

No. 07-290

IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

THOMAS C. GOLDSTEIN
CHRISTOPHER M. EGLESON
Akin Gump Strauss Hauer
& Feld LLP
1333 New Hampshire
Avenue, NW
Washington, DC 20036

WALTER DELLINGER
MATTHEW M. SHORS
MARK S. DAVIES
BRIANNE J. GOROD*
JOSEPH BLOCHER*
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006

* *Not admitted in D.C.;
supervised by principals of
the firm*

PETER J. NICKLES
Interim Attorney General
TODD S. KIM
Solicitor General
Counsel of Record
DONNA M. MURASKY
Deputy Solicitor General
LUTZ ALEXANDER PRAGER
Office of the Attorney
General for the District
of Columbia
441 Fourth Street, NW
Washington, DC 20001
(202) 724-6609

ROBERT A. LONG
JONATHAN L. MARCUS
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004

Attorneys for Petitioners

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE SECOND AMENDMENT PROTECTS ONLY MILITIA-RELATED FIREARM RIGHTS.....	1
A. The Amendment’s Text, History, And Purposes All Support A Militia- Related Right.	3
B. The Theories Offered By Respondent And The United States Are Contrary To The Amendment’s Text, History, And Purposes.	10
II. LEGISLATION CONFINED TO THE DISTRICT, LIKE OTHER STATE AND LOCAL GUN REGULATION, DOES NOT INFRINGE THE SECOND AMENDMENT.....	16
III. THE DISTRICT’S LAWS ARE IN ANY EVENT PERMISSIBLE REGULATIONS OF RESPONDENT’S ASSERTED RIGHTS.....	19
A. Respondent’s Proposed Rules Are Insupportable.	20
B. The District’s Laws Satisfy The United States’ Proposed Standard	24
C. The District’s Laws Are Reasonable And Should Be Upheld.	27
CONCLUSION.....	29

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Andrews v. United States</i> , 922 A.2d 449 (D.C. 2007).....	26
<i>Arkansas v. Buzzard</i> , 4 Ark. 18 (1842)	6
<i>Ayotte v. Planned Parenthood</i> , 546 U.S. 320 (2006).....	29
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992).....	23
<i>D.C. Common Cause v. District of Columbia</i> , 858 F.2d 1 (D.C. Cir. 1988).....	18
<i>District of Columbia v. Carter</i> , 409 U.S. 418 (1973).....	18
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003).....	4
<i>Graham v. John Deere Co.</i> , 383 U.S. 1 (1966).....	4
<i>Johnson v. California</i> , 543 U.S. 499 (2005).....	23
<i>Lewis v. United States</i> , 445 U.S. 55 (1980).....	22
<i>Louisiana v. Smith</i> , 11 La. Ann. 633 (1856)	6
<i>McIntosh v. Washington</i> , 395 A.2d 744 (D.C. 1978).....	28
<i>New York v. United States</i> , 505 U.S. 144 (1992).....	16
<i>O'Donoghue v. United States</i> , 289 U.S. 516 (1933).....	18

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Presser v. Illinois</i> , 116 U.S. 252 (1886).....	17
<i>Printz v. United States</i> , 521 U.S. 898 (1997).....	5
<i>Seegars v. Ashcroft</i> , 297 F. Supp. 2d 201 (D.D.C. 2004).....	18
<i>U.S. Term Limits, Inc. v. Thornton</i> , 514 U.S. 779 (1995).....	16
<i>United States v. Miller</i> , 307 U.S. 174 (1939).....	3, 12, 20
<i>United States v. Toner</i> , 728 F.2d 115 (2d Cir. 1984).....	24
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997).....	23

STATUTES

18 U.S.C. § 922.....	26
D.C. Code § 7-2502.02.....	26
D.C. Code § 49-404.....	18
D.C. Code § 49-405.....	18
D.C. Code § 49-409.....	18

CONSTITUTIONAL PROVISIONS

Pa. Const. art. VIII (1776).....	6
U.S. Const. art. I, § 8, cl.15.....	10
U.S. Const. art. I, § 8, cl.16.....	2, 6
U.S. Const. art. I, § 8, cl.17.....	25
U.S. Const. art. I, § 10, cl.3.....	17
U.S. Const. art. III, § 3.....	10

TABLE OF AUTHORITIES

(continued)

	Page(s)
U.S. Const. amend. II.....	<i>passim</i>
OTHER AUTHORITIES	
Joel P. Bishop, <i>Commentaries on the Law of Statutory Crimes</i> (1883)	6
William Blackstone, <i>Commentaries on the Laws of England</i> (1765).....	6, 14, 15
<i>The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins</i> (Neil H. Cogan ed., 1997).....	5
Saul Cornell, <i>The Original Meaning of Original Understanding: A Neo-Blackstonian Critique</i> , 67 Md. L. Rev. 150 (2007)	13
John Hart Ely, <i>Democracy and Distrust: A Theory of Judicial Review</i> 146 (1980).....	23
Federalist No. 43 (James Madison).....	25
Federalist No. 46 (James Madison).....	2, 12
Steven J. Heyman, <i>Natural Rights and the Second Amendment</i> , 76 Chi.-Kent L. Rev. 237 (2000)	15
Journals of the Continental Congress, 1774–1789	12
James Kent, <i>Commentaries on American Law</i> (1826).....	4, 6
Nathaniel Kozuskanich, <i>Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?</i> , 10 U. Pa. J. Const. L. 413 (2008).....	7

TABLE OF AUTHORITIES
(continued)

	Page(s)
Letter from George Mason to Martin Cockburn, <i>reprinted in</i> Kate Mason Rowland, <i>Life and Correspondence of George Mason</i> (1892)	11
Benjamin L. Oliver, <i>The Rights of an American Citizen</i> (1832)	6
Antonin Scalia, <i>Response, in A Matter of Interpretation: Federal Courts and the Law</i> (Amy Gutmann ed., 1997)	17
L.G. Schworer, <i>To Hold and Bear Arms</i> , 76 Chi.-Kent L. Rev. 27 (2000)	14, 15
Joseph Story, <i>Commentaries on the Constitution of the United States</i> (1833).....	2, 4, 6
Laurence H. Tribe, <i>Sanity and the Second Amendment</i> , Wall St. J., Mar. 4, 2008, at A16	17
Adam Winkler, <i>Fundamentally Wrong About Fundamental Rights</i> , 23 Const. Comment. 227 (2006)	23

ARGUMENT

This Court should reverse the decision below for any of three independent reasons. First, only the District's view that the Amendment protects a militia-related right makes sense of its language, history, and purposes. Second, the Amendment was enacted to preserve state autonomy from federal interference and imposes no limitation on the District's laws. Third, the Amendment does not, in any event, confer a right to possess the weapons of one's choosing. The District's decision to ban a particularly dangerous weapon while permitting access to other weapons, including rifles and shotguns, should be upheld.

I. THE SECOND AMENDMENT PROTECTS ONLY MILITIA-RELATED FIREARM RIGHTS.

When the Framers submitted the Constitution to state ratifying conventions, the ensuing political debate was one of the most divisive in American history. By proposing to transfer authority from state governments to a distant national government, the Constitution seemed (to some) to threaten the democratic principles upon which the states had governed themselves in the decade since independence.

In particular, some were alarmed by the Constitution's grant of powers to the national government to create a standing army and exercise substantial control over state militias. Many viewed a professional standing army as a threat to liberty, preferring to keep military force in the hands of "the people," assembled as citizen-soldiers, "fighting for their common liberties, and united and conducted by governments possessing their affections and confi-

dence.” Federalist No. 46 (James Madison). The militia—considered in this very real sense to be “the people”—would temporarily put aside their livelihoods to take up arms when called to defend their communities.

One clause of the Constitution was thus a lightning rod for criticism: Article I, § 8, cl.16, which gave Congress the power “to provide for organizing, arming, and disciplining, the Militia.” The notion that the distant national government could “provide for [the] . . . arming” (and thus effectively the “disarming”) of the militias became “a topic of serious alarm and powerful objection.” 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1201, at 84 (1833).

As its text makes clear, the Second Amendment directly responded to this grant of power. The Amendment prevents Congress from interfering with the right of the people of each state to arm a well-regulated militia composed not of professional soldiers, but of the people themselves.

Respondent and the United States offer competing readings of the Amendment which are not only unsupported by its text and history, but utterly at odds with both. Respondent’s proposed right of insurrection turns history on its head: states wanted to maintain control over the arming of their militias to defeat, not to promote, rebellion. And the United States’ reading engrafts onto the Amendment a free-standing personal liberty right unrelated to any state’s ability to maintain a militia.

The Amendment’s text and history make clear that the right the Amendment enshrines requires some connection to a state militia. The nature and

quality of the connection an individual must show to raise a successful challenge need not be resolved in this case. Respondent has not alleged—and cannot establish—*any* connection between his desire to own a handgun and a well-regulated militia.

A. The Amendment's Text, History, And Purposes All Support A Militia-Related Right.

The “declaration *and* guarantee” of the Amendment “must be interpreted and applied” “in view” of its “obvious purpose” of protecting state militias. *United States v. Miller*, 307 U.S. 174, 178 (1939) (emphasis added). The District’s reading gives meaning to every word of the Amendment and comports with its history and “obvious purpose.” *Id.*

1. The first half of the Amendment—“a well regulated Militia, being necessary to the security of a free State”—so plainly supports the District’s position that respondent, like the United States and the court below, is reduced to arguing that it must be given *no* operative effect whatsoever. Respondent’s Brief (RBr) 5; United States’ Brief (USBr) 14; PA34a-35a. But reading half the Amendment out of the text cannot be reconciled either with this Court’s repeated condemnation of interpretations that render constitutional language irrelevant, see Petitioners’ Brief (PBr) 17; Brief of Brady Center (BCBr) 6, or with the considerable attention the Framers focused on this language during the Amendment’s drafting, PBr27-29.

Respondent nevertheless contends that the Court should ignore the Amendment’s declaration, which he calls the “preamble,” because the second half of the Amendment is “clear and positive,” requiring no

further elaboration. See RBr5-8. But that misstates the rule of construction on which respondent relies. See, e.g., 1 Story, *supra*, § 459, at 443 (“[t]he importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded in all juridical discussions”). Giving effect to all of the Amendment’s language is especially vital here because the declaration is not a separate preamble, but an absolute clause within the Amendment itself. Brief of Linguists (LingBr) 14; BCB8-9; 1 James Kent, *Commentaries on American Law* 431-32 (1826).¹

2. In any event, respondent cannot show that the second half of the Amendment “clear[ly] and positive[ly]” supports his position. Respondent cannot explain why a non-militia right so “clear[ly]” protected by the second part of the Amendment has nevertheless been overlooked by multiple adverse precedents, including *Miller*. The United States confirms the lack of clarity by offering an interpretation that differs from both its own longstanding position, see Brief of Former Department of Justice Officials 9, and *Miller* itself, see USBr20 n.4 (noting that *Miller* “differs in some respects” from the United States’ position).

¹ Respondent suggests that the Copyright Clause also contains a meaningless “preamble,” but in *Graham v. John Deere Co.*, 383 U.S. 1 (1966), this Court held that this language is a “constitutional command” that “may not be ignored,” *id.* at 6. See also *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (Copyright Clause is “both a grant of power and a limitation” (quoting *Graham*, 383 U.S. at 6)); BCB7-10 (discussing state constitutions).

a. Respondent and the United States argue that the Amendment's use of "the right" shows that it is enforceable by individuals. RBr9-10; USBr11. The District agrees. *Cf. Printz v. United States*, 521 U.S. 898, 918 (1997) (structural rights may be enforced by individuals). But that says nothing about *what* right individuals may enforce.

Nor does it advance respondent's position to argue that the phrase "*the right*" must be read to refer to some pre-existing right. See RBr18; see also USBr12. The right of the people to keep and bear arms in connection with militia service was a pre-existing right, recognized by states prior to the Founding in an effort to provide for their defense. Massachusetts and North Carolina, for instance, recognized the right of the people to "keep and bear arms for the common defense" and "to Bear Arms, for the Defense of the State." CertPet12; see also PBr30-31 (Delaware, Maryland, Virginia); PBr13 & n.1; Brief of American Jewish Committee (AJCBr) 9; Brief of Historians (HBr) 10-11. By contrast, *no* state recognized a right to "bear Arms" for private purposes. PBr30-31; HBr10. Contrary to respondent's suggestion that Pennsylvania protected a private right to arms, RBr12, its constitution separately protected hunting (without any mention of the right to "bear arms," HBr10 n.3), and the provision protecting the right to "bear arms for the defense of themselves and the State" encompassed only the right to engage in military defense on behalf of the community, PBr31. That is proven by its conscientious objector clause, which used the phrase "bearing arms" to refer exclusively to military service. See *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 184 (Neil H. Cogan ed., 1997).

The Second Amendment was enacted precisely because Anti-Federalists feared that the Constitution's Militia Clauses, which authorize Congress to "organiz[e], arm[], and disciplin[e], the Militia," U.S. Const. art. I, § 8, cl.16 (emphasis added), threatened this pre-existing militia-related right. As George Mason explained at the Virginia Ratifying Convention, "[t]he militia may here be destroyed . . . by rendering them useless—by disarming them." PA24; see also AJCBr15-17, 80a. The Amendment directly and proportionately responded to these concerns by protecting the right of the people to be armed in connection with state militias.²

Respondent suggests that it is "strange" to limit "the right" to militia-related conduct entailing a duty to "obey orders." RBr10. But "rights" and "duties" were often linked at the Founding. See, e.g., 1 Kent, *supra*, at 397-98; 2 *id.* 33-63; 1 William Blackstone, *Commentaries on the Laws of England* *119-23, *157, *237-38, *243-44 (1765); Pa. Const. art. VIII (1776). Respondent's authorities recognize that the "right" at issue involved the concomitant duty to defend the new republic. RBr13 ("The constitutions of most of our States assert" that it is the people's "right *and duty* to be at all times armed" (quoting Thomas Jefferson) (emphasis added)); see also HBr18.

² Nineteenth-century scholars and jurists also accepted the principle that the Amendment protects a militia-related right. See, e.g., CertReply3 n.3; 3 Story, *supra*, § 1890, at 746; Benjamin L. Oliver, *The Rights of an American Citizen* 176 (1832); Joel P. Bishop, *Commentaries on the Law of Statutory Crimes* § 792, at 497-98 (1883); *Louisiana v. Smith*, 11 La. Ann. 633, 633 (1856); *Arkansas v. Buzzard*, 4 Ark. 18, 19-20 (1842); BCB13 (discussing *Aymette v. State*, 21 Tenn. 154 (1840)).

b. Respondent contends that, because it uses the phrase “the people,” the Amendment’s guarantee must sweep more broadly than its declaration, which refers only to “a well regulated Militia.” In fact, the two phrases are tightly connected, because there was little space between “the people” and the “Militia” at the Framing. RBr15-16; USBr16. The militia consisted of citizen-soldiers drawn from the community, as opposed to full-time professional soldiers lacking allegiance to it. RBr15 (quoting Mason). “[T]he people” of the guarantee draws the same distinction: the Framers sought to distinguish the “Militia” from professional standing armies. BCB27-29. As Federal Farmer explained, the “Militia” were “the people, immediately under the management of the state governments.” AJCBr18-19; *see also* PBr20-21.

c. Most importantly, the phrase that defines the right—“to keep and bear Arms”—supports the District’s position. The Framers used that phrase—as opposed to the formulations upon which respondent relies, *see* RBr11 (“bear . . . guns”)—because this idiomatic expression referred to the use of arms in a military context. Every use of the phrase “bear Arms” in congressional debates from 1774 to 1821 supports the District’s military reading. PBr16; LingBr18-27; *see also* Nathaniel Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. Pa. J. Const. L. 413, 416 (forthcoming 2008) (*available at* <http://www.law.upenn.edu/journals/conlaw/articles/vol10num3/kozuskanich.pdf>). Madison’s original inclusion of a conscientious objector clause exempting “any person religiously scrupulous of bearing arms” confirms the point. LingBr23; BCB23-25. Respondent’s only response is that the

words “Arms” and “bear Arms” did not have a “uniquely” or “exclusive[ly]” military meaning at the Founding. RBr10-11. But even if that were so, respondent does not and could not argue that his reading of “keep and bear Arms” is the more natural one—let alone that the phrase “clear[ly] and positive[ly]” compels his non-military reading.

Seeking to elide that obvious problem, respondent argues that the words “keep” and “bear” “embody distinct concepts in the Second Amendment.” RBr10. But ripping the words “keep” and “bear” out of their context deprives them of their natural meaning when read as part of the Amendment as a whole.

Respondent’s claim that the word “keep” means “possess at home,” RBr10, for example, says nothing about *why* arms could be kept at home. The purpose of the word “keep” was to ensure citizen-soldiers access to “Arms” so that, when called into service, they could “bear” them. *See, e.g.*, LingBr27; BCB20-22&26. That was the meaning of “keep” in the most relevant authorities: contemporary state constitutions and militia laws. PBr16-17, 30. Respondent and his *amici* can point only to other statutes and contexts lacking the critical military language surrounding the word “keep” in the Second Amendment. RBr10-11; Brief of Cato Institute 12-14.

Respondent’s argument that “bear” means “carry” has similar shortcomings. RBr11. Stripped of its context, it suggests to respondent that the Framers meant to ensure the people could possess (“keep”) and carry (“bear”) arms without expressly protecting *any* particular uses, even in militia service—a reading fundamentally at odds with the text and history

of the Amendment. The District's reading, by contrast, makes sense of the Amendment as a whole.

3. The Amendment's drafting history confirms that the right the Framers protected was militia-related. PBr27-29. Respondent asserts that Madison meant to incorporate proposals by the New Hampshire ratifying convention and by *dissenters* in Pennsylvania and Massachusetts. RBr37-38. The suggestion that Madison intended to endorse those decidedly atypical formulations, while studiously avoiding their language, is untenable. AJCBr20; PBr32-33.

The Amendment's drafters considered various proposals that would have altered the delicate compromise struck in Article One, which gave Congress authority to ensure the militias were capable of performing their responsibilities, while preserving to the individual states some control over them. For example, the Framers found it unnecessary to include the language "for the common defence," which might have been read to suggest that the militias could only be used for the Union's "common defence," thereby limiting the power of the individual states to use their militias to suppress localized insurrections like Shays' Rebellion. PBr29.

Federalists also rejected a Virginia proposal that would have given the states authority to "organiz[e], arm[], and disciplin[e]" the militia because they were unwilling to change the body of the Constitution and feared the proposal would give too much power to the states, preventing the federal government from ensuring that the militia were sufficiently well-regulated and disciplined. See PBr29 n.6; HBr3-4; RBr36. But they adapted the alternative Virginia

