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

BRIEF OF THE STATES OF NEW YORK, HAWAII, ILLINOIS, AND MARYLAND AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

BARBARA D. UNDERWOOD*
Solicitor General

MICHELLE ARONOWITZ
Deputy Solicitor General

SASHA SAMBERG-CHAMPION
Assistant Solicitor General

ANDREW M. CUOMO
Attorney General of the State of New York
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8020

* *Counsel of Record*

Attorneys for Amici Curiae

(*Additional Counsel Listed on Signature Page*)

211537

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
STATEMENT OF INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
REASONS TO GRANT CERTIORARI	3
I. The Decision Below is Inconsistent with *Miller.*	3
II. The Court of Appeals' Absolute Protection of a Particular Weapon is Without Precedent.	10
III. Granting Absolute Protection to "Lineal Descendants" of Founding-Era Weapons in "Common Use" Today Creates an Unmanageable Standard.	17
CONCLUSION	20

TABLE OF CITED AUTHORITIES

Page

CASES:

Arnold v. City of Cleveland,
616 N.E.2d 163 (Ohio 1993) 11, 14

Aymette v. State,
2 Humphreys [21 Tenn.] 154 (1840) 5

Bach v. Pataki,
408 F.3d 75 (2d Cir. 2004),
cert. denied,
546 U.S. 1174 (2006) 6

Benjamin v. Bailey,
662 A.2d 1226 (Conn. 1995) 11, 14

Bleiler v. Chief, Dover Police Dep't,
927 A.2d 1216 (N.H. 2007) 13

Burton v. Sills,
248 A.2d 521 (N.J. 1968),
dismissed for want of a substantial federal question,
394 U.S. 812 (1969) 7

Caban v. Mohammed,
441 U.S. 380 (1979) 7

Cases v. United States,
131 F.2d 916 (1st Cir. 1942),
cert. denied,
319 U.S. 770 (1943) 7, 17, 20

City of Las Vegas v. Moberg,
485 P.2d 737 (N.M. Ct. App. 1971) 12

Cited Authorities

	Page
City of Salina v. Blaksley, 72 Kan. 230 (1905)	5-6
City of Seattle v. Montana, 919 P.2d 1218 (Wash. 1996)	14
Cody v. United States, 460 F.2d 34 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1972)	7
Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976)	14
Eckert v. Philadelphia, 477 F.2d 610 (3d Cir.), *cert. denied*, 414 U.S. 839 (1973)	7
Ex parte Thomas, 21 Okla. 770 (1908)	8
Fife v. State, 31 Ark. 455 (1876)	6, 8
Gideon v. Wainright, 372 U.S. 335 (1963)	8
Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000)	6

Cited Authorities

Page

Hickman v. Block,
81 F.3d 98 (9th Cir.),
cert. denied,
519 U.S. 912 (1996) 7

In re Brickey,
70 P. 609 (Ida. 1902) 13

Kalodimos v. Village of Morton Grove,
470 N.E.2d 266 (Ill. 1984) 14

Lewis v. United States,
445 U.S. 55 (1980) ..... *passim*

Mosby v. Devine,
851 A.2d 1031 (R.I. 2004) 13-14

People v. Brown,
235 N.W. 245 (Mich. 1931) 5, 14

Printz v. United States,
521 U.S. 898 (1997) 6

Quilici v. Village of Morton Grove,
695 F.2d 261 (7th Cir. 1982),
cert. denied,
464 U.S. 863 (1983) ..... *passim*

Robertson v. City & County of Denver,
874 P.2d 325 (Colo. 1994) 11, 13, 14

State v. Duke,
42 Tex. 455 (1874) 6

Cited Authorities

Page

State v. Fennell,
382 S.E.2d 231 (N.C. Ct. App. 1989) 12, 14

State v. Hamdan,
665 N.W.2d 785 (Wisc. 2003) 13

State v. Kerner,
107 S.E. 222 (N.C. 1921) 12

State v. LaChapelle,
451 N.W.2d 689 (Neb. 1990) 14

State v. Rosenthal,
55 A. 610 (Vt. 1903) 12

State v. Woodward,
74 P.2d 92 (Ida. 1937) 14

State v. Workman,
14 S.E. 9 (W. Va. 1891) 6

United States v. Cruikshank,
92 U.S. 542 (1876) 6

United States v. Hale,
978 F.2d 1016 (8th Cir. 1992),
cert. denied,
507 U.S. 997 (1993) 7, 12

United States v. Lippman,
369 F.3d 1039 (8th Cir. 2004),
cert. denied,
543 U.S. 1080 (2005) 6

Cited Authorities

Page

United States v. Miller,
307 U.S. 174 (1939) ..... *passim*

United States v. Nelson,
859 F.2d 1318 (8th Cir. 1988) 12

United States v. Parker,
362 F.3d 1279 (10th Cir. 2004),
cert. denied,
543 U.S. 874 (2004) 9

United States v. Rybar,
103 F.3d 273 (3d Cir. 1996),
cert. denied,
522 U.S. 807 (1997) 6-7, 18

United States v. Tot,
131 F.2d 261 (3d Cir. 1942),
rev'd on other grounds,
319 U.S. 463 (1943) 9

United States v. Warin,
530 F.2d 103 (6th Cir.),
cert. denied,
426 U.S. 1948 (1976) 7, 12, 20

Vieth v. Jubelirer,
541 U.S. 267 (2004) 19

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8 4

U.S. Const. amend. II ..... *passim*

Cited Authorities

Page

STATUTES AND LEGISLATIVE MATERIAL

18 U.S.C. § 922 12

Act of June 26, 1934, c. 757, 48 Stat. 1236, § 1 ... 4, 9

Act of May 8, 1792, ch. XXXIII, § 1, 1 Stat. 271 .. 19

D.C. Code § 5-129.02 15

D.C. Code § 7-2501.01 9

D.C. Code § 11-723 16

H.R. Rep. No. 1780, 73d Cong., 2d Sess. 1 (1934) ... 4, 9

STATEMENT OF INTEREST OF THE AMICI CURIAE

This petition implicates the important interest of the amici States in protecting the safety of their residents by restricting access to certain types of particularly dangerous firearms. For more than two centuries, the States, as well as municipalities and the federal government, have banned certain weapons as too dangerous for general availability. Until the decision of the court of appeals in this case, such bans had been consistently upheld under the Second Amendment and under provisions of state constitutions guaranteeing the right to bear arms. The decision below is inconsistent with the decisions of this Court and every other court to consider the question. If permitted to stand, it will tend to destabilize the settled understanding of the federal and state constitutional provisions protecting the right to bear arms, and cast a cloud over all federal and state laws restricting access to firearms.

As the court of appeals recognized, any decision in this case, concerning the validity of a law of the District of Columbia, would not necessarily determine the outcome of challenges to laws enacted by individual States. Nonetheless, the decision below has the potential to influence judicial interpretation of both the Second Amendment and state constitutional provisions. Consequently, the amici States have a strong interest in the review of the court of appeals' decision, the rejection of its reasoning, and the reaffirmance by this Court of the States' traditional authority to protect public safety through the exercise of the police power to restrict access to certain types of firearms.

SUMMARY OF ARGUMENT

The decision of the court of appeals is so clearly inconsistent with this Court's settled interpretation of the Second Amendment as to warrant a grant of certiorari and summary reversal. The court of appeals has construed the Second Amendment as conferring an absolute right to own and use the firearm of an individual's choice, so long as the firearm is a "lineal descendant" of one that was common in the Eighteenth Century and remains in "common use" today. Pet. App. 51a. That ruling is flatly inconsistent with the holding and the rationale of this

Court's decision in *United States v. Miller*, 307 U.S. 174 (1939). In *Miller*, this Court upheld a federal law that effectively banned the ownership of a weapon determined to be particularly dangerous while allowing continued access to a wide variety of other firearms. In this case the court of appeals struck down, purportedly under the authority of *Miller* itself, Pet. App. 39a-44a, a District of Columbia law that did precisely the same thing.

Miller held that a law does not violate the Second Amendment "[i]n the absence of any evidence tending to show that possession or use" of any weapon affected by the law "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178. Just as no such evidence was introduced with respect to the short-barreled shotgun at issue in *Miller*, so no such evidence has been introduced with respect to the handgun at issue here. Thus, *Miller* directly controls this case. This Court has given lower courts no reason to question the validity of its definitive holding in *Miller*, although it has had ample opportunity to do so. To the contrary, it reaffirmed that holding in *Lewis v. United States*, 445 U.S. 55, 65 & n.8 (1980), expressly stating that the Second Amendment does not confer a fundamental right that triggers heightened scrutiny for equal protection purposes. *Miller* and *Lewis* do not permit the rule set forth by the court of appeals, much less require it.

Moreover, although the court of appeals purported to incorporate into Second Amendment jurisprudence a state-law right to bear arms that predates the Second Amendment, Pet. App. 21a, instead the decision below ignores over a century of state-court jurisprudence that directly contradicts both its reasoning and its result. State courts that have considered similar questions have concluded that a right to bear arms does not preclude bans on machine guns, assault weapons, pistols, and other specific types of firearms that state and municipal legislatures have determined pose particular threats to public safety.

Finally, the court of appeals' "lineal descendant"/"common use" standard for determining which weapons a citizen has the

absolute right to own not only is illegitimate, but is entirely unworkable as a standard for deciding cases in an objective manner. As a result, it amounts to nothing more than a way for a federal court to substitute its judgment for that of an elected legislature as to which weapons are unreasonably dangerous in light of local realities.

Rather than following the standards prescribed by this Court or state courts, the court of appeals devised its own Second Amendment test that lacks both a convincing rationale and manageable standards. Because of the manifest importance of this issue, the gross failure of the court of appeals to abide by this Court's precedents, and the unbridled judicial discretion its jurisprudence promises, summary reversal is appropriate here. Such a disposition would reaffirm the principle, unquestioned by any court until now, that the Second Amendment permits reasonable regulation of firearms to protect public safety and does not guarantee individuals the absolute right to own the weapons of their choice.

REASONS TO GRANT CERTIORARI

I. The Decision Below is Inconsistent with *Miller*.

Only by grossly distorting the holding of *Miller* and ignoring other precedents of this Court could the court of appeals reach the erroneous conclusion that "there is no unequivocal precedent that dictates the outcome of this case," Pet. App. 36a. Not only did *Miller*, this Court's leading Second Amendment decision, set forth the legal standard that governs Second Amendment challenges, but it upheld a federal weapon ban that cannot be meaningfully distinguished from the ban at issue here.

Any discussion of the Second Amendment must begin with *Miller* and other cases in which this Court has interpreted the Amendment. Instead, the court of appeals began with *de novo* consideration of the Amendment's text, various academic sources, and historical documents such as England's Bill of Rights of 1689 and Blackstone's Commentaries, as if it were free to interpret the Amendment unconstrained by prior pronouncements of this Court, Pet. App. 12a-27a. After fifteen pages of such discussion, it made its first passing reference to

Miller, not to ascertain its holding, but simply to quote *Miller*'s somewhat tangential statements regarding the history of militias, Pet. App. 27a-28a. It proceeded to formulate an unprecedented interpretation of the Second Amendment, acknowledging that its conclusions were difficult to reconcile with *Miller*, Pet. App. 36a. Finally, it adopted and applied a test, purportedly drawn from *Miller*, but inconsistent with *Miller* and finding no support in any of this Court's precedents. Pet. App. 48a-51a.

At issue in *Miller* was the constitutionality of the National Firearms Act of 1934, which instituted onerous taxation and registration requirements on the possession of machine guns and short-barreled shotguns, with the purpose and effect of banning their possession. *See* H.R. Rep. No. 1780, 73d Cong., 2d Sess. 1 (1934) (purpose of law was to deprive the gangster "of his most dangerous weapon"; "there is no reason why anyone except a law officer should have a machine gun or sawed-off shotgun"). In *Miller*, this Court sustained an indictment for violating this law, holding that the Second Amendment did not guarantee the defendant the right to own a short-barreled shotgun, defined broadly as any "shotgun or rifle having a barrel of less than eighteen inches in length." 307 U.S. at 175, *quoting* Act of June 26, 1934, c. 757, 48 Stat. 1236.

Miller held that the Second Amendment must be interpreted *in pari materia* with the Militia Clause, which provides for joint federal/state governance and control of the State Militias. *See* U.S. Const. art. I, § 8. It explained that the guarantee of the Second Amendment was made "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of" the State militias, so the Amendment "must be interpreted and applied with that end in view." *Miller*, 307 U.S. at 178.

Accordingly, this Court ruled that

> [i]n the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and

> bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State*, 2 Humphreys [21 Tenn.] 154, 158 (1840).

Id. Miller also pointed out that "[m]ost if not all of the States have adopted provisions touching the right to keep and bear arms," and it concluded that "none of them seem to afford any material support for" the asserted Second Amendment right to own a short-barreled shotgun. *Id.* at 182.

Miller incorporated into its holding, and drew much of its wording from, *Aymette*, a decision interpreting the Tennessee Constitution's guarantee of a right to bear arms. In *Aymette*, the Supreme Court of Tennessee rejected the argument that this provision "gives to every man the right to arm himself in any manner he may choose, however unusual or dangerous the weapon he may employ." 21 Tenn. at 156. It held, in a sentence reflected in *Miller*'s holding, that the right to bear arms "is of general and public nature, to be exercised by the people in a body, for their *common defence*, so the *arms*, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment." *Id.* at 158 (emphasis and spelling in original). Given the "public nature" of the right, *Aymette* concluded, the legislature could freely regulate with respect to those weapons "which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin." *Id.*

In this manner, *Miller* aligned itself with the conclusion that *Aymette* had reached a century before, that a legislature may ban a type of weapon deemed particularly dangerous without infringing the right to bear arms if the weapon is meant for personal rather than military use. *Miller* also cited other "important" state-court decisions in the intervening hundred years that had reached similar conclusions. *See Miller*, 307 U.S. at 182 & n.2, *citing*, *inter alia*, *People v. Brown*, 235 N.W. 245, 246-47 (Mich. 1931) (upholding ban on blackjacks); *City of Salina v. Blaksley*, 72 Kan. 230, 233-34 (1905) (upholding law

prohibiting the "carrying of firearms or other deadly weapons"); *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891) (upholding concealed weapon ban); *Fife v. State*, 31 Ark. 455, 461-62 (1876) (upholding ban on pistols); *State v. Duke*, 42 Tex. 455, 458-59 (1874) (upholding prohibition on carrying pistols and other deadly weapons).

Even before *Miller*, this Court had held that the Second Amendment does not create a distinct federal right to keep and bear arms, but rather protects a right that predated the Constitution. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), declared that any right of "bearing arms for a lawful purpose" is not granted by the United States Constitution or "dependent upon that instrument for its existence."

Thus, *Miller* appropriately drew on state constitutional provisions in holding that no violation of the Second Amendment can be made out in the absence of evidence that the challenged federal gun regulation limits the use or ownership of a weapon that "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178. In particular, *Miller* made clear, such a showing cannot be made where the banned weapon is not "part of the ordinary military equipment" or could not "contribute to the common defense." *Id.*; *cf. Printz v. United States*, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring) (stating that *Miller* "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'").

This Court has never revisited its definitive holding in *Miller* and earlier cases, or otherwise curtailed legislative decisions regarding gun control, although plaintiffs have frequently challenged federal or state gun control laws on Second Amendment grounds. *See, e.g., Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2004), *cert. denied*, 546 U.S. 1174 (2006); *United States v. Lippman*, 369 F.3d 1039 (8th Cir. 2004), *cert. denied*, 543 U.S. 1080 (2005); *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000); *United States*

v. Rybar, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Hickman v. Block*, 81 F.3d 98 (9th Cir.), *cert. denied*, 519 U.S. 912 (1996); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 1948 (1976); *Eckert v. Philadelphia*, 477 F.2d 610 (3d Cir.), *cert. denied*, 414 U.S. 839 (1973); *Cody v. United States*, 460 F.2d 34 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1972); *Burton v. Sills*, 248 A.2d 521 (N.J. 1968), *dismissed for want of a substantial federal question*, 394 U.S. 812 (1969); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943). Indeed, this Court's dismissal of the appeal in *Burton*, which held both that the Second Amendment is not incorporated against the States and that it is not implicated by "regulation . . . which does not impair the maintenance of the State's active, organized militia," 248 A.2d at 528, should have been treated as binding precedent. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979).

This Court's only extended discussion of the Second Amendment since *Miller* arose not in the context of a Second Amendment challenge to the federal gun-control law at issue, but rather in an equal protection challenge to the law's application to a class of individuals. In *Lewis*, the Court rejected that equal protection challenge, and in so doing reaffirmed that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Lewis*, 445 U.S. at 65 n.8 (*quoting Miller*, 307 U.S. at 178)).

The court of appeals referred to *Lewis* only for the proposition that "convicted felons may be deprived of their right to keep and bear arms." Pet. App. 52a. But that proposition was not disputed in *Lewis*. Rather, *Lewis* has much broader application to this case, as it confirms that gun ownership is not a fundamental right of the sort that triggers strict scrutiny of a legislative decision.

The petitioner in *Lewis* had been convicted without counsel before *Gideon v. Wainright*, 372 U.S. 335 (1963), and thus his conviction was susceptible to collateral challenge, because of *Gideon's* retroactivity. *See Lewis*, 445 U.S. at 57-59. The petitioner argued, *inter alia*, that the federal ban on felons owning firearms violated the Equal Protection Clause as applied to someone whose underlying conviction was constitutionally invalid.

This Court reviewed the gun restriction only for its rationality, *id.* at 65-66, because the class of persons affected was not suspect and a restriction on gun ownership does not "trench upon any constitutionally protected liberties," *id.* at 65 n.8 (*citing Miller*, 307 U.S. at 178). The Court found that "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm," adding that convicted felons may be barred "from engaging in activities far more fundamental than the possession of a firearm," such as "holding office in a waterfront labor organization." *Id.* at 66. In short, after *Lewis* it is settled that legislative enactments limiting the possession of firearms receive considerable deference so long as they do not rely on a suspect classification, because the possession of firearms is not itself a fundamental right.

The holding of *Miller*, especially when combined with the deference required by *Lewis*, directly controls this case. There is no more evidence that ownership or use of a handgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia," 307 U.S. at 178, than there was with respect to ownership or use of the short-barreled shotgun at issue in *Miller*. Indeed, several courts have considered the precise argument advanced by plaintiffs and have concluded that, if a short-barreled shotgun lacked the requisite militia connection to satisfy *Miller*, so must a pistol or other handgun.[1]

1. Similarly, pre-*Miller* state courts that applied such a weapon-based standard concluded that pistols were not protected "Arms," because they are designed for private rather than military use. *See, e.g.*, *Ex parte Thomas*, 21 Okla. 770, 774-81 (1908); *Fife*, 31 Ark. at 461.

See United States v. Parker, 362 F.3d 1279, 1284 (10th Cir. 2004), *cert. denied*, 543 U.S. 874 (2004); *Quilici*, 695 F.2d at 270; *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943). No evidence has been introduced in this case to refute that common-sense conclusion, and *Miller* counsels that a court may not take judicial notice of such matters.

Nor can any meaningful distinction be drawn between the purpose or effect of the ban at issue here and the one involved in *Miller*. Both are legislative efforts to take out of general circulation particular weapons that are highly correlated with criminal activity, without banning the possession of other firearms. *Compare* Pet. App. 111a (District determined that handguns "have no legitimate use in the purely urban environment of the District of Columbia") *with* H.R. Rep. No. 1780, 73d Cong., 2d Sess. 1 (1934) (Congress determined that "there is no reason why anyone except a law officer should have a machine gun or sawed-off shotgun"). They are worded equally broadly, so as to cover a range of weapons. *Compare* D.C. Code § 7-2501.01 (defining banned "pistol" as "any firearm originally designed to be fired by use of a single hand") *with* Act of June 26, 1934, c. 757, 48 Stat. 1236, § 1(a) (defining restricted shotguns and rifles as those "having a barrel of less than eighteen inches in length").

Instead of distinguishing *Miller*, the Court of Appeals simply declined to apply *Miller*'s straightforward holding. The Court of Appeals interpreted *Miller* as holding that a weapon is protected by the Second Amendment if it is "lineally descended" from one that was in "common use" at the time of the Second Amendment's ratification. *See* Pet. App. 49a-51a. But *Miller* held nothing of the sort. To the contrary, it held that a weapon's connection to militia-related use must be examined "at this time," 307 U.S. at 178, rather than at the time of the Second Amendment's ratification. And it held that the relevant issue is not "common use" but use for militia-related purposes.

To be sure, before cataloguing the various colonial-era laws that required militamen to carry to duty very specific weapons

and other provisions, *see id.* at 179-82, *Miller* observed that "ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time," *id.* at 179. But *Miller* makes plain that the critical question for Second Amendment analysis is whether the weapon has a militia-related use "at this time" and not whether it had such a use in colonial times. And there is no basis, in *Miller* or elsewhere, for finding that a connection between common use and militia use exists today.

Thus, the Court of Appeals made a fundamental error in declaring that a weapon's constitutional status depends on its history, *i.e.*, whether it is "lineally descended" from a weapon used by militias in colonial times, or on its popularity, *i.e.*, whether it is in "common use."

Far from requiring a lengthy examination of the nature and scope of the Second Amendment right, this petition presents a simple case of a court of appeals' refusal to apply the precedents of this Court. Under any available reading, *Miller* and *Lewis* constitute "unequivocal precedent that dictates the outcome of this case," Pet. 36a. Respondent did not allege, much less establish with evidence, that use or possession of a handgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia,"[2] *Miller*, 307 U.S. at 178, and so the district court correctly concluded that he had failed to state a claim. In light of the court of appeals' clear error in its reading of precedent, summary reversal and reinstatement of the district court's judgment is appropriate.

II. The Court of Appeals' Absolute Protection of a Particular Weapon is Without Precedent.

The rule announced by the court of appeals in this case not only squarely contradicts *Miller*, but also is unprecedented under

2. The only evidence that could be read to support such a proposition is respondent's conclusory statement in his declaration that not having access to a handgun "limits . . . my ability to act in concert with others for the common good." Heller Decl. ¶ 5. This statement neither mentions a militia nor demonstrates that the handgun law has any relationship to the efficiency of one.

federal or state law. Indeed, federal and state courts have many times rejected the proposition that undergirds the court of appeals' holding: that "[o]nce it has been determined . . . that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them," Pet. App. 53a.

The court of appeals constructed from whole cloth the theory that the constitutionality of a law banning a certain type of weapon turns on whether the weapon at issue is a "lineal descendent" of a weapon in "common use" during the founding era, and is a weapon that is in common use today. Pet. App. 51a. If so, according to the court of appeals, ownership of the weapon is absolutely protected by the Second Amendment and cannot be banned, although the court of appeals would apparently permit the weapon's use to be regulated in some respect. *See* Pet. App. 51a-53a. Whether other weapons are available is irrelevant. Pet. App. 53a. On the other hand, if the weapon was not and is not in common use, ownership of the weapon receives no Second Amendment protection at all. Pet. App. 42a. Far from acknowledging that the doctrine it created is novel, the court of appeals suggested that it was merely reading the Second Amendment to function analogously to state provisions guaranteeing the right to bear arms. *See* Pet. App. 23a-24a, 52a-53a.

In fact, this doctrine is utterly unprecedented. Until now, it has been well settled that the right to bear arms does not include the right to possess the weapon of one's choice. State and federal courts have routinely upheld restrictions on the ownership of particularly dangerous weapons, including pistols, pursuant not only to the Second Amendment, but also to state constitutional provisions that provide an individual right to ownership of firearms for private purposes. They have done so regardless of whether the weapon at issue is considered a protected "Arm." *See, e.g.*, *Quilici*, 695 F.2d at 261; *Benjamin v. Bailey*, 662 A.2d 1226 (Conn. 1995); *Robertson v. City & County of Denver*, 874 P.2d 325 (Colo. 1994) (en banc); *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993). No federal court has ever questioned Congress's power to ban particularly dangerous

weapons, a power it has exercised on multiple occasions,[3] that was confirmed in *Miller*, and that is not challenged by respondent, *see, e.g.*, Brief in Response to Pet. for Certiorari ("Br. in Resp.") at 19.

In support of its rule that any "Arm" covered by the Second Amendment cannot be banned, the court of appeals invoked a single North Carolina case. *See* Pet. App. 53a (citing *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921)). But even that case explicitly stated that it would be permissible to enact a ban limited to pistols of small sizes, "which are easily and ordinarily carried as concealed," *Kerner*, 107 S.E. at 225, and struck down the law in question only after concluding that it functioned as a total ban on all arms within the means of its citizenry, *id.*[4] In just this fashion, state courts have carefully and consistently drawn the very distinction that the court of appeals dismissed out of hand as "frivolous," *see* Pet. App. 53a — the distinction between laws that ban *all* firearms, which violate some state constitutions,[5]

---

3. For example, the federal government has largely banned access to machine guns, *see* 18 U.S.C. §§ 922(a)(4), (b)(4), (o)(1), after considering "the relationship between the availability of machine guns, violent crime, and narcotics trafficking," and this ban has been upheld by every court to consider it. *See, e.g., United States v. Hale*, 978 F.2d at 1018. Similarly, the federal government's ban on the possession of submachine guns has been upheld. *See, e.g., United States v. Warin*, 530 F.2d at 106-07. Courts have also upheld federal restrictions on certain types of switchblade knives that Congress found "were increasingly being used for criminal purposes," *United States v. Nelson*, 859 F.2d 1318, 1319-20 (8th Cir. 1988). The federal government also has banned possession of firearms that cannot be detected by airport metal detectors. 18 U.S.C. § 922(p)(1).

4. North Carolina has since upheld a ban on short-barreled shotguns. *State v. Fennell*, 382 S.E.2d 231, 233 (N.C. Ct. App. 1989).

5. *See, e.g., City of Las Vegas v. Moberg*, 485 P.2d 737, 738-39 (N.M. Ct. App. 1971) (striking down city ordinance that banned all "deadly weapons," including all firearms); *State v. Rosenthal*, 55 A. 610, 611 (Vt. 1903) (striking down city law that barred the possession

(Cont'd)

and those such as the District's that merely ban particularly dangerous *types* of firearms, which are upheld.

State courts are led to this distinction through application of a "reasonable regulation" standard for evaluating the constitutionality of gun regulations, including those that ban specific types of weapon. This standard has been adopted virtually unanimously by the state courts. *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004) (collecting cases); *Robertson*, 874 P.2d at 329-30 (same). Although the court of appeals' interpretation purported to permit "reasonable regulation[]" of weapons, Pet. App. 51a, thus alluding to this well-established state standard, the actual "reasonable regulation" state standard bears no resemblance to the rule applied by the court of appeals.

Applying the "reasonable regulation" standard, the state courts strike down a gun-control law only if the extent of its "impinge[ment] upon the constitutional right to bear arms" is unreasonable in relation to its purpose of protecting the "health, safety and welfare of the public." *Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1223 (N.H. 2007). Thus, state courts "must balance the conflicting rights of an individual to keep and bear arms for lawful purposes against the authority of the State to exercise its police power to protect the health, safety, and welfare of its citizens." *State v. Hamdan*, 665 N.W.2d 785, 800 (Wisc. 2003).

Under this standard, it is generally held that a state constitutional "right to bear arms" is not the right to bear *any* weapon. *See Quilici*, 695 F.2d at 267 (Illinois constitution "grants only the right to bear arms, not handguns"). So long as the regulation is reasonable and "there are ample weapons available for citizens to fully exercise their right," a ban on particularly dangerous weapons does not "significantly interfere with this right." *Robertson*, 874 P.2d at 333; *accord Mosby*,

---

(Cont'd)
within city limits of *any* dangerous weapon); *In re Brickey*, 70 P. 609 (Ida. 1902) (invalidating law that banned the possession of firearms within city or village limits).

851 A.2d at 1045 (upholding a "restriction on the type of firearms one may lawfully possess"); *Benjamin*, 662 A.2d at 1232 (right is "to possess a weapon of reasonably sufficient firepower to be effective for self-defense," not "to possess any weapon of the individual's choosing"). Accordingly, under state law, while "the right to bear arms may not be denied by the legislature" outright, the legislature may "prescribe the kind or character of arms that may or may not be kept, carried or used." *State v. Woodward*, 74 P.2d 92, 95 (Ida. 1937). It is up to the state legislatures, not the courts, to "take account of the character and ordinary use of weapons and interdict those whose customary employment by individuals is to violate the law." *People v. Brown*, 235 N.W. 245, 246-47 (Mich. 1931).

For example, state bans on the possession of "assault weapons" are routinely upheld, because these firearms are used in a disproportionate number of crimes. *See, e.g., Benjamin*, 662 A.2d at 1235; *Robertson*, 874 P.2d at 331-32; *Arnold*, 616 N.E.2d at 171-73. In like fashion, state courts have followed this Court's lead in *Miller* and have upheld restrictions and outright bans on the possession of short-barreled shotguns, citing legislative determinations that these weapons are powerful, easily concealed, and "associated with violent crime," *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976); *accord State v. LaChapelle*, 451 N.W.2d 689, 690-91 (Neb. 1990); *Fennell*, 382 S.E.2d at 233. Washington's highest court has upheld Seattle's ban on carrying certain kinds of knives, in deference to "the reality of life in our state's largest city," where "street crime involving knives is a daily risk," *see City of Seattle v. Montana*, 919 P.2d 1218, 1223 (Wash. 1996). And a ban on handguns enacted by Morton Grove, Illinois, that is very similar to the one involved here has been upheld by both federal and state courts as not violating the Illinois constitution (as well as the Second Amendment). *See Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 278 (Ill. 1984); *Quilici*, 695 F.2d at 267.

The District's ban on handguns was motivated by the same concerns and cannot be distinguished in any meaningful respect from these other bans on particularly dangerous weapons. The District, facing a crime wave and data that showed that handguns were by far the weapon of choice in local crimes, concluded that handguns similarly had become associated with violent crime rather than lawful purposes. Accordingly, it concluded that whatever infringement a ban on handguns constituted on residents' right to bear arms was outweighed by the need to protect public safety. These conclusions are not unreasonable, and should have been upheld even if the Second Amendment were to be interpreted — contrary to this Court's jurisprudence – as limiting the federal government to the same extent as state provisions generally limit the various state governments.

State courts do not closely scrutinize the merits of legislative decisions to ban particularly dangerous weapons, but rather uphold them unless they deprive a plaintiff of any reasonable means by which to exercise his right to bear arms. Such a showing of effective disarmament has not been made here with respect to the handgun ban. To the contrary, respondent explicitly acknowledges in his declaration — one of the very few pieces of evidence in the sparse record — that he owns other firearms that may be legally possessed in the District.[6]

Indeed, plaintiffs' own theory of the case has not been that the handgun ban standing alone violated the Second Amendment, but rather that the combination of the handgun ban and the two other District laws at issue deprived them of their "fundamental right to possess a functional, personal

6. Respondent is a special police officer, *see* D.C. Code § 5-129.02, who owns multiple "long guns" that are not subject to the District's ban on handguns. Heller Decl. ¶¶ 2-3. He states in conclusory fashion that not having access to a handgun "limits my ability to defend myself . . . as a handgun could often be better suited for such uses than a rifle or shotgun." *Id.* ¶ 5. It is doubtful that such a conclusory statement even creates a triable issue of fact that any Second Amendment right has been meaningfully burdened, let alone that it warrants summary judgment for the respondent, as directed by the court of appeals.

firearm, such as a handgun *or ordinary long gun (shotgun or rifle)* within the home," Complaint ¶ 12 (emphasis added). In response to the petition, respondent makes no attempt to defend the court of appeals' holding that the District cannot ban any weapon determined to be an "Arm." Instead, he asks this Court to grant certiorari and then confine its review to the abstract question of whether a handgun is such an "Arm," without considering at all what consequences should flow from such a determination. Br. in Resp. 26.

As respondent notes, *id.* at 3, his argument before the court of appeals was that the District's laws amounted to a total disarmament in combination. But the court of appeals did not adopt respondent's theory of the case, and instead went much further, holding that the handgun ban in isolation (as well as each of the other two laws in isolation) violated the Second Amendment.[7]

In short, the court of appeals did not simply read the Second Amendment as limiting the federal government in the same manner as the state right to bear arms limits the States. Rather, it ventured far beyond the States' well-established test, fashioning a hitherto unknown *per se* rule that was not asked for and is not defended by the respondent, and that is so broad as to render irrelevant the fact that the respondent has produced no evidence that the District's handgun ban burdens his right to bear arms in any meaningful way. This rule is not consistent with the reasonable regulation standard adopted by the state courts, nor can it be squared with this Court's admonition that Second Amendment challenges to such enactments must be

7. Moreover, the court of appeals improperly reached the conclusion that the statutes at issue amounted to a total disarmament. Given the extreme disagreement between the parties as to the statutes' meaning and operation, the federal court of appeals should have certified the question to the local D.C. Court of Appeals for an authoritative interpretation before reaching out to decide what may be an entirely unnecessary question of federal constitutional law. *See* D.C. Code § 11-723 (permitting certification from a variety of courts, including this Court).

based on evidence, *see Miller*, 307 U.S. at 178, and so the court of appeals' decision should be summarily reversed.[8]

III. Granting Absolute Protection to "Lineal Descendants" of Founding-Era Weapons in "Common Use" Today Creates an Unmanageable Standard.

Nor is there any legitimate rationale for the court of appeals' "lineal descendant"/"common use" standard for determining which weapons a citizen has the absolute right to own. This standard, which appears to have been constructed to fit the facts of a challenge to a handgun ban, attempts to avoid the fundamental problem encountered by any court inclined to interpret the Second Amendment as providing the right to a choice of weaponry: how to cabin that right so as to avoid the absurd result of a right to own a tank or bazooka. *See Cases*, 131 F.2d at 922 (discussing how *Miller* cannot reasonably be interpreted as providing right to military-grade equipment). But

---

8. Further support for summary reversal is provided by a recent order of the court of appeals, confirming that it improperly placed the burden on the District, rather than on the challengers, on the issue of whether the law disarmed the citizenry or merely prohibited particular types of weapons. In denying the plaintiffs' motion to lift the stay of its mandate, the court of appeals stated that the District had not "presented in our court" the argument the District now advances before this Court that its "ban on handguns can be justified so long as rifles and shotguns can be utilized in the home for self protection." *See* Order of Sept. 25, 2007, *available at* http://dcguncase.com/blog/wp-content/uploads/2007/09/dc-circuit-order-denying-motion-to-lift-stay.pdf. The order also stated that the District never "suggested that a rifle or shotgun, as opposed to a handgun, could be legally employed in self defense." *Id.* These statements show that the court of appeals incorrectly placed the burden on the District to demonstrate that other weapons could feasibly substitute for the banned ones rather than requiring the plaintiffs to demonstrate that they could not defend themselves with other weapons. *See Miller*, 307 U.S. at 178 (putting burden on law's challenger to come forward with evidence); *cf. Lewis*, 445 U.S. at 65-66 (rejecting strict scrutiny of laws affecting gun ownership). This error provides further support for summary reversal.

it has no grounding in the Amendment's text and history or this Court's precedent, nor is it the sort of manageable standard that can describe the contours of a constitutional right. In the end, it is nothing more than an open-ended invitation for federal courts to second guess the determinations of elected legislatures as to which weapons are unreasonably dangerous in light of local realities, without ever acknowledging that they are doing so. *Cf. Rybar*, 103 F.3d at 294 n.6 (Alito, J., dissenting) (appellate judges "are not experts on firearms," nor on "crime in general").

For example, it cannot be that an individual has a Second Amendment entitlement to own a weapon that waxes as a weapon gains in popularity and wanes as that weapon falls into disuse. The popularity of a weapon has no bearing on the degree to which a law banning that weapon infringes upon any one individual's rights. Rather, it simply indicates how many individuals would have standing to challenge such a law.

Similarly, there is no more rationale for limiting the "Arms" encompassed by the Second Amendment to those that are "lineally descended" from a weapon known to the founders than there is for limiting the property protected by the Fifth Amendment to that which is "lineally descended" from Eighteenth Century property.[9] Instead, like the "common use" standard, the "lineally descended" test is a limitation that purports to be neutral but in fact selects certain favored weapons for protection while excluding others, thereby substituting a judicial determination for the carefully considered judgment of a local legislature.

---

9. As the court of appeals itself recognized, there is rarely justification for limiting the protections of a constitutional right to the technology that would have been foreseeable by the founders. Pet. App. 51a. For similar reasons, the court of appeals' suggestion that the only permissible infringements on the Second Amendment are those that were known to common law at the time of the Amendment's ratification and thus expressly contemplated by the ratifiers, *see* Pet. App. 51a-52a, has no justification in this Court's jurisprudence.

Ironically, the result of the "common use"/"lineal descendant" test is the exclusion from the Second Amendment right of *only* those new and powerful weapons that "at this time" are "part of the ordinary military equipment" or "could contribute to the common defense," *Miller*, 307 U.S. at 178. Thus, while purporting to follow *Miller*, the "common use"/"lineally descended" construction of the Second Amendment directly rejects what the court of appeals itself viewed as the key distinction drawn by *Miller* — between those weapons that could contribute to the common defense and those that could not, Pet. App. 50a-51a. To accomplish this result, the court of appeals selectively quoted *Miller*'s holding, leaving out the words "at this time," Pet. App. 42a. *Miller* itself asks whether the use or possession of a weapon "at this time" has a relationship to the preservation of a militia, and so squarely rejects the historical inquiry embodied in the "lineal descendant" test.

Nor does the "common use"/"lineal descendant" test represent the sort of "workable standard[]" that can support judicial intervention, *see Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring). The court of appeals did not specify how common a weapon would have to be (either presently or in the Eighteenth Century) to earn Second Amendment protection. Indeed, it made little showing that handguns were, in fact, common in the Eighteenth Century.[10] The court of appeals also did not specify whether a weapon must be common within the jurisdiction in question, or within the entire United States, or both — an important distinction here, since the District's three-decades-old ban on handguns presumably has made handgun use for other than criminal

10. The Militia Act of 1792, the only source upon which the court of appeals relied, *see* Pet. App. 49a-50a, actually counsels the opposite conclusion. The Militia Act required ordinary militiamen to outfit themselves with a variety of longer firearms, including muskets, bayonets, and rifles, but not including pistols. *See* Act of May 8, 1792, ch. XXXIII, § 1, 1 Stat. 271. Instead, the only militiamen expected to carry pistols were members of specialized horse-mounted units (the "dragoons"). *Id.* § 4, 1 Stat. 272.

purposes very rare. It did not explain how close "a lineal descendant" a weapon must be to one that was common among militiamen, or why the short shotguns involved in *Miller* are not similarly descended from Eighteenth Century weaponry.

Nor, finally, did the court of appeals explain how the constitutional inquiry into a particular weapon's commonality or ancestry could apply to the District's broad statutory definition at issue here, "any firearm originally designed to be fired by use of a single hand." The law bans multiple types of gun, most of which individually are no more common than were short-barreled shotguns at the time of *Miller*. Under the court of appeals' test, it would appear that the District could ban each relatively uncommon model or type of gun individually, but it could not achieve the same result with one broad definition. The impossibility of drawing such lines in an objective manner only highlights the futility of the enterprise upon which the D.C. Circuit would set the federal courts — and explains why other courts have consistently rejected the court of appeals' misreading of *Miller*, as somehow guaranteeing the absolute right to own any weapon "capable of being used in military action," *Warin*, 530 F.2d at 106; *see, e.g.*, *Cases*, 131 F.2d at 922.

This Court should summarily reverse the court of appeals' decision and reaffirm the well-settled principle that the Second Amendment does not guarantee the right to own the weapon of a citizen's choice. Given the egregiousness of the court of appeals' error, this Court's review is warranted not only to correct the error below but also to ensure that the decision below does not mislead other courts into unsound Second Amendment jurisprudence.

CONCLUSION

For the reasons stated above, as well as those that are stated in the petition, this Court should grant certiorari in this case and summarily reverse the decision below.

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8020

BARBARA D. UNDERWOOD*
Solicitor General

MICHELLE ARONOWITZ
Deputy Solicitor General

SASHA SAMBERG-CHAMPION
Assistant Solicitor General

MARK J. BENNETT
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
Chicago, IL 60601
(312) 814-3000

DOUGLAS F. GANSLER
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6300

* *Counsel of Record*

Attorneys for Amici Curiae