

No. 08-4244
(Consolidated with Nos. 08-4241 and 08-4243)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

OTIS MCDONALD, ET AL.,
Plaintiffs-Appellants,
v. Dist. Ct. No. 08-C-3645
CITY OF CHICAGO,
Defendant-Appellee.

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL.,
Plaintiffs-Appellants,
v. Dist. Ct. No. 08-C-3696
VILLAGE OF OAK PARK,
Defendant-Appellee.

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL.,
Plaintiffs-Appellants,
v. Dist. Ct. No. 08-C-3697
CITY OF CHICAGO,
Defendant-Appellee.

Appeal from a Judgment of the United States District Court
for the Northern District of Illinois
The Hon. Milton I. Shadur, Senior District Judge

APPELLANTS' BRIEF AND REQUIRED SHORT APPENDIX

David G. Sigale*
Law Firm of David G. Sigale, P.C.
4300 Commerce Court, Suite 300-3
Lisle, IL 60532
630.452.4547/630.596.4445
*Counsel of Record

Alan Gura
Gura & Possesky, PLLC
101 N. Columbus St., Ste. 405
Alexandria, VA 22314
703.835.9085/703.997.7665

CORPORATE DISCLOSURE STATEMENT
Fed. R. App. Proc. 26.1, Circuit Rule 26.1

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson,
Second Amendment Foundation, Inc., Illinois State Rifle
Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Gura & Possessky, PLLC
Law Firm of David G. Sigale, P.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

Alan Gura

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APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants (“Plaintiffs”) seek declaratory and injunctive relief barring enforcement of several City of Chicago ordinances as unconstitutional under the Second and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343.

Plaintiff Second Amendment Foundation, Inc., is a non-profit corporation, organized under the laws of Washington with its principal place of business in Bellevue, Washington. Plaintiff Illinois State Rifle Association is a non-profit corporation, organized under the laws of Illinois with its principal place of business in Chatsworth, Illinois

This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1291. On December 18, 2008, the District Court granted Defendant-Appellee’s (“Defendant”) motion for judgment on the pleadings, and directed entry of final judgment for Defendant. App. 41-44. Plaintiffs timely filed their notice of appeal the same day. App. 46. The Clerk entered final judgment for Defendant on December 22, 2008. App. 45.

STATEMENT OF ISSUES

1. Is the Second Amendment right to keep and bear arms incorporated as against the states pursuant to either the Privileges or Immunities or Due Process Clauses of the Fourteenth Amendment?
2. Do Chicago ordinances banning handguns, requiring annual re-registration of guns, mandating that guns be registered prior to their possession within city limits, and permanently prohibiting the ownership of any particular gun whose registration lapses, violate Plaintiffs' rights to arms and to equal protection?

STATEMENT OF THE CASE

But for the laws challenged in this action, Plaintiffs would possess handguns in their homes. And although Plaintiffs do not contest the constitutionality of gun registration *per se*, they seek to bring Chicago's gun registration program into compliance with constitutional standards. If Chicago is to register guns, it must not do so in a manner that burdens or prevents the exercise of Second Amendment rights.

The day after this case was filed, other parties led by the National Rifle Association (“NRA”) brought somewhat similar cases against the City of Chicago and several neighboring jurisdictions that also maintained handgun bans (“the *NRA* cases”). Of these, only the *NRA* cases against Chicago and Oak Park remain, the other defendants having abandoned their handgun bans. This case, and the remaining *NRA* cases against Chicago and Oak Park, were related in the District Court and consolidated on appeal.

Mindful of this Court’s command to avoid duplicative pleading, counsel for all appellants endeavored not to repeat each other’s arguments and to minimize any overlap. That task was not difficult considering the substantial differences among the cases:

- *McDonald* challenges various ordinances not at issue in the *NRA* cases, including Chicago’s requirement that guns be at all times registered prior to their acquisition, Chicago’s re-registration requirement, and Chicago’s non-registrability penalty for guns whose registration lapses for any reason.

- *McDonald*'s theory of Due Process Clause selective incorporation differs markedly from the implicit, apparently total incorporation theory advanced by *NRA* Plaintiffs.
- The provisions challenged in *McDonald* have been applied against the individual plaintiffs in this case.
- *McDonald* seeks incorporation of the Second Amendment not only under the Due Process Clause, but also under the Privileges or Immunities Clause.
- *McDonald* and the *NRA* cases advance different theories under the Equal Protection Clause.
- *McDonald* Plaintiffs sought summary judgment in the District Court, and as did the plaintiffs in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), seek an order directing the granting of that motion on appeal.
- *McDonald* and the *NRA* cases approach this Court's precedent differently in some respects.

Plaintiffs submit that this case is more comprehensive and, in any event, substantially different from those brought by the *NRA* such that

the Court will not find a great deal of overlap in the briefing and argument. And just as the cities of Chicago and Oak Park may wish to defend their respective ordinances differently, the various parties challenging these ordinances must have their unique claims heard as well. *Cf. Greenlaw v. United States*, 128 S. Ct. 2559, 2564 (2008) (“[O]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”) (citation omitted).

The facts not being in dispute, and the case raising purely questions of law, *McDonald* Plaintiffs moved for summary judgment on July 31, 2008. Upon presentment of the motion, the District Court announced that the motion would not be considered as it was allegedly premature, and Defendant was therefore excused from briefing an opposition. *But see* Fed. R. Civ. Proc. 56 (plaintiffs may file motion for summary judgment within twenty days of filing the complaint).¹

¹Counsel for *McDonald* Plaintiffs was also counsel for the plaintiffs in *Heller*, which was eventually resolved on plaintiffs’ motion for summary judgment filed thirty-two days after initiation of that action. The District Court in *Heller*, just as the District Court in this case, denied the plaintiffs’ summary judgment motion as moot, since it granted defendants judgment on a Rule 12 motion. *Parker v. District of*

As the cases progressed, the District Court came to accept Plaintiffs' position that the cases would be largely, if not completely, controlled by one legal question: whether the Second Amendment is incorporated as against the states by the Fourteenth Amendment. The District Court therefore suggested that plaintiffs in the three cases could obtain a resolution of this question by filing a motion to narrow the issues in the cases pursuant to Fed. R. Civ. Proc. 16.

On October 21, 2008, *McDonald* Plaintiffs followed the District Court's advice and filed just such a motion, again setting forth their incorporation arguments. The following day, *NRA* Plaintiffs filed similar motions, albeit theirs were styled as motions for leave to brief the incorporation issue under Rule 16. The District Court allowed the *NRA* Plaintiffs to brief the issue.

On December 4, 2008, the District Court issued an opinion and order denying the Rule 16 motions in the *NRA* cases. The District Court

Columbia, 311 F. Supp. 2d 103, 109 (D.D.C. 2004). The D.C. Circuit reversed and ordered that the summary judgment motion be granted. *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007). The Supreme Court affirmed. *Heller*, 128 S. Ct. at 2822 (2008).

believed itself bound by Seventh Circuit precedent to reject
incorporation of the Second Amendment:

This Court should not be misunderstood as either rejecting or endorsing the logic of plaintiffs' argument – it may well carry the day before a court that is unconstrained by the obligation to follow the unreversed precedent of a court that occupies a higher position in the judicial firmament. But as later-to-be-Justice Oliver Wendell Holmes famously observed in 1881 in *The Common Law*:

The life of the law has not been logic: it has been experience.

In sum, this Court--duty bound as it is to adhere to the holding in *Quilici* [v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982)] rather than accepting [*NRA*] plaintiffs' invitation to "overrule" it (!) – declines to rule that the Second Amendment is incorporated into the Fourteenth Amendment so as to be applicable to the Chicago or Oak Park ordinances.

App. 39 (Order, N.D. Ill. Nos. 08-3696/3697, 12/4/2008 at 5).

Concurrently, the District Court entered an order denying *McDonald* Plaintiffs' Rule 16 motion, as well as their outstanding Rule 56 motion for summary judgment, on the same grounds. Referencing its order in the *NRA* cases, the District Court explained:

Quilici is an on-all-fours decision by our Court of Appeals that takes the opposite position from that now pressed by plaintiffs in all three cases before this Court. There is no need to repeat what is said in that opinion, for it might well have been written for this case too.

App. 41-42 (Order, No. 08-3645, 12/4/2008).

The District Court set all three matters for a status conference December 9, 2008, at which Defendants orally moved for judgment on the pleadings in all three cases on the basis of the December 4 orders. The parties were instructed to submit proposed orders.

At the next scheduled status conference held December 18, 2008, the District Court announced it was granting the Defendants' motions for judgment on the pleadings, and entering the proposed orders conclusively disposing of the cases. App. 43. Notices of appeal were promptly filed in all three cases. App. 46 (notice of appeal in instant case). On December 22, 2008, the District Court Clerk entered the final judgment in this action dated December 18, 2008. App. 45.²

The facts of this case are not subject to dispute. Nor can the challenged laws be thought compatible with the right to keep and bear arms. The only significant legal issue before the Court is whether the

²*McDonald* Plaintiffs had noticed an interlocutory appeal (No. 08-4112) from the denial of their summary judgment motion pursuant to 28 U.S.C. § 1292(a)(1), as that order constituted a “definitive denial of permanent injunctive relief.” *Elliott v. Hinds*, 786 F.2d 298, 300 (7th Cir. 1986) (citation omitted); *Holmes v. Fisher*, 854 F.2d 229, 231 (7th Cir. 1988). The interlocutory appeal was voluntarily dismissed when this appeal, from the final judgment, was filed.

Second Amendment is binding upon state and local government entities through application of the Fourteenth Amendment. Plaintiffs submit that under any theory of Fourteenth Amendment incorporation, Chicago is bound to respect their rights under the Second Amendment.

This Court should therefore reverse the lower court's decision granting judgment for Defendant, and remand with instructions to enter summary judgment for Plaintiffs consistent with their prayer for relief.

STATEMENT OF FACTS

1. Facts Relating to the Handgun Ban

Chicago Municipal Code § 8-20-040(a) mandates the registration of all firearms. App. 7, 21 (Complaint, Amended Answer, ¶ 36).³ Chicago Municipal Code § 8-20-050 provides: “No registration certificate shall be issued for any of the following types of firearms: . . . (c) handguns” App. 7, 21 (Complaint, Amended Answer, ¶ 37). While Section 8-20-050(c) allows exceptions for certain handguns owned prior to the law's effective date, and handguns owned by police officers, security personnel, and private detectives, this provision in conjunction with

³Chicago's Municipal Code is also within judicial notice.

Section 8-20-040 generally bars the private home possession of handguns by law-abiding adult citizens. App. 7 (Complaint, ¶ 37.)

Each individual Plaintiff applied to register a handgun for possession in his or her Chicago home. Defendant has denied each of Plaintiffs' handgun registration applications per its ban on handgun registration. App. 3-5, 16-18 (Complaint, Amended Answer, ¶¶ 12, 17, 20, 23).

Plaintiffs Orlov and David Lawson were also denied registration of their handguns as these handguns were acquired prior to submission of the registration forms. App. 4, 18 (Complaint, Amended Answer, ¶¶ 17, 23).

Each individual Plaintiff fears arrest, criminal prosecution, incarceration, and fine if he or she were to possess a handgun within the home. App. 3-5 (Complaint, ¶¶ 13, 18, 21, 24). Each individual Plaintiff presently intends to possess a handgun within the home for self-defense, but is prevented from doing so by the city's active enforcement of the handgun ban. App. 3-5 (Complaint, ¶¶ 11, 16, 19, 22).

2. Facts Relating to Re-Registration Requirement

Chicago Municipal Code § 8-20-200 mandates that all lawfully registered guns be re-registered each year. App. 7, 21 (Complaint,

Amended Answer, ¶ 39). Re-registration requires the payment of additional fees and re-submission of all initial registration materials. *Id.* If a registered gun is not timely re-registered, that particular gun becomes “unregisterable” and thus illegal to possess in Chicago. *Id.*

Plaintiff McDonald owns a shotgun lawfully registered pursuant to the Chicago Municipal Code. App. 3 (Complaint, Amended Answer, ¶ 14). Mr. Lawson likewise owns various guns lawfully registered in the city. App. 5, 18 (Complaint, Amended Answer, ¶ 25). McDonald and Lawson fear arrest, criminal prosecution, incarceration, and fine if they were to possess their guns in Chicago without re-registering them annually. App. 3, 5 (Complaint, ¶¶ 15, 26).

On May 4, 2008, the registration of Mr. Lawson’s K31 rifle lapsed. That rifle thus became permanently unregisterable within the City of Chicago. App. 5, 19 (Complaint, Amended Answer, ¶ 27). Mr. Lawson removed the rifle from his Chicago home and now keeps it outside the City of Chicago. App. 5 (Complaint, ¶ 27). Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess the

lapsed K31 rifle within his Chicago home without benefit of registration. App. 5 (Complaint, ¶ 28).

Plaintiff Lawson is not the only Chicagoan who had inadvertently allowed his firearm registration to lapse and thus render his gun “unregisterable.” The phenomenon is responsible for a decline in the number of registered guns that does not reflect the true firearm population in the city. App. 8 (Complaint, ¶ 40). When Alderman Richard Mell had various firearms become unregisterable for lack of timely re-registration, he successfully sponsored an amnesty ordinance permitting the re-registration of lapsed firearms upon payment of a fine. App. 8-9 (Complaint, ¶¶ 40, 41, 45).

Defendant’s Mayor, Richard M. Daley, supported the re-registration amnesty, declaring that Alderman Mell and other similarly-situated gun owners should be allowed to re-register their firearms, as their conduct in allowing the registrations to lapse was harmless and permitting re-registration of the firearms would not endanger public safety. App. 8 (Complaint, ¶¶ 42-44). The amnesty ordinance does not repeal the re-

registration requirement. App. 9 (Complaint, ¶ 45); *see* Chicago City Clerk Document S02008-2626, Ordinance of June 11, 2008.

3. Facts Relating to Pre-Acquisition Registration Requirement.

Chicago Municipal Code § 8-20-090(a) provides: “A registration certificate shall be obtained prior to any person taking possession of a firearm from any source.” App. 7, 21 (Complaint, Amended Answer, ¶ 38).

At times, compliance with this requirement is not strictly possible. In 2007, plaintiff David Lawson applied to purchase a rifle from the federal Civilian Marksmanship Program (“CMP”). On October 18, 2007, Mr. Lawson was informed via email that his application was granted and the rifle would be delivered to his Chicago home. App. 5 (Complaint, ¶ 29). The CMP requires that delivery be made to Mr. Lawson’s Chicago home, because that is the address listed both in Mr. Lawson’s driving license and Illinois Firearms Owner Identification Card. *Id.*

On October 19, 2007, the CMP rifle arrived at the Lawson home. Mr. Lawson thus had approximately a day’s notice that he would be receiving the CMP rifle. Only upon receiving the CMP rifle could Mr.

Lawson learn the gun's serial number, necessary to apply for a Chicago registration certificate for the firearm. App. 6 (Complaint, ¶ 30).

Mr. Lawson relocated the rifle outside of Chicago and, on November 30, 2007, applied to register the rifle. On December 11, 2007, that application was refused because Lawson did not effectuate registration of the rifle prior to taking possession of it. App. 6, 20 (Complaint, Amended Answer, ¶ 31). Mr. Lawson presently intends to possess the CMP rifle within his home, but is prevented from doing so only by the city's active enforcement of the pre-acquisition registration requirement and now unregistrable status of that firearm. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess this rifle within his home. App. 6 (Complaint, ¶ 32).

Plaintiffs Second Amendment Foundation and Illinois State Rifle Association each have individual members who are impacted by the challenged laws. App. 32, 34. Vindication of the right to keep and bear arms is germane to these organizations' purposes. App. 31, 33.

SUMMARY OF ARGUMENT

Applying Fourteenth Amendment incorporation tests to the Second Amendment right to keep and bear arms, there can be only one result: the Second Amendment applies to the states.

The right to keep and bear arms is among the privileges and immunities of United States citizenship which the states are forbidden from abridging. Indeed, the Fourteenth Amendment was intended and originally understood to stop the states' abridgement of the right to keep and bear arms. The Fourteenth Amendment's Privileges and Immunities Clause may have been given a wrong, parsimoniously narrow interpretation by the Supreme Court in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), but Second Amendment incorporation through that provision remains the most logical course of action. Considering the widely held view that the current Privileges or Immunities Clause jurisprudence is incorrect, and the recent suggestion by an Associate Justice of the Supreme Court that this doctrine be revisited, Plaintiffs would in good faith urge that this precedent be

reconsidered to better honor the original intent, meaning, and plain text of the Fourteenth Amendment.

Yet no settled law need be overturned in order for Plaintiffs to prevail. To the contrary, precedent requires entry of judgment for Plaintiffs. However *Slaughter-House* might hamper incorporation through the Privileges or Immunities Clause, the Supreme Court's well-established doctrine of selective incorporation through the Fourteenth Amendment's Due Process Clause mandates that the City of Chicago respect its residents' Second Amendment rights.

This brief thus addresses the various elements of the selective incorporation analysis: the subject right's roots in our legal tradition, the right's historical treatment by the states, the recent state-level trend with respect to the right, and most importantly, the character of the right. The Second Amendment right to arms easily satisfies all prongs of the selective incorporation test.⁴

⁴*NRA* Plaintiffs apparently assert that the Due Process Clause incorporates wholesale all textually enumerated rights, but this is not *McDonald* Plaintiffs' position.

The District Court erred in considering itself bound by *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982). Although *Quilici* rejected a challenge to a municipal gun ban, the case did not adjudicate the arguments raised by *McDonald* Plaintiffs. Neither did the Supreme Court’s pre-incorporation era precedent on which *Quilici* relied address selective-incorporation-era law. Even were these cases on-point, they have been overruled by the Supreme Court’s intervening decision in *Heller*, instructing that the question of Second Amendment incorporation be analyzed in a manner rejected by *Quilici* and unknown to the earlier courts from which it sought guidance. This Court does not consider precedent binding under such circumstances.

Applying the Second Amendment to the challenged laws, the latter must yield. A ban on the home possession of handguns by law-abiding adults is clearly unconstitutional. *Heller*, 128 S. Ct. at 2818. And while *Heller* did not purport to define the precise standard of review under which gun regulations must be examined in Second Amendment cases, Chicago’s re-registration and pre-acquisition registration requirements, and “unregisterability” penalty, fail any possible standard of review.

The “unregisterability” penalty, in particular, also violates the Fourteenth Amendment’s Equal Protection Clause in that it treats identical firearms differently, in a manner that burdens the exercise of a fundamental constitutional right. However, even in the absence of a relevant fundamental right, the unregisterability penalty fails rational basis review as the Defendant has admitted by its statements and conduct that the penalty serves no purpose.

This Court should reverse the judgment of the District Court and remand the case with instructions to grant *McDonald* Plaintiffs’ motion for summary judgment.

ARGUMENT

I. THE STANDARD OF REVIEW IN THIS CASE IS DE NOVO.

“[W]e review judgments on the pleadings de novo.” *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 619 (7th Cir. 2007) (citation omitted). “We review a district court’s grant or denial of summary judgment de novo.” *Belcher v. Norton*, 497 F.3d 742, 747 (7th Cir. 2007) (citation omitted).

II. THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS IS A PRIVILEGE OR IMMUNITY WHICH NO STATE SHALL ABRIDGE.

The Fourteenth Amendment provides, in pertinent part: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. Const. amend. XIV, sec. 1, cl. 2. The Fourteenth Amendment Privileges or Immunities Clause was originally intended and understood to incorporate the Bill of Rights – including, specifically, the Second Amendment – as against the states. It should be given this effect today.

Plaintiffs acknowledge that this argument is foreclosed by *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), holding that the Privileges or Immunities Clause guarantees only rights that flow from the existence of United States citizenship, such as the rights to diplomatic protection abroad or to access the navigable waterways of the United States. *Slaughter-House* may be binding law, but “‘everyone’ agrees the Court [has] 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 (1994); see also Laurence H. Tribe,

Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1121, 1297 n.247 (1995) (“[T]he *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause.”); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1258-59 (1992).

“Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873.” *Saenz v. Roe*, 526 U.S. 489, 523 n.1 (1999) (Thomas, J., dissenting) (citations omitted). Indeed, Justice Thomas, joined by Chief Justice Rehnquist, declared that he “would be open to reevaluating [the Privileges or Immunities Clause’s] meaning in an appropriate case.” *Saenz*, 526 U.S. at 528 (Thomas, J., dissenting).⁵ Plaintiffs submit that this is an appropriate such case, considering that no modern court has considered the

⁵“Since the adoption of [the Fourteenth] Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open.” *Gideon v. Wainright*, 372 U.S. 335, 345-46 (1963) (Douglas, J., concurring) (citation omitted).

interplay between the Second Amendment, properly understood, and the Fourteenth Amendment.

Before the Civil War, the Supreme Court held that states were not bound by the Bill of Rights. *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). *Barron* proved intolerable during Reconstruction. With recalcitrant southern states actively oppressing those just freed from slavery, Congress saw the need to constitutionally define American citizenship and imbue that citizenship with meaningful federal protection. Thus the Fourteenth Amendment's first section was designed to overrule two Supreme Court precedents. The first clause dispensed with *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which held that people of African descent could not be American citizens or citizens of American states. The Privileges or Immunities Clause was aimed squarely at overruling *Barron*.⁶

⁶*McDonald* Plaintiffs' historical arguments relating to the Fourteenth Amendment's original public meaning and intent relate, specifically, to the Privilege or Immunities Clause. *NRA* Plaintiffs' discussion of other Reconstruction Era legislation, which further describes an intent to have the states honor their residents' Second Amendment rights, is nonetheless illuminating and incorporated by reference.

“[I]n drafting section one,” Rep. John Bingham:

looked to *Barron* itself for guidance. Within the words of Chief Justice John Marshall he found clear instructions: “Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention.”

Michael Anthony Lawrence, *Second Amendment Incorporation Through the Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 18 (2007) (hereafter “Lawrence”) (citing Cong. Globe, 42d Cong., 1st Sess. 84 app. (1871); *Barron*, 32 U.S. at 250). The opening words of the Privileges or Immunities Clause thus imitate directly the command of Article I, Section 10 referenced by *Barron*: “No state shall.” Bingham made explicit that *Barron*’s suggestion was followed in order to bind the states. Lawrence, at 18-19 and citations therein.

As for the privileges and immunities that “no state shall . . . abridge,” these included, at a minimum, the Bill of Rights. “Congress in 1866 understood perfectly well that section one was intended to repudiate *Barron*. ‘Over and over [John Bingham] described the privileges-or-immunities clause as encompassing ‘the bill of rights’ – a phrase he used more than a dozen times in a key speech” Lawrence, 72 Mo. L.

Rev. at 19 (quoting Akhil Reed Amar, *THE BILL OF RIGHTS* 182 (1998) (hereafter “Amar”)). The Fourteenth Amendment’s Senate sponsor, Senator Jacob Howard, explained the Privileges or Immunities Clause’s incorporating scope:

To these privileges and immunities, whatever they may be – for they are not and cannot be fully defined in their entire extent and precise nature – to these should be added the personal right guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech, . . . *and the right to keep and to bear arms* The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (emphasis added).

These and numerous other widely reported congressional comments expressing the Fourteenth Amendment’s repudiation of *Barron* were unopposed. Amar, at 186-87. Indeed, the Fourteenth Amendment’s southern opponents understood that the Privileges or Immunities Clause incorporated the Bill of Rights, as did those who promoted the Fourteenth Amendment’s ratification among the states. *See* Lawrence, at 22-27. There is no question but that under the original public meaning of the Privileges or Immunities Clause, the entire Bill of Rights is to be incorporated as against the states. David Hardy, “Original

Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68,” January 1, 2009, available at SSRN: <http://ssrn.com/abstract=1322323>.

And arguably, the right to keep and bear arms was the right whose incorporation was most urgently desired.

With respect to the proposed [Fourteenth] Amendment, Senator Pomeroy described as one of the three “indispensable” “safeguards of liberty . . . under the Constitution” a man’s “right to bear arms for the defense of himself and family and his homestead.”

Heller, 128 S. Ct. at 2811 (citing Cong. Globe, 39th Cong., 1st Sess., 1182 (1866)).

Accordingly, until *Slaughter-House*, it was perfectly understood by fans and foes of the Fourteenth Amendment alike that the Privileges or Immunities Clause incorporates the entire Bill of Rights as against the states – including the Second Amendment. For purposes of this appeal, it suffices to note that *Slaughter-House*’s evisceration of the Privileges or Immunities Clause was wrong the day it was decided and remains wrong today.

III. THE SECOND AMENDMENT IS INCORPORATED BY THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

Slaughter-House may have rendered the Privileges or Immunities Clause all but meaningless, but the Supreme Court would discover another approach to Fourteenth Amendment incorporation. It is now well-established that the amendment's Due Process Clause has a substantive dimension, and that deprivation of enumerated constitutional rights is thus largely incompatible with due process. Almost every provision of the Bill of Rights considered for incorporation in the modern era has been incorporated. The Second Amendment must be among the incorporated rights.

NRA Plaintiffs advanced a view of substantive due process incorporation which *McDonald* Plaintiffs prefer as a matter of policy,⁷ but which they do not advance here. *NRA* Plaintiffs posit that all rights are "fundamental" if "explicitly or implicitly protected by the Constitution," *NRA* Brief, Dec. 4, 2008, at 12 (citation omitted), and that "[a]s such, the Second Amendment should be recognized as

⁷And which they endorse under the Privileges or Immunities Clause.

incorporated.” Id.

In sum, since the Second Amendment encompasses an explicitly-guaranteed, substantive right, it meets the standards of the Supreme Court’s jurisprudence on incorporation of fundamental rights into the Fourteenth Amendment.

Id. at 15.

The District Court accurately summed up the *NRA* argument as a “simple syllogism,” App. 36, that because most of the Bill of Rights has been incorporated under the Fourteenth Amendment, “Ergo, the Second Amendment’s guaranty of the right of the people to keep and bear arms, as construed in *Heller*, also extends to Oak Park and Chicago via the Fourteenth Amendment. QED.” Id.

Yet the District Court erred in equating these arguments for implicit due process incorporation with *McDonald* Plaintiffs’ selective incorporation arguments. And as discussed below, the District Court erred to the extent it declined *either* claim by invoking nineteenth-century case law that did not contemplate any manner of due process incorporation.

“[T]he sort of Fourteenth Amendment inquiry required by our later cases,” *Heller*, 128 S. Ct. at 2813 n.23, involves more than identification

of a right's textual enumeration. In the early days of incorporation, the Supreme Court explained that

immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

Palko v. Connecticut, 302 U.S. 319, 324-25 (1937). The Second

Amendment, given its forceful command and basis in the inherent human right of self-preservation, would surely pass this test.

But the Supreme Court would settle on an analysis proven yet more amenable to incorporation. The modern incorporation test asks whether a right is “fundamental to the American scheme of justice,” *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), or “necessary to an Anglo-American regime of ordered liberty,” *id.* at 150 n.14. *Duncan*'s analysis suggests looking to the right's historical acceptance in our nation, its recognition by the states (including any trend regarding state recognition), and the nature of the interest secured by the right. The right to bear arms clearly satisfies all aspects of the selective incorporation standard.

1. The Right to Arms in Our Legal Tradition.

“By the time of the founding, the right to have arms had become fundamental for English subjects.” *Heller*, at 2798 (citations omitted). When the Constitution was written, English law had “settled and determined” that “a man may keep a gun for the defence of his house and family.” *Mallock v. Eastly*, 87 Eng. Rep. 1370, 1374, 7 Mod. Rep. 482 (C.P. 1744). The violation of that right by George III “provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.” *Heller*, at 2799.

There is no need to recite the exhaustive historical evidence considered in *Heller*. Notwithstanding the wishes of some to fashion an alternate history oddly omitting the right to arms from our legal tradition, the matter is now settled precedent and beyond further dispute: the Second Amendment “codified a right inherited from our English ancestors.” *Heller*, at 2802 (citation omitted).

2. The States’ Treatment of the Right to Arms.

All five state constitutional ratifying conventions that demanded a Bill of Rights demanded a right to arms. Forty-four of the fifty states

secure a right to arms in their constitutions. Of these, fifteen are either new or strengthened since 1970. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191 (2006). And in *Heller*, thirty-two states advised the Supreme Court that the individual Second Amendment “is properly subject to incorporation.” Brief of Amici States Texas, et al., Supreme Court No. 07-290, at 23 n.6.⁸

3. The Interest Secured by the Right to Arms.

The Second Amendment’s purpose confirms its incorporation. “The inherent right of self-defense has been central to the Second Amendment right.” *Heller*, at 2818. Blackstone described that right as preserving “‘the natural right of resistance and self-preservation,’ and ‘the right of having and using arms for self-preservation and defence.’” *Heller*, at 2792 (citations omitted).

“[T]he right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process Clause.” *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (citation omitted). The Supreme Court binds the states to respect various rights which, like the Second

⁸North Carolina joined the brief’s thirty-one original signatories by letter.

Amendment, are rooted in deference to preserving personal autonomy.

Observing that

no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law,

Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 269 (1990) (citation omitted), the Supreme Court recognized a right to refuse life-sustaining medical care. *Id.* at 278; *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“liberty of the person both in its spatial and more transcendent dimensions” supports right to consensual intimate relationships); *Rochin v. California*, 342 U.S. 165 (1952) (right of bodily integrity against police searches).

The Supreme Court instructs that “choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). It is unfathomable that the states are constitutionally limited in their

regulation of medical decisions or intimate relations, because these matters touch upon personal autonomy, but are unrestrained in their ability to trample upon the enumerated right to arms designed to enable self-preservation. If abortion is protected because “[a]t the heart of liberty is the right to define one’s own concept of existence,” *id.*, the right of armed self-defense against violent criminal attack is surely deserving of incorporation. Indeed, the right to purchase contraception was discovered as related to the “indefeasible right of personal security.” *Griswold v. Connecticut*, 381 U.S. 479, 484 n.* (1965) (citation omitted). The right to arms plainly possesses greater nexus to the interest in personal security.

Indeed, *Casey* invoked the second Justice Harlan’s celebrated passage describing the liberty protected by the Due Process Clause as broader than “a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on.” *Id.* at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan,

J., dissenting)) (emphasis added). Liberty cannot now be defined so narrowly as to exclude one of its more obvious attributes.

This circuit has also long accepted that “the right to some degree of bodily integrity” is “chief among” the interests protected by the Due Process Clause. *White v. Rockford*, 592 F. 2d 381, 383 (7th Cir. 1979). Once *Heller* clarified that the Second Amendment right is one of personal security, its incorporation was not solely required by Supreme Court incorporation precedent, but by circuit law.

The Second Amendment also has another purpose, spelled out in the prefatory clause: preservation of the people’s ability to act as militia. *Heller*, at 2800-01. The Amendment’s framers believed this purpose was “necessary to the security of a free state.” U.S. Const. amend. II. By its own terms, the Second Amendment secures a fundamental right.

IV. THE DISTRICT COURT OVER-READ INAPPLICABLE AND SUPERSEDED PRECEDENT.

A. Selective Incorporation of the Second Amendment Under the Due Process Clause Is Not Addressed by any Precedent.

The District Court cannot be faulted for invoking the axiom that a lower court is bound to “follow the unreversed precedent of a court that

occupies a higher position in the judicial firmament.” App. 39. Yet left unstated is the equally obvious proposition that a District Court is not bound by precedent that does not speak to the claims before it.

It is not enough to say that *Quilici, Presser v. Illinois*, 116 U.S. 252 (1886) and *United States v. Cruikshank*, 92 U.S. 542 (1876) rejected application of the Second Amendment to the states. The value of precedent lies in the reasoning, not the result. The District Court acknowledged that *Presser* and *Cruikshank* “long antedated the more modern jurisprudence of implied incorporation [and later] selective incorporation.” App. 38-39. Plaintiffs’ substantive due process claims were made pursuant to this “more modern jurisprudence,” which the Supreme Court has now instructed contains the “required” analysis. *Heller*, at 2813 n.13; *see also Duncan*, 391 U.S. at 155 (complete non-incorporation “a position long since repudiated”).

Neither is *Quilici*, which relied entirely on *Presser* to adjudicate claims different than those advanced here, relevant to selective incorporation claims. No holding in *Quilici* “takes the opposite position from that now pressed by [*McDonald*] plaintiffs.” App. 41-42.

To be sure, *Quilici*'s statement that "the right to keep and bear handguns is not guaranteed by the Second Amendment," *Quilici*, 695 F.2d at 270 (footnote omitted), is dicta. The case was decided on incorporation grounds:

Since we hold that the second amendment does not apply to the states, we need not consider the scope of its guarantee of the right to bear arms. For the sake of completeness, however, and because appellants devote a large portion of their briefs to this issue, we briefly comment on what we believe to be the scope of the second amendment.

Id. The "belief" about handgun bans contained in *Quilici*'s "brief commentary" is not the law: "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid [under the Second Amendment]." *Heller*, at 2818.

As for the incorporation arguments adjudicated in *Quilici*, this Court first rejected the claim that the right to arms "is an attribute of national citizenship which is not subject to state restriction." *Quilici*, at 269. This accurately describes Plaintiffs' Privileges or Immunities argument, which Plaintiffs acknowledge to be foreclosed but hope to have reconsidered by the Supreme Court. This language does not, however,

describe Plaintiffs' claim of selective due process incorporation. Selective incorporation does not turn on the nature of citizenship.

Quilici also rejected three other incorporation theories:

that: (1) *Presser* is no longer good law because later Supreme Court cases incorporating other amendments into the fourteenth amendment have effectively overruled *Presser*; (2) *Presser* is illogical; and (3) the entire Bill of Rights has been implicitly incorporated into the fourteenth amendment to apply to the states.

Quilici, at 269-70.⁹

These claims are easily disposed of. *McDonald* Plaintiffs do not advance a theory of total due process incorporation, nor have *McDonald* Plaintiffs rested their selective due process theory on mere attacks on any precedent's logic. Indeed, there is no precedent rejecting Second Amendment incorporation on due process grounds.

As for *Presser* no longer being good law, *McDonald* Plaintiffs do not claim that the decision is bad law merely because its reasoning has been undercut by subsequent decisions. Rather, subsequent decisions – as

⁹*McDonald* Plaintiffs apparently read *Quilici* in two different respects than do *NRA* Plaintiffs. *McDonald* Plaintiffs read *Quilici* as (1) perpetuating the wrong yet still-binding *Slaughter-House* doctrine eviscerating the Privileges or Immunities Clause, and (2) rejecting any form of complete, implicit incorporation. Neither proposition is relevant to *McDonald* Plaintiffs' selective incorporation argument.

notably explained by *Heller* – command a due process analysis unknown to the *Presser* Court.

Presser's regrettable denial of Privileges or Immunities incorporation remained binding upon the District Court, as it remains binding on this Court. But whereas in 1886, denial of Privileges or Immunities Incorporation left matters with *Barron's* truism that the Bill of Rights did not originally bind the states – that is not what remains of the Fourteenth Amendment today. *Presser's* logic, rooted in *Slaughter-House* and *Cruikshank*, simply does not address Plaintiffs' selective incorporation due process claims.

Quilici clearly did not distinguish between Privileges or Immunities incorporation and Due Process incorporation. And in rejecting implicit, total incorporation, *Quilici* did not consider the selective incorporation arguments advanced by Plaintiffs.

B. To the Extent *Presser*, *Cruikshank*, or *Quilici* Might Cast Doubt upon Second Amendment Incorporation Under the Due Process Clause, Such Precedent Is Not Authoritative.

Even if the Supreme Court's pre-incorporation era precedents, or their Seventh Circuit progeny, could be argued to cast doubt on

substantive due process incorporation of the Second Amendment, these cases are all superseded.

Quilici's own words suggest the rationale for finding that case no longer authoritative on this question (if it ever was). When *Quilici* was decided, the “appellants offer[ed] no authority, other than their own opinions, to support their arguments that *Presser* is no longer good law or would have been decided differently today.” *Quilici*, 695 F.2d at 270.

Times have changed. Since *Quilici*, two circuits concluded *Presser* had been overtaken by the incorporation doctrine. Judge Reinhardt, writing for the Ninth Circuit in elucidating the “collective right” theory later rejected in *Heller*, agreed with the Fifth Circuit that *Presser* and *Cruikshank* “rest on a principle that is now thoroughly discredited.” *Silveira v. Lockyer*, 312 F.3d 1052, 1066 n.17 (9th Cir. 2002) (citing *United States v. Emerson*, 270 F.3d 203, 221 n.13 (5th Cir. 2001)).

More critically, the Supreme Court has just explained that *Cruikshank*, upon which *Presser* relied, did not “engage in the sort of Fourteenth Amendment inquiry *required by our later cases.*” *Heller*, at 2813 n.23 (emphasis added). *Quilici* itself suffers from this flaw, having

expressly refused consideration of “historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments,” *Quilici*, 695 F.2d at 270 n.8, – key aspects of “the sort of inquiry” now “required” by the Supreme Court. *Quilici*’s refusal to engage history is all the more troubling considering the Supreme Court’s extended discussion of the Second Amendment’s role in the Fourteenth Amendment’s ratification.

“Our decisions do not bind the district court when there has been a relevant intervening change in the law.” *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 796 (7th Cir. 2005) (citation omitted); *cf. Cameo Convalescent Center, Inc. v. Percy*, 800 F.2d 108, 110 (7th Cir. 1986). “A court need not blindly follow decisions that have been undercut by subsequent cases” *United States v. Burke*, 781 F.2d 1234, 1239 n.2 (7th Cir. 1985) (citations omitted).

Constitutional law is very largely a prediction of how the Supreme Court will decide particular issues when presented to it for decision . . . sometimes later decisions, though not explicitly overruling or even mentioning an earlier decision, indicate that the Court very probably will not decide the issue the same way the next time. In such a case, to continue to follow the earlier case blindly until it is formally overruled is to apply the dead, not the living, law.

Norris v. United States, 687 F.2d 899, 904 (7th Cir. 1982). When

events subsequent to the last decision by the higher court approving the doctrine -- especially later decisions by that court and statutory changes -- make it almost certain that the higher court would repudiate the doctrine if given a chance to do so, the lower court is not required to adhere to the doctrine.

Olson v. Paine, Webber, Jackson, & Curtis, Inc., 806 F.2d 731, 734 (7th

Cir. 1986) (collecting numerous cases). Such repudiation has already occurred – in *Heller* – with respect to any preclusive effect *Cruikshank* and its progeny might have upon substantive due process incorporation.

Other circuits likewise follow this common sense rule, recognizing that their panel precedents may be rendered obsolete by intervening higher authority. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 n.7 (4th Cir. 1996); *White v. Estelle*, 720 F.2d 415, 417 (5th Cir. 1983); *Dawson v. Scott*, 50 F.3d 884, 892 n.20 (11th Cir. 1995).

[T]he issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.

Miller, 335 F.3d at 900.

Indeed, failure to recognize that intervening Supreme Court precedent has rendered obsolete a circuit court decision is grounds for summary reversal. *United States v. Nachtigal*, 507 U.S. 1 (1993). *Heller's* limitation of *Cruikshank*, and instruction that modern incorporation analysis is required to resolve the issue of Second Amendment incorporation, constitute “a relevant intervening change in the law.” *EEOC*, 417 F.3d at 796. The Village of Morton Grove must understand *Quilici's* limitations, as it just repealed the handgun ban upheld in that case in the face of a post-*Heller* challenge. Robert Channick, *Morton Grove repeals 27-year old gun ban*, Chicago Tribune (July 28, 2008).

Presser “would have been decided differently today,” *Quilici*, 695 F.2d at 270 – not because *Presser's* Privileges or Immunities analysis would necessarily be revisited, but because the Supreme Court has flatly declared it would expect to perform a substantive due process analysis. Of course, “[o]rdinarily a lower court has no authority to reject a doctrine developed by a higher one,” *Olson*, 806 F.2d 731, 734. But with respect to Plaintiffs’ selective incorporation claim, this Court is not called upon to reject anything developed in *Presser* or *Cruikshank*;

rather, this Court is called upon to apply the doctrine “required” by more recent cases, as stated in *Heller*.

The District Court misinterpreted Justice Holmes’s maxim relating to “the life of the law” being “experience” rather than “logic.” The Second Circuit supplied a better, directly relevant explanation of this language:

We would stultify ourselves and unnecessarily burden the Supreme Court if -- adhering to the dogma, obviously fictional to any reader of its history, that alterations in that court’s principles of decision never occur unless recorded in explicit statements that earlier decisions are overruled -- we stubbornly and literally followed decisions which have been, but not too ostentatiously, modified. “The life of the law,” as Mr. Justice Holmes said, “has been experience.” Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it.

Perkins v. Endicott Johnson Corp., 128 F.2d 208, 217-18 (2nd Cir. 1942), *aff’d*, 317 U.S. 501 (1943) (footnotes omitted).

Selective due process incorporation is not a new trend. This Court should follow the Supreme Court’s fresh, specific instruction that modern incorporation analysis is “required,” *Heller*, 128 S. Ct. at 2813 n.23, in considering the Second Amendment’s application to Chicago.

V. THE CHALLENGED LAWS VIOLATE PLAINTIFFS' RIGHTS TO KEEP ARMS AND TO EQUAL PROTECTION.

Handgun bans of the sort at issue here clearly violate the Second Amendment. *Heller*, 128 S. Ct. at 2818. With respect to the other challenged provisions, *Heller* made clear that the standard of review in Second Amendment cases should be one befitting other enumerated constitutional rights. *Id.* at 2818 n.27. The Fifth Circuit employs a version of strict scrutiny, allowing those laws that are

limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.

Emerson, 270 F.3d at 261. This Court should adopt the same test. But regardless of the standard to be applied, the challenged laws fail. *See Zobel v. Williams*, 457 U.S. 55, 60-61 (1982) (failing lowest standard, no need for testing higher standard).

Whatever the value of registration, the requirement that guns be constantly re-registered burdens gun ownership but serves no useful purpose. The city already mandates that registrants immediately notify police of any changes in their registration information, including loss or

disposition of a gun or registration certificate. Chicago Mun. Code § 8-20-140. Moreover, “[a] state may not impose a charge for the enjoyment of a right granted by the Federal Constitution.” *Murdock v.*

Pennsylvania, 319 U.S. 105 (1943). The re-registration requirement, apart from harassing gun ownership, amounts to an impermissible annual tax on the exercise of a fundamental constitutional right.

The penalty for lapsed or improper registration rendering the subject firearm “unregisterable” is likewise unconstitutional. Whatever penalty the city might wish to impose for non-compliance with a registration scheme (within other constitutional limitations), permanently banning the gun at issue from lawful possession is an extreme, unwarranted deprivation of the right to keep arms.

But the non-registerability penalty is not merely a Second Amendment violation. The penalty violates the Equal Protection Clause as well, because the would-be registrant is fully capable of registering an identical firearm (if available) – just not the particular firearm whose registration lapsed or failed for some reason. The non-registerability penalty thus creates two classes of identical firearms: one which can be

possessed, and one which cannot, and the only distinction between the two is that an item falling in the latter category was once subject to a registration failure. Since the penalty tracks the gun, not the registrant, it deprives wholly innocent people the ability to possess perfectly good firearms whose possession is protected by the Second Amendment and which the city, in any event, often does not otherwise seek to ban.

This is precisely the sort of classification held to violate the Equal Protection Clause, under a rational basis analysis, in *People's Rights Org. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (unconstitutional to base registerability of firearms upon prior compliance with registration law). Of course, whatever the standard of review for equal protection analysis in cases touching upon Second Amendment rights, it must be now be higher than rational basis.

Defendant itself realized that the practice of rendering guns whose registration has lapsed “unregisterable” frustrates legitimate gun ownership, and that the annual re-registration is so burdensome as to discourage compliance with the registration program. Had the unregisterability penalty advanced any public safety rationale,

Defendant would not have enacted an amnesty, motivated by a powerful alderman's unfortunate re-registration lapse. The Mayor himself had declared such lapses harmless, and the unregistrability penalty counterproductive.

The pre-acquisition registration requirement, at least as applied to Plaintiffs, is likewise unconstitutional. The city has no valid interest regulating the acquisition of firearms outside its borders, and should not ban the registration of firearms lawfully acquired elsewhere if they are otherwise registerable. As David Lawson's attempt to register a CMP rifle demonstrates, rigid application of the pre-acquisition rule can bar even innocuous activity. People should be afforded a reasonable opportunity to comply with the registration requirements.

CONCLUSION

Defendant is bound to respect Plaintiffs' Second Amendment rights by the Fourteenth Amendment. There being no factual dispute, the judgment should be reversed and the case remanded with directions to enter summary judgment for Plaintiffs.

Dated: January 28, 2009

Respectfully submitted,

David G. Sigale
Law Firm of David G. Sigale, P.C.
4300 Commerce Court, Suite 300-3
Suite 300-3
Lisle, IL 60532
630.452.4547/630.596.4445

Alan Gura
Gura & Possessky, PLLC
101 N. Columbus Street
Suite 405
Alexandria, VA 22314
703.835.9085/703.997.7665

By: _____
Alan Gura

Attorneys for Plaintiffs-
Appellants Otis McDonald,
Adam Orlov, Colleen Lawson,
David Lawson, Second
Amendment Foundation, Inc.,
and Illinois State Rifle Ass'n

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Alan Gura
Attorney for Plaintiffs-Appellants
Dated: January 28, 2009

CERTIFICATE OF SERVICE

On this, the 28th day of January, 2009, I served two true and correct copies of the foregoing Appellants' Brief and Required Short Appendix on the following by Federal Express:

Suzanne M. Loose
City of Chicago Department of Law
Appeals Division
30 North LaSalle Street, Suite 800
Chicago, IL 60602

Stephen A. Kolodziej
Brenner, Ford, Monroe & Scott, Ltd.
300 South Dearborn Street, Suite 300
Chicago, IL 60602

Stephen P. Halbroom
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030

I further certify that on this, the 28th day of January, 2009, I served the electronic copy of the foregoing Appellants' Brief and Required Short Appendix on above-listed counsel by email to sloose@cityofchicago.org, skolodziej@brennerlawfirm.com, and protell@aol.com.

The brief was also filed this day by dispatch to the Clerk via Federal Express.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 28th day of January, 2009.

Alan Gura

REQUIRED SHORT APPENDIX

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

Alan Gura

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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

Plaintiffs,)

v.)

CITY OF CHICAGO and)
MAYOR RICHARD M. DALEY,)

Defendants.)

Case No.

COMPLAINT

FILED: JUNE 26, 2008 08CV3645

COMPLAINT

COME NOW the Plaintiffs, Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc., and Illinois State Rifle Association, by and through undersigned counsel, and complain of the Defendants as follows:

THE PARTIES

1. Plaintiff Otis McDonald is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. McDonald resides in a high-crime neighborhood and is active in community affairs. As a consequence of trying to make his neighborhood a better place to live, Mr. McDonald has been threatened by drug dealers.

2. Plaintiff Adam Orlov is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. Orlov is a former Evanston, Illinois, police officer. As a police

officer, Mr. Orlov was entrusted with a handgun for the purpose of defending himself and others from violent crime.

3. Plaintiff Colleen Lawson is a natural person and a citizen of the United States, residing in Chicago, Illinois. Ms. Lawson's home has been targeted by burglars.

4. Plaintiff David Lawson is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. Lawson's home has been targeted by burglars.

5. Plaintiff Second Amendment Foundation, Inc. ("SAF") is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 600,000 members and supporters nationwide, including many in Chicago. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control. SAF brings this action on behalf of itself and its members.

6. Plaintiff Illinois State Rifle Association ("ISRA") is a non-profit membership organization incorporated under the laws of Illinois with its principal place of business in Chatsworth, Illinois. ISRA has over 17,000 members and supporters in Illinois, including many in Chicago. The purposes of ISRA include securing the Constitutional right to privately own and possess firearms within Illinois, through education, outreach, and litigation. ISRA brings this action on behalf of itself and its members.

7. Defendant City of Chicago is a municipal entity organized under the Constitution and laws of the State of Illinois.

8. Defendant Richard M. Daley is the Mayor of the City of Chicago, and as such is responsible for executing and administering the City of Chicago's laws, customs, practices, and

policies. In that capacity, Mr. Daley is presently enforcing the laws, customs, practices and policies complained of in this action, and is sued in both his individual and official capacities.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983.

10. Venue lies in this Court pursuant to 28 U.S.C. § 1391.

STATEMENT OF FACTS

11. Mr. McDonald lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. McDonald presently intends to possess the handgun within his home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

12. Mr. McDonald applied for permission to possess a handgun within his Chicago home. On June 13, 2008, that application was refused pursuant to the policies complained of in this action.

13. Mr. McDonald fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home.

14. Mr. McDonald owns a shotgun which he keeps in his Chicago home. This shotgun is lawfully registered pursuant to the Chicago Municipal Code.

15. Mr. McDonald fears arrest, criminal prosecution, incarceration, and fine if he were to continue to possess the shotgun in his Chicago home without re-registering it annually as required by the Chicago Municipal Code.

16. Mr. Orlov lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. Orlov presently intends to possess the handgun within his home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

17. Mr. Orlov applied for permission to possess the handgun within his Chicago home. On May 6, 2008, that application was refused pursuant to the policies complained of in this action.

18. Mr. Orlov fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home.

19. Ms. Lawson lawfully owns a handgun, which she keeps outside the City of Chicago. Ms. Lawson presently intends to possess the handgun within her home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

20. Ms. Lawson applied for permission to possess the handgun within her Chicago home. On January 3, 2008, that application was refused pursuant to the policies complained of in this action.

21. Ms. Lawson fears arrest, criminal prosecution, incarceration, and fine if she were to possess a handgun within her home.

22. Mr. Lawson lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. Lawson presently intends to possess the handgun within his home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

23. Mr. Lawson applied for permission to possess the handgun within his Chicago home. On January 23, 2008, that application was refused pursuant to the policies complained of in this action.

24. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home.

25. Mr. Lawson owns various long arms which are kept in his Chicago home and are lawfully registered pursuant to the Chicago Municipal Code.

26. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to continue to possess these arms in his Chicago home without re-registering them annually as required by the Chicago Municipal Code.

27. On May 4, 2008, the registration for one of Mr. Lawson's rifles, a K31, lapsed. The rifle thus became permanently unregistrable within the City of Chicago. Mr. Lawson removed the rifle from his Chicago home and now keeps it outside the City of Chicago.

28. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess the lapsed K31 rifle within his Chicago home. Mr. Lawson presently intends to possess the K31 rifle within his home, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

29. In 2007, Mr. Lawson applied to purchase a rifle from the federal Civilian Marksmanship Program ("CMP"). On October 18, 2007, Mr. Lawson was informed via email that his application was granted and the rifle would be delivered to his Chicago home. The Civilian Marksmanship Program requires that delivery be made to Mr. Lawson's Chicago home,

because that is the address listed both in Mr. Lawson's driving license and Illinois Firearms Owner Identification Card.

30. On October 19, 2007, the CMP rifle arrived at the Lawson home via the U.S. Postal Service. Mr. Lawson thus had approximately a day's notice that he would be receiving the CMP rifle. Only upon receiving the CMP rifle could Mr. Lawson learn the gun's serial number, necessary to apply for a Chicago registration certificate for the firearm.

31. Mr. Lawson relocated the rifle outside of Chicago and, on November 30, 2007 applied to register the rifle. On December 11, 2007, that application was refused pursuant to the policies complained of in this action.

32. Mr. Lawson presently intends to possess the CMP rifle within his home, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess the CMP rifle within his home.

33. The Second Amendment to the United States Constitution provides: "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."

34. At a minimum, the Second Amendment guarantees individuals a fundamental right to possess a functional, personal firearm, including a handgun, within the home.

35. The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or 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.”

36. Chicago Municipal Code § 8-20-040(a) mandates that

All firearms in the City of Chicago shall be registered in accordance with the provisions of this chapter. It shall be the duty of a person owning or possessing a firearm to cause such firearm to be registered. No person shall within the City of Chicago, possess, harbor, have under his control . . . or accept any firearm unless such person is the holder of a valid registration certificate for such firearm. No person shall, within the City of Chicago, possess, harbor, have under his control . . . or accept any firearm which is unregistrable under the provisions of this chapter.

37. Chicago Municipal Code § 8-20-050 provides: “No registration certificate shall be issued for any of the following types of firearms: . . .(c) handguns . . .” While Section 8-20-050(c) provides exceptions for certain handguns owned prior to the law’s effective date, and handguns owned by police officers, security personnel, and private detectives, the provision, in conjunction with Section 8-20-040, generally bars the private home possession of handguns by law-abiding adult citizens.

38. Chicago Municipal Code § 8-20-090(a) provides: “A registration certificate shall be obtained prior to any person taking possession of a firearm from any source.”

39. Chicago Municipal Code § 8-20-200 provides:

(a) Every registrant must renew his registration certificate annually. Applications for renewal shall be made by such registrants 60 days prior to the expiration of the current registration certificate.

(b) The application for renewal shall include the payment of a renewal fee as follows:

1 firearm . . . \$20.00; 2-10 firearms . . . 25.00; More than ten firearms . . . 35.00

(c) Failure to comply with the requirement for renewal of registration of a firearm shall cause that firearm to become unregistrable.

(d) All terms, conditions and requirements of this chapter for registration of firearms shall be applicable to renewal or registration of such firearms.

(e) The renewal fee shall not be applicable to duty-related handguns of peace officers domiciled in the City of Chicago.

40. Many Chicago gun owners fail to re-register their firearms every year. Among these recently was Alderman Richard Mell, whose firearms became unregistrable when he failed to timely renew his registration certificates.

41. Accordingly, Alderman Mell proposed an ordinance amending the law to permit, for one month, lapsed guns to be re-registered if their owners had attempted to re-register their guns between May 1, 2007 and April 1, 2008, a period that would have covered his lapsed firearm registrations.

42. Defendant Mayor Daley endorsed Mell's proposal, stating: "A lot of people go back and forth to their summer homes . . . A lot of people move their shotguns. A lot of 'em are bird hunters, gun collectors. . . . They move 'em back from Wisconsin, Michigan, [other] parts of Illinois."

43. Defendant Mayor Daley added: "It's one time [for] one month . . . You want to have 'em register. There's nothing wrong with that . . . People want to just register. A lot of 'em bring 'em back from hunting trips. So, why not?"

44. Speaking of Alderman Mell's desire to re-register his lapsed guns, Defendant Mayor Daley stated: "He has a home in Wisconsin. He brings 'em back and forth. He's not running out with a shotgun and hurting people."

45. The proposed re-registration amnesty bill was passed by the Chicago City Council, with the amnesty period extended to 120 days. The fee for re-registering a lapsed firearm under the amnesty bill is \$60.00.

46. A first violation of Chicago’s ban on the ownership or possession of unregistered firearms within the home is punishable by a fine of “not less than \$300.00, nor more than \$500.00; or [incarceration] for not less than ten days nor more than 90 days or both.” Chicago Municipal Code § 8-20-250. Subsequent violations are punishable by a fine of \$500.00 and incarceration ranging from ninety days to six months. Id.

FIRST CAUSE OF ACTION – HANDGUN BAN
RIGHT TO KEEP AND BEAR ARMS
U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983

47. Paragraphs 1 through 46 are incorporated as though fully stated herein.

48. The Second Amendment right is incorporated as against the states and their political subdivisions pursuant to the Due Process Clause of the Fourteenth Amendment.

49. The Second Amendment right to keep and bear arms is a privilege and immunity of United States citizenship which, pursuant to the Fourteenth Amendment, states and their political subdivisions may not violate.

50. Handguns, as a class of weapons, are “arms” whose possession by law-abiding adult citizens is protected by the Second Amendment right to keep and bear arms.

51. By banning handguns, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in

violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

SECOND CAUSE OF ACTION – RE-REGISTRATION REQUIREMENT
RIGHT TO KEEP AND BEAR ARMS
U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983

52. Paragraphs 1 through 51 are incorporated as though fully stated herein.

53. By requiring Plaintiffs to annually re-register each firearm, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

THIRD CAUSE OF ACTION – PRE-ACQUISITION REGISTRATION REQUIREMENT
RIGHT TO KEEP AND BEAR ARMS
U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983

54. Paragraphs 1 through 53 are incorporated as though fully stated herein.

55. By requiring Plaintiffs to register all firearms prior to their acquisition, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement

and maintenance of Defendants' unconstitutional customs, policies, and practices.

FOURTH CAUSE OF ACTION – UNREGISTERABLE STATUS PENALTY
RIGHT TO KEEP AND BEAR ARMS
U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983

56. Paragraphs 1 through 55 are incorporated as though fully stated herein.

57. By declaring specific firearms “unregisterable” as a penalty for not complying with registration requirements, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

FIFTH CAUSE OF ACTION – UNREGISTERABLE STATUS PENALTY
EQUAL PROTECTION
U.S. CONST., AMEND. XIV, 42 U.S.C. § 1983

58. Paragraphs 1 through 57 are incorporated as though fully stated herein.

59. By declaring specific firearms “unregisterable” as a penalty for not complying with registration requirements, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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

No. 08 C 3645

Plaintiffs,

Judge Milton I. Shadur

v.

Magistrate Judge Schenkier

**CITY OF CHICAGO and
MAYOR RICHARD M. DALEY,

Defendants.**

**DEFENDANT CITY OF CHICAGO’S AMENDED ANSWER
TO PLAINTIFFS’ COMPLAINT, DEFENSE, AND JURY DEMAND**

Defendant City of Chicago (“City”), by and through its attorney, Mara S. Georges, Corporation Counsel for the City of Chicago, hereby submits its Answer to Plaintiffs’ Complaint, its Defense, and its Jury Demand.

ANSWER

THE PARTIES

1. Plaintiff Otis McDonald is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. McDonald resides in a high-crime neighborhood and is active in community affairs. As a consequence of trying to make his neighborhood a better place to live, Mr. McDonald has been threatened by drug dealers.

ANSWER: Pursuant to the Court’s June 27, 2008 Memorandum Order, all but the first sentence of this paragraph is stricken. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 1.

2. Plaintiff Adam Orlov is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. Orlov is a former Evanston, Illinois, police officer. As a police officer, Mr. Orlov was entrusted with a handgun for the purpose of defending himself and others from violent crime.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, all but the first sentence of this paragraph is stricken. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 2.

3. Plaintiff Colleen Lawson is a natural person and a citizen of the United States, residing in Chicago, Illinois. Ms. Lawson's home has been targeted by burglars.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, all but the first sentence of this paragraph is stricken. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 3.

4. Plaintiff David Lawson is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. Lawson's home has been targeted by burglars.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, all but the first sentence of this paragraph is stricken. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 4.

5. Plaintiff Second Amendment Foundation, Inc. ("SAF") is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 600,000 members and supporters nationwide, including many in Chicago. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control. SAF brings this action on behalf of itself and its members.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5.

6. Plaintiff Illinois State Rifle Association ("ISRA") is a non-profit membership organization incorporated under the laws of Illinois with its principal place of business in Chatsworth, Illinois. ISRA has over 17,000 members and supporters in Illinois, including many in Chicago. The purposes of ISRA include securing the Constitutional right to privately own and possess firearms within Illinois, through education, outreach, and litigation. ISRA brings this action

on behalf of itself and its members.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6.

7. Defendant City of Chicago is a municipal entity organized under the Constitution and laws of the State of Illinois.

ANSWER: The City admits the allegations contained in Paragraph 7.

8. Defendant Richard M. Daley is the Mayor of the City of Chicago, and as such is responsible for executing and administering the City of Chicago's laws, customs, practices, and policies. In that capacity, Mr. Daley is presently enforcing the laws, customs, practices and policies complained of in this action, and is sued in both his individual and official capacities.

ANSWER: Pursuant to the Court's Memorandum Orders of June 27, 2008 and July 7, 2008, this paragraph is stricken.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, the references in Paragraph 9 to 28 U.S.C. §§ 2201 and 2202 are stricken. The City admits that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343. The City denies the remaining allegations contained in Paragraph 9.

10. Venue lies in this Court pursuant to 28 U.S.C. § 1391.

ANSWER: The City admits the allegations contained in Paragraph 10.

STATEMENT OF FACTS

11. Mr. McDonald lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. McDonald presently intends to possess the handgun within his home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

ANSWER: The City is without knowledge or information sufficient to form a belief as to

the truth of the allegations contained in Paragraph 11.

12. Mr. McDonald applied for permission to possess a handgun within his Chicago home. On June 13, 2008, that application was refused pursuant to the policies complained of in this action.

ANSWER: The City admits that Mr. McDonald applied to the City for permission to register a handgun and that the application was refused on June 13, 2008, pursuant to Chicago Municipal Code § 8-20-050. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 12.

13. Mr. McDonald fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13.

14. Mr. McDonald owns a shotgun which he keeps in his Chicago home. This shotgun is lawfully registered pursuant to the Chicago Municipal Code.

ANSWER: The City admits that a shotgun is currently registered with the City under Mr. McDonald's name. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 14.

15. Mr. McDonald fears arrest, criminal prosecution, incarceration, and fine if he were to continue to possess the shotgun in his Chicago home without re-registering it annually as required by the Chicago Municipal Code.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15.

16. Mr. Orlov lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. Orlov presently intends to possess the handgun within his home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16.

17. Mr. Orlov applied for permission to possess the handgun within his Chicago home. On May 6, 2008, that application was refused pursuant to the policies complained of in this action.

ANSWER: The City admits that Mr. Orlov applied to the City for permission to register a handgun and that the application was refused on May 6, 2008, pursuant to Chicago Municipal Code §§ 8-20-050 and 8-20-090. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 17.

18. Mr. Orlov fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18.

19. Ms. Lawson lawfully owns a handgun, which she keeps outside the City of Chicago. Ms. Lawson presently intends to possess the handgun within her home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19.

20. Ms. Lawson applied for permission to possess the handgun within her Chicago home. On January 3, 2008, that application was refused pursuant to the policies complained of in this action.

ANSWER: The City admits that Ms. Lawson applied to the City for permission to register a handgun and that the application was refused on January 3, 2008, pursuant to Chicago Municipal Code § 8-20-050. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 20.

21. Ms. Lawson fears arrest, criminal prosecution, incarceration, and fine if she were to possess a handgun within her home.

ANSWER: The City is without knowledge or information sufficient to form a belief as to

the truth of the allegations contained in Paragraph 21.

22. Mr. Lawson lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. Lawson presently intends to possess the handgun within his home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 22.

23. Mr. Lawson applied for permission to possess the handgun within his Chicago home. On January 23, 2008, that application was refused pursuant to the policies complained of in this action.

ANSWER: The City admits that Mr. Lawson applied to the City for permission to register a handgun and that the application was refused on January 23, 2008, pursuant to Chicago Municipal Code §§ 8-20-050 and 8-20-090. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 23.

24. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24.

25. Mr. Lawson owns various long arms which are kept in his Chicago home and are lawfully registered pursuant to the Chicago Municipal Code.

ANSWER: The City admits that it has approved various registration applications filed by Mr. Lawson for various long arms. The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25.

26. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to continue to possess these arms in his Chicago home without re-registering them annually as required by the Chicago Municipal Code.

ANSWER: The City is without knowledge or information sufficient to form a belief as to

the truth of the allegations contained in Paragraph 26.

27. On May 4, 2008, the registration for one of Mr. Lawson's rifles, a K31, lapsed. The rifle thus became permanently unregistrable within the City of Chicago. Mr. Lawson removed the rifle from his Chicago home and now keeps it outside the City of Chicago.

ANSWER: The City admits that, on May 3, 2007, the City approved the registration of one of Mr. Lawson's rifles, Serial No. 750304, and that Mr. Lawson has not filed an application to re-register that rifle. The City further admits that section 8-20-200(c) of the Chicago Municipal Code states that "Failure to comply with the requirement for renewal of registration of a firearm shall cause that firearm to become unregistrable." The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 27.

28. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess the lapsed K31 rifle within his Chicago home. Mr. Lawson presently intends to possess the K31 rifle within his home, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28.

29. In 2007, Mr. Lawson applied to purchase a rifle from the federal Civilian Marksmanship Program ("CMP"). On October 18, 2007, Mr. Lawson was informed via email that his application was granted and the rifle would be delivered to his Chicago home. The Civilian Marksmanship Program requires that delivery be made to Mr. Lawson's Chicago home, because that is the address listed both in Mr. Lawson's driving license and Illinois Firearms Owner Identification Card.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29.

30. On October 19, 2007, the CMP rifle arrived at the Lawson home via the U.S. Postal Service. Mr. Lawson thus had approximately a day's notice that he would be receiving the CMP rifle. Only upon receiving the CMP rifle could Mr. Lawson learn the gun's serial number, necessary to apply for a Chicago registration certificate for the firearm.

ANSWER: The City is without knowledge or information sufficient to form a belief as to

the truth of the allegations contained in Paragraph 30.

31. Mr. Lawson relocated the rifle outside of Chicago and, on November 30, 2007 applied to register the rifle. On December 11, 2007, that application was refused pursuant to the policies complained of in this action.

ANSWER: The City admits that Mr. Lawson applied to the City for permission to register a rifle on November 30, 2007, and that on December 11, 2007, that application was refused pursuant to Chicago Municipal Code § 8-20-090. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 31.

32. Mr. Lawson presently intends to possess the CMP rifle within his home, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess the CMP rifle within his home.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 32.

33. The Second Amendment to the United States Constitution provides: "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."

ANSWER: The City admits that the Second Amendment to the United States Constitution states that "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." The City denies the remaining allegations contained in Paragraph 33.

34. At a minimum, the Second Amendment guarantees individuals a fundamental right to possess a functional, personal firearm, including a handgun, within the home.

ANSWER: The City denies the allegations contained in Paragraph 34.

35. The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or 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."

ANSWER: The City admits that the Fourteenth Amendment to the United States Constitution contains the language quoted in Paragraph 35. The City denies the remaining allegations contained in Paragraph 35.

36. Chicago Municipal Code § 8-20-040(a) mandates that

All firearms in the City of Chicago shall be registered in accordance with the provisions of this chapter. It shall be the duty of a person owning or possessing a firearm to cause such firearm to be registered. No person shall within the City of Chicago, possess, harbor, have under his control... or accept any firearm unless such person is the holder of a valid registration certificate for such firearm. No person shall, within the City of Chicago, possess, harbor, have under his control... or accept any firearm which is unregistrable under the provisions of this chapter.

ANSWER: The City admits that § 8-20-040(a) of the Chicago Municipal Code contains the language cited in Paragraph 36. The City denies that Paragraph 36 fully and completely cites the entirety of § 8-20-040(a). The City denies the remaining allegations contained in Paragraph 36.

37. Chicago Municipal Code § 8-20-050 provides: “No registration certificate shall be issued for any of the following types of firearms: . . . (c) handguns . . .” While Section 8-20-050(c) provides exceptions for certain handguns owned prior to the law’s effective date, and handguns owned by police officers, security personnel, and private detectives, the provision, in conjunction with Section 8-20-040, generally bars the private home possession of handguns by law-abiding adult citizens.

ANSWER: The City admits that § 8-20-050 of the Chicago Municipal Code contains the language cited in Paragraph 37. The City denies that Paragraph 37 fully and completely cites the entirety of § 8-20-050. The City denies the remaining allegations contained in Paragraph 37.

38. Chicago Municipal Code § 8-20-090(a) provides: “A registration certificate shall be obtained prior to any person taking possession of a firearm from any source.”

ANSWER: The City admits the allegations in Paragraph 38.

39. Chicago Municipal Code § 8-20-200 provides:

(a) Every registrant must renew his registration certificate annually. Applications for renewal shall be made by such registrants 60 days prior to the expiration of the current registration certificate.

(b) The application for renewal shall include the payment of a renewal fee as follows:

1 firearm \$20.00; 2-10 firearms 25.00; More than ten firearms 35.00

(c) Failure to comply with the requirement for renewal of registration of a firearm shall cause that firearm to become unregistrable.

(d) All terms, conditions and requirements of this chapter for registration of firearms shall be applicable to renewal or registration of such firearms.

(e) The renewal fee shall not be applicable to duty-related handguns of peace officers domiciled in the City of Chicago.

ANSWER: The City admits the allegations contained in Paragraph 39, except that the City denies that § 8-20-200(b) of the Chicago Municipal Code contains semicolons.

40. Many Chicago gun owners fail to re-register their firearms every year. Among these recently was Alderman Richard Mell, whose firearms became unregistrable when he failed to timely renew his registration certificates.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, this paragraph is stricken.

41. Accordingly, Alderman Mell proposed an ordinance amending the law to permit, for one month, lapsed guns to be re-registered if their owners had attempted to re-register their guns between May 1, 2007 and April 1, 2008, a period that would have covered his lapsed firearm registrations.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, this paragraph is stricken.

42. Defendant Mayor Daley endorsed Mell's proposal, stating: "A lot of people go back and forth to their summer homes ... A lot of people move their shotguns. A lot of 'em are bird hunters, gun collectors. ... They move 'em back from Wisconsin, Michigan, [other] parts of Illinois."

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, this paragraph is stricken.

43. Defendant Mayor Daley added: "It's one time [for] one month . . . You want to have 'em register. There's nothing wrong with that . . . People want to just register. A lot of 'em bring 'em back from hunting trips. So, why not?"

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, this paragraph is stricken.

44. Speaking of Alderman Mell's desire to re-register his lapsed guns, Defendant Mayor Daley stated: "He has a home in Wisconsin. He brings 'em back and forth. He's not running out with a shotgun and hurting people."

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, this paragraph is stricken.

45. The proposed re-registration amnesty bill was passed by the Chicago City Council, with the amnesty period extended to 120 days. The fee for re-registering a lapsed firearm under the amnesty bill is \$60.00.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, this paragraph is stricken.

46. A first violation of Chicago's ban on the ownership or possession of unregistered firearms within the home is punishable by a fine of "not less than \$300.00, nor more than \$500.00; or [incarceration] for not less than ten days nor more than 90 days or both." Chicago Municipal Code § 8-20-250. Subsequent violations are punishable by a fine of \$500.00 and incarceration ranging from ninety days to six months. *Id.*

ANSWER: The City admits that § 8-20-250 of the Chicago Municipal Code states that "Any person who violates any provision of this chapter, where no other penalty is specifically provided, shall upon conviction for the first time, be fined not less than \$300.00, nor more than \$500.00; or be incarcerated for not less than ten days nor more than 90 days or both. Any subsequent conviction for a violation of this chapter shall be punishable by a fine of \$500.00 and by incarceration for a term of not less than 90 days, nor more than six months." The City denies the remaining allegations contained in Paragraph 46.

**FIRST CAUSE OF ACTION - HANDGUN BAN
RIGHT TO KEEP AND BEAR ARMS
U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983**

47. Paragraphs 1 through 46 are incorporated as though fully stated herein.

ANSWER: The City hereby incorporates its answers to Paragraphs 1-46, above.

48. The Second Amendment right is incorporated as against the states and their political subdivisions pursuant to the Due Process Clause of the Fourteenth Amendment.

ANSWER: The City denies the allegations contained in Paragraph 48.

49. The Second Amendment right to keep and bear arms is a privilege and immunity of United States citizenship which, pursuant to the Fourteenth Amendment, states and their political subdivisions may not violate.

ANSWER: The City denies the allegations contained in Paragraph 49.

50. Handguns, as a class of weapons, are “arms” whose possession by law-abiding adult citizens is protected by the Second Amendment right to keep and bear arms.

ANSWER: The City denies the allegations contained in Paragraph 50.

51. By banning handguns, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants’ unconstitutional customs, policies, and practices.

ANSWER: The City denies the allegations contained in Paragraph 51. The City further denies that Plaintiffs are entitled to the relief sought in this Paragraph.

**SECOND CAUSE OF ACTION - RE-REGISTRATION REQUIREMENT
RIGHT TO KEEP AND BEAR ARMS
U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983**

52. Paragraphs 1 through 51 are incorporated as though fully stated herein.

ANSWER: The City hereby incorporates its answers to Paragraphs 1-51, above.

53. By requiring Plaintiffs to annually re-register each firearm, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants’ unconstitutional customs, policies, and practices.

ANSWER: The City denies the allegations contained in Paragraph 53. The City further denies that Plaintiffs are entitled to the relief sought in this Paragraph.

**THIRD CAUSE OF ACTION - PRE-ACQUISITION REGISTRATION REQUIREMENT
RIGHT TO KEEP AND BEAR ARMS
U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983**

54. Paragraphs 1 through 53 are incorporated as though fully stated herein.

ANSWER: The City hereby incorporates its answers to Paragraphs 1-53, above.

55. By requiring Plaintiffs to register all firearms prior to their acquisition, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

ANSWER: The City denies the allegations contained in Paragraph 55. The City further denies that Plaintiffs are entitled to the relief sought in this Paragraph.

**FOURTH CAUSE OF ACTION - UNREGISTERABLE STATUS PENALTY
RIGHT TO KEEP AND BEAR ARMS
U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983**

56. Paragraphs 1 through 55 are incorporated as though fully stated herein.

ANSWER: The City hereby incorporates its answers to Paragraphs 1-55, above.

57. By declaring specific firearms "unregisterable" as a penalty for not complying with registration requirements, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

ANSWER: The City denies the allegations contained in Paragraph 57. The City further denies that Plaintiffs are entitled to the relief sought in this Paragraph.

**FIFTH CAUSE OF ACTION - UNREGISTERABLE STATUS PENALTY
EQUAL PROTECTION
U.S. CONST., AMEND. XIV, 42 U.S.C. § 1983**

58. Paragraphs 1 through 57 are incorporated as though fully stated herein.

ANSWER: The City hereby incorporates its answers to Paragraphs 1-57, above.

59. By declaring specific firearms “unregisterable” as a penalty for not complying with registration requirements, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants’ unconstitutional customs, policies, and practices.

ANSWER: The City denies the allegations contained in Paragraph 59. The City further denies that Plaintiffs are entitled to the relief sought in this Paragraph.

PRAYER FOR RELIEF

Plaintiffs request judgment be entered in their favor and against Defendants as follows:

1. An order permanently enjoining Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing Chicago Municipal Code § 8-20-050(c), barring registration of handguns; Chicago Municipal Code § 8-20-200, requiring the annual renewal of firearms registrations; Chicago Municipal Code § 8-20-090, mandating that registration certificates for firearms be obtained prior to taking possession of a firearm; Chicago Municipal Code § 8-20-040, as applied to prohibiting possession of an unregistered firearm within a period of time reasonably necessary to obtain registration; and any custom, policy, or practice of deeming a firearm "unregisterable" for the sole reason that it has previously been not validly registered.

2. Attorney Fees and Costs pursuant to 42 U.S.C. § 1988;

3. Declaratory relief consistent with the injunction;

4. Costs of suit; and

5. Any other further relief as the Court deems just and appropriate. Dated: June 26, 2008.

ANSWER: The City denies that the Plaintiffs are entitled to the relief sought in the Prayer

for Relief. The City further requests that judgment be entered in its favor and against Plaintiffs.

DEFENSE - FAILURE TO STATE A CLAIM

1. The Complaint fails to state any claims upon which relief can be granted.

JURY DEMAND

The City demands trial by jury.

Respectfully submitted,

Mara S. Georges, Corporation Counsel for
the City of Chicago

By: /s/ Rebecca Alfert Hirsch
Assistant Corporation Counsel

Michael A. Forti
Deputy Corporation Counsel
Mardell Nereim
Chief Assistant Corporation Counsel
Andrew W. Worseck
Assistant Corporation Counsel
William Macy Aguiar
Assistant Corporation Counsel
Rebecca Alfert Hirsch
Assistant Corporation Counsel
City of Chicago Department of Law
Constitutional and Commercial Litigation Division
30 N. LaSalle Street, Suite 1230
Chicago, IL 60602
312-744-9010

Dated: Sept. 5, 2008.

CERTIFICATE OF SERVICE

The undersigned, an attorney of record for the City of Chicago, hereby certifies that on September 5, 2008, she served a copy of the **Defendant City of Chicago's Amended Answer to Plaintiffs' Complaint, Defense, and Jury Demand**, along with this certificate of service, on:

David G. Sigale
Law Firm of David G. Sigale, P.C.
Corporate West 1
4300 Commerce Court, Suite 300-3
Lisle, IL 60532

by electronic means pursuant to Electronic Case Filing (ECF), and on:

Alan Gura
Gura & Possessky, PLLC
101 N. Columbus Street, Suite 405
Alexandria, VA 22314

by first class United States Mail, postage pre-paid, by placing them in the United States Mail box at 30 North LaSalle Street, Chicago, Illinois 60602.

/s/ Rebecca Alfert Hirsch

CERTIFICATE OF SERVICE

The undersigned, an attorney of record for the plaintiffs, hereby certifies that on July 31, 2008, he served a copy of the above **Motion for Summary Judgment, supporting Separate Statement, Exhibits, and Declarations**, and this certificate of service, on:

Michael A. Forti
Mardell Nereim
Andrew W. Worseck
William Macy Aguiar
City of Chicago Department of Law
Constitutional and Commercial Litigation Division
30 N. LaSalle Street, Suite 1230
Chicago, IL 60602

by electronic means pursuant to Electronic Case Filing (ECF). Pursuant to FRCP 5, the undersigned certifies that, to his best information and belief, there are no non-CM/ECF participants in this matter.

The undersigned also effect service of the foregoing on:

Stephen A. Kolodziej (Counsel for Plaintiffs in *NRA v. City of Chicago*, No. 08-3697)
Brenner, Ford, Monroe & Scott
33 N. Dearborn Street, Suite 300
Chicago, IL 60602
Fax: 312-781-9202

Stephen Halbrook (Counsel for Plaintiffs in *NRA v. City of Chicago*, No. 08-3697)
10560 Main Street, Suite 404
Fairfax, VA 22030
Fax: 703-359-0938

by facsimile and by first class United States Mail, postage pre-paid.

/s/David G. Sigale

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

OTIS McDONALD, et al.,

) Case No. 08-CV-3645

Plaintiffs,

)
) **DECLARATION OF**
) **ALAN GOTTLIEB**

v.

CITY OF CHICAGO,

Defendant.

DECLARATION OF ALAN GOTTLIEB


I, Alan Gottlieb, am competent to state, and declare the following based on my personal knowledge:

1. I am the Founder and Executive Vice President of the Second Amendment Foundation, Inc.
2. The Second Amendment Foundation, Inc. ("SAF") is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 600,000 members and supporters nationwide, including many in Chicago. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control.

3. SAF has individual members and supporters who are adversely impacted by the laws being challenged in this litigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 29TH day of JULY, 2008


Alan Gottlieb

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

OTIS McDONALD, et al.,

Plaintiffs,

v.

CITY OF CHICAGO,

Defendant.

) Case No. 08-CV-3645

)
) **DECLARATION OF**
) **RICHARD PEARSON**

DECLARATION OF RICHARD PEARSON


I, Richard Pearson, am competent to state, and declare the following based on my personal knowledge:

1. I am the Executive Director of the Illinois State Rifle Association.
2. The Illinois State Rifle Association ("ISRA") is a non-profit membership organization incorporated under the laws of Illinois with its principal place of business in Chatsworth, Illinois. ISRA has over 17,000 members and supporters in Illinois, including many in Chicago. The purposes of ISRA include securing the Constitutional right to privately own and possess firearms within Illinois, through education, outreach, and litigation.

3. ISRA has individual members and supporters who are adversely impacted by the laws being challenged in this litigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 30 day of July, 2008


Richard Pearson

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ILLINOIS
 EASTERN DIVISION

NATIONAL RIFLE ASSOCIATION OF)	
AMERICA, INC., et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 08 C 3696
)	
VILLAGE OF OAK PARK,)	
)	
Defendant.)	
_____)	
NATIONAL RIFLE ASSOCIATION OF)	
AMERICA, INC., et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 08 C 3697
)	
CITY OF CHICAGO,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Fresh from a historic victory for their cause before the Supreme Court in Dist. of Columbia v. Heller, 128 S.Ct. 2783 (2008), the National Rifle Association of America, Inc. ("Association") and some of its members filed these two lawsuits just one day after the Heller decision.¹ These cases have taken aim at the gun control ordinances in the City of Chicago and the

¹ Even so, the Association was not quite as quick on the trigger as counsel for the plaintiffs in McDonald v. City of Chicago, 08 C 3645, who actually filed suit here on the same morning that Heller was decided in Washington! What is eminently plain is that both sets of lawyers--the counsel who are handling both of these cases and another set of lawyers in McDonald--came loaded for bear, on the assumption that the Supreme Court majority would rule as it did.

Village of Oak Park. Although counsel's constitutional arguments are set out in 15 well-written pages,² they may be encapsulated in a simple syllogism:

1. Under Heller, the Second Amendment's guaranty of the right to keep and bear arms has invalidated the District of Columbia's prohibition on the possession of handguns.

2. Almost all of the guaranties that apply against the federal government and its agencies under the Bill of Rights (the first ten amendments to the Constitution) have been held to have been incorporated in the guaranties that apply against the states and their subordinate units of government under the Fourteenth Amendment.

3. Ergo, the Second Amendment's guaranty of the right of the people to keep and bear arms, as construed in Heller, also extends to Oak Park and Chicago via the Fourteenth Amendment. QED.

That approach, however, ignores a fundamental and critical jurisprudential curb that confronts a district judge such as the writer who is asked to confirm that third proposition--the judge's duty to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of

² After brief introductory paragraphs, the remaining 14 pages of the two memoranda are word-for-word replicas of each other. This memorandum order will accordingly cite only to the memorandum filed in the City of Chicago case.

more recent caselaw may point in a different direction. As stressed in Sabin v. United States Dep't of Labor, 509 F.3d 376, 378 (emphasis in original)--one of many cases standing for the same proposition:³

The Supreme Court has told the lower courts that they are not to anticipate the overruling of a Supreme Court decision, but are to consider themselves bound by it until and unless the Court overrules it, however out of step with current trends in the relevant case law the case may be.

That posture of the Court of Appeals vis-a-vis the Supreme Court is of course echoed in the posture of this Court vis-a-vis our Court of Appeals.

In this instance our Court of Appeals has squarely upheld the constitutionality of a ban on handguns a quarter century ago in Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982). And in reaching that conclusion, Quilici, id. at 269 relied on the Supreme Court's decision in Presser v. Illinois, 116 U.S. 252, 265 (1886):

It is difficult to understand how appellants can assert that Presser supports the theory that the second amendment right to keep and bear arms is a fundamental right which the state cannot regulate when the Presser decision plainly states that "[t]he Second Amendment declares that it shall not be infringed, but this... means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government...."

³ See also, e.g., United States v. Santiago-Ochoa, 447 F.3d 1015, 1020-21 (7th Cir. 2006).

In doing so, Quilici, id. at 270 rejected arguments (1) that later Supreme Court decisions that had incorporated other Bill of Rights provisions into the Fourteenth Amendment had effectively overruled Presser and (2) that the entire Bill of Rights had been implicitly incorporated into the Fourteenth Amendment to apply to the states.

Indeed, Heller itself (128 S.Ct. at 2812-13) confirmed that both Presser and the Court's predecessor decision in United States v. Cruikshank, 92 U.S. 542 (1876) have held that the Second Amendment applies only to the federal government. Heller, id. at 2812 described Cruikshank as having "held that the Second Amendment does not by its own force apply to anyone other than the Federal Government," after which Heller, id. at 2813 n.23 went on to state:

With respect to Cruikshank's continuing validity on incorporation, a question not presented by this case, we note that Cruikshank also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in Presser v. Illinois, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886) and Miller v. Texas, 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed. 812 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.

To be sure, as the just-quoted language reflects, both Cruikshank and Presser long antedated the more modern jurisprudence of implied incorporation that began with the initial suggestion in Gitlow v. New York, 268 U.S. 652 (1925)

that the First Amendment was brought into play against the states via the Fourteenth Amendment, and then continued with selective incorporation thereafter. But Heller deliberately and properly did not opine on the subject of incorporation vel non of the Second Amendment (after all, that question was not before the Court). It is simply wrong--an overreaching obviously prompted by the enthusiasm of advocacy--for plaintiffs' counsel to state (Mem. 8-9, emphasis added):

Heller's holding that the Second Amendment guarantees an individual right to keep and bear arms, including handguns, squarely overrules the Seventh Circuit's ruling that "the right to keep and bear handguns is not guaranteed by the second amendment."

This Court should not be misunderstood as either rejecting or endorsing the logic of plaintiffs' argument--it may well carry the day before a court that is unconstrained by the obligation to follow the unreversed precedent of a court that occupies a higher position in the judicial firmament. But as later-to-be-Justice Oliver Wendell Holmes famously observed in 1881 in The Common Law:

The life of the law has not been logic: it has been experience.

In sum, this Court--duty bound as it is to adhere to the holding in Quilici, rather than accepting plaintiffs' invitation to "overrule" it (!)--declines to rule that the Second Amendment is incorporated into the Fourteenth Amendment so as to be applicable to the Chicago or Oak Park ordinances. These actions

are set for a status hearing at 8:45 a.m. December 9, 2008 to discuss further proceedings.



Milton I. Shadur
Senior United States District Judge

Date: December 4, 2008

from that now pressed by plaintiffs in all three cases before this Court.

There is no need to repeat what is said in that opinion, for it might well have been written for this case too. Instead this memorandum order simply denies (1) plaintiffs' two pending motions--their Motion for Summary Judgment (Dkt. 32) and their Motion To Narrow Legal Issues (Dkt. 43)--and (2) sets this case as well for a status hearing at 8:45 a.m. December 9, 2008.



Milton I. Shadur
Senior United States District Judge

Date: December 4, 2008

BR

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Milton I. Shadur	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 C 3645	DATE	12/18/2008
CASE TITLE	McDonald vs. City of Chicago		

DOCKET ENTRY TEXT

Status hearing held. Enter Order. This Court hereby grants the contested December 9, 2008 oral motion of the City of Chicago, pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings on Counts 1-V of the Complaint. Judgment is hereby entered in favor of the City of Chicgao and against Plaintiffs on all counts of the Complaint.

■ [For further detail see separate order(s).]

Docketing to mail notices.

00:15

Courtroom Deputy Initials:	SN
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BR

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

Plaintiffs,)

Case No. 08-CV-3645

v.)

CITY OF CHICAGO,)


Defendant.)

ORDER

On December 4, 2008, the Court ruled it is bound by Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982) to reject incorporation of the Second Amendment *via* the Fourteenth Amendment as against Defendant City of Chicago. Accordingly, the Court denied Plaintiffs' Rule 56 motion for summary judgment, holding Plaintiffs cannot prevail absent incorporation of the Second Amendment. On the same grounds as announced earlier by the Court, and over Plaintiffs' objection for the reasons stated in their Rule 56 and Rule 16 Motions and in open court, the Court hereby grants the contested December 9, 2008 oral motion of the Defendant City of Chicago, pursuant to Fed. R. Civ. P. 12(c), for judgment on the pleadings on Counts I-V of the Complaint. Judgment is hereby entered in favor of the City of Chicago and against Plaintiffs on all counts of the Complaint.

Dated: December 18, 2008

ENTERED:



The Honorable Milton I. Shadur
United States District Court Judge

BR

United States District Court
Northern District of Illinois
Eastern Division

McDonald

JUDGMENT IN A CIVIL CASE

v.

Case Number: 08 C 3645


City of Chicago

- Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.
- Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered in favor of the City of Chicago and against Plaintiffs on all counts of the Complaint.

Michael W. Dobbins, Clerk of Court

Date: 12/18/2008



/s/ Sandy Newland, Deputy Clerk

CERTIFICATE OF ATTORNEY AND NOTICE OF ELECTRONIC FILING

The undersigned certifies that:

1. On December 18, 2008, the foregoing document was electronically filed with the District Court Clerk *via* CM/ECF filing system;
2. Pursuant to FRCP 5, the undersigned certifies that, to his best information and belief, there are no non-CM/ECF participants in this matter.

/s/ David G. Sigale

Attorney for Plaintiffs

David G. Sigale, Esq. (#6238103)
LAW FIRM OF DAVID G. SIGALE, P.C.
Corporate West I
4300 Commerce Court, Suite 300-3
Lisle, IL 60532
630.452.4547
dsigale@sigalelaw.com