
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 BUCKEYE FIREARMS FOUNDATION
LLC, NATIONAL COUNCIL FOR INVESTIGATION
AND SECURITY SERVICES, OHIO ASSOCIATION
OF PRIVATE DETECTIVE AGENCIES, INC.,
DBA OHIO ASSOCIATION OF SECURITY AND
INVESTIGATION SERVICES (OASIS), MICHIGAN
COUNCIL OF PRIVATE INVESTIGATORS,
INDIANA ASSOCIATION OF PROFESSIONAL
INVESTIGATORS, AND KENTUCKY
PROFESSIONAL INVESTIGATORS ASSOCIATION,
AS *AMICI CURIAE* SUPPORTING RESPONDENT**

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INTERESTS OF *AMICI CURIAE*¹

Buckeye Firearms Foundation is a non-profit organization dedicated to defending and advancing human and civil rights secured by law, specifically the rights of Ohio citizens to own and use firearms for all legal activities including, but not limited to, self-defense. Buckeye Firearms Foundation acts primarily through education and legal advocacy. Buckeye Firearms Foundation has a substantial interest in ensuring that the Second Amendment of the U.S. Constitution is interpreted to secure and guarantee the human and civil right of freedom from criminal acts and intimidation, without regard to the political whims of any particular government branch or administration.

National Council for Investigation and Security Services (NCISS) is the sole nationwide organization in the United States dedicated to advancing and protecting the interests of the contract private security industry and professional private investigators. The business interests of NCISS members encompass the employment of more than 600,000

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk. Counsel of record for all parties received written notice in January of intent to file this brief.

private security personnel, including security officers, private investigators, “private police” and other private-sector protection professionals. NCISS is the voice of the industry in Washington, D.C.

Ohio Association of Security and Investigation Services (OASIS) is the sole statewide professional trade organization dedicated to advancing and protecting the interests of the contract private security industry and licensed private investigators in Ohio. It was established in 1947 as the Ohio Association of Private Detective Agencies, a not-for-profit educational organization dedicated to advancing professionalism in an industry employing more than 20,000 Ohioans.

Michigan Council of Private Investigators is the largest state professional organization dedicated to advancing and protecting the interests of licensed private investigators in the state of Michigan and sets ethical standards for those in the industry.

Indiana Association of Professional Investigators is a state professional organization dedicated to advancing and protecting the interests of licensed private investigators in the state of Indiana. It sets ethical standards and includes government, law enforcement, fire service and special investigators as members.

Kentucky Professional Investigators Association is a statewide professional association dedicated to advancing and protecting the interests of

licensed private investigators in the commonwealth of Kentucky.

Private security officers and licensed private investigators are often called upon to provide protection when police services are unavailable or unsatisfactory. Private security personnel have a substantial interest in ensuring that the Second Amendment is interpreted to specifically allow private investigators and licensed, armed security officers, such as Respondent Dick Anthony Heller, broad firearm rights in their capacity as private citizens and private employees. Private security personnel are often plaintiffs in gun rights cases, or defendants in criminal prosecutions, as they clash with the patchwork of local gun control laws that invariably result in the government gaining a *de facto* monopoly over providing armed security and investigation services to often defenseless and helpless citizens.

SUMMARY OF ARGUMENT

I. The District of Columbia Metropolitan Police Department² has failed to provide adequate police services to the District of Columbia's³ citizens. The District is consistently a national leader in various crime categories while simultaneously demonstrating

² District of Columbia Metropolitan Police Department [hereinafter *MPD*].

³ District of Columbia [hereinafter *the District*].

inability to adapt or change under the crippling bureaucracy endemic to the District. Compounding this deadly combination of high crime and inflexibility are constant examples of corruption, incompetence and outright misfeasance in the operation of the department.⁴ To compound the problem, the MPD is statutorily responsible for regulating their private sector competition, the private security industry, a duty executed poorly enough so as to embarrass an industry focused on constantly improving its professionalism.

Unfortunately, this is not a mere phase or temporary problem for the District. Since the 30-plus year old implementation of what amounts to a complete ban on owning, carrying or using firearms for self-defense,⁵ the MPD has cycled through new chiefs and precinct commanders with depressing frequency. The only constant within the department has been the incompetence, corruption, cronyism and failure to perform the most basic duty of a police department—to protect and serve.

⁴ *Amici* wish to state that this criticism is not intended to reflect on the majority of the rank-and-file police officers serving honorably in the District of Columbia Metropolitan Police Department. In point of fact, there are thousands of current, former and/or honorably retired peace officers serving in *amici's* constituent organizations, including dozens of D.C. MPD veterans.

⁵ D.C. CODE §§7-2502.02 (2007) [hereinafter *D.C. Gun Ban*].

The jaded citizens of the District have essentially given up on the police and the administration, resigning themselves to living as victims—or as outlaws, for those who choose to defend themselves despite the D.C. Gun Ban. The unavoidable result of the D.C. Gun Ban is that it is the victims, not the criminals, who are disarmed and rendered helpless. Not only are the police failing to protect district residents but the District government is burdening proven private sector solutions.

II. Compounding the impact of the failures of the MPD are the numerous court cases which have exonerated and granted immunity to the police for their collective failure to adequately protect the public they disarmed. Rather than holding the police responsible for their failures, the courts have empowered the police department's incompetence, nonfeasance and misfeasance.

No matter the degree, police incompetence typically is not actionable; thus, there is no legal incentive to rectify the incompetence. The MPD has been sued several times over this incompetence. The fact patterns in these cases leave people of ordinary sensibilities outraged; outrage magnified by the failure of the courts to impose any liability for the misfeasance.

These court decisions serve to empower the incompetence rather than remediate the department's shortcomings. The essence of the court decisions is that the police must assume a special relationship or

duty to a citizen, or a police officer must cross over the line into overt misconduct towards a citizen, prior to liability existing. Under this legal environment, the MPD's incentive is to remain negligent and incompetent, thus evading liability for even gross negligence, rather than venture forth with a sense of mission and responsibility for their failures with the attendant liability for failing to protect the citizenry.

III. As examined in Argument I, the MPD has failed to protect the citizens of the District. At the same time, as examined in Argument II, courts have exonerated and immunized the MPD for its incompetence and misfeasance. Within the context of a police department failing in the most basic duty owed to the citizens, to protect and serve, and courts declining to hold police departments accountable for even the most egregious of these failures, the Second Amendment must be interpreted as an individual right to keep and bear firearms for defense of self and others. To hold otherwise would be to hold that well-meaning but misguided governments and courts across America may render citizens defenseless victims without citizens having any meaningful recourse or alternatives.

Even in a jurisdiction that is effective at providing police services, the police will never be able to provide completely thorough protection from criminal attack; they cannot be everywhere at once. Courts have consistently recognized and endorsed this premise in the cases immunizing the police for failing to protect the public. The only way to avoid this framework from

having the singularly unconscionable result of the government creating a powerless victim class is for this court to interpret the Second Amendment as guaranteeing the fundamental, individual right to keep and bear firearms.

For those citizens who choose to be self-reliant and self-sufficient, this holding would empower citizens to defend themselves where the police cannot. For those citizens who choose not to be victimized by the failures of the police but who are still not comfortable with arming themselves, this holding would empower competent private armed protection personnel to function as an alternative to the government provided police force.

ARGUMENT

I. THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT HAS FAILED TO ADEQUATELY PROTECT THE CITIZENS OF WASHINGTON, D.C.

“To Protect and Serve.” That is the mission statement often found on the sides of police cruisers across the country. It embodies everything a citizen would expect from their police department. Nothing more. Nothing less. Pity that for the citizens of Washington, D.C. the MPD has failed, repeatedly, in this, their most basic mission.

A. Washington, D.C. has a significant crime problem.

Washington, D.C. is widely believed to have the highest per capita concentration of sworn law enforcement officers in America.⁶ By the time the various “general jurisdiction” federal police departments headquartered in the District⁷ are added to the federal entities located in the District that have sworn officers native to their organic structure,⁸ it would be a heroic effort to completely detail the variety of badges walking around the city. Despite this extremely dense concentration of sworn law enforcement, the District’s criminals seemingly have the run of the city.

The difficulty in examining the District’s crime situation is not in documenting the problem but rather in deciding where to start. As other *Amici* are expected to exhaustively cover the various crime

⁶ “Counting federal agents, DC has more police and security officers per capita than any other city in the republic.” Daniel St. Albin Greene, *The Case for Owning a Gun*, Washingtonian, Mar. 1985, at 154, available at http://www.buckeyefirearms.org/privatefiles/heller/_0204133631_001.pdf (visited 2/4/08.) Even excluding the federal agents, D.C. has the most police officers per capita of any force in the nation. Sari Horwitz, Michael Powell & Cheryl W. Thompson, *Problems in D.C. Police Dept. Festered for Decades*, Wash. Post, Oct. 12, 1997, at A01.

⁷ For instance, the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives.

⁸ For instance, the United States Park Police and the U.S. Capitol Police.

statistics relating to the District this brief will only examine a few highlights. No summary of the District's crime problem would be complete without the story of Benedict Fitzgerald Jr., who had his pocket picked *at the police station while waiting in line to register his handguns* under the, then new, D.C. Gun Ban.⁹

According to the 2004 Uniform Crime Report,¹⁰ on a per capita basis the District ranked first in Murder, Violent Crime, Robbery, Aggravated Assault and Motor Vehicle Theft. D.C. ranked second in Property Crime, 16th in Forcible Rape, 21st in Burglary and 22nd in Larceny-theft. The numbers are not much better for 2005: first in Murder, Violent Crime, Robbery, Aggravated Assault, and Motor Vehicle Theft, fourth in Property Crime, 14th in Larceny-theft, 26th in Burglary and 30th in Forcible Rape. The year 2007 brought a 7 percent increase in homicides.¹¹

Compounding the high per capita rate is the low rate at which the MPD solves crimes. In 1998, 50

⁹ Jaqueline Bolder, *Gun Registry Goes Slowly in District*, Wash. Star, Nov. 16, 1976, at B01, available at http://www.buckeyefirearms.org/privatefiles/heller/_0204133631_001.pdf (visited 2/4/08.)

¹⁰ See *U.S. States Crime 2004-2005 Crimes per 100,000 and Ranking (Includes District of Columbia and Puerto Rico)*, available at http://www.disastercenter.com/crime/US_States_Rate_Ranking.html (visited 01/18/2008.)

¹¹ Allison Klein, *Killings Up In D.C. After Long Dip*, Wash. Post, Jan. 1, 2008, at A01.

federal agents and city detectives formed a taskforce to investigate 107 unsolved murders dating to 1991. While “cold cases” are difficult to close, this taskforce solved only seven cases, with apparently no arrests, at a total cost of about \$180,000—or about \$25,700 per solved case.¹² For the first half of 1997 the Washington Post revealed that 49 of the detectives in the MPD Homicide Unit failed to close even one of the three-or-fewer files in their caseload during that period.¹³ The article further noted the unit’s overall rate of closure was 34 percent compared to a national average of 65 percent.

Performance in closing burglary cases was similarly abysmal. In 1996, FBI statistics showed the MPD closed about 5% of burglary cases. This rate was approximately one-fifth of the closure rate for neighboring Fairfax and Montgomery counties.¹⁴

There is perhaps no more concise an example of the gun crime problem in the District and the failure of the MPD to combat violent crime than that of the “ShotSpotter.” Despite the *de facto* total ban on citizens legally using firearms, the District’s gun

¹² Jim Keary, *Homicide task force flops; only 7 of 107 cases listed as closed*, Wash. Times, Feb. 2, 1998, at C3.

¹³ Avis Thomas-Lester & Bill Miller, *49 in D.C. Homicide Unit Failed to Solve any '97 cases, Official says*, Wash. Post, Sept. 19, 1997, at A01.

¹⁴ Cheryl W. Thompson, *D.C. Police Solve Few Burglaries; Closure Rate Half of National Average*, Wash. Post, Nov. 8, 1998, at A01.

crime problem is so out of control that the District has resorted to a network of permanent gunshot sensors to aid police.¹⁵ This network was spurred, at least in part, by jaded District residents being so accustomed to gunfire that they are no longer calling the police to report it. Twenty-year-old Martin Castro reported he heard the gun shots that ended a neighbor's life, the third night in a row he heard gunfire, but that he no longer calls 911.¹⁶ Merchants report that it is not worth calling the police, with 40 percent not bothering to file complaints with the MPD anymore.¹⁷

B. The MPD has a significant problem hiring and retaining qualified police officers.

The recent history of the MPD's hiring and recruiting is a study in governmental inflexibility. The department has lurched from hiring freeze to hiring binge with depressing frequency, and the result of both the feast and the famine has been that

¹⁵ The Federal Bureau of Investigation actually paid for the system as part of a pilot program. Allison Klein, *Gunshot Sensors Are Giving D.C. Police Jump on Suspects*, Wash. Post, Oct. 22, 2006, at A01.

¹⁶ Serge F. Kovalski, *Homicides in D.C. Top 1992 Mark*, Wash. Post, Dec. 18, 1993, at A01.

¹⁷ Phillip P. Pan, Criminal, *D.C. Police Frustrate Merchants*, Wash. Post, Aug. 29, 1999, at C01.

highly qualified officers are not recruited or are not retained.

In 1980, shortly after the D.C. Gun Ban took effect, the Washington Post noted that budget woes had shrunk the MPD's force from 5,100 officers in the early 1970s to 3,654 in 1980.¹⁸ Noting the accompanying rise in crime, particularly murder, the House D.C. Appropriations subcommittee directed the District to increase police officer hiring to reach 3,880 officers. The MPD reached 3,695 sworn officers in that time, and MPD Union Representative Gary Hankin lamented that the additional 180 officers could not be hired without "abandoning" all hiring standards.¹⁹ One Congressman on the House subcommittee responded that the District was only in this position because they had been "dillydallying" in hiring new officers.²⁰

Partially in response to the need to hire new officers and partially in response to challenges to the racial composition of the force, Mayor Marion Barry abandoned any pretense of "quality over quantity" and ordered sweeping changes to the academy entrance process: the passing score on the police entrance exam was lowered to 35 out of 80; rather than

¹⁸ Alfred E. Lewis, *Police, on Overtime, to Man Extra Units to Battle Crime*, Wash. Post, Nov. 20, 1980, at A7.

¹⁹ Alfred E. Lewis & Judith Valente, *Police Union Official Hits Hiring Plan*, Wash. Post, Aug. 25, 1981, at C01.

²⁰ Lewis, *Police Union Official*, *id.*

filling the academy class roster according to who scored highest on the entrance exam, the roster would now be filled by lottery, without regard to exam scores.²¹ In describing Mayor Barry's and Human Rights Director Anita Shelton's hiring of police officers, the Washington Post editorialized, "They are confused and making bad decisions."²²

These bad decisions were compounded over the next decade. Noting that police recruits scored poorly in reading comprehension, the police academy instituted a remedial reading class to rehabilitate the recruits. Mayor Barry ordered the class terminated, fearing it reflected badly upon the District's school system.²³ English language classes for non-native English speaking recruits were terminated.²⁴ The MPD leadership opposed national accreditation standards for their department.²⁵ Classes on Constitutional and legal principals were taught not by a lawyer but by a police officer who had not been in a courtroom in a decade.²⁶ Hours of instruction were

²¹ Eugene Robinson, *Police Hiring Still Clouded*, Wash. Post, Aug. 25, 1981, at C01.

²² Editorial, *Bad Hiring Decisions*, Wash. Post, Aug. 28, 1981, at A26.

²³ Mary Pat Flaherty & Keith A. Harriston, *Cutting Corners at Police Academy; Training was Reduced, Standards Eased in Rush to Expand D.C. Force*, Wash. Post, Aug. 29, 1994, at B01.

²⁴ Flaherty, *Cutting Corners*, *id.*

²⁵ Flaherty, *Cutting Corners*, *id.*

²⁶ Flaherty, *Cutting Corners*, *id.*

cut, and an academy designed to process 300 recruits per year processed 1,500 in two years.²⁷ Driving instruction was cut in half or eliminated altogether.²⁸

In the mid 1990s, MPD Chief Fred Thomas found himself inheriting a department facing the problems wrought during 1980s. Thomas pledged to revamp failed hiring practices and eliminate the bad apples. “We need to raise the standards for the persons we hire ... If you don’t hire good product, there is no way you are going to ... make sure they are not corrupt and do not have criminal tendencies.”²⁹

Chief Thomas went on to implement a “quiet revolution” to weed out “an inordinate number” of corrupt and inexperienced officers, announcing new restrictions on the hiring and recruiting of officers.³⁰ This “revolution” and “dawn of a new era” was in response, in part, to the fact that 70 young officers hired during the binge in the 1980s faced criminal charges after being hired.³¹

Thomas’ optimism quickly waned, and on July 7, 1995 Thomas resigned. Thomas is credited with the 200 member recruiting class brought on board during

²⁷ Flaherty, *Cutting Corners*, *id.*

²⁸ Flaherty, *Cutting Corners*, *id.*

²⁹ Brian Reilly, *Chief Hopes to Improve Police with Higher Hiring Standards*, Wash. Times, Jan. 28, 1993, at A01.

³⁰ Brian Reilly, *Chief Announces Police Department Overhaul*, Wash. Times, May 28, 1993, at B01.

³¹ Reilly, *Chief Announces*, *id.*

his tenure as being the best qualified “in memory.”³² While Thomas had his critics, he was universally acknowledged with increasing recruiting standards and with slowing the rate of violent crime.³³ Despite the high quality of the recruiting class under his tenure, Thomas lamented about the 400 veteran officers who left the force³⁴ during his tenure. Thus, despite his revolutionary recruiting efforts, reformer Thomas actually oversaw a net decrease in veteran/qualified officers serving the MPD.

If the citizens of the District believed that the MPD would learn from the mistakes of the 1980s and early 1990s, that trust was misplaced. The department found itself in the same quandary: The mantra was once again quantity over quality. Within three years the newspapers were again reporting that the MPD was hiring unqualified officers and accepting falsified employment applications.³⁵ Department policy did not disqualify applicants convicted of violent crimes, including murder, as juveniles.³⁶ Within a year of Thomas’ departure the MPD instituted a contingent

³² Ruben Castaneda & Bill Miller, *D.C. Police Chief Leaving Behind Accomplishments, Resentments*, Wash. Post, Jun. 26, 1995, at B01.

³³ Ruben Castaneda, *D.C. Police Chief to Resign in July*, Wash. Post, Jun. 13, 1995, at A01.

³⁴ Castaneda, *D.C. Police Chief to Resign*, *id.*

³⁵ Cheryl W. Thompson, *Probe Reveals 65 Cases of D.C. Police Misdeeds*, Wash. Post, Oct. 7, 1997, at A01.

³⁶ Thompson, *Probe Reveals*, *id.*

hiring process, hiring recruits before background checks were completed. In one instance this resulted in 22 of 113 officers hired later being fired once the background checks were completed.³⁷ This rush to hire quantity over quality occurred despite the department only having half the instructors necessary to properly train the already unqualified recruits.³⁸

As Law Enforcement Alliance of America Board of Directors member and Second Vice-President Carl Rowan Jr. summarized:

During the Barry years, the (MPD) became home to an array of thugs, slackers and scam artists. Now it has, by my unofficial counts, about 900 first-rate officers. About 1,400 other officers perform at a satisfactory to poor level but could and would do a better job if they were properly trained and supervised. That leaves about 1,200 below-par officers and officials who are sucking the life out of the department. They range from young street officers to veteran assistant chiefs, and they come in all colors and both sexes. These bad officers cause good officers to leave the force, and they are the main contributors to citizens feeling unsafe on the streets of Washington. Some of these bad officers—through their apathy, misconduct and

³⁷ Thompson, *Probe Reveals*, *id.*

³⁸ Thompson, *Probe Reveals*, *id.*

malfeasance—actively endanger the public safety and the safety of their fellow officers.³⁹

C. The MPD has a significant history of mismanagement.

Although the MPD has suffered significantly as a result of fluctuations in the staffing level and the quality of the recruits, ultimate responsibility rests with the political leadership of the MPD. Recruiting and staffing problems, as outlined above, are 100 percent the responsibility of political leadership. Leadership sets the qualifications, the goals and the priorities of the hiring process. For far too long this has focused on patronage and bureaucratic inertia over quality of policing. The following section examines corruption as a separate topic in greater detail, but separate from corruption is the problem of patronage-based hiring. “Once recognized as a national model of fine policing, the force has endured two decades of political interference by Mayor Marion Barry (D) and the D.C. Council, a persistent lack of fiscal controls, bad hiring practices and poor management.”⁴⁰

Cronyism, thy name is Marion Barry. Starting at the top, Mayor Barry has almost exclusively hand-picked the chiefs of police for the MPD for two decades

³⁹ Carl Rowan Jr., Op-Ed., *Time to Police His Own Department*, Wash. Post, Aug. 15, 1999, at B08.

⁴⁰ Horwitz, *Problems in D.C.*, *supra* note 6.

or more. Chief Larry Soulsby is but one example. Soulsby was widely believed to have been named chief because Mayor Barry could control Soulsby and therefore the MPD. Dwight Cropp, a professor at George Washington University and former aide to Barry, said, "Soulsby was more than willing to carry water for Barry and an essentially corrupt department."⁴¹ This included hiring and firing at the direction of Barry and, later, the D.C. Financial Control Board.⁴² Barry also directed Soulsby to withdraw cooperation with federal law enforcement.⁴³ Soulsby resigned as "embattled chief" two hours prior to the commander of his Special Investigations Section, also his apartment roommate, appearing in court to be arraigned on extortion charges.⁴⁴

Barry himself directly appointed the people serving at the rank above captain and had a heavy hand in rank-and-file hiring and assignment details.⁴⁵ Barry wanted Detective Ulysses Walltower on his security detail and Soulsby made the assignment, even though Walltower was being investigated for

⁴¹ Michael Powell & Doug Struck, *By Denying and Disavowing Troubles, Soulsby Brought Himself Down*, Wash. Post, Nov. 26, 1997, at A08.

⁴² Powell, *By Denying*, *id.*

⁴³ Carl T. Rowan Jr., *Who's Policing D.C. Cops? Cronyism and Misconduct Endanger our Lives*, Wash. Post, Oct. 8, 1995, at C01.

⁴⁴ Sari Horwitz & Cheryl W. Thompson, *Embattled D.C. Police Chief Resigns*, Wash. Post, Nov. 26, 1997, at A01.

⁴⁵ Powell, *By Denying*, *supra* note 41.

witness tampering⁴⁶ involving an allegation of campaign finance irregularities against Mayor Barry's wife. Walltower eventually resigned from the MPD rather than contest the department's ultimate decision to fire him.

Structurally, the MPD lacked institutional safeguards. A Civilian Complaint Review Board was established and disbanded after amassing a backlog of 800 cases, some more than five years old.⁴⁷ A financial control board was established in 1995 by Congress "to eliminate ... management inefficiencies in the government of the District of Columbia."⁴⁸ This board was already being called ineffective by 1997⁴⁹ and terminated by operation of law September 30, 2001.⁵⁰ Charles C. Maddox became the fourth Inspector General in a 42-month span as he replaced Elijah Barrett Prettyman Jr. who replaced Robert L. Thomas who replaced Angela L. Avant as Temporary Inspector General.⁵¹ It is notable that during this

⁴⁶ Powell, *By Denying*, *id.*

⁴⁷ Mary Jane DeFrank, *Why Citizens Need to Police the Police*, Wash. Post, Aug. 2, 1998, at C08.

⁴⁸ *D.C. Financial Responsibility and Management Assistance Act of 1995*, Pub. L. No. 104-8, 109 Stat. 97.

⁴⁹ Katharine Q. Seelye, *Despair Grows Over Problems of Governing U.S. Capitol*, N. Y. Times, Nov. 27, 1997, at A26.

⁵⁰ *D.C. Management Restoration Act of 1999*, Pub. L. No. 106-1, 113 Stat. 3.

⁵¹ Vincent S. Morris, *Won't Pull Punches; Temporary D.C. Inspector General to Tackle Abuse, Corruption Charges*, Wash. Times, Dec. 31, 1997, at A01.

period it was revealed that over half of the MPD's officers were not certified to use their duty firearms.⁵²

Even when bad cops were identified, institutional hurdles and management mistakes prevented the department from taking corrective actions. Published reports show that a total of 256 officers identified for firing between 1991 and 1994 were reinstated simply because police management took too long to get through the process of firing them.⁵³ Chief Fred Thomas tried to reassure citizens that these officers were not out on the street in contact with the public; most were reassigned as armed desk clerks. "I put them in places where they have little direct contact with the public."⁵⁴ One officer's new job was passing out radios at the beginning of the shift and collecting them at the end of the shift, otherwise he just "kill(ed) time."⁵⁵

While Chief Thomas was paying full salary to sworn officers he dared not place on the street but could not fire due to mismanagement, his warrant squad could not work warrants because they could not afford paper to print out warrant lists.⁵⁶ As

⁵² Cheryl W. Thompson, *Half of Officers Lack Firearm Certification*, Wash. Post, Mar. 28, 1998, at B01.

⁵³ Mary Pat Flaherty & Keith Harriston, *Delays Defeat Police Efforts to Clean House*, Wash. Post, Aug. 31, 1994, at A01.

⁵⁴ Flaherty, *Delays Defeat*, *id.*

⁵⁵ Flaherty, *Delays Defeat*, *id.*

⁵⁶ Castaneda, *D.C. Police Chief to Resign*, *supra* note 32.

summarized in the New York Times the MPD was, “... a department awash in scandal over unsolved killings, hapless criminal investigations, lost evidence and excessive overtime and was facing renewed charges of structural flaws in the city’s management.”⁵⁷

It is tempting to lay the MPD’s problems upon the altar of budget shortage; however, much of the budgetary challenge faced by the MPD is self-inflicted. As examined above, the MPD was carrying 256 officers on the payroll simply because the leadership of the MPD was too incompetent to properly fire them. Even prior to this, a Police Executive Research Forum report said the MPD was carrying more officers than it could competently manage. Even if the MPD cut 1,000 officers, D.C. would still have the nation’s largest per-capita police force and would have \$330 million left over. None of the recommendations of the study was adopted.⁵⁸

Most damning was a report that the MPD failed to spend \$11 million worth of grant money and other funds collected with this failure laid squarely at the feet of MPD management.⁵⁹ “(It shouldn’t) take a control board or an oversight committee to make the

⁵⁷ Seelye, *Despair Grows*, *supra* note 49.

⁵⁸ Horwitz, *Problems in D.C.*, *supra* note 6.

⁵⁹ Avis Thomas-Lester, *D.C. Police Fail to use \$11 Million in Funds; Officers Still Lack Needed Equipment*, Wash. Post, Mar. 24, 1998, at B01.

police department work as it should. The answer is to put top-flight management in place to get the job done—and fast. The department doesn't have anything like that now.”⁶⁰

D. The District's “911 System is a Joke.”⁶¹

The D.C. Gun Ban has created a community of disarmed citizens/victims with a high dependence upon the police for protection. Unfortunately, this artificially created dependence exists simultaneously with an amazingly incompetent 911 emergency dispatch system. As recently as December 2007, D.C. council members confirmed constituents were reporting that dispatchers were rude and phones are never answered. “People constantly say they call 911 and an officer either doesn't respond or an officer responds late,” said Ward 2 Councilman Jack Evans. “Somewhere the system is still not working even after all the money we've put into this.”⁶²

In 2003 the *Washington Post* editorialized, “Since (1998), violent crime in the District has increased.

⁶⁰ Editorial, *Help Wanted: A Police Manager*, Wash. Post, Mar. 25, 1998, at A20.

⁶¹ Editorial, *Time to Police the Chief*, Wash. Post, Jun. 1, 2003, at B08.

⁶² Michael Neibauer & Daniel Catania, *Councilman Claims He Was Badgered During 911 Call*, (Dec. 15, 2007), http://www.examiner.com/a-1106755~Councilman_claims_he_was_badgered_during_911_call.html (visited 2/4/08.)

Murders are up, too, and the 911 system is a joke.”⁶³ One reporter observing the 911 center at this time reported “a pair of dispatchers 6 feet away who—despite the fact that a newspaper reporter is observing the operation center for the day—are looking at a newspaper instead of their computer screens.”⁶⁴ Unfortunately, the failing 911 system was not unique to 2003.

The *Washington Times* examined the 911 system in 1998 and found that almost 90,000 citizens calling 911 had to wait at least 90 seconds for their call to be answered by a rude operator.⁶⁵ Additionally, 32,000 citizens calling 911 hung up in frustration before reaching a dispatcher.⁶⁶ The 911 system was understaffed and the department did little to curb absenteeism by dispatchers who accumulated six hours of leave every two weeks.⁶⁷ Even when the calls were answered often times the police were slow to respond to the call or never showed up at the crime scene at all.⁶⁸ Unfortunately, the incompetent 911 system wasn’t even unique to 1998.

⁶³ Editorial, *Time to Police*, *supra* note 61.

⁶⁴ Robert Davis, *Why Quality of Care Varies: A Telling Tale of Two Cities*, USA Today, Jul. 28, 2003, at 5D.

⁶⁵ Jim Keary, *Need Police? Call 911 and Wait; Sick-leave Abuse Retards Responses*, Wash. Times, Jun. 24, 1998, at A01.

⁶⁶ Keary, *Need Police?*, *id.*

⁶⁷ Keary, *Need Police?*, *id.*

⁶⁸ Jennifer Lee & Martin Weil, *Slow Response, Abuse of Leave Cited at D.C. 911*, Wash. Post, Jun. 24, 1998, at B01.

A 1997 story described neighbors calling 911 as a car thief broke into a nearby auto body shop. During the leisurely crime the thief took a car battery out of one car and installed it into the car he wanted to steal. Twenty minutes later the criminal left the shop in the stolen car with police still nowhere to be found. The victim, an auto body shop owner, had previously complained to the police, as he had been robbed seven times in three weeks. He was told by the police to get a vicious guard dog.⁶⁹ Yet the 911 problems are even more deep-rooted.

Nadine Winter, a D.C. council member who originally supported D.C.'s Gun Ban, was mugged in 1985. In a scene that has been played out countless times in the district she was going to her car when a mugger beat her and stole her Gucci bag. Neighbors called 911 but got no answer. Winter tried to call 911 from her own car phone but could not get an answer. A neighbor actually rushed down and caught Mayor Barry leaving the district building. The Mayor himself finally managed to contact the MPD, who then responded to the mugging of the councilwoman some twenty minutes after the calls began.⁷⁰

⁶⁹ Michael Powell, *D.C. Police Changes Should Start at the Top*, Wash. Post, Oct. 21, 1997, at B01.

⁷⁰ Greene, *The Case*, *supra* note 6.

E. The MPD has a significant history of corruption.

As previously discussed, Mayor Barry controlled the promotion of officers beyond the rank of captain.⁷¹ Additionally, Barry had final say on outside contracts and purchases by the MPD.⁷² By 1982, MPD officers who crossed the mayor, including those investigating his alleged drug use, found their careers suffering.⁷³ Officers headed to captain knew that getting advanced training would not help their careers as much as knowing someone who had the ear of the mayor.⁷⁴ “There was virtually no one let go because of a lack of performance. People were not rewarded by what they did. It was who you knew that counted.”⁷⁵

What was Mayor Barry doing with this hand-picked force? In one instance in 1996, two Washington Post reporters saw Mayor Barry campaigning for Eddie Whittington, anointed successor to Barry as Ward 8 councilmember. The reporters observed Barry use a loudspeaker mounted on a Whittington campaign van to urge two voters to get into an unmarked police car and go vote for Whittington. The reporters previously observed the unmarked car, driven by

⁷¹ Cheryl W. Thompson, *Detailing Failings of D.C. Police Department; Report Cites ‘Chronic’ Problems of Agency Working at ‘Minimum Level,’* Wash. Post, Apr. 9, 1997, at B01.

⁷² Thompson, *Detailing Failings*, *id.*

⁷³ Horwitz, *Problems in D.C.*, *supra* note 6.

⁷⁴ Horwitz, *Problems in D.C.*, *id.*

⁷⁵ Horwitz, *Problems in D.C.*, *id.*

members of Barry's security detail, shuttle two voters to and from their polling place.⁷⁶

The 1996 primary was not the only time the Mayor used the police to illegally aid his crony Whittington. During the 1995 special election, held to replace now-Mayor Barry in Ward 8, a member of the Mayor's security detail entered the D.C. Board of Elections and Ethics office after hours, *using an electronic key that elections officials had not authorized and had no knowledge of*. When confronted, the officer said he was trying to get absentee ballots for Barry and his wife for the upcoming Ward 8 special election. Whittington won the special election by a single vote.⁷⁷

Beyond this, the MPD was running wild. Police overtime was "uncontrollable" with many officers submitting false overtime claims.⁷⁸ Officers viewed overtime pay as an entitlement and managers felt they were "only responsible for seeing that it is distributed equally."⁷⁹ Chief Soulsby personally authorized unlimited overtime pay for homicide detectives. The thirst for money became so pervasive that on two different occasions cash was stolen from a safe inside

⁷⁶ Hamil Harris & Vanessa Williams, *D.C. Mayor's Police Escort Taxis Voters*, Wash. Post, Sept. 11, 1996, at A01.

⁷⁷ Harris, *D.C. Mayor's*, *id.*

⁷⁸ Horwitz, *Problems in D.C.*, *supra* note 6.

⁷⁹ Horwitz, *Problems in D.C.*, *id.*

a police station, including cash that was raised to benefit the family of a deceased fellow officer.⁸⁰

In the early 1990s, 201 officers were arrested on charges running from shoplifting to rape and murder.⁸¹ One out of every 14 graduates in the academy classes of 1989 and 1990 would subsequently be arrested.⁸² The problems became so dire that the District had a list of 185 MPD Officers so tainted by corruption that prosecutors would not put these officers on the stand.⁸³ One proud new cadet received news of his acceptance to the MPD Academy while in jail in Prince George's County while awaiting trial on drug distribution charges.⁸⁴ Problems in the early 1990s became so bad that the FBI set up Operation Broken Faith, which eventually led to the arrest of 12 MPD officers for bribery and drug conspiracy. These 12 officers took a total of \$85,000 in cash bribes to protect FBI agents posing as drug dealers shipping in hundreds of kilos of cocaine.⁸⁵

Corruption was certainly not limited to the early 1980s, late 1990s or early 1990s. In the mid and late

⁸⁰ Cheryl W. Thompson & Emily Wax, *Second Theft Reported from D.C. Police Safe*, Wash. Post, Oct. 8, 1999, at B01.

⁸¹ Horwitz, *Problems in D.C.*, *supra* note 6.

⁸² Mary Pat Flaherty & Keith A. Harriston, *District Police are Still Paying for Forced Hiring Binge*, Wash. Post, Aug. 28, 1994, at A1.

⁸³ Flaherty, *District Police*, *id.*

⁸⁴ Flaherty, *District Police*, *id.*

⁸⁵ Flaherty, *District Police*, *id.*

1980s the FBI actually went to the extreme measure of penetrating the MPD during an undercover investigation of corruption within the department. As one official put it, "It has not escaped anyone's observation that in recent memory the Internal Affairs Division has never successfully investigated any high-ranking official in this department or in the District government."⁸⁶ The Internal Affairs Division (IAD) was largely viewed with distrust, as it was not an independent agency, but rather was subject to the political control of the mayor and the chief.⁸⁷

Corruption is not limited to rank and file officers and elected officials. The MPD has a history of promoting supervisory rank officers who have been involved in off-duty incidents. Charles R. Bacon is just one such example.

After firing four shots at a girlfriend, Bacon was charged with assault with intent to murder. The victim declined to testify and charges were dropped, but the MPD internal investigation found against Bacon and recommended demotion. Bacon successfully fought this recommendation and, far from being demoted, he was promoted to inspector and then promoted to deputy chief. Bacon subsequently faced an additional criminal complaint from a new girlfriend,

⁸⁶ John Ward Anderson & Victoria Churchville, *FBI Investigation Underlines Distrust of D.C. Police Unit*, Wash. Post, Sept. 21, 1987, at A1.

⁸⁷ Anderson, *FBI Investigation*, *id.*

who alleged Bacon tried to ram her car. Bacon faced no charges or action after an IAD investigation cleared him.⁸⁸

Fred W. Raines has faced a string of domestic assault charges in Prince George's County. None have resulted in convictions, and Raines went on to serve as the department's ethics officer and eventually headed the Police and Fire Clinic. Inspector Claude J. Beheler was named commander of the entire Northeast District while a sexual harassment complaint was pending against him. The complaint was upheld and a 20-day suspension without pay was recommended.

Winston Robinson attempted to flee the scene of an off-duty accident, fought with officers and gave a false name. He received a \$50 ticket and was subsequently promoted to inspector, court liaison officer and commander of the 7th District.⁸⁹

Perhaps the most outrageous component of the corruption permeating the MPD is the nature of the people who are disciplined by the department and IAD: the whistle blowers. As summarized by police union attorney Robert E. Deso, "I find it ironic that the only action taken so far in this thing is against the people who gave information that initiated the

⁸⁸ Mary Pat Flaherty, *Off-Duty Missteps Haven't Derailed the Career of Some Supervisors*, Wash. Post, Aug. 31, 1995, at A10.

⁸⁹ Flaherty, *Off-Duty*, *id.*

investigation in the first place.”⁹⁰ Sergeants Christopher Sanders and Harry Hill testified to the council’s Judiciary Committee that they were retaliated against for refusing to illegally certify payroll records and reporting the illegal conduct to supervisors.⁹¹

At hearings held by the Special Committee on Police Misconduct and Personnel Mismanagement, officers testified to: retaliation against officers who bring information about corruption or misconduct to the attention of supervisors; transfers for reporting sexual harassment; transfers to the midnight shift or a cut in pay for writing traffic tickets to a supervisor; and finally, in an incident involving a highly esteemed homicide investigator, transfer to purgatory at the Academy after several clashes with the chief.⁹²

F. The MPD has stifled private security and mismanaged the industry’s regulation.

Citizens facing a crime problem and a police department failing to provide the most basic of services can turn to private security as an alternative. Private security services are a counterweight to government power and abuse, often investigating police misconduct and government corruption for

⁹⁰ Anderson, *FBI Investigation*, *supra* note 84.

⁹¹ Vernon Loeb, *Barry, Evans call for Independent Police Probe*, Wash. Post, Dec. 10, 1997, at B01.

⁹² Jonetta Rose Barras, *Cleaning up the Corruption*, Wash. Times, Mar. 6, 1998, at A21.

attorneys, the media, watchdog groups and private citizens. Security companies fill gaps and ensure that public safety agencies do not monopolize protective services. Unfortunately, the District has granted the MPD *de jure* control over the private security industry, allowing the MPD to license, regulate and control its only private-sector competition, exacerbating the crime problem in the process by taking sworn officers off the street to serve as regulatory bureaucrats rather than peace officers.⁹³

Private industry has been ill-served by the MPD, as illustrated in 1993 when District shopkeepers were promised increased protection by the MPD. When it became apparent that the promised increased protection would not materialize, the MPD instead suggested that shopkeepers close their businesses early, thus avoiding the usual high-crime period of the day.⁹⁴ Effective, vibrant private security provides shopkeepers a viable alternative to meekly surrendering a portion of the business day to criminals. This alternative is not limited strictly to private businesses, either. Respondent Dick Heller, a licensed special police officer who carries a handgun while on duty at the Federal Judicial Center, is but one example of the

⁹³ See MPD Directive 308.07 (Private Security, effective Sept. 28, 1993), Part I, paras. G, H, available at http://www.buckeyefirearms.org/privatefiles/heller/_0204133631_001.pdf (visited 2/4/08.)

⁹⁴ Brooke A. Masters, *Close Early to Cut Crime, D.C. Chief Tells Retailers*, Wash. Post, Nov. 19, 1993, at A01.

private security industry providing the public sector with solutions.

Under District law, the industry is divided into four license categories: security officers (unarmed guards for low risk assignments), private detectives (unarmed investigators in private employ), “special police” (armed private security guards) and private detective agencies (the only entity that may employ any of the first three individual licensees.)⁹⁵ The mayor is granted broad discretion in appointing citizens to serve as special police officers, private detectives and security officers. Private detective agencies may hire only employees licensed by the mayor.⁹⁶ Additionally, the mayor is granted absolute discretion in issuing rules governing these private citizens.⁹⁷ The mayor has implemented this process through a series of rules and directives to the MPD.⁹⁸

It is not surprising that the MPD performs this function poorly. *Amici’s* members, already licensed in multiple states, have reported that it can take nearly a year to obtain licensing as a detective agency in the District. Applicants with felonies were licensed by the MPD without the MPD notifying the employers of the

⁹⁵ MPD Directive 308.07, *supra* note 93 at Part I.

⁹⁶ D.C. CODE §5-129.02(a) (2007); 17 D.C. CODE MUN. REGS. §2000 (2007); 6A D.C. CODE MUN. REGS. §1100 (2007); 17 D.C. CODE MUN. REGS. §2105 (2007.)

⁹⁷ D.C. CODE §5-129.02(c) (2007); D.C. CODE §47-2839 (2007); D.C. CODE §47-2839a (2007.)

⁹⁸ See 96 and 97, *id.*

convictions.⁹⁹ Applicant licensing files are not maintained properly, with some files lacking background checks, current employment records and drug test results.¹⁰⁰ A 2005 Inspector General report “ ... found that the lack of effective internal controls at MPD jeopardizes the review and approval process for security personnel seeking licenses in that there is no assurance that MPD (verified) eligibility for each license it issued to security personnel.”¹⁰¹

Despite these basic, fundamental failures in licensing regulation, the MPD micromanages the industry by dictating minutiae, including the specific type of weapons to be carried¹⁰² and where those weapons may be stored,¹⁰³ the specific property or persons that may be protected,¹⁰⁴ the size, shape, location, color and words appearing upon required sleeve patches,¹⁰⁵ nickel-plated buttons of at least five-eighths inch

⁹⁹ *Gov't of the District of Columbia, Office of the Inspector Gen., Audit of Background and Training of Security Personnel at District of Columbia Public Schools* (July 15, 2005), No. 03-2-14GA(c), pages 8-9, available at <http://oig.dc.gov/news/view2.asp?url=release%2FDCPS%5FBackground%5Fand%5FTraining%5FFinal%5FReport%5FOIG%5FNo%5F03%2D2%2D14GAc%2Epdf&mode=release&archived=1&month=20056> (visited 2/4/08.)

¹⁰⁰ *Id.* at 10-11.

¹⁰¹ *Id.* at 11.

¹⁰² MPD Directive 308.07, *supra* note 93 at Part I, paras. D.7 and F.1.

¹⁰³ 6A D.C. CODE MUN. REGS. §1100 and 1103 (2007.)

¹⁰⁴ 6A D.C. CODE MUN. REGS. §1101 (2007.)

¹⁰⁵ 6A D.C. CODE MUN. REGS. §1109 (2007.)

diameter on the uniform coat with gold buttons specifically prohibited,¹⁰⁶ screening for severe epilepsy,¹⁰⁷ the color of cap worn,¹⁰⁸ regulations allowing the use of initials on the uniform only with the prior written consent of the mayor and specifying that chevrons denoting rank must be red with white piping.¹⁰⁹ The arbitrariness of the District's regulatory scheme prevents a licensed private detective, whose sole function is to solve crime, from carrying a firearm for protection while working.¹¹⁰

There is perhaps no clearer example of the irrationality of the District's licensing authority over private-sector competition than that of special police officer Lt. Fred Williams. Williams, the chief of security for the Martin Luther King Library, in uniform and armed, was required to leave the library to respond to a subpoena to testify in a hearing at the U.S. Attorney's Citizens Complaint Center. After hearing the testimony, the Assistant U.S. Attorney hearing the case ordered Williams arrested for carrying a gun without a license. Williams was carrying his duty sidearm, *which was registered to the D.C. government*. Fifteen months later, a four-day trial resulted in the jury acquitting Williams, but only

¹⁰⁶ 6A D.C. CODE MUN. REGS. §1109 (2007.)

¹⁰⁷ 17 D.C. CODE MUN. REGS. §2105 (2007.)

¹⁰⁸ 17 D.C. CODE MUN. REGS. §2112 (2007.)

¹⁰⁹ 17 D.C. CODE MUN. REGS. §2113 (2007.)

¹¹⁰ MPD Directive 308.07, *supra* note 93 at Part I, paras. C.1., but, compare F.3.

after thousands of dollars in legal expenses on both sides.¹¹¹

Williams is far from the only private security professional to suffer arrest at the hands of his competitors, the MPD, for infractions that amount to status offenses. In an assortment of cases over the past 48 years, the MPD has charged numerous private detectives, security officers and “special police” with these violations. *Henderson v. United States*, 687 A.2d 918 (D.C. 1996) (Former special police officer charged with weapons possession); *Hood v. United States*, 661 A.2d 1081 (D.C. 1995) (Off duty special police officer convicted of unlicensed weapons possession, conviction reversed when seizure of gun suppressed); *Chapman v. United States*, 493 A.2d 1026 (D.C. 1985) (Special police officer convicted of two counts of unlicensed weapon possession, one count reversed); *Timus v. United States*, 406 A.2d 1269 (D.C. 1979) (Off duty special police officer convicted of unlicensed weapons possession); *Franklin v. United States*, 271 A.2d 784 (D.C. 1970) (Off duty special police officer convicted of unlicensed weapons possession); *Leven v. United States*, 260 A.2d 681 (D.C. 1970) (Licensed private detective convicted of unlicensed weapons possession); *McKenzie v. United States*, 158 A.2d 912 (D.C. Mun. Ct. App. 1960) (Off duty special police officer convicted of unlicensed weapons possession.)

¹¹¹ Greene, *The Case*, *supra* note 6.

Far from being an effective, viable alternative to the MPD, the private security industry has been regulated to the brink of ineffectiveness by the MPD.

II. THE CITIZENS OF WASHINGTON, D.C. HAVE NO LEGAL RECOURSE AGAINST THE METROPOLITAN POLICE DEPARTMENT FOR THESE FAILURES.

The citizens of D.C., faced with an epic crime problem, turn to a police force suffering from incompetence, mismanagement and corruption. Against this backdrop, courts have consistently granted the police civil immunity for even the most egregious of failures. “Over a century ago, the Supreme Court enunciated a rule which remains the law: law enforcement officials and, consequently, state governments generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct (citations omitted.)” *Morgan v. District of Columbia*, 468 A.2d 1306, 1310 (D.C. 1983.)

Absent some special relationship between the police and the citizen, the police owe no duty of protection to the citizen. The *Morgan* case even went so far as to say that the police owe no duty of protection to any individual citizen, even when the citizen calls 911 to request help.¹¹² This case law merely reaffirms

¹¹² *Id.* at 1313. See also *Morgan v. Barry*, 785 F.Supp. 187, 194 (D.D.C. 1992.)

prior case law granting the MPD immunity for their failures.

Illustrative of this failure is the case of *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981.) In the late winter of 1975, three women (Warren, Taliaferro and Douglas, plus Douglas' four-year-old daughter) were asleep in a rooming house on Lamont Street, NW in the District. In the early morning hours, two burglars entered the property and raped Douglas. Warren and Taliaferro heard Douglas' screams and called the MPD at 6:23 a.m. to report a burglary in progress. They were assured police were on the way. At 6:26 a.m., three cruisers were dispatched to the rooming house on a "priority 2" call. One officer knocked on the door while other officers remained in their cruisers. Receiving no response at the door, the officers left. Warren and Taliaferro watched in horror from the roof of their building before crawling back into their room, where they continued to hear Douglas' screams. They called the MPD again at 6:42 a.m. and asked for immediate assistance. Again, they were told assistance was on the way. The dispatcher never dispatched additional police, unbeknownst to the two who yelled reassurance to Douglas and were, as a result, discovered by the burglars. All three women were then abducted at knifepoint and held prisoner for 14 additional hours, while being beaten, robbed,

raped and directed to perform sex acts on each other.¹¹³

All three women subsequently brought a tort action against the MPD for its failure to respond and protect them from the assaults. All three had their cases dismissed.¹¹⁴ The D.C. Gun Ban rendered these women defenseless in their own home; the MPD failed to protect these women, even when called specifically to provide protection; and the court granted the MPD immunity for these same failures.

While it is notable that several immunity cases have arisen as a direct result of the failures of the MPD specifically, it is accurate to state that the law is similar in all 50 states: the police have no duty to protect you, and it is almost impossible to construct a fact pattern that will trigger liability when the police fail to protect citizens. As recently as the year 2005, in the case of *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), this court reaffirmed this reasoning, stating that a protective order is not a “benefit” or “entitlement” to protection.

¹¹³ *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981.)

¹¹⁴ *Warren, id.*

III. WHEN THE POLICE FAIL TO PROTECT THE CITIZENS AND THE COURTS IMMUNIZE THE POLICE FOR THESE SAME FAILURES, THE SECOND AMENDMENT MUST BE INTERPRETED AS A PRIVATE RIGHT TO KEEP AND BEAR FIREARMS FOR THE DEFENSE OF SELF AND OTHERS.

Amici's prior arguments can be best summarized as follows:

1. D.C.'s Gun Ban has disarmed all victims within the District, thus removing their best means to resist criminal attack.
2. The District continues to suffer from high crime rates while providing, at best, sub-par police protection.
3. Citizens have no entitlement to protection from the police and courts grant police immunity for failing to protect citizens.

This court has already spoken to this exact circumstance in the case *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989),

... when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. (citations omitted) The affirmative duty to

protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. *DeShaney*, at 200.

Stated plainly, the District has affirmatively exercised power by disarming the citizens in the District. The myriad of problems faced by the MPD combined with court-granted immunity for these same failures means the District fails to provide their citizens with the most basic human need, personal safety. The District and the courts have abdicated all responsibility for the disarmed citizens. This is a singularly unconscionable result and cannot stand up to scrutiny under *DeShaney*.

This court has two alternatives to avoid government-sanctioned victimization. First, the long string of precedents granting police immunity for failing to protect citizens could be reversed. Second, this court could interpret the Second Amendment to the U.S. Constitution as granting a fundamental, individual right to own and bear firearms for defense of self and others. Obviously the second alternative is the most practical and effective.

The police can never be everywhere at once, and simple logic dictates that the one best able to resist criminal attack is the one being attacked. The victim will always be present at the time of the crime; the police will almost never be present, serving instead to respond to the crime after it has happened. The most

fundamental rights enshrined in our legal tradition were summarized as the right to life, liberty and the pursuit of happiness. Those same rights are meaningless under a framework where random criminal attack is not only expected but accepted without recourse.

By interpreting the Second Amendment to the U.S. Constitution as a fundamental, individual right to keep and bear firearms, this Court will empower citizens to defend themselves from criminal attack without regard to the political whim of any branch or level of government. Citizens, not politicians worried about editorial boards, will decide what is best for their own personal safety. Citizens will no longer face the excruciating choice between a trip to jail over a firearm owned illegally for self-defense and a trip to the morgue at the hands of an armed criminal.

For those citizens not comfortable with assuming this burden, interpreting the Second Amendment to the U.S. Constitution as a fundamental, individual right to keep and bear firearms will empower and reenergize the private security industry as a viable provider of private police services, providing citizens an alternative when their local police fail. No longer will the private security professional have to worry about vindictive or politically motivated regulation or arrest at the hands of their public-sector competition.

CONCLUSION

The United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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