No. 07-290

IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA AND
MAYOR ADRIAN M. FENTY,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

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

BRIEF OF *AMICI CURIAE* MAJOR AMERICAN CITIES, THE UNITED STATES CONFERENCE OF MAYORS, AND LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

FEDERAL STATUTES

TABLE OF AUTHORITIES
(Continued)

Page(s)

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES

(Continued)

Page(s)

TABLE OF AUTHORITIES

(Continued)

Page(s)

TABLE OF AUTHORITIES

(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

MUNICIPAL ORDINANCES

TABLE OF AUTHORITIES
(Continued)

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are eleven of America's largest cities, The United States Conference of Mayors, and Legal Community Against Violence. Each *amicus* is actively engaged in efforts to reduce the costs inflicted by gun violence upon local, and especially urban, communities.

Amici cities are: Baltimore, Maryland; Cleveland, Ohio; Los Angeles, California; Milwaukee, Wisconsin; New York City, New York; Oakland, California; Philadelphia, Pennsylvania; Sacramento, California; San Francisco, California; Seattle, Washington; and Trenton, New Jersey. Each of these cities has suffered extensive loss of life, threats to the safety and security of law enforcement personnel, disruption to their economies, and massive health care costs associated with gun violence. Each has developed regulatory programs to address the particular risks and threats posed by gun violence in their communities. *Amici* thus have a critical interest in ensuring that states and localities retain the flexibility to counter the risks of guns and to protect public safety through reasonable firearms regulations.

The United States Conference of Mayors is the official non-partisan organization of all United States

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[1] Pursuant to this Court's Rule 37.3, the parties have filed conditional consents to the filing of *amicus curiae* briefs. *Amici curiae* have satisfied the parties' condition. Pursuant to this Court's Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

cities with populations of more than 30,000. Its members suffer a disproportionate share of gun violence in the United States and have a common interest in maintaining the flexibility to address this problem in the manner local officials determine to be most effective and appropriate.

Legal Community Against Violence ("LCAV") is a public interest law center dedicated to preventing gun violence, formed in the wake of the 1993 assault weapon massacre at 101 California Street in San Francisco. The nation's only organization devoted exclusively to providing legal assistance in support of gun violence prevention, LCAV assists cities and counties in crafting a variety of local regulations to fit community needs.

SUMMARY OF ARGUMENT

Gun violence poses a serious threat to American cities. In roughly the last thirty years, the United States Department of Justice reports that there were over 340,000 homicides in large American cities. Over sixty percent of the nation's homicides during that period were committed using a gun. In addition, law enforcement personnel are disproportionately the victims of gun violence: while about 64% of homicides nationally involved guns, over 90% of officers killed in the line of duty were killed by guns. In addition to this terrible human toll, communities such as *amici* cities face massive economic costs and losses due to the fear and danger associated with gun violence.

While gun violence is a national concern, major American cities such as *amici* bear the brunt of the problem. Sixty percent of all gun homicides in the United States occur in large cities. Urban dwellers

are 60% more likely to be the victim of a violent crime than are residents of suburbs and 82% more likely than those living in rural areas. The on-the-ground statistics from *amici* cities paint a sobering picture of the human and fiscal toll exacted by gun violence.

Firearms regulation is a critical part of cities' efforts to protect the health and safety of their residents. Cities have adopted a wide range of measures—from bans on certain types of weapons and ammunition to eligibility and registration requirements—to reduce the threat of gun violence in their communities. The range of measures cities have adopted reflects the variety of challenges cities face and underscores the need for local flexibility in this area.

The Second Amendment does not constrain the ability of local elected officials to respond to the problems that confront their communities, and the Court of Appeals erred in invalidating the District of Columbia's ordinance. As explained in Petitioners' brief, the Second Amendment applies only to the national government and does not limit firearms regulation in the District of Columbia. Because this case involves the District of Columbia, and not a State or one of its political subdivisions, the question of the Second Amendment's application to the States and their local entities through the Fourteenth Amendment's due process clause is not presented and need not be addressed in this case. Nevertheless, this Court's precedents and the federalism-promoting purpose of the Second Amendment firmly establish that the Second Amendment imposes no barrier to state and local regulation of firearms.

This Court has already held that the Second

Amendment constrains the federal government alone—not the States or their political subdivisions. *See United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886). The Founders adopted the Second Amendment to preserve the balance between federal and state power embodied in the Constitution. A review of the debates surrounding the Amendment's drafting confirms that the Amendment shields States from federal incursion into the one area in which States retained military power—the militia. Because the Second Amendment was designed to reinforce state sovereignty and limit federal control, it would be contrary to the purpose of the Second Amendment to apply its limits against state and local action. This history and purpose, moreover, make clear that nothing in this Court's more recent incorporation jurisprudence compromises the vitality of *Cruikshank*'s and *Presser*'s conclusion that the Second Amendment applies exclusively to the federal government.

ARGUMENT

I. AMERICA'S CITIES FACE SUBSTANTIAL COSTS FROM GUN VIOLENCE AND MUST HAVE THE FLEXIBILITY TO REGULATE GUNS TO PROTECT AGAINST LOSS OF LIFE, THREATS TO PUBLIC SAFETY, KILLING OF POLICE OFFICERS, AND CRIPPLING HEALTH CARE AND ECONOMIC COSTS POSED BY CERTAIN TYPES OF GUNS AND GUN ACCESS

Gun violence poses a major threat to America's cities. Between 1976 and 2005, there were over 340,000 homicides in large American cities. U.S.

Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States*, *available at* http://www.ojp.usdoj.gov/bjs/homicide/tables/urbantab.htm. Sixty-four percent of the nation's homicides during that period were committed using a gun. *Id.*, *available at* http://www.ojp.usdoj.gov/bjs/homicide/tables/weaponstab.htm. Although the rate of violent crime has declined since its peak in the 1990s, over 9,000 homicides were committed in 2006 in American cities with populations over 100,000. U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States*, 2006, *available at* http://www.fbi.gov/ucr/cius2006/data/ table_12.html. In addition, between 1965 and 2000, over 60,000 people died from accidental shootings. David Hemenway, *Private Guns Public Health* 27 (2004) (hereinafter *Private Guns Public Health*).

Gun violence is a national problem, but large cities such as *amici* are disproportionately affected. Between 1976 and 2005, nearly 60% of all gun homicides in the United States took place in large cities. U.S. Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.: Trends by City Size*, *available at* http://www.ojp.gov/bjs/homicide/city.htm. According to the most recent statistics from the United States Department of Justice, urban dwellers are 60% more likely to be the victim of a violent crime than are residents of suburbs and 82% more likely than those living in rural areas. U.S. Department of Justice, *Criminal Victimization in the United States, 2005 Statistical Tables*, Table 57, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus05.pdf. Estimates indicate that

one quarter of low income urban youth have witnessed a murder. Firearm Injury in the U.S., Firearm & Injury Center at the University of Pennsylvania, at 5, *available at* http://www.uphs.upenn.edu/ficap/resourcebook/pdf/monograph.pdf (hereinafter Firearm Injury in the U.S.).

The experience of *amici* cities highlights these national statistics. For example, Baltimore, a city of approximately 631,000, witnessed 232 homicides by gun and 650 non-fatal shootings in 2007. The number of homicides in Baltimore in 2007 was the highest since 1999. In 2007, the number of homicides in San Francisco hit its highest level since 1995. There were nearly 1,900 shooting victims in Los Angeles last year. Eighty percent of the homicides in Los Angeles in 2007 involved a gun. In 2007, there were 1,734 shooting victims in Philadelphia, and 330 gun homicides. Eighty-four percent of homicides in Philadelphia last year were committed using a firearm. Milwaukee saw 84 firearms-related homicides in 2007. In Sacramento, a city of approximately 467,000 residents, there were 180 gun-related assaults and 26 gun-related homicides in 2007. There were 2,056 arrests in Cleveland for crimes involving firearms in 2006. In Seattle in 2005, over 550 violent firearm crimes (assaults, robberies, and homicides) were committed.

Handguns pose a particular threat. From 1993 to 2001, an average of 737,360 violent crimes were committed with handguns each year, making handguns seven times more likely to be used to commit violent crimes than other firearms. Office of Justice Programs, U.S. Dep't of Justice, *Bureau of Justice Statistics Special Report, National Crime*

Victimization Survey, 1993-2001 – Weapons Use and Violent Crime 3 (Sept. 2003). Handguns are used in approximately 75% of all firearm homicides and 70% of all firearm suicides. Firearm Injury in the U.S., *supra*, at 7. On the local level, in Baltimore, approximately 82% of all homicides in 2007 were committed using a firearm, and of those, nearly 99% involved a handgun.

Guns also pose particular dangers to first responders. Of the 562 police officers killed in the line of duty in the United States between 1997 and 2006, 521 were killed with a gun. U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed & Assaulted, Table 27*, *available at* http://www.fbi.gov/ucr/killed/2006/table27.html. In 2006, 46 of 48 officers killed in the line of duty were killed with a gun. U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed & Assaulted, Officers Feloniously Killed*, *available at* http://www.fbi.gov/ucr/killed/2006/feloniouslykilled.html. In Washington state, the number of police officers assaulted with a firearm grew 76% between 2001 and 2006.

The threats posed by guns have a profound effect not only on human lives but also on city budgets and policies. It is estimated that half of the medical costs of gunshot injuries are paid by American taxpayers; gun injuries are the leading cause of uninsured hospital stays in this country. *Private Guns Public Health*, *supra*, at 4. For example, in San Francisco, the estimated annual cost for government services relating to firearm violence is at least $31.2 million. In Washington state, private insurance was the

primary payer for the treatment of gun shot wounds in only 26% of the cases between 1997 and 2006; the remainder was covered by government programs or by no insurance at all. In Baltimore in 2006, it cost roughly $30.2 million to provide hospital care and treatment for the city's 657 non-fatal shooting victims. In Milwaukee, it can cost the city over $4,000 to respond to each shooting: $3,000 for police officers, detectives, and supervisors to respond on the scene, and $1,200 for fire department paramedics to give first care and rush the patient to the hospital. The average bill in 2005 to provide medical care for a shooting victim admitted at one Milwaukee hospital was $38,172 (not including physician fees and rehabilitation).

Cities have responded to these threats to their communities through various forms of firearms regulation tailored to the particular needs of their communities. *See generally* Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws, Legal Community Against Violence (2006), *available at* http://www.lcav.org/library/reports_analyses/National_Audit_Total_8.16.06.pdf. The variety of local regulations of firearms reflects the range of challenges that gun violence poses and the flexibility localities need to address these challenges.

A number of cities face a proliferation of especially dangerous types of weapons, and thus have banned the sale or possession of particular kinds of guns or ammunition. For example, Boston, Chicago, and Denver ban the possession and sale of assault weapons. *See* 1989 Mass. Acts 596, §§ 1-7; Chicago Code § 8-24-025; Denver Code § 38-130. Boston,

Chicago, and Los Angeles prohibit large capacity ammunition magazines. 1989 Mass. Acts 596, § 2; Chicago Code §§ 8-20-030(i), 8-24-025; Los Angeles Mun. Code ch. V, art. 5, § 55.13. Los Angeles and San Francisco prohibit the sale of 50-caliber handguns. Los Angeles Mun. Code ch. V, art. 5, § 55.18; San Francisco Police Code art. 9, § 613.10-1. Oakland prohibits firearms dealers from selling ultra-compact handguns. Oakland Mun. Code §§ 9.36.400–9.36.440.

In addition to placing restrictions on certain types of weapons, some localities have determined that certain types of persons pose a greater risk of abusing guns in their communities, and have thus restricted those groups' access to weapons. Thus, for example, while federal law prohibits the sale of firearms to individuals who have, among other things, been convicted of certain offenses or who have been adjudged mentally ill, 18 U.S.C. § 922(g), a number of cities have adopted other eligibility criteria or have forbidden gun ownership by persons under 21. *See, e.g.*, Hartford Code §§ 21-71, 21-72 (requiring applicant for permit to carry handgun outside the home or business to provide three character references as well as fingerprints and to take a range safety and qualification test); Omaha Code § 20-253(b) (prohibiting a concealed firearm from being registered to persons who, among other things, have provided false information on the registration request or who have a record of a mental disorder that would show the applicant to be a danger to himself or others); 1993 Mass. Acts 491 (Boston ordinance generally prohibiting those under 21 from purchasing or possessing a firearm); N.Y. Charter §§ 462-464

(same).

Cities have also determined that law enforcement may be enhanced by making it easier to locate guns in the event they are later used in a crime. Thus, a number of cities require local licenses for owners and/or purchasers of certain firearms or registration of certain firearms. *E.g.*, Chicago Code § 8-20-040; Hartford Code § 21-59; N.Y. Rules tit. 38, ch. 5; N.Y. Admin. Code §§ 10-303, 10-304; Omaha Code §§ 20-200, 20-251, *et seq*. Baltimore requires those who have been convicted of gun-related offenses to register with the Police Commissioner and periodically update their information. Baltimore City Code Art. 19, § 60-1, *et seq*.

New York City's experience with gun regulation provides a good case study on how locally tailored firearms regulations can address the threat of gun violence. In the early 1990s, New Yorkers saw a dramatic escalation in violent and gun-related crime. New York City's homicide rate reached a historic high of 2,245 in 1990. This surge in violence prompted the City to institute an innovative, multi-faceted anti-crime campaign, in which new restrictions on firearms played a prominent role, as did proactive policing aimed at curbing gun violence. For example, in 1991, a city-wide ban on assault weapons went into effect, adding another layer of firearms regulation to long-standing state statutes requiring the licensing of handguns and a local ordinance requiring the licensing of long guns. In 1998, the City began to require all handguns to be sold with locking devices, a requirement that was extended to long arms in 2000. The State of New York followed suit shortly thereafter, instituting a

statewide ban on assault weapons and a gun-lock requirement in 2000. In 2006, the State adopted the nation's toughest penalty for carrying a loaded, unlicensed handgun or assault weapon, raising the mandatory minimum sentence from one year to three-and-a-half years.

These new initiatives succeeded in curbing gun-related violence. Shooting incidents in New York City declined sharply from 5,259 in 1993 to only 1,533 by 2005. In the period between 1995 and 2005, 1,177 homicides fell to 539—at that time, the lowest rate since reliable crime statistics had been kept. The number of aggravated assaults dropped from 52,322 to 27,950; and 115,153 violent crimes became 54,623. Assaults involving the use of a firearm against a police officer dropped from 442 to 112. And these reductions occurred while New York City's population grew from 7.3 million to approximately 8.1 million. Recent statistics show that the trend continues. After a short-lived rise in 2006 to 596, the City's homicide rate was at its lowest level ever in 2007, at 494. There can be no doubt that New York City has been able to achieve this success through its creative, locally tailored approach to firearms regulation.

As the above examples of municipal regulations make clear, cities have adopted a range of approaches to confront the particular threats of gun violence that their communities face. This range puts in sharp focus "the theory and utility of our federalism . . . [as] the States [] perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581-82 (1995) (Kennedy, J.,

concurring) ("If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds. Other, more practicable means to rid the schools of guns may be thought by the citizens of some States to be preferable for the safety and welfare of the schools those States are charged with maintaining." (citations omitted)). The data from cities and their varying approaches to municipal firearms regulation also show that cities need flexibility to craft locally tailored solutions to the particular threats and costs of gun violence that their residents face.

II. THE SECOND AMENDMENT DOES NOT LIMIT THE OPTIONS AVAILABLE TO CITIES TO ADDRESS THE PROBLEM OF GUN VIOLENCE

The Court of Appeals erred in reversing the District Court's order dismissing Respondent's claim. As outlined in Petitioners' brief, the Second Amendment is a limit on the national government alone and does not constrain the District of Columbia's legislative authority. *See* Br. of Petitioners at 35-40. For analogous reasons, the Second Amendment does not serve as a limit on the States and their political subdivisions. Although the Court need not address this issue in this case—which does not involve a challenge to a law passed by a State or one of its political subdivisions—it is well established that the Second Amendment does not apply to the States.

1. This Court has long held that the Second Amendment restricts the federal government only, and does not constrain the ability of States to regulate firearms.

In *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), the Court held that the Second Amendment "has no other effect than to restrict the powers of the National government . . . ." "The Second Amendment declares that it shall not be infringed," the Court explained, "but this . . . means no more than that it shall not be infringed by Congress." *Id.*

In *Presser v. Illinois*, 116 U.S. 252, 256 (1886), the Court re-affirmed this principle in rejecting a Second Amendment challenge to an Illinois law prohibiting groups of citizens outside the State's own organized militia from drilling or parading with arms without a license from the Governor. The Second Amendment, the Court concluded, "is a limitation only upon the power of Congress and the National government, and not upon that of the state." *Id.*

Although *Presser* and *Cruikshank* pre-date many of this Court's decisions incorporating certain provisions of the Bill of Rights against the States through the Fourteenth Amendment, nothing since *Presser* and *Cruikshank* were decided has compromised their conclusion that the Second Amendment applies only to the federal government. "[P]roperly understood, [the Second Amendment] is no limitation upon arms control by the states." Antonin Scalia, Response, *in A Matter of Interpretation: Federal Courts and the Law* 137 n.13 (Amy Gutmann ed., 1997).

2. The Second Amendment cannot properly be applied against the States and their subdivisions

because the Amendment was intended to prevent an undue concentration of power in the federal government relative to the States. To apply it to limit state authority would be inconsistent with its purpose.

The Framers of the Constitution sought to avoid placing too much power in any one body. Power was balanced among the three branches of the federal government and between the federal and state governments. *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." (internal quotation marks omitted)).

The delegates to the Constitutional Convention were particularly concerned about the allocation of military power. 2 The Records of the Federal Convention of 1787, at 329-32 (Max Farrand ed., 1966); *see also Perpich v. Department of Defense*, 496 U.S. 334, 340 (1990) (noting "widespread fear" at the Constitutional Convention "that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States"). Some participants in the Philadelphia Convention contended that the federal government should not be permitted to form a standing army. 2 The Records of the Federal Convention of 1787, at 329. Those more concerned that the nation be capable of defending itself carried the day, however, and Congress was granted the power to raise and support armies. *Id.* at 330; U.S. Const. art. I, § 8, cl. 12.

In the hope of avoiding the necessity of forming a standing army, George Mason proposed that the national government be given the power to regulate the militia. 2 The Records of the Federal Convention of 1787, at 326, 330. A concern was raised, however, that to transfer control over the militia from the States and repose all martial authority in the federal government would eliminate the States' power and, therefore, their independent political significance. Oliver Ellsworth argued that, if the States were deprived of all authority over the militia, the States' "consequence would pine away to nothing after such a sacrifice of power." *Id.* at 331. Others suggested that the States would never give up their power over the militia. *Id.* at 332. The matter was referred to a committee, which proposed a compromise in which the federal government would have authority over organizing, arming, and disciplining the militia, while the States would retain the power to appoint its officers and conduct training. *Id.* at 384-85.

The committee's compromise proposal prevailed, and the federal government was granted the authority "to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const. art. I, § 8, cl. 16; *see also United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992). The key to the compromise was the vesting of control over the selection of officers in the States, which ensured that militia would continue to be a source of state power. As Edmund Randolph

succinctly put it, "Leaving the appointment of officers to the States protects the people agst. every apprehension that could produce murmur." 2 The Records of the Federal Convention of 1787, at 387; *see also* The Federalist No. 29, at 141 (Alexander Hamilton) (Garry Wills ed., 1982) ("What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia and to command its services when necessary; while the particular States are to have the *sole and exclusive appointment of the officers*?" (emphasis in original)).[2]

In The Federalist No. 46, Madison himself explained that the compromise struck in the Militia

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[2] The importance placed on this grant of authority to the States was again highlighted when Madison proposed to modify the language to make an exception to the States' appointment power for general officers. 2 The Records of the Federal Convention of 1787, at 388. This proposal was soundly rejected. *Id.* Roger Sherman called the amendment "absolutely inadmissible," saying that "if the people should be so far asleep as to allow the Most influential officers of the Militia to be appointed by the Genl. Government, every man of discernment would rouse them by sounding the alarm to them." *Id.* Elbridge Gerry echoed the sentiment still more vehemently, suggesting that the Convention might just as well eliminate states altogether if they were to be so deprived of power. *Id.* ("Let us at once destroy the State Govts[,] have an executive for life or hereditary . . . and then there would be some consistency in giving full powers to the Genl Govt."). Gerry went on to express his surprise that, as the Convention had not chosen to eliminate the states, efforts were nonetheless being made to grant the national government powers that he considered inconsistent with the very existence of the states. *Id.* ("[A]s the states are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence.").

Clauses (in particular state control over the selection of officers) was a crucial part of the balance between federal and state power. Hypothesizing an attempted use of a federal standing army to impose tyranny, Madison noted that such an army "would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands, *officered by men chosen from among themselves*, fighting for their common liberties, and united *and conducted by governments possessing their affections and confidence*." The Federalist No. 46, at 242 (James Madison) (Garry Wills ed., 1982) (emphasis added).

The militia could provide the balance between federal and state power, however, only if the federal government could not disable the militia by disarming it. Article I granted Congress the authority to arm the militia. U.S. Const. art. I, § 8, cl. 16. It did not specify whether this power encompassed the authority to withhold arms from the militia when not in service to the federal government. Precisely this question was raised during the ratification debates in the States. Jack Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chicago-Kent L.R. 103, 137-38 (2000); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L.R. 309, 345-48 (1998). During the debate in Virginia, George Mason asserted that "[t]he militia may be here destroyed by that method which has been practised in other parts of the world before. That is, by rendering them useless, by disarming them." Rakove, *supra*, at 137-38.

As explained in greater detail in Petitioners' brief, the drafting history confirms that the Second

Amendment was intended to clarify that Congress did not have the power to render the militia impotent, the militia "being necessary to the security of a free State."[3] *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997), *vacated in part on other grounds*, 133 F.3d 1412 (11th Cir. 1998); Bogus, *supra*, at 369 ("Specifically, Madison sought to assure that Congress's power to arm the militia would not be used to disarm the militia."). From the origin of its language in the Virginia ratifying convention (where Mason and Patrick Henry raised the concern that the national government might disable the militia) to the congressional debates and revisions, the development of the Second Amendment demonstrates that its purpose was to protect the militia from being disarmed by the federal government. Br. of Petitioners at 22-35. This Court has emphasized the connection between the Militia Clauses and the

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[3] The Court of Appeals suggested that this understanding of the Second Amendment's purpose is implausible because, in the majority's view, the drafters could have stated more directly that the militia were not to be disarmed if that was their concern. *Parker v. District of Columbia*, 478 F.3d 370, 379 (D.C. Cir. 2007). This approach to constitutional interpretation provides a far more compelling argument *against* the Court of Appeals' reading of the Amendment than for it. If the drafters had intended the Amendment to protect the right to possess guns for self defense and hunting, models of such language were readily available. *See, e.g.*, Dissent of the Minority of the Pennsylvania Convention, Pennsylvania Packet (Philadelphia), Dec. 18, 1787, reprinted at 1 The Debate on the Constitution 526, 533 (1993) ("That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game."). The drafters chose to omit any such language and instead to highlight the importance of the militia.

Second Amendment, noting that the Amendment was enacted "[w]ith [the] obvious purpose to assure the continuation and render possible the effectiveness of" the militia referenced in Article I. *United States v. Miller*, 307 U.S. 174, 178 (1939).

Contrary to Respondent's assertions, moreover, the Second Amendment was not intended to vest armed power in citizens acting outside of any governmental military effort—either federal or state. For the Framers of the Constitution, irregular bands of armed citizens were a threat to be countered, not a guarantor of their liberties. Bogus, *supra*, at 390-96. As discussed in the brief filed by *amici* constitutional historians, the 1786-87 uprising in western Massachusetts known as Shays's Rebellion was a significant impetus for the abandonment of the Articles of Confederation and the creation of a stronger central government. It was his alarm over this insurrection that brought George Washington out of retirement to lead the Constitutional Convention. Leonard L. Richards, *Shays's Rebellion: The American Revolution's Final Battle* at 131-32 (Univ. of Penn. 2002).

The debate at the Convention reflected this concern. Charles Pinckney made reference to the Massachusetts uprising, commenting that the lack of a national military had resulted in "rapid approaches toward anarchy." 2 The Records of the Federal Convention of 1787, at 332. More significantly, the Convention debate regarding how authority over the militia would be allocated was exclusively concerned with whether the national government or the States would exercise control; there was no discussion of the militia operating outside of governmental authority.

Id. at 330-32, 385-87. Indeed, Convention delegates viewed the suppression of "insurrections," *i.e.*, armed uprisings by persons outside of government control, as a principal purpose of the militia. *Id.* at 332; U.S. Const. art I, § 8, cl. 15.

This country does not countenance the use of violence as a political tool and never has. *See* U.S. Const. art. III, § 3, cl. 1 (defining "treason" to include "levying War against" the United States); 18 U.S.C. § 2383 (making it unlawful to engage in "rebellion or insurrection against the authority of the United States"); 18 U.S.C. § 2384 (making it unlawful to "conspire to overthrow, put down, or to destroy by force the Government of the United States . . . or to oppose by force the authority thereof"). The Second Amendment embodies this understanding—referring as it does to a "well regulated" militia. The Amendment cannot reasonably be understood, as Respondent suggests, to protect a right to possess firearms for the purpose of engaging in violence against a government that an individual believes to have overstepped its bounds.

Unlike portions of the Bill of Rights that have been applied against the States, the Second Amendment is a structural provision, designed to remedy a perceived weakness in the system of balances that the Constitution erected to protect against tyranny. In particular, the Second Amendment shielded States from federal incursion into the one area in which States retained military power—the militia. This purpose cannot be served by limiting state regulation of firearms: state power is undermined by restricting the States' authority in this area.

3. *Presser* and *Cruikshank*'s conclusion that the Second Amendment limits only the federal government is also fully consistent with this Court's more recent approach to incorporation. The Court has declined to apply all of the first eight amendments in the Bill of Rights to the States automatically by virtue of the Fourteenth Amendment's due process clause. Rather, the Court has adopted a selective incorporation approach by which the Court examines each amendment on its own terms and decides whether its provisions are suitable for incorporation against the States. *See*, *e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that the Sixth Amendment jury trial guarantee is incorporated against the States via the Fourteenth Amendment due process clause because "trial by jury in criminal cases is fundamental to the American scheme of justice").

The Second Amendment cannot apply against the States under this framework. As explained above, the Second Amendment was designed to limit the federal government and to protect state sovereign interests. Unlike provisions of the Bill of Rights that, for example, ensure fair procedures for criminal defendants or protect an individual's right to speak without governmental interference, the Second Amendment was designed to serve a much different, structural function. It would make little sense to hold that an amendment designed expressly to limit federal power and *preserve* state authority operates as a limit on States' power. Such a result would turn

the Second Amendment on its head.[4]

The Second Amendment, moreover, by no means stands alone as applying exclusively to the federal government. This Court, for example, has held that the Fifth Amendment's requirement of a grand jury indictment does not apply against the States. *E.g.*, *Hurtado v. Calfornia*, 110 U.S. 516 (1884). Although the Court's initial ruling that the States were under no federal constitutional obligation to proceed by grand jury indictment dates back to 1884, its holding has consistently been applied since. *See Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972) (noting that

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[4] One scholar has argued that, while the Second Amendment was adopted as a federalism-promoting provision designed to prevent Congress from disarming the militia, the Fourteenth Amendment transformed its meaning into a protection of individual freed slaves' ability to arm themselves against the Ku Klux Klan. Akil Amar, *The Bill of Rights: Creation and Reconstruction* 266 (1998). Not only is this novel theory without any support in the caselaw, it rests on an erroneous historical premise. Amar contends that the Republicans who enacted the Fourteenth Amendment wanted to prevent states from enacting restrictions on guns because then "only the Klan would have guns." *Id.* This contention does not withstand scrutiny. Saul Cornell and Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 518-22 (2004) (explaining that, while the view relied upon by Amar was articulated at the time, it was not widely held either by the ratifiers of the Fourteenth Amendment or the general public). In fact, consistent with the Founders' original vision, the Republicans turned *to the militia*—not unorganized armed individuals—to protect the freed slaves, forming integrated militias and arming them to fight the insurrectionist former Confederate soldiers who opposed the post-war order. Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 176 (2006).

"indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment" and citing *Hurtado*); *Beck v. Washington*, 369 U.S. 541, 545 (1962) ("Ever since *Hurtado v. California*, this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions." (citation omitted)). Similarly, the Seventh Amendment's civil jury guarantee does not bind the States. *E.g.*, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 438 (1996); *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916). Nor has this Court held that the Eighth Amendment's ban on excessive fines or the Third Amendment's prohibition on quartering soldiers apply against the States. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) ("We shall not decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment . . . ."); Rotunda & Nowak, *Incorporation of the Bill of Rights*, 2 Treatise on Const. L. § 15.6(b) (4th ed. 2007) (noting that the Court has not decided whether the Third Amendment applies to the States).

Finally, the lower courts are virtually unanimous in their conclusion that the Second Amendment does not apply against the States or their subdivisions. *E.g.*, *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269-71 (7th Cir. 1982); *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir. 1995) ("The Second Amendment does not apply to the states."); *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005) ("join[ing] five of our sister circuits" in holding that "the Second Amendment's 'right to

keep and bear arms' imposes a limitation on only federal, not state, legislative efforts"). As one court explained, "[w]hatever rights in this respect the people may have depend upon local legislation; the only function of the Second Amendment being to prevent the federal government and the federal government only from infringing that right." *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942).

In sum, although the Court need not address the issue of the Second Amendment's incorporation against the States or their subdivisions in this case, this Court's precedents and the federalism-promoting purpose of the Second Amendment firmly establish that the Second Amendment imposes no barrier to state and local regulation of firearms.

CONCLUSION

American cities need flexibility to respond to the serious threat of gun violence facing their communities. Although the Court need not address this issue in this case, nothing in the Second Amendment restrains the authority of States or their political subdivisions to meet this threat through the regulation of firearms within their borders. The Second Amendment applies to the federal government alone. It does not constrain firearms regulations in the District of Columbia or in the States or their political subdivisions. The Court of Appeals decision was in error and should be reversed.

Respectfully submitted,

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