

No. 08-1521

In the
Supreme Court of the United States

OTIS McDONALD, ET AL.,
Petitioners

v.

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

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

**MOTION OF RESPONDENTS-SUPPORTING-PETITIONERS FOR
DIVIDED ARGUMENT**

Pursuant to Supreme Court Rule 28.4, Respondents-Supporting-Petitioners, the National Rifle Association, Inc., et al., respectfully move for divided argument such that counsel for Petitioners, Otis McDonald, et al., would have 20 minutes of argument time and the under-signed counsel for Respondents-Supporting-Petitioners would have 10 minutes. This division of argument time would materially assist the Court and ensure a full exploration of both the alternative grounds for reversing the decision below which are included in the question presented. Granting this motion would not necessitate expanding the total time this Court has allocated for oral argument. Counsel for Petitioners opposes this request.

Respondents-Supporting-Petitioners, the National Rifle Association Inc., et al, are parties to this case, and throughout this litigation have consistently urged that the courts recognize that the Second Amendment applies against the States and local governments, such as Respondent City of Chicago, Illinois. Throughout this litigation, counsel for the National Rifle Association, Inc., et al., have emphasized the Due Process Clause of the Fourteenth Amendment as the most straightforward route to find the Second Amendment

applicable to the States and local governments. Respondents-Supporting-Petitioners have had an active role in this litigation throughout. They were the lead plaintiffs-appellants in the decision under review and participated in the oral argument in the Seventh Circuit that produced the decision under review.

While Respondents-Supporting-Petitioners have consistently urged the Due Process Clause as the most direct way to apply the Second Amendment to States and localities, Petitioners in their opening brief have concentrated their argument on a Privileges or Immunities Clause theory that would require overruling at least three of this Court's precedents. Indeed, Petitioners dedicate only 7 pages of their 73-page brief to the Due Process Clause, using the balance of the brief to develop an argument based on the Privileges or Immunities Clause. While Respondents-Supporting-Petitioners have urged the Privileges or Immunities Clause as an alternative basis for reversal, *see* Br. of Respondents-Supporting-Petitioners at 38-47, they have consistently stressed the Due Process Clause argument, *see id.* at 10-38, and continue to believe that the Due Process Clause presents the most straightforward and direct route to reversal of the decision below.

The question on which the Court granted certiorari clearly encompassed both the Due Process Clause and the Privileges or Immunities Clause. Respondents-Supporting-Petitioners respectfully submit that divided argument in this case will materially assist the Court by ensuring that both issues encompassed within the question presented are fully explored at oral argument. Indeed, because the Due Process Clause represents a route to reversal that does not necessitate the overruling of this Court's precedents, it would be particularly unfortunate if that argument were not adequately presented at oral argument.

Finally, it bears noting that as a party to this case and active participant throughout the proceedings, Respondents-Supporting-Petitioners have a particularly

strong claim to argument time. This Court has routinely granted divided argument motions in order to hear from counsel for a respondent-supporting-petitioner, in addition to counsel for petitioner. *See, e.g., NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 130 S. Ct. 356 (2009); *Alaska v. Southeast Alaska Conservation Council*, 129 S. Ct. 667 (2008); *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 445 (2008); *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1*, 128 S. Ct. 1136 (2008). The case for divided argument is particularly strong where there is a concern that all aspects of the question presented will not be fully presented. Indeed, the Court recently granted the opposed divided argument motion of an amicus who wished to present an issue included in a supplemental question that appellant did not address at length. *See Citizens United v. Federal Election Commission*, 130 S. Ct. 31 (2009). In light of the more demanding standard for amicus, as opposed to party, participation at argument, *see* Supreme Court Rule 28.7, the case for granting divided argument to a party here is considerably stronger.¹

This is an extraordinarily important case. The outcome will determine whether the Second Amendment is somehow bizarrely limited to the federal government and federal enclaves or whether it is the fundamental guarantee of liberty that the Framers of the Fourteenth Amendment envisioned. As the question presented recognizes, the Fourteenth Amendment provides two avenues to realize the Second Amendment's promise. Because participation of Respondents-Supporting-Petitioners in the oral argument will ensure that the Due Process Clause alternative is adequately presented, the proposed division of argument will materially assist the Court in its consideration of the case.

¹ Amici Texas, et al., have filed a motion for divided argument pursuant to Rule 28.7. While Respondents-Supporting-Petitioners do not oppose that motion, in the event the Court grants only one motion for divided argument among those seeking reversal, we respectfully request the Court follow its normal practice of preferring divided argument between the parties and grant this motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'P. D. Clement', written in a cursive style.

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January 5, 2009

CERTIFICATE OF SERVICE


The undersigned hereby certifies that one true and correct copy of this Motion of Respondents-Supporting-Petitioners for Divided Argument was served via Federal Express (Next Day Air Delivery) and via electronic mail on January 5, 2010 to:

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The undersigned also certifies that on January 5, 2010, the original and 11 copies of this Motion of Respondents-Supporting-Petitioners for Divided Argument were hand-delivered to the clerk, as addressed below:

Hon. William K. Suter, Clerk
Supreme Court of the United States
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Paul D. Clement