No. 15-746

IN THE

Supreme Court of the United States

TAB BONIDY AND
NATIONAL ASSOCIATION FOR GUN RIGHTS,
Petitioners,

v.

UNITED STATES POSTAL SERVICE, *et al*.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF FIREARMS OWNERS AGAINST CRIME AND FIREARMS INDUSTRY CONSULTING GROUP IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Second Amendment to the Constitution protects the "right of the people to keep and bear Arms". This Court held that the Second Amendment establishes a "fundamental right" that belongs to individuals, rather than merely through collective action. This Court's ruling in *District of Columbia v. Heller*, 554 U.S. 570 (2008), arose in the context of a blanket governmental ban on possession of a handgun extending even into one's own home, *id.* at 635. The questions presented are:

1. Whether the fundamental right to keep *and bear arms* extends to at least some ordinary, responsible, law-abiding citizens, at some times, at some places outside the home, on the one hand, or whether the right is exclusively limited to a person's home, on the other hand.

2. Whether the lobby of a rural post office that is open at all times and which does not regularly employ any security officers constitutes a "sensitive place[]" categorically excluded from a responsible, law-abiding citizen's otherwise lawful right to carry a firearm and, if so, whether that categorical exclusion extends to the "unsecured" parking lot made available for postal patrons.

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INTEREST OF THE *AMICI CURIAE* [1]

Amicus Firearm Owners Against Crime ("FOAC") is a Pennsylvania non-partisan political action committee ("PAC") and membership organization with more than 1,500 members, which actively works to defend, preserve, and protect the constitutional and statutory rights of lawful firearms owners, under the Second Amendment to the United States Constitution as well as other sources of federal and Pennsylvania law. FOAC was formed in 1993, formally becoming a Pennsylvania statewide PAC in 1994, and has members who legally possess firearms under federal and Pennsylvania law. Many of FOAC's members regularly engage in the lawful possession of firearms outside their respective homes, either through "open carry" or "concealed carry" within the bounds of law. FOAC represents its members in seeking the clarification of the law permitting them to lawfully carry firearms as, for example, in the currently pending *Firearms Owners Against Crime v. City of Harrisburg*, No. 1:15-cv-00322 (M.D. Pa.) (Kane, J.).

Amicus Firearms Industry Consulting Group ("FICG") is a division of Prince Law Offices, P.C., that represents individual gun owners, as well as local clubs and ranges, and Federal Firearms Licensees ("FFLs") throughout Pennsylvania. Furthermore, in

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), *amici* state that counsel of record for the parties were timely notified of the intent to file this *amici* brief and that letters reflecting the parties' consent have been filed with the Clerk's office.

relation to federal issues, FICG represents numerous FFLs across the United States. FICG's purpose is:

> To provide legal representation in the protection and defense of the Constitutions of Pennsylvania and the United States, especially with reference to the inalienable right of the individual citizen guaranteed by such Constitutions to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens.

FICG's interest in this matter stems from its representation of numerous Pennsylvania citizens who seek to lawfully transport and carry firearms.

SUMMARY OF ARGUMENT

This case presents at least two different splits in circuit authority on threshold issues that are stunting the development of the case law and, as a result, the percolation of well-developed issues to the Court.

There is a split of authority on whether this Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), determined that certain categories of regulation not at issue in that case were, nonetheless, beyond the scope of protection under the Second Amendment. Some courts have determined that text indicating that such issues were left open for later resolution actually constituted a resolution of those issues. Other courts

have recognized the need to examine whether challenged regulations of the type mentioned by the *Heller* Court are permissible under the Second Amendment.

There is also a split of authority on whether the Second Amendment protects any right other than the right to possess firearms in one's own home for the purpose of self-defense. Both splits in authority result in some courts failing to develop the factual record and modes of analysis that would permit the issues to properly percolate to this Court. Resolution of the splits would permit a more-robust jurisprudence which would benefit this Court when eventually confronting issues about the types of regulations consistent with the Second Amendment and the appropriate levels of scrutiny applicable to such regulations.

ARGUMENT

I. THERE IS A DIVISION OF AUTHORITY AS TO WHETHER THIS COURT'S CAUTIONARY LANGUAGE ALREADY DETERMINED CERTAIN ACTIVITIES ARE CATEGORICALLY EXCLUDED FROM SECOND AMENDMENT PROTECTION

In the decision under review, the Tenth Circuit expressly acknowledged that the precedent upon which it relied "is anchored in a single sentence contained in *District of Columbia v. Heller*, 554 U.S. 570 (2008)." Pet. App. 6a. That sentence, which tempered the holding that the Second Amendment protects an individual right to possess and bear arms, stated: "Nothing in our opinion should 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 firearms." Pet. App. 7a (quoting *Heller*, 554 U.S. at 626-27). Yet, *Heller* did not set forth a rationale for the latter statement, let alone the boundaries of permissible regulations, instead explaining that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned *if and when those exceptions come before us*." *Heller*, 554 U.S. at 635 (emphasis added). The italicized language would not have been necessary if the Court had itself in *Heller* determined that prohibitions and restrictions of the nature described were categorically excluded from protection under the Second Amendment. What was a statement about reserving judgment on issues not before the Court has, instead, been misconstrued as deciding those very issues.

A. Courts are Split on Whether They are Bound by the *Heller* Dicta

Although repeatedly classifying as dicta the sentence upon which it relied, the Tenth Circuit nonetheless determined that it was "bound by the Supreme Court dicta almost as firmly as by the Courts' outright holdings", Pet. App. 8a, thereby undermining centuries of distinction critical to the traditional method of case law development. Although the rationale for a court's holding may be entitled to weight comparable to the holding itself (because the rationale supports the holding), the same cannot be said for statements in which a court tentatively limits the scope of its holding by reassuring that the holding itself does not decide matters not before the court. Such statements are dicta in the purest sense and could only have force if federal courts were permitted

to issue advisory opinions. Yet, the "oldest and most consistent thread in the federal law of justiciability" identified by this Court is "that the federal courts will not give advisory opinions." *Richardson v. Ramirez*, 418 U.S. 24, 72 (1974).

Opponents of this Court's recognition of a fundamental, individual right to keep and bear arms argued that such a holding would jeopardize virtually every law regulating firearms. In both *Heller and McDonald v. City of Chicago*, 561 U.S. 742 (2010), this Court explained that opponents of the recognition of an individual right overstated the impact of those rulings. Not every law regulating firearms would be invalid as the issue before the Court hardly required such a sweeping determination. "Despite municipal respondent's doomsday proclamations, incorporation does not imperil every law regulating firearms." *McDonald*, 561 U.S. at 786 (plurality) (emphasis added). The Tenth Circuit (and other courts) elevated that dicta over the holding and twisted it to effectively mean neither *Heller* nor *McDonald* subject to scrutiny any law regulating firearms short of a complete ban that would encompass ownership within one's own home of any firearm, in any manner, for any use, including self-defense.

The various categories of laws that the Court assured need not be addressed to resolve the issue in *Heller* and *McDonald* were thus misread by some lower courts as already determined by this Court to be categorically excluded from the protection of the Second Amendment. *E.g., Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014) ("certain longstanding regulations are 'exceptions' to the right to keep and bear arms, such that the conduct they regulate is not within the scope of the

Second Amendment"). Some of those courts reached that result despite recognizing, as did the Tenth Circuit here, that the sentence from *Heller* was dicta. *E.g., United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir.), *cert denied*, 562 U.S. 867 (2010). Other courts recognized the nature of this Court's statement and treated the language as merely "informative" rather than "dispositive":

> We do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question whether § 922(g)(9) is valid. They are precautionary language. Instead of resolving questions such as the one we must confront, the Justices have told us the matters have been left open. The language we have quoted warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense. What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open. The opinion is not a comprehensive code; it is just an explanation for the Court's disposition. Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration.

United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010), *cert. denied*, 562 U.S. 1303 (2011). Other Courts have simply rejected the view the language is dicta at all. For example, the Third Circuit expressly acknowledged the split in authority before concluding "the Supreme Court's discussion in *Heller* of the

categorical exceptions to the Second Amendment" was "not dicta" and that it was "bound". *United States v. Barton*, 633 F.3d 168, 171-72 (3d Cir. 2011).

B. The Split in Authority Minimizes the Opportunity for Issues to Percolate

As long as this split in authority remains unresolved, certain lower courts will fail to develop the necessary record and decline to engage in meaningful analysis of the issues. Only if the Court removes that obstacle will there be full percolation of the issues regarding which restrictions are consistent with the Second Amendment, what standards of review are appropriate to such restrictions, and related matters.

C. This Case Presents a Superior Vehicle for Resolution of the Split

Given the analysis of the Tenth Circuit and the extreme set of facts in this case, the Court could remove the obstacle to further development of issues in the lower courts without the need for an expansive ruling. If the Second Amendment provides any protection for responsible, law-abiding citizens to bear arms outside of their own homes, the case under review requires a more thoughtful and nuanced inquiry.

The *Heller* Court examined the words "keep" and "bear" as codifying distinct rights. *See Heller*, 554 U.S. at 582-84. The Court explained that to "keep arms" meant to "have weapons", *id.* at 582, whereas the phrase "bear arms" meant to "wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person," *id.* at 584 (citations omitted). If the only place

one had a right to bear arms was within one's own home, rather than the two separate rights the Court identified, there would only be one. Moreover, "[t]he right to 'bear' as distinct from the right to 'keep' arms is unlikely to refer to the home. To speak of 'bearing' arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012) *reh'g denied*, 708 F.3d 901 (7th Cir. 2013).

The *Heller* Court concluded that the "core" of the Second Amendment protection addresses "self-defense" as well as the "protection of one's home *and family*". 554 U.S. at 628-30 (emphasis added). It is obvious that the need to defend one's self and family is not limited to the home. The Pennsylvania State Police reported that 219,782 licenses to carry firearms were issued in 2014. *See* Pennsylvania State Police, *2014 Firearms Annual Report* (available at http://www.psp.pa.gov/firearms-information/Firearms%20Annual%20report/Pennsylvania_State_Police_2014_Firearms_Annual_Report.pdf) (last visited Jan. 5, 2016). As the license term is five years, *see* 18 Pa. C.S. § 6109(f)(1), the number of individuals with valid licenses is much larger. Moreover, Pennsylvania is not unique. As of 2014, more than 11.1 million Americans had permits authorizing them to carry concealed firearms outside the home in addition to those allowed to engage in the "open carry" of firearms, those living in the five States and majority of Montana that permit concealed firearms to be carried without any permit, and those living in States that did not report the number of permits. *See* Crime Prevention Research Center, *Concealed Carry Permit Holders Across the United States* 4 (2014) (available at http://crimeresearch.org/wp-content/uploads/2014/07/Concealed-

Carry-Permit-Holders-Across-the-United-States.pdf) (last visited Jan. 5, 2016). Applicants for such permits include people like "a reserve sheriff's deputy, a civilian FBI employee, an owner of a business that restocks ATM machines and carries large amounts of cash, and a victim of an interstate kidnapping". *Drake v. Filko*, 724 F.3d at 443 (Hardiman, J., dissenting).

It is undisputed in this case that the Petitioner is a responsible, law-abiding citizen. He has a valid license to carry a firearm. The only basis for denying his requested relief was the erroneous view that even the unsecured parking lot of a post office designated for patron use constitutes a "sensitive place" categorically excluded from protection under the Second Amendment. The only indicia that the parking lot differs from any place else where Petitioner could carry his firearm is a sign stating that the lot is owned by the government; but, that cannot be a sufficient criterion. If the right to "bear arms" outside the home may be asserted only against governmental actors, it would not limit restrictions by a private landowner. And before the Fourteenth Amendment was held to incorporate certain guarantees of the Bill of Rights against governments other than the central government of the United States, the Second Amendment right to "bear arms" would not have been enforceable against State or local governments. Given the absence of a general federal police power under the Constitution, one might reasonably inquire where else a Second Amendment right to "bear arms" outside the home would have been applicable in 1795 or 1825 or 1855 if not on *some* property owned by the United States government. Mere property ownership cannot be sufficient to exclude protection under the Second Amendment as otherwise the places where one would

have had a right to bear arms outside the home would be a null set.

While some government-owned property may constitute a sensitive place where some restriction on gun possession could be appropriate, it does not follow that *all* persons at *all* times may be prohibited from possessing *all* forms of firearms on *all* property owned by the government. One can only reach that result by rejecting the premise that the Second Amendment protects a right to carry a firearm outside of one's home. Some courts have openly questioned that premise. For example, in *Drake v. Filko*, 724 F.3d 426, the Third Circuit expressly acknowledged the split in the circuits and observed: "It remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home." *Id.* at 430. On the one hand, the Third Circuit pointed to Seventh Circuit precedent concluding that the right to bear arms for self-defense, addressed in *Heller*, "is as important outside the home as inside." *Id.* (quoting *Moore v. Madigan*,702 F.3d at 942). Yet, on the other hand, the Third Circuit chose to "reject [the] contention that a historical analysis leads *inevitably* to the conclusion that the Second Amendment confers upon individuals a right to carry handguns in public for self-defense." *Id.* at 431. Instead, the Third Circuit determined that even "[i]f the Second Amendment protects the right to carry a handgun outside the home for self-defense at all, that right is not part of the core of the Amendment." *Id.* at 436. That split in authority, like the dispute whether *Heller* excluded entire categories of regulations from Second Amendment scrutiny is the sort of threshold issue that precludes further development of authority on questions like what types of restrictions on carrying loaded firearms are consistent with the Second

Amendment and what standard of review such restrictions must pass.

II. THIS CASE DOES NOT PRESENT COLLATERAL ISSUES THAT MIGHT UNDERMINE IT SERVING AS AN EFFECTIVE VEHICLE

Because this case arises with respect to a regulation of the U.S. Postal Service, there are no federalism considerations that might weigh in favor of the proposed regulation. Like *Heller* itself, the case presents an opportunity to consider the scope of the right to keep and bear arms without such collateral concerns.

The setting of this case permits consideration of the right to keep and bear arms in the context of an ordinary, responsible, law-abiding person. Factors that may change the baseline either to weaken the claim (*e.g.*, prior felony conviction, determination of mental illness, or indicia of criminal intent) or to bolster it (*e.g.*, law enforcement status) are absent. As a result this case does not require the Court to determine how such factors may influence the analysis in other situations.

The locale involved is also suited for a baseline determination. It is not property owned by a non-governmental actor who might not be directly constrained by constitutional restrains on governmental action. Nor is the location one that has indicia of a "sensitive place" as the lobby, the only portion of the structure the Petitioner sought to access, "is open to the public at all times" and the "post office does not regularly employ any security officers." Pet. App. 4a. Moreover, not only the lobby is at issue, so too is the "unsecured customer lot" available for patron parking. Pet. App.

4a. The only feature that distinguished the parking lot from other areas was a sign indicating the lot was property of the U.S. Postal Service. Pet. App. 4a.

Petitioner indicated a willingness to store his firearm in his vehicle rather than to bring it into the lobby but the Tenth Circuit held he could be criminally prosecuted for doing so. If the Second Amendment protects a right to carry a firearm outside of one's own home, it would seem problematic to conclude mere governmental ownership of a parking lot is sufficient to create a categorical exception to that right.

A ruling establishing such a right would not call into question restrictions with regard to places with other indicia of secure places. Prisons and jails, for example, have fences and guards and locks. They are not open to the public at all times.

This case thus represents a superior vehicle for the Court to address the narrow issue of the right to bear arms and, in doing so, to resolve splits in authority on at least two issues that hamper further development of the case law.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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