

No. 07-290

IN THE
Supreme Court of the United States

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

v.

DICK ANTHONY HELLER,
Respondent.

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

BRIEF FOR AMICUS CURIAE
AMERICAN LEGISLATIVE EXCHANGE
COUNCIL IN SUPPORT OF RESPONDENT

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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?

TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE TEXT OF THE SECOND AMENDMENT SUPPORTS THE RIGHT TO KEEP ARMS IN THE HOME	4
II. THE HISTORY OF THE ADOPTION OF THE SECOND AMENDMENT SUPPORTS THE RIGHT TO KEEP ARMS IN THE HOME	6
III. PAST AND CURRENT STATE GUARANTEES SUPPORT THE RIGHT TO KEEP ARMS IN THE HOME	9
CONCLUSION	37

TABLE OF AUTHORITIES

	<i>Page(s)</i>
CASES:	
<i>Andrews v. State</i> , 50 Tenn. (3 Heisk.) 165, 8 Am.Rep. 8 (1871)	11, 32
<i>Arnold v. City of Cleveland</i> , 67 Ohio St.3d 35, 616 N.E.2d 163 (1993)	11
<i>Aymette v. State</i> , 21 Tenn. (2 Hump.) 154 (1840) .	33
<i>Baca v. New Mexico Department of Public Safety</i> , 132 N.M. 282, 47 P.3d 441 (2002)	10, 27
<i>Barnett v. State</i> , 72 Or. App. 585, 695 P.2d 991 (1985)	10, 30
<i>Benjamin v. Bailey</i> , 234 Conn. 455, 662 A.2d 1226 (1995)	11
<i>Bleiler v. Chief, Dover Police Department</i> , 927 A.2d 1216 (N.H. 2007)	26
<i>Bliss v. Commonwealth</i> , 12 Ky. (2 Litt.) 90, 13 Am.Dec. 251 (1822)	11, 21
<i>In re Brickey</i> , 8 Ida. 597, 70 P. 609 (1902) . . .	11, 19
<i>City of Lakewood v. Pillow</i> , 180 Colo. 20, 501 P.2d 744 (1972)	10, 14, 37
<i>City of Las Vegas v. Moberg</i> , 82 N.M. 626, 485 P.2d 737 (Ct.App. 1971)	10, 27
<i>Crawford v. United Steelworkers, AFL-CIO</i> , 230 Va. 217, 335 S.E. 2d 828 (1985)	36

Table of Authorities continued

	<i>Page(s)</i>
<i>Glasscock v. City of Chattanooga</i> , 157 Tenn. 518, 11 S.W.2d 678 (1928)	10, 32
<i>Harmelin v. Michigan</i> , 495 U.S. 956 (1990)	9
<i>Jennings v. State</i> , 5 Tex. App. 298 (1878)	11, 34
<i>Junction City v. Mevis</i> , 226 Kan. 526, 601 P.2d 1145 (1979)	10, 21, 37
<i>Kalodimos v. Village of Morton Grove</i> , 103 Ill. 2d 483, 83 Ill. Dec. 308, 470 N.E. 2d 266 (1984)	19
<i>Mosby v. Devine</i> , 851 A.2d 1031 (R.I. 2004)	31
<i>Nunn v. State</i> , 1 Ga. (1 Kel.) 243 (1846)	11, 17-18
<i>Parker v. District of Columbia</i> , 478 F.3d 370 (D.C. Cir. 2007)	3, 11
<i>People v. Liss</i> , 406 Ill. 419, 94 N.E. 2d 320 (1950)	20
<i>People v. Nakamura</i> , 99 Colo. 262, 62 P.2d 246 (1936)	10, 14
<i>People v. Zerillo</i> , 219 Mich. 635, 189 N.W. 927 (1922)	10, 23
<i>In re Reilly</i> , 31 Ohio Dec. 364 (C.P. 1919)	10, 29
<i>Rinzler v. Carson</i> , 262 So.2d 661 (Fla 1972)	15
<i>Robertson v. Denver</i> , 874 P.2d 325 (Colo. 1994)	11
<i>Schubert v. DeBard</i> , 398 N.E. 2d 1339 (Ind. App. 1980)	20

Table of Authorities continued

	<i>Page(s)</i>
<i>Smith v. Ishenhour</i> , 43 Tenn. (3 Cold.) 214 (1866)	11, 33
<i>Solorio v. United States</i> , 483 U.S. 435 (1987)	4
<i>State ex rel. City of Princeton v. Buckner</i> , 180 W.Va. 457, 377 S.E.2d 139 (1988) ...	10, 36, 37
<i>State v. Bias</i> , 37 La. Ann. 259 (1885)	22
<i>State v. Blocker</i> , 291 Or. 255, 630 P.2d 824 (1981)	10, 30, 37
<i>State v. Delgado</i> , 298 Or. 395, 692 P.2d 610 (1984)	10, 30
<i>State v. Friel</i> , 508 A.2d 123 (Me. 1986)	22
<i>State v. Hamdan</i> , 264 Wis.2d 433, 665 N.W.2d 785 (2003)	10, 37
<i>State v. Huntly</i> , 25 N.C. (3 Ired.) 418, 40 Am. Dec. 416 (1843)	29
<i>State v. Johnson</i> , 16 S.C. 187 (1881)	32
<i>State v. Kerner</i> , 181 N.C. 574, 107 S.E. 222 (1921)	10, 28
<i>State v. Kessler</i> , 289 Or. 359, 614 P. 2d 94 (1980)	10, 30
<i>State v. McAdams</i> , 714 P.2d 1236 (Wy. 1986) ...	37
<i>State v. Mendoza</i> , 82 Haw. 143, 920 P.2d 357 (1996)	18

Table of Authorities continued

	<i>Page(s)</i>
<i>State v. Rosenthal</i> , 75 Vt. 295, 55 A. 610 (1903)	10, 35
<i>State v. Shelby</i> , 90 Mo. 302, 2 S.W. 468 (1886) .	24-25
<i>State v. Spiers</i> , 119 Wash.App. 85, 79 P.3d 30 (2003)	10, 36
<i>Taylor v. McNeal</i> , 523 S.W. 2d 148 (Mo. Ct. App. 1975)	24
<i>United States v. Emerson</i> , 270 F.3d 203 (5th Cir. 2001)	5
<i>Williams v. State</i> , 402 So. 2d 78 (Fla App. 1981)	15
<i>Wilson v. State</i> , 33 Ark. 557, 34 Am.Rep. 52 (1878)	11, 13
CONSTITUTIONS:	
U.S. Constitution:	
U.S. CONST. amend. II	<i>passim</i>
State Constitutions:	
ALA. CONST. art. I, § 27	12
ALASKA CONST. art. I, § 19	12
ARIZ. CONST. art. II, § 26	13
ARK. CONST. art. II, § 5	13

Table of Authorities continued

	<i>Page(s)</i>
ARK. CONST. OF 1836 art. II, § 21	13
ARK. CONST. OF 1861 art. I, § 21	13
ARK. CONST. OF 1864 art. II, § 21	13
COLO. CONST. art II, §13	14
CONN. CONST. art. I § 15	14
DEL. CONST. art. I § 20	14
FLA. CONST. art. I § 8	14-15
FLA. CONST. OF 1838, art. I, § 21	16
FLA. CONST. OF 1868, art. I, § 22	16
FLA. CONST. OF 1885, art. I, § 20	15-16
FLA. CONST. OF 1968, art. I, § 8	15
GA. CONST. art. I, § 1, ¶ VIII	16
GA. CONST. OF 1865, art. I, § 4	16
GA. CONST. OF 1868, art. I, § 14	16
HAW. CONST. art I, § 17	18
IDAHO CONST. art. I, § 11	18-19
IDAHO CONST. of 1889, art. I, § 11	19
ILL. CONST. art. I, § 22	19
IND. CONST. art. I, § 32	20
IND. CONST. of 1816, art. I, § 20	20
KAN. CONST. Bill of Rights, § 4	20-21

Table of Authorities continued

	<i>Page(s)</i>
KY. CONST. Bill of Rights § 1, ¶ 7	21
KY. CONST. OF 1792, art XII, cl. 23	21
KY. CONST. OF 1850, art XIII, § 25	21
LA. CONST. art. I, § 11	22
LA. CONST. OF 1879, art. 3	22
ME. CONST. art. I, § 16	22
ME. CONST. OF 1819, art. I, § 16	22
MASS. CONST. part 1, art. 17	23
MICH. CONST. art. I § 6	23
MICH. CONST. OF 1835, art. I, § 13	23
MICH. CONST. OF 1850, art XVIII, § 7	23
MISS. CONST. art. III, § 12	23-24
MISS. CONST. OF 1817, art. I, § 23	24
MISS. CONST. OF 1868, art. I, § 15	24
MO. CONST. art. I, §23	24
MO. CONST. OF 1820, art. XIII, § 3	25
MO. CONST. OF 1865, art. I, § 8	25
MONT. CONST. art. II, § 12	25
NEB. CONST. art. I, § 1	25-26
NEV. CONST. art. I, § 11, ¶ 1	26
N.H. CONST. part 1, art. 2-a	26

Table of Authorities continued

	<i>Page(s)</i>
N.M. CONST. art II, § 6	26
N.M. CONST. OF 1912, art. II, § 6	27
N.C. CONST. art. I, § 30	27
N.C. CONST. OF 1868, art. I, § 24	28
N.C. CONST. OF 1876, art. I, § 24	28
N.C. DECLARATION OF RIGHTS, 1776, § XVII	28
N.D. CONST. art. I, § 1	29
OHIO CONST. art. 1, § 4	29
OHIO CONST. OF 1802, art. VIII, § 20	29-30
OKLA. CONST. art. II, § 26	30
OR. CONST. art. I, § 27	30
PA. CONST. art 1, § 21	30
PA. DECLARATION OF RIGHTS, 1776, Cl. XIII	31
REPUB. TEX. CONST. OF 1836, DECLARATION OF RIGHTS, cl. 14	34
R.I. CONST. art. I, § 22	31
S.C. CONST. art. I, § 20	31
S.C. CONST. OF 1868, art. I, § 28	31-32
S.D. CONST. art VI, § 24	32
TENN. CONST. art. I, § 26	32
TENN. CONST. OF 1796, art. XI, § 26	33

Table of Authorities continued

	<i>Page(s)</i>
TENN. CONST. OF 1834, art. I, § 26	33
TEX. CONST. art. I, § 23	34
TEX. CONST. OF 1845, art. I, § 13	34
TEX. CONST. OF 1868, art. I, § 13	34
UTAH CONST. art. I, § 6	34-35
UTAH CONST. of 1895, art. I, § 6	35
VT. CONST. ch. I, art. 16	35
VA. CONST. art. I, § 13	35
WASH. CONST. art I, § 24	36
W. VA. CONST. art. III, § 22	36
WIS. CONST. art. I, § 25	36
WYO. CONST. art. I, § 24	37
STATUTES AND CODES:	
Calif. Govt. Code § 8571.5	4
D.C. Code §§ 7-2502.02(a)(4)	i
D.C. Code § 7-2507.02	i
D.C. Code § 22-4504(a)	i
720 Ill. Comp. Stat. 5/24-10	19
15 U.S.C. § 7901(a)(2)	3
42 U.S.C. § 5207	3

Table of Authorities continued

	<i>Page(s)</i>
LAW REVIEW ARTICLES:	
Robert Dowlut & Janet A. Knoop, <i>State Constitutions and the Right to Keep and Bear Arms</i> , 7 Okl. City Univ. L. Rev. 177 (1982) . . .	5
Nelson Lund, <i>D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?</i> , 18 Geo. Mason Univ. Civil Rights Law Journal 1001 (2008)	4
Glenn H. Reynolds, <i>The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought</i> , 61 Tenn. L. Rev. 647 (1994)	33
Eugene Volokh, <i>State Constitutional Rights to Keep and Bear Arms</i> , 11 Tex. Rev. of Law & Politics 191 (2006)	12
BOOKS:	
6 DICTIONARY OF AMERICAN BIOGRAPHY (Dumas Malone ed. 1933)	18
DOCUMENTS OF AMERICAN HISTORY (Henry Steele Commager, ed., 5th ed. 1949)	9
Richard Frothingham, HISTORY OF THE SIEGE OF BOSTON AND OF THE BATTLES OF LEXINGTON, CONCORD AND BUNKER HILL (6th ed. 1903) . .	9-10
Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS (Yale Univ. Press 1999)	6-7

Table of Authorities continued

	<i>Page(s)</i>
Joyce Lee Malcolm, <i>TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT</i> (Harvard University Press 1994)	7
<i>THE STORY OF GEORGIA</i> (Am. Historical Society 1938)	18
Laurence H. Tribe, <i>I AMERICAN CONSTITUTIONAL LAW</i> (Foundation Press 2000)	8
OTHER AUTHORITIES:	
ABC News Poll of May 8-12, 2002	3
Gallup Poll of October 9-12, 2006	3
<i>Judge Lumpkin In Memoriam</i> , 36 Ga. 19 (1867)	18

STATEMENT OF INTEREST OF AMICUS CURIAE¹

Mission Statement

The American Legislative Exchange Council's mission is to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a non-partisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government and the general public. The District of Columbia handgun ban is inconsistent with this mission statement.

Operational Strategy

- To promote the principles of federalism by developing and promoting policies that reflect the Jeffersonian principles that the powers of government are derived from, and assigned to, first the People, then the States, and finally the National Government.
- To enlist state legislators from all parties and members of the private sector who share ALEC's mission.
- To engage in an ongoing effort to promote Jeffersonian principles among elected officials, the

¹ Rule 37.6 notice. No counsel for any party authored this brief in whole or in part. No counsel for a party or party made a financial contribution for the preparation or submission of this brief. Funding for printing and submission of this brief was provided by NRA Civil Rights Defense Fund. This brief is filed with the written consent of all parties, reflected in letters filed by the parties with the clerk. Amicus complied with the conditions of those consents by providing advance notice of its intention to file this brief.

private sector, and the general public, for the purpose of enacting substantive and genuine legislative reforms consistent with the ALEC mission.

- To conduct a policy making program that unites members of the public and private sector in a dynamic partnership to support research, policy development, and dissemination activities.
- To prepare the next generation of political leadership through educational programs that promote the principles of Jeffersonian democracy, which are necessary for a free society.

SUMMARY OF ARGUMENT

The Second Amendment guarantees that “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.” This case involves the right to keep arms in the home. This case does not involve bearing arms outside the home.

When viewed from a national perspective, the right to keep and bear arms is not an archaic right. The right to arms is deeply rooted in our nation’s tradition and history. The Second Amendment to the Bill of Rights was adopted in 1791. The earliest guarantees to arms were adopted in 1776 by Pennsylvania and North Carolina. The most recent guarantee was adopted by Wisconsin in 1998. Since 1945, twenty-one (21) states have adopted or readopted the right to bear arms in their state constitutions. Presently, forty-four (44) states have a

guarantee to arms. The people have spoken in support of the right to arms. It is a mainstream right that is still valued in the 21st Century, and it is a vital part of the constitution.

Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), should be affirmed. From a national perspective, *Parker* is compatible with a long line of decisions from state courts that strike down unreasonable arms laws. *Parker* is supported by the plain text of the Second Amendment, by the history surrounding the adoption of that amendment, and by the nation's tradition and history on the right to keep arms in the home.

There is a national consensus that the Second Amendment is not restricted to the militia, and there is a national consensus that handguns should not be banned. This national consensus is supported by polls showing that 73% believe the Second Amendment guarantees "the right to individuals to own guns" (ABC News Poll, May 8-12, 2002), and that 66% are opposed to a handgun ban (Gallup Poll, October 9-12, 2006). Furthermore, in the wake of Hurricane Katrina, recent laws demonstrate that even in an emergency law-abiding adults should not be deprived of firearms, including handguns. 42 U.S. Code § 5207. Congress has also found that "The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms." 15 U.S. Code § 7901(a)(2). Thus, a clear majority of the people's representatives have found that the Second Amendment secures an individual right. At the state level, for example,

California enacted an amendment to its emergency powers act commanding that “[n]othing in this article shall authorize the seizure or confiscation of any firearm or ammunition from any individual who is lawfully carrying or possessing the firearm or ammunition, or authorize any order to that effect....” Calif. Govt. Code § 8571.5 (signed by governor October 14, 2007).

ARGUMENT

I. THE TEXT OF THE SECOND AMENDMENT SUPPORTS THE RIGHT TO KEEP ARMS IN THE HOME.

The plain language of the constitution controls its interpretation. *Solorio v. United States*, 483 U.S. 435, 441, 447 (1987). The Second Amendment commands that “the right of the people to keep and bear arms shall not be infringed.” The Second Amendment’s preamble (“A well regulated militia being necessary to the security of a free state”) does not limit its operative language. The preamble is an ablative absolute or nominative absolute. The preamble is independent of the rest of the sentence, and it does not qualify any word in the operative clause to which it is appended. Because no word in the amendment’s command is grammatically qualified by the prefatory assertion, the Second Amendment has exactly the same meaning that it would have if the preamble had been omitted, or indeed if the preamble is inaccurate. Nelson Lund, *D.C.’s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 Geo. Mason Univ. Civil Rights Law Journal 1001 (2008).

However, even the broad-based unorganized militia has a place in the modern world. In the Second World War the unorganized militia served as a substitute for the National Guard, which was federalized and activated for overseas duty. For example, Maryland Governor Herbert R. O'Connor called on men "of all ages and stations in life" to volunteer for the manning of home guard stations for the task of "repelling invasion forays, parachute raids and sabotage uprisings in the state." Before the end of 1943, 15,000 Maryland Minute Men, as these men were designated, manned home guard stations. They served without pay and were expected to bring their own arms — rifles, shotguns, handguns — for training and for guard duty. Their training stressed guerilla tactics, patrolling, demolitions, and roadblock techniques. Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okl. City Univ. L. Rev. 177, 197-98, 233-35 (1982).

A law that forbids law-abiding, adult individuals a right to keep ordinary, functional firearms, including handguns, in their homes is inconsistent with the command of the Second Amendment. "The plain meaning of the right of the people to keep arms is that it is an individual, rather than a collective, right and is not limited to keeping arms while engaged in active military service or as a member of a select militia such as the National Guard." *United States v. Emerson*, 270 F.3d 203, 232 (5th Cir. 2001). The command language of the Second Amendment was to withdraw the right to keep arms in the home from the vicissitudes of political controversy, to place the right beyond the reach of majorities and officials, and to establish the right as a legal principle to be applied by the courts.

One's right to keep arms in the home for self-defense may not be submitted to vote; it depends on the outcome of no elections.

II. THE HISTORY OF THE ADOPTION OF THE SECOND AMENDMENT SUPPORTS THE RIGHT TO KEEP ARMS IN THE HOME.

The history of the adoption of the Second Amendment supports the right to keep arms in the home. Pulitzer Prize winning historian Leonard W. Levy instructs:

Believing that the [Second] [A]mendment does not authorize an individual's right to keep and bear arms is wrong. The right to bear arms is an individual right. The military connotation of bearing arms does not necessarily determine the meaning of a right to bear arms. If all it meant was the right to be a soldier or serve in the military, whether in the militia or the army, it would hardly be a cherished right and would never have reached constitutional status in the Bill of Rights. The "right" to be a soldier does not make much sense. Life in the military is dangerous and lonely, and a constitutionally protected claim or entitlement to serve in uniform does not have to exist in order for individuals to enlist if they so choose. Moreover, the right to bear arms does not necessarily have a military connotation, because Pennsylvania, whose constitution of 1776 first used the phrase "the right to bear arms," did not even have a state militia. In Pennsylvania, therefore, the right to bear arms was devoid of military significance.

Moreover, such significance need not necessarily be inferred even with respect to states that had militias. Bearing arms could mean having arms. Indeed, Blackstone's *Commentaries* spoke expressly of the "right to have arms." An individual could bear arms without being a soldier or militiaman.

Leonard W. Levy, *ORIGINS OF THE BILL OF RIGHTS* 134-35 (Yale Univ. Press 1999).

Historian Joyce Lee Malcolm instructs that

"The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defense and self-preservation....The second and related objective concerned the militia, and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public.... The clause concerning the militia was not intended to limit ownership of arms to militia members, or return control of the militia to the states, but rather to express the preference for a militia over a standing army."

TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162-63 (1994 Harvard University Press).

Professor Laurence H. Tribe concludes the following: