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 OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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INTEREST OF *AMICI CURIAE*

Amici Curiae are members of the 110th Congress.[1] *Amici* have several important interests in this case.

First, as members of Congress bound by oath or affirmation "to support th[e] Constitution," U.S. Const. art. VI, cl. 3, *Amici* have an interest in assisting the Court to arrive at an appropriate construction of the Second Amendment and resolution of this case.

Second, the Constitution specifically allocates to Congress certain powers and responsibilities related to the militia. *See* U.S. Const. art. I, § 8, cls. 15 & 16. The responsibility of *Amici* for exercising this constitutionally assigned role give *Amici* a particular interest in assisting the Court to arrive at an appropriate construction of the Second Amendment and resolution of this case.

Third, Congress has, for decades, exercised the power assigned to it by the Constitution to regulate,

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[1] A list of the members of Congress is provided in the Appendix of this brief. This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Amici submit this brief in their individual capacities, not on behalf of Congress itself, but their views are informed and animated by their experiences as members of Congress, and their interest in Congress's standing as an institution.

and in some cases ban, the use or possession of certain weapons.[2] In so doing, Congress has regularly considered, interpreted and applied the Second Amendment in light of its obligation "to support th[e] Constitution." U.S. Const. art. VI, cl. 3. While it is well established that the judiciary has the power to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), this Court frequently has noted its respect for Congress as a coordinate and coequal branch of government, and generally assumes Congress "legislates in light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). *Amici* have an interest in ensuring that when resolving this case the Court considers Congress's experience interpreting and applying the Second Amendment – particularly during the 68 years since the Court last directly addressed the substantive nature of any rights conferred by that provision of the Constitution.

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[2] In 1927, Congress prohibited the mailing of concealable weapons. *See* Act of Feb. 8, 1927, ch. 75, § 1, 44 Stat. 1059. Regulation of firearms in the District of Columbia dates back considerably further. *See* Pet. Br. at 3.

SUMMARY OF ARGUMENT

The decision below reads the Second Amendment as creating an individual right to possess firearms for purposes unrelated to the preservation or efficiency of a well regulated militia. In so doing, the decision rendered meaningless the Amendment's opening clause ("A well regulated Militia, being necessary to the security of a free state"), disregarded this Court's settled precedent limiting the application of the Amendment to those situations where the preservation or efficiency of a well regulated militia is potentially impaired, and failed to evaluate the statutes at issue using standards anything like those ordinarily applied when (unlike here) constitutional rights are implicated.

Under this Court's interpretation of the Second Amendment (*United States v. Miller*, 307 U.S. 174, 178 (1939); *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980)), that provision lends no support to Respondent's claims, since he does not assert that his desired use or possession of the firearms at issue relates to "the preservation or efficiency of a well regulated militia,"[3] and the decision below should be reversed.

Had the Court been presented with a colorable claim that the challenged conduct infringed the "right to keep and bear arms" in a manner

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[3] *See infra* page 22 and note 10.

inconsistent with the "preservation or efficiency of a well regulated militia," *Miller*, 307 U.S. at 178, this Court's precedents suggest that judgments about whether the regulation or prohibition of a *particular* weapon is consistent with the Second Amendment should be left to the political branches. The Constitution's express assignment of responsibility for the nation's militia to Congress (*see* U.S. Const. art. I, § 8, cls. 15 & 16), and the absence of "judicially discoverable and manageable standards" for resolving such controversies, militate in favor of such a result. This approach would be in accord with the state of affairs in the decades since *Miller* was decided. During that time, Congress has legislated actively to regulate or prohibit the use or possession of certain weapons – mindful of any limitations imposed by the Second Amendment, and guided by this Court's decision in *Miller*. [4]

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[4] *Amici* take no position here regarding the application of the Second Amendment to the States, through the Fourteenth Amendment or otherwise. *Cf. Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876).

ARGUMENT

I. INTERPRETATION OF THE SECOND AMENDMENT TO RESOLVE THIS CASE SHOULD BE INFORMED BY CONGRESS'S LEGISLATIVE ACTIVITIES AND ROLE AS A CONSTITUTIONAL INTERPRETER

It has been nearly seven decades since this Court "consider[ed] the nature of the substantive right safeguarded by the Second Amendment." *Printz v. United States*, 521 U.S. 898, 938 (1997) (Thomas, J., concurring). In the intervening period there has been considerable academic debate and public discourse about that question. It is also an issue that Congress has addressed, both expressly and implicitly, as part of the lawmaking process.

Indeed, since this Court's decision in *United States v. Miller*, 307 U.S. 174 (1939), which itself addressed a challenge to the National Firearms Act of 1934, Congress has enacted numerous laws which required it to consider whether and how the Second Amendment constrains its authority. *See*, *e.g.*, Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-931); Armor Piercing Ammunition Ban, Pub. L. No. 99-408, 100 Stat. 920 (1986) (amending 18 U.S.C. §§ 921-923, and § 929 to prohibit the manufacture, importation, or sale of armor piercing ammunition and impose penalties for crimes involving armor piercing ammunition); Undetectable Firearms Act of 1988, Pub. L. No. 100-649, 102 Stat. 3816 (making it unlawful to manufacture, import, sell, or possess any

firearm that is undetectable by a metal detector or an x-ray machine); Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844-45 (ruled unconstitutional on grounds unrelated to Second Amendment in *United States v. Lopez*, 514 U.S. 549 (1995)); Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (requiring waiting period and completion of background check before individual is able to purchase a handgun); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Federal Domestic Violence Gun Ban, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 (1997) (banning persons convicted of misdemeanor crimes of domestic violence from possessing firearms); Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 119, 112 Stat. 2681, 2681-69 (1999) (requiring all licensed gun dealers to offer "gun storage or safety devices" for sale); *see generally* 18 U.S.C. §§ 921-931.

Congress has also enacted numerous laws under which criminal sentences are enhanced based on the possession or use of a firearm. *See*, *e.g.*, Act of Oct. 12, 1984, Pub. L. No. 98-473, §§ 1005-1006, 98 Stat. 1837, 2138-2139; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469 (amending 18 U.S.C. § 924 to include mandatory prison sentences for crimes of violence or drug trafficking involving handguns); *see also Harris v. United States*, 536 U.S. 545 (2002) (addressing

"brandishing" and "discharging" a firearm as sentencing factors).

Article VI, Clause 3 of the Constitution requires that members of Congress be bound, by oath or affirmation, "to support th[e] Constitution." In view of that requirement, the courts do "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Indeed, it is "out of respect" for Congress's obligation "to support" the Constitution and its capacity as an interpreter of the Constitution that the Court generally assumes Congress "legislates in light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991); *see also Harris*, 536 U.S. at 556 (quoting *Rust*).

Congress's obligation to support the Constitution, and its interpretive role, are particularly germane to the issues in this case.

Article I vests Congress with the power to provide "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "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." U.S. Const. art. I, § 8, cls. 15 & 16 (the "Militia Clauses"). Any assessment of the Second Amendment should be made in light of the Constitution's allocation of responsibility for the

militia to Congress. *See McElroy v. United States*, 361 U.S. 234, 268 (1960) (Whittaker, J., concurring in part and dissenting in part) (noting a "protracted controversy in the Constitutional Convention" was resolved "by continuance of the militia 'according to the discipline prescribed by Congress.' Art. I, s 8, cls. 15 and 16, and Amend. II"); *see generally McCulloch v. Maryland*, 17 U.S. 316, 406 (1819) (interpreting constitutional provisions in light of "construction of the whole instrument").

In other contexts, this Court has recognized the appropriateness of judicial deference to congressional judgments related to the exercise of powers specifically conferred by Article I. *See*, *e.g.*, *Rumsfeld v. Forum for Academic & Institutional Rights*, *Inc.*, 547 U.S. 47, 58-59 (2006) (discussing the deference due to Congress under its Article I "Spending Clause" and "military affairs" powers); *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."); *see also Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998) ("Deference to the political branches dictates 'a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.'") (quoting *Mathews v. Diaz*, 426 U.S. 67, 82 (1976)); *South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987) (discussing deference to Congress when exercising its "spending power" conferred by Article I); *Bowen v. Gilliard*, 483 U.S. 587, 598 (1987) (courts exercise

deferential review over Congress's "decisions to spend money to improve the general public welfare" pursuant to Article I, Section 8) (quotation omitted); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964) ("How obstructions in commerce may be removed – what means are to be employed – is within the sound and exclusive discretion of the Congress" under its Commerce Clause power); *Graham v. Goodcell*, 282 U.S. 409, 431-432 (1931) (recognizing Congress's broad discretion when exercising its constitutional power over taxation).

As discussed above, Congress has a long history of regulating or prohibiting the possession or use of certain weapons. These congressional actions should be viewed as undertaken mindful of any limitations imposed by the Second Amendment, as well as this Court's decision in *Miller*. *See Rust*, 500 U.S. at 191; *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73-74 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court."). *Amici* respectfully ask that the Court give appropriate weight in this case to the understanding of the Second Amendment that inheres in Congress's extensive experience regulating or prohibiting the use of certain "arms."

Consideration of, or deference to, Congress's experience as an interpreter of the Constitution, in appropriate circumstances, is entirely consistent with the Court's role, articulated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), to "say

what the law is." *See*, *e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (reconciling *Marbury* with the Court's view that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,'" and that "its conclusions are entitled to much deference") (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

Such deference to congressional activity is particularly appropriate here, given that this Court has not addressed the substantive nature of the Second Amendment for nearly 70 years – leaving Congress to apply its own judgments and interpretations, guided by *Miller* and earlier decisions of this Court.

As explained in Section II of this brief, the Court of Appeals's decision erroneously departed from this Court's holding in *Miller*. In doing so, it arguably calls into question numerous statutes enacted by Congress over the years – and, in the view of some, possibly state and local laws as well. *See*, *e.g.*, Linda Greenhouse, *Supreme Court Agrees to Hear Gun Control Case*, N.Y. Times, Nov. 20, 2007, at A1 ("[L]awyers on both sides of the case agreed today that a victory for the plaintiff in this case would amount to the opening chapter in an examination of the constitutionality of gun control rather than anything close to the final word."); Robert A. Levy, *Unholster the 2nd Amendment*, L.A. Times, Nov. 14, 2007, at 21 ("[I]f the Supreme Court affirms the D.C. [C]ircuit's holding, state gun control laws across the nation could be vulnerable to constitutional attack.").

This Court has recognized the problems that can arise from abrupt changes to settled expectations about the meaning of statutes or the Constitution, and has considered them when analyzing cases before it. *See*, *e.g.*, *Leegin Creative Leather Prods. v. PSKS*, *Inc.*, 127 S. Ct. 2705 (2007) (interpreting Sherman Act); *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (applying doctrine of *stare decisis* to sustain constitutional *Miranda* rule, and observing "the warnings have become part of our national culture"); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion) (applying doctrine of *stare decisis* to interpretation of the Constitution). While the preservation of congressional expectations and judgments upon which existing laws depend is not a value that trumps other considerations in all circumstances, *cf. INS v. Chadha*, 462 U.S. 919 (1983) (finding one-House veto unconstitutional), this is a case where that value should be afforded considerable weight.

When reexamining a prior holding, this Court's "judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Casey*, 505 U.S. at 854. Here, the Court's decision could affect numerous existing federal laws, as well as Congress's consideration of future legislation. While that is no doubt true of many decisions, the Court's decades-long silence during a

period of consistent lawmaking by Congress is unusual. These special circumstances warrant particular attention to Congress's activity in the area of firearms regulation, and to the views of Congress as an institution that are implicit in its lawmaking activity in this area.[5]

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[5] Petitioner contends that the Second Amendment does not apply to the District of Columbia. *See* Pet. Br. at 35-40. Given the Question for which *certiorari* was granted, *Amici* have assumed for purposes of this appeal that the Amendment applies within the District of Columbia, and take no substantive position on the issue in this brief. However, even if the Second Amendment applies in the District, judgments of the District government are made pursuant to power delegated by Congress. *See* D.C. Code § 1-201.02 (Congress has "ultimate legislative authority over the nation's capital granted by article I, § 8, of the Constitution"); D.C. Code § 1-206.01 ("[T]he Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject . . . including legislation to amend or repeal any law in force in the District . . . ."). The decisions to enact the statutes at issue here are therefore entitled to substantial deference given the responsibilities for the militia specifically assigned to Congress by Article I of the Constitution. The Court of Appeals failed to consider the significance of this constitutional assignment, or to assess the degree of deference owed to legislative judgments about the meaning and boundaries of the Second Amendment.

II. THE DECISION BELOW BREAKS WITH THIS COURT'S PRECEDENT AND FAILS TO ACCORD APPROPRIATE DEFERENCE TO LEGISLATIVE JUDGMENTS ABOUT THE NATURE AND BOUNDARIES OF ANY RIGHTS CONFERRED BY THE SECOND AMENDMENT

A. The Decision Below Is An Unwarranted Departure From This Court's Precedent

The decision below is a dramatic departure from this Court's prior interpretation of the Second Amendment.

This Court has *never* construed the Second Amendment as applicable when the desired possession or use of a weapon at issue is purely "private" – that is, when it has no "relationship to the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178; *see also id.* (considering whether the weapon at issue could "contribute to the common defense"); *Printz v. United States*, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring) ("In *Miller*, we determined that the Second Amendment did not guarantee a citizen's right to possess a sawed-off shotgun because that weapon had not been shown to be 'ordinary military equipment' that could 'contribute to the common defense.'") (quoting *Miller*).

While the Court of Appeals acknowledged the *Miller* Court's exhortation that the Second Amendment "must be interpreted and applied" in light of the Amendment's purpose "to assure the

continuation and render possible the effectiveness" of the militia, Pet. App. 42a, it erroneously construed the Amendment as "protect[ing] an individual right to keep and bear arms," even when such activity has no conceivable connection to a militia. Pet. App. 44a ("[T]he activities [the Second Amendment] protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia."). This departure from *Miller* is both unwarranted and unwise.[6]

The Court of Appeals sought to justify its decision on the ground that *Miller* related to a limited issue – whether a short-barreled shotgun was "within the scope of the term 'Arms'" – and supposedly did not address whether the Second Amendment protects the right to "keep and bear arms . . . for private purposes." Pet. App. 40a. Yet this Court's most recent reliance on *Miller* does not support the Court of Appeals's narrow reading of that decision. To the contrary, in *Lewis v. United States*, this Court explained that "legislative restrictions on the use of firearms" do not "trench upon any constitutionally protected liberties," and described *Miller* as having determined that "the Second Amendment guarantees no right to keep and

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[6] Much commentary about the Second Amendment lapses into a debate about whether the Amendment confers an "individual" or "collective" right. *Miller* did not employ or embrace that simplistic dichotomy, nor should the Court do so now.

bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" 445 U.S. 55, 65 & n.8 (1980) (quoting *Miller*, 307 U.S. at 178). Thus, the Court described *Miller's* holding in precisely the terms the lower court seeks to sidestep. Only by ignoring the critical language in *Miller*, as well as this Court's explanation of *Miller's* holding in *Lewis* (and the citations in *Lewis* to lower court cases holding that certain firearms regulations "do not violate the Second Amendment," *id.* at 65 n.8) could the Court of Appeals have found a violation of the Second Amendment in this case.

Lower courts have properly interpreted *Miller* as holding that a threshold requirement for application of the Second Amendment is that the possession or use of a firearm "bear a reasonable relationship to 'the preservation or efficiency of a well regulated militia.'" *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (quoting *Miller*, 307 U.S. at 178); *see id.* at 290 (Alito, J., dissenting on grounds related only to Congress's power under the Commerce Clause and observing "Congress may ban [machine guns] from the channels of interstate commerce altogether . . . ."); *see also United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992) ("[T]he claimant of Second Amendment protection must prove that his or her *possession* of the weapon was reasonably related to a well regulated militia."); *Lewis*, 445 U.S. at 65 n.8 (citing lower court decisions).

As this Court has observed, expansive language in the Constitution "must be interpreted according to

its text, by considering history, tradition and precedent, and with due regard for its purpose and function in the constitutional design." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). None of these considerations supports the Court of Appeals's reading of the Second Amendment, which arguably calls into question much about the ways society has organized its law enforcement and public safety regimes in recent decades, and risks unleashing a flood of Second Amendment challenges to existing federal laws.[7]

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[7] Respondent's Brief in Response to the Petition for *Certiorari* advanced his interpretation of the Second Amendment in substantial part by pressing a "right" to self-defense. *See* Resp. Br. at 19-23, 29-32. For instance, Respondent asserts the "*need* for Second Amendment rights" in view of violent crime, *id.* at 30 (emphasis added), and contends the Amendment guarantees "to citizens . . . an effective means of preserving their lives." *Id.* at 32. Whether an armed citizenry actually improves public safety is a question best left for policymakers, not the courts. Moreover, the existence of violent crime does not establish that the Second Amendment has anything to do with combating it. If the Constitution places any constraints on laws that would attempt to criminalize or otherwise prohibit self-defense, those constraints need not be predicated on the Second Amendment (and there is no persuasive evidence that they are). Instead, if a "right" to self-defense is recognized in the Constitution, it is likely rooted elsewhere, such as the guarantees of the Fifth Amendment (and the Fourteenth Amendment under the incorporation doctrine), or among those rights "retained by the people" referred to in the Ninth Amendment.

B. Even If Second Amendment Rights Were Implicated, The Court Of Appeals Failed To Apply An Appropriate Level Of Scrutiny

Although the Court of Appeals acknowledged, as a general proposition, that "reasonable regulations" on the "use and ownership" of firearms might not run afoul of the Second Amendment, Pet. App. 51a-52a, it did not evaluate the constitutionality of the statutes at issue using standards anything like those ordinarily applied when constitutional rights are implicated. *Cf. Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary.") (quotation omitted); *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 279 (1990) ("[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether [the person's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests'") (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63 n.18 (1976) ("Reasonable regulations of the time, place, and manner of protected speech, where those regulations

are necessary to further significant governmental interests, are permitted by the First Amendment.").[8]

Instead, the court below 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. Thus, the decision below compounds the erroneous conclusion that the Second Amendment affords substantive rights to Respondent under the facts of this case with the misguided view that the statutes at issue *necessarily* are unconstitutional if the Amendment applies to the use or possession of firearms unrelated to "the preservation or efficiency of a well regulated militia."

There is simply no support for such reasoning – which is also plainly inconsistent with *Lewis*, where the Court applied "rational basis" scrutiny to a statute *prohibiting* certain people from possessing firearms. 445 U.S. at 65 ("We therefore hold that

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[8] The Court of Appeals seemed to believe such an analysis was unnecessary because it understood the statutes at issue to constitute a firearm "ban," as opposed to "reasonable regulation." Pet. App. 51a-53a. But such a reading of the laws would not obviate the need for further inquiry; even fundamental rights that traditionally receive the greatest protection – like the First Amendment right to speech free of prior restraints – are not absolute. *Cf. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) ("This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.").

§ 1202(a)(1) prohibits a felon from possessing a firearm").

C. Disputes Regarding Second Amendment Constraints On Federal Laws Relating To The Use Or Possession Of "Arms" Generally Should Be Deemed Nonjusticiable

This case provides the Court an opportunity to consider whether certain claims based on the Second Amendment should be deemed nonjusticiable. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968) (Justiciability is "'not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . .'") (quoting *Poe v. Ullman*, 367 U.S. 497, 508 (1961)); *cf. New York v. United States*, 505 U.S. 144, 183-86 (1992) (discussing cases finding Guarantee Clause claims nonjusticiable issues committed to Congress).

When evaluating whether a case presents a "political question" best left to the political departments, the Court considers whether there is:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for

> unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). These prudential considerations are instructive here.

Much or all of the original significance of the Amendment has dissipated with the passage of time and changes in society. *See* Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control 196 (2006) (Federal laws enacted in 1903 and 1916 "effectively nationalized the function and control of the militia. By wresting control of the militia from the states, these acts had the practical effect of draining the Second Amendment of much of its remaining force."); Akhil Reed Amar, America's Constitution: A Biography 325 (2005) ("The legal and social foundations on which the amendment was built have washed away over the years."); Don Higginbotham, "The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship," 55 Wm. & Mary Q. 39-58 (1998); *cf. Perpich v. Dept. of Defense*, 496 U.S. 334, 343 (1990) (discussing Militia Clauses of Article I and the decision by Congress in 1916 "to 'federalize' the National Guard"); *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973) (observing that the Militia referred to in Article I is "now the National Guard").

It is also self-evident that this Court has not developed extensive jurisprudence regarding the

Second Amendment, either before or since *Miller* was decided in 1939. *Cf.* Mark V. Tushnet, Out of Range: Why the Constitution Can't End the Battle Over Guns 63 (2007) ("Since *Miller* the Supreme Court has assiduously avoided taking up Second Amendment cases."). If Respondent and the court below were correct that individuals have a right to use or possess weapons under the Second Amendment unrelated to the "preservation or efficiency of a well regulated militia," *Miller*, 307 U.S. at 178, neither this Court nor the courts of appeals have articulated "judicially discoverable and manageable standards" for ascertaining the contours of such a right or how it might apply to contemporary society. *See Baker v. Carr*, 369 U.S. at 217. Nor is it evident the judiciary is well positioned to do so. *Cf. Gilligan*, 413 U.S. at 10 ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence" than "decisions as to the composition, training, equipping and control of a military force . . . .").[9]

As discussed above, *Miller* made clear that the Second Amendment "must be interpreted and applied" keeping in view the Amendment's purpose "to assure the continuation and render possible the

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[9] Under the approach employed by the Court of Appeals, the judiciary also would be tasked with determining whether particular modern weapons are "lineal descendant[s]" of "founding-era" weapons (Pet. App. 51a) – an exercise for which there are no existing or obvious "judicially discoverable and manageable standards." *Baker v. Carr*, 369 U.S. at 217.

effectiveness" of the militia. *Miller*, 307 U.S. at 178. Because Respondent does not assert that his desired use or possession of the firearms at issue relates to "the preservation or efficiency of a well regulated militia,"[10] the Amendment lends no support to his claims.

Were a court presented, in another case, with a colorable claim that the challenged conduct infringed the "right to keep and bear arms" in a manner inconsistent with the "preservation or efficiency of a well regulated militia," *Miller*, 307 U.S. at 178, this Court's precedents suggest such a controversy should be left to the political branches, and deemed nonjusticiable.[11]

It is well established by the text of the Constitution, and from this Court's prior decisions, that Congress is vested with responsibility for the nation's militia. *See* U.S. Const. art. I, § 8, cls. 15 & 16; *Perpich*, 496 U.S. at 349-54 (discussing powers granted to Congress by Militia Clauses and federal authority over state militia); *see also* U.S. Const. art.

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[10] *See* Pet. App. 71a; *see also* J.A. 51a (Complaint ¶ 2: Heller "presently intends to possess a functional handgun and long gun for self-defense within his own home"). Moreover, given that Respondent was born in 1941 (Pet. App. 120a), he was a member of neither the United States nor District of Columbia militias at the time he filed suit, based on age limits for membership in each. *See* 10 U.S.C. § 311; D.C. Code § 49-401.

[11] At least one district court has found a Second Amendment claim barred by the political question doctrine. *See Gregoire v. Rumsfeld*, 463 F. Supp. 2d 1209, 1218-20 (W.D. Wash. 2006).

I, § 10 ("No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace"). The Court has acknowledged that Congress's power over the militia is "analogous" to its power over military affairs, in which Congress has "plenary constitutional authority." *Chappell v. Wallace*, 462 U.S. 296, 301-02 (1983). "[T]he insistence . . . with which the Constitution confers authority over the Army, Navy, and *militia* upon the political branches" is clear. *United States v. Stanley*, 483 U.S. 669, 682 (1987) (Scalia, J.) (emphasis added); *see also Gilligan*, 413 U.S. at 5-6 (finding claim seeking federal court oversight of "training, weaponry and orders of the Ohio National Guard" nonjusticiable because Article I is "explicit that the Congress shall have the responsibility for organizing, arming and disciplining the Militia").

Whether the regulation or prohibition of a *particular* weapon implicates the "preservation or efficiency of a well regulated militia," *Miller*, 307 U.S. at 178, over which Congress has responsibility, is precisely the kind of question best left for the political branches to resolve.[12] *See Gilligan*, 413

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[12] Although the Court need not identify all exceptions to a general determination that Second Amendment claims are nonjusticiable, *cf. Veith v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring) (agreeing case before the Court was nonjusticiable while noting "I would not foreclose all possibility of judicial relief . . . in some redistricting cases"), one category of exceptions might involve claims brought by States – an exception respectful of federalism considerations and consistent with the Amendment's purpose "to assure the continuation and

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U.S. at 10 ("The complex, subtle, and professional decisions as to the composition, training, *equipping*, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system . . . .") (emphasis added).[13]

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render possible the effectiveness" of the militia, *Miller*, 307 U.S. at 178, in which both the Congress and the States may play a role. *See* U.S. Const. art. I, § 8, cls. 15 & 16; *cf. Hickman v. Block*, 81 F.3d 98, 102 (9th Cir.) ("Because the Second Amendment guarantees the right of the states to maintain armed militia, the states alone stand in the position to show legal injury when this right is infringed."), *cert. denied*, 519 U.S. 912 (1996).

[13] The Court's willingness to conclude in *Miller* that a "shotgun having a barrel of less than eighteen inches in length" was not within the scope of the term "arms," as used in the Second Amendment, 307 U.S. at 178, does not foreclose this Court from now concluding that such judgments, if necessary at all, are best left to the political branches. In fact, Appellees in *Miller* did not even participate in the appeal, and the Court explained its decision was based on "the absence of any evidence" that the weapon at issue bore a "reasonable relationship to the preservation or efficiency of a well regulated militia," and that it was not within "judicial notice" that the weapon "could contribute to the common defense." *Id.*; *cf. Gilligan*, 413 U.S. at 10 ("[I]t is difficult to conceive of an area

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This approach would be in accord with the state of affairs since *Miller* was decided. During that time, Congress has legislated actively to regulate or prohibit the use or possession of certain weapons. *See supra* pp. 5-7. Consistent with its precedents, this Court should presume Congress has done so (and will continue to do so) mindful of the Second Amendment, *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (assuming Congress "legislates in light of constitutional limitations"), despite operating in a political environment where passions about these issues run high.[14]

Since *Miller* it has been well settled that the Second Amendment is implicated only when the desired possession or use of a weapon has a "relationship to the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178. If the Second Amendment has any specific applications in Twenty-First Century America, it may be most appropriate for judgments about those applications to reside with the political branches, and

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of governmental activity in which the courts have less competence" than "decisions as to the composition, training, *equipping* and control of a military force") (emphasis added).

[14] Respecting interpretations and applications of the Second Amendment by the political branches of the federal government is also appropriate given this Court's view that the provision operates as a restraint only on the federal government. *See Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

particularly with Congress,[15] which is expressly vested with responsibilities over the militia by Article I.[16]

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[15] This would allow members of Congress who share the Court of Appeals's reading of the Second Amendment to legislate in light of that view. Even though *Amici* do not believe such a view is consistent with a proper interpretation of the Second Amendment or with *Miller*, Congress is permitted to legislate with the intent of protecting or advancing "rights" beyond those established by the Constitution, provided it is acting pursuant to authority granted by the Constitution. *Cf.* Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901(a)(2) ("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.").

[16] Congress's regulation of the use or possession of "arms" would remain subject to other constitutional restraints, and to review by the federal courts. *Cf. United States v. Lopez*, 514 U.S. 549 (1995) (finding statute exceeded Congress's power under the Commerce Clause).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

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Representative John Conyers, Jr. (MI-14)
Representative Danny K. Davis (IL-07)
Representative Keith Ellison (MN-05)
Representative Sam Farr (CA-17)
Representative Chaka Fattah (PA-02)*
Representative Al Green (TX-09)
Representative Raúl M. Grijalva (AZ-07)
Representative Michael Honda (CA-15)
Representative Zoe Lofgren (CA-16)
Representative Carolyn McCarthy (NY-04)
Representative Gwen Moore (WI-04)
Representative James P. Moran (VA-08)
Representative Eleanor Holmes Norton (DC)
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* Congressman Fattah served as the lead Member on this brief.