practice is to remand to permit further consideration (and any appropriate fact finding or legal determinations) by the lower courts in the first instance. Several factors counsel in favor of following the Court's customary practice here, particularly the lack of case law from this Court fleshing out the potentially relevant doctrines and subdoctrines that might inform the Second Amendment analysis. Accordingly, after taking the foundational

steps discussed above, the better course would be to remand the case for further proceedings consistent with the Court's opinion.

ARGUMENT

As the court of appeals correctly held, the Second Amendment protects an individual right to possess firearms, including for private purposes unrelated to militia operations. But like other constitutional rights, that individual right is subject to reasonable restrictions, must be applied in light of context and history, and does not provide any protections to individuals who have never been understood to be within the Amendment's protections. The D.C. laws at issue here ban a commonly-used and commonly-possessed firearm. The ban is not unconstitutional just because it takes a categorical approach, but it is subject to heightened judicial scrutiny. This Court should affirm the court of appeals' threshold determination that the Second Amendment protects an individual right, but it should adopt a more flexible standard of review.

A. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT TO POSSESS FIREARMS, INCLUDING FOR PURPOSES UNRELATED TO MILITIA OPERATIONS

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Relying primarily on the Amendment's prefatory language, petitioners contend that the Second Amendment "protects the possession and use of guns only in service of an organized militia." Pet. Br. 8; see *id.* at 11-35. That is incorrect.

1. The Text Of The Second Amendment, And Its Placement Within The Bill of Rights, Strongly Indicate That The Amendment Protects An Individual Right

a. As the court of appeals explained, "[i]n determining whether the Second Amendment's guarantee is an individual one, or some sort of collective right, the most important word is the [term] the drafters chose to describe the holders of the right—'the people.'" Pet. App. 18a. The term "the people" would not naturally be used to refer to a select body like today's National Guard. Rather, as used in the Bill of Rights, it is a "term of art" that "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

The Second Amendment's use of the word "right" is likewise highly significant. "Setting aside the Second Amendment, not once does the Constitution confer a 'right' on any governmental entity, state or federal. Nor does it confer any 'right' restricted to persons in governmental service, such as members of an organized military unit." *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel 11 (Aug. 24, 2004) (*OLC Opinion*) <http://www.usdoj.gov/olc/secondamendment2.pdf>. Rather, the Constitution consistently uses the term to secure the rights of *individuals* as against governmental overreaching. See *ibid.* "It would be a marked anomaly if 'right' in the Second Amendment departed from such uniform usage throughout the Constitution." *Ibid.*

b. The placement of the Second Amendment within the Bill of Rights, and particularly within Amendments One to Four (Three to Six, as proposed), reinforces the

most natural reading of the Amendment's text. The surrounding Amendments are unambiguously intended, and have consistently been construed, to place particular spheres of individual private activity beyond the reach of the national government. See Pet. App. 22a; *OLC Opinion* 35-36. If the purpose of the Second Amendment were to define the respective prerogatives of the federal and state governments with regard to collective military action, its placement would be odd indeed. That is particularly so because the federal-state division of authority over militia operations had *already* been addressed by Article I, Section 8, Clause 16 of the Constitution, which had taken effect only 15 months before the Bill of Rights was submitted to the States for ratification. See *OLC Opinion* 39.

In addition, the Framers' use of the phrase "the people" in the Second Amendment is consistent with their use of that "term of art" in other provisions of the Bill of Rights—the First and Fourth Amendments—that unquestionably protect individual rights. See *Verdugo-Urquidez*, 494 U.S. at 265. The basic structure of the Second Amendment is also similar to other provisions, like the Fourth Amendment, that protect individual rights. While each individual right guaranteed by the Constitution must be interpreted in its own light, it is telling that the wording of the Second Amendment comports with other Bill of Rights provisions long understood to secure individual rights.

c. It is also significant that the Second Amendment refers, not to "*a* right of the people," but to "*the* right of the people to keep and bear Arms." The Framers' use of the definite article indicates that the Amendment was intended to secure a pre-existing right rather than to create a new one. See Pet. App. 20a. Because the gov-

ernment of England did not have a federal structure, and because the Constitution was intended to refashion the division of authority between the state and national governments, a constitutional provision defining the respective state and federal roles in the sphere of militia operations could not plausibly have been viewed as protecting some pre-existing right. Rather, the pre-existing right secured by the Second Amendment could only have been the common-law right to possess firearms, which was not limited to possession for collective purposes. See pp. 17-19, *infra*; Pet. App. 21a.

In *Robertson* v. *Baldwin*, 165 U.S. 275 (1897), this Court explained:

> The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the "Bill of Rights," were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; [and] the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons.

Id. at 281-282. The Court in *Robertson* thus read the Second Amendment in pari materia with other Bill of Rights provisions that indisputably protect individual freedoms, and it construed the Amendment as securing a pre-existing right "inherited from our English ancestors"—a right that was individual in nature and wholly unrelated to the distinct federal structure created by the Constitution.[2]

2. The Second Amendment's Reference To The Necessity Of A "Well Regulated Militia" Does Not Limit The Substantive Right That The Amendment Secures

In arguing that the individual right protected by the Second Amendment may be exercised only in connection with militia operations, petitioners emphasize that the Amendment's prefatory language "speaks only of militias, with not a hint about private uses of firearms." Br. 8. Petitioners' reliance on that language is misplaced.

a. The Second Amendment's prefatory language ("A well regulated Militia, being necessary to the security of a free State") reflects that the Framers regarded the furtherance of militia operations as a particularly salient benefit of private firearm ownership, but it does not limit the scope of the Amendment's substantive guarantee. While protection of the militia was a principal *object*

[2] The *Robertson* Court's reference to concealed-weapon bans as evincing the qualified nature of the Second Amendment right further indicates that Court did not view the basic right as limited to firearm possession in furtherance of militia service. If the Court had so understood the Second Amendment, it would presumably have identified the requirement of militia-relatedness as the major limiting principle. The *Robertson* Court's analysis likewise bolsters the court of appeals' conclusion that the Second Amendment, no less than other provisions of the Bill of Rights, is applicable to the District of Columbia. See note 5, *infra*.

of the Second Amendment, the Framers sought to achieve that goal not by defining a *new* right limited to active militia service or even to militia members, but by giving constitutional status to the *pre-existing* common-law "right of the people to keep and bear Arms." As Thomas M. Cooley explained, "[t]he meaning of the [Second Amendment] undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 297-298 (1898).

At the time the Second Amendment was adopted and ratified, moreover, "[i]t was quite common for prefatory language [in constitutional or statutory provisions] to state a principle of good government that was narrower than the operative language used to achieve it." Pet. App. 34a; see Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793, 814-821 (1998) (listing examples roughly contemporaneous with the Second Amendment); *OLC Opinion* 20. The interpretive significance of such prefatory language was well established. To the extent that a particular provision's substantive scope was otherwise unclear, the prefatory language could be used to resolve the ambiguity; but an introductory declaration or statement of purpose could not supersede the plain meaning of the operative guarantee. See *ibid.*; *United States* v. *Emerson*, 270 F.3d 203, 234 n.32 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002). Cf. *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (explaining that "statutory prohibitions often go beyond the principal evil" that motivated the law); *Gonzales* v. *Oregon*, 546 U.S. 243, 288 (2006) (find-

ing "no reason to think" that a statute's "*principal* concern" is its "*exclusive* concern").

b. If the term "well regulated Militia" is understood to refer to a select corps akin to today's National Guard, protection of "the right of the people to keep and bear Arms" might appear to be an extravagant means of furthering militia operations. See Antonin Scalia, *A Matter of Interpretation* 137 n.13 (1997) (explaining that, if the Second Amendment term "Militia" is construed to refer to a select body, the Amendment "produces a guarantee that goes far beyond its stated purpose"). The Framers, however, had a much broader conception of the militia. See, *e.g.*, Act of May 8, 1792 (Second Militia Act), ch. 33, § 1, 1 Stat. 271; Pet. App. 29a; *OLC Opinion* 27. As this Court has explained, "[t]he signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense." *United States* v. *Miller*, 307 U.S. 174, 179 (1939). The Court further explained that "ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Ibid.*

Given the composition of the militia and the manner of its armament at the time the Second Amendment was ratified, no sharp distinction could have been drawn between private and militia-related gun possession. While the Founding-era militia was not entirely coextensive with "the people" at large, extending the Second Amendment's substantive protections to the general populace is consistent with the scope of the surrounding provisions of the Bill of Rights and directly furthers militia

operations as well. There is consequently no reason to suppose that the Amendment's drafters intended either "Militia" or "the people" to be given anything other than its prevailing construction at the time the Amendment was adopted.[3]

c. In three related respects, the Framers regarded the individual right protected by the Second Amendment as central to the preservation of liberty.

First, the Framers' view that a "well regulated Militia" was "necessary to the security of a free State" was not based simply on a belief that the militia would be effective in preventing insurrection or invasion. In addition, many expressed profound concern that the obvious *alternative* mechanism for averting such dangers—a large standing army—would facilitate oppression by the federal government. Preservation of the militia was seen as a means of reducing the need and the rationale for such a force. See, *e.g.*, *Emerson*, 270 F.3d at 240, 272; *OLC Opinion* 66-67 (discussing, inter alia, amendment proposed by Virginia convention expressly linking

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[3] Under current federal law, the "militia of the United States" includes "all able-bodied males at least 17 years of age and * * * under 45 years of age" who are United States citizens or have declared their intention to become citizens, as well as female citizens who are members of the National Guard. 10 U.S.C. 311(a); see D.C. Code § 49-401 (defining D.C. militia). The requirements that each militia member procure appropriate weaponry, imposed by statute for the first century of the Republic, were repealed in 1901. See *Perpich* v. *DoD*, 496 U.S. 334, 341 (1990). The militia is now divided into the "organized militia," which consists of the National Guard and the Naval Militia, and the "unorganized militia," which includes all other members. 10 U.S.C. 311(b)(1) and (2). While membership in the militia no longer entails a legal obligation to possess firearms, militia members are potentially subject to being called to service in specified (albeit highly unusual) circumstances. See 10 U.S.C. 331, 332.

right to keep and bear arms with concerns over standing armies). As Alexander Hamilton explained, "[i]f the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force." *The Federalist No. 29*, at 183 (Clinton Rossiter ed. 1961).

Second, Framing-era discussions of the need for the Second Amendment frequently described an armed citizenry as a deterrent to abusive behavior by the federal government itself. See, *e.g.*, *Emerson*, 270 F.3d at 237-240; Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 649 (1989). Justice Story stated that "[t]he right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them." Joseph Story, *Commentaries on the Constitution of the United States* § 1001, at 708 (1987). In that regard, the Framers frequently contrasted American society with the perceived tendency of European governments to disarm their populations in order to facilitate oppressive rule. See, *e.g.*, *The Federalist No. 46*, at 299 (James Madison); *Emerson*, 270 F.3d at 240 n.53; *OLC Opinion* 63 n.258.

Third, the Anglo-American common-law tradition recognized the importance of private firearm possession as a bulwark against private depredations. Thus, Blackstone identified the three "principal or primary" rights of English subjects as "the right of personal security, the right of personal liberty, and the right of private property." 1 William Blackstone, *Commentaries* *129.

Blackstone further recognized, however, that the recognition of those principal rights would be illusory "if the constitution had provided no other method to secure their actual enjoyment." *Id.* at *140-*141. Among the "auxiliary" rights that Blackstone recognized as necessary to preserve those primary rights was the right of English subjects "of having arms for their defence, suitable to their condition and degree, and such as are allowed by law." *Id.* at *143-*144. Blackstone described the right to possess arms as "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. Thus, by constitutionalizing the pre-existing common-law right to possess firearms, the Second Amendment served in part to protect the individual's lawful right to possess a firearm for self-defense.[4]

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[4] In *Miller*, the Court observed that the Second Amendment should be "interpreted and applied" in light of what the Court described as the "obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces." 307 U.S. at 178. Applying that principle, the Court rejected a challenge to federal restrictions on the licensing and control of sawed-off shotguns given "the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." *Ibid.* Although the Court did not expressly address the issue, the decision in *Miller* is consistent with the conclusion that the Second Amendment confers an individual right of some character. Indeed, the Court considered Miller's Second Amendment claim without suggesting, much less holding, that he had no basis to press such a claim. In addition, the Court did not place any significance on whether the underlying indictment in *Miller* alleged that the defendants were involved in any military or militia service (which it did not). See *Emerson*, 270 F.3d at 224-227. Although the Court's decision (following the government's own brief in *Miller*) supports a mode of analysis that

B. LIKE RIGHTS CONFERRED BY SURROUNDING PROVISIONS OF THE BILL OF RIGHTS, THE INDIVIDUAL RIGHT GUARANTEED BY THE SECOND AMENDMENT IS SUBJECT TO REASONABLE RESTRICTIONS AND IMPORTANT EXCEPTIONS

For the reasons stated above, the court of appeals was correct in concluding that the Second Amendment protects an individual right. As the court of appeals further recognized (Pet. App. 51a), however, it does not follow that "the government is absolutely barred from regulating the use and ownership of pistols" or other firearms. See *Robertson*, 165 U.S. at 281 (The various liberties secured by the Bill of Rights "ha[ve], from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case."). Rather, the Second Amendment, properly construed, allows for reasonable regulation of firearms, must be applied in light of context and history, and does not provide any protections to certain individuals, such as convicted felons, who have never been understood to be within the Amendment's coverage. In those respects, the Second Amendment right is like rights conferred by the surrounding provisions of the Bill of Rights and enjoyed by individuals. Given the unquestionable threat to public safety that unrestricted private firearm posses-

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interprets the Second Amendment in light of the relationship between the regulated firearms and "the preservation or efficiency of a well regulated militia" (*ibid.*), the Court did not express any holding on whether or to what extent the Amendment applies only to "militia related" activities. Accordingly, although the Court's discussion of the Second Amendment in *Miller* differs in some respects from the analysis described in this brief, *Miller* presents no precedential barrier to adopting that approach.

sion would entail, various categories of firearm-related regulation are permitted by the Second Amendment under that constitutional understanding, as illustrated by the existing federal laws regulating firearms.[5]

1. Congress Has Authority To Prohibit Particular Types Of Firearms, Such As Machineguns

a. While the court of appeals correctly recognized that the Second Amendment both secures individual rights and allows "reasonable restrictions" (Pet. App. 51a), it appears to have adopted a categorical test. The court of appeals concluded that, "[o]nce it is determined * * * that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." Pet. App. 53a. Such a categorical approach would cast doubt on the constitutionality of the current federal machinegun ban, as well as on Congress's general authority to protect the public safety by identifying and proscribing particularly dangerous weapons. See p. 2, *supra*. Indeed, the court's unqualified determination that "handguns are 'Arms,'" Pet. App. 53a; see *id.* at 51a, does not exclude certain automatic weapons covered

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[5] The court of appeals correctly concluded that the Second Amendment—like the surrounding provisions of the Bill of Rights—applies to the District of Columbia. See Pet. App. 44a-48a; *O'Donoghue* v. *United States*, 289 U.S. 516, 539-541 (1933); *Robertson*, 165 U.S. at 281-282. Although the Second Amendment may have limited or no application to special federal enclaves such as military bases, where the government has always enjoyed greater leeway in regulating the private conduct of individuals who voluntarily enter, that rationale would not extend to the whole of the District of Columbia. Indeed, petitioners' argument (Br. 35-40) that the District is unique compared to the States when it comes to the Second Amendment is seriously undercut by the fact that the District has its own militia statute. D.C. Code § 49-401; see Act of Mar. 3, 1803, ch. 20, 2 Stat. 215 (providing for organization of D.C. militia).

by 18 U.S.C. 922(*o*) that fall within the D.C.-law definition of "pistol." And because automatic rifles like the M-16 are now standard-issue military weapons for rank-and-file soldiers, the court's reference to the "lineal descendant[s]" of the weapons used in Founding-era militia operations, see Pet. App. 51a, on its face would cover machineguns and other firearms that represent vast technological improvements over the "Arms" available in 1791. See *ibid.*

b. The text and history of the Second Amendment strongly indicate that the Amendment does not *categorically* foreclose legislative prohibitions on particular categories of "Arms." The question remains whether the restriction is reasonable. The right protected by the Second Amendment is a right to "keep and bear *Arms*," not a right to possess any specific type of firearm. A ban on a type or class of firearms, such as machineguns, is not unconstitutional just *because* it is categorical. A number of factors—including whether a particular kind of firearm is commonly possessed, poses specific dangers, or has unique uses, as well as the availability of functional alternatives—are relevant to the constitutional analysis.

History also supports that conclusion. Because Founding-era militia members were expected to procure their own firearms and to bring those guns when called to service, see p. 16, *supra*, the militia could not have been "well regulated" if individuals had unrestricted freedom to choose *which* "Arms" they would possess. Rather, it was essential to the effective operation of the militia as then constituted that government officials be authorized to specify the weapons that individual members would be required to procure and maintain. The Amendment's text and history thus suggest that the

substantive right secured did not guarantee an unfettered *choice* of "Arms."

That inference is strongly reinforced by the Second Militia Act of 1792. Because of its vintage, that Act provides significant contemporaneous evidence of the Framers' views as to the scope of the right that the Second Amendment secures. In addition to requiring (with limited exceptions) that all "free able-bodied white male citizen[s]" between 18 and 45 years old be enrolled in the militia, the Second Militia Act prescribed in considerable detail the type and quantity of firearms and ammunition that different classes of militia members were to procure and bring when called to service. See Second Militia Act, § 1, 1 Stat. 271-272; Pet. App. 29a, 49a-50a. Congress's enactment of that statute confirms that the Framers did not understand the right secured by the Second Amendment to include unrestricted freedom of choice among "Arms." Indeed, Congress could certainly have made clear—consistent with the Second Amendment—that certain "Arms" would be disruptive of a "well regulated Militia" if wielded by certain classes of militia members and so should not be brought when the militia was called to service.

Other historical evidence is to the same effect. Blackstone described the right secured by the English constitution as the right of English subjects "of having arms for their defence, suitable to their condition and degree, and *such as are allowed by law*." 1 Blackstone, *supra*, *143-*144 (emphasis added). Blackstone further characterized the right as "a public allowance, *under due restrictions*, of the natural right of resistance and self-preservation." *Id.* at *144 (emphasis added).

Accordingly, when a law directly limits or prohibits the private possession of "Arms" in a way that has no

grounding in Framing-era practice, the Second Amendment requires that the law be subject to heightened judicial scrutiny, but not to the type of per se rule suggested by the court of appeals. See Pet. App. 53a.[6] In conducting the appropriate inquiry, the reviewing court should consider (a) the practical impact of the challenged restrictions on the plaintiff's ability to possess firearms for lawful purposes (including the nature and practical adequacy of the available lawful alternatives), and (b) the strength of the government's interest in enforcement of the relevant restriction. Cf. *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). Under that approach, the "rigorousness of [the] inquiry" (*ibid.*) depends on the extent to which a law burdens Second Amendment rights, and important regulatory interests are typically sufficient to justify reasonable restrictions on such rights. See *ibid.*; *Timmons* v. *Twin City Area New Party*, 520 U.S. 351, 358-359 (1997).

The federal prohibitions on the possession of particular types of firearms, such as machineguns, readily pass such scrutiny. Those prohibitions are carefully targeted

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[6] The difference between the court of appeals' standard and the standard advocated here can be analogized to the difference in approach between the concurring and majority opinions in *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334 (1995). While the concurrence surveyed the historical evidence of anonymous electioneering during the Founding era and advocated a categorical rule of protection, see *id.* at 358-367 (Thomas, J., concurring in the judgment), the Court invalidated the law by applying a more broadly applicable standard of review (there, strict scrutiny) that would allow some restrictions on anonymous electioneering speech, see *id.* at 348-353, 357. Whatever the merits of the competing views in *McIntyre*, a per se rule is clearly out of place in the Second Amendment context in light of the co-existence of the Second Amendment and reasonable restrictions on firearms dating back to the Founding. See, *e.g.*, *Robertson*, 165 U.S. at 281-282.

to firearms that have little or no legitimate private purpose, they permit possession for lawful purposes of a broad class of firearms other than those regulated, and the government's interest in regulating firearms like the machinegun to protect the public safety is paramount.

2. Congress Has Substantial Authority To Ban The Private Possession Of Firearms By Persons Whom Congress Deems Unfit To Keep Such Weapons

Heightened judicial scrutiny is not appropriate forall laws regulating the possession of firearms. As is true for other constitutional rights, in some contexts the underlying right has little or no application at all (*e.g.*, "fighting words" are not entitled to First Amendment protection). As the court of appeals recognized, some individuals, like convicted felons, simply do not enjoy Second Amendment rights. Pet. App. 52a. Because such individuals fall outside the protection of the Second Amendment, a law restricting gun ownership by felons need not satisfy the heightened scrutiny appropriate for laws prohibiting the possession of categories of guns by law-abiding citizens.

Abundant historical evidence makes clear that Section 922(g)(1)'s ban on firearm possession by felons—by far the most frequently applied of the prohibitions currently contained in 18 U.S.C. 922(g) (see pp. 2-3, *supra*)—is consistent with the Framers' intent. "Felons simply did not fall within the benefits of the common law right to possess arms. * * * Nor does it seem that the Founders considered felons within the common law right to arms or intended to confer any such right upon them. All the ratifying convention proposals which most explicitly detailed the recommended right-to-arms amendment excluded criminals and the violent." Don B. Kates,

Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 266 (1983); see, *e.g.*, Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okla. L. Rev. 65, 96 (1983) ("Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from possessing firearms]."). [7] The courts of appeals in the instant case and *Emerson*, which both correctly recognized that the Second Amendment secures an individual right, also recognized that the right simply does not extend to felons. See Pet. App. 52a; *Emerson*, 270 F.3d at 261 ("[I]t is clear that felons * * * may be prohibited from possessing firearms."). The validity of Section 922(g)(1) thus does not depend on the satisfaction of heightened scrutiny or on any empirical showing.

3. Congress Has Authority To Regulate The Manufacture, Sale, And Flow Of Firearms In Commerce

Licensing requirements such as those contained in the GCA (see p. 3, *supra*) generally do not present the same Second Amendment concerns as a direct prohibition on the possession of firearms by individuals. The Amendment's text and history suggest that the Framers were more concerned with securing the right of individuals to "keep and bear Arms" than with limiting the gov-

[7] The current federal ban on possession of firearms by any person "who has been adjudicated as a mental defective or who has been committed to a mental institution," 18 U.S.C. 922(g)(4), likewise has a precise analog in Framing-era practice. And, of course, to the extent that federal law limits access to firearms by certain groups in the absence of a Framing-era analog, those restrictions would be subject to scrutiny under the Second Amendment, but would not be barred by any categorical rule.

ernment's ability to regulate the manufacture or sale of such arms. Government restrictions on the importation and interstate transportation of firearms, see p. 3, *supra*, are even further afield from the Framers' concerns. In addition, as in the context of other individual rights, regulation of firearm-related *commercial* activities may present distinct constitutional considerations. See, *e.g.*, *New York* v. *Burger*, 482 U.S. 691 (1987) (recognizing exception to Fourth Amendment warrant requirement for administrative searches of certain business premises); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that commercial speech is entitled to reduced protection under the First Amendment). Accordingly, there is no basis here for questioning the constitutionality of the GCA's licensing provisions or federal limits on importation or transport of firearms. In any event, this case, which involves private possession, provides no opportunity for the Court to expound on the different principles that might govern efforts to regulate the commercial trade in firearms.

C. THE COURT SHOULD REMAND THIS CASE TO THE LOWER COURTS TO PERMIT THEM TO ANALYZE THE CONSTITUTIONALITY OF THE D.C. LAWS AT ISSUE UNDER THE PROPER CONSTITUTIONAL INQUIRY

As discussed, a general prohibition on the possession of a type or class of firearms is subject to heightened judicial scrutiny that balances the impact of the challenged restrictions on protected conduct and the strength of the government's interest in enforcement of the relevant restriction. The greater the scope of the prohibition and its impact on private firearm possession, the more difficult it will be to defend under the Second Amendment.

Cf. *Burdick*, 504 U.S. at 434. Under that analysis, the D.C. ban may well fail constitutional scrutiny. The court of appeals appears to have applied instead a categorical rule, and the best course would be to remand for application of the proper standard of review in the first instance.

1. The heightened judicial scrutiny described above is materially different from the more categorical approaches taken by the district court and the court of appeals. The district court dismissed respondent's complaint based on the erroneous view that the Second Amendment does not secure any individual right "separate and apart from service in the Militia," Pet. App. 83a, and thus did not engage in intermediate scrutiny or indeed in *any* consideration (or fact-finding) on the constitutionality of the D.C. laws. The court of appeals appears to have erred in the opposite direction. Based on its determination that "handguns are 'Arms' referred to in the Second Amendment," the court of appeals appears to have ruled categorically that "it is not open to the District to ban them." *Ibid.*; see pp. 21-22, *supra*.

2. When this Court announces a legal standard significantly different from that applied by the court of appeals, the preferred course generally is to remand the case to allow the lower courts to apply the correct standard in the first instance. See, *e.g.*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237 (1995) ("Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced."); *O'Leary* v. *Brown-Pac.-Maxon, Inc.*, 340 U.S. 504, 508 (1951) ("When this Court determines that a Court of Appeals has applied an incorrect principle of law, wise judicial administration

normally counsels remand of the cause to the Court of Appeals with instructions to reconsider the record."). That exercise of restraint is simply an application of the principle that the Court ordinarily "do[es] not decide in the first instance issues not decided below." *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

Adherence to the Court's customary practice would be appropriate here. First and foremost, the Court's resolution of the extent to which the Second Amendment secures an individual right and, if so, its identification of the appropriate standard of review will be a substantial constitutional undertaking. Few issues in constitutional law have generated more historical research and scholarly comment, and of course the ratio of such historical and scholarly comment to extant Supreme Court doctrine has no parallel. Unlike most of the surrounding provisions of the Bill of Rights, there is scant case law interpreting the scope of the Second Amendment, much less precedent fleshing out and applying various principles or sub-doctrines giving effect to that right, as this Court has developed in other contexts. This Court's most extensive treatment of the Second Amendment is contained in a five-page discussion in an opinion issued nearly 70 years ago, which lacks any extended analysis or explication of Second Amendment rights. *Miller*, *supra*. Much of petitioners' briefing, and presumably an even greater percentage of amicus filings, will concentrate on these threshold issues.

If the Court takes the foundational steps discussed above, there would be virtue in remanding the case for application of a proper standard of review and permitting Second Amendment doctrine to develop in an incremental and prudent fashion as is necessary to decide particular cases that may arise. Allowing lower courts

to develop doctrines to address issues concerning the scope of the Second Amendment, its application to a variety of circumstances, and the relevance of particular historical materials has much to recommend it. When lower courts differ as to the proper resolution of concrete and particularized disputes, the Court can grant plenary review and develop the law incrementally, as it does in other contexts. On the other hand, broad-based pronouncements in the context of adjudicating the details of a law that is far from typical could unduly skew the future course of Second Amendment adjudication.

3. Applying the heightened judicial scrutiny described above to the specific claims raised by respondent might warrant consideration of additional legal or factual issues that the court of appeals did not need to reach under its analysis. In contending that the challenged D.C. laws unconstitutionally prevent him from possessing functional firearms for personal self-defense in the home, respondent has focused throughout this litigation on the *combined effect* of the handgun ban and the trigger-lock provision. See J.A. 54a (complaint) (alleging that the challenged D.C.-law provisions violate respondent's Second Amendment "right to possess a functional, personal firearm, such as a handgun *or* ordinary long gun (shotgun or rifle) within the home") (emphasis added); J.A. 57a-58a; Br. in Opp. 2, 18-23 (emphasizing that respondent's challenge is to combined effect of D.C. laws on handguns *and* long guns). The determination whether those laws deprive respondent of a functional firearm depends substantially on whether D.C.'s trigger-lock provision, D.C. Code § 7-2507.02, can properly be interpreted (as petitioners contend, see Br. 56) in a manner that allows respondent to possess a func-

tional long gun in his home.[8] And if the trigger-lock provision can be construed in such a manner, the courts below would be required to address the factual issue—not fully explored during the prior course of the litigation—whether the firearms that *are* lawfully available to respondent are significantly less suited to the identified lawful purpose (self-defense in the home) than the type of firearm (*i.e.*, a handgun) that D.C. law bars respondent from possessing.[9]

To the extent necessary, further consideration of those questions should occur in the lower courts, which would be in the best position to determine, in light of this Court's exposition of the proper standard of review, whether any fact-finding is necessary, and to place any

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[8] The court of appeals suggested that, because D.C. Code § 7-2507.02 does not expressly authorize use of a firearm even in lawful self-defense in the home, respondent could not lawfully remove a trigger-lock and render a firearm functional even in response to an imminent threat. See Pet. App. 55a. Under established D.C.-law principles, however, the absence of an explicit self-defense exception within a particular prohibitory statute is not, standing alone, a proper ground for inferring that the defense is unavailable. See, *e.g.*, *Hernandez* v. *United States*, 853 A.2d 202, 205-207 (D.C. 2004) (reversing conviction for aggravated assault because trial court erroneously failed to instruct jury on right of self-defense). And, of course, the normal canon of construction is to construe statutes in a manner that *avoids* constitutional problems.

[9] The practical adequacy of long guns as a means of self-defense within the home will likely vary from individual to individual. Some disabled persons, as well as some individuals with less than average physical strength, might have particular difficulty using rifles or shotguns. Respondent himself has not alleged, however, that he is unable to use a long gun effectively. To the contrary, he has alleged that he owns long guns and seeks to use them for self-defense. J.A. 51a. The record compiled to this point does not appear to shed light on the question whether, and to what extent, long guns provide a functionally adequate alternative to handguns for self-defense in the home.

appropriate limits on any evidentiary proceedings. Moreover, even if the existing record proved to be adequate, initial examination of those issues is typically better reserved for the lower courts. Cf., *e.g.*, *Merck KGaA* v. *Integra Lifescis. I, Ltd.*, 545 U.S. 193, 208 (2005).[10]

CONCLUSION

The Court should affirm that the Second Amendment, no less than other provisions of the Bill of Rights, secures an individual right, and should clarify that the right is subject to the more flexible standard of review described above. If the Court takes those foundational steps, the better course would be to remand.

Respectfully submitted.

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[10] If the court of appeals ultimately holds that some or all of the challenged D.C.-law provisions are unconstitutional under the correct standard of review, a remand will also give that court the opportunity to state more precisely the scope of its remedial holding. With respect to D.C. Code § 22-4504(a), which prohibits the carrying of a pistol without a license, the court of appeals stated that it was declaring the law invalid only as applied to carriage within the home and was not addressing the question "whether the District can ban the carrying of handguns in public, or in automobiles." Pet. App. 54a. With respect to the other challenged provisions, however, the court did not make clear whether it was declaring the laws invalid on their face or only as applied to some particular set of circumstances.

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