No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD ET AL.,
Petitioners,
v.
CITY OF CHICAGO ET AL.,
Respondents.

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

REPLY BRIEF FOR RESPONDENTS THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. ET AL. IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Respondent National Rifle Association of America, Inc. ("NRA"), is a corporation which has no parent corporation. No publicly held company owns 10% or more of the corporation's stock.

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Two Terms ago, this Court analyzed at great length the history and scope of the Second Amendment, concluding that it had "no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *District of Columbia* v. *Heller*, 218 S. Ct. 2783, 2799 (2008). The only question presented by this case is whether the same right to keep and bear arms described in *Heller* applies against the States via incorporation into the Fourteenth Amendment.

Despite the limited scope of this case, Respondents devote much of their brief ("Resp. Br.") to two tasks: (1) revisiting the history of the Second Amendment in an apparent attempt to convince this Court to reconsider *Heller*; and (2) arguing that courts should apply only a weak "reasonableness" standard when reviewing state and local laws—an analysis that is only necessary if the Second Amendment is incorporated in the first place. In advancing these arguments—which are irrelevant to the question presented and meritless—Respondents only underscore the extent to which the decision in *Heller* foreordained incorporation of the Second Amendment.[1]

[1] It is noteworthy that the Brady Center and the NAACP Legal Defense and Education Fund—two of the principal amici that submitted briefs in *Heller* arguing against recognition of an individual right to keep and bear arms—have submitted briefs in this case arguing not against incorporation of the right, but in favor of particular contours for the right on the assumption that it will be incorporated. See generally Brief for Amici Curiae Brady Center to Prevent Gun Violence, et al., in Support of Neither Party; Brief of Amicus Curiae NAACP Legal Defense and Education Fund in Support of Neither Party.

As an initial matter, Respondents' attempt to marginalize the right to keep and bear arms by declaring that "the purpose" of the Second Amendment was "to protect the militia rather than to further a fundamental aspect of personal liberty," Resp. Br. 36, was already rejected in *Heller*. *Heller* declared that, far from being exclusively "tie[d] * * * to militia or military service," the right codified by the Second Amendment was predicated upon " 'the natural right of resistance and self-preservation.' " 128 S. Ct. at 2798 (citing 1 Blackstone 139 (1765)). Indeed, *Heller* concluded that "self-defense * * * was the *central component* of the right itself," not merely a " 'subsidiary interest.' " 128 S. Ct. at 2801 (quoting Justice Breyer's dissent at 2841). Respondents' analysis of the Framing-era history of the Second Amendment, see Resp. Br. 31–37, which includes recasting the Second Amendment as tied to militia service, is nothing more than a naked attempt to relitigate *Heller*. The time for a rehearing petition in *Heller*, however, has long since expired.

This case, like *Heller*, also does not present an occasion on which to decide the standard of review to be applied in analyzing laws touching on the right to keep and bear arms. The ruling below rested exclusively on the holding that the right to keep and bear arms has *not yet* been incorporated against the States, and the only question presented in this case is whether it should be. The standard of review issue is not part of the question presented and is not fairly included within that question. Even if it were, the handgun bans at issue in this case are substantively identical to the ban in *Heller*, which the Court struck down while pointedly declining to identify a standard of review with precision. See 128 S. Ct. at 2817–18 ("Under any of the standards of scrutiny that we

have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster" (internal quotation marks and citation omitted)). Thus, to the extent the Second Amendment is incorporated, *Heller* dictates the demise of the bans at issue here without the need to settle upon a comprehensive standard of review.[2]

When Respondents actually argue against incorporation, they present little more than a series of *non sequiturs* and faulty logic. Respondents argue that the Second Amendment, alone among the enumerated substantive rights, should be subject to unfettered "experimentation" by the States, an argument without precedent or principle. They argue for a definition of "ordered liberty" that better describes a police state than our Republic. They focus on purported social science evidence concerning handgun violence, overlooking not only that Chicago's ban has been in place—and failing—since 1982, but also the widespread use of handguns by law-abiding citizens in other jurisdictions to prevent and deter violence. They ask the Court to look to handgun regulations in England and other common-law countries, notwithstanding that it was English efforts to disarm the colonists that provided the immediate spark to the Revolution. And they provide no answer to the argument that even if *Slaughterhouse* is not overruled the right to keep and bear arms should still be deemed a privilege and immunity of national citizenship.

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[2] The decision by the United States, which surely has an interest in the standard of review, not to participate in this case underscores that the issue is not properly presented.

For the reasons set forth below, and in the opening brief of the Respondents in Support of Petitioners ("NRA Br."), the Second Amendment must be incorporated into the Fourteenth Amendment.

ARGUMENT

I. Respondents' Historical Arguments Are Meritless.

Respondents look to history in arguing that the Second Amendment should not be incorporated into the Due Process Clause of the Fourteenth Amendment. See Resp. Br. 31–37. They first look, however, to the wrong history, focusing on the adoption of the Second Amendment during the Framing rather than the adoption of the Fourteenth Amendment during Reconstruction. They then compound that error by drawing the wrong lessons from the Framing-era history. When Respondents eventually consider the Reconstruction-era history (in the course of discussing the Privileges or Immunities Clause), they paint an inaccurate historical portrait.

1. Respondents' principal historical argument against incorporation is their theory that the Second Amendment was intended only to protect the right of States to field militias, not to protect an individual right to keep and bear arms. See Resp. Br. at 31–37. This argument is irreconcilable with *Heller* and wrong for at least three reasons.

First, Respondents' argument looks at the wrong history. This Court's incorporation precedents exploring the scope of the Fourteenth Amendment quite naturally and consistently look to

Reconstruction-era history for assistance in determining whether to incorporate a right. See, *e.g.*, *Adamson* v. *California*, 332 U.S. 46, 71 (1947) (deciding the question whether to incorporate the 5th Amendment by looking to a "study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage"); *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226, 239–40 (1897) (interpreting the meaning of the Due Process Clause of the Fourteenth Amendment by looking at "the meaning and scope of the Fourteenth Amendment," and citing treatises from the 1860s). Particularly with respect to the right to keep and bear arms in the face of state laws, much had changed between the Framing and Reconstruction. Among other developments, the nation had a fresh appreciation for the risk posed by States to the keeping and bearing of arms, as exemplified by the efforts of some States to disarm the Freedmen. See Brief for Amici Curiae Senator Kay Bailey Hutchinson, et al., in Support of Petitioners at 14–15 (hereinafter "309 U.S. Senators and Representatives Br."). As explained in the opening briefs of Petitioners and Respondents in Support of Petitioners, this Reconstruction-era history firmly supports incorporation of the Second Amendment. See NRA Br. at 10–21.

Second, Respondents' characterization of the Second Amendment's history as supporting only a "militia right" and not a right to self defense, Resp. Br. at 31–40, was flatly rejected in *Heller* when it was put forward in support of the substantively identical "collective right" position. The Court in *Heller* dispatched the argument that the Second

Amendment right to keep and bear arms is "tie[d] * * * to militia or military service." 128 S. Ct. at 2798. Instead, the Court explained that the right codified by the Second Amendment was predicated upon " 'the natural right of resistance and self-preservation.' " *Ibid.* (citing 1 Blackstone 139 (1765)). Indeed, *Heller* concluded that "self-defense * * * was the *central component* of the right itself," not merely a " 'subsidiary interest.' " 128 S. Ct. at 2801 (quoting Justice Breyer's dissent at 2841).

Third, and also in response to the Seventh Circuit's ruminations on federalism, see *infra* at 12–18, Respondents appear to forget that, as a result of the First Militia Clause of the Constitution, the militia serves not only as a check on, but also as a resource for, the national government. See U.S. Const., Art. I, Sec. 8, Cl. 15 ("The Congress shall have the power * * * to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions."). The most direct threat to the militia is disarmament of the people, and the best bulwark against disarmament is protection of an individual right. Therefore, even assuming that the right to keep and bear arms is inextricably tied to the militia (which it is not), such linkage *still* supports finding a right enforceable against the States.

In fact, with an eye on the First Militia Clause, the Court long ago explained in *Presser* v. *Illinois* that "the states cannot * * * prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government." 116 U.S. 252, 265 (1886); see also NRA

Br. at 42–43; 309 U.S. Senators and Representatives Br. at 16–18. That is because, as this Court explained in *Heller*, an individual accustomed to bearing arms through everyday ownership and use will be a more effective soldier when called into duty by the Federal government (whether as part of the militia, the volunteer military, or in a draft) than an individual who is shackled by law from acquiring such experience:

> [The Georgia Supreme Court in *Nunn* v. *State*, 1 Ga. 243 (1846)] perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right:
>
> > "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State."

128 S. Ct. at 2809; see also *id.* at 2811 ("Cooley understood the right not as connected to militia service, but as securing the militia by ensuring a populace familiar with arms * * *."); *id.* at 2809 (right to keep and 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.' " (quoting *State* v. *Chandler*, 5 La.

Ann. 489, 490 (1850))). Congress has, unsurprisingly, repeatedly acted to protect and encourage the right to keep and bear arms. See 309 U.S. Senators and Representatives Br. at 28–33.

The cases quoted at length in *Heller* make clear the importance of everyday private ownership and private use of arms to the national government. And *Presser* confirms that no individual State can decide for itself that widespread familiarity with arms through the everyday possession and use of certain classes of arms is not of value.[3] The notion that there should be no limits under the federal Constitution on the ability of States to "experiment" in an area so vital to our free national government finds no support in logic or experience. Thus, even if the right to keep and bear arms were exclusively tied to the militia, which it is not, incorporation of the right into the Fourteenth Amendment would still be dictated.

2. Once Respondents turn to Reconstruction-era history, they argue that such history does not reflect an intention to protect the right to keep and bear arms, but only an intention to prevent discrimination against the Freedmen in their exercise of that right. Resp. Br. 62–70. In Respondents' telling, the only vice of the infamous Black Codes was that their deprivations did not apply to everyone equally. That blinks reality.

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[3] Nor, under the Second Amendment and *Heller*, may Congress restrict the full exercise of Second Amendment rights. The Second Amendment and the Fourteenth Amendment thus work hand in hand to preserve our free and federal form of government.

As an initial matter, Respondents' argument that Reconstruction concerned only equality and not substance would, if accepted, require rejection of this Court's Incorporation doctrine *in toto*. After all, state governments are not allowed *carte blanche* to restrict free speech and the free exercise of religion so long as they do so equally. They cannot engage in unreasonable searches and seizures on the condition that bias does not enter the picture. And there is a reason that the Bill of Rights has been incorporated through the Fourteenth Amendment's Due Process Clause and not its Equal Protection Clause. Respondents' argument, therefore, that there was "*no* incorporationist understanding" in the States, and that contemporaneous public statements did not show "whether the first eight Amendments were to be made applicable to the States or not," Resp. Br. 70 (emphasis added), proves either nothing or far too much. Respondents provide no basis for singling out the Second Amendment's right to keep and bear arms as the only enumerated right for which non-discrimination by state governments is the only Constitutional imperative.

Moreover, Respondents' argument does not comport with the historical record. Examples of the Reconstruction-era understanding that the Fourteenth Amendment protected not only equality but substantive rights are legion. For instance, the Freedmen's Bureau Act protected the "*full* and equal benefit" of laws for "personal liberty" and "personal security," "including the constitutional right to bear arms." § 14, 14 Stat. 173, 176–77 (1866) (emphasis added). The Civil Rights Act of 1866 likewise protected the "*full* and equal benefit" of laws "for the security of person and property." § 1, 14 Stat. 27 (1866) (emphasis added). The use of the word "full"

in addition to "equal" belies Respondents' claim that the enactments protected only equality. As yet another example, while Respondents quote Rep. Henry Raymond on "equality of rights," Resp. Br. at 64, they ignore his statement that, as a citizen, the African American has "a right to defend himself and his wife and children; a right to bear arms * * *." Cong. Globe, 39th Cong., 1st Sess. 1266 (1866).

Of the petition of South Carolina Freedmen complaining that they were prohibited from firearms possession, Respondents claim that there was "no hint that an equality requirement would not suffice." Resp. Br. 75–76. But Sen. Charles Sumner said that Freedmen "should have the constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press"—not that they could be equally deprived of these rights. Cong. Globe, 39th Cong., 1st Sess. 337 (1866). Nor would Sen. Henry Wilson's concern that state forces were "visiting the freedmen, disarming them, perpetrating murders and outrages on them" have been assuaged if these same state forces also disarmed and perpetrated outrages upon their white opponents. See Cong. Globe, 39th Cong., 1st Sess. 39–40 (1866).

3. As set forth more fully in Respondents-in-Support-of-Petitioners' Opening Brief, the original understanding of the Fourteenth Amendment was that it protected the right to keep and bear arms, either alone or together with the other rights set forth in the first eight Amendments to the Constitution. See NRA Br. at 10–21. Introducing the Fourteenth Amendment, Senator Jacob Howard referred to "personal rights" like "the right to keep and bear arms," and explained that the Amendment would compel the States "to respect these great

fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess. 2765–66 (1866). Not even the *opponents* of the Amendment on whom Respondents rely, see Resp. Br. 66, disputed Howard's explanation.

Respondents discount Representative Bingham's reiteration of incorporation in debate on the Civil Rights Act of 1871 because it was "long after the ratification of the Amendment." Resp. Br. 67–68. But this Court has relied on that same speech in explaining the scope of the Amendment. See *Monell* v. *Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 685 n. 45 (1978) (citing Cong. Globe, 39th Cong., 1st Sess., App. 84 (1866)). On the same page of the speech that the Court cited in *Monell*, Bingham characterized "the right of the people to keep and bear arms" as one of the "limitations upon the power of the States * * * made so by the Fourteenth Amendment." *Id*. at App. 84.

Respondents assert that the state firearm laws were not understood to be subject "to a more stringent nationalized standard." Resp. Br. at 77. Yet Gen. Sickles' order, see NRA Br. at 14, recognized "civil rights and immunities" as including "[t]he constitutional rights of all loyal and well disposed inhabitants to bear arms," except for unlawful concealed weapons. Cong. Globe, 39th Cong., 1st Sess. 908–09 (1866). Likewise, and contrary to Respondents' argument, see Resp. Br. at 77, the history of the disbanding by Congress of militias in the Southern States does not support Respondents' position. Sen. Wilson's original bill not only would have "disbanded" those militias, it would also have "disarmed" them. See Cong. Globe, 39th Cong., 2nd Sess. 1848–49 (1867). But, because the militia were defined to include all male citizens, Sen.

Willey noted the "constitutional objection against depriving men of the right to bear arms * * * ." *Id.* at 1848. The term "disarmed" subsequently was stricken from the bill, which then passed. 14 Stat. 487 (1867).

Finally, the nineteenth century decisions Respondents cite on concealed weapons laws, see Resp. Br. 28–30, are actually adverse to their position. *Aymette* v. *State*, 2 Humph. (21 Tenn.) 154, 158 (1840), supported the right to possess any arms used in "civilized warfare," so that citizens could "repel any encroachments upon their rights * * * ." *English* v. *State*, 35 Tex. 472, 476 (1872), upheld protection for militia arms—muskets, holster pistols, and carbines. *Andrews* v. *State*, 50 Tenn. 165, 179 (1871), similarly held that rifles, shotgun, and repeating pistols may not be "forbidden by the Legislature."

II. "Our Federalism" Has No Bearing on Whether a Constitutional Right Is Incorporated Against the States.

In addition to their (meritless) historical arguments, Respondents also assert that incorporating the Second Amendment would be an affront to the principle of federalism. Relying on Justice Brandeis's oft-quoted passage that States 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), Respondents argue that States must be allowed to experiment in the realm of firearms regulation without any oversight under the Constitution. But the Fourteenth Amendment was designed precisely

to prevent certain state "experiments." States are no more free to perform unfettered experiments with firearms regulations than they are with the suppression of speech.[4]

1. It is undoubtedly true that variations in state and local laws are often justified by geographically localized concerns. Respondents forget, however, that the States' flexibility within the construct of "Our Federalism," *Younger* v. *Harris*, 401 U.S. 37, 44 (1971), may be trumped by the Constitutional rights of individuals. The very purpose of the Fourteenth Amendment is to prevent States from "experiment[ing]," *New State Ice*, 285 U.S. at 311, with the elimination of personal liberties. Important though the benefits of federalism may be, States have been afforded no room to experiment in the complete elimination of freedom of speech or religion, or in the conduct of unreasonable searches and seizures, or in the imposition of cruel and unusual punishment. In each of these areas, while room remains for local variation, Federal law imposes some fixed national standards for the protection of individual rights.

Thus, Respondents are emphatically wrong to contend that the question whether to recognize the right to keep and bear arms is the "type of social problem to be worked out by state and local governments, without a nationally imposed solution excluding one choice or the other." Resp. Br. at 11–12. The rights set forth in the Bill of Rights and

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[4] In contrast to Respondents' federalism argument, it is certainly telling that 38 States signed an *amicus* brief in support of Petitioners, arguing that the Second Amendment should be incorporated. See generally Brief of the States of Texas, et al. as Amici Curiae in Support of Petitioners.

incorporated by the Fourteenth Amendment represent the ground rules for state and local government behavior, the irreducible minimum liberties that states and local governments may not infringe. See *New State Ice*, 285 U.S. at 279–80 (stating that "[t]he principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments," and recounting that in *Near* v. *Minnesota*, 283 U.S. 697 (1931), "experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press"). As this Court held in *Heller*, "[t]he very enumeration of the right takes out of the hands of government * * * the power to decide * * * whether the right is *really worth* insisting upon." 128 S. Ct. at 2821; *see also id*. at 2822 ("the enshrinement of constitutional rights necessarily takes certain policy choices off the table").

To be sure, as this Court explained in *Heller*, no Constitutional right is unlimited and the right to keep and bear arms is no exception. See 128 S. Ct. at 2799. Thus, even after incorporating the Second Amendment against the States, the localized concerns that Respondents describe may be relevant to determining whether certain laws and regulations can withstand the scrutiny of the courts. Those local concerns, however, are not material to the antecedent question of incorporation, a process that, by definition, imposes some uniform national standard. Further, the question of what standard of review should apply to laws infringing on Second Amendment rights is not at issue here: As in *Heller*, the Chicago and Oak Park handgun bans would not

withstand any constitutional analysis. *See* 128 S. Ct. at 2817–18.[5]

2. Respondents seek to buttress their federalism argument by reference to the variety of state regulatory regimes governing firearms today, some of which (like Respondents' handgun bans) may run afoul of *Heller*. To the extent, however, that the Due Process Clause of the Fourteenth Amendment was meant, and understood at the time, to prevent state and local governments from encroaching on individuals' right to keep and bear arms, it is no answer to point out that some States and municipalities presently are doing so. Ubiquitous violations of a fundamental right would be an argument *for*, not against, incorporation.

Indeed, the fact that some States do not have Constitutional provisions protecting the right to keep and bear arms at all, and that other States' judiciaries have arguably nullified or diluted such right, serves only to highlight the importance of incorporating the Second Amendment. Absent incorporation, citizens of those States could be disarmed without having recourse to a federal remedy in federal court. Congress' power to protect

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[5] Respondents suggest that *Heller* invented the common-use test, Resp. Br. at 26, when in fact that test is well grounded in State law. See, *e.g., Rinzler* v. *Carson*, 262 So. 2d 661, 666 (Fla. 1972) (holding that arms which "are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles" are protected); *North Carolina* v. *Kerner*, 181 N.C. 574, 577 (1921) ("all 'arms' as were in common use"); *Texas* v. *Duke*, 42 Tex. 455, 458–59 (1875) ("such arms as are commonly kept, according to the customs of the people").

citizens in those states would also be called into question. See 309 Senators and Representatives Br. at 30–33. Moreover, allowing a patchwork of local laws to ban various types of firearms in different parts of the country would chill the exercise of Second Amendment rights everywhere and hinder travel between jurisdictions.

In a related section of their brief, Respondents also claim that there is a "consensus" in the States to "subject [the right to keep and bear arms] to interest-balancing," applying a "reasonable regulation standard" to laws infringing on such a right. Resp. Br. at 24; see also Resp. Br. at 23–31.[6] From this, Respondents ask this Court to conclude that "State law accordingly does not support incorporation." Resp. Br. at 23. Again, however, Respondents' conclusion does not logically follow from the premise. As an initial matter, States' recognition of the right to keep and bear arms in their founding documents is far more relevant to the incorporation question than would be subsequent efforts by state judiciaries

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[6] The asserted "consensus" in state law on a "reasonableness" test does not, in fact, exist. See, *e.g.*, *Rabbitt* v. *Leonard*, 36 Conn. Supp. 108, 112 (1979) (noting the "fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process."); *City of Lakewood* v. *Pillow*, 180 Colo. 20, 23 (1972) (invalidating firearm ban because a legitimate government purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."). Moreover, the application of what is "reasonable" by some state courts is hardly consistent with what Chicago has in mind. See, *e.g.*, *Bleiler* v. *Chief, Dover Police Dep't*, 155 N.H. 693, 699 (2007) (requirement of license to carry a concealed handgun held "reasonable" where no license required to carry openly or to possess at home).

to engage in interest balancing. More fundamentally, this Court in *Heller* already rejected an interest-balancing approach to scrutinizing laws that infringe on Second Amendment rights. 128 S. Ct. at 2821 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."). The fact that some States' courts employ an interest-balancing approach under state law is irrelevant in light of *Heller's* explanation that such an approach is irreconcilable with the protection of rights enumerated in the U.S. Constitution.

3. Finally, in response to Respondents' argument based on the virtues of experimentation, it is surely worth noting that Respondents' bans on the lawful possession of handguns as a means to limit the use of handguns by criminals are failed experiments. Respondents somehow think the fact that "[h]andguns were used in 402 of the 412 firearm homicides in Chicago in 2008," Resp. Br. at 13—notwithstanding the nearly thirty-year ban on lawful possession of handguns in the city—supports continuing to prevent law abiding citizens from keeping and bearing handguns for self-defense. Respondents' own statistics show that they are engaging in mere wishful thinking when they assert that "[h]andgun restrictions can be an effective tool for curbing criminal street gangs." Resp. Br. at 16. The *criminals* have guns and are using them. Respondents' experiments in disarming *law-abiding citizens* so that they cannot defend themselves from criminals was never wise and, after *Heller*, is clearly unconstitutional. If Respondents wish to cut crime, they can and should experiment with stricter

enforcement of laws against, *inter alia*, unlawful gang activities.

III. "Ordered Liberty" Does Not Prescribe Enhancing Order at the Expense of Individual Liberty.

1. In arguing against incorporation of the Second Amendment, Respondents contend that the rights protected by the Second Amendment are not "implicit in the concept of ordered liberty." Resp. Br. at 8 (quoting *Mapp* v. *Ohio*, 367 U.S. 643, 650 (1961)). To support this argument, Respondents invent a novel definition of "ordered liberty" out of whole cloth: Without citing any precedent, Respondents declare that "ordered liberty" means little more than "limit[ing] violence" and "reduc[ing] injury and death." Resp. Br. at 13. Thus, they reach the Orwellian conclusion that, in certain cases, the infringement of Constitutional rights can actually "lead to the preservation of, not the intrusion upon, a system of ordered liberty." Resp. Br. at 13.

In essence, Respondents define "ordered liberty" as the government's ability to restrict individual liberties in order to ensure a more "orderly" society. Such an unprecedented and unsupported definition, however, perverts the entire purpose of Constitutional rights. Of course, any government would find it easier to control their populations—to create more "order" and less "violence"—if they could eliminate personal liberties. The most orderly society imaginable would be one in which all persons resided in prison-like conditions. Fortunately, however, the Bill of Rights protects "ordered *liberty*," not just order.

Undoubtedly aware of the tyrannical implications of their argument, Respondents try desperately to distinguish the Second Amendment from all other enumerated rights that have been incorporated against the States. Thus, Respondents assert that the right to keep and bear arms is uniquely "dangerous" and capable of leading to "violence." Resp. Br. at 11. Their attempt, however, falls flat, for the Second Amendment is not unique in this regard. Many provisions of the Bill of Rights protect liberties that have the potential to be "dangerous" and to lead to "violence." The presence of such rights in the Constitution, however, indicates a determination that the benefits of protecting those rights outweigh their potential for harm. *Heller*, 128 S. Ct. at 2821 (explaining that Constitutional rights are "the very *product* of an interest-balancing by the people").

The First Amendment is the perfect example. As the familiar adage declares, "the pen is mightier than the sword." It is indisputably true that the spoken and written word contain enormous potential to promote societal disorder, to encourage civil disobedience and even to spark revolutions. Thomas Paine's *Common Sense* may have sparked a revolution that cost many lives, yet no serious American legal scholar could dispute that such speech would be protected under the First Amendment and, post-incorporation, immune to encroachment by the States.

Speech is not the only other "dangerous" right protected by our Constitution. The Court's First Amendment jurisprudence also protects pornography, *Miller* v. *California*, 413 U.S. 15 (1973), and nude dancing, *Schad* v. *Mount Ephraim*,

452 U.S. 61 (1981), despite the fervent belief of many that they corrupt society and create disorder. Far from withdrawing such activities from the purview of First Amendment protection, thereby allowing States to eliminate individuals' right to engage in them, the Court has concluded that the potential risks these activities pose are properly mitigated with appropriately narrow time, place, and manner restrictions. See, *e.g., Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986).

Similarly, the Fourth Amendment protects a variety of rights that, by their very definition, make it more difficult for the police to catch criminals. Yet the Court incorporated the Fourth Amendment against the States without so much as a whisper about its potential harm to society. See *Wolf* v. *Colorado*, 338 U.S. 25, 27–28 (1949). Indeed, the Court reached its result under the Fifth and Sixth Amendments in *Miranda* v. *Arizona* notwithstanding Justice White's warning that:

> [i]n some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined.

384 U.S. 436, 542 (1966) (White, J., dissenting)

The reality is that Respondents' elastic concept of "ordered liberty" could be used to argue against incorporation of any one of the first eight Amendments. But the act of enumeration of a substantive right requires overwhelming democratic support throughout the United States for designating that right as fundamental and thereby sheltering it from unrestrained policymaking of the type urged by Respondents. Protecting a fundamental enumerated right from undermining by individual States thus does not raise the difficulties inherent in recognition of an unenumerated right. See 309 U.S. Senators and Representatives Br. at 25 (citing *TXO Prod. Corp*. v. *Alliance Res. Corp*., 509 U.S. 443, 470 (1993) (Scalia, J., concurring in judgment, joined by Thomas, J.)). Absent further Constitutional amendment, it is beyond the province of this Court to declare that the protection of such enumerated rights is "outmoded" or "extinct." *Heller*, 128 S. Ct. at 2822.

2. Respondents' position ultimately boils down to concern with their own efficaciousness—or rather their lack thereof—in fighting crime. In response to Respondents' inability to stop criminals from unlawfully acquiring and abusing handguns, Respondents seek to prevent everyone, including law-abiding citizens, from lawfully keeping and bearing such arms. Because, in light of *Heller*, incorporation would be the death knell for such an overly broad and unguided policy, Respondents resist the recognition of any federal right to keep and bear arms whatsoever.

It would be unprecedented, however, for the Court to decline to incorporate a right simply

because that right has the potential to be abused. It is the task of government to ensure that rights are exercised responsibly by punishing those who act irresponsibly. Governments cannot avoid this task, however difficult, by simply eliminating rights wholesale. If Respondents' test for incorporation were correct, it is difficult to imagine a single Constitutional right that would have been incorporated against the States. Life outside of Washington, D.C., would be extremely "orderly," though far from the society envisioned during the Framing and Reconstruction.

Moreover, even if a State's quest for greater order and security could justify intrusions on personal liberty of a kind the federal government is prohibited from undertaking, Respondents do not explain how their handgun bans further that aim. The Chicago handgun ban has been in place since 1982, yet Respondents concede that Chicago continues to suffer from "an exceptionally serious problem of firearm—and, in particular, handgun—violence and crime," Resp. Br. at 13. Indeed, all the violence and crime that Respondents worry about is *already* against the law, regardless of the handgun ban. *See* Brief for Amicus Curiae Anti-Defamation League at 6–10 (describing the murderous rampages of Richard Baumhammers, Wade and Christopher Lay, James Von Brunn, and other violent extremists, all of whom were sentenced to lengthy prison terms and/or death for their violation of numerous criminal laws).

Respondents' argument knows no stopping point, and would permit jurisdictions to outlaw the possession of any firearm, not only handguns. Respondents concede as much, suggesting in a footnote that to stop gangs from "seeking to

assassinate rivals" they could ban not only handguns but also hunting rifles. See Resp. Br. at 19 n. 9. Presumably, however, it is against the law "to assassinate rivals" whether done with a firearm or a carving knife. Banning firearms in common possession by law abiding citizens in an effort to prevent gangland assassinations is neither necessary nor wise, and under *Heller* and the Fourteenth Amendment it is surely unconstitutional as well.

3. As did the District of Columbia and its amici in *Heller*, Respondents and their amici in this case put forth a cornucopia of purported social science evidence concerning violent acts involving firearms generally and handguns in particular. Such evidence failed to persuade this Court not to recognize an individual right to keep and bear arms in *Heller*, and it is no more relevant to the question whether to incorporate presented by this case.[7]

Obviously, handguns—particularly, as in the case of Chicago and Oak Park, illegally owned and carried handguns—are used by some criminals to commit some crimes. Equally obviously, however, the use of firearms, including handguns, by law-abiding citizens for lawful purposes—including not only hunting and competition shooting but also self-defense and the deterrence of crime—is far more common. Overwhelming evidence shows that

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[7] Respondents cite a single State case in American history, *Kalodimos* v. *Village of Morton Grove*, 470 N.E.2d 266 (Ill. 1984), that upheld a complete handgun ban. (Notably, that same court in another decision implied that the Second Amendment applies to the States. *People* v. *Liss*, 406 Ill. 419, 424 (1950)). No other court has ever upheld a ban on possession of any of the three basic types of firearms—handguns, rifles, and shotguns.

firearms, including handguns, are the most effective and safe means of deterring burglars and other home invaders. See Ikeda *et al.*, *Estimating Intruder-Related Firearm Retrievals in U.S. Households, 1994*, 12 Violence and Victims 4, 363 (Winter 1997) (according to CDC, an estimated 497,646 homeowners believed that they scared away an intruder using a firearm in 1994); Kopel, *Lawyers, Guns, and Burglars*, 43 Ariz. L. Rev. 345, 346 (Summer 2001). Victims who resist with a firearm are less likely than other victims to lose their property to a burglar. See Kleck & Gertz, *Armed Resistance To Crime: The Prevalence and Nature of Self-defense with a Gun*, 86 J. Crim. L. & Criminology 150, 151 (Fall 1995); Tark & Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, 42 Criminology 861, 882 (Nov. 2004). In the majority of cases, the burglar flees as soon as he discovers the victim is armed, and before a shot is ever fired. See Kleck & Gertz, *supra*, at 164 (explaining survey data showing 2.2 million to 2.5 million defensive gun uses annually in the United States, the vast majority of which are handgun uses).

Notably, aware of high rates of home ownership of firearms, burglars in the United States have a strong tendency to forego intrusion when homeowners are likely to be present. See Kopel, *supra*, at 346. By contrast, British and other European homeowners, who are generally subject to stricter gun control laws, are three times as likely as American homeowners to be home when burglaries occur. See Dorfman & Koltonyuk, *When The Ends Justify The Reasonable Means: Self-Defense and the Right to Counsel*, 3 Tex. Rev. L. & Pol. 381, 395 (Spring 1999); Kopel, *supra*, at 346.

Because they are easy to handle effectively, firearms, especially handguns, are proven defensive arms. See Caplan & Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. The Fourth, Fifth, and Fourteenth Amendments—And the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. Rev. 1073, 1105 (2004–2005) (arguing that, "[i]n modern times, effective self-defense implies a handgun; long-guns can also be very effective * * * but in some homes they may be unwieldy or awkward to use."); Dorfman & Koltonyuk, *supra*, at 392 (observing that handguns function as the "great equalizer," because of their small size, effectiveness, and relative simplicity). For many people, especially many women, a handgun, which is smaller, lighter and causes less recoil than a rifle or shotgun, may be the safest and most effective means of self-defense.

All told, reliance on crime data to support the proposition that handguns and potentially other firearms could be banned to prevent crime and enhance "ordered liberty" (as improperly defined) ignores much relevant evidence. The keeping and bearing of firearms, including handguns, by law-abiding citizens serves to deter and prevent crime; it is the banning of the lawful possession of handguns that allows criminals to terrorize the disarmed, law-abiding populace.

IV. Respondents' Reliance on the Modern Laws of Foreign Jurisdictions Is Misplaced.

Respondents' constitutional analysis suffers from another fatal flaw. In arguing against incorporation, Respondents point to the modern "legal systems of

England, Canada, and Australia," which they describe as relevant to this Court's analysis simply because the laws of those countries "each have their roots in the same English law as does this country." Resp. Br. at 21.

Of course, Respondents are correct that this Court often looks to the common law traditions of England in interpreting U.S. Constitutional rights. In fact, the Court did just that in *Heller*. See 128 S. Ct. at 2798 ("By the time of the founding, the right to have arms had become fundamental for English subjects."). But the only relevant common law traditions are those that were in place at the time our Constitution was adopted. Those traditions help us understand how the Constitution itself was understood by those who ratified it. Since the time of our Founding, however, our own laws have diverged from the laws of England in many areas, in particular with respect to the right to keep and bear arms. In interpreting the rights enumerated in the U.S. Constitution, therefore, the modern laws of other countries with common law traditions are as irrelevant as the modern laws of any other country—they simply have no bearing on what those rights meant when adopted. Moreover, whatever the hazards of relying on foreign jurisprudence in interpreting our Constitution's basic guarantees, they are surely magnified when interpreting the Fourteenth Amendment and uniquely American doctrines like incorporation and "our"—not *their*—"Federalism."

Indeed, in this case reliance on developments in English law is particularly inappropriate because our respective views of the right to keep and bear arms have not only diverged since the Framing, but were

different even prior. The Crown's attempts to disarm the colonists during period from 1768 to 1775, after all, were a significant cause of the American Revolution. Halbrook, The Founders' Second Amendment, chapters 1–4 (2008). James Madison referred to "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast to Europe, where "the governments are afraid to trust the people with arms." *The Federalist* No. 46, in 15 Documentary History of the Ratification of the Constitution 492–93 (1984). In calling the right to arms "the true palladium of liberty," St. George Tucker contrasted England, where "the people have been disarmed." 1 St. George Tucker, Blackstone's Commentaries, ed. app. at 300 (1803). The English approach to firearms regulation, in other words, is what our Second Amendment protects *against*, not what it aspires toward.

V. In the Alternative, The Right To Keep and Bear Arms Is a Privilege or Immunity of National Citizenship.

As described above, Respondents' arguments as to incorporation under the Due Process Clause are misplaced, employing circular logic, flawed history, incorrect and incomplete social science data, and a dangerous, unprecedented interpretation of "ordered liberty." But at least Respondents endeavor to offer arguments. With respect to the Privileges or Immunities Clause, by contrast, while Respondents address the arguments offered by Petitioners in support of the wholesale incorporation of the Bill of Rights via the Privileges or Immunities Clause, see Resp. Br. at 42–81, they provide absolutely no rebuttal to the NRA's more specific argument that, in

light of this Court's explanation in *Presser* of the interplay between the right to keep and bear arms and the First Militia Clause, the right should be deemed a privilege or immunity of national citizenship even under the test set forth in *The Slaughter-House Cases*. See NRA Br. 38–43. Thus, even if the Court declines to incorporate the Second Amendment through the Due Process Clause of the Fourteenth Amendment, it should still incorporate it through the Privileges or Immunities Clause.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Petitioners' and NRA's respective opening briefs, the decision of the Seventh Circuit below should be reversed.

Respectfully submitted,

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