

No. 07-290

IN THE
Supreme Court of the United States

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

v.

DICK ANTHONY HELLER,
Respondent.

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

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

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QUESTION PRESENTED

Whether the following provisions, D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02, violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

Mission Statement

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

Operational Strategy

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

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

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

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

SUMMARY OF ARGUMENT

The Second Amendment guarantees that “A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.” This case involves the right to keep arms in the home. This case does not involve bearing arms outside the home.

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

Historian Joyce Lee Malcolm instructs that

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

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

Professor Laurence H. Tribe concludes the following:

Perhaps the most accurate conclusion one can reach with any confidence is that the core meaning of the Second Amendment is a populist/republican/federalism one. Its central object is to arm “We the People” so that ordinary citizens can participate in the collective defense of their community and their state. But it does so not through directly protecting a right on the part of states or other collectivities, assertable by them against the federal government, to arm the populace as they see fit. Rather, the amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes — not a right to hunt for game, quite clearly, and certainly not a right to employ firearms to commit aggressive acts against other persons — a right that directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by § 1 of the Fourteenth Amendment against state or local government action.

Laurence H. Tribe, *I AMERICAN CONSTITUTIONAL LAW*
901-02 n.221 (Foundation Press 2000).

In view of this history, the *Parker* decision correctly interpreted an explicit constitutional right. The text of the amendment and its history preordained the result reached in *Parker*.

III. PAST AND CURRENT STATE GUARANTEES SUPPORT THE RIGHT TO KEEP ARMS IN THE HOME.

State constitutions existed prior to the adoption of the federal Bill of Rights. State constitutions and state case law serve as guides to interpreting the federal Bill of Rights. *Harmelin v. Michigan*, 495 U.S. 956 (1990). State constitutions show a national consensus supporting the right to keep and bear arms, including handguns.

There are three broad classes of firearms: rifles, shotguns, and handguns. Banning any one of the three classes would be inconsistent with the historical reason for the recognition of this right.

The British effort to disarm the inhabitants of Boston (a seizure of 1,778 muskets, 973 bayonets, 634 pistols, and 38 blunderbusses) was addressed in the July 6, 1775, *Declaration of the Causes and Necessity of Taking Up Arms* by the Continental Congress. Such unhappy experiences with government efforts to disarm the people served as an impetus to include a right to bear arms in state constitutions as well as in the Bill of Rights. *The Declaration of the Causes and Necessity of Taking Up Arms* (1775), reprinted in DOCUMENTS OF AMERICAN HISTORY 92, 94 (Henry Steele Commager, ed., 5th ed. 1949); see also Richard Frothingham, HISTORY OF THE SIEGE OF BOSTON AND

OF THE BATTLES OF LEXINGTON, CONCORD AND BUNKER HILL 95 (6th ed. 1903).

From 1822 to 2003, state courts have voided a law as an infringement on the right to bear arms or an infringement on the right to keep arms at least twenty-four times.² Some of these cases involved

² *State v. Spiers*, 119 Wash.App. 85, 79 P.3d 30 (2003) (struck down that part of statute forbidding ownership of a firearm while free on bond for a serious offense); *State v. Hamdan*, 264 Wis.2d 433, 665 N.W.2d 785 (2003) (pistol concealed carrying statute unconstitutional as applied); *Baca v. New Mexico Department of Public Safety*, 132 N.M. 282, 47 P.3d 441 (2002) (local government prohibited from regulating in any way an incident of the right to bear arms); *State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988) (struck down pistol carrying law as too restrictive); *Barnett v. State*, 72 Or. App. 585, 695 P.2d 991 (1985) (struck down prohibition of possession of black jack); *State v. Delgado*, 298 Or. 395, 692 P.2d 610 (1984) (struck down prohibition of possession of switchblade knife); *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981) (struck down prohibition of carrying a club); *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980) (struck down prohibition of possession of a club); *Junction City v. Mevis*, 226 Kan. 526, 601 P.2d 1145 (1979) (struck down gun carrying ordinance as too broad); *City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972) (struck down gun law on sale, possession, and carrying as too broad); *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (Ct.App. 1971) (struck down gun carrying ordinance as too restrictive); *People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (1936) (struck down law prohibiting possession of a firearm); *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W.2d 678 (1928) (struck down pistol carrying ordinance as too restrictive); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922) (struck down statute prohibiting possession of a pistol); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921) (struck down pistol carrying license and bond requirement law as too restrictive); *In re Reilly*, 31 Ohio Dec. 364 (C.P. 1919) (struck down ordinance forbidding hiring armed guard to protect property); *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903) (struck

handguns. Therefore, from a national perspective, *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), is compatible with a long line of decisions that strike down unreasonable arms laws.

In the so-called assault firearm cases, courts did not uphold the banning of all handguns or all rifles or all shotguns. None of the three broad classes of firearms was banned. The laws focused on a narrow subset of semiautomatic handguns, semiautomatic rifles, and semiautomatic shotguns. *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 36 n. 1, 616 N.E.2d 163, 164 n. 1 (1993); *Robertson v. Denver*, 874 P.2d 325, 336 appendix (Colo. 1994); *Benjamin v. Bailey*, 234 Conn. 455, 459 n.4, 662 A.2d 1226, 1229 n. 4 (1995).

The District of Columbia's ban of an entire class of firearm, the handgun, is unconstitutional in the face of a constitutional command that the right to keep arms shall not be infringed.

down pistol carrying ordinance as too restrictive); *In re Brickey*, 8 Ida. 597, 70 P. 609 (1902) (struck down gun carrying statute as too restrictive); *Jennings v. State*, 5 Tex. App. 298 (1878) (struck down statute requiring forfeiture of pistol after misdemeanor conviction as infringement on right to arms); *Wilson v. State*, 33 Ark. 557, 34 Am.Rep. 52 (1878) (struck down pistol carrying statute as too restrictive); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 8 Am.Rep. 8 (1871) (struck down pistol carrying statute as too restrictive); *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214 (1866) (struck down gun confiscation law as infringement on right to arms); *Nunn v. State*, 1 Ga. (1 Kel.) 243 (1846) (struck down pistol carrying statute as too restrictive); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 13 Am.Dec. 251 (1822) (struck down concealed carrying statute as infringement on right to arms; the constitution was later amended to allow regulation of concealed carrying of arms).

The state guarantees to arms are listed here along with some case law.³

Alabama 1819:

“That every citizen has a right to bear arms in defense of himself and the state.” ALA. CONST. art. I, § 27 (“[t]hat” added, and “defence” changed to “defense,” in 1875).

Alaska 1994:

“A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State.” ALASKA CONST. art. I, § 19.

1959: “A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.” *Id.*

Arizona 1912:

“The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be

³ Each guarantee is listed with the year it was first enacted; moves to different sections are not noted. If a guarantee to arms first enacted in one year was changed very slightly some years later, the latter version is listed together with the original year, and the changes and change dates are noted parenthetically. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. of Law & Politics 191 (2006).

construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.” ARIZ. CONST. art. II, § 26.

Arkansas 1868:

“The citizens of this State shall have the right to keep and bear arms, for their common defense.” ARK. CONST. art. II, § 5 (comma after “arms” added, and “defence” changed to “defense,” in 1874).

Wilson v. State, 33 Ark. 557, 34 Am.Rep. 52 (1878)
(struck down pistol carrying statute as too restrictive).

1864: “That the free white men of this State shall have a right to keep and to bear arms for their common defence.” ARK. CONST. OF 1864, art. II, § 21.

1861: “That the free white men and Indians of this State have the right to keep and bear arms for their individual or common defense.” ARK. CONST. OF 1861, art. I, § 21.

1836: “That the free white men of this State shall have a right to keep and to bear arms for their common defence.” ARK. CONST. OF 1836, art. II, § 21.

California: No provision.

Colorado 1876:

“The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to

justify the practice of carrying concealed weapons.” COLO. CONST. art. II, § 13.

City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (1972) (struck down gun law on sale, possession, and carrying as too broad); *People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (1936) (struck down law prohibiting possession of a firearm).

Connecticut 1818:

“Every citizen has a right to bear arms in defense of himself and the state.” CONN. CONST. art. I, § 15 (“defence” changed to “defense” in 1956).

Delaware 1987:

“A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.” DEL. CONST. art. I, § 20.

Florida 1990:

“(a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, ‘purchase’ means the transfer of money or other valuable consideration to the retailer, and ‘handgun’ means a firearm capable of being carried and used by one hand, such as a pistol or

revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.

(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

(d) This restriction shall not apply to a trade in of another handgun." FLA. CONST. art. I § 8.

1968: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." *Id.*

The right to possess a firearm is a civil right. *Williams v. State*, 402 So.2d 78 (Fla. App. 1981).

To avoid "a construction [that] might run counter to the historic constitutional right of the people to keep and bear arms.... We, therefore, hold that the statute does not prohibit the ownership, custody and possession of weapons not concealed upon the person, which, although designed to shoot more than one shot semi-automatically, are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles." *Rinzler v. Carson*, 262 So.2d 661, 666 (Fla. 1972).

1885: "The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the

Legislature may prescribe the manner in which they may be borne.” FLA. CONST. OF 1885, art. I, § 20.

1868: “The people shall have the right to bear arms in defence of themselves and of the lawful authority of the State.” FLA. CONST. OF 1868, art. I, § 22.

1865: Provision deleted.

1838: “That the free white men of this State shall have a right to keep and to bear arms for their common defence.” FLA. CONST. OF 1838, art. I, § 21.

Georgia 1877:

“The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne.” GA. CONST. art. I, § 1, para. VIII.

1868: “A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne.” GA. CONST. OF 1868, art. I, § 14.

1865: “A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.” GA. CONST. OF 1865, art. I, § 4.

Nunn v. State, 1 Ga. (1 Kel.) 243 (1846) (struck down restrictive pistol carrying statute on Second Amendment grounds):

It is true, that these adjudications are all made on clauses in the State Constitutions; but these instruments confer no new rights on the people which did not belong to them before. When, I would ask, did any legislative body in the Union have the right to deny to its citizens the privilege of keeping and bearing arms in defence of themselves and their country?The language of the second amendment is broad enough to embrace both Federal and State Governments—nor is there anything in its terms which restricts its meaning.... [D]oes it follow that because the people refused to delegate to the general government the power to take from them the right to keep and bear arms, that they designed to rest it in the State governments? Is this a right reserved to the States or to themselves? Is it not an unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures....If a well-regulated militia is necessary to the security of the State of Georgia and of the United States, it is competent for the General Assembly to take away this security, by disarming the people? What advantage would it be to tie up the hands of the national legislature, if it were in the power of the States to destroy this bulwark of defence? ... The right of the whole people, old and young, men, women and boys,

and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of free State.

Nunn v. State, 1 Ga. (1 Kel.) 243, 249-51 (1846).

Nunn should be given great weight because Chief Justice Joseph Henry Lumpkin, author of the opinion, started practicing law at a time when several of the framers were still alive, and he grew up in a prominent Georgia family surrounded by members of the generation that conceived of and made the United States Constitution and its Bill of Rights. He was known as a reformer. *Judge Lumpkin In Memoriam*, 36 Ga. 19 (1867); 6 DICTIONARY OF AMERICAN BIOGRAPHY 502 (Dumas Malone ed. 1933); THE STORY OF GEORGIA 243 (Am. Historical Society 1938).

Hawaii 1959:

“A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.” HAW. CONST. art. I, § 17.

State v. Mendoza, 82 Haw. 143, 920 P.2d 357 (1996) (assume individual right is protected but is subject to reasonable regulation).

Idaho 1978:

“The people have the right to keep and bear arms, which right shall not be abridged; but this

provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.” IDAHO CONST. art. I, § 11.

1889: “The people have the right to bear arms for their security and defence; but the Legislature shall regulate the exercise of this right by law.” IDAHO CONST. OF 1889, art. I, § 11.

In re Brickey, 8 Ida. 597, 70 P. 609 (1902) (struck down gun carrying statute as too restrictive).

Illinois 1970:

“Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.” ILL. CONST. art. I, § 22.

In a 4 to 3 opinion, the court upheld a village handgun ban. *Kalodimos v. Village of Morton Grove*, 103 Ill.2d 483, 83 Ill.Dec. 308, 470 N.E.2d 266 (1984). The legislature subsequently enacted a state law that creates an affirmative defense to a charge of violating a local firearm law if the firearm is used in defense of self or another. 720 Ill. Comp. Stat. 5/24-10. The

legislature has refused to ban handguns. *Kalodimos* is an outlier decision.

Prior to *Kalodimos*, in *People v. Liss*, 406 Ill. 419, 424, 94 N.E.2d 320, 323 (1950), the court opined: “The second amendment to the constitution of the United States provides the right of the people to keep and bear arms. This, of course, does not prevent the enactment of a law against carrying concealed weapons, but it does indicate it should be kept in mind, in the construction of a statute of such character, that it is aimed at persons of criminal instincts, and for the prevention of crime, and not against use in the protection of person or property.”

Indiana 1851:

“The people shall have a right to bear arms, for the defense of themselves and the State.” IND. CONST. art. I, § 32.

Schubert v. DeBard, 398 N.E.2d 1339 (Ind. App. 1980) (self-defense is constitutionally proper reason for obtaining a pistol license).

1816: “That the people have a right to bear arms for the defence of themselves, and the State; and that the military shall be kept in strict subordination to the civil power.” IND. CONST. of 1816, art. I, § 20.

Iowa: No provision.

Kansas 1859:

“The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall

not be tolerated, and the military shall be in strict subordination to the civil power.” KAN. CONST. BILL OF RIGHTS, § 4.

Junction City v. Mevis, 226 Kan. 526, 601 P.2d 1145 (1979) (struck down gun carrying ordinance as too broad).

Kentucky 1891:

“All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . [t]he right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.” KY. CONST. BILL OF RIGHTS § 1, para. 7.

1850: “That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned; but the general assembly may pass laws to prevent persons from carrying concealed arms.” KY. CONST. OF 1850, art. XIII, § 25.

1799: “That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned.” KY. CONST. OF 1792, art. XII, cl. 23 (“That” and the “s” in “rights” added in 1799).

Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am.Dec. 251 (1822) (struck down concealed carrying statute as infringement on right to arms; the constitution was later amended to allow regulation of concealed carrying of arms).

Louisiana 1974:

“The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.” LA. CONST. art. I, § 11.

1879: “A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed.” LA. CONST. OF 1879, art. 3.

“The constitutional right is to bear arms openly, so that when one meets an armed man there can be no mistake about the fact that he is armed. When we see a man with musket to shoulder, or carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense. Of course there are other examples. These are but illustrations.” *State v. Bias*, 37 La. Ann. 259, 260 (1885).

Maine 1987:

“Every citizen has a right to keep and bear arms and this right shall never be Questioned.” ME. CONST. art. I, § 16 (enacted after Maine Supreme Court interpreted original provision as securing only collective right, *State v. Friel*, 508 A.2d 123, 125 (Me. 1986)).

1819: “Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.” ME. CONST. OF 1819, art. I, § 16.

Maryland: No provision.

Massachusetts 1780:

“The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.” MASS. CONST. part 1, art. 17.

Michigan 1963:

“Every person has a right to keep and bear arms for the defense of himself and the state.” MICH. CONST. art. I § 6.

1850: “Every person has a right to bear arms for the defence of himself and the state.” MICH. CONST. OF 1850, art. XVIII, § 7.

People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922) (struck down statute prohibiting possession of a firearm).

1835: “Every person has a right to bear arms for the defence of himself and the State.” MICH. CONST. OF 1835, art. I, § 13.

Minnesota: No provision.

Mississippi 1890:

“The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but

the Legislature may regulate or forbid carrying concealed weapons.” MISS. CONST. art. III, § 12.

1868: “All persons shall have a right to keep and bear arms for their defence.” MISS. CONST. OF 1868, art. I, § 15.

1817: “Every citizen has a right to bear arms in defence of himself and of the State.” MISS. CONST. OF 1817, art. I, § 23 (“of” before “the State” added, and comma after “arms” deleted, in 1832).

Missouri 1945:

“That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.” MO. CONST. art. I, § 23.

Taylor v. McNeal, 523 S.W.2d 148 (Mo. Ct. App. 1975) (pistols and ammunition clips are protected by this right).

1875: “That the right of no citizen to keep and bear arms in defence of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.” MO. CONST. OF 1875, art. II, § 17.

State v. Shelby, 90 Mo. 302, 2 S.W. 468, 469 (1886) (“a revolving pistol comes within the description of

such arms as one may carry for the purposes designated in the constitution ...”).

1865: “That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that their right to bear arms in defence of themselves and of the lawful authority of the State cannot be questioned.” MO. CONST. OF 1865, art. I, § 8.

1820: “That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to bear arms in defence of themselves and of the State cannot be questioned.” MO. CONST. OF 1820, art. XIII, § 3.

Montana 1889:

“The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.” MONT. CONST. art. II, § 12.

Nebraska 1988:

“All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms

for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof.” NEB. CONST. art. I, § 1 (right added to preexisting provision).

Nevada 1982:

“Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.” NEV. CONST. art. I, § 11, para. 1.

New Hampshire 1982:

“All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.” N.H. CONST. part 1, art. 2-a.

Bleiler v. Chief, Dover Police Department, 927 A.2d 1216 (N.H. 2007) (rational basis test rejected; balancing of interests test adopted).

New Jersey: No provision.

New Mexico 1986:

“No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.” N.M. CONST. art. II, § 6

Baca v. New Mexico Department of Public Safety, 47 P.3d 441 (N.M. 2002) (law voided because local government may not regulate an incident of the right to bear arms).

1971: “No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons.” *Id.*

1912: The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons.” N.M. CONST. OF 1912, art. II, § 6.

City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (Ct.App. 1971) (struck down gun carrying ordinance as too restrictive).

New York: No provision.

North Carolina 1971:

“A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.” N.C. CONST. art. I, § 30.

1876: “A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to and governed by the civil power. Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the legislature from enacting penal statutes against said practice.” N.C. CONST. OF 1876, art. I, § 24.

State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921)
(struck down pistol carrying license and bond requirement law as too restrictive).

1868: “A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to and governed by the civil power.” N.C. CONST. OF 1868, art. I, § 24.

1776: “That the people have a right to bear arms for the defence of the State; and as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by the civil power.” N.C. DECLARATION OF RIGHTS § XVII.

State v. Huntly, 25 N.C. (3 Ired.) 418, 422-23, 40 Am.Dec. 416 (1843) (right to “bear arms for the defence of the State” includes liberty to carry gun for any lawful purpose but not for a wicked purpose).

North Dakota 1984:

“All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.” N.D. CONST. art. I, § 1 (right to bear arms added to preexisting provision).

Ohio 1851:

“The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.” OHIO CONST. art. I, § 4.

In re Reilly, 31 Ohio Dec. 364, 1919 WL 1022 (Com. Pleas 1919) (struck down ordinance forbidding hiring armed guard to protect property).

1802: “That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up,

and that the military shall be kept under strict subordination to the civil power.” OHIO CONST. OF 1802, art. VIII, § 20.

Oklahoma 1907:

“The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.” OKLA. CONST. art. II, § 26.

Oregon 1857:

“The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.” OR. CONST. art. I, § 27.

Barnett v. State, 72 Or. App. 585, 695 P.2d 991 (1985) (struck down prohibition of possession of black jack); *State v. Delgado*, 298 Or. 395, 692 P.2d 610 (1984) (struck down prohibition of possession of switchblade knife); *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981) (struck down prohibition of carrying a club); *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980) (struck down prohibition of possession of a club).

Pennsylvania 1790:

“The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.” PA. CONST. art. 1, § 21 (“the” before “citizens” added in 1838; commas after “arms” and “State” deleted in 1873).

1776: “That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.” PA. DECLARATION OF RIGHTS, cl. XIII.

Rhode Island 1842:

“The right of the people to keep and bear arms shall not be infringed.” R.I. CONST. art. I, § 22.

Mosby v. Devine, 851 A.2d 1031, 1042 (R. I. 2004) (“This implied relationship between the bearing of arms and military service, however, does not undermine the individual right to ‘keep’ arms in one’s home or in his or her place of business. It is the keeping of arms that is the *sine qua non* of the individual right under art. 1, sec. 22.”).

South Carolina 1895:

“A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it.” S.C. CONST. art. I, § 20.

1868: “The people have a right to keep and bear arms for the common defence. As, in times of peace, armies are dangerous to liberty, they

ought not to be maintained without the consent of the general assembly. The military power ought always to be held in an exact subordination to the civil authority, and be governed by it." S.C. CONST. OF 1868, art. I, § 28.

In reversing a conviction, the court stated, "[W]e think that the purpose was, as far as may be consistent with the right of the citizen to bear arms, absolutely to prohibit the carrying of [concealed] deadly weapons, with a view to prevent acts of violence and bloodshed" *State v. Johnson*, 16 S.C. 187, 191 (1881).

South Dakota 1889:

"The right of the citizens to bear arms in defense of themselves and the state shall not be denied." S.D. CONST. art. VI, § 24.

Tennessee 1870:

"That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." TENN. CONST. art. I, § 26.

Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928) (struck down pistol carrying ordinance as too restrictive).

Andrews v. State, 50 Tenn. 165, 178, 8 Am. Rep. 8, 13 (1871), in striking down pistol carrying statute as too restrictive, held: "The right to keep arms necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to

purchase and provide ammunition suitable for such arms, and to keep them in repair.” Andrews also held: “but the right to *keep* them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.” 50 Tenn. at 182.

Glenn H. Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 Tenn. L. Rev. 647, 666-67 (1994) (guarantee to keep arms for common defense is a personal right and includes self-defense).

1834: “That the free white men of this State have a right to keep and to bear arms for their common defence.” TENN. CONST. OF 1834, art. I, § 26.

Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214 (1866) (struck down gun confiscation law as infringement on right to arms).

Aymette v. State, 21 Tenn. (2 Hump.) 154, 160 (1840), right to keep arms broader than right to bear arms for common defense: “The citizens have the unqualified right to keep the weapon, it being of the character before described, as being intended by this provision. But the right to bear arms is not of that unqualified character. The citizen may bear them for the common defence; but it does not follow, that they may be borne by an individual, merely to terrify the people, or for purposes of private assassination.”

1796: “That the freemen of this State have a right to keep and to bear arms for their common defence.” TENN. CONST. OF 1796, art. XI, § 26.

Texas 1876:

“Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.” TEX. CONST. art. I, § 23.

Jennings v. State, 5 Tex. App. 298 (1878) (struck down statute requiring forfeiture of pistol after misdemeanor conviction as infringement on right to arms).

1868: “Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the legislature may prescribe.” TEX. CONST. OF 1868, art. I, § 13.

1845: “Every citizen shall have the right to keep and bear arms, in the lawful defence of himself or the State.” TEX. CONST. of 1845, art. I, § 13 (comma added after “arms” in 1866).

1836: “Every citizen shall have the right to bear arms in defence of himself and the republic. The military shall at all times and in all cases be subordinate to the civil power.” REPUB. TEX. CONST. OF 1836, DECLARATION OF RIGHTS, cl. 14.

Utah 1984:

“The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from

defining the lawful use of arms.” UTAH CONST.
art. I, § 6.

1895: “The people have the right to bear arms for
their security and defense, but the legislature
may regulate the exercise of this right by law.”
UTAH CONST. OF 1895, art. I, § 6.

Vermont 1777:

“That the people have a right to bear arms for the
defence of themselves and the State—and as
standing armies in time of peace are dangerous
to liberty, they ought not to be kept up; and that
the military should be kept under strict
subordination to and governed by the civil
power.” VT. CONST. ch. I, art. 16.

State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903)
(struck down pistol carrying ordinance as too
restrictive).

Virginia 1971:

“That a well regulated militia, composed of the
body of the people, trained to arms, is the proper,
natural, and safe defense of a free state,
therefore, the right of the people to keep and bear
arms shall not be infringed; that standing
armies, in time of peace, should be avoided as
dangerous to liberty; and that in all cases the
military should be under strict subordination to,
and governed by, the civil power.” VA. CONST. art.
I, § 13 (right added to preexisting 1776
provision).

There is “the tendency of many of our citizens to keep and bear arms.” *Crawford v. United Steelworkers, AFL-CIO*, 230 Va. 217, 239, 335 S.E.2d 828, 841 (1985) (Russell, J., dissenting with Carrico, C.J., and Stephenson, J., joining). Art. I, § 13 “protects all citizens.” Va. Atty. Gen. Opinion No. 05-078 (Jan. 4, 2006).

Washington 1889:

“The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.” WASH. CONST. art. I, § 24.

State v. Spiers, 79 P.3d 30 (Wash. App. 2003) (struck down that part of statute forbidding ownership of a firearm while free on bond for a serious offense).

West Virginia 1986:

“A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.” W. VA. CONST. art. III, § 22.

State ex rel. City of Princeton v. Buckner, 180 W.Va. 457, 377 S.E.2d 139 (1988) (struck down pistol carrying law as too restrictive).

Wisconsin 1998:

“The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” WIS. CONST. art. I, § 25.

State v. Hamdan, 665 N.W.2d 785 (Wis. 2003) (pistol concealed carrying statute unconstitutional as applied).

Wyoming 1889:

“The right of citizens to bear arms in defense of themselves and of the state shall not be denied.”
WYO. CONST. art. I, § 24.

A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for purposes of defense, would be clearly unconstitutional. *State v. McAdams*, 714 P.2d 1236 (Wy. 1986).

CONCLUSION

The laws under review sweep too broadly.⁴ A complete handgun ban is an unconstitutional infringement regardless of the standard of review. The *Parker* decision should be affirmed because it is supported by the do not infringe command of the Second Amendment. It is also supported by the national consensus that the constitution guarantees an individual right to keep arms, and by the national consensus that handguns should not be banned.

⁴ *State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988); *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981); *Junction City v. Mevis*, 226 Kan. 526, 601 P.2d 1145 (1979); *City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972).

Respectfully submitted,

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