No. 08-1521

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2009

OTIS McDONALD, ADAM ORLOV, COLLEEN LAWSON,
DAVID LAWSON, SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,
Petitioners,

v.

CITY OF CHICAGO AND VILLAGE OF OAK PARK,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

RESPONSE TO MOTION BY TEXAS AND 37 STATES TO PARTICIPATE IN ORAL ARGUMENT AND FOR DIVIDED ARGUMENT

Texas and 37 other States have filed a brief as *amici curiae* in support of petitioners to urge the Court to incorporate the Second Amendment, thereby restricting the legislative prerogatives of state and local governments. These States now seek to participate in oral argument, relying on their status "[a]s sovereign governmental entities." Motion at 2. Respondents, the City of Chicago and the Village of Oak Park, take no position on whether the Court should grant the motion. Respondents do object to certain statements in the motion and file this response to correct them.

1. This case arose from a challenge by petitioners to the constitutionality of Chicago's prohibition on the possession of handguns within the city limits unless those weapons were properly registered before 1982 and continuously thereafter. Petitioners are individuals who wish to possess handguns and organizations that oppose restrictions like Chicago's ordinance. To that end, they ask the Court to apply the Second Amendment to the States by incorporating it into the Privileges or Immunities Clause or the Due Process Clause of the Fourteenth Amendment.

2. Texas notes that 44 States have constitutional provisions that protect the right to keep and bear arms. See Motion at 2. While that is true, not one of those is at issue in this case. Insofar as Texas and the States that have joined it seek to enforce their own state constitutional provisions, respondents accept – indeed, endorse – their ability to do so. The decision in this case will not provide support for those provisions; it could serve (if petitioners prevail) only to invalidate firearms regulations that are otherwise lawful under state law. Indeed, because the scope of permissible firearms regulation under the Second Amendment is not yet clear (see *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008)), incorporation of the Second Amendment could lead to the invalidation of laws that Texas and its co-signers currently have, and it could limit the prerogatives of all States to regulate firearms in the future. Thus, what these States seem to mean by the interests of "sovereign governmental bodies" (Motion at 2) is the right to determine the sovereign choices of *other* States – or, even, if petitioners are ultimately successful in this case, to override the choices of their own citizens.

3. Texas also claims that "the legislatures of all 50 States are united in their rejection of bans on the possession of handguns." Motion at 2. This is incorrect. It is settled as a matter of Illinois law that local governments have inherent home-rule authority to ban handguns. See *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 273-77 (1984). Other States may grant similar authority to local governments. We have been informed that the State of Illinois intends to file a brief as *amicus curiae* in support of respondents, demonstrating its belief that regulation of firearms should remain with the States and, to the extent permitted under state law, local governments. Other States may join the *amicus* brief of the State of Illinois. The State of Texas does not speak for all of the States in this case.

4. Texas asserts its "strong interests in crime prevention." Motion at 2. But only under the position of respondents, not petitioners, are Texas and the other States free to regulate firearms as appropriate in light of local conditions and in the interest of crime

prevention or other goals. Petitioners' argument, supported here by Texas, would strip significant regulatory authority from the States and put others in charge of what is "reasonable state and local regulation." *Id.* at 3.

5. Texas contends that "[u]nless the ruling of the court of appeals is reversed, millions of Americans will be deprived of their constitutional right to keep and bear arms as a result of actions by local governments, such as the ordinances challenged in this case." Motion at 2. In fact, Texas is explicit that it wishes to "[d]en[y] local governments" what it terms "the power to nullify the Amendment." *Id.* at 3. But the "actions by local governments" to which Texas refers are authorized by state law. The people of each State already have the power to use state law to limit or control the actions of local governments in their States. No ruling from this Court is required for that. Instead, this case would serve (if petitioners prevail) only to limit the ability of States to control their local governments, because it would limit the ability of States to authorize or allow their local governments to institute some forms of firearm regulation. By contrast, it offends no sovereign interest of Texas or any other State that Illinois and other States allow their local governments to regulate arms differently, based on local conditions and local ideas about the best means for preventing violence, crime, and accidental injury.

6. Texas notes that the Court has granted motions in other cases in which the States have "independent interests." Motion at 1. That, too, does not describe this case, since the States do not identify any interest that petitioners do not also forcefully press. Moreover, Texas's claim that it and the 37 States signing its brief "have a substantial interest in ensuring that [constitutional] rights are accorded their proper scope" (*id.* at 2) could be advanced in every case involving a constitutional right.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I certify that all parties required to be served have been served with a copy of the response to motion for leave to participate in oral argument and for divided argument, filed in the above entitled case on December 22, 2009. Proper first class postage was affixed to each properly addressed envelope to the following:

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