

The District of Columbia and Mayor Adrian Fenty respectfully petition this Court for rehearing *en banc* because the panel majority's decision conflicts with a decision of the Supreme Court, because the decision creates inter- and intra-jurisdiction decisional conflict, and because the proceeding involves questions of exceptional importance. In holding that the District's longstanding laws governing firearms possession are unconstitutional, the divided panel adopted readings of the Second Amendment and Supreme Court precedent that are contrary to those of nearly every other federal court of appeals, as well as the highest local court in this jurisdiction, and thereby created a clear conflict on constitutional issues of fundamental importance. The decision marks the first time in the Nation's history that a federal court of appeals has struck down a law as unconstitutional under the Second Amendment, which reads: "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."

Rehearing by the full Court is merited for three reasons. First, *en banc* review is necessary to ensure conformity with Supreme Court precedent. As Judge Henderson explained in dissent, the panel majority's decision conflicts with the decision in *United States v. Miller*, 307 U.S. 174 (1939). That decision held that the Second Amendment's right cannot be uncoupled from its stated civic purpose: "With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Id.* at 178. The panel majority, however, held that "the activities [the Second Amendment] protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia." *Op.* at 46; *see op.* at 41-45 (discussing *Miller*). Judge Henderson is correct that this Court is obliged to follow *Miller's* declaration that "the right

of the people to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual States.” Diss. op. at 3-6 (footnote omitted). *En banc* rehearing is thus warranted to ensure fidelity to *Miller*.

Second, the panel majority’s decision created an acknowledged conflict among the Circuits and an even more unseemly conflict within the District of Columbia itself. Nearly every other federal court of appeals and the District of Columbia Court of Appeals have reached a contrary conclusion on the fundamental question of what the Second Amendment means; indeed, absent the panel majority’s decision, there would be no clearly established conflict among the federal circuits. That fact itself establishes that *en banc* rehearing is appropriate. *See* Fed. R. App. Proc. 35(b)(1)(B).

Third, the proceeding otherwise involves questions of exceptional importance. These include: (1) whether the Second Amendment protects firearms possession or use that is not associated with service in a State militia; (2) whether the Amendment applies differently because of the District’s constitutional status; and (3) whether the challenged laws represent reasonable regulation of whatever right the Amendment protects. These questions are literally life-or-death given the realities of gun violence in our society. Reasonable minds may differ as to how effective particular firearms control measures may be, but if the panel majority’s holding remains unchanged, it will severely limit the authority of both the District government and Congress to legislate in ways that they believe will best protect citizens and law-enforcement officers from gun violence and ultimately save lives.

BACKGROUND

Three fundamental principles of District law are at issue here. First, although most rifles and shotguns may be registered for lawful possession, handguns generally may not be registered.

D.C. Code § 7-2502.02; *see* D.C. Code § 7-2502.01 (prohibiting possession of unregistered firearms). Second, persons carrying handguns or other weapons capable of concealment must have licenses. D.C. Code § 22-4504(a); *see* D.C. Code § 22-4515 (penalty provision). Third, firearms kept at home generally must be “unloaded and disassembled or bound by a trigger lock or similar device.” D.C. Code § 7-2507.02. These provisions were enacted because then-applicable law failed to prevent a proliferation of guns, of crimes involving guns, and of gun-related deaths. Appellees Br. at 34 (citing and discussing legislative history).

Six residents of the District brought facial challenges to these provisions under the Second Amendment. R. 1. Asserting a desire for “functional” firearms including handguns for self-defense in their homes, they sought an order permanently enjoining the District “from enforcing D.C. Code § 7-2502.02(a)(4), barring registration of handguns; . . . from enforcing D.C. Code § 7-2507.02 in such a manner as to bar the possession of functional firearms within the home or on possessed land; and . . . from enforcing D.C. Code §§ 22-4504 and 4515 in such a manner as to forbid the carrying of a firearm within one’s home or possessed land without a license.” R. 1. The district court dismissed the complaint after rejecting “the notion that there is an individual right to bear arms separate and apart from service in the Militia” and concluding that, “because none of the plaintiffs have asserted membership in the Militia, plaintiffs have no viable claim under the Second Amendment.” R. 35, at 15; R. 36; *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109-10 (D.D.C. 2004).

On appeal, a divided panel reversed and remanded. Writing for himself and Judge Griffith, Senior Judge Silberman first found that one of the six plaintiffs, Dick Heller, had standing to challenge all the statutory provisions at issue because he had unsuccessfully sought to register a handgun. Op. at 5-12. This fact, the panel majority ruled, distinguished the case from

Seegars v. Gonzales, 396 F.3d 1248 (D.C. Cir.), *reh'g denied*, 413 F.3d 1 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1187 (2006), in which this Court dismissed a Second Amendment challenge to the same provisions for lack of standing. Op. at 8.

On the merits, the panel majority concluded that “the Second Amendment protects an individual right to keep and bear arms” and that, “[d]espite the importance of the Second Amendment’s civic purpose, . . . the activities it protects are not limited to militia service, nor is an individual’s enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.” Op. at 46; *see op.* at 1246. The panel majority read *Miller* to limit the scope of the Amendment based only on the “relationship between the *weapon* in question—a short-barreled shotgun—and the preservation of the militia system,” not “the *individual’s* connection (or lack thereof) to an organized functioning militia.” Op. at 41-45; *see op.* at 37.

The panel majority next concluded that the District’s status as a “purely federal entity” did not alter the analysis. Op. at 46-50. Having already rejected the notion that the Second Amendment right is limited to a “guarantee about militias,” the panel majority noted that whether the right would be further “confined to *state* militias” was likely not relevant. Op. at 47-48. In any event, the panel majority read the reference in the Second Amendment to “a free State” to be a “refer[ence] to republican government generally.” Op. at 48-49.

Finally, the panel majority ruled that the laws at issue are not the sort of “reasonable restrictions” on firearms use and possession that might be permissible. Op. at 50-58. After concluding that a handgun is a weapon embraced by the Second Amendment right (op. at 50-53), the panel majority held: “it is not open to the District to ban them.” Op. at 56. For similar reasons, the panel majority held that the District could not use a licensing requirement to defeat handgun use in the home: “just as the District may not flatly ban the keeping of a handgun in the home,

obviously it may not prevent it from being moved throughout one's house." Op. at 57. Similarly, because the panel majority read D.C. Code § 7-2507.02 to "amount[] to a complete prohibition on the lawful use of handguns for self-defense," that provision too was held unconstitutional. Op. at 57-58. Finding "no material questions of fact in dispute," the panel majority remanded the case for the district court "to grant summary judgment to Heller consistent with the prayer for relief contained in appellants' complaint." Op. 58.

Judge Henderson dissented. She noted that, under this Court's decision in *Seegars*, even Heller would lack standing as to the provision directing how firearms are to be stored. Diss. op. at 2 n.2. On the merits, she found *Miller* to be "unmistakable" and to "doom[] Heller's challenge." Diss. op. at 2. In particular, the Supreme Court "emphatically declared that the *entire* Second Amendment—both its 'declaration' and its 'guarantee'—must be interpreted and applied together" and thus, "as *Miller* declares, the right of the people to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual States." Diss. op. at 3-6 (quoting *Miller*, 307 U.S. at 178) (citations and footnotes omitted). Judge Henderson concluded that, "under *Miller*, the District is inescapably excluded from the Second Amendment because it is not a State." Diss. op. at 6; *see* diss. op. at 8-17 (concluding that the District need not be treated as a State for Second Amendment purposes). "[U]ntil and unless the Supreme Court revisits *Miller*, its reading of the Second Amendment is the one we are obliged to follow." Diss. op. at 6.

DISCUSSION

I. The Panel Majority's Decision Conflicts with the Supreme Court's Decision in *Miller*.

The Supreme Court in *Miller* analyzed the Second Amendment by considering the relationship between its two parts: the declaration ("A well regulated Militia, being necessary to the security of a free State . . .") and the guarantee (" . . . the right of the people to keep and bear

Arms, shall not be infringed.’). 307 U.S. at 178. After setting forth the Militia Clauses of the Constitution, U.S. Const. Art. I, § 8, cl. 15-16, the *Miller* Court stated: “With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration *and* guarantee of the Second Amendment were made. *It must be interpreted and applied with that end in view.*” 307 U.S. at 178 (emphasis added). As Judge Henderson explained, the Court thus held that “the right of the people to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual States.” Diss. op. at 36 (footnote omitted).

The panel majority, however, held that “the activities [the Second Amendment] protects are not limited to militia service, nor is an individual’s enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.” Op. at 46. It so held after relating that the arguments the United States had made to the *Miller* Court included both an argument about the meaning of the entire Second Amendment and an argument specifically about what “Arms” it covers. Op. at 42. Concluding that “the Court’s opinion . . . is most notable for what it omits,” the panel majority concluded that the holding was limited to the narrower, “weapons-based argument.” Op. at 42-44.

The District respectfully submits that nothing in the Supreme Court’s opinion and reasoning contains the gloss applied by the panel majority. Over the nearly seven decades since *Miller* was issued, most other federal courts of appeals have read it as the District and Judge Henderson do.¹ Diss. op. at 4 n.4; *see op.* at 16 n.4; *see also Lewis v. United States*, 445 U.S. 55,

¹ *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1272 (11th Cir. 1997), *vacated in other part*, 133 F.3d 1412 (11th Cir. 1998); *United States v. Rybar*, 103 F.3d 273, 285-86 (3d Cir. 1996); *Hickman v. Block*, 81 F.3d 98, 101-02 (9th Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1018-20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th

65 n.8 (1980) (citing and quoting *Miller* in holding that a law prohibiting gun possession by felons trenching on no liberty protected by the Second Amendment). Only a divided panel of the Fifth Circuit in dicta has read *Miller* as the panel majority does.² At a minimum, rehearing *en banc* is warranted before the Court adopts an interpretation of *Miller* that is subject to such great dispute.

II. The Panel Majority's Decision Creates Inter- and Intra-jurisdictional Conflict.

The acknowledged decisional conflicts created by the panel majority's holding themselves justify *en banc* rehearing. See Fed. R. App. Proc. 35(b)(1)(B). Nearly every other federal court of appeals has interpreted the Second Amendment contrary to the panel majority. *Op.* at 16 & n.4. Indeed, there would be no clear circuit conflict absent the panel majority's ruling. A divided panel of the Fifth Circuit in *Emerson* adopted the view that firearm possession and use with no connection to militia service may enjoy Second Amendment protection; however, the federal firearms law at issue was upheld and the concurring judge deemed the majority's view to be non-binding dicta.³ 270 F.3d at 264-65; *id.* at 272-74 (Parker, J., specially concurring). Neither the Fifth Circuit nor any other circuit until now has ever struck down a gun control law under the Second Amendment. In that respect, the panel majority's decision stands alone.

Cir. 1977); *cf. Silveira v. Lockyer*, 312 F.3d 1052, 1061 (9th Cir.), *reh'g denied*, 328 F.3d 567 (9th Cir. 2003); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942)).

² *United States v. Emerson*, 270 F.3d 203, 221-26 (5th Cir. 2001); *see also Silveira*, 328 F.3d at 585-87 (Kleinfeld, J., dissenting from denial of rehearing *en banc*).

³ Later cases in that court have not clarified whether the *Emerson* panel's view is binding. Compare *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004) (stating that *Emerson* is binding but upholding the law in question), with *United States v. Darrington*, 351 F.3d 632, 633 (5th Cir. 2003) ("*Emerson* is a carefully worded decision, and we do not address the contention that its recognition of an individual right to keep and bear arms is dicta.>").

The panel majority also stands in acknowledged conflict with the highest local court in this jurisdiction, the District of Columbia Court of Appeals. Op. at 17 n.6; *see Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987). That court's view of the constitutionality of District law deserves this Court's full consideration to resolve this unseemly conflict.

III. The Proceeding Involves Questions of Exceptional Importance.

Rehearing *en banc* is also justified given the exceptional importance of the questions presented in this case: (1) whether the Second Amendment protects firearms possession or use that is not associated with service in a State militia; (2) whether the Amendment applies differently because of the District's constitutional status; and (3) whether the challenged laws represent reasonable regulation of whatever right the Amendment protects.

1. The District submits that the Second Amendment protects private possession of weapons only in connection with service in a well-regulated citizens militia. Even assuming that *Miller* did not directly hold as much, there are significant textual and historical arguments (as well as voluminous scholarship) supporting this reading. *See, e.g., Silveira*, 312 F.3d at 1066-87; Appellees Br. at 23-34. The full Court should consider these arguments.

The exceptional importance of how the Second Amendment should be read is plain. Based on its reading, the panel majority struck down District laws enacted over three decades ago for the protection of the District's citizens and law-enforcement officers. If the ruling stands, the federal courts in this jurisdiction may expect to be singularly attractive to suits against the United States Attorney General challenging nationally applicable firearm laws Congress has enacted or may yet enact. Any ruling striking down a law as unconstitutional is important, but this one is particularly so given the subject matter. How best to control gun violence is a complex topic, with many competing, passionately held views. The politically accountable

legislatures—the Council of the District of Columbia as to District-specific legislation and Congress as to national legislation—are the best fora for considering such competing views. Whether or not they are correct, constitutional rulings like that of the panel majority severely limit what measures the political branches can take to address the concerns facing their citizens. Thus, the constitutional question posed here has real consequences in terms of lives saved or lives lost.

2. The panel majority further held that the District’s constitutional status made no difference to its analysis. That holding is also exceptionally important and deserves full consideration by this Court, particularly because it is unique to this Circuit. Judge Henderson reasoned that “the right of the people to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual States’ and that the District need not be treated as a State for purposes of the Second Amendment. Diss. op. at 3-6, 8-17 (footnote omitted). She disagreed with the panel majority’s conclusion that the textual reference to “a free State” was a “refer[ence] to republican government generally.” Op. at 48-49. Instead, she concluded that the word “State” should have the same meaning in the Second Amendment that it does elsewhere in the Constitution—such as in the Militia Clauses themselves, where the word “States” is used in its standard sense. Diss. op. at 8-9; U.S. Const. Art. 1, § 8, cl. 16.

Judge Henderson’s conclusion if adopted would merely place District residents on a par with State residents, given that the Second Amendment does not restrict State regulation of weapons but instead allows each State to adopt measures allowing or restricting firearms use as the State sees fit. Op. at 39 n.13; *Presser v. Illinois*, 116 U.S. 252, 265 (1886). Whether the

District has the same ability is a matter deserving *en banc* rehearing by the federal court of appeals with geographic jurisdiction limited to the District.⁴

3. Finally, the panel majority held that the challenged laws do not represent acceptable regulation of activity protected by the Second Amendment, but rather are unconstitutional to the extent they prohibit handgun possession in the home, require licenses for any movement of handguns in the home, and prohibit use of lawfully possessed firearms for self-defense. The panel majority agreed that Second Amendment rights are subject to “reasonable restrictions”; however, it did not consider the legislature’s reasons for enacting the laws in question. Op. at 53-54; *cf.* op. at 55 n.17 (declining to consider whether laws are “irrational[.]”). At a minimum the legislature’s view that handguns contributed disproportionately to crime should merit consideration in the decision whether the legislature’s choice to ban most handguns while allowing rifles and shotguns is constitutionally permissible.

The panel majority decided that handguns, as a class of weapons subject to Second Amendment protection, may not be barred. Op. at 56. The District submits, however, that outlawing a particular type of weapon because its harms outweigh its benefits does not frustrate the core purposes of the Second Amendment—whether to promote the common defense, the militia, or self-defense—so long as other arms remain available and reasonably adequate to serve those purposes. Appellees Br. at 14-16. Even if the Court does not take as conclusive the Council’s view on handguns’ disproportionate contribution to social ills, the Court should take that view into account or at least allow factual exploration of whether handguns may reasonably be banned given that District law does allow rifles and shotguns. The panel majority, however,

⁴ In the District, Congress and the Council generally possess “all the police and regulatory powers which a state legislature or municipal government would have.” *Palmore v. United States*, 411 U.S. 389, 397 (1973); *see* D.C Code § 1-203.02; *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 110 (1953).

found no disputed facts and ordered the entry of summary judgment. Op. at 58. Its conclusion that the District is barred as a matter of law from banning what it deems to be a particularly harmful type of weapon deserves the full Court's consideration.

Similarly deserving of *en banc* rehearing are the panel majority's conclusions on the District's licensing and safe-storage laws. Op. at 57-58. After holding that the District may not deny registration to handguns as a class, the panel majority appeared to reject the notion that the District may require a license for any person to move handguns within the home. Op. at 57. The District submits, however, that there are circumstances when the licensing law may be constitutionally applied—for example, when the potential licensee is a convicted felon. *See op.* at 54 (citing *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897)). Under the usual principles relating to a facial constitutional challenge, if a law is capable of being applied constitutionally, then the challenge fails. *United States v. Salerno*, 481 U.S. 739, 745 (1987). On a related note, the fact that the District of Columbia Court of Appeals has never construed the safe-storage provision and could yet construe it to comport with the panel majority's constitutional analysis raises doubt as to whether the panel majority should have invalidated the District's law without awaiting an authoritative construction from the District's courts. *See New York v. Ferber*, 458 U.S. 747, 768 (1982) (limiting constitutional attacks to as-applied settings“fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities”).

IV. The Court Should Order New Briefing.

If the Court grants this petition for rehearing *en banc*, the District respectfully suggests that the Court should order new briefing by the parties. *See* Circuit Rule 35(e). The Court should also allow new briefing both by the *amici* who filed briefs before the panel and by other

amici who may be interested in and affected by the Court's decision and who could contribute meaningfully to the Court's understanding of the issues raised.⁵

Because the posture of the case would change significantly before the *en banc* Court, new briefing would be particularly appropriate. The parties' briefs before the panel addressed standing in great detail. Appellants Br. at 17-22; Appellees Br. at 7-11; Reply Br. at 2-18. Indeed, this Court had previously ordered the parties to address both standing and the merits. Order of Nov. 2, 2005. The parties' standing analyses depended on interpretation of precedent—in particular *Seegars*—that was binding on the panel but would not be in an *en banc* proceeding, and thus the briefing would likely change substantially.

Moreover, the importance of this case counsels in favor of allowing new briefing. The parties should have full opportunity to address the points made by the panel majority and the dissent. Two particular topics that could benefit from further exploration are what level of scrutiny applies in determining whether a governmental interest is sufficiently weighty to justify regulation of Second Amendment rights and whether, as Judge Henderson concluded in dissent, the District's constitutional status is itself reason to reject the plaintiffs' challenges to District law. Ordering new briefing will prejudice no one but instead will ensure that these exceptionally important issues receive the full treatment they deserve.

⁵ Attesting to this case's importance, 16 States (as well as the cities of Boston, Chicago, New York, and San Francisco) and numerous national groups participated as *amici curiae* before the panel on both sides. Many additional *amici* would likely be interested in assisting the Court should the petition be granted. For instance, the International Association of Chiefs of Police has expressed concern that the panel majority's ruling will harm law-enforcement efforts, and the American Academy of Pediatrics has expressed concern that children in particular will suffer from avoidable gun violence. {CITE TO WEB SITES WITH PRESS RELEASES: www.iacp.org / www.aap.org .}

CONCLUSION

The Court should grant this petition for rehearing *en banc*.

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United States Court of Appeals
for the District of Columbia Circuit

SHELLY PARKER, *ET AL.*,
Plaintiffs–Appellants

v.

DISTRICT OF COLUMBIA; ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,
Defendants–Appellees.

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