Nos. 08-1497 & 08-1521

In The
Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL.,
Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, ET AL.,
Respondents.

OTIS MCDONALD, ET AL.,
Petitioners,

v.

CITY OF CHICAGO, ILLINOIS,
Respondent.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF TEXAS, GEORGIA, ALABAMA, ALASKA, ARKANSAS, COLORADO, FLORIDA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the right of the people to keep and bear arms guaranteed by the Second Amendment to the United States Constitution is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting possession of handguns in the home.

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INTEREST OF AMICI CURIAE[1]

Texas, Georgia, and the other amici States have a profound interest in this case as guardians of their citizens' constitutional rights. As our Founding Fathers recognized, and as this Court reaffirmed in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the right to keep and bear arms secured by the Second Amendment is a critical liberty interest, essential to preserving individual security and the right to self-defense. Yet federal courts of appeals are divided over whether this right fully extends to the vast majority of citizens who live not in a federal enclave, but in one of the several States. Without this Court's review, millions of Americans may be deprived of their Second Amendment right to keep and bear arms as a result of actions by local governments, such as the ordinances challenged in this case.

Moreover, the States have an additional interest in the proper interpretation of the Second Amendment in order to facilitate the development of similar protections under state law. Interpretive guidance from this Court, and from other federal courts, would help the States as they construe and enforce their own, analogous state-law protections—including the 44 state constitutions that guarantee a right to keep and bear arms. *See, e.g.*, Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 194 n.113 (1983) ("'In a community that perceives the Supreme Court to be the

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1. Counsel of record received notice that Texas, Georgia, and the other amici States intended to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the States to file this brief.

primary interpreter of constitutional rights, reliance on Supreme Court reasoning can help to legitimate state constitutional decisions that build on the federal base.'") (citation omitted).[2]

INTRODUCTION

Over the last century, the Court has held that "virtually all" of the individual rights found in the Bill of Rights apply to the States through the Due Process Clause of the Fourteenth Amendment. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34 (1991) (Scalia, J., concurring in judgment). Under the doctrine of selective incorporation, these rights have been applied to the States because they are considered "fundamental"—that is, "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

The right to keep and bear arms under the Second Amendment is not just a "fundamental" liberty interest. In the Anglo-American tradition, it is among the *most* fundamental of rights because it is essential to securing all our other liberties. The Founders well understood that, without the protections afforded by the Second Amendment, all of the other rights and privileges ordinarily enjoyed by Americans would be vulnerable to governmental acts of oppression. As St. George Tucker wrote, the right protected by the Second Amendment "may be considered as the true palladium of liberty" because "[t]he right to self-defence is the first law of

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2. The relevant state constitutional and statutory provisions concerning firearms are attached in the Appendix to this brief.

nature," and wherever "the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." St. George Tucker, *View of the Constitution of the United States*, *in* WILLIAM BLACKSTONE, 1 COMMENTARIES app., at 300 (Philadelphia, Birch & Small 1803) (1765).

Two familiar events in our Nation's history are particularly instructive in illustrating this point. The very first battle of the Revolutionary War was sparked by British efforts to disarm American colonists. As news spread of these efforts, colonists formed militias to secure their arms. ROBERT A. GROSS, THE MINUTEMEN AND THEIR WORLD 59 (1976). These tensions culminated in April 1775, when British General Sir Thomas Gage sent a column of Redcoats to destroy arms and ammunition stored by colonists in Lexington and Concord, triggering the first battle of the Revolutionary War. *See* JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 145-46 (1994). In forming these militias, the colonists were expressly aware that their right to bear arms was critical to the protection of their other liberties. When George Mason (in conjunction with George Washington and others) began organizing a militia in Fairfax County, Virginia, he noted that the colonists were being "threat'ned with the Destruction of our Civil-rights, & Liberty, and all that is dear to British Subjects & Freemen." 1 THE PAPERS OF GEORGE MASON 1725-1792, at 210-11 (Robert A. Rutland ed., 1970). After raising the militia company, Mason praised it as necessary "for the great and useful purposes of defending our country,

and preserving those inestimable rights which we inherit from our ancestors." *Id.* at 229.

Nearly one hundred years later, in the aftermath of the Civil War, the Southern States engaged in a brutal campaign to disarm and thereby oppress the recently freed slaves. Those efforts included enactment of the so-called "Black Codes" prohibiting the possession of firearms by African-Americans. *See Heller*, 128 S. Ct. at 2810. Disarmament was frequently followed by acts of lawlessness perpetrated on defenseless African-Americans. *See, e.g.*, Report of the Joint Comm. on Reconstruction, H.R. REP. NO. 39-30, pt. 4, at 49-50 (1866) (testimony that armed patrols in Texas, acting under supposed authority of the Governor, "passed about through settlements where negroes were living, disarmed them—took everything in the shape of arms from them—and frequently robbed them"); CONG. GLOBE, 39th Cong., 1st Sess. 915 (1866) (statement of Sen. Wilson) ("There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description."); *see also McDonald* Pet. at 20-21. When the Reconstruction Congress attempted to remedy these injustices through the Fourteenth Amendment, the Freedmen's Bureau, and the Civil Rights Act, it did so with the clear understanding that an "indispensable" "safeguard[] of liberty . . . under the Constitution" is a man's "right to bear arms for the defense of himself and family and his homestead." *Heller*, 128 S. Ct. at 2811 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866)).

The common thread in these transformative events in our Nation's history was the fundamental importance of the right to keep and bear arms as the ultimate guarantor of all the other liberties enjoyed by Americans. The source of the threat to liberty shifted from the British Crown during the Founding to oppressive local governments in the post-Civil War era, but the cure remained the same: protection of the individual right to keep and bear arms, arising from the natural right of self-preservation and the right of "resistance . . . to the violence of oppression." WILLIAM BLACKSTONE, 1 COMMENTARIES 139 (Legal Classics Library 1983) (1765).

As history has proven, the right to bear arms provides the foundational bulwark against the deprivation of all our other rights and privileges as Americans—including rights that have already been incorporated against the States by this Court. Accordingly, the Court should grant the petitions and hold that the Second Amendment also secures a "fundamental" right that can no more be abrogated by local government than by the federal government.

STATEMENT

1. Petitioners challenge the constitutionality of two local handgun bans. The City of Chicago's Municipal Code prohibits possession of unregistered firearms. CHICAGO, ILL., MUN. CODE § 8-20-040(a). The code also provides that no registration certificates will be issued for handguns. *Id.* § 8-20-050(c). If a handgun owner in Chicago does not have a registration certificate, it is "presumptive evidence that he is not authorized to

possess such firearm" and "shall also be cause for the confiscation of such firearms." *Id.* § 8-20-150.

The Village of Oak Park, Illinois, also prohibits possession of handguns. Specifically, the Oak Park Municipal Code provides: "It shall be unlawful for any person to possess or carry, or for any reason to permit another to possess or carry on his/her land or in his/her place of business any firearm." OAK PARK, ILL., MUN. CODE § 27-2-1. The Code defines firearms to include "pistols, revolvers, guns, and small arms of a size and character that may be concealed on or about the person, commonly known as handguns." *Id.* § 27-1-1. As the court of appeals noted, the Chicago and Oak Park firearms ordinances effectively "ban the possession of most handguns." Pet. App. 1.[3]

2. Petitioners include individuals who have attempted to register handguns in Chicago and have been denied because of the ban, *see McDonald* Pet. at 5; Pet. App. 34-45; individuals who own handguns but must store them outside these jurisdictions, *see NRA* Pet. at 3; and individuals who wish to obtain handguns but have been chilled from doing so as a result of the Chicago and Oak Park handgun prohibitions, *see id.* All Petitioners wish to own handguns for lawful and reasonable purposes of self-defense. For example, as the complaint filed in *McDonald* recounts, Otis McDonald, a community activist, lives in a high-crime Chicago neighborhood. His efforts to make his neighborhood a

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3. Citations to "Pet. App.__" refer to the appendix to the petition filed in No. 08-1521, *Otis McDonald, et al. v. City of Chicago, Illinois.*

better place to live have subjected him to violent threats from drug dealers, and he wishes to own a handgun for self-protection.[4] Similarly, Colleen Lawson is a Chicago resident whose home has been targeted by burglars. She too would like to own a handgun for self-defense.[5]

Petitioners filed lawsuits in federal district court challenging the validity of the Chicago and Oak Park ordinances under the Second Amendment. Pet. App. 11-13, 17-18. The district court held that Petitioners' claims were foreclosed by circuit precedent upholding the constitutionality of handgun bans and rejecting the argument that the Second Amendment applies to the States. Pet. App. 13-14, 17-18 (citing *Quilici v. Village of Morton Grove*, 695 F.3d 261 (7th Cir. 1982)).

The court of appeals concluded that it was bound by both this Court's precedent and circuit precedent holding that the Second Amendment is not incorporated against the States. Pet. App. 2-4. The court of appeals noted that in *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894), this Court held that the Second Amendment applies only to the federal government, a holding later adopted by the court of appeals in *Quilici*. Pet. App. 2-3. Based on this precedent, the court of appeals affirmed the district court's decision dismissing Petitioners' Second Amendment challenges. Pet. App. 2-4, 9-10.

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4. *See McDonald* Petitioners' Complaint, at 1-2, *available at* http://www.chicagoguncase.com/wpcontent/uploads/2008/06/com-plaint.pdf (last visited June 29, 2009).

5. *See id.*

DISCUSSION

I. THE PETITIONS PRESENT AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW ON WHICH THERE IS A SPLIT AMONG THE LOWER COURTS.

In *Heller*, the Court confirmed that the Second Amendment "confer[s] an individual right to keep and bear arms." 128 S. Ct. at 2799. It still remains to be seen, however, whether this right will be realized in practice by millions of Americans nationwide.

If the Second Amendment applies exclusively to the federal government, many Americans may find their constitutional right to arms severely compromised or entirely abrogated by local regulations. Indeed, that is precisely what has occurred here. Petitioners' Second Amendment rights are effectively nullified by the Chicago and Oak Park firearms prohibitions—no less so than if the federal government imposed the very same ban, as occurred in *Heller*.

The similarities between the ban invalidated in *Heller* and those upheld by the court of appeals below are striking. For one, like the ordinances at issue in *Heller*, the Chicago and Oak Park regulations "totally ban[] handgun possession." *Id.* at 2817. These municipalities have thus accomplished precisely what *Heller* forbade the District of Columbia from doing: Each has enacted a handgun ban that "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." *Id.* Further, as in *Heller*, the prohibitions at issue here extend to the home, "where the need for defense of self, family, and property is most acute." *Id.*

Accordingly, all of the Second Amendment concerns expressed by the Court in *Heller* apply equally here. And if the court of appeals decision stands, the right to arms of the *McDonald* and *NRA* Petitioners—and the nearly three million residents of the third largest city in the United States—will be effectively nullified by the very same type of firearms prohibition that the Court rejected in *Heller*. The practical implications of the decision below argue strongly for this Court's review.

Contrary to the decision below, Pet. App. 2-4, the issue of Second Amendment incorporation has not been entirely resolved by the Court's earlier decisions. To be sure, this Court held in *Cruikshank* that the Second Amendment does not, by its own force, apply to the States. 92 U.S. at 553; *see also Miller*, 153 U.S. at 538 (concluding that the Second and Fourth Amendments "operate only upon the federal power"); *Presser*, 116 U.S. at 265 (concluding that the Second Amendment "is a limitation only upon the power of Congress and the national government, and not upon that of the State"). But when *Cruikshank* and its progeny were decided, the same was true of the Bill of Rights in its entirety; all of these decisions pre-dated the Court's adoption of the doctrine of selective incorporation. Under that doctrine, developed through a series of decisions over the last century, the Court has made clear that "fundamental" individual rights found in the first eight amendments to the Constitution are applicable to the States through the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Duncan*, 391 U.S. 145 (right to criminal jury); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against compelled self-incrimination); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause). Indeed, the

Court specifically noted this fact in *Heller*, stating that, in determining that the Second Amendment did not apply to the States, *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S. Ct. at 2813 n.23.

Moreover, the selective incorporation question presented in this case was not ripe until now because, until *Heller* was decided, it was not established that the Second Amendment actually secured an individual right to keep and bear arms. In the wake of *Heller*, the question of incorporation has assumed great importance for the States, as reflected by the filing of this amicus brief. It has also generated conflict among the lower courts. The Seventh Circuit and the Second Circuit have held that the Second Amendment applies only to the federal government. *See Nat'l Rifle Assoc. of Am., Inc. v. City of Chicago*, Nos. 08-4241, 08-4243, 08-4244, 2009 WL 1515443, at *1 (7th Cir. June 2, 2009); *Maloney v. Cuomo*, 554 F.3d 56, 58-59 (2d Cir. 2009). Several state courts have reached the same conclusion. *See, e.g.*, *State v. Turnbull*, No. A08-0532, 2009 WL 1515301, at *2 (Minn. Ct. App. June 2, 2009); *People v. Flores*, 86 Cal. Rptr. 3d 804, 806-07 & n.4 (Cal. Ct. App. 2008). By contrast, the Ninth Circuit has concluded that the Second Amendment applies to the States through the Due Process Clause. *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009).

This split of authority, encompassing both federal and state courts across the country, including the nation's three largest population centers, on a matter of great importance to the States, is now ripe for review. The Court should therefore grant the petitions so that it can

"engage in the sort of Fourteenth Amendment inquiry required by [its] later cases," *Heller*, 128 S. Ct. at 2813 n.23, and provide needed guidance to the lower courts as to whether the Second Amendment applies to the States.

II. THE COURT SHOULD REVERSE THE COURT OF APPEALS AND HOLD THAT THE SECOND AMENDMENT APPLIES TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

A. The Due Process Clause Incorporates "Fundamental" Rights.

The Due Process Clause of the Fourteenth Amendment bars "any State [from] depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Court has recognized that this Clause "guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). Rather, due process also encompasses "fundamental" rights. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

The doctrine of selective incorporation is premised on the Court's conclusion that any "fundamental right" listed in the Bill of Rights "is made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403 (1965). Applying this doctrine in a series of decisions over the last century, the Court has held that the Due Process Clause of the Fourteenth

Amendment incorporates most of the Bill of Rights against the States.[6]

In the doctrine's initial formulation, as expressed in *Palko v. Connecticut*, 302 U.S. 319 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969), the Due Process Clause incorporated against the States only those rights "implicit in the concept of ordered liberty." *Id.* at 325. The analysis has since been refined to focus on the Anglo-American historical background of the right. The incorporation inquiry now turns on whether a right is "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14. Applying this test in *Duncan* to determine that the Sixth Amendment right to jury trial in criminal cases applied to the States, the Court reviewed the history of the right in English law, as well as its place in the Founding era. *See id.* at 151-54. The Court also reviewed the current state systems for criminal trials, noting that every State "uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict." *Id.* at 149 n.14. Because the Second Amendment also secures a fundamental right with a well-established and necessary place in the Anglo-American regime of ordered liberty, it too applies to the States.

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6. *See, e.g.*, *Schilb v. Kuebel*, 404 U.S. 357 (1971) (Excessive Bail Clause); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Speedy Trial Clause); *Pointer*, 380 U.S. 400 (Confrontation Clause); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (free assembly); *Gitlou v. New York*, 268 U.S. 652 (1925) (free speech).

B. The Right to Keep and Bear Arms Was Considered "Fundamental" Under English Law and During the Founding Era.

As the Court observed in *Heller*, "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." 128 S. Ct. at 2798. In reaching this conclusion, the Court cited Blackstone, "whose works, we have said, 'constituted the preeminent authority on English law for the founding generation.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)). Blackstone explained that "having" arms was among the five basic rights of every Englishman, those rights which secured the "primary rights" of each individual. WILLIAM BLACKSTONE, 1 COMMENTARIES 136, 139 (Legal Classics Library 1983) (1765). Indeed, Blackstone saw the right to bear arms as a natural right because it arose from the natural right of self-preservation, and the right of "resistance . . . to the violence of oppression." *Id.* at 139. And as *Heller* also noted, Blackstone's view was shared by his contemporaries. 128 S. Ct. at 2798 (citing several eighteenth century authorities). The right to arms recognized by Blackstone was also part of the English Declaration of Right (codified as the English Bill of Rights) of 1689, the relevant portion of which "has long been understood to be the predecessor to our Second Amendment." *Id.*

The American colonists likewise viewed the right to arms as fundamental, derivative of their rights as Englishmen. During the 1760s and 1770s, as relations between the colonists and the British Crown deteriorated, King George III "began to disarm the inhabitants of the most rebellious areas." *Id.* at 2799. This forced disarmament "provoked polemical reactions

by Americans invoking their rights as Englishmen to keep arms." *Id.* Indeed, the right to keep and bear arms must have been nothing less than "fundamental" to colonists faced with the prospect of a prolonged struggle against the most accomplished standing military force in the eighteenth century. JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 6 (2000) ("Taken together, the British army and navy constituted the most powerful military force in the world, destined in the course of the succeeding century to defeat all national competitors for its claim as the first hegemonic power of the modern era."). "For the colonists, the importance of the right to bear arms 'was not merely speculative theory. It was the lived experience of the [] age.'" *Nordyke*, 563 F.3d at 453 (quoting AKHIL REED AMAR, THE BILL OF RIGHTS 47 (1998)).

Given the colonists' experience before and during the Revolutionary War, it is unsurprising that "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right [to keep and bear arms] and declares only that it 'shall not be infringed.'" *Heller*, 128 S. Ct. at 2797. The Framers were well aware of the central importance of this right, recognizing "the advantage of being armed, which the Americans possess over the people of almost every other nation." THE FEDERALIST NO. 46, at 296 (James Madison) (Clinton Rossiter ed., 1961).

The Framers also understood that the right to arms was essential to preserving all the other "fundamental" liberties enjoyed by the American people. Alexander Hamilton articulated this understanding in his Federalist No. 29:

> [I]f circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people, while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens.

THE FEDERALIST NO. 29, at 145 (Alexander Hamilton) (G. Carey & J. McClellan eds., 1990).

Finally, the actions of the States themselves during the Founding era establish that they too viewed the right to keep and bear arms as "fundamental." *See* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT 126-69 (2008) (State-by-State analysis). For example, after the adoption of the Declaration of Independence in 1776, several of the colonies adopted written constitutions of their own. The constitutions of Massachusetts, Pennsylvania, North Carolina, and Vermont all included provisions that guaranteed the right to bear arms. MASS. CONST. pt. 1, art. 17; PA. CONST. of 1776, DECLARATION OF RIGHTS, cl. 13; N.C. CONST. of 1776, DECLARATION OF RIGHTS § XVII; VT. CONST. of 1777, ch. 1, art. XV. And when the States voted on the ratification of the Constitution, several of them recommended amendments securing the right to keep and bear arms. 4 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 912 (1980) (noting that New Hampshire, New York, North Carolina, Rhode Island, and Virginia recommended including a provision on the right to keep and bear arms); *see also* 1 ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION 326-28 (Jonathan Elliott ed., 1859).

The States' understanding of the fundamental nature of the right to arms was further demonstrated in the decades after the adoption of the Constitution. As the Nation admitted more States to the Union, the right to keep and bear arms was recognized by a growing number of state constitutions. By 1868, twenty-two state constitutions explicitly guaranteed a right to bear arms. *See* App. The judicial opinions of state courts during this time also consistently recognized the importance of the right to arms. *See, e.g.*, *Cockrum v. State*, 24 Tex. 394, 401-02 (1859) ("The right of a citizen to bear arms, in the lawful defence of himself . . . is absolute . . . . A law cannot be passed to infringe upon it or impair it . . . ."); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (the right to bear arms is "calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations"); *Nunn v. State*, 1 Ga. 243, 251 (1846) (stating that the right to keep and bear arms protects the "*natural* right of self-defence" and that the Second Amendment secured a right "originally belonging to our forefathers, trampled under foot by Charles I and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta*!").

In sum, the historical record, much of it detailed by this Court in *Heller*, demonstrates that the right to keep and bear arms was understood as a fundamental right of English subjects at the time of the Founding. Throughout this period the Framers, and Americans generally, considered the right to arms to be essential to

preserving the other "fundamental" liberties enjoyed by our citizens at the birth of the Nation.

C. The Right to Keep and Bear Arms Was Considered "Fundamental" at the Time the Fourteenth Amendment Was Adopted, and It Remains So to This Day.

As it was during the Founding era and in the succeeding decades leading up to the Civil War, the right to keep and bear arms continued to be considered "fundamental" at the time the Fourteenth Amendment was adopted. The Court described this period in *Heller*, noting that, "[i]n the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly freed slaves." 128 S. Ct. at 2809-10. A significant concern in these debates was the disarming of newly freed African-Americans in the Southern States by statute as well as by vigilantism. *See id.* at 2810 (citing generally STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998)).

The Framers of the Fourteenth Amendment acted to end these oppressions, which included the drafting of the Amendment itself, as well as the passage of the Freedmen's Bureau Acts and the Civil Rights Act of 1866. A prominent constitutional scholar has noted that "[o]ne of the core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances" of African-American citizens who had been stripped of their arms and subjected to violent attacks, and to "affirm the full and equal right of every citizen to

self-defense." AMAR, *supra*, at 264. Indeed, "more evidence exists that the framers of the Fourteenth Amendment intended to protect the right to keep and bear arms from state infringement than exists for any other Bill of Rights guarantee." HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 188.

The debates of the Thirty-Ninth Congress, which drafted the Fourteenth Amendment, are replete with evidence that the Second Amendment was considered a fundamental right. For example, Senator Pomeroy listed among the "indispensable" "safeguards of liberty" one's "right to bear arms for the defense of himself and family and his homestead." CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866), *quoted in Heller*, 128 S. Ct. at 2811. Similarly, Representative Roswell Hart listed "the right of the people to keep and bear arms" as inherent in a "republican government." CONG. GLOBE, 39th Cong., 1st Sess. 1629 (1866). In fact, even the opponents of these Reconstruction measures acknowledged that the right to keep and bear arms was fundamental; they disagreed only as to whom that right extended and whether the federal government should enforce it. *See, e.g.*, *id.* at 371 (statement of Sen. Davis) (objecting to the Freedmen's Bureau bill but agreeing that the Founding Fathers "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense"); *Id.* at 914-15 (Sen. Saulsbury) (objecting to a bill to disband white southern militias, arguing that such a measure by Congress would violate the Second Amendment).

The results of these debates further confirm the critical importance of the Second Amendment in the

Reconstruction period. The Freedmen's Bureau bill specifically declared that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens." Act of July 16, 1866, ch. 200, sec. 14, 14 Stat. 173, 176 (1866) (emphasis added). Notably, the same two-thirds-plus members of Congress who voted for the proposed Fourteenth Amendment also voted for this language in the Freedmen's Bureau bill. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 42. "No other guarantee in the Bill of Rights was the subject of this official approval by the same Congress that passed the Fourteenth Amendment." *Id.*

The state constitutions adopted during the Reconstruction period, including those adopted by States that had joined the Confederacy, likewise demonstrate that the right to arms was considered fundamental by the States that ratified the Fourteenth Amendment. *See, e.g.*, ARK. CONST. of 1868, art. II, § 5 ("The citizens of this state shall have the right to keep and bear arms for their common defense."); MISS. CONST. of 1868, art. I, § 15 ("All persons shall have a right to keep and bear arms for their defence."); TEX. CONST. of 1869, art. I, § 13 ("Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State . . . .").

In sum, at the time the Fourteenth Amendment was drafted and ratified, as during the Founding era, the right to keep and bear arms remained central to the American conception of liberty. The post-Civil War disarmament of the freed slaves in the Southern States—followed swiftly by the deprivation of other basic

liberties—powerfully demonstrated that the Second Amendment preserves a right essential to securing all the other rights and privileges of free citizens. The Fourteenth Amendment, Freedmen's Bureau Acts and Civil Rights Act, designed to remedy these injustices, were predicated on the recognition that the right to arms is "fundamental."

Events since the adoption of the Fourteenth Amendment further confirm that the right to arms remains of central importance to the States. Now 44 state constitutions expressly secure an arms-bearing right,[7] and the legislatures of all 50 States uniformly reject bans on private handgun ownership. Every State in the Union permits private handgun ownership. *See* App. In *Heller*, thirty-two States submitted an amicus brief to the Court arguing that the Second Amendment secures a "fundamental" right that is "properly subject to incorporation." Brief for the State of Texas et al. as Amici Curiae Supporting Respondent, at 23 n.6, *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). Finally, the submission of this amicus brief provides further evidence of the States' understanding of the

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7. In addition to the 44 States that expressly protect a right to bear arms in their constitutions, three other States protect a right to self-defense and defense of property. CAL. CONST. art. I, § 1 (originally adopted in 1849); IOWA CONST. art. I, § 1 (originally adopted in 1846); N.J. CONST. art. I, ¶ 1 (originally adopted in 1844). As the Court has noted, "the inherent right of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2817. Only Maryland, Minnesota, and New York have neither guarantee in their state constitutions.

fundamental importance of the arms-bearing right guaranteed by the Second Amendment.

III. THE FEDERALISM CONCERNS INVOKED BY THE COURT OF APPEALS ARE MISPLACED.

The decision below that the Second Amendment does not apply to the States was based in part on the court's reasoning that incorporation would raise federalism concerns. *See Nat'l Rifle Assoc.*, 2009 WL 1515443, at *3-4. But those concerns are misplaced and do not justify applying the Second Amendment to only the *federal government*.

The lower court's federalism concerns start off on the wrong foot. The court begins by observing that, because "[o]ne function of the second amendment is to prevent the national government from interfering with state militias," incorporation could implicate problematic federal interference with state decisions on what weapons "best serve the public interest in an effective militia." *Id.* at *3. But this premise mistakenly presumes that the Second Amendment is, in part, a federalism provision. *Heller* expressly rejected the argument that the Second Amendment addressed any concern about federal control over state militias. As the Court explained, "[t]he Second Amendment right, protecting *only* individuals' liberty to keep and carry arms, did nothing to assuage Antifederalists' concerns about federal control of the militia." 128 S. Ct. at 2804 (emphasis added). The Founders sought to address their fear of federal abolition of state militias not through the Second Amendment, but "in separate structural provisions that would have given the States concurrent and seemingly nonpre-emptible authority to organize,

discipline, and arm the militia when the Federal Government failed to do so." *Id.*

The court of appeals further suggests that incorporation may be incorrect because "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." *Nat'l Rifle Assoc.*, 2009 WL 1515443, at *4. To be sure, amici States agree that "[i]t is one of the happy incidents of the federal system" that each State may "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (cited in *Nat'l Rifle Assoc.*, 2009 WL 1515443, at *4). But the discretion of state and local governments to explore legislative and regulatory initiatives does not include "the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights." *Pointer*, 380 U.S. at 413 (Goldberg, J., concurring). As the Court stated in *Heller*, "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 128 S. Ct. at 2821. Just as local governments cannot constitutionally act as "laboratories" for initiatives to abrogate their citizens' right to free speech or their freedom from unreasonable searches and seizures, nor can they nullify the fundamental right to keep and bear arms secured by the Second Amendment.

State and local experimentation with reasonable firearms regulations will continue under the Second

Amendment. As noted in *Heller*, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 2816. Many firearms regulations would plainly survive Second Amendment scrutiny, such as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2816-17. For example, in *Nordyke*, the Ninth Circuit applied the Second Amendment to the States, but nonetheless upheld an Alameda County, California ordinance prohibiting firearms on county property. 563 F.3d at 457, 460.

As "independent sovereigns in our federal system," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), the amici States are particularly concerned when the Court engages in constitutional or statutory interpretation that implicates federalism issues. The incorporation of the Second Amendment presents no such concerns. Denying local governments the power to nullify the Amendment will not increase federal power, mandate any state action pursuant to federal directives, or preclude reasonable state and local regulation of firearms. It will simply prevent local governments, like the federal government, from abrogating the fundamental, individual right to keep and bear arms.

CONCLUSION

The petitions should be granted.

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