

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,  
DR. KATHRYN TYLER, VAN F. WELTON, and BRETT BENSON,  
Plaintiffs-Appellants,

v.

CITY OF CHICAGO,  
Defendant-Appellee.

---

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,  
ROBERT KLEIN ENGLER, and DR. GENE A. REISINGER,  
Plaintiffs-Appellants,

v.

VILLAGE OF OAK PARK and DAVID POPE, President,  
Defendants-Appellees.

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

v.

CITY OF CHICAGO,  
Defendants-Appellees.

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Appeals from the United States District Court  
for the Northern District of Illinois, Eastern Division  
Nos. 08 CV 3645, 08 CV 3696, 08 CV 3697  
The Honorable Milton I. Shadur, Judge Presiding

**BRIEF OF DEFENDANTS-APPELLEES CITY OF CHICAGO  
AND VILLAGE OF OAK PARK**

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**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 08-4244, 08-4241, 08-4243

Short Caption: NRA, et al. v. Chicago; NRA, et al. v. Village of Oak Park; McDonald, et al. v. Chicago

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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**TABLE OF CONTENTS**

	Page
<b>TABLE OF AUTHORITIES</b> .....	iii
<b>JURISDICTIONAL STATEMENT</b> .....	1
<b>ISSUES PRESENTED</b> .....	2
<b>STATEMENT OF THE CASE</b> .....	3
<b>STATEMENT OF FACTS</b> .....	9
<b>SUMMARY OF ARGUMENT</b> .....	9
<b>ARGUMENT</b> .....	12
<b>I. BINDING SUPREME COURT PRECEDENT HOLDS THAT THE SECOND AMENDMENT DOES NOT RESTRAIN THE STATES.</b> ...	14
<b>II. UNDER THE SUPREME COURT’S SELECTIVE INCORPORATION DOCTRINE, THE SECOND AMENDMENT SHOULD NOT BE INCORPORATED.</b> .....	20
<b>A. Incorporation, Like Other Due Process Issues, Requires Evaluation Of Many Factors And Considerations, And Is Not Automatic.</b> .....	22
<b>B. <u>Heller</u> Limited Its Analysis To The Text Of The Second Amendment And Did Not Consider Factors That Govern A Selective Incorporation Analysis.</b> .....	26
<b>C. There Is No Fundamental Categorical Right To Arms In Common Use, To Handguns In Particular, Or To Any Particular Arms For Self Defense.</b> .....	30
<b>1. The Second Amendment’s origins do not show a fundamental right to arms in common use, including handguns.</b> .....	30
<b>2. The state constitutions do not show a deeply rooted right to arms in common use.</b> .....	37

3.	<b>The purpose of self-defense in the home does not require access to any particular weapon, including those in common use, especially where adequate alternative arms are allowed. ....</b>	<b>44</b>
4.	<b>Under the concept of ordered liberty, local governments should be afforded great latitude in regulating firearms, including weapons in common use. ....</b>	<b>47</b>
<b>III.</b>	<b>CONGRESSIONAL INTENT UNDERLYING THE FOURTEENTH AMENDMENT IS NO BASIS TO INCORPORATE THE SECOND AMENDMENT. ....</b>	<b>52</b>
<b>IV.</b>	<b>JUDGMENT ON THE PLEADINGS WAS PROPER ON ALL COUNTS. ....</b>	<b>59</b>
	<b>CONCLUSION .....</b>	<b>64</b>

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<u>Adamson v. State of California</u> , 332 U.S. 46 (1947), overruled on other grounds by <u>Malloy v. Hogan</u> , 378 U.S. 1 (1964) .....	53
<u>Agostini v. Felton</u> , 521 U.S. 203 (1997) .....	16
<u>Anderson v. Celebrese</u> , 460 U.S. 780 (1983) .....	61
<u>Andrews v. State</u> , 1871 WL 3579, 50 Tenn. 165 (1871) .....	40
<u>Apodaca v. Oregon</u> , 406 U.S. 404 (1972) .....	45
<u>Arnold v. City of Cleveland</u> , 616 N.E.2d 163 (Ohio 1993) .....	43
<u>Aymette v. State</u> , 1840 WL 1554, 2 Hum. 154 (Tenn. 1840) .....	40
<u>Bach v. Pataki</u> , 408 F.3d 75 (2d Cir. 2005) .....	18
<u>Barron v. Mayor &amp; City Council of Baltimore</u> , 32 U.S. (7 Pet.) 243 (1833) .....	20, 33
<u>Benjamin v. Bailey</u> , 662 A.2d 1226 (Conn. 1995) .....	42, 43
<u>Benton v. Maryland</u> , 395 U.S. 784 (1969) .....	25
<u>Bliss v. Commonwealth</u> , 1822 WL 1085, 2 Litt. 90 (Ky. 1822) .....	40
<u>Campbell v. Louisiana</u> , 523 U.S. 392 (1998) .....	24

Carson v. State,  
247 S.E.2d 68 (Ga. 1978) ..... 42

Cases v. United States,  
131 F.2d 916 (1st Cir. 1942) ..... 18

Chandler v. Florida,  
449 U.S. 560 (1981) ..... 51

Chaplinsky v. New Hampshire,  
315 U.S. 568 (1942) ..... 49

City of Cincinnati v. Langan,  
640 N.E.2d 200 (Ohio Ct. App. 1994) ..... 43

City of Cleveland v. Turner,  
No. 36126, 1977 WL 201393 (Ohio Ct. App. Aug. 4, 1977) ..... 42

City of Junction City v. Mevis,  
601 P.2d 1145 (Kan. 1979) ..... 41

City of Lakewood v. Pillow,  
501 P.2d 744 (Col. 1972) ..... 41

City of Salina v. Blaksley,  
83 P. 619 (Kan. 1905) ..... 38

Commonwealth v. Davis,  
343 N.E.2d 847 (Mass. 1976) ..... 38

County of Sacramento v. Lewis,  
523 U.S. 833 (1998) ..... 23

Danforth v. Minnesota,  
128 S. Ct. 1029 (2008) ..... 25

District of Columbia v. Heller,  
128 S. Ct. 2783 (2008) ..... passim

Duncan v. Louisiana,  
391 U.S. 145 (1968) ..... passim

Edwards v. City of Goldsboro,  
178 F.3d 231 (4th Cir. 1999) ..... 18

<u>Edwards v. Elliott,</u> 88 U.S. (21 Wall.) 532 (1874) .....	59
<u>Ex parte Thomas,</u> 97 P. 260 (Okla. 1908) .....	40
<u>Farmer v. Brennan,</u> 81 F.3d 1444 (7th Cir. 1995) .....	60
<u>Fresno Rifle &amp; Pistol Club, Inc. v. Van de Kamp,</u> 965 F.2d 723 (9th Cir. 1992) .....	18
<u>Hunt v. Daley,</u> 677 N.E.2d 456 (Ill. App. Ct. 1997) .....	62
<u>Hurtado v. California,</u> 110 U.S. 516 (1884) .....	24, 25, 40, 44
<u>Jehovah’s Witnesses in the State of Washington v. King County Hospital Unit No. 1,</u> 390 U.S. 598, 598 (1968) (per curiam) .....	49
<u>Justice v. Elrod,</u> 832 F.2d 1048 (7th Cir. 1987) .....	18
<u>Kalodimos v. Village of Morton Grove,</u> 470 N.E.2d 266 (Ill. 1984) .....	12, 42
<u>Lawrence v. Texas,</u> 539 U.S. 558 (2003) .....	40
<u>Love v. Pepersack,</u> 47 F.3d 120 (4th Cir. 1995) .....	18
<u>Malloy v. Hogan,</u> 378 U.S. 1 (1964) .....	15, 53
<u>Maloney v. Cuomo,</u> 554 F.3d 56 (2d Cir. 2009) .....	17
<u>Mapp v. Ohio,</u> 367 U.S. 643 (1961) .....	17

<u>Miller v. Texas</u> , 153 U.S. 535 (1894) .....	passim
<u>Minneapolis &amp; St. Louis R. v. Bombolis</u> , 241 U.S. 211 (1916) .....	24
<u>Montana v. Egelhoff</u> , 518 U.S. 37 (1996) .....	23, 37
<u>Morrison v. State</u> , 339 S.W.2d 529 (Tex. Crim. App. 1960) .....	42
<u>Mosby v. Devine</u> , 851 A.2d 1031 (R.I. 2004) .....	41
<u>Mr. S. v. Webb</u> , 2009 WL 650542 (D. Conn. Mar. 13, 2009) .....	17
<u>Osborn v. Haley</u> , 549 U.S. 225 (2007) .....	24
<u>Palko v. Connecticut</u> , 302 U.S. 319 (1937), overruled on other grounds by <u>Benton v. Maryland</u> , 395 U.S. 784 (1969) .....	24
<u>People v. Abdullah</u> , 870 N.Y.S.2d 886 (N.Y. Crim. Ct. Dec. 30, 2008) .....	17
<u>People v. Smelter</u> , 437 N.W.2d 341 (Mich. Ct. App. 1989) .....	43
<u>People v. Williams</u> , 377 N.E.2d 285 (Ill. App. Ct. 1978) .....	41
<u>Peoples Rights Organization, Inc. v. City of Columbus</u> , 152 F.3d 522 (6th Cir. 1998) .....	18, 62
<u>Planned Parenthood v. Casey</u> , 505 U.S. 833 (1992) .....	61
<u>Presser v. Illinois</u> , 116 U.S. 252 (1886) .....	passim

<u>Prince v. Massachusetts,</u> 321 U.S. 158 (1944) .....	49
<u>Quilici v. Village of Morton Grove,</u> 695 F.2d 261 (7th Cir. 1982) .....	passim
<u>Riggins v. Nevada,</u> 504 U.S. 127 (1992) .....	50
<u>Rinzler v. Carson,</u> 262 So. 2d 661 (Fla. 1972) .....	42
<u>Rodriguez de Quijas v. Shearson/American Express, Inc.,</u> 490 U.S. 477 (1989) .....	16
<u>Saban v. United States Department of Labor,</u> 509 F.3d 376 (7th Cir. 2007) .....	17
<u>Santos v. United States,</u> 461 F.3d 886 (7th Cir. 2006) .....	19
<u>Schenk v. United States,</u> 249 U.S. 47 (1919) .....	49
<u>Sell v. United States,</u> 539 U.S. 166 (2003) .....	50
<u>Silveira v. Lockyer,</u> 312 F.3d 1052 (9th Cir. 2002) .....	18
<u>Sklar v. Byrne,</u> 727 F.2d 633 (7th Cir. 1984) .....	12, 18, 42, 62
<u>The Slaughter-House Cases,</u> 83 U.S. (16 Wall.) 36 (1872) .....	52, 59
<u>State v. Dawson,</u> 159 S.E.2d 1 (N.C. 1968) .....	41
<u>State v. Fennell,</u> 382 S.E.2d 231 (N.C. App. 1989) .....	42
<u>State v. Hamdan,</u> 665 N.W.2d 785 (Wis. 2003) .....	42

<u>State v. McAdams,</u> 714 P.2d 1236 (Wy. 1986) .....	41
<u>State Oil Co. v. Khan,</u> 522 U.S. 3 (1997) .....	16
<u>Tenet v. Doe,</u> 544 U.S. 1 (2005) .....	16
<u>Thomas v. Members of City Council of Portland,</u> 730 F.2d 41 (1st Cir. 1984) .....	18
<u>Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.,</u> 460 U.S. 533 (1983) ( <i>percuriam</i> ) .....	14
<u>Trinen v. City &amp; County of Denver,</u> 53 P.3d 754 (Col. Ct. App. 2002) .....	41
<u>Twitchell v. Pennsylvania,</u> 74 U.S. (7 Wall.) 321 (1868) .....	58
<u>United States v. Cruikshank,</u> 92 U.S. 542 (1875) .....	passim
<u>United States v. Emerson,</u> 270 F.3d 203 (5th Cir. 2001) .....	18
<u>United States v. Lopez,</u> 514 U.S. 549 (1995) .....	52
<u>United States v. Miller,</u> 307 U.S. 174 (1939) .....	passim
<u>Virginia v. Black,</u> 538 U.S. 343 (2003) .....	49
<u>Washington v. Glucksberg,</u> 521 U.S. 702 (1997) .....	22, 23, 25, 47
<u>Williams v. Florida,</u> 399 U.S. 78 (1970) .....	45
<u>Wolf v. Colorado,</u> 338 U.S. 25 (1949) .....	17, 24, 25, 48

<u>Young v. Hawaii</u> , 2009 WL 874517 (D. Haw. Apr. 9, 2009) .....	17
---	----

**U.S. CONSTITUTION**

U.S. Const., Art. I, § 8, cl. 12 .....	30
U.S. Const. Art. I, § 10 .....	34
U.S. Const. Art. IV, § 4 .....	37
U.S. Const. Amend. X .....	37, 50

**FEDERAL AND STATE STATUTES AND LEGISLATIVE MATERIAL**

18 U.S.C. § 926A .....	7
Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 .....	54, 56
Act of July 10, 1866 § 14, 14 Stat. 173 .....	54, 56
Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218 .....	35
Cong. Globe 39th Cong., 1st Sess. (1866) .....	55
720 ILCS 5/24-1(a)(4) (2006) .....	50

**ORDINANCES AND LEGISLATIVE MATERIAL**

Municipal Code of Chicago, Ill. § 8-20-040 (2008) .....	6, 12
Municipal Code of Chicago, Ill. § 8-20-040(b) (2008) .....	6
Municipal Code of Chicago, Ill. § 8-20-050 (2008) .....	6, 12
Municipal Code of Chicago, Ill. § 8-20-090(a) (2008) .....	6
Municipal Code of Chicago, Ill. § 8-20-200(a) (2008) .....	6
Municipal Code of Chicago, Ill. § 8-20-200(c) (2008) .....	6
Municipal Code of Oak Park, Ill. § 27-1-1 (2008) .....	7
Municipal Code of Oak Park, Ill. § 27-2-1(2008) .....	7, 12

Municipal Code of Oak Park, Ill. § 27-2-1(K) (2008) .....	7
Municipal Code of Oak Park, Ill. § 27-2-1(L) (2008) .....	7
Chicago City Council, <u>Journal of Proceedings</u> , Mar. 19, 1982 .....	6, 12

**BOOKS**

Chris Bird, <u>The Concealed Handgun Manual: How to Choose, Carry, and Shoot a Gun in Self-Defense</u> (2008) .....	46
2 <u>Blackstone Commentaries on the Laws of England</u> (Tucker ed. 1803) ..	36, 47, 48
Saul Cornell, <u>A Well Regulated Militia</u> (2006) .....	58
Eric Foner, <u>Reconstruction: America’s Unfinished Revolution 1863-1877</u> (1988) .....	54
Richard Kohn, <u>Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802</u> (1975) .....	31
William Nelson, <u>The Fourteenth Amendment: From Political Principle to Judicial Doctrine</u> (1988) .....	55
Lois Schworer, <u>To Hold and Bear Arms: The English Perspective, in The Second Amendment in Law and History</u> (C. Bogus ed. 2000) .....	36
Josh Sugarmann, <u>Every Handgun is Aimed at You: The Case for Banning Handguns</u> (2001) .....	46, 49, 50
<u>The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins</u> (Cogan ed. 1997) .....	34

**LAW REVIEWS AND OTHER JOURNALS**

Carl Bogus, <u>The Hidden History of the Second Amendment</u> , 31 U.C. Davis L. Rev. 309 (1998) .....	37
James E. Bond, <u>The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania</u> , 18 Akron L. Rev. 435 (1985) .....	58

Steven Calabresi, et al., <u>Individual Rights Under State Constitutions When the Fourteenth Amendment was Ratified in 1868,</u> 87 Tex. L. Rev. 7 (2008) .....	38
Philip J. Cook, et al., <u>Underground Gun Markets,</u> 117 Econ. J. F558 (2007) .....	51
Saul Cornell & Nathan DeDino, <u>A Well Regulated Right: The Early American Origins of Gun Control,</u> 73 Fordham L. Rev. 487 (2004) .....	35
David P. Currie, <u>The Reconstruction Congress,</u> 75 U. Chi. L. Rev. 383 (2008) .....	55
Steven J. Heyman, <u>Natural Rights and the Second Amendment,</u> 76 Chi. Kent L. Rev. 237 (2000) .....	47
Colin Loftin, et al., <u>Effects of Restrictive Licensing in Handguns on Homocide and Suicide in the District of Columbia,</u> 325 New Eng. J. Med. 1615 (1991) .....	50
Jack Rakove, <u>The Second Amendment: The Highest Stage of Originalism,</u> 76 Chi.-Kent L. Rev. 103 (2000) .....	34
Lawrence Rosenthal, <u>Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs,</u> 41 Urb. Lawyer 1 (2009) .....	50, 56, 58
George C. Thomas, III, <u>The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal,</u> 68 Ohio St. L.J. 1627 (2007) .....	57
Eugene Volokh, <u>State Constitutional Rights to Keep and Bear Arms,</u> 11 Tex. Rev. L. & Pol. 191 (2006) .....	38, 39
Bryan Wildenthal, <u>Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73 (2009)</u> (available at <a href="http://ssrn.com/abstract=1354404">ssrn.com/abstract=1354404</a> ) .....	57
Adam Winkler, <u>The Reasonable Right to Bear Arms,</u> 17 Stan. L. & Pol. Rev. 597 (2006) .....	41

Adam Winkler, <u>Scrutinizing the Second Amendment</u> , 105 Mich. L. Rev. 683 (2007) .....	40, 41
David Yassky, <u>The Second Amendment: Structure, History, and Constitutional Change</u> , 99 Mich. L. Rev. 588 (2000) .....	31
<b>OTHER</b>	
Chicago Police Department, <u>2006-2007 Murder Analysis in Chicago</u> .....	49
Thomas Cooley, <u>Treatise on Constitutional Limitations</u> (1868) .....	31, 57
Department of Justice, Bureau of Justice Statistics, <u>Homicide Trends in the United States</u> .....	49
<u>Unintended Consequences: Pro-Handgun Experts Prove that Handguns are a Dangerous Choice for Self-Defense</u> , Violence Policy Center (2001) .....	46
<u>The Federalist</u> , No. 46 (Madison) .....	33

## **JURISDICTIONAL STATEMENT**

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The jurisdictional statements of plaintiffs-appellants are complete and correct.

## ISSUES PRESENTED

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1. Whether binding Supreme Court precedent precludes plaintiffs' arguments that the Second Amendment is incorporated into the Fourteenth Amendment.

2. Whether the Second Amendment right to weapons in common use should be incorporated by the selective incorporation doctrine as a fundamental liberty interest under the Fourteenth Amendment.

3. Whether plaintiffs' view of the historical evidence of the meaning of the Fourteenth Amendment provides an alternative basis for incorporation where the Supreme Court has rejected that approach and whether, in any event, that evidence establishes a public understanding that the Fourteenth Amendment imposed the Second Amendment on the States.

## STATEMENT OF THE CASE

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This appeal involves three lawsuits challenging various restrictions that Chicago and Oak Park ordinances place on possession of firearms, including the prohibition of most handguns. One case was filed by the National Rifle Association of America, Inc., and several individuals (collectively, “NRA”) against Chicago. Separate Appendix to Brief of NRA (“NRA Sep. App.”) A-31. The NRA brought another against Oak Park. *Id.* at A-42. The third case was filed against Chicago by Otis McDonald, along with several other individuals, the Second Amendment Foundation, and the Illinois State Rifle Association (collectively, “McDonald”). Brief of Plaintiffs-Appellants McDonald (“McDonald Br.”) A-1.

All three cases were before the same district court judge. McDonald moved for summary judgment, McDonald Br. A-29, which the district court deferred for some discovery by Chicago, Aug. 18, 2008 Tr. 14-15. Subsequently, plaintiffs filed motions asking the court to rule on the threshold question whether the Second Amendment is incorporated into the Fourteenth Amendment to apply to state and local governments. R. 43 (No. 08-4244); NRA Sep. App. A-74. In response, the district court issued two opinions on December 4, 2008. The first, which was issued in both NRA cases, ruled that the court was bound by precedent squarely holding that the Second Amendment applies only to the federal government and declined plaintiffs’ invitation to “overrule” that authority. Brief of Plaintiffs-Appellants NRA (“NRA Br.”) SA-13. The court explained that this court had upheld a ban on handguns in Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), and,

in doing so, rejected the argument that “the second amendment right to keep and bear arms is a fundamental right which the state cannot regulate when [Presser v. Illinois, 116 U.S. 252 (1886)] 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.” NRA Br. SA-11 (citations omitted). The district court further observed that Quilici also rejected the arguments that “later Supreme Court decisions that had incorporated other Bill of Rights provisions into the Fourteenth Amendment had effectively overruled Presser,” and that “the entire Bill of Rights had been implicitly incorporated in the Fourteenth Amendment.” NRA Br. SA-12. The district court added that District of Columbia v. Heller, 128 S. Ct. 2783 (2008), “confirmed that both Presser and the Court’s predecessor decision in United States v. Cruikshank, 92 U.S. 542 (1875), have held that the Second Amendment applies only to the federal government.” NRA Br. SA-12.

The second opinion, issued in McDonald, noted that McDonald, like NRA, “attacks Chicago’s handgun ordinance.” McDonald Br. A-42. That order adopted the rationale in the NRA cases and denied the McDonald motions for summary judgment and to narrow the legal issues. Id. at A-42, A-43.

At the next status hearing, Chicago and Oak Park made oral motions for judgment on the pleadings in all three cases, Dec. 9, 2008 Tr. 10, which the district court granted, NRA Br. SA-15 to SA-20; McDonald Br. A-43 to A-45.

Plaintiffs appealed. NRA Br. SA-23, SA-25; McDonald Br. A-46. The appeals were consolidated.

## STATEMENT OF FACTS

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### Chicago and Oak Park's Ordinances

In 1982, Chicago enacted a handgun ban, along with other firearms regulations, because “the convenient availability of firearms and ammunition has increased firearm related deaths and injuries” and handguns “play a major role in the commission of homicide, aggravated assaults and armed robbery.” Chicago City Council, Journal of Proceedings, Mar. 19, 1982, at 10049. Under Chicago’s ordinance, “no person shall . . . possess . . . any firearm unless the person is the holder of a valid registration for such firearm,” and no person may possess “any firearm which is unregisterable.” Municipal Code of Chicago, Ill. § 8-20-040 (2008). Unregisterable firearms include most handguns. See id. § 8-20-050. Exceptions to the handgun ban include “[t]hose validly registered to a current owner . . . prior to the effective date of this chapter” and those owned by security personnel and licensed private detective agencies. Id. Registerable firearms must be registered before being possessed in Chicago, see id. § 8-20-090(a), and registration must be renewed annually, see id. § 8-20-200(a). Failure to renew registration “shall cause the firearm to become unregisterable.” Id. § 8-20-200(c). The registration requirements do not apply to non-residents participating in or traveling to “lawful firearms-related activity” if the weapon is lawfully possessed in another jurisdiction and is kept unloaded and securely wrapped. Id. § 8-20-040(b).

Oak Park’s firearms ordinance makes it “unlawful for any person to possess or carry, or for any person to permit another to possess or carry on his/her land or in

his/her place of business any firearm . . . .” Municipal Code of Oak Park, Ill. § 27-2-1 (2008). The definition of firearms includes “pistols, revolvers, guns, and small arms of a size and character that may be concealed on or about the person, commonly known as handguns.” *Id.* § 27-1-1. The restriction does not apply to “[l]icensed firearms collectors,” *id.* § 27-2-1(K), or “established theater organizations” under certain circumstances, *id.* § 27-2-1(L).

### **NRA Lawsuits**

NRA filed one lawsuit against Chicago, NRA Sep. App. A-31, and another against Oak Park, *id.* at A-42, challenging the handgun restrictions. The individual plaintiffs allege that they wish to possess handguns for purposes of self-defense at home. *Id.* at A-34, A-46.

Count I of NRA’s complaint against Chicago alleges that Chicago’s handgun ban violates the Second Amendment, allegedly incorporated into the Fourteenth Amendment. NRA Sep. App. A-35. Count II challenges, on equal protection grounds, exceptions allowing the registration of handguns registered to a current owner before 1982, handguns owned by detective agencies and security personnel, and handguns possessed by non-residents participating in certain lawful recreational firearm-related activities. *Id.* at A-37.<sup>1</sup>

In its complaint against Oak Park, NRA similarly alleged that Oak Pa

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<sup>1</sup> Count III, which alleged that restrictions on transportation of firearms through Chicago violate 18 U.S.C. § 926A, NRA Sep. App. at A-38, was dismissed with prejudice by stipulation, R. 37 (No. 08-4241).

handgun ban violates the Second Amendment, as allegedly incorporated into the Fourteenth Amendment, and that exceptions for licensed firearm collectors and theater organizations deny equal protection. NRA Sep. App. A-42 to A-50.

### **McDonald Lawsuit Against Chicago**

The McDonald lawsuit was filed by the Illinois State Rifle Association, the Second Amendment Foundation, and several individual plaintiffs. McDonald Br. A-2 to A-5. The individual plaintiffs allege that they legally own handguns they wish to possess in their Chicago homes for self-defense; that they applied for permission to possess the handguns in Chicago; and that their applications were refused. See id. Plaintiffs allege in count I that Chicago's handgun ban violates the Second Amendment, incorporated into the Fourteenth Amendment's Due Process Clause and Privileges or Immunities Clause. Id. at A-9. Counts II, III, and IV raise Second and Fourteenth Amendment claims against the requirements of annual registration of firearms, registration as a prerequisite to possession in Chicago, and the penalty of rendering firearms unregistrable for failure to comply with either requirement. Id. at A-10 to A-11. Count V is an equal protection challenge to the unregistrability penalty. Id. at A-11.

## SUMMARY OF ARGUMENT

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Plaintiffs' Second and Fourteenth Amendment challenges fail because the Second Amendment does not restrain state and local governments. The Supreme Court has already decided this, as has this court. This court should regard those decisions as binding. Plaintiffs' efforts to avoid Supreme Court precedent are unsound because, even though the Court's incorporation analysis has developed, only the Court itself is free to reconsider its earlier decisions on Second Amendment incorporation. For this reason, the district court properly rejected the plaintiffs' attacks on the gun ordinances, and that judgment should be affirmed.

Moreover, even considering the Supreme Court's more recent approach to incorporation of rights in certain Bill of Rights provisions, plaintiffs' incorporation arguments fail. Rather than automatically incorporate all Bill of Rights provisions, something the Court has repeatedly and expressly rejected, the Court has examined the historical roots and purpose of particular rights in assessing whether they should be incorporated as fundamental liberties under the Due Process Clause. Neither the NRA nor McDonald undertakes such an analysis of the Second Amendment right. And in fact, the inclusion of the Second Amendment in the Bill of Rights says nothing about whether the right it protects – interpreted in Heller as a right to weapons in common use – is a fundamental personal liberty interest within the meaning of the Fourteenth Amendment. Unlike other enumerated rights, the Second Amendment was not codified to protect individual liberty. Rather, although conferring an individually held right, the scope of the Second

Amendment's protection is circumscribed by its primary purpose of preventing federal disarmament of the militia. Nor does the history of the right to arms in England and America, including its development under state constitutions, reveal a deeply rooted right to any particular category of firearms commonly used for self-defense, much less a specific right to handguns, without regard to the danger imposed by the weapon or the availability of other arms that will serve the underlying purpose of self-defense in the home. Under the operative test of "ordered liberty," state and local governments should be free to decide that the right to possess handguns – the type of weapon most responsible for homicides, suicides, and other armed violence – is not implicit in the concept of ordered liberty. Moreover, in our system of federalism, the disagreement over the efficacy of gun regulations actually supports leaving the policy judgment to the States, at least so long as some right to arms for self-defense is preserved.

As an alternative to the Court's selective incorporation approach, plaintiffs argue, based mostly on their view of congressional intent, that the history of the Fourteenth Amendment is a reason to incorporate the Second Amendment. But their varying historical approaches are foreclosed because the Supreme Court has rejected that route to incorporation. Also, the merits of their arguments are seriously flawed. Although some members of Congress endorsed a view that the entire Bill of Rights would be incorporated, many other views were expressed in the debates, including a prominent view that the Fourteenth Amendment was intended to require only non-discrimination by the States. Beyond the few who expressed an

incorporationist understanding of the Fourteenth Amendment in congressional debates, there is little historical evidence showing that the public understood the Fourteenth Amendment generally, or the Privileges or Immunities Clause specifically, would impose the Bill of Rights upon the States.

All of plaintiffs' claims, including their equal protection claims, depend upon incorporation, since, without incorporation, plaintiffs have asserted no fundamental right requiring elevated scrutiny under the Equal Protection Clause. Because the Second Amendment does not apply to Chicago or Oak Park, and the rights it protects are not incorporated, judgment on the pleadings on all counts was proper and should be affirmed.

## ARGUMENT

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Because handguns “play a major role in the commission of homicide, aggravated assaults and armed robbery,” Chicago City Council, Journal of Proceedings, March 19, 1982, at 10049, Chicago has a stringent firearms ordinance that allows possession of only registered firearms and forbids registration of most handguns, see Municipal Code of Chicago, Ill. §§ 8-20-040, 8-20-050. Oak Park, too, prohibits the possession of handguns. See Municipal Code of Oak Park, Ill. § 27-2-1. Handgun bans such as these have withstood attack on both federal and state constitutional grounds in both this court, see Sklar v. Byrne, 727 F.2d 633 (7th Cir. 1984); Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), and the Illinois Supreme Court, see Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (Ill. 1984). In Quilici, this court rejected arguments just like the ones plaintiffs make here – that the Second Amendment restricts state and local governments. Nevertheless, invigorated by the decision in District of Columbia v. Heller, 128 S. Ct. 2783 (2008), plaintiffs ask this court to revisit the issue. Their new attacks on the handgun bans should be rejected for the same reason Quilici’s claims were: the Second Amendment does not restrict the States.

Even if this court were free to consider incorporation anew, plaintiffs’ arguments should be rejected. To begin, Heller did not decide incorporation, since the case involved the federal district. Moreover, as an interpretation of the Second Amendment itself, the Court looked only to the language and original meaning of the constitutional text. And under a proper application of the Court’s selective

incorporation framework – which does not include the automatic incorporation NRA proposes – the Second Amendment right to have arms in common use, which Heller held included the right to have a handgun for self-defense in the home, is not a fundamental liberty interest protected by the Due Process Clause. The origins of the Second Amendment, the treatment of the right to arms under state constitutions, the purpose to be served by the right, as well as the concept of ordered liberty itself all demonstrate that the right is not fundamental, and thus the right should not be incorporated into the Fourteenth Amendment.

Plaintiffs’ contention that Congress intended either the Fourteenth Amendment generally, see NRA Br. 17, or the Privileges or Immunities Clause specifically, see McDonald Br. 19, to impose the Second Amendment on the States is no basis for incorporation, either. As the Court has made clear, the public understanding of the constitutional text is essential in determining its meaning. With several competing views of the Fourteenth Amendment voiced inside and outside Congress – including a resounding theme of non-discrimination rather than establishment of particular substantive rights – plaintiffs have not shown that the public understood the Fourteenth Amendment to impose the Second Amendment upon States.

McDonald’s other Second Amendment challenges include Chicago’s annual and “pre-acquisition” registration requirements. See McDonald Br. 42-45. In addition, NRA challenges certain exceptions to the ban, see NRA Br. 43, and McDonald the unregistrability of firearms for which registration or renewal

requirements were not followed, on equal protection grounds, see McDonald Br. 44. These claims all depend on enforcing the Second Amendment against local governments because, without incorporation, there is no basis for elevated scrutiny. On this basis, too, judgment on the pleadings should be affirmed.

**I. BINDING SUPREME COURT PRECEDENT HOLDS THAT THE SECOND AMENDMENT DOES NOT RESTRAIN THE STATES.**

In United States v. Cruikshank, 92 U.S. 542 (1876), the Court held that the Second Amendment constrains only the federal government:

The second amendment declares that it shall not be infringed; but this, as has been seen, 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 . . . .

Id. at 553. The Court reaffirmed this holding in Presser v. Illinois, 116 U.S. 252 (1886), which rejected a Second Amendment challenge to the State's Military Code:

a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of congress and the national government, and not upon that of the state.

Id. at 265. Then, in Miller v. Texas, 153 U.S. 535 (1894), the Court held "it is well settled that the restrictions of th[is] amendment[] operate only upon the federal power, and have no reference whatever to proceedings in state courts," id. at 538.

Thus, the Court has squarely decided that the Second Amendment inhibits no power of the States. And, of course, "only th[e] [Supreme] Court may overrule one of its precedents." Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S.

533, 535 (1983) (per curiam reversal of Ninth Circuit decision that wrongly pronounced Supreme Court precedent not good law). Accordingly, plaintiffs'

reliance on the Second Amendment is foreclosed.

NRA argues that Cruikshank, Presser, and Miller decided only that the Second Amendment does not apply to the States “directly” and not whether it applies indirectly through the Fourteenth Amendment. NRA Br. 26. But the Court’s pronouncements that the Second Amendment restrains only the federal government were straightforward and clear, and cannot be rewritten to say, as the NRA does, merely that the Second Amendment does not apply to the States “directly,” id.; id. at 28, 29, “by its own force,” id. at 26, or “in and of itself,” id. at 28. Moreover, in Presser, the Court considered claims that an Illinois statute prohibiting associating as a military organization or parading and drilling with arms without a license violated the Privileges or Immunities Clause and the Due Process Clause of the Fourteenth Amendment, the argument was “so clearly untenable as to require no discussion.” 116 U.S. at 268. The Court has since characterized Presser as holding that Second Amendment rights are “not safeguarded against state action by the Privileges and Immunities Clause *or other provision* of the Fourteenth Amendment.” Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964) (emphasis added).<sup>2</sup>

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<sup>2</sup> NRA emphasizes Miller’s holding that the defendant waived a Fourteenth Amendment claim, suggesting this means the Court did not regard its earlier decisions as decisive on whether the Fourteenth Amendment imposed the Second Amendment upon the States. See NRA Br. 29, 31. This reads far too much into a simple waiver ruling. The Court was free to reconsider its prior decisions, and relying on waiver suggests nothing more than that the Court would not do so when the issue had not been properly preserved. In any event, based on the record before it, the Court concluded there had been “no denial of due process of law; nor did the law of the state, to which reference was made, abridge the privileges or immunities

Heller did not disturb these holdings. To the contrary, the Court expressly acknowledged that these decisions held “the Second Amendment applies only to the Federal Government” and expressly declined to address the question of “Cruikshank’s continuing validity on incorporation,” since incorporation was “a question not presented” in Heller. 128 S. Ct. at 2813 n.23. Cruikshank could hardly have “continuing validity” on an issue it had not decided in the first instance.

While Heller noted Cruikshank “did not engage in the sort of Fourteenth Amendment inquiry required by our later cases,” 128 S. Ct. at 2813 n.23, this observation does not give license to ignore binding Supreme Court cases. It is well established that when Court precedent “has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the] Court the prerogative of overruling its own decisions.” Tenet v. Doe, 544 U.S. 1, 10-11 (2005) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)). Accord Agostini v. Felton, 521 U.S. 203, 237-38 (1997). Indeed, even when the foundation of a decision is “inconsistent with later decisions,” State Oil Co. v. Khan, 522 U.S. 3, 9 (1997), “it is [the Supreme] Court’s prerogative alone to overrule one of its precedents,” id. at 20. Thus, although lower courts should generally follow “new doctrinal trend[s] in Supreme Court decisions,” McDonald Br. 41 (citation omitted), they are not free to revisit issues that the Supreme Court has already decided,

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of citizens of the United States.” 153 U.S. at 539.

based on doctrinal trends or anything else.<sup>3</sup> “The lower courts . . . 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.” Saban v. United States Department of Labor, 509 F.3d 376, 378 (7th Cir. 2007). That is particularly true for “application of the Due Process Clause,” where “it is for the Court to draw [the line] by the gradual and empiric process of ‘inclusion and exclusion.’” Wolf v. Colorado, 338 U.S. 25, 27-28 (1949), overruled on other grounds by Mapp v. Ohio, 367 U.S. 643 (1961).

Not surprisingly, even after Heller, lower courts have adhered to Cruikshank, Presser, and Miller. As the Second Circuit recently held, “[i]t is settled law . . . that the Second Amendment applies only to limitations the federal government seeks to impose on this right,” and “Heller . . . does not invalidate this principle.” Maloney v. Cuomo, 554 F.3d 56, 58 (2d Cir. 2009) (per curiam). See also Young v. Hawaii, 2009 WL 874517, \*4-5 (D. Haw. Apr. 9, 2009); Mr. S. v. Webb, 2009 WL 650542, \*8 (D. Conn. Mar. 13, 2009); People v. Abdullah, 870 N.Y.S.2d 886, 886-87 (N.Y. Crim. Ct. Dec. 30, 2008).

Moreover, under principles of *stare decisis*, this court should follow its

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<sup>3</sup> As for occasions when lower federal courts passed on incorporation of other Bill of Rights provisions before the Supreme Court did, see Amicus Brief of 69 State Legislators 15-18, the Court has never expressly endorsed this approach. And while the Court “did not rebuke,” id. at 15, or “question,” id. at 16, those lower court decisions, neither did it issue an opinion in any of them. These cases thus provide no basis to disregard the numerous Supreme Court cases that unequivocally direct the lower courts to follow Court precedent until the Court itself overrules it.

decision in Quilici, which addressed the same issues of Presser's meaning and continuing validity that plaintiffs raise. In Quilici, this court found it "difficult to understand how . . . Presser supports the theory that the second amendment right to keep and bear arms is a fundamental right which the state cannot regulate" when Presser squarely ruled that the Second Amendment limits only the national government. 695 F.2d at 269. Quilici also expressly rejected arguments that "Presser is no longer good law because later Supreme Court cases incorporating other amendments into the fourteenth amendment have effectively overruled" it, that "Presser is illogical," and that "the entire Bill of Rights has been implicitly incorporated." Id. at 269. And this court reaffirmed the inapplicability of Second Amendment restrictions on the States in Sklar, 727 F.2d at 637, and Justice v. Elrod, 832 F.2d 1048, 1051 (7th Cir. 1987).<sup>4</sup>

This court should adhere to these rulings. "[P]rinciples of stare decisis require that we 'give considerable weight to prior decisions of this court unless and until they have been overruled or undermined by the decisions of a higher court, or

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<sup>4</sup> Other circuits consistently agree. See, e.g., Thomas v. Members of City Council of Portland, 730 F.2d 41 (1st Cir. 1984) (*per curiam*); Cases v. United States, 131 F.2d 916, 921-22 (1st Cir. 1942); Bach v. Pataki, 408 F.3d 75, 84 (2d Cir. 2005); Love v. Pepersack, 47 F.3d 120, 123-24 (4th Cir. 1995); Edwards v. City of Goldsboro, 178 F. 3d 231, 252 (4th Cir. 1999); Peoples Rights Organization, Inc. v. City of Columbus, 152 F.3d 522, 539 n.18 (6th Cir. 1998); Fresno Rifle & Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 730-31 (9th Cir. 1992). Plaintiffs note that two courts have expressed the view that Presser and Cruikshank have been discredited. See McDonald Br. 37 (citing Silveira v. Lockyer, 312 F.3d 1052, 1066 n.17 (9th Cir. 2002), and United States v. Emerson, 270 F.3d 203, 221 n.13 (5th Cir. 2001)); NRA Br. 32 (same). The cited footnotes were dicta and when the issue was actually presented in the Ninth Circuit, it ruled that the Second Amendment does not limit the States. See Fresno Rifle, 965 F.2d at 730-31.

other supervening developments, such as a statutory overruling.” Santos v. United States, 461 F.3d 886, 891 (7th Cir. 2006). Far from being overruled or undermined by a higher court, this court’s cases are true to Cruikshank, Presser, and Miller, which Heller recognizes are the Court’s last word on the applicability of the Second Amendment to the States, as we explain above. Accordingly, there is no basis for overruling Quilici.

McDonald attempts to evade Quilici by arguing that it did not address the particular argument raised here, and that “[n]o holding in Quilici . . . takes the opposite position from that now pressed.” McDonald Br. 33. But Quilici rejected the attempt to avoid Presser based on “later Supreme Court cases,” 695 F.2d at 269, and that is plainly a holding “opposite” from McDonald’s position that the Court’s “more modern jurisprudence” should be followed instead of Presser. McDonald Br. 33. McDonald also attempts to differentiate his argument that Presser’s “reasoning has been undercut by subsequent decisions” from Quilici’s argument that Presser “is no longer good law” because of those decisions. Id. While McDonald phrases his argument differently, the substance is the same, *i.e.*, that later decisions require a different result. Quilici considered and rejected that very point, and no subsequent Supreme Court decision supports reconsidering that holding.

Plaintiffs further argue that this court should disregard Quilici because the courts must “decide cases in light of intervening Supreme Court decisions.” NRA Br. 30 (citations omitted). See also McDonald Br. 38 (Seventh Circuit decisions not binding “when there has been a relevant intervening change in the law”) (citations

omitted). But this principle does not apply – as we explain, no intervening decision undermines the Court’s holdings that the Second Amendment does not restrict the States. NRA correctly observes that Heller overrules Quilici’s holding that the Second Amendment does not protect a “right to keep and bear handguns.” NRA Br. 30. McDonald similarly observes that Heller rejected the theory that the Second Amendment protects “collective” rights rather than individual ones. McDonald Br. 37. But these developments do not bear on whether the Second Amendment binds the States. Heller is not, therefore, an “intervening change in the law” on the question of incorporation, id. at 38, nor did it “change,” “undercut,” or “render[] obsolete,” id. at 38-39; or “supercede,” NRA Br. 30, holdings in Cruikshank, Presser, and Miller. Indeed, Heller acknowledges that those decisions govern on the issue. There is no reason to reconsider Quilici, which soundly rests upon that undisturbed Supreme Court precedent. Judgment for Chicago and Oak Park should be affirmed on this ground alone.

## **II. UNDER THE SUPREME COURT’S SELECTIVE INCORPORATION DOCTRINE, THE SECOND AMENDMENT SHOULD NOT BE INCORPORATED.**

Even if this court were free to address whether the Second Amendment right can be enforced against the States, it should reject that notion. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), long ago decided that the enumerations of the Bill of Rights restrain only the federal government and not the States. While an enumerated right can be enforced against the States through incorporation, a right is incorporated only after the Court determines, among other

things, that the right is “fundamental to the American scheme of justice” or “necessary to an Anglo-American regime of ordered liberty.” Duncan v. Louisiana, 391 U.S. 145, 149 & 150 n.14. (1968). If so, the right is deemed part of the Fourteenth Amendment’s Due Process Clause and, as such, protected against state intrusion. See id. at 147-48.

As we explain in detail below, Heller determined that the right conferred by the Second Amendment is a right to keep and bear arms that are in common use.<sup>5</sup> Heller then interpreted that right to include categorical protection for handguns because they are a commonly owned class of weapons. But Heller did no more than construe the meaning of the Second Amendment’s text. It did not conduct the type of Fourteenth Amendment analysis of fundamental rights required under Supreme Court precedent, including Duncan. That question was not presented in Heller, and the Court pointedly did not answer it. See 128 S. Ct. at 2813 n.23. The Fourteenth Amendment shows that the Second Amendment right recognized in Heller – which included a handgun as a weapon in common use, including handguns – is not a fundamental right of the sort that is protected by the Due Process Clause.

In addition to the factors typically used to assess whether a right is

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<sup>5</sup> Heller’s treatment of this common-use right is actually the decision’s less noteworthy aspect, for the Court had discerned that right 70 years earlier. See United States v. Miller, 307 U.S. 174, 179 (1939) (recognizing that militia members used arms “of the kind in common use at the time”). See also Heller, 128 S. Ct. at 2815-16 (discussing Miller). The primary, and novel, question in Heller was not about the scope of the Second Amendment right, but rather who could exercise it – *i.e.*, whether the right is an individual right untethered to service in a militia, or a collective, militia-connected right. See 128 S. Ct. at 2789.

fundamental for purposes of the Fourteenth Amendment’s Due Process Clause, which show that incorporation is not appropriate here, other issues Heller also expressly declined to address – such as the wisdom, values, and tradeoffs involved in providing categorical protection to handguns – show that handguns pose very serious problems in modern urban centers. A due process analysis allows state and local governments to assess the costs and benefits of handguns. Particularly where, as here, the government allows the possession of other firearms for the protection of personal liberties like self-defense, there can be no serious claim that merely because a weapon in common use was protected at the time the Constitution was ratified, such a weapon cannot be banned today.

**A. Incorporation, Like Other Due Process Issues, Requires Evaluation Of Many Factors And Considerations, And Is Not Automatic.**

In most respects, selective incorporation cases are no different from other cases addressing the content of the Due Process Clause. Due process analysis requires precision and “utmost care . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of th[e] Court” and “the matter [be placed] outside the arena of public debate and legislative action.” Washington v. Glucksberg, 521 U.S. 702, 720 (1997). The problem arises because of that clause’s “spacious language.” Duncan, 391 U.S. at 148. Thus, it is critical that the asserted liberty interest be “carefully formulat[ed].” Glucksberg, 521 U.S. at 722. Then, to determine whether that right is fundamental under the Due Process Clause, the courts examine numerous factors, such as the right’s

origins in English and American jurisprudence; its prevalence in and treatment under state constitutions; and the purposes, functions, and efficacy of the right. See, e.g., Duncan, 391 U.S. at 151-56. Applying this test, Montana v. Egelhoff, 518 U.S. 37 (1996), found no protection for a criminal defendant's desire to introduce evidence of voluntary intoxication, because the asserted right was not a "principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental." Id. at 43. See also id. at 43-45, 48-49, 50-51, 51 n.5 (reviewing "historical practice" in Anglo-American law, degree to which States embraced asserted right, and empirical and policy justifications for restricting the right in "modern times"); Glucksberg, 521 U.S. at 710 (review covers "Nation's history, legal traditions, and practices"); County of Sacramento v. Lewis, 523 U.S. 833, 858-59 (1998) (Kennedy, J., concurring) ("history and tradition are the starting point," but "[t]here is room as well for an objective assessment of the necessities of law enforcement, in which the police must be given substantial latitude and discretion, acknowledging, of course, the primacy of the interest in life which the State, by the Fourteenth Amendment, is bound to respect.").

The only unique aspect of this inquiry in an incorporation case is that the Court begins by "look[ing] . . . to the Bill of Rights for guidance" to flesh out the amorphous Due Process Clause. Duncan, 391 U.S. at 148. Yet, as is clear from Duncan's resort to the numerous factors outlined above, the Bill of Rights is only a starting point and hardly dispositive. This approach precludes the NRA's argument that codification in the Bill of Rights automatically makes a right a component of

Fourteenth Amendment liberty. See NRA Br. 35-42. The Court has never endorsed such total incorporation of all provisions of the Bill of Rights “based solely on their status as such.” Id. at 40. To the contrary, “[t]he notion that the ‘due process of law’ guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and therefore incorporates them has been rejected by this Court again and again, after impressive consideration.” Wolf, 338 U.S. at 26 (citations omitted). And, of course, neither the Fifth Amendment right to grand jury indictment, see Hurtado v. California, 110 U.S. 516 (1884), nor the Seventh Amendment right to jury trial in civil cases, see Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916), is incorporated.<sup>6</sup>

Instead, the most consistent theme in incorporation jurisprudence is whether a right enumerated within the first Eight Amendments is necessary to secure a regime of ordered liberty. For example, incorporation of the Fourth Amendment’s protection against unreasonable search and seizure was based on the Court’s conclusion that “the ‘security of one’s privacy against arbitrary intrusion by the police’ is ‘implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause.’” Mapp, 367 U.S. at 650 (quoting Wolf, 338 U.S. at 28 (internal quotations omitted)). Similarly, the incorporation of First Amendment rights reflected that these rights are “implicit in the concept of ordered liberty.” Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled on other grounds

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<sup>6</sup> The Court recently reaffirmed that these rights are not incorporated. See Osborn v. Haley, 549 U.S. 225, 252 n.17 (2007) (Seventh Amendment); Campbell v. Louisiana, 523 U.S. 392, 399 (1998) (Fifth Amendment grand jury indictment).

by Benton v. Maryland, 395 U.S. 784 (1969). And in Glucksberg, the Court held that the Due Process Clause does not encompass a right to assisted suicide because that right was not “deeply rooted in this Nation’s history and tradition” so as to be fundamental and “implicit in the concept of ordered liberty.” 521 U.S. at 720-21.

Even the cases involving trial rights have looked to whether a given right is “necessary to an Anglo-American regime of ordered liberty.” Duncan, 391 U.S. at 149 n.14. Accord Danforth v. Minnesota, 128 S. Ct. 1029, 1034 (2008) (state criminal trials must provide defendants with protections “implicit in the concept of ordered liberty”) (citing Palko). In contrast, the Court has rejected incorporation of the Fifth Amendment’s right to indictment by a grand jury on felony charges on the ground that other procedures can adequately protect an accused’s interest against unfounded accusations. See, e.g., Hurtado, 110 U.S. at 534-38. There is thus no basis for the NRA’s apparent attempt to distinguish the unincorporated procedural rights under the Fifth and Seventh Amendment on the basis that “substantive” rights are automatically incorporated. See NRA Br. 40, 42. Duncan hints at no distinction between substantive and procedural rights. Instead, as we explain, the test of “ordered liberty” is in the full array of cases.

In short, while there is no “tidy formula for the easy determination of what is a fundamental right” under the Fourteenth Amendment, Wolf, 338 U.S. at 27, it is nevertheless quite settled that only a right that is itself an aspect of ordered liberty merits incorporation within the Fourteenth Amendment. When the Court in Heller referred to “the Fourteenth Amendment inquiry required by our later cases,” 128 S.

Ct. at 2813 n.23, this is what it meant.

**B. Heller Limited Its Analysis To The Text Of The Second Amendment And Did Not Consider Factors That Govern A Selective Incorporation Analysis.**

Plaintiffs seek incorporation of what they describe as a right “to bear arms.” McDonald Br. 27; see also NRA Br. 13, 42. Their argument is simply that Heller recognized a fundamental right to self-defense and, in particular, a right to a handgun. Of course, Heller itself explains that the Second Amendment is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” 128 S. Ct. at 2816. But granting whatever it is that the Second Amendment protects, the question here is different. As we have just explained, incorporation under the Due Process Clause requires precise identification of the right at issue and a searching look at a number of factors, in addition to the constitutional text.

Plaintiffs ignore this governing standard. Perhaps even worse, they rely on Heller for issues it did not decide. Heller did not decide anything beyond the original public meaning of the Second Amendment at the time of ratification in 1791. Heller explains that, in examining the meaning of enumerated rights, the Court must do nothing more than determine “the scope they were understood to have when the people adopted them.” 128 S. Ct. at 2821. The Court is not free to conduct a “freestanding ‘interest-balancing,’” id., and cannot take account of modern developments or conditions, see id. at 2817 (“the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right

cannot change our interpretation of the right”). Pursuing the issue before it, the Court concluded that the right extended to weapons in common use. See id. at 2816-17. The Court then determined that handguns were in common use. See id. at 2817-18. Based on those two conclusions alone, the Court ruled that the federal district’s ordinance violated the Second Amendment.

This analysis does not control the due process issue in this case. Both the question the Court answered and the way in which it went about answering it were a world away from the analysis that is appropriate under the inclusive and adaptive test in the Court’s due process jurisprudence. As the Court admitted, Heller examined no policy issues; the Second Amendment took “certain policy choices off the table.” 128 S. Ct. at 2822. Heller also froze its conception of the right to arms as it existed in 1791.

To be sure, there are words in Heller that can be read out of context to support plaintiffs. For example, Heller observed that handguns are useful for self-defense and that Americans “considered” them to be the quintessential self-defense weapon. 128 S. Ct. at 2818. But that is not the reason Heller found them protected under the Second Amendment. Rather, handguns were protected as a “class of ‘arms’” that is commonly owned and “overwhelmingly chosen,” id. at 2817, because (as we explain below), in 1791, weapons in common use were necessary for an effective militia. Indeed, this protection exists “[w]hatever the reason” Americans actually decide to possess them, and even if alternative arms are available. Id. at 2818. Conversely, no matter how useful a weapon might be, that does not itself

bring it within the scope of the Second Amendment. Machine guns, for example, are undoubtedly useful for self-defense (indeed, they are standard-issue military equipment precisely because they kill effectively), but they lack constitutional protection because they are not in the class of arms in common use but are instead “dangerous and unusual.” Id. at 2817. In short, the touchstone in Heller is not whether a weapon is useful, much less whether it is essential, to self-defense.

Similarly, Heller observed that “[b]y the time of the founding, the right to arms had become fundamental for English subjects.” 128 S. Ct. at 2798. But, as we explain in more detail below, the context was its discussion of an individual right (as opposed to a collective right) under English law, and not whether handguns are empirically or logically essential to the exercise of any fundamental personal liberty, such as self-defense. Nor did Heller cite, much less rely upon, any data or evidence establishing a correlation between handguns and effective self-defense. Heller did not address these issues because they were not properly part of the inquiry before it, which, as we explain, was simply the original meaning of the Second Amendment’s text.

In this Fourteenth Amendment case, however, the issue is whether plaintiffs have a fundamental liberty interest in self-defense that requires access to a handgun because cannot be meaningfully exercised in any other way. Plaintiffs make no argument at all on this issue. Nor do they even contend that Heller decided it; and, as we explain, it did not. Plaintiffs’ sole reliance on Heller is therefore misplaced.

