No. 08-1521

In The Supreme Court of the United States

OTIS MCDONALD, ET AL.,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

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

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Is the Second Amendment right to keep and bear arms incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses?

INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon, and in educating the public about constitutional and human rights issues.

Attorneys affiliated with the Institute have represented parties and filed *amicus curiae* briefs in this Court on numerous occasions. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between government and citizens.

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[1] Counsel of record to the parties in this case have filed letters with the Court granting "blanket" consent to the filing of *amicus curiae* briefs in this case. By letters dated October 7, 2009, The Rutherford Institute advised counsel of record for the parties of its intent to file the instant *amicus curiae* brief. No counsel to any party authored this brief in whole or in part.

The Rutherford Institute works to preserve the most basic freedoms of our Republic: in the present case before this Court, the right of a private party to keep and bear arms in the privacy of one's own home, free from interference and restriction by the states.

STATEMENT OF FACTS

Amicus incorporates by reference the statement of facts set forth in the Petition For a Writ of Certiorari of Petitioners Otis McDonald *et al*.

SUMMARY OF ARGUMENT

The right to keep and bear arms is protected by the Second Amendment to the United States Constitution. Since the adoption of the Bill of Rights, this Court has recognized that a substantial number of the Amendments must be applicable to and restrain the several states of the United States, either through the Privileges or Immunities Clause or the Due Process Clause of the Fourteenth Amendment. In *Heller v. District of Columbia*, 128 S.Ct. 2783 (2008), this Court expressly extended the application of the Second Amendment's right to keep and bear arms to the federal government, holding therein that citizens of the District of Columbia had the inherent right, as individuals, to keep and bear arms in their homes.

In the instant case, the City of Chicago maintained in the courts below and before this Court that it has the power to forbid citizens of that city from possessing handguns in their homes. The City's firearm restriction is indistinguishable from that of the District of Columbia considered in *Heller*. The City of Chicago asks this Court to hold that the individual right secured by the Second Amendment – a right that pre-dates the adoption of the Constitution and Bill of Rights[2] – is not protected as against the authority of state and local lawmakers. Under the City's argument, virtually nothing prevents states and localities from barring citizens from possessing handguns in their homes, even for purposes of self-defense and irrespective of the serious crime problems encountered by residents of that city and other cities and states throughout the nation.

Rather than permit an illogical and indefensible jurisprudence under which the rights of citizens would be protected against infringement by the federal government whilst simultaneously being susceptible to erosion and nullification by state and local governments, this Court should now recognize that the Fourteenth Amendment's Privileges or Immunities Clause or Due Process Clause incorporates the Second Amendment and makes the

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[2] This point has been recognized on numerous occasions. *See, e.g., Heller v. District of Columbia*, 128 S. Ct. at 2797, and *Nordyke v. King*, 563 F.3d 439, 452 (9th Cir.), *reh'g granted*, 575 F.3d 890 (9th Cir. 2009) (the right to bear arms is a fundamental right).

fundamental individual right secured by that Amendment enforceable against the states and their political subdivisions. In keeping with this country's historical roots and traditions, this Court should not permit a state government to ride roughshod over a bedrock principle of liberty, a right deemed by Blackstone to be "one of the fundamental rights of Englishmen", *Heller*, 128 S. Ct. at 2798, and which pre-dates the establishment of United States – the right of individual citizens to keep and bear arms.

ARGUMENT

I. The Right To Bear Arms Is A Fundamental Right of All Americans Guaranteed By The Fourteenth Amendment And Applies Equally To The States And The Federal Government.

As this Court held in *Heller*, the right to keep and bear arms secured by the Second Amendment is not limited to the context of militias. Citing William Blackstone, the majority in *Heller* found the origin of the right to be variously "the natural right of resistance and self-preservation" and "the right of having and using arms for self-preservation and defence." *Heller*, 128 S. Ct. at 2798 (citations omitted). Around 200 years after Blackstone, it fell to George Orwell to opine that the rifle hanging on the wall of the flat or cottage of the working classes was "the symbol of democracy." *See* Michael Shelden, *Orwell: The Authorized Biography* 328 (1991). Even

the Seventh Circuit recognized in its decision below that the Second Amendment protects the right of citizens to keep and bear arms in their homes for the lawful purpose of self-protection. *National Rifle Ass'n of America, Inc. v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009).

Thus, *Heller* and other cases have resolved the question of whether the right to bear arms relates to militias, and have instead established the inviolable right of individuals to keep and bear arms in their private homes. While the opinion in *Heller* was limited to the federal enclave of Washington D.C., the Second Amendment itself clearly is meant to apply more broadly. The Second Amendment proclaims in unambiguous terms: "A well-regulated Militia, being necessary to the security of a free State, **the right of the people to keep and bear Arms, shall not be infringed**" (emphasis added). Courts have found that handguns fall within the definition of arms under the Second Amendment. *See, e.g., Parker v. District of Columbia*, 478 F.3d. 370 (D.C. Cir. 2007), *aff'd in part, sub nom., District of Columbia v. Heller*, 128 S.Ct. 2994 (2008).

Since at least the turn of the 20th century, this Court has not hesitated to ensure that the essential, fundamental liberties set forth in the Bill of Rights are protected from state impairment through "incorporation" of those rights into the Fourteenth Amendment, which provides in relevant part,

> [n]o state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This Court summarized the basis for "incorporation" as follows:

> So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts.

Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled on other grds.*, *Benton v. Maryland*, 395 U.S. 784 (1969). Furthermore, this Court "has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective

version of the individual guarantees of the Bill of Rights[.]" *Benton*, 395 U.S. at 794) (citing *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964)).

Thus, the primary guidance on the scope of liberties protected against state encroachment by the "spacious language" of the Fourteenth Amendment is to be found in the first ten amendments to the Constitution, collectively the Bill of Rights. *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968). Incorporation depends upon "whether a right is among those fundamental principles of liberty and justice which lie at the base of our civil and political institutions . . . whether it is basic in our system of jurisprudence[.]" *Id.* at 148-49 (citations and internal quotations omitted). As the Ninth Circuit wrote recently, a substantive right is fundamental if it is "necessary to an *Anglo-American* regime of ordered liberty." *Nordyke v. King*, 563 F.3d 439, 450 (9th Cir. 2009) (quoting *Duncan*, 391 U.S. at 149, n. 14).

From the foregoing, it should therefore be apparent that government in all its forms is prohibited from constricting the fundamental rights recognized by the nation's founders as essential for the protection of freedom and secured to citizens of the United States by the Bill of Rights. That being so, there can be no room for doubt that, as recognized by the Ninth Circuit in *Nordyke*, 563 F.3d at 439, the Second Amendment's unequivocal grant of the right to keep and bear arms must fall within the ambit of

the liberties, privileges and immunities protected by the Fourteenth Amendment.[3]

The holding in *Heller* should not be misinterpreted as this Court's narrow attempt to protect the rights of D.C. citizens alone. Rather, it is more accurately characterized as a triumph of individual liberty over encroachment by government of any sort. The Second Amendment was appended to the Constitution to provide citizens with the means to protect themselves, and was meant to restrain overbearing legislatures at all levels of government bent upon interfering with the basic right to keep and bear arms.

The Seventh Circuit in this case avoided addressing the conflict between the Second Amendment's guarantees and a local restriction nearly identical to the one struck down in *Heller* by embracing the expedient that the Second Amendment applies only against the federal government, not against the states or their subdivisions. *National Rifle Ass'n of America*, 567 F.3d at 859. *See also Bach v. Pataki,* 408 F.3d 75 (2d Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006). This avoidance may at best be characterized as peculiar, given that most other provisions of the Bill of Rights have now been incorporated by the Fourteenth

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[3] Although the states are far from uniform in this belief, with some jurisdictions holding that there is no absolute, individual right to bear arms. *Gardner v. Vespia*, 252 F.3d 500 (1st Cir. 2001); *Love v. Pepersack*, 47 F.3d 120 (4th Cir. 1995).

Amendment. Moreover, the holding in the *Slaughter-House Cases*, 83 U.S. 36 (1873), and later cases such as *United States v. Cruikshank*, 92 U.S. 542 (1876), regarding the scope of the Fourteenth Amendment upon which the Seventh Circuit relied, have been widely discredited. In fact, it would not be an overstatement to say that "everyone agrees that the Court [in *Slaughter-House*] incorrectly interpreted the Privileges or Immunities Clause." Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 627 (1994).

Allowing states and localities to prevent citizens from possessing handguns in their homes also conflicts with the *Nordyke* court's conclusion that the right to arms in the United States was "deeply rooted in this Nation's history and tradition", a history it found to be "compelling." *Nordyke*, 563 F.3d at 454-455. The court there, after an exhaustive analysis of the history of "incorporation" and the Second Amendment, concluded that "language throughout *Heller* suggests that the right is fundamental by characterizing it the same way other opinions described enumerated rights found to be incorporated." *Id.* at 456-57.

If this Court does not recognize the applicability of the Second Amendment to the states, it runs the risk of creating a patently absurd legal bifurcation, according to which although the federal government, under which the federal government, by

virtue of *Heller*, could not deprive individuals of their right to keep and bear arms, while individual states would have the power to restrict firearm possession. The fundamental right identified in Heller could become nothing more than a mirage, subject to restriction and outright elimination at the whim of state actors. This Court's "incorporation" of the Bill of Rights is aimed at avoiding such a calamitous and unsustainable situation. It was Thomas Jefferson, a great advocate of states' rights, who wrote, in his Draft Constitution for Virginia of 1776, that "[n]o freeman shall be debarred the use of arms (within his own lands)."[4]

Where, as in the instant case and in *Heller*, the laws passed by legislatures (be they local or federal) infringe upon a right deemed "necessary to the security of a free state," it falls to this Court to strike them down in accordance with the principle set out by Justice Paterson even before Chief Justice Marshall's famous dictum in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803),:

> [I]f a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void. The constitution is the basis of legislative authority; it lies at the foundation of

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[4] Draft Constitution for Virginia 1776, *available at* http://avalon.law.yale.edu/18th_century/jeffcons.asp

> all law, and is a rule and commission by which both legislators and judges are to proceed.

Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012, 1015 (1795).

Simply put, the legislative branch of the states or federal government cannot be given free reign over determining the efficacy of a provision of the Bill of Rights. Politicians are not judges; they are democratically accountable representatives of the people, experts in policy and not, on the whole, constitutional law and the legal ramifications of their legislative acts. If, as sometimes happens, legislators make errors and end up passing laws not in accordance with the Constitution, it falls to this Court to correct them. The case at bar presents an ideal opportunity for this Court to affirm the applicability of the Second Amendment to the states and local governments. In so doing, it would also be reiterating that the Constitution is a living instrument which must be read in light of present crime problems and social conditions. Simply because there is no militia today does not render the Second Amendment null and void.

The City of Chicago today has serious crime problems. For example, in 2008, 80.6% of homicides were committed with guns,[5] and of the total number of 412 homicides that year, 92 were perpetrated in

[5] The statistics include handguns, rifles and shotguns.

residences.[6] As this Court noted in *Heller*, the protection of all forms of communications is now read into the First Amendment, and the Second Amendment accordingly refers to all instruments which may be construed within the definition of "bearable arms", whether they existed at the time the Amendment was introduced or not. *Heller*, 128 S.Ct. at 2781-92.

Just as this Court's reading of the meaning of arms in the Constitution has evolved from the meaning it would have been accorded at the time the Second Amendment was adopted, so the purpose of the Amendment must be read in light of today's altered social conditions. The first clause of the Second Amendment references the militia, and thus makes the existence of that militia one of the purposes of the Amendment. However, this reference does not make it the only, or even the most, informing purpose. The second clause is significantly broader.

When the Second Amendment was drafted, the definition of those it covered was narrow, and limited to members of the militia. In *U.S. v. Miller*, 307 U.S. 174, 179 (1939), this Court observed that at that time, the militia "comprised all males physically capable of acting in concert for the common defense."

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[6] Chicago Police Department, 2008 Murder Analysis in Chicago, *available at* https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Homicide%20Reports/2008%20Homicide%20Reports

In other words, the Amendment drew within its ambit only an extremely narrow group of individuals. Were this Court to find that the Second Amendment applied to the states as well as to the federal government, it would of course not be practicable to limit its holding to men only, or only to those capable of acting for the common defense. In other words, the reading this Court gives to the Constitution has evolved, and continues to evolve, so as to prevent the Constitution from becoming little more than a relic with no applicability to the lives of citizens today.

In the same way, it is necessary for the Court to consider the purpose informing the Second Amendment today. Although it is clear that militias as the authors of the Second Amendment knew them do not exist today, the need for self-defense and defense of the home has not disappeared. The figures cited *supra* make apparent the fact that homicides occasioned by firearms amount to more than a small percentage of all crimes committed in Chicago. As one observer has pointed out, crime is even more prevalent in America's inner cities than in its rural areas, because "[t]he concentrated poverty of inner-city neighborhoods erodes the web of social connections that often restrains crime in urban areas." Bruce Western, *Punishment and Inequality in America*, 109 (2007).

Moreover, if the argument against allowing handguns in citizens' homes is motivated by safety concerns, the legislative remedy should be the adoption of stricter state laws on the storage of

handguns, not to their outright ban. Safety concerns may also be effectively addressed by laws requiring background checks prior to the purchase of a firearm. In fact, a bipartisan 2009 survey of 612 registered voters by the Illinois Campaign to Prevent Gun Violence revealed that 90% of those asked were in favor of background checks for all gun sales.[7] Most importantly, such laws would not threaten or infringe upon the right guaranteed in the Second Amendment, but would simply place reasonable restrictions upon that right as are in the public interest.

CONCLUSION

For the aforementioned reasons, therefore, this Court should hold that the right to hold and bear arms as enumerated by the Second Amendment to the Constitution of the United States applies to the states and territories of the United States, and not only to the federal government.

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[7] Illinois Campaign to Prevent Gun Violence, Press Release, "New Bipartisan Poll Shows Overwhelming Support for Common Sense Gun Laws", 3/3/2009, available at: http://www.icpgv.org/icpgv_media3.html.

Respectfully submitted,

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