No. 07-290

In The Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF MAJOR GENERAL JOHN D. ALTENBURG, JR., LIEUTENANT GENERAL CHARLES E. DOMINY, LIEUTENANT GENERAL TOM FIELDS, LIEUTENANT GENERAL JAY M. GARNER, GENERAL RONALD H. GRIFFITH, GENERAL WILLIAM H. HARTZOG, LIEUTENANT GENERAL RONALD V. HITE, MAJOR GENERAL JOHN. G. MEYER, JR., HONORABLE JOE R. REEDER, LIEUTENANT GENERAL DUTCH SHOFFNER, GENERAL JOHN TILELLI, AND THE AMERICAN HUNTERS AND SHOOTERS ASSOCIATION AS *AMICI CURIAE* 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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INTEREST OF *AMICI*

Amici are former high-ranking military officers and a civilian leader in the United States Army and an organization that advocates rational regulation of firearms.[1] *Amici* are deeply interested in the present case, not because its outcome could affect the way in which the Second Amendment is viewed and applied, but rather because *amici* believe that facility with rifles and pistols is a predictor of success in basic training and in the military, and that lawful and regulated practice with appropriate firearms is a critical component of national defense. The judgment of individual *amici* is based on decades of experience and accomplishment at the very highest positions of our nation's military leadership. The responsibilities and experiences of *amici* are highlighted below.

Major General John D. Altenburg, Jr.: retired Army 2-star; Army Deputy Judge Advocate General and former civilian Appointing Authority, Military

[1] Pursuant to Rule 37, the parties have consented to the filing of this brief. *See* Standing Consents from the Petitioners and Respondent on file with this Court. *Amici* have advised counsel for Petitioners and Respondent of their intent to file this brief more than seven days prior to said filing. In accordance with Rule 37.6, *amici* state: No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Commissions, Guantanamo Bay, Cuba; former enlisted soldier, Vietnam.

Lieutenant General Charles E. Dominy: retired Army 3-star; Director, Army Staff, responsible for coordinating Army Staff functions, including training.

Lieutenant General Tom Fields: retired Army 3-star; Deputy Commander-in-Chief & Chief of Staff U.S. Pacific Command (1991-94).

Lieutenant General Jay M. Garner: retired Army 3-star; Director, Office for Reconstruction & Humanitarian Assistance for Iraq (2003); Assistant Vice Chief of Staff of the Army (1996).

General Ronald H. Griffith: retired Army 4-star; Vice Chief of Staff, Army Inspector General and Gulf War Commanding General, 1st Armored Division.

General William H. Hartzog: retired Army 4-star; Commanding General, Army Training & Doctrine Command; Deputy Commanding General, Atlantic Command & Commanding General, 1st Infantry Division.

Lieutenant General Ronald V. Hite: retired Army 3-star; Program Executive Officer, Combat Support; Commanding General, White Sands Missile Range & U.S. Army Test & Evaluation Command; Military Deputy to the Assistant Secretary of the Army for Research, Development, & Acquisition; Director, Army Acquisition Corps.

Major General John G. Meyer Jr.: retired Army 2-star; Chief of Army Public Affairs (1996-01); Commander, Army Community & Family Support Center (1993-96).

Honorable Joe R. Reeder, 14th Under Secretary of the Army (1993-97), was President of the National Board for the Promotion of Rifle Practice, the governmental entity responsible for administering the Civilian Marksmanship Program (1993-96).

Lieutenant General Dutch Shoffner: retired Army 3-star; Commanding General, Combined Arms Center & Commandant, U.S. Army Command & General Staff College; Commanding General, 3rd Infantry Division & Director, Army Force Development.

General John H. Tilelli: retired Army 4-star; Commanding General, U.S. Army Forces Command; Commander in Chief, Korea; Army Vice Chief of Staff; Gulf War Commanding General, 1st Calvary Division.

The American Hunters and Shooters Association ("AHSA") is non-partisan organization that advocates sensible public policies for gun ownership and use. AHSA seeks to balance Americans' right to possess firearms with the need to ensure sensible and mature ownership, including keeping guns out of the hands of children, criminals, and those who lack the ability to responsibly own a weapon. AHSA does not support unfettered access to all types of weapons.

SUMMARY OF ARGUMENT

The Petitioners and Respondent are asking this Court to select among two mutually exclusive interpretations of the Second Amendment: one establishing an individual's right to bear arms and, the other memorializing society's right to organize a force for its collective defense. *Amici* suggest that this dichotomy, pitting individual rights against group rights, is not ordained by the language of the Second Amendment, which is a cogent blend of both individual rights and community rights, with each depending on the other. A well-regulated militia – whether *ad hoc* or as part of our organized military – depends on recruits who have familiarity and training with firearms – rifles, pistols and shotguns. *Amici* suggest that the Second Amendment ensures both the individual's right to possess firearms, subject to reasonable regulation, and the constitutional goal of collective defense readiness. Based on decades of military experience, *amici* have concluded that the District of Columbia's Gun Law ("D.C. Gun Law"), D.C. Code § 7-2502.01 *et seq*., directly interferes with various Acts of Congress aimed at enhancing the national defense by promoting martial training amongst the citizenry.

For over a century, Congress has authorized and funded programs to promote the marksmanship of young Americans so that they might make the transition from civilian to military life more effectively and at less cost to our national defense. This pre-military training has become an integral part of national

defense aimed at preparing, as civilians, "every able-bodied male [and female]." Pub. L. No. 57-33, 32 Stat. 775 (Jan. 21, 1903); *see* Pub. L. No. 64-242, 39 Stat. 619, 643 (Aug. 29, 1916) (all "able bodied males"). The D.C. Gun Law, by barring individuals from owning handguns and using other firearms at reasonable times and places, is inconsistent with these congressional mandates and, when in enacted in 1976, impeded the Department of the Army's Civilian Marksmanship program ("DCM").[2] The D.C. Gun Law's categorical prohibition on pistol ownership by D.C. residents not only conflicts with the Second Amendment and the Defense, Raise and Support Clauses of the Constitution, but also with the District of Columbia Home Rule Act § 602(a)(3), Pub. L. No. 93-198; 87 Stat. 777 (Dec. 24, 1973), codified at D.C. Code § 1-201 *et seq*., which precludes the District of Columbia City Council from enacting legislation that affects any function of the federal government. *See* U.S. CONST. amend. II, and art. I, § 8, cls. 1, 12, 13, and 16; D.C. Code § 1-233(a)(3). As this Court has consistently recognized, "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." *Rumsfeld v. Forum*

[2] Congress originally created the Office of Director of Civilian Marksmanship ("DCM") in 1916. The DCM was modified in 1996 and renamed the Civilian Marksmanship Program ("CMP"). *See* Pub. L. No. 104-450, To avoid confusion, we refer to the program as established in 1916 as "DCM," the post-1996 amendment program as the "CMP," and both programs or the program generically as the Civilian Marksmanship program.

for Academic and Institutional Rights, Inc., 547 U.S. 47, 58 (2006) (citing *Rostker v. Goldberg,* 453 U.S. 57, 70 (1981)). Thus, this Court need not reach the constitutional question posed by Petitioners: to the extent that it affects federally sponsored and operated marksmanship and training programs, the D.C. Gun Law is not authorized by the D.C. Home Rule Act and therefore, is void *ab initio*. *See International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 392 (1986).

ARGUMENT

I. Military Pre-Training is Critical to the National Defense.

A. Marksmanship Facilitates Military Training.

This Court has recognized that a "highly qualified . . . officer corps . . . is essential to the military's ability to fulfill its principal mission to provide national security" and that the Reserve Officer Training Corps ("ROTC") programs at various colleges and universities are critical to ensuring a continuous cadre of trained and diverse officers for our military. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003). While ROTC programs train officers, no comparable program exists for those who enlist. Those who enlist in the military undergo extensive and costly training. Yet, in *amici's* experience, recruits with prior pistol and rifle training tend to move through basic training

with greater ease than those who lack that training and, subsequently, demonstrate superior performance in safety, marksmanship, and weapon maintenance. Every soldier has an inherent right of self-defense under the laws of war. Pre-military practice with firearms better enables our soldiers to exercise that right meaningfully. *Amici's* observations, gleaned from extensive military experience, are confirmed by empirical evidence and history.

1. The Framers of the Second Amendment Inherited a Tradition of Legally Mandated Pre-Induction Weapons Training.

The notion that prior pistol and rifle experience is a significant factor in predicting the success of a recruit during his or her first year in the military should come as no surprise. History teaches that competence with weapons does not occur magically; it normally requires significant pre-military expertise honed through assiduous practice.

The English recognized this relationship early on, largely out of necessity. Their weapon of choice, the yew longbow, was not easily mastered and proved to be a difficult weapon to use. To ensure a sufficient cadre of a well-trained archers, the Crown, over the course of three centuries, encouraged and later required rich and poor alike to improve their longbow skills through regular practice. For example, Edward III (r. 1312-1377) required "the use of the bow" in

target practice, usually in the form of monthly events in each town. *See* Order that Archery Should Be Practised, 1346, 19 Edw. 3 c. 6.[3] Institutionalized practice by English bowmen proved critical in a number of battles waged during the Hundred Years' War, especially the Battles of Crecy and Agincourt. In both of those encounters, the English prevailed in no small measure because of their prowess with the longbow.

The lessons learned from the longbow were transferred easily when gunpowder began to replace arm-power and bows gave way to muskets. The ability to load the complicated new weapon quickly, using powder, ball, and wad, and accurately fire an unrifled pistol or musket required constant practice. As weapons – handguns and rifles – became more sophisticated, the need to practice did not diminish. Improved weapons required different skills; skills, though, of whatever nature, are honed through practice. Again, the English promoted marksmanship training among the entire male citizenry largely

[3] Even monarchs antedating Edward III recognized this need for constant practice and therefore, promoted civilian training through various edicts and statutes. King Henry I (r. 1100-1135) issued a law that absolved any archer of criminal culpability if he "[killed] another with a missile or some such accident." 1118, 18 Hen., c. 88, § 6; *see* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 978-79 (1932); Thomas Atkins Street, THE FOUNDATIONS OF LEGAL LIABILITY: THEORY AND PRINCIPLES OF TORT 77 (1906). In such cases, the archer merely had to compensate the family of the deceased.

because it relied on a volunteer militia especially starting in the mid-17th century. *See* Joyce Lee Malcolm, *The Role of the Militia in the Development of the Englishman's Right to be Armed – Clarifying the Legacy*, 5 J FIREARMS & PUB. POL'Y 139, 141 (1993) ("Men resented having to serve and tried to avoid spending their leisure hours at mandatory target practice. Not surprisingly, there were complaints of 'to much bowling and to little shoting' and in the 1620s Charles I was obliged to close ale houses on Sundays to keep men at their shooting practice."); WILLIAM BLACKSTONE, 1 Commentaries *412 ("The general scheme of [the militia laws] is to discipline a certain number of the inhabitants of every county, chosen by lot for three years . . . under a commission from the crown."); *see generally* Bernard D. Rostker, AMERICA GOES TO WAR: MANAGING THE FORCE DURING TIMES OF STRESS AND UNCERTAINTY (RAND 2007) (Prepared for the Office of the Secretary of Defense).

2. Colonial America Emulated the English Experience and Promoted Small Arms Proficiency Among Its Citizens.

Not surprisingly, the American colonies adopted the English custom of universal arms training for all able-bodied males. In 1774, George Mason and George Washington formed the Fairfax County Militia Association, which was not under the control of the Royal Governor. A contemporary editorial praised their unofficial militia by opining that "[with] the English troops in our front, and our governors forbid

giving assent to militia laws, make it high time that we enter into **associations for learning the use of arms**, and to chuse officers; so that if ever we should be attacked, we may be able to defend ourselves, and not be drove like sheep to the slaughter." WILLIAMSBURG VA. GAZETTE, Oct. 27, 1774, at 2, col. 2. Another contemporary commentator echoed the need for weaponry practice: "The inhabitants of this colony . . . ought therefore never be without the most ample supply of arms and ammunition," [and should prepare] "for the defence of this valuable country, by a diligent application to acquire a thorough knowledge of the use of arms and discipline, which might easily be obtained, without materially interfering with business, by devoting every Saturday afternoon to training." WILLIAMSBURG VA. GAZETTE, Dec. 1, 1774, at 2, col. 3.

During the constitutional ratification debates in Virginia, George Mason proposed the following reservations of rights and limitations on Federal power: "That the people have a right to keep and bear arms; that **a well-regulated militia, composed of the body of the people trained to arms**, is the proper, natural and safe defence of a free state. That standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided." *Amendments Proposed by the Convention of Virginia, 1788*, *in* Alexander Hamilton, James Madison & John Jay, THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, app. at 635 (Paul Leicester Ford ed., 1898) (emphasis supplied); Stephen P.

Halbrook, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 74 (1984).

Writing in Federalist No. 29, Alexander Hamilton rejected the notion that the National government could require a large standing Army. "Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped." THE FEDERALIST, NO. 29 (Alexander Hamilton). "This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude **that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms,** who stand ready to defend their rights and those of their fellow citizens." *Id.* (emphasis supplied).[4]

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[4] Tench Coxe, a prominent Federalist and friend of James Madison, wrote in favor of ratification in the PENNSYLVANIA GAZETTE in February 1788:

> The power of the sword, say the minority of Pennsylvania, is in the hands of Congress. My friends and countrymen, it is not so, for the powers of the sword are in the hands of the yeomanry of America from sixteen to sixty. The militia of these free commonwealths, **entitled and accustomed to their arms**, when compared with any possible army, must be tremendous and irresistible. Who are the militia? Are they not ourselves? Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of every American. . . ."

Halbrook, *supra*, at 68-69 (emphasis supplied).

Anti-Federalists also accepted the assumptions that standing armies were dangerous to liberty and that the most trustworthy system of national defense should be grounded in an armed citizenry, trained and practiced in the use of small arms. Richard Henry Lee's *Letters from the Federal Farmer* (1788) were highly influential writings against the ratification of a Constitution without a bill of rights. *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 365 (1995) (Thomas, J., concurring). Since Lee proposed specific rights later incorporated in the Bill of Rights, his writings are accepted as valuable guides to the original understanding of the Bill of Rights. According to Lee, "[t]o preserve liberty, it is essential that the **whole body of the people always possess arms, and be taught alike, especially when young, how to use them**." Halbrook, *supra*, at 72 (emphasis supplied).

B. Congress Promotes Small-Arms Marksmanship Among the Civilian Population.

1. Congress Creates the Civilian Small-Arms Marksmanship Training Programs.

The colonial experience memorialized in the Federalist Papers and later in the Second Amendment carried over into the twentieth century. Recognizing the importance of civilian marksmanship to national preparedness, Congress, as part of the Department of War Appropriations Act of 1903, Pub. L. No. 57-33, 32 Stat. 775 (Jan. 21, 1903), codified the

obligation of all male citizens, whether in uniform or not, to take up arms in defense of their country. In 1905, Congress implemented this mandate by authorizing the Secretary of War to sell ammunition to private rifle clubs to improve the marksmanship of the citizenry. *See* Pub. L. No. 58-149, 33 Stat. 986 (March 3, 1905). And, with the nation on the brink of entering the First World War, Congress, in the Army Appropriations Act for Fiscal Year 1916-17, Pub. L. No. 64-242, 39 Stat. 619, promoted private marksmanship in three significant ways. First, Congress appropriated funds to construct shooting galleries that would be open to "organized rifle clubs." 39 Stat. at 638. Second, it appropriated an additional $3,000,000 for "ammunition, targets, target materials, and other accessories [as] may be issued for small-arms[5] target practice and instruction of able-bodied males capable of bearing arms . . . " 39 Stat. at 643. At the time, this was an enormous sum, given that the entire defense budget for FY 1916-17 was $377 million. *See* William J. Durch & Pamela L. Reed, *The Boundaries of Choice: Domestic Constraints on Decisions Affecting the Armed Forces in* THE AMERICAN MILITARY IN THE 21ST CENTURY 113 (Barry M. Blechman *et al*. eds., 1993). And third, it authorized the President to appoint a Director of

[5] The term "small-arms" means any weapon used by a single individual, as opposed to a crew and as such, includes rifles, pistols and shotguns. *See* 14 U.S.S.G. § 2M5.2(a)(2) (defining non-fully automatic small arms as "rifles, handguns, or shotguns.")

Civilian Marksmanship who would be responsible for developing and implementing programs to promote "marksmanship" amongst the citizenry through "the purchase of materials, supplies, and services." 39 Stat. at 648.

In addition to maintaining shooting ranges for civilian use, the Director of Civilian Marksmanship was required, among other things, to organize annually a national rifle and pistol competition open to members of the military, "rifle clubs, and to civilians." 10 U.S.C. § 4312(a) (recodified by Pub. L. No. 105-225, 112 Stat. 1253 (Aug. 12, 1998) at 36 U.S.C. § 40725). A similar "junior" competition is also open to those under 18 years of age. *See* 10 U.S.C. § 4313 (recodified by Pub. L. No. 105-225, 112 Stat. 1253 (Aug. 12, 1998) at 36 U.S.C. § 40726).

In 1996, Congress amended and modified the Civilian Marksmanship program by establishing, through congressional charter, a private non-profit entity to oversee and operate the same sorts of programs that had existed since 1916. *See* National Defense Authorization Act for Fiscal Year 1996, § 1601 *et seq*., Pub. L. No. 104-450, 110 Stat. 186, 515 (Feb. 10, 1996), recodified at 36 U.S.C. § 40701 *et seq*.; 32 C.F.R. § 578.102. Having removed the programs from the direct control of the Department of Defense, though, required CMP to strengthen its ties with private gun enthusiasts as a way of ensuring continued logistical support for the program. The 1996 revisions to and re-authorization of the program required the Army to provide logistical support, as

well as facilities and personnel for the training program and national marksmanship competitions.

2. Training and Marksmanship Programs Prove Highly Successful.

The Civilian Marksmanship program has been remarkably successful, both as it existed from 1916-1996 and as it currently exists and has fulfilled congressional expectations when measured either subjectively or objectively. During both World Wars, the DCM's pre-military training was credited with giving many recruits a leg up on in basic training and made their transition to the military faster, less costly, and safer for the recruits. President Truman and General George C. Marshall both attested to the importance of the CMP in the overall war effort. *See* Federal Firearms Act: Hearings on S.1 before Subcommittee to Investigate Juvenile Delinquency of the Senate Judiciary Committee, 90th Cong. 1st Sess. pp. 484-5 (1967), cited in *Gavett v. Alexander*, 477 F. Supp. 1035, 1038 (D.D.C. 1979).

In the early 1960s, the Army commissioned a study to determine the efficacy of the DCM program. The study, undertaken by the Arthur D. Little Company under the direction of former General James Gavin, concluded that those who were involved in the programs operated by the Office of the Director of the Civilian Marksmanship, when compared to those who were not, (i) had fewer casualties in battle, (ii) were more likely to use their weapons in battle, (iii) qualified

in training more quickly with small arms, (iv) learned how to field strip their weapons and learned the essential nomenclature of gun components more quickly, and (v) were able to clear jammed or obstructive weapons more rapidly. *See* ARTHUR D. LITTLE, A STUDY OF THE ACTIVITIES AND MISSIONS OF THE NBPRP, REPORT TO THE DEPARTMENT OF THE ARMY (Jan. 1966) ("Little Report") cited in James Biser Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 969-70 (1992). The Little Report revealed that while 13.1% of ordinary recruits qualified as "Expert," the highest category of marksmanship, 68.6% of recruits who had been DCM participants qualified as "Expert." Little Report at 18 (Table II-1). The Report confirmed what common sense and nearly a millennium of military history have consistently taught: soldiers with superior training and practice are superior in battle. *See* Little Report at 23-24 ("the more marksmanship instruction . . . the more effective . . . in combat and the fewer the casualties").

Firearms training is especially effective in reducing the rate of gun-related accidents which are a constant concern to any military commander. Army General David H. Petraeus, the Commanding General, Multi-National Force – Iraq, was nearly killed as a result of a training accident. On a Saturday in 1991, while observing an infantry squad practice assaulting a bunker, Petraeus was hit by an errant bullet from an M-16 that had been fired accidentally. *See* Rick Atkinson, IN THE COMPANY OF SOLDIERS 37-38

(2005). The bullet entered directly above the "A" in Petraeus' name tag on the right side of his chest; it exited through his back.[6] *See id.* DCM pre-military training with pistols and rifles reduced the rate of gun-related accidents in the military. *See* Little Report at 261 (Table IV-64).

II. The District of Columbia Gun Law Impedes Small-Arms Training and Undermines Military Preparedness.

The federal Civilian Marksmanship programs, as they existed in 1976, when the law at issue was enacted by the District of Columbia, and as they currently exist, include both rifles and pistols. The D.C. Gun Law permits one to own a gun provided that it is duly registered with the District of Columbia. The law, though, precludes, subject to certain exceptions not relevant here, the District Government from registering any "[p]istol not validly registered to the current registrant in the District prior to September 24, 1976." D.C. Code § 7-2502.02(a)(4). The law permits one to own a registered rifle in the District provided it is "unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of

[6] Gen. Petraeus was transported by medevac helicopter to Vanderbilt University Medical Center, where the surgeon, William Frist, had rushed to hospital from the golf course to operate.

Columbia[.]" D.C. Code § 7-2507.02. Under any interpretation, the law at issue effectively precludes one from owning a pistol in the District of Columbia and imposes significant constraints, in addition to registration, on ownership of a rifle.

The inability of a District resident to own a pistol precludes that individual from participating in any pistol training program in the District of Columbia, any pistol marksmanship program in the District of Columbia, and in the national matches originally sponsored by the Department of Defense and now sponsored by the CMP. The D.C. Gun Law contains no exception that would reach the Civilian Marksmanship program, as it existed in 1976, and as it exists today. The D.C. Gun Law is particularly pernicious because it permits non-residents to carry a firearm to a "lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction[,]" but does not extend that same benefit to residents of the District of Columbia. D.C. Code § 7-2502.02(b)(3). Therefore, the Department of Defense could sponsor a pistol marksmanship contest in the District, but no District resident could participate in that event with his or her own pistol. The D.C. Gun Law does not similarly disable non-residents of the District. Residents of Maryland or Virginia or California or any other jurisdiction could enter the District with their pistols to participate in that event. These non-D.C. residents can cross through the District with pistols provided they are en route to a firearms event in another

jurisdiction. D.C. residents, by contrast, are precluded from attending those same events in another jurisdiction.

The D.C. Gun Law permits members of the organized reserve or organized militia (*i.e.*, the National Guard) to possess a firearm, without registration, "while on duty in the performance of official authorized functions[.]" D.C. Code § 7-2502.02(b)(1). But the D.C. Gun Law does not extend this exception to the "reserve or unorganized militia," consisting of all able-bodied men not in the military. The reserved militia, however, was the target and intended beneficiary of both the 1903 and 1916 Acts, noted above. Each law promoted marksmanship and "small-arms target practice" among all "able-bodied males capable of bearing arms." 39 Stat. at 643. In short, those residing in the District could not then, and cannot now, meaningfully participate in the Department of Defense Civilian Marksmanship program and Civilian Marksmanship Program, respectively, aimed at ensuring a cadre of citizens trained in the use of small-arms – pistols, rifles and shotguns.

III. The District of Columbia Gun Law Impedes the Federal Government's Function of Training Citizens for National Defense and Therefore, Is Barred by the D.C. Home Rule Act.

Petitioners do not deny that the D.C. Gun Law has these effects. Instead, Petitioners argue that the Second Amendment does not pertain because that

Amendment does not create an individual right and, even if it did, the D.C. Gun Law imposes reasonable restrictions on gun ownership. *Amici* suggest that these arguments are not relevant. Rather, the D.C. Gun Law is not authorized by the District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code § 1-211 *et seq*., commonly known as the Home Rule Act. The Home Rule Act creates the D.C. local government and authorizes it to pass certain legislation. The D.C. Council has "no authority to . . . [e]nact any act, or enact any act to amend or repeal any act of Congress which *concerns the functions* or property of the United States." D.C. Code § 1-233(a)(3) (emphasis supplied).[7] In 1976, when the

[7] In *Techworld Dev. Corp. v. District of Columbia Pres. League*, 648 F. Supp. 106 (D.D.C. 1986), the district court held that the limitation imposed by D.C. Code § 1-233 did not preclude the District of Columbia from closing a street even where title to that street vested in the federal government. The court reasoned that unlike other authorities, the authority to close streets had been continuously exercised by the District of Columbia government for more than 150 years and had been expressly upheld by this Court as a valid exercise of local governmental authority. *See Van Ness v. City of Washington*, 29 U.S. (4 Pet.) 232, 281 (1830) ("Among these are certainly the authority to widen or alter streets"). Categorically prohibiting pistol ownership is not a power that has been exercised, continuously or otherwise, by the District government prior to home rule. Indeed, the *Techworld Dev. Corp.* court expressly recognized, as have other courts since, that a local undertaking, at least with respect to the National Historic Preservation Act, can become a " 'federal undertaking when a federal agency lends its' . . . approval, sanction, assistance, or support." Here, the programs upended by the D.C. Gun Law were entirely federal

(Continued on following page)

D.C. Gun Law was enacted, the Civilian Marksmanship program was operated by the Department of the Army. As discussed above, the Gun Law when enacted effectively precluded and continues to preclude District residents from participating in Civilian Marksmanship program-sponsored pistol events. As such, the D.C. Gun Law "concerne[d] the functions" of the Department of Defense (*see* 10 U.S.C. §§ 4312, 4313 (1995)) and is, therefore, void *ab initio* as "concern[ing]" a federal function.

This is not to say that a gun law similar to one enacted by the District of Columbia could not pass muster under a traditional implied preemption analysis; nor is it to say that the District could not have crafted a gun law consistent with its Charter and with the Second Amendment by not intruding into federal functions.[8] *See Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992). A normal implied preemption analysis seeks to balance the federal interest affected by a state law with those fundamental notions of federalism that

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through 1996, and still receive approval, sanction and support from the Department of Defense. In short, even under *Techworld*, the D.C. Gun is not a "local undertaking," and runs afoul of D.C. Code § 1-233.

[8] *Amici* suggest that laws which reasonably require handgun registration and which restrict civilian possession of uniquely military arms would likely pass muster under both an implied preemption and Second Amendment analysis, provided such laws permit District residents to possess pistols, rifles and shotguns and permit their use in CMP events and competitions.

authorize states to exercise their inherent police powers. *See Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996); *Hillsborough Cty. v. Automated Med. Labs*., 471 U.S. 707, 715 (1985). However, as a federal district, D.C. enjoys none of the indicia of statehood absent congressional legislation to the contrary and, therefore, basic notions of federalism cannot logically or semantically apply to the District. *See United States v. Carter*, 409 U.S. 418, 419 (1973); *Nat'l Ins. Co. v. Tidewater*, 337 U.S. 582 (1949); *LaShawn A. by Moore v. Barry*, 144 F.3d 847, 853 n. 7 (D.C. Cir. 1998) (holding that the District of Columbia is not a State for Eleventh Amendment purposes); *cf. Clarke v. Washington Metro. Area Transit Auth.,* 654 F. Supp. 712 (D.D.C. 1985) *aff'd,* 808 F.2d 137 (D.C. Cir. 1987) (holding that the District can exercise indicia of statehood provided Congress authorizes it). As in the U.S. Territories, Congress has plenary authority in the District of Columbia. *See* U.S. CONST. art. I, § 8, cl. 17; U.S. CONST. art. IV, § 3, cl. 2; *see also, e.g., Binns v. United States*, 194 U.S. 486, 491 (1904). Correspondingly, laws enacted by the District are much the same as regulations issued by a federal agency given that their legal basis is an act of Congress and not, as is the case with States, the Constitution or retained authority. *Compare* D.C. Code § 1-233(c) (requiring D.C. Council to submit its legislation to Congress for its review before taking effect) *with* the Congressional Review Act, 5 U.S.C. § 801 *et seq*. (requiring administrative agencies to submit significant final rules to Congress for its review before taking effect).

This Court has consistently held that federal regulations, like D.C. laws, are only valid if they are authorized by Congress. In this case, that authorization is not only absent, but the legislation itself affirmatively withdraws authorization of the type necessary to support the D.C. Gun Law. *See Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 647 (1986); *Ridgway v. Ridgway*, 454 U.S. 46, 57 (1981) (regulations must not be "unreasonable, unauthorized, or inconsistent with" the underlying statute). Further, the D.C. Council's action is not entitled to deference when the issue is whether that action is authorized by congressional action. *See United States v. Mead Corp.*, 533 U.S. 201, 226-27 (2001) (holding that *Chevron* deference presupposes that "Congress delegated authority to the agency generally to make" the law at issue); *Ry. Labor Executives Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*) (*Chevron* "deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.' ") (*quoting Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984)).

Inasmuch as the D.C. Gun Law prevents D.C. residents from participating in federally-operated, federally-supervised, and federally-mandated programs, it necessarily affects a unique federal function and therefore is expressly barred by the D.C. Home Rule Act. The argument advanced by *amici* would in no way prevent the D.C. Council from enacting reasonable regulations relating to possession, safety, and

registration of firearms in the District. Indeed, it has a responsibility to the public to do so. *Amici* believe that the District's Gun Law was a laudable effort. However, insofar as it improperly impedes Defense Department programs vital to the national defense, it exceeds the bounds of the D.C. Home Rule Act.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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