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**

## BRIEF OF LAW PROFESSORS ERWIN CHEMERINSKY AND ADAM WINKLER, AS AMICI CURIAE IN SUPPORT OF PETITIONER


ERWIN CHEMERINSKY*

DUKE UNIVERSITY SCHOOL OF LAW
Science Drive and Towerview Road
Durham, NC 27708
(919) 613.7173

ADAM WINKLER
UNIVERSITY OF CALIFORNIA, LOS ANGELES
School of Law
405 Hilgard Avenue
Los Angeles, CA 90095

**Counsel of Record  Counsel for Amici Curiae*



COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued



STATUTES

TABLE OF AUTHORITIES – Continued

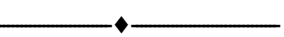
TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

## INTEREST OF AMICUS CURIAE

This amicus curiae brief is submitted on behalf of Erwin Chemerinksy and Adam Winkler in support of Petitioner.[1] Amici are professors at law schools located in the United States who have studied and written about the Second Amendment.

Erwin Chemerinsky is the Alston & Bird Professor of Law and Professor of Political Science at Duke University School of Law, and, as of July 1, 2008, will be the Dean of the Donald Bren School of Law at the University of California, Irvine. Adam Winkler is Professor of Law at University of California, Los Angeles School of Law.



## SUMMARY OF THE ARGUMENT

If the Court holds that the Second Amendment guarantees a private, individual right to keep and bear arms unrelated to militia service, the Court also will have to determine what standard of review applies to laws regulating firearms and other deadly

[1] Pursuant to Supreme Court Rule 37.3(a), the amici curiae state that the parties have consented to the filing of this brief and have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the amici curiae state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. Amici curiae further state that no one made a monetary contribution to the preparation or submission of this brief.

weapons. No right is absolute, thus the constitutionality of legislation ordinarily turns on the standard of review used to weigh and assess the governmental interests behind a challenged law.

State supreme courts in the forty-two states with their own constitutional protections for the individual right to bear arms universally hold that legislatures have substantial leeway to adopt reasonable regulations on arms to further public safety. This Court has also consistently upheld reasonable restrictions on dangerous weapons.

Should this Court hold that the Second Amendment protects an individual right apart from service in the militia, this Court should follow the consistent, longstanding federal and state constitutional practice and hold that the right to keep and bear arms is subject to reasonable regulation. Reasonableness review is appropriate because most weapons regulations are unquestionably legitimate means of enhancing public safety, reducing crime, or protecting children. Where the vast majority of regulation in an area is legitimate, this Court has held that the predicate for heightened scrutiny is absent and the judiciary should presume the constitutionality of legislation. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 444 (1985). Moreover, the text of the Second Amendment, the history of the right to bear arms in federal and state constitutional law, and federalism values all support permitting legislators substantial latitude to adopt reasonable regulations of arms.

The plain language of the Second Amendment recognizes the "necessity" of a militia, or armed citizenry, that is "well regulated." The history of the right to bear arms in American constitutionalism is marked by a long tradition, dating back to the Founders, of legislative authority to enact reasonable restrictions on dangerous weapons. Furthermore, should this Court hold that the Second Amendment applies against the states, adoption of any form of heightened scrutiny will disrupt the federal-state balance, substituting a novel, untested federal standard for the well-established reasonableness test universally preferred by states. Any Second Amendment standard more demanding than reasonableness review is likely to burden the states with a flood of litigation challenging prior state criminal convictions for weapons offenses and severely limit the ability of local authorities to shape public safety laws to fit local circumstances.

Reasonableness review remains the appropriate standard even if the Court concludes that the right to keep and bear arms is a "fundamental" right. Not all fundamental rights trigger heightened scrutiny and many are governed by reasonableness tests or other forms of relatively deferential scrutiny. Moreover, assuming an individual's right to keep and bear arms unrelated to militia service, that right would be essentially a property right to own, possess, and use a particular kind of physical object. Under current constitutional doctrine, reasonable restrictions on the right to own, possess, and use property

are constitutionally permissible even though the right of property is fundamental.

## ARGUMENT

### I. REASONABLE RESTRICTIONS ON THE RIGHT TO KEEP AND BEAR ARMS ARE CONSTITUTIONALLY PERMISSIBLE.

If the Second Amendment protects an individual right to bear arms for private uses, the constitutionality of weapons safety laws will turn on the standard of review this Court adopts to review challenged legislation. The question of which standard is appropriate for the right to bear arms has been asked and answered in scores of cases decided under state constitutional law and the law in every state with constitutional protections for the private, individual right to bear arms provides that the right is subject to reasonable regulation.[2] Forty-two states have

[2] *See, e.g.*, *Hoskins v. State*, 449 So. 2d 1269, 1270 (Ala. Crim. App. 1984) ("[T]he constitutional guarantee of the right of a citizen to bear arms is subject to reasonable regulation by the state under its police power, and that the classification created under the statute is warranted and is clearly a reasonable exercise of the State's police power."); *City of Tucson v. Rineer*, 971 P. 2d 207, 213 (Ariz. Ct. App. 1998) ("If it can be shown that an ordinance is directed at a legitimate legislative purpose and that the means by which the city seeks to achieve that purpose are reasonable, then the ordinance is a proper exercise of the city's police power."); *People v. Swint*, 572 N.W.2d 666, 674 (Mich. Ct. App. 1997) ("The right to bear arms . . . is not absolute and is subject to . . . reasonable limitations. . . ."); *James v. State*,

(Continued on following page)

constitutional protections for a private, individual right to bear arms and, with hundreds of state court decisions ruling on the constitutionality of weapons laws, the right-to-bear-arms jurisprudence at the state level is well developed and comprehensive. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 715-26 (2007). Every state, without exception, applies the same standard of review, requiring only that laws be reasonable regulations of the right. *Id*. at 686. Under this standard, the people's elected representatives have substantial leeway to craft weapons safety laws, which the courts consistently uphold so long as the laws do not destroy the right by disarming the people or are irrational or arbitrary. This Court should follow the uniform, long established practice and apply a relatively deferential standard that permits reasonable regulation of the right to keep and bear arms short of complete disarmament.

---

731 So. 2d 1135, 1137 (Miss. 1999) ("In limiting the possession of firearms by those persons who have been shown to present a threat to public safety, peace and order, the state is reasonably exercising its power to protect in the interest of the public."); *State v. White*, 253 S.W. 724, 727 (Mo. 1923) (holding that the "right to bear arms may be taken away or limited by reasonable restrictions"); *see also State v. LaChapelle*, 451 N.W.2d 689, 690 (Neb. 1990); *State v. Ricehill*, 415 N.W.2d 481, 483 (N.D. 1987); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993); *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004); *State ex rel W.V. Div. of Nat. Res. v. Cline*, 488 S.E.2d 376, 380-81 (W. Va. 1997); *State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003); *State v. McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986).

### A. The Vast Majority of Weapons Safety Regulations Are Unquestionably Legitimate, and Thus the Predicate for Heightened Scrutiny Is Absent.

This Court has held that heightened scrutiny is inappropriate where "in the vast majority of situations" legal regulation "is not only legitimate but also desirable." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 444 (1985). In *City of Cleburne*, this Court explained that deferential scrutiny of classifications based on mental disability was necessary because policymaking in this area was "a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary." *Cleburne*, 473 U.S. at 442; *see also Turner v. Safley*, 482 U.S. 78, 84 (1987) (deferential review of prison regulations is appropriate because "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform") (citation and internal quotation marks omitted).[3] This Court has repeatedly held that heightened scrutiny is

[3] This Court has also traditionally reserved heightened scrutiny for areas of law where the burdened individuals are victimized by "a continuing antipathy or prejudice" that triggers "a corresponding need for more intrusive oversight by the judiciary." *Cleburne*, 473 U.S. at 443. Gun owners are hardly a suspect class. Gun rights advocates have succeeded in amending twelve state constitutions since 1978 to add protections for the individual right to bear arms and, since 1990, twenty-nine states have passed legislation permitting the concealed carrying of firearms. *See* Winkler, *supra*, at 702-03.

reserved for areas of law where courts should "presume that *any given legislative action* . . . is rooted in considerations that the Constitution will not tolerate." *Cleburne*, 473 U.S. at 444 (emphasis added). Many forms of arms regulation are clearly legitimate and thus the "predicate for such judicial oversight" *id*. at 443, is not present.

### 1. The Vast Majority of Weapons Regulations Are Clearly Legitimate.

The vast majority of weapons regulations are both legitimate and desirable, as a brief overview of types of current restrictions makes clear. States and localities, including those with constitutional guarantees of a private, individual right to bear arms, commonly prohibit possession of particular types of weapons, such as machine guns, *see, e.g.,* Colo. Rev. Stat. § 18-12-102; Fla. Stat. ch. 790-221; sawed-off shotguns, *see, e.g.,* Ind. Code § 35-47-5; automatic firearms, *see, e.g.,* Ariz. Rev. Stat. §§ 13-3101, 13-3102; explosives, *see, e.g.,* Tex. Penal Code Ann. § 46.05; assault rifles, *see, e.g.,* Denver Mun. Code § 38-130; switch-blade knives, *see, e.g.,* Wis. Stat. Ann. § 941.24; and, in some densely populated urban areas, handguns, *see, e.g.,* Chicago Mun. Code § 8-20-040(a), -050(c). States and local governments also ban silencers, *see, e.g.,* Calif. Penal Code § 12520; armor-piercing ammunition, *see, e.g.,* Fla. Stat. ch. 790.31; and the carrying of concealed arms, *see, e.g.,* Ala. Code § 13A-11-50; Ariz. Rev. Stat. § 13-3112. State and local governments mandate safe storage of

firearms, *see, e.g.,* Md. Code Ann. § 4-104; limit the transportation of loaded firearms, *see, e.g.,* Md. Code Ann. § 4-203; and prohibit the possession of arms in schools, *see, e.g.,* Colo. Rev. Stat. § 18-12-105.5; Ind. Code § 35-47-9-2; courthouses, *see, e.g.,* S.D. Codified Laws § 22-14-23; and places where alcohol is served or sold, *see, e.g.,* Wis. Stat. Ann. § 941.237. States commonly bar violent felons from keeping and bearing arms, *see, e.g.,* Colo. Rev. Stat. § 18-12-108; and restrict the ability of minors, *see, e.g.,* Neb. Rev. Stat. § 28-1204, and the mentally disabled, *see, e.g.,* Idaho Code §§ 18-3302, 18-3316, to possess weapons. Many of these same restrictions are found in federal law. *See, e.g.,* 18 U.S.C. § 922(g)(1) (felons); 18 U.S.C. § 922(g)(4) (mentally ill); 18 U.S.C. § 922(b)(1) (minors). The pervasiveness of weapons safety laws across jurisdictions is a strong indication that many restrictions on the right to keep and bear arms are legitimate means of enhancing public safety.

The legitimacy of these weapons safety regulations is also shown by the many state and federal court decisions, including decisions of this Court, affirming the constitutionality of reasonable burdens on gun ownership and use. This Court has repeatedly affirmed the legitimacy of numerous types of gun safety regulation, including the federal bar on the possession of firearms by convicted felons, *see, e.g.*, *Beecham v. United States*, 511 U.S. 368, 370-74 (1994); *Lewis v. United States*, 445 U.S. 55, 65 (1980), and criminal penalty enhancements for using a firearm in the commission of a crime, *see, e.g.*, *Caron*

*v. United States*, 524 U.S. 308, 316-17 (1998); *Smith v. United States*, 508 U.S. 223, 225, 240-41 (1993). In 1897, this Court stated that a federal law banning the carrying of concealed weapons would be constitutional. *See Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). The lower federal courts have likewise upheld gun safety laws in numerous cases. *See, e.g., United States v. Emerson*, 270 F.3d 203, 264-65 (5th Cir. 2001) (upholding a federal prohibition on the transportation of firearms or ammunition in interstate commerce by persons subject to a domestic restraining order, despite recognizing a Second Amendment right to bear arms unrelated to militia service).

Under state constitutional guarantees of a right to bear arms, state courts have affirmed the legitimacy of a wide variety of weapons safety laws. *See* Winkler, *supra*, at 719-20. Over the past eighty years, every state court to consider the question has upheld, without exception, bans on the possession of firearms by felons, *see, e.g.*, *State v. Ricehill*, 415 N.W.2d 481, 483-84 (N.D. 1987); *State v. Hirsch*, 114 P.3d 1104, 1105 (Or. 2005); *Perito v. County of Brooke*, 597 S.E.2d 311, 321 (W. Va. 2004); prohibitions on possession of particular types of firearms, *see, e.g., Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 269-73 (Ill. 1984) (handguns); *Carson v. State*, 247 S.E.2d 68, 72 (Ga. 1978) (short-barreled shotguns); *Rinzler v. Carson*, 262 So.2d 661, 666-67 (Fla. 1972) (machine guns); prohibitions on carrying concealed weapons, *see, e.g., Klein v. Leis*, 795 N.E.2d 633, 638 (Ohio

2003); *State v. McAdams*, 714 P.2d 1236, 1236-38 (Wyo. 1986); bans on the transportation of loaded firearms, *see, e.g., State ex rel. W. Va. Div. of Natural Res. v. Cline*, 488 S.E.2d 376, 382-83 (W. Va. 1997); bans on the possession of firearms by intoxicated individuals, *see, e.g.*, *People v. Garcia*, 595 P.2d 228, 230 (Colo. 1979); bans on the possession of firearms in places where alcohol is sold or served, *see, e.g.*, *State v. Lake*, 918 P.2d 380, 382 (N.M. Ct. App. 1996); *Second Amendment Found. v. City of Renton*, 668 P.2d 596, 597-98 (Wash. Ct. App. 1983), including private residences, *e.g.*, *Gibson v. State*, 930 P.2d 1300, 1302-03 (Alaska Ct. App. 1997); and criminal penalty enhancements for committing a crime while possessing a firearm, *see, e.g.*, *State v. Daniel*, 391 S.E.2d 90, 96-97 (W. Va. 1990).

This overwhelming pattern of federal and state judicial decisions recognizing the legitimacy of reasonable restrictions on arms establishes that many forms of weapons regulation are constitutionally sound means of furthering public safety. As a result, the predicate for heightened scrutiny under the Second Amendment is absent.

### 2. Weapons Safety Laws Are a Difficult and Technical Matter for Which Legislatures, Not Courts, Are Best Equipped to Make the Necessary Tradeoffs.

This Court has repeatedly held that deferential scrutiny is appropriate where desirable legislation is

a difficult and technical matter best left to legislatures. *See Cleburne*, 473 U.S. at 443; *Turner*, 482 U.S. at 80. Weapons regulation is precisely the sort of complicated policy matter that legislatures, guided by experts, are most qualified to design. Questions about the effectiveness of various sorts of gun safety laws are hotly contested, and even social scientists using the most sophisticated methodologies cannot agree. *See* Winkler, *supra*, at 713-14. Sorting out these complex questions should be left to the legislative branch, which is better equipped than the judiciary to conduct the necessary fact-finding and to balance the competing interests.

Moreover, achieving the right balance between public safety and weapons possession is inherently local. Lawmakers must be able to respond to local conditions, including the local crime rate, the types of crimes committed locally, the types of weapons used locally, the history of the area, and the preferences of the people in the community. Heightened scrutiny will hobble legislators from finding the optimal balance between rights and regulation for their communities.

Unquestionably, many gun laws are so clearly grounded in the compelling interest of public safety that they would survive even the strictest scrutiny. Nevertheless, as this Court has stated, "[e]ven assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from

acting at all." *Cleburne*, 473 U.S. at 444. In light of the undisputable legitimacy of many forms of gun safety regulation, heightened scrutiny runs the risk of discouraging the people's representatives from enacting reasonable measures to enhance public security, reduce crime, and protect children.

### B. Assuming an Individual Right Unrelated to Militia Service, the Text of the Second Amendment and the History of the Right to Bear Arms Support the Application of Reasonableness Review.

#### 1. A Reasonableness Test Is Consistent with the Text of the Second Amendment, Which Explicitly Acknowledges the Necessity of Government Regulation for Public Safety and Security.

The text of the Second Amendment acknowledges that the people have the authority to regulate the right to keep and bear arms for public safety. The provision explicitly voices an expectation that the "militia" – the armed citizenry – will be "well regulated." U.S. Const., Amend. II. Indeed, proper regulation is not only legitimate, it is "*necessary* for the security of a free state." *Id*. (emphasis added). By these terms, the Second Amendment imposes a duty on government to regulate the militia adequately to further public safety and security. In light of this clear textual recognition of a legitimate sphere of regulatory authority, the Court should

adopt a standard that affords the people's representatives relatively broad leeway to regulate arms to enhance public safety.

The Second Amendment's explicit support for regulation stands in stark contrast to provisions in the Constitution that traditionally trigger heightened scrutiny. The First Amendment, for example, provides that "Congress shall pass *no law*" infringing on First Amendment rights. U.S. Const., Amend. I (emphasis added). The Fourteenth Amendment declares that "[n]o state shall make or enforce *any law*" which denies due process or equal protection of the laws. U.S. Const., Amend. XIV (emphasis added). Whereas the First and Fourteenth Amendments assume that any government burden violates their respective rights, the Second Amendment acknowledges and invites at least some regulation in the furtherance of public security.

By explicitly recognizing the legitimacy of regulation, the Second Amendment follows a common practice in constitutional provisions guaranteeing a right to bear arms. The 1689 English Bill of Rights recognized the right to bear arms, while also expressing the appropriateness of legislative oversight: "Subjects which are Protestants may have Armes for their defence Suitable to their Condition and as allowed by Law." 1 W. & M. 2d Sess., c. 2 sect. 7 (1689). Blackstone's Commentaries on the Law of England, written in 1765, also emphasized that the right was subject to regulation. According to Blackstone, the right was enjoyed only "as allowed by law"

and "subject to due restrictions." 1 William Blackstone, Commentaries on the Laws of England 139 (Univ. of Chicago Press, 1979) (1765). Similar language may be found in state constitutions. *See, e.g.,* Ga. Const. art. I, § 1, ¶ VIII (providing that "the General Assembly shall have the power to prescribe the manner in which arms may be borne"). The right to keep and bear arms has thus long been expressly tied to the power of the people's representatives to regulate dangerous weapons in the interests of public safety.

Achieving a "well regulated" militia, as compared to a poorly regulated one, requires local authorities to have ample authority to balance public safety against individual rights in light of local conditions. The balance drawn in a rural area with little violent crime might not be appropriate in a densely populated area with a high crime rate. Yet, heightened judicial scrutiny would impose a straightjacket on legislators and discourage experimentation to meet local needs. A reasonableness standard that affords local officials substantial deference best ensures that each community will be able to achieve the ideal level of regulation suitable for its particular circumstances.

In light of the Second Amendment's recognition of a legitimate sphere of government regulation, the appropriate standard of review is one that permits legislatures leeway to protect public safety and security. While a private, individual right reading of the Second Amendment would mean that legislatures cannot completely disarm the people, reasonable

burdens on gun ownership, possession, and use are consistent with the Second Amendment's recognition of the necessity of a "well regulated militia."

### 2. There Is a Long, Established History and Tradition of Legislative Authority to Reasonably Regulate the Right to Keep and Bear Arms.

The long history of weapons regulation provides additional support for broad legislative power to impose reasonable restrictions on the right to keep and bear arms. As evidenced by the many forms of weapons regulation adopted by the Founding generations, the original understanding was that the right to keep and bear arms was not infringed by reasonable measures short of complete disarmament of the citizenry.

Every generation of Americans since the Founding has regulated weapons. Today every one of the fifty states, the federal government, and all U.S. territories have weapons safety laws in effect. Moreover, there is a long tradition of courts upholding reasonable restrictions on weapons in constitutional controversies. In light of the pervasive recognition of legitimate legislative authority to regulate weapons throughout American constitutional history, this Court should adopt a reasonableness standard for the Second Amendment.

### a. Gun Control in the Founding Era.

During the Revolutionary and Founding era, legislatures adopted a diverse array of restrictions on gun ownership and possession, some quite onerous. *See* Saul Cornell & Nathan DeNino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Ford. L. Rev. 487, 502-05 (2004). In the 1780s and 1790s, Pennsylvania, New York, and Massachusetts adopted laws that mandated how gunpowder could be stored or transported. *See* Act of Dec. 6, 1783, ch. CIV, 1783 Pa. Laws 161, ch. MLIX, 11 Pa. Stat. 209; Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627; Act of June 26, 1792, ch. X, 1792 Mass. Acts 208. The Massachusetts law barred the inhabitants of Boston from keeping loaded arms in "any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building" in the city because "the depositing of loaded Arms in the Houses of the Town of Boston, is dangerous." Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218. To protect against harmful accidents, laws required that gunpowder be kept on the top floor of buildings, *see* § XLII, 1781-1782 Pa. Laws 41; stored in small containers, *see* Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627; or maintained in public storage facilities, *see* Act of June 19, 1801, ch. XX, 1801 Mass. Acts 507; Act of Oct. 4, 1780, ch. V, 1780 Mass. Acts 326.

Legislative authority over firearms was broad enough to permit categorical disarmament of selected groups of citizens. The right to keep and bear arms was not infringed by laws, such as those in

Pennsylvania and Massachusetts, which banned possession of a firearm by any person who failed to swear a loyalty oath. *See* Act of Apr. 1, 1778, ch. LXI, 2, 5, 1777-1778 Pa. Laws 123, 126; Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31. Nor did laws that authorized the disarmament of the disorderly and the riotous infringe the right to keep and bear arms. Act of June 10, 1799, ch. DCCCVI, 2, 1799 N.J. Laws 561, 562; Act of Feb. 24, 1797, ch. DCXXXVII, 1, 1797 N.J. Laws 179, 179. In each of these instances of early American gun safety laws, public safety outweighed any private, individual right to keep and bear arms.

To achieve a "well regulated militia," the Founders recognized broad legislative power to burden gun owners. States compelled men to serve in militias in defense of the community; to outfit themselves with particular types of weapons and gear; and to report for mandatory "musters," public assemblies of militiamen at which local leaders inspected the men and their weapons. *See* Cornell & DeNino, *supra*, at 509. Individuals were expected to bear the cost of equipment personally; militia-related property was exempted from the ordinary requirement that government compensate all takings of property. *Id*. at 496. The Founders understood that such profound intrusions on personal liberty and individual choice were not infringements of the right to bear arms; they were a necessary corollary of the right.

In the decades following the adoption of the Second Amendment and similar state constitutional

provisions guaranteeing a right to bear arms, weapons safety laws became more, not less, pervasive. In the early 1800s, in response to a rise in violent crime, numerous states passed laws banning the carrying of concealed weapons. *See, e.g.,* Act of Oct. 19, 1821, ch. XIII, 1821 Tenn. Pub. Acts 15; Act of Feb. 2, 1838, 1838 Va. Acts ch. 101, at 76; Act of Mar. 18, 1859, 1859 Ohio Laws 56. In some states, the legislature went so far as to ban entirely the sale of particular classes of weapons, such as pistols, that were easily concealed. *See, e.g.,* Act of Dec. 25, 1837, 1837 Ga. Laws 90. Other states adopted licensing laws that required some citizens to obtain a license before owning a gun or gunpowder. *See* Act of Feb. 4, 1806, 1805-1806 Va. Acts ch. XCIV 51. As these laws suggest, the original understanding of the constitutional right to bear arms was that the right was not infringed by reasonable regulations of dangerous weapons to enhance public safety.

**b. The Tradition of Legislative Authority to Regulate Dangerous Weapons.**

Reasonable regulation of the right to bear arms has been a consistent tradition in Anglo-American law for at least six hundred years. *See, e.g.,* Statute of Northampton, 2 Edw. 3, c. 3 (1328) (banning the possession of arms in fairs, markets, and "before the King's Justices, or other of the King's Ministers"); Blackstone, *supra*, at 139 (recognizing that the right to bear arms was "subject to due restrictions"). As

noted above, the Founders regulated dangerous weapons in a variety of ways and the American legal tradition has continued to recognize legislative authority to reasonably restrict the right to keep and bear arms. Every generation of Americans since the Founding has regulated access to dangerous weapons, and currently each of the fifty states and the federal government has in place a variety of restrictions on the right to possess dangerous weapons.

The history of judicial review under American constitutional provisions on the right to bear arms also counsels in favor of reasonableness review. None of this Court's decisions considering the Second Amendment ever has applied heightened scrutiny. *See, e.g.*, *Lewis*, 445 U.S. at 65 n.8, 66; *United States v. Miller*, 307 U.S. 174, 177 (1939); *Robertson*, 165 U.S. at 281-82 (1897). Reasonableness review also has been the unanimous choice of lower federal courts considering the constitutionality of restrictions on the right to bear arms. *See, e.g.*, *Cody v. United States*, 460 F.2d 34, 36-37 (8th Cir. 1974); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288, 1293 (7th Cir. 1974); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974). Moreover, this Court and lower federal courts repeatedly have refused to incorporate the Second Amendment or describe it as a fundamental right. *See, e.g.*, *Presser v. Illinois*, 116 U.S. 252 (1886) (affirming that the Second Amendment applies only to action by the federal government); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) ("The second amendment

declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government. . . . ").

State courts also have deferentially reviewed restrictions on the right to bear arms. As noted above, forty-two state constitutions guarantee an individual right to bear arms unrelated to militia service and every state applies reasonableness review to restrictions on the right, giving legislatures wide leeway to regulate weapons for public safety purposes. No state court applies heightened scrutiny of any sort to laws burdening the constitutional right to bear arms. *See* Winkler*, supra* at 705. State courts repeatedly and unanimously have refused to apply strict or even intermediate scrutiny to weapons safety laws. *See, e.g., State v. Cole*, 665 N.W.2d 328, 337 (Wis. 2003); *Arnold v. Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993); *State v. Mendoza*, 920 P.2d 357, 367-68 (Hawaii 1996).

Reasonableness review of arms regulation dates back well over a century. In 1886, for example, the Missouri Supreme Court upheld a prohibition on the possession of firearms by intoxicated individuals, concluding that "the act is but a *reasonable regulation* of the use of . . . arms, and to which the citizen must yield." *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886) (emphasis added).

Under the reasonableness test applied by the state courts, any law that is a reasonable regulation

of the right is constitutionally permissible. Because of the legitimacy of many weapons regulations, courts presume the constitutionality of legislation and the challenger carries the burden of showing the regulation to be unreasonable. *See, e.g.*, *State v. Comeau,* 448 N.W.2d 595, 596 (1989). A law will be held to be unreasonable if it "eviscerates," *State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003), renders "nugatory," *Trinen v. City of Denver*, 53 P.2d 754, 757 (Colo. Ct. App. 2002), or results in the "destruction," *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986), of the people's right to bear arms. The state courts will generally uphold a weapons law so long as the law is "not a total ban on the right to bear arms," *Mosby*, 851 A.2d at 1045, or the law is not irrational or arbitrary, *Carson v. State*, 247 S.E.2d 68, 72 (Ga. 1978) ("[T]he question in each [right-to-bear-arms] case is whether the particular regulation involved is legitimate and reasonably within the police power, or whether it is arbitrary, and, under the name of regulation, amounts to a deprivation of the constitutional right.").

Judicial deference is not unlimited under the reasonableness test. If a state were to outlaw all dangerous weapons and leave the citizenry with no lawful alternative arms, such a law would nullify the right and be held unconstitutional. *See, e.g., City of Junction City v. Mevis*, 601 P.2d 1145, 1152 (Kan. 1979) (invalidating an ordinance barring any transportation of a firearm, loaded or unloaded, where "[a]pplying the city ordinance literally, it appears that virtually every private citizen of Junction City who

has purchased a firearm since the passage of [the law] has committed a crime in possessing that firearm"). Moreover, state courts will invalidate arbitrary or irrational laws that further no legitimate government interests. *See, e.g., State v. Rupe*, 683 P.2d 571, 597 (Wash. 1984) (en banc) (invalidating capital sentence where prosecution introduced evidence that defendant owned firearms, all lawful and with no connection to any crime, because there is "no relation between the fact that someone collects guns and the issue of whether they deserve the death sentence"). Nevertheless, the deference afforded elected officials by the state courts is nevertheless broad and the vast majority of weapons safety laws are upheld as reasonable. *See* Winkler, *supra*, at 715-26.

The well-established governmental traditions of reasonable regulations of the arms right and deferential judicial review should be accorded due respect by this Court. *Cf. McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 892-95 (2005) (Scalia, J., dissenting) (arguing that established governmental practices should inform construction of the Establishment Clause).

### C. Federalism Values Support the Adoption of a Reasonable Regulation Standard Consistent with Current State Constitutional Law.

Should this Court hold that the Second Amendment applies against the states and that a form of

scrutiny more demanding than the reasonable regulation standard used by the states applies, the effect would be substantially disruptive of the federal-state balance. Despite disparate social, economic, and political demographics, the states have come together in a remarkable consensus on the appropriateness of relatively deferential review in right-to-bear-arms cases. This Court should not hastily replace the consensus choice of states with a new, untested standard with unknown consequences for public safety.

The state courts have been balancing the right to bear arms with public safety concerns for decades – in some cases, centuries – and have unanimously agreed that reasonable restrictions are constitutionally permissible. This Court should defer to the state courts' wealth of experience and expertise in selecting a Second Amendment standard, or risk rendering superfluous hundreds of state right-to-bear-arms precedents. Heightened Second Amendment scrutiny would effectively displace the entirety of the richly developed, long-settled right-to-bear-arms jurisprudence.

More troubling still, a departure from reasonableness review will raise constitutional doubts about all existing state weapons laws and invite individuals convicted under such laws to reopen their cases to make Second Amendment claims, substantially disrupting the state courts and burdening state penal systems. Adoption of a new rule of heightened scrutiny that calls into question existing

weapons regulations would be a substantive, not procedural, change and thus would apply retroactively. *See Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). Such a new constitutional rule certainly would "carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Bousely v. United States*, 523 U.S. 614, 620 (1998) (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

Public safety regulation, including restrictions on access to dangerous arms, is a traditional area of state regulation. Where state and local governments historically have exercised the authority to legislate in an area, the imposition of a federal mandate upsets the delicate federal-state balance. This Court should not impose a new right-to-bear-arms standard that prevents state and local governments from "experimenting and exercising their own judgment in an area to which the States lay claim by right of history and expertise." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). Adoption of the reasonableness standard will empower the people's representatives to shape public safety and weapons laws to fit local circumstances and needs.

## II. EVEN IF THE RIGHT TO PRIVATE OWNERSHIP OF WEAPONS IS A FUNDAMENTAL RIGHT, REASONABLE REGULATIONS OF THE RIGHT REMAIN CONSTITUTIONALLY PERMISSIBLE.

Even if this Court declares the right to private ownership of weapons unrelated to militia service to be a "fundamental" right, reasonableness review remains the appropriate standard to judge weapons safety laws. The prevailing rule in the federal courts is that that the "right to possess a gun is clearly not a fundamental right," *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984), and this Court has declared that there are rights "far more fundamental" than the right to bear arms, *Lewis v. United States*, 445 U.S. 55, 66 (1980). If this Court now departs from precedent and deems the Second Amendment right fundamental, this should not automatically trigger heightened review.

First, despite the common expression that fundamental rights always receive strict scrutiny, this Court applies a number of different and more lenient standards of review, including reasonableness review, in fundamental rights cases. Second, guns are a form of property and even fundamental property rights trigger only lenient scrutiny under current constitutional doctrine.

Once again, state constitutional law is instructive. Even in states where the right to bear arms is

considered a "fundamental" right under state constitutional law, the courts uniformly reject heightened scrutiny and apply instead reasonableness review. *See, e.g.*, *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004); *Klein v. Leis*, 795 N.E.2d 633, 637 (Ohio 2003); *Cole*, 665 N.W.2d at 336.

### A. Fundamental Rights Do Not Universally Trigger Heightened Review.

Although members of this Court have stated that "a government practice or statute which restricts 'fundamental rights' . . . is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available," *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment and dissenting in part), this Court does not apply and has never applied heightened review to all fundamental rights. *See* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 Const. Comm. 227, 227-37 (2007).

Several fundamental rights are governed by reasonableness or rational basis review. No right is more fundamental than freedom of speech. Yet, just last term, this Court held that public school students' speech rights at official school outings may be limited whenever a reasonable basis exists for believing the speech to advocate illegal drug use. *See Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007); *see also*

*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school officials can restrict student speech in the school newspaper "so long as their actions are reasonably related to legitimate pedagogical concerns").

In fundamental right of privacy cases under the due process clauses of the Fifth and Fourteenth Amendments, the Court has held that government burdens are invalid when there is "no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). In Eighth Amendment cases, the challenger must show that a criminal sentence imposed by the government is grossly disproportionate. *See Coker v. Georgia*, 433 U.S. 584, 592 (1977). The right to contract free from state interference is also governed by reasonableness review. *See Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 438 (1934) (the "question" in contracts cases is "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end"). The fundamental right to equal protection of the laws triggers rational basis scrutiny for discrimination against the disabled. *See Cleburne*, 473 U.S. at 446.

The Court in fundamental rights cases has applied a variety of different standards, including reasonableness review, to judge the constitutionality of burdensome laws. Should the Court determine that Second Amendment rights are fundamental, the Court may still reject heightened scrutiny in favor of

reasonableness review consistent with current doctrine.

### B. Guns Are a Form of Property Subject to Deferential Scrutiny.

Any individual right to keep and bear arms unrelated to militia service would be essentially a property right and, as such, ought to trigger deferential judicial scrutiny. Property rights are among the oldest "fundamental" rights. *See, e.g., Chicago, Burlington & Quincy Ry. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897). Nevertheless, for seventy years, this Court consistently has applied deferential forms of scrutiny to laws that enhance public welfare by regulating the ability of individuals to own or use their real or personal property. Weapons safety laws, which do no more than regulate the ability of individuals to own or use one particular type of personal property, should receive the same judicial scrutiny regardless of whether the right to bear arms is fundamental.

This Court repeatedly has held that the right of individuals to own and use property is subject to reasonable restriction. In *Nebbia v. New York*, 291 U.S. 502 (1934), this Court upheld a New York law that set prices for milk, explaining that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose." *Id.* at 537. This Court added that "neither

property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows." *Id.* at 523-24. What this Court wrote about milk is even more applicable to arms: Government cannot exist if anyone can use his or her gun at will to the detriment of others.

Deferential scrutiny is the rule for the gamut of regulations of individuals' ability to own or use property. Under the Takings Clause, this Court applies a relatively lenient reasonableness type of review in most cases. Uncompensated regulatory takings trigger deferential scrutiny. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (explaining that a requirement that regulation "substantially advance" state interests "has no proper place in our takings jurisprudence"); *Penn Cent. Transp. v. New York*, 438 U.S. 104 (1992). This Court also uses deferential scrutiny in determining if a taking is for a public use. *See Kelo v. New London,* 545 U.S. 469, 483 (2005) ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

This consistent tradition of judicial deference to governmental regulation of individuals' right to own, use, and convey property shows that even the oldest, most fundamental constitutional rights explicitly provided for in the text of the Constitution may be appropriately governed by reasonableness review.

Like other forms of property, the right to own, use, and convey a weapon should trigger only relatively deferential scrutiny.



## CONCLUSION

The Founders' original understanding that the right to keep and bear arms did not prohibit even onerous weapons safety laws, the long history of firearms regulation in America, and the consistent federal and state constitutional law principle of reasonableness review all recommend against this Court adopting a heightened form of scrutiny for the Second Amendment.

For the foregoing reasons, amici respectfully request that, if this Court reads the Second Amendment to protect a right to possess guns for private purposes, the standard of review applicable to weapons regulation should be the reasonable regulation test used uniformly by the states.

Respectfully submitted,

ERWIN CHEMERINSKY
*Counsel of Record*
ADAM WINKLER