

No. 05-

---

**In the Supreme Court of the United States**

---

SANDRA SEEGARS, GARDINE HAILES, ABSALOM F. JORDAN,  
JR., CARMELA B. BROWN, AND ROBERT N. HEMPHILL,  
*Petitioners,*

v.

ALBERTO GONZALES, ATTORNEY GENERAL  
OF THE UNITED STATES, AND  
ANTHONY A. WILLIAMS, MAYOR, DISTRICT OF COLUMBIA,  
*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**PETITION FOR A WRIT OF CERTIORARI**

---

STEPHEN P. HALBROOK\*  
Richard E. Gardiner  
10560 Main St., Suite 404  
Fairfax, Virginia 22030  
(703) 352-7276  
*Attorneys for Petitioners*

\*Counsel of Record

## **QUESTION PRESENTED**

The District of Columbia prohibits the possession of pistols, requires firearms possessed in the home to be unloaded and disabled, and prohibits carrying a pistol in one's dwelling. Petitioners, law-abiding residents of the District, challenged these provisions, which are aggressively enforced, under the Second Amendment to the U.S. Constitution and as beyond the District's statutory authority delegated by Congress. They alleged that, but for these criminal prohibitions, they would forthwith possess pistols in their homes, and would enable their firearms for use and carry them in their homes if threatened by criminal intrusion.

The question is whether plaintiffs alleged sufficient harm, including the threat of arrest and prosecution, to have standing for a pre-enforcement challenge to the District's above criminal prohibitions. This involves two sub-issues. First, does standing exist on the part of persons who will not violate the law unless and until a court invalidates the law, at which time such persons incontestably will forthwith engage in activities the invalidated law proscribes? Second, does standing exist on the part of persons who will violate the law in a dire emergency which may or may not come to pass, but for which a prudent person must take steps to meet?

**PARTIES TO PROCEEDING**

All parties to the proceeding are identified in the caption and are natural persons. None of the parties are corporations, and hence there is no parent or publicly held company owning 10% or more of the corporation's stock.

**TABLE OF CONTENTS**

	<b>Page</b>
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES .....	vi
OPINIONS BELOW .....	1
JURISDICTION .....	1
STATUTES AND REGULATIONS .....	1
STATEMENT OF THE CASE .....	2
(i) Proceedings in the Courts Below .....	3
(ii) Statement of Facts .....	4
ARGUMENT: THE WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE D.C. CIRCUIT AND THE SIXTH CIRCUIT ON THE LEVEL OF THREAT NECESSARY FOR STANDING FOR PRE-ENFORCEMENT REVIEW OF A CRIMINAL PROHIBITION, AND TO SETTLE WHETHER THE STANDING DOCTRINE SET FORTH IN <i>BABBITT V. UNITED FARM WORKERS NATIONAL UNION</i> , 442 U.S. 289 (1979), APPLIES TO NON-FIRST AMENDMENT CASES .....	7
CONCLUSION .....	25

**APPENDIX**

Opinion of the U.S. Court of Appeals, Feb. 8, 2005 . . . . .	1a
Order of the U.S. Court of Appeals denying petition for rehearing, June 21, 2005 . . . . .	21a
Order of the U.S. Court of Appeals denying petition for rehearing en banc, with separate statements of Judges Ginsburg, Sentelle, and Williams, June 21, 2005 . . . . .	23a
Order of dismissal by the U.S. District Court, Jan. 14, 2005 . . . . .	31a
Amended Memorandum Opinion by the U.S. District Court, Jan. 14, 2005 . . . . .	32a
Constitution, Statutes, and Ordinances	
U.S. Const., Amend. II . . . . .	119a
42 U.S.C. §1981(a) . . . . .	119a
D.C. Code § 1-303.43 . . . . .	119a
D.C. Code § 7-2502.01 . . . . .	120a
D.C. Code § 7-2502.02 . . . . .	122a
D.C. Code § 7-2507.02 . . . . .	122a
D.C. Code § 7-2507.06 . . . . .	123a

D.C. Code § 22-4504 ..... 123a

D.C. Code § 22-4515 ..... 124a

## TABLE OF AUTHORITIES

<b>CASES</b>	<b>Page</b>
<i>Abbott Labs. v. Gardner</i> , 387 U.S. 136 (1967) . . .	13, 14, 24
<i>Arnold v. Cleveland</i> , 616 N.E.2d 163 (Ohio 1993) . . . . .	14
<i>Austin v. United States</i> , 847 A.2d 391 (D.C. 2004) . . . . .	16
<i>Babbitt v. United Farm Workers National Union</i> , 442 U.S. 289 (1979) . . . . .	<i>passim</i>
<i>Bach v. Pataki</i> , 408 F.3d 75 (2nd Cir. 2005) . . . . .	22
<i>Blanchette v. Conn. General Insurance Corp.</i> , 419 U.S. 102 (1974) . . . . .	14
<i>Bsharah v. United States</i> , 646 A.2d 993 (D.C. 1994) . . .	5, 9
<i>Clark v. Suarez Martinez</i> , 125 S. Ct. 716 (2005) . . . . .	9
<i>Coalition of New Jersey Sportsmen, Inc. v. Whitman</i> , 44 F. Supp. 2d 666 (D. N.J. 1999), <i>aff'd</i> , 263 F.3d 157 (3d Cir. 2001), <i>cert. denied</i> , 534 U.S. 1039 (2001) . . . . .	18
<i>Cooper v. United States</i> , 512 A.2d 1002 (D.C. 1986) . . .	24
<i>Copening v. United States</i> , 353 A.2d 305 (D.C. 1976) . . .	5
<i>Doe v. Duling</i> , 782 F.2d 1202 (4th Cir. 1986) . . . . .	16

<i>Gillespie v. City of Indianapolis</i> , 185 F.3d 693 (7th Cir. 1999), <i>cert. denied</i> , 528 U.S. 1116 (2000) .	15-16
<i>Japan Whaling Association v. American Cetacean Soc.</i> , 478 U.S. 221 (1986) . . . . .	24
<i>Linda R. S. v. Richard D.</i> , 410 U.S. 614 (1973) . . . . .	15
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) . . . . .	2, 9, 14
<i>Maine v. Thiboutot</i> , 448 U.S. 1 (1980) . . . . .	23
<i>Mobil Oil Corp. v. Attorney General of Virginia</i> , 940 F.2d 73 (4th Cir. 1991) . . . . .	25
<i>Navegar, Inc. v. United States</i> , 103 F.3d 994 (D.C. Cir. 1997) . . . . .	<i>passim</i>
<i>Patsy v. Board of Regents of the State of Florida</i> , 457 U.S. 496 (1982) . . . . .	23
<i>Peoples Rights Organization, Inc. v. Columbus</i> , 152 F.3d 522 (6th Cir. 1998) . . . . .	7, 16-17, 18
<i>Poe v. Ullman</i> , 367 U.S. 497 (1961) . . . . .	16
<i>Quackenbush v. Allstate Insurance Co.</i> , 517 U.S. 706 (1996) . . . . .	22
<i>Roper v. Simmons</i> , 125 S. Ct. 1183 (2005) . . . . .	9

<i>San Diego County Gun Rights Committee v. Reno</i> , 98 F.3d 1121 (9th Cir. 1996) . . . . .	25
<i>Silveira v. Lockyer</i> , 312 F.3d 1052 (9th Cir. 2002) . . . . .	11
<i>Staples v. United States</i> , 511 U.S. 600 (1994) . . . . .	24
<i>State v. Hamdan</i> , 2003 Wis. 113, 665 N.W.2d 785 (2003) . . . . .	15
<i>Staub v. City of Baxley</i> , 355 U.S. 313 (1958) . . . . .	22
<i>Steffel v. Thompson</i> , 415 U.S. 452 (1974) . . . . .	10, 18, 19
<i>Stein v. United States</i> , 532 A.2d 641 (D.C. 1987), <i>cert. denied</i> , 485 U.S. 1010 (1988) . . . . .	24
<i>United States v. Emerson</i> , 270 F.3d 203 (5th Cir. 2001) . . . . .	11
<i>United States v. Panter</i> , 688 F.2d 268 (5th Cir. 1982) . . . . .	14
<i>United States v. Students Challenging Regulatory Agency Procedures</i> , 412 U.S. 669 (1973) . . . . .	15
<i>Valley Forge Christian College v. Americans United for Separation of Church &amp; State, Inc.</i> , 454 U.S. 464 (1982) . . . . .	15, 20
<i>Virginia v. American Booksellers Association</i> , 484 U.S. 383 (1988) . . . . .	19, 20

*Warren v. District of Columbia*, 444 A.2d 1  
(D.C. 1981) ..... 15

*Whitmore v. Arkansas*, 495 U.S. 149 (1990) ..... 2

*Yoon v. United States*, 594 A.2d 1056 (D.C. 1991) ..... 24

**CONSTITUTION**

U.S. Const., Amend. I ..... *passim*

U.S. Const., Amend. II ..... *passim*

**STATUTES**

18 U.S.C. § 922(g) ..... 5

18 U.S.C. § 922(t) ..... 5

28 U.S.C. § 1254(l) ..... 1

28 U.S.C. § 1331 ..... 2

42 U.S.C. § 1981(a) ..... 1

42 U.S.C. § 1983 ..... 23

D.C. Code § 1-303.43 ..... 1, 9

D.C. Code § 2-510(a) ..... 20

D.C. Code § 7-2502.01	1, 21
D.C. Code § 7-2502.01(a)	5
D.C. Code § 7-2502.02	1
D.C. Code § 7-2502.02(a)	5, 6, 8, 21
D.C. Code § 7-2502.02(a)(4)	5
D.C. Code § 7-2502.10(b)	21
D.C. Code § 7-2507.02	1, 5, 6, 9
D.C. Code § 7-2507.06	1, 5
D.C. Code § 7-2507.09	21
D.C. Code § 22-4504	1
D.C. Code § 22-4504(a)	5, 9
D.C. Code § 22-4515	1, 5

**LEGISLATIVE MATERIAL**

Hearings on H.R. 5623 before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess., 75-76 (1928)	19
---	----

## **OPINIONS BELOW**

The opinion of the court of appeals, 396 F.3d 1248, is printed in the Appendix (“App.”) at 1a. The unreported order denying the petition for rehearing is at App. 12a. The order denying the petition for rehearing *en banc*, with separate statements of Judges Ginsburg, Sentelle, and Williams, is reported at 413 F.3d 1, and is at App. 23a. The unreported order of dismissal by the district court is at App. 32a. The district court’s amended memorandum opinion, 297 F. Supp.2d 201, is at App. 32a.

## **JURISDICTION**

On February 8, 2005, the court of appeals rendered judgment affirming in part and reversing in part the judgment of the district court, and rendered an opinion on the same date holding that the plaintiffs did not have standing to bring this action. On June 21, 2005, the court of appeals denied the petition for rehearing and for rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(l).

## **STATUTES AND REGULATIONS**

The texts of the following are in the Appendix: U.S. Const., Amend. II; 42 U.S.C. § 1981(a); D.C. Code §§ 1-303.43, 7-2502.01, 7-2502.02, 7-2507.02, 7-2507.06, 22-4504, and 22-4515.

## STATEMENT OF THE CASE

### Introduction

A free people should not have to risk imprisonment to exercise their most fundamental individual rights, including the right to keep and bear arms. The decision below, however, puts the residents of the District of Columbia in just such an untenable position. The D.C. Circuit concluded that Petitioners lacked standing not because it misapplied a legal standard that this Court has clearly articulated. Rather, the court applied this Court's well-established precedents to the fact pattern before it in a way that those precedents do not anticipate.

A plaintiff satisfies the requirements of Article III provided (1) he has suffered an injury in fact, (2) that injury was caused by the defendant's conduct, and (3) the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). An imminent threat of future injury satisfies the injury requirement provided it is not "speculative." *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990) ("Allegations of possible future injury do not satisfy the requirements of Article III. A threatened injury must be certainly impending to constitute injury in fact.").

The lower court acknowledged this standard, but concluded that Petitioners could not satisfy it. Petitioner Gardine Hailes has already been victimized once by a burglar in her home. She possesses a registered shotgun, but must keep it bound with a trigger lock under the District of Columbia's laws. If another burglary attempt is made on her house, she stands ready to defend herself with her shotgun. But, according

to Judge Ginsburg, such threat of injury is “highly speculative.” App. 27a. How many times must Ms. Hailes be victimized before she will be deemed to have standing? The obvious answer is that once is more than enough, but the court below rejected this conclusion.

As for Petitioners’ challenge to the prohibition on pistol possession, the court suggested that there was no standing because the threat of prosecution was not sufficiently imminent and because plaintiffs had an administrative remedy. But residents of D.C. should not have to run the gauntlet of a Byzantine and futile administrative process to ask permission to exercise their constitutional rights. The prospect of a Bureau of Free Speech to which citizens must apply in order to speak, only to be denied in all cases, is unthinkable. The D.C. “registration” process for pistols is just as invalid.

This Court should take this case to vindicate the rights of the petitioners and the thousands of other D.C. residents who seek nothing more than the ability to exercise their constitutionally guaranteed individual right to keep and bear arms.

#### **(i) Proceedings in the Courts Below**

Petitioners Sandra Seegars, Gardine Hailes, Absalom F. Jordan, Jr., Carmela B. Brown, and Robert N. Hemphill filed a complaint for declaratory and injunctive relief alleging that provisions of the District of Columbia Code prohibiting possession of pistols and otherwise restricting firearms by law-abiding citizens in their homes violated the Second Amendment to the U.S. Constitution and were not authorized under enabling

legislation passed by Congress. Respondents Alberto Gonzales,<sup>1</sup> Attorney General of the United States, and Anthony A. Williams, Mayor of the District of Columbia, were and are in charge of enforcing these provisions.

The district court had jurisdiction under 28 U.S.C. § 1331. That court found that only plaintiff Hailes had standing, and only to challenge the provision requiring any registered firearm in the home to be unloaded and disabled. App. 61-62a. The court then ruled on the merits that she failed to state a claim upon which relief can be granted and dismissed the complaint. App. 118a.

The court of appeals affirmed in part and reversed in part. It held that none of the plaintiffs had standing to challenge any of the provisions at issue. App. 16a. Circuit Judge Sentelle filed a dissenting opinion. App. 16a. On June 21, 2005, the court of appeals denied the petition for rehearing and rehearing *en banc*. Chief Judge Ginsburg filed a statement concurring in the denial of rehearing *en banc*, Circuit Judge Sentelle filed a statement dissenting in such denial, and Senior Circuit Judge Williams filed a statement explaining his call for rehearing *en banc*. App. 25a.

## **(ii) Statement of Facts**

The District effectively bans possession of handguns by requiring all firearms to be registered, but prohibiting registration of any pistol not registered before 1976. D.C. Code

---

<sup>1</sup> John D. Ashcroft, who was Attorney General when this litigation commenced, was succeeded in office by Mr. Gonzales.

§§ 7-2502.01(a), 7-2502.02(a)(4), 7-2507.06 (penalties of one year imprisonment and \$1000 fine). Registered firearms kept at home must be unloaded and disassembled or bound by a trigger lock. §§ 7-2507.02, 7-2507.06 (same penalties). Carrying a pistol in one's own dwelling without a license is prohibited. §§ 22-4504(a), 22-4515 (same penalties).<sup>2</sup>

Prosecution for violation of the provisions at issue may be made by the U.S. Attorney,<sup>3</sup> who serves under Respondent Gonzales, or the D.C. Attorney General (formerly Corporation Counsel), which serves under Respondent Williams. Arrests may be made by federal and District law enforcement agencies which serve under respondents.

Petitioners are eligible under federal law to possess firearms.<sup>4</sup> But for D.C. Code § 7-2502.02(a), each would forthwith obtain and register a pistol to keep at home for self protection against a deadly attack by an intruder.<sup>5</sup> Sandra Seegars, who is retired on a disability and is a member of the D.C. Taxicab Commission, resides in a high crime neighborhood and is a crime victim. Carmela B. Brown, a writer and actor, resides in a high crime neighborhood rife with open-air drug

---

<sup>2</sup> Carry licenses are not obtainable. *Bsharah v. United States*, 646 A.2d 993, 646 A.2d at 996 n.12 (D.C. 1994).

<sup>3</sup> Attorney General's Motion to Dismiss at 6 & n.1; *Copening v. United States*, 353 A.2d 305, 307 n.2 (D.C. 1976).

<sup>4</sup> See 18 U.S.C. §§ 922(g) (persons ineligible to possess firearms), 922(t) (requiring background checks on persons who receive firearms).

<sup>5</sup> Factual allegations refer to the complaint, which must be taken as true in a motion to dismiss. Pertinent allegations are in the Joint Appendix in the court below, at 15-17.

trafficking and prostitution. Plaintiff Robert N. Hemphill is a retired postman.

Petitioner Absalom F. Jordan, Jr., an Advisory Neighborhood Commissioner and an NRA Certified Firearms Instructor, is a victim of attempted armed robbery and is involved in efforts to expel drug dealers from his neighborhood. He lawfully owns a pistol which he stores outside the District and which, but for D.C. Code § 7-2502.02(a), he would forthwith register and keep at his residence for self protection.

Petitioner Gardine Hailes, an officer manager, is a victim of burglary at her home. She possesses a registered shotgun which she keeps bound by a trigger lock. But for D.C. Code § 7-2507.02, she would remove the trigger lock when she deems it necessary to defend herself in her home under urgent circumstances.

Petitioners face arrest, prosecution, and incarceration should they violate the above provisions. But for those provisions and the enforcement thereof by Respondents, they would forthwith obtain and possess pistols and keep firearms in usable condition when necessary for security. As a proximate cause of the provisions and their enforcement, Petitioners are subjected to irreparable harm.

**ARGUMENT****THE WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE D.C. CIRCUIT AND THE SIXTH CIRCUIT ON THE LEVEL OF THREAT NECESSARY FOR STANDING FOR PRE-ENFORCEMENT REVIEW OF A CRIMINAL PROHIBITION, AND TO SETTLE WHETHER THE STANDING DOCTRINE SET FORTH IN *BABBITT V. UNITED FARM WORKERS NATIONAL UNION*, 442 U.S. 289 (1979), APPLIES TO NON-FIRST AMENDMENT CASES**

The decision at bar conflicts with decisions of another United States court of appeals on the level of threat necessary for pre-enforcement review of a criminal prohibition. As stated in the instant decision, the Sixth Circuit's decision in *Peoples Rights Organization, Inc. v. Columbus*, 152 F.3d 522, 528-29 (6th Cir. 1998) ("PRO"), "is plainly inconsistent with" *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997), which the decision at bar follows. App. 14a.

In addition, the court of appeals decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. That question is whether the following test set forth in *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), applies to constitutional interests generally, or is limited to First Amendment cases:

When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of

prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

The decision at bar conflicts with a literal reading of the above, and the circuits have ruled both ways on the issue. *See* App. 5a, 8a, 11a-13a (majority); 17a-18a (Sentelle, J., dissenting). Senior Judge Williams, author of the majority opinion, called for rehearing *en banc*, on the basis that the *Navegar* precedent (on which the court relied) “appeared to be in conflict with an earlier Supreme Court decision, *Babbitt v. United Farm Workers Nat’l Union* [citation omitted].” App. 27a. However, if the above statement is narrowly limited to First Amendment interests rather than “constitutional interest[s]” in general, this Court should so clarify that rule.

Resolution of this issue in the context of the present type of case is an important federal question. Senior Judge Williams explained it best when he concluded in calling for rehearing *en banc*:

I do not think our law of standing requires that citizens who want to obey the law, but also to follow their judgment as to self-preservation, be told that they cannot get a reading on the validity of the law except by pursuing concededly useless administrative avenues or by engaging in forbidden behavior that is sure to be exposed if the risk they fear arises. (App. 30a)

Petitioners are law-abiding residents of the District of Columbia who wish to possess pistols and usable firearms in their dwellings for security and protection against crime. These measures are prohibited by D.C. Code § 7-2502.02(a) (prohibits

registration of pistol), § 7-2507.02 (requires firearms to be unloaded and disassembled or locked), and § 22-4504(a) (prohibits carrying pistol in one's dwelling). “[N]o specific intent to use the gun” need be proven for a conviction.<sup>6</sup>

Petitioners sought a declaratory judgment that these prohibitions (1) are inconsistent with D.C. Code § 1-303.43, the enabling act in which Congress authorized the District to pass only “usual and reasonable police regulations . . . necessary for the regulation of firearms,”<sup>7</sup> and (2) infringe on “the right of the people to keep and bear arms” guaranteed by the Second Amendment to the U.S. Constitution. The plain language of the enabling act, together with the canon of constitutional avoidance, *see Clark v. Suarez Martinez*, 125 S. Ct. 716, 724 (2005), may be applied to invalidate the ordinances at issue and to avoid the constitutional issue.

Petitioners suffer injury in fact by being forced into the dilemma of forgoing prudent security measures to protect themselves from criminals, or violating the law and being subjected to arrest and prosecution. The injury is traceable to the challenged laws and enforcement thereof. Their injuries would be redressed by a favorable decision. They thus meet the criteria for standing set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

Two standing issues arise in this case which this Court

---

<sup>6</sup> *Bsharah v. United States*, 646 A.2d 993, 999-1000 (D.C. 1994).

<sup>7</sup> Viewing the “usual” prong alone, the District’s pistol ban is most unusual, as not one of the 50 States in the United States bans pistols. This Court has held that a “national consensus” of what is “cruel and *unusual*” may be established by 30 States. *Roper v. Simmons*, 125 S. Ct. 1183, 1192 (2005).

should clarify. First, does standing exist on the part of persons who will not violate the law unless and until a court invalidates the law, at which time such persons incontestably *will forthwith* engage in activities the invalidated law proscribes? This issue arises with the Petitioners who would possess pistols in the District forthwith on a judicial decision invalidating the pistol prohibition. Second, does standing exist on the part of persons who *will violate the law in a dire emergency* which may or may not come to pass, but for which a prudent person must take steps to meet? This issue arises with Petitioner Hailes, a past burglary victim who refuses to be a victim again.<sup>8</sup>

The opinion below itself provides an excellent discussion of the conflict within the case law on standing which this Court should resolve. It begins by quoting the following from *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (App. 5a):

When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.<sup>9</sup>

---

<sup>8</sup> Depicting serious threatened injury from criminal violence as “speculative” disregards common prudence. A hurricane like Katrina may or may not hit New Orleans and the surrounding Gulf region again during our lifetime, but prudent people will certainly take steps to prepare for just such a disaster.

<sup>9</sup> “It is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.” *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). *See id.* at 480 (“the declaratory judgment procedure

That case involved a union's preenforcement challenge to a state criminal law relating to unfair labor practices. While the state pointed out that the criminal penalty had not been (and might never be) applied, this Court noted that "the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices," and that the fear of prosecution was not "imaginary or wholly speculative." 442 U.S. at 302. Based on that, the decision below concludes: "Thus *United Farm Workers* appeared to find a threat of prosecution credible on the basis that plaintiffs' intended behavior is covered by the statute and the law is generally enforced."<sup>10</sup> App. 8a. As the decision readily concedes, Petitioners easily meet that test:

Whatever the ultimate understanding of the Second Amendment, compare *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), with *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the conduct that plaintiffs would engage in is at least arguably affected with a constitutional interest, but proscribed by a statute. (App. 13a)

The above test has been applied in cases both involving and not involving the First Amendment. Slip op. 8a (citations omitted). Indeed, the decision below states:

---

is an alternative to pursuit of the arguably illegal activity") (Rehnquist, J., concurring).

<sup>10</sup> "As appellants allege a similarly realistic fear of prosecution, I would hold *United Farm Workers* controlling, and conclude that appellants have standing to bring the Second Amendment challenge." App. at 18a (Sentelle, J., dissenting).

[T]he idea of a special First Amendment rule for preenforcement review of statutes seems to have no explicit grounding in Supreme Court decisions. In *United Farm Workers*, for example, although plaintiffs in fact attacked the statute on First Amendment grounds, the Court conspicuously neglected to mention the point in its discussion of standing. *United Farm Workers*, 442 U.S. at 297-302. (App. 12a.)

Despite the above, the court below felt bound by what it viewed as a contrary holding in “our circuit’s single post-*United Farm Workers* case” involving a preenforcement review of a criminal law not involving the First Amendment or the appeal of an agency decision. App. 9a-10a, citing *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997).

*Navegar* found preenforcement standing to challenge the federal “assault weapon” prohibition regarding products of particular companies actually named in the law, finding that the threat of prosecution could be deemed speculative “only if it is likely that the government may simply decline to enforce these provisions at all.” App. 10a, quoting 103 F.3d at 1000. However, standing did not exist to challenge portions of the statute prohibiting firearms by general characteristics rather than by name. *Id.*, citing 103 F.3d at 1001.

To be sure, *Navegar* contains the same internal conflicts that the panel in the case at bar describes. *Navegar* stated:

A credible threat of imminent prosecution can injure the threatened party by putting her between a rock and a hard place--absent the availability of preenforcement review, she must either forego possibly lawful activity because of

her well-founded fear of prosecution, or willfully violate the statute, thereby subjecting herself to criminal prosecution and punishment.

*Id.* at 998-99.

Indeed, *Navegar* observed that to require litigants “to violate the law and subject themselves to criminal prosecution before their challenges may be heard would create incentives that are perverse from the perspective of law enforcement [and] unfair to the litigants . . . .” 103 F.3d at 1000-01. Yet that is exactly where the Petitioners here are left.

The court below read *Navegar* to require very specific threats to prosecute, at the same time acknowledging contrary precedents. “There is . . . tension between *Navegar* and our cases upholding preenforcement review of First Amendment challenges to criminal statutes.” App. 11a (citations omitted).

Moreover, “*Navegar*’s analysis is in sharp tension with standard rules governing preenforcement challenges to agency regulations,” where the litigants have standing because they face the dilemma of costly compliance measures or the risk of enforcement. App. 10a, citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). “The passage from *United Farm Workers* quoted at the outset alludes to precisely this hardship.” App. 11a.

One might attempt to explain the recognition of hardship caused by a regulation while rejecting equivalent hardship caused by a statute by the need to avoid resolving constitutional issues posed by the latter. “That answer seems weak, as courts reviewing agency action commonly give preenforcement review not only to statutory claims but to constitutional attacks on the underlying statute.” App. 11a (citations omitted).

This seemingly irrational distinction is particularly egregious here. Law-abiding citizens who wish to protect themselves from criminal violence in their own homes by obtaining firearms apparently must, in order to have standing to protect their constitutional and statutory rights, break the law and inform law enforcement so that they will become sufficiently threatened with prosecution.<sup>11</sup> This Court's jurisprudence does not require corporations to violate the law to prevent economic injury occasioned by agency regulations. *Abbott Labs.*, *supra*. Nor does it require citizens who wish to avoid potential death or serious bodily injury to violate the law in order to have their rights declared.

All kinds of injuries, from economic to aesthetic, have been recognized for purposes of standing. *See Lujan*, 504 U.S. at 562, 573 (reaffirming cases finding standing on aesthetic grounds). If avoidance of psychological harm by not being able to enjoy seeing an animal confers standing, so too does the avoidance of psychological and physical harm knowing that one has a defense to criminal attack. Indeed, "The right to defend oneself from a deadly attack is fundamental." *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982).<sup>12</sup> The District has

---

<sup>11</sup> While even a wilful lawbreaker may not be caught, *Blanchette v. Conn. General Insurance Corp.*, 419 U.S. 102, 143 n.29 (1974), "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Id.* at 143.

<sup>12</sup> "The right of defense of self, property and family is a fundamental part of our concept of ordered liberty. . . . For many, the mere possession of a firearm in the home offers a source of security." *Arnold v. Cleveland*, 616 N.E.2d 163, 169-70 (Ohio 1993). "If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence . . . ." *State v. Hamdan*, 2003 Wis. 113, 665 N.W.2d 785, 808 (2003).

no legal duty to protect plaintiffs.<sup>13</sup>

“An identifiable trifle is enough for standing . . . .” *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (e.g., a stake of \$5). A preenforcement challenge to a criminal statute may be every bit as much a case or controversy as a challenge to a civil statute or regulation, and may be far more compelling due to the risk of loss of liberty, property, livelihood, and reputation.

The decision below does recognize that arguable violation of a constitutional right may confer an element of standing, but is not sufficient. It states:

[T]he conduct that plaintiffs would engage in is at least arguably affected with a constitutional interest, but proscribed by a statute. Thus, the first requirement of *United Farm Workers and Navegar* is satisfied. (App. 13a)

Indeed, standing may derive from “the ‘zone of interests’ intended to be protected or regulated by the statute or constitutional guarantee in question.” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982).<sup>14</sup> See *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999) (plaintiff “suffered a cognizable injury as a result of the statute’s

---

<sup>13</sup> “A government and its agents are under no general duty to provide . . . police protection, to any particular individual citizen.” *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981) (*en banc*).

<sup>14</sup> “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n.3 (1973).

enactment [depriving him of firearm], and that injury is one that would be redressed through a favorable ruling on his Second Amendment challenge”), *cert. denied*, 528 U.S. 1116 (2000).

The court below notes that the District “enforces its gun laws, prosecuting ‘all violators of the statute under normal prosecutorial standards.’” App. Slip op. 13a, quoting *Austin v. United States*, 847 A.2d 391, 393-94 (D.C. 2004).<sup>15</sup> However, “plaintiffs allege no prior threats against them or any characteristics indicating an especially high probability of enforcement against them.” App. 13a. Yet requiring prior threats to be the tail which wags the standing dog would mean that law-abiding citizens could never bring a preenforcement action, which would thereby be confined only to actual lawbreakers or persons who recklessly live on the murky edge, because only such persons receive highly concrete threats of prosecution. It ignores that good citizens do not risk getting criminal records and do not violate the law even if they will not be caught. It is enough that such citizens, as here, would engage in proscribed conduct “forthwith” but for a law which is duly enforced, and will in fact engage in that conduct on a judicial determination that the law is invalid.

Not only do Petitioners allege that they will forthwith obtain pistols on a proper judicial determination, but also plaintiff Jordan owns and stores a pistol outside the District, and would keep it at his home in the District if he could lawfully do so. “Plaintiffs correctly argue that *Peoples Rights Organization, Inc. v. Columbus*, 152 F.3d 522, 528-29 (6th Cir. 1998) (“*PRO*”), supports preenforcement standing in precisely this circumstance.” App. 14a. *PRO* found standing where

---

<sup>15</sup> This is not a case where the law is not enforced, as in *Poe v. Ullman*, 367 U.S. 497, 501 (1961) (ban on contraceptives), and *Doe v. Duling*, 782 F.2d 1202, 1204 (4th Cir. 1986) (fornication law).

plaintiffs faced the Hobson's choice of the following: "They can either possess their firearms in Columbus and risk prosecution under the City's law, or, alternatively, they can store their weapons outside the City, depriving themselves of the use and possession of the weapons."<sup>16</sup> *PRO*, 152 F.3d at 529.

Since it found that the plaintiffs were threatened with prosecution, the *PRO* court implied that they may have been in violation of the law, and thus had standing. By contrast, it is undisputed here that none of the Petitioners are in violation of the law. But the important point is that the threat of prosecution was no more imminent in *PRO* than here.

Moreover, Petitioner Hailes has already been the victim of a crime in her home and may well be the victim of a future attack. Judge Ginsburg's observation that Petitioner Hailes allegations of future injury are "highly speculative" (App. 27a) cannot be squared with the record.

Any attempt to reconcile the D.C. Circuit's decision here with the Sixth Circuit's decision in *PRO* is unavailing: "*PRO* is plainly inconsistent with *Navegar*." App. 14a. The court below found the threat in *Navegar* as even greater than that in *PRO*, in which the plaintiffs argued that the law was vague. Yet the allegedly vague portions of the federal assault weapon law challenged in *Navegar* were subject to clarification by the agency that enforced it. By contrast, the law in *PRO* was fit for review because it "is not subject to any type of clarifying interpretation . . . . Rather, the words of the ordinance provide

---

<sup>16</sup> "[Plaintiffs] risk prosecution and possible imprisonment if they possess their weapons within Columbus, as the City has assured us that it will prosecute those who violate its assault weapons ban." *PRO*, 152 F.3d at 530.

the sole source of guidance for firearms' owners."<sup>17</sup> *PRO*, 152 F.3d at 530.

The plaintiffs in *PRO* did the only thing that responsible firearm owners could have done – seek a judicial resolution. “[A] citizen should be allowed to prefer ‘official adjudication to public disobedience.’” *Id.* The alternative would have entailed the perverse result of flaunting one’s disobedience of the law sufficiently to provoke law enforcement authorities into threatening or issuing an actual arrest warrant.

This Court in *Steffel* recalled the words of Professor Borchard, author of the Declaratory Judgment Act, about courts forcing a plaintiff into the alternatives of violating a statute to test its constitutionality or of foregoing the exercise of his claimed rights:

Into this dilemma no civilized legal system operating under a constitution should force any person. The court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it. Assuming that the plaintiff has a vital interest in the enforcement of the challenged statute or ordinance, there is no reason why a declaratory judgment should not be issued, instead of compelling a violation of the statute as a condition precedent to challenging its

---

<sup>17</sup> A challenge to a firearms prohibition is justiciable where “the plaintiffs wish to engage in conduct plainly prohibited on the face of the allegedly unconstitutional statute.” *Coalition of New Jersey Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d 666, 673 n.10 (D. N.J. 1999), *aff’d*, 263 F.3d 157 (3d Cir. 2001) (*mem.*), *cert. denied*, 534 U.S. 1039 (2001).

constitutionality.

*Steffel*, 415 U.S. at 468 n.18, quoting Hearings on H.R. 5623 before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess., 75-76 (1928).

Petitioner Hailes possesses a shotgun in her home secured by a trigger lock. But for the District’s prohibition, she would remove it when necessary to defend herself in her home. The district court found that she had standing because she must forego possibly lawful activity based on her “well-founded fear of prosecution,” and because she lacked an administrative remedy. App. 15a. The court below disagreed: “But the lack of an administrative remedy, while it increases the hardship resulting from denial of preenforcement review, still does not enable Hailes to meet the *Navegar* test.” App. 16a.

Judge Sentelle would have found standing. App. 16a (Sentelle, J., dissenting). “As the majority notes, a long line of cases upholds pre-enforcement review of First Amendment challenges to criminal statutes by plaintiffs with bases for standing no different than that asserted by appellants herein for their Second Amendment challenge.” App. 18a, citing *Virginia v. American Booksellers Ass’n*, 484 U.S. 383 (1988).

In *American Booksellers*, plaintiffs challenged a prohibition on the display for sale of certain sexually-related material. Injury was threatened “as the law is aimed directly at plaintiffs, who . . . will have to take significant and costly compliance measures or risk criminal prosecution.” 484 U.S. at 392. This Court found preenforcement review proper:

The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that

plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

*Id.* at 393.

As Judge Sentelle comments about the above: “The only difference between that harm and the harm alleged in this case is that there it was to First Amendment interests, here to Second. I know of no hierarchy of Bill of Rights protections that dictates different standing analysis.”<sup>18</sup> App. 19a. Judge Sentelle concludes: “The allegedly constitutionally protected conduct in the record before us is clearly defined and clearly unlawful under a statute that the District apparently enforces regularly, and under which there is certainly no doubt that plaintiffs reasonably apprehend enforcement.” App. 20a (Sentelle, J., dissenting).

Chief Judge Ginsburg filed a statement concurring in the denial of the petition for rehearing *en banc*. He stated that Petitioners “could have applied to register a pistol and then challenged the subsequent denial of that application on the basis of the Second Amendment in the courts of the District of Columbia . . . .” App. 26a, citing D.C. Code §§ 2-510(a), 7-2502.10(b), 7-2507.09. While plaintiff Hailes has no administrative remedy, it was only “speculative” that she would remove the trigger lock and be prosecuted. App. 27a.

---

<sup>18</sup> No constitutional right is “less ‘fundamental’ than” others, and “we know of no principled basis on which to create a hierarchy of constitutional values or a complementary ‘sliding scale’ of standing . . . .” *Valley Forge*, 454 U.S. at 484.

However, Senior Circuit Judge Williams wrote about the plaintiffs:

The imminence of the threat to their security matched the imminence of the threat of prosecution; the greater the probability of enforcement, the greater the pressure to forego what they saw as lawful and needed security precautions. And the defendant governments in no way suggested any reluctance to enforce the laws to the hilt. Although the threat of prosecution appeared as imminent as in *United Farm Workers, Navegar* demanded a higher level of imminence, indeed one rarely attainable in practice. (App. 28a)

Regarding the argument that the plaintiffs could apply to register pistols, Judge Williams noted:

The statutes plainly, unequivocally, bar issuance of such permits. See D.C. Code §§ 7-2502.01, 7-2502-02(a) . . . . That being so, it is mysterious to me how plodding through the charade of seeking permits would render the threat of prosecution (and thus the need to forego measures for their security) one iota more imminent. . . . The availability of a null administrative remedy seems irrelevant to the standing issue. (App. 28a)<sup>19</sup>

---

<sup>19</sup> Quoting *United Farm Workers*, 442 U.S. at 298, Judge Williams added:

it is an illusion to suppose that pursuit of the administrative “remedies” identified by the defendant

The Second Circuit recently resolved that issue in favor of standing in *Bach v. Pataki*, 408 F.3d 75 (2nd Cir. 2005). The plaintiff sought a declaratory judgment that New York's statute denying firearms licenses to non-residents violated the Second Amendment and the Privileges and Immunities Clause. The court held that the plaintiff had standing despite not having applied for a license:

Imposing a filing requirement would force Bach to complete an application for which he is statutorily ineligible and to file it with an officer without authority to review it. "We will not require such a futile gesture as a prerequisite for adjudication in federal court."

408 F.3d at 83 (citation omitted).

The same rule applies here, and is consistent with this Court's jurisprudence. *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958) (rejecting view that "appellant lacked standing to attack the constitutionality of the ordinance because she made no attempt to secure a permit under it"). "[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1996).

Moreover, this action seeks relief under 42 U.S.C. § 1983. "[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 516 (1982). If the availability of State administrative

---

governments could alleviate the burden on plaintiffs of "await[ing] and undergo[ing] a criminal prosecution as the sole means of seeking relief." (App. 29a)

procedures (however futile) and of an appeal in State courts preclude plaintiffs from having standing in federal court, few § 1983 actions would be brought in federal courts.<sup>20</sup>

For petitioner Hailes, there is not even a futile administrative remedy available. She wishes to remove the trigger lock from her shotgun and load it if she feels threatened by a possible intruder. As Judge Williams explains, it will then be too late to have her rights declared:

But if such an intrusion occurs, and she is able to defend herself by virtue of having violated the law, the ensuing police investigation will bring out the evidence of her crime (unless she were to successfully commit another crime by lying about how she kept the gun). . . . The risk of prosecution in the event of the contingency she fears is high, and thus the resulting deterrent to her freeing the trigger lock is effectively as great as if she proposed to violate the law down at the police station. (App. 29a)

It is no defense to the District's firearms prohibitions that a person is a crime victim merely seeking to protect herself from attack.<sup>21</sup> Even if it was, the outcome would be known only after she was arrested, prosecuted, tried, convicted or

---

<sup>20</sup> After all, State courts have concurrent jurisdiction over § 1983 claims. *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980).

<sup>21</sup> *Yoon v. United States*, 594 A.2d 1056, 1057 (D.C. 1991) (upholding conviction of market owner who was repeatedly robbed and shot at).

acquitted, and an appeal taken – all harms she wishes to avoid.<sup>22</sup> See *Stein v. United States*, 532 A.2d 641, 644 (D.C. 1987), *cert. denied*, 485 U.S. 1010 (1988) (“his right to avoid prosecution (if he has such a right) cannot be ‘vindicated by an acquittal at trial or on appeal’”).

America’s law-abiding gun owners should have the same access to the courthouse door to have their rights declared as do wildlife watchers<sup>23</sup> and commercial interests (such as the businesses in *Abbott Labs.*). “Roughly 50 percent of American homes contain at least one firearm of some sort,” *Staples v. United States*, 511 U.S. 600, 613-14 (1994), and “there is a long tradition of widespread lawful gun ownership by private individuals in this country.” *Id.* at 610. Lawful gun owners have a responsibility to seek judicial determinations of their rights at a point no where near crossing the line of potential law breaking, rather than recklessly engaging in violations of the law to attain the elusive “standing” status advocated by the Respondents here.

Moreover, clarification by this Court of the law of standing in the context of the threat of criminal prosecution would be beneficial in many other circumstances. As the opinion below explains, the circuits differ – in some cases dramatically – over the required level of threat as applied to a

---

<sup>22</sup> *E.g.*, *Cooper v. United States*, 512 A.2d 1002 (D.C. 1986) (affirming conviction).

<sup>23</sup> *E.g.*, *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 230-31 n.4 (1986) (environmental organizations had standing because “whale watching and studying of their members w[ould] be adversely affected by continued whale harvesting”).

variety of topics. App. 6a.<sup>24</sup>

The decision below leaves the residents of the District of Columbia in the untenable predicament of risking imprisonment if they take prudent steps to protect themselves from criminal violence. This Court should grant this petition to vindicate the rights of the Petitioners and the thousands of other D.C. residents who seek nothing more than the ability to exercise their constitutionally guaranteed individual right to keep and bear arms.

### CONCLUSION

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

STEPHEN P. HALBROOK\*  
Richard E. Gardiner  
10560 Main Street, Suite 404  
Fairfax, Virginia 22030  
(703) 352-7276  
*Attorneys for Petitioners*

\*Counsel of Record

---

<sup>24</sup> Compare *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996) (requiring a specific time and date at which plaintiffs intended to violate the law) with *Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 75 (4th Cir. 1991) (persons should comply with the law and seek declaratory relief).