



**Testimony of Walter Smith, Executive Director  
DC Appleseed Center for Law and Justice**

**Before the Council of the District of Columbia Committee on Public Safety and the Judiciary  
July 2, 2008**

Good morning Councilmember Mendelson and other members of the Committee. My name is Walter Smith. I am the Executive Director of the DC Appleseed Center for Law and Justice. Thank you for the opportunity to offer comments on how the District should revise its gun control laws in light of the U.S. Supreme Court's recent decision in *District of Columbia v. Heller*, 554 U.S. \_\_\_ (2008) (No. 07-290) ("*Heller* Slip Op.>").

DC Appleseed filed an amicus brief (copy attached) with the Supreme Court in *Heller* at the invitation of the District's Office of Attorney General. In that brief, joined by the D.C. Chamber of Commerce, D.C. for Democracy, the D.C. League of Women Voters, the Federal City Council, and the Washington Council of Lawyers, we argued that (1) when reviewing firearm regulations, the Court should give great deference to the Council's decisions and only overturn legislative enactments that are unreasonable infringements on the rights protected by the Second Amendment, and (2) under that standard, the District's laws were reasonable and should be upheld. Brief for DC Appleseed Center for Law and Justice et al. as Amici Curiae Supporting Petitioners 4-5, *District of Columbia v. Heller*, 554 U.S. \_\_\_ (2008) (No. 07-290) ("DC Appleseed Brief"). Unfortunately, the Court did not reach the important issue of how much deference should be given to decisions made by local legislatures. Instead, the Court determined that a total ban on handguns is *per se* unreasonable; at the same time, the Court also recognized that some limitations on handguns are permissible. In these circumstances, we think it is imperative that the Council gather as much expert testimony into the legislative history of the new firearms regulations as possible to demonstrate that the Council's responsive actions are well-informed, well-reasoned, fit within the kinds of limitations the Court said are permissible, and are carefully tailored to the circumstances and needs of District residents.

**The *Heller* Opinion**

The Court held that the District's law violated the Second Amendment because the statutes completely banned possession of handguns in the home and rendered lawfully possessed firearms inoperable for purposes of self-defense. *Id.* at 64. But Justice Scalia notes that the *Heller* decision should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms," and he goes on to note that even this list of regulations is not exhaustive. *Id.* at 54-55. He furthermore said that the Court's decision does not "suggest the invalidity of laws regulating the storage of firearms to prevent accidents." *Id.* at 60.

The majority opinion did not reach the issue of the standard of review courts should use<sup>1</sup> to determine if any of these other firearm regulations – short of a total ban – violates the Second Amendment. *Id.* at 56. But we believe that, whatever standard of review the courts adopt, it will be a rigorous one, and the key to sustaining the Council’s new legislation will be building a persuasive legislative record documenting the reasonableness of the choices the Council now makes and showing that those choices were designed to fit within the kind of limitations the Court found to be permissible.

### **Revising the Challenged Statutes**

While Justice Scalia’s majority opinion does not reach the issue of how much deference courts should give to choices made by legislatures when regulating firearms, Justice Breyer’s dissent notes that courts generally defer to legislatures on policy decisions because a “legislature is likely to have greater expertise and greater institutional factfinding capacity.” *Id.* at 11. For the District to show that whatever decisions it makes in revising its gun laws are constitutional, there must be a robust legislative record to show that the legislature used its “institutional factfinding capacity” to the maximum extent feasible; and the Council’s legislative solutions should reflect a well-reasoned effort to protect the constitutional right the Court found in *Heller*. We recognize that there is pressure on the District to remedy its laws as quickly as possible, but that process should not neglect the need to build a record justifying the legislative decisions the District makes. Any legislative enactment lacking a record explicitly substantiating the Council’s efforts to regulate firearms in ways that are consistent with the kind of limitations the Court found permissible will be in jeopardy, given that the Court has rejected a rational basis standard of review. *See id.* at 56, note 27. The stronger the justification the Council can produce, the more likely it is that the resulting statute will be upheld.

#### *Revising the Handgun Ban*

The Court categorically rejected a complete ban on handguns – partly because they are the “most popular weapon chosen by Americans for self-defense,” *id.* at 57-58 – but left the District “a variety of tools for combating” the problem of handgun violence. *Id.* at 64. For example, as noted, the Court left open the possibility of regulating at least who can own handguns (both by prohibiting certain classes of people from owning firearms and by instituting registration requirements), where firearms may be possessed, who may sell firearms, and what types of firearms may be owned. *Id.* at 54-55.

Our brief collected examples of state and local statutes and ordinances regulating the use of various arms. DC Appleseed Brief at 18. Many states ban machineguns, short-barreled rifles or shotguns, and assault weapons; Los Angeles bans the sale of ultra-compact firearms. *Id.* at 18, note 7. Nearly all states ban the possession of weapons on school grounds; several states prohibit firearms in places where alcohol is consumed; and many states ban the carrying of concealed weapons. *Id.* at 18-19, notes 8, 10. Most states prohibit minors, felons, or the mentally ill from owning weapons, and at least one state bans possession by drug addicts. *Id.* at 19, note 9.

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<sup>1</sup> Justice Scalia’s majority opinion rejected a rational basis standard, *id.* at 56, and Justice Breyer’s dissent suggests that the Court also “implicitly, and appropriately reject[ed]” a strict scrutiny test. *Id.* at 9.

We believe the Council should conduct a detailed study of regulations in other jurisdictions and, where possible, examine evidence of the effectiveness of these regulations to show that the Council had a good understanding of practical solutions to the problem of gun violence that have worked in other jurisdictions and that are within the kinds of limitations the Court found permissible. Justice Breyer's dissent included a detailed summary of the studies introduced by both Mr. Heller and the District, and the amici supporting each, and he noted that that summary revealed that the evidence could serve only to "leave a judge uncertain about the proper policy conclusion." *Heller* Slip Op. at 25. But as he said, "legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact," *id.*, and the Council should ensure that it has an extensive record of empirical data to justify the changes made in light of the *Heller* decision.

#### *Revising the Storage Requirements*

The Court did not accept our argument and the District's argument that the trigger lock requirement included an implied exception for self-defense, and thus found that requirement unconstitutional. *Id.* at 58. But we believe the majority has clearly invited the District to add an explicit exception into the law that allows gun owners to remove trigger-locks and load guns for the purpose of self-defense, easily bringing the statute into compliance with the ruling. However, we urge the Council to create a record showing that the trigger-lock can be effectively removed and the gun loaded in enough time to make firearms useful for self-defense. At the Supreme Court arguments, the District's lawyer described testing a trigger-lock himself and removing it within seconds, and the current Interim Attorney General has made similar statements. This evidence will likely not be sufficient to show that a trigger-lock requirement does not prevent gun owners from exercising the rights protected by the Second Amendment. Instead, we think the Council should solicit expert testimony to show that before it enacted legislation the Council had a good understanding of the practical impact of a trigger-lock requirement on gun owners who want to use their guns for self-defense.

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DC Appleeed believes that this hearing is an important part of the process of creating an extensive legislative history for the statute the Council must enact to bring the District's firearms regulations into compliance with the Constitution. But we note that the *Heller* decision has already resulted in lawsuits challenging firearms regulations in Illinois and California, and we therefore urge the Council not to move so quickly that the legislative decisions it makes can be easily challenged. The substance of the statutes and regulations enacted in reaction to the *Heller* decision are important, but the process used to reach those substantive ends is equally important. The Council should invite experts on all sides of the issues to be addressed in legislation to testify, and it should show a careful consideration and understanding of that expert testimony before moving forward. This could usefully include an extensive findings section in the statute to demonstrate the law's justifications and the Council's recognition of the constitutionally protected right announced in the *Heller* decision.

We welcome the opportunity to assist the Council as needed. Thank you for the opportunity to testify. I will be happy to answer any questions that you might have.