

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' REPLY BRIEF

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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:

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None.

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None.

David G. Sigale

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APPELLANTS' REPLY BRIEF

SUMMARY OF ARGUMENT

The arguments raised by Defendants and their amici fall into three broad categories. First, a highly selective historical analysis is invoked for the proposition that the Fourteenth Amendment was not understood to incorporate any portion of the Bill of Rights as against the states. This erroneous view, like the “collective rights” vision of the Second Amendment recently rejected in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), held sway within the legal academy in the middle to latter part of the 20th century— until it was debunked by examination of the historical record.

Indeed, none of the views expressed by Defendants and their amici on this point withstand comparison to the historical record. The Fourteenth Amendment’s incorporating effect is obvious not just due to its plain text and historical context. Incorporation was forcefully advocated by the Fourteenth Amendment’s framers, and was widely understood to be a key feature of that amendment. Even those who opposed incorporation did not dispute the fact that the Fourteenth

Amendment had this effect – a fact widely understood by the public, by prominent legal scholars of the day and, at least prior to *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), by the federal judiciary.

With respect to *Heller*, the definitive Supreme Court decision outlining the character and history of the Second Amendment handed down less than a year ago, Defendants re-argue the most basic aspects of that exhaustive holding. Of course, these arguments remain wrong, but now their error is also a matter of precedent that the Supreme Court is unlikely to revisit and that this Court cannot.

Only by re-writing *Heller*, ignoring it, or reading the dissenting opinions in that case as though they are binding can Defendants assert that the Second Amendment is not incorporated via the Fourteenth Amendment's Due Process Clause. *Heller* may be a controversial opinion for those who continue opposing it on policy grounds, but it is also unambiguous and controlling – and its definition of the Second Amendment's content precludes Defendants' arguments with respect to selective incorporation.

Though they cast aside fresh controlling precedent, Defendants invoke a series of antiquated, inapposite decisions in arguing they need not respect Second Amendment rights at all. Read in a vacuum, the Second Amendment, like the others, restrains only the federal government. But the Fourteenth Amendment is also an operative part of the Constitution, and the Supreme Court now requires an incorporation analysis to resolve cases such as this – an analysis which was never conducted in any case cited by Defendants.

Last month, the Ninth Circuit became the first court to conduct such analysis, and it reached the same conclusion urged by *McDonald* plaintiffs: selective incorporation of the Second Amendment. *Nordyke v. King*, 2009 U.S. App. LEXIS 8244 (9th Cir. April 20, 2009). The result here should be no different.

Accordingly, the challenged laws must yield. There is no question that a handgun ban violates the Second Amendment right to keep arms, as do the other provisions challenged by *McDonald* plaintiffs. The judgment should be reversed and the case remanded with instructions to enter summary judgment for *McDonald* plaintiffs.

ARGUMENT

I. THE FOURTEENTH AMENDMENT WAS UNDERSTOOD AT THE TIME OF ITS ADOPTION TO INCORPORATE THE BILL OF RIGHTS.

Defendants and their amici have not pointed to a single statement dating to the time of the Fourteenth Amendment's adoption contradicting the Amendment's incorporating impact. That is because no such recorded statements exist. *See* Akhil Reed Amar, *THE BILL OF RIGHTS* 186-87 (1998); Const. Law Profs. Br. at 10.

On the other hand, numerous examples abound of the Fourteenth Amendment's proponents advocating and specifically endorsing its incorporating effect. *McDonald* Br. at 22-24; Const. Law Professors Br. at 6, 8-10 15-16; Inst. for Justice Br. at 5-9. Curiously, Defendants' amici claim that Fourteenth Amendment author Rep. John Bingham believed the Privileges or Immunities Clause to be merely a non-discrimination provision. Cornell Br. at 9. This is an astonishing claim considering the clear text of Bingham's speeches already before the Court. To these can be added other examples, such as, "the privileges and immunities of citizens of the United States, as contradistinguished

from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.” Cong. Globe, 42d Cong. May 14, 2009, 1st Sess. app. at 84 (Mar. 31, 1871); *see also* Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57, 70 n.72 (1993) (collecting Bingham’s statements).

It bears repeating that the Fourteenth Amendment’s detractors held this view as well: “Fourteenth Amendment opponent Senator Reverdy Johnson . . . agreed that the privileges and immunities protected by the Fourteenth Amendment included the right to keep and bear arms.” Aynes, 103 Yale L.J. at 98 (citations omitted). Interior Secretary Orville Browning

published widely, in the fall of 1866, a letter denouncing the proposed Amendment. The Browning letter predicted the Amendment, especially the Due Process Clause, would “subordinate the State judiciaries to Federal supervision and control” and “annihilate the[ir] independence . . . in the administration of State laws.” Indeed, he said, “all State laws . . . will be equally open to criticism, interpretation and adjudication by the Federal tribunals, whose judgments and decrees will be supreme and will override the decisions of the State Courts” Browning specifically noted that the Amendment would authorize federal court claims by state criminal defendants.

Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67* (“Revisiting”), 68 Ohio St. L.J. 1509, 1604 (2007) (footnotes omitted).¹

Unlike their amici, Defendants concede that the Fourteenth Amendment’s author and Senate sponsor “expressed a view that the Fourteenth Amendment would . . . mak[e] the Bill of Rights applicable to States.” Appellees’ Br. at 54. Yet they carefully claim that the incorporationist view “was just one of several views expressed during debate.” *Id.*

That much is literally true, as far as it goes – there were indeed many views expressed about the Fourteenth Amendment, because it dealt with so many important topics. But none of these “several views” contradicted or were incompatible with the obvious incorporationist purpose and effect of the proposed amendment.²

¹“The letter was published in numerous papers. The quotations in the text are taken from the *Cincinnati Commercial* of October 26, 1866.” Revisiting, at 1604 n.313 (other citations omitted).

²Defendants’ amici’s selective reading of the historical record also occurs within sources. Cornell et al. cite Prof. Maltz’s work for the proposition that the Fourteenth Amendment may have been merely a non-discrimination provision. Cornell Br. at 6 (citing Earl Maltz, *The*

[W]hile today we see the Amendment's first section as its most significant, in 1866-68 its most controversial portions were sections two, three and four . . . Some critics and supporters of the Amendment even suggested that its first section was not controversial in the least. The *New York Times* thought that "To this, the first section of the amendment, the Union party throughout the country will yield a ready acquiescence, and the South could offer no justifiable resistance." The *Brooklyn Daily Eagle*, a Democratic paper opposed to the amendment, called the due process and equal protection provisions "entirely unobjectionable and entirely unnecessary."

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>, at 5 (citations omitted).

Defendants oddly insist that "[t]here is little evidence outside the congressional debates showing that certain members of Congress 'clearly, publicly, and candidly conveyed' an incorporationist 'intent to the country.'" Appellees' Br. at 57 (citation omitted). This is simply wrong. Several scholars have undertaken exhaustive study of just how publicly the debate over the Fourteenth Amendment was conducted.

Fourteenth Amendment as Political Compromise — Section One in the Joint Committee on Reconstruction, 45 OHIO L.J. [sic] 933, 966 (1984). However, that article endorses the view that the Privileges or Immunities Clause incorporated the Bill of Rights. Maltz, 45 Ohio St. L.J. at 966-67, 970.

The results overwhelmingly refute Defendants' claim that the public was unaware of the Amendment's incorporationist effect. Hardy, *supra*; Revisiting, *supra*; Aynes, *supra*.

“The newspaper coverage of the Bingham and Howard speeches provides substantial evidence that the national body politic, during 1866–68, was placed on fair notice about the incorporationist design of the Amendment.” Revisiting, 68 Ohio St. L.J. at 1590.

In 1866-68, the American public had before it extensive discussions of the meaning of the Amendment it was called upon to ratify. It was the political topic of the day: “Everybody asks everybody,” a New York Times reporter wrote, “What do you think of the Constitutional Amendment?” almost before he says ‘How d’ye do?’”

Hardy, at 24 (citation omitted). The *New York Herald*, the largest circulation paper of the day, carried Rep. Bingham's February 26, 1866 incorporationist speech on its front page. Hardy, at 15-16 (citation omitted). The *Herald*, along with the *Chicago Tribune*, carried on their front pages Bingham's stridently incorporationist February 28, 1866 speech, with the following note: “This was simply a proposal to arm the Congress of the United States, by the consent of the people, with power to enforce the bill of rights as it stood in the constitution. It had that

extent, no more.” Hardy, at 16 (citation omitted). Bingham’s speeches were also covered by the *New York Times*, and smaller newspapers, including *The Daily National Intelligencer* (Washington, D.C.), the *Ft. Wayne Daily Gazette*, and *The Bangor Daily Whig & Courier*. Hardy, at 16 (citations omitted).

Bingham’s hometown newspaper, the *Cadiz Republican*, reprinted many of his speeches; others were bound in pamphlet form for mass distribution. Since these speeches were intended for circulation among constituents as well, they “provide clues to the sentiments of [those] constituents.”

Aynes, 103 Yale L.J. at 69 n.66 (quoting Kenneth M. Stamp, *AMERICA IN 1857*, at viii (1990)).³

Senator Howard’s speech, declaring the Bill of Rights to be within the Fourteenth Amendment’s Privileges or Immunities Clause, received even greater play. It was reprinted in the *New York Times*, *New York Herald*, *Philadelphia Inquirer*, *National Daily Intelligencer*, among others, and had its incorporationist meaning encapsulated in other newspapers, including those in Boston and Baltimore. Hardy, at 18-20 (citations omitted).

³Aynes notes that order sheet records for the printing of Bingham’s speeches ran into the thousands. *Id.*

Predictably, the widespread newspaper coverage of Congressional incorporation discussions generated letters to editors and op-ed pieces discussing the topic of incorporation. Hardy, at 20-22 (citations omitted). And the incorporationist intent and effect of the Fourteenth Amendment also became fodder for magazine expositions. Twelve days before its ratification, *The Nation* declared that the Amendment “would, indeed, be almost a revolution; it would give to the liberty of the individual inhabitant the will of the nation as its basis, instead of the will of a State.” Bryan Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73*, (“Scholarship”) 18 J. Contemp. Leg. Issues ___, available at SSRN: <http://ssrn.com/abstract=1354404> at 67 (forthcoming 2009) (quoting “Pomeroy’s Constitutional Law,” *The Nation*, July 16, 1868 at 54).

The comprehensive bill of rights contained in the first eight amendments applied to the action of Congress alone, and did not control that of the States. . . . This was a great evil, and there was danger lest it might become greater. To remedy it, the Fourteenth Amendment was adopted. This was the sole design of that most just and beneficial change.

Aynes, 103 Yale L.J. at 90 n.219 (quoting “The Force Bill,” *The Nation*, Apr. 20, 1871, at 268, 270).

The earliest federal court decisions interpreting the Fourteenth Amendment adopted the incorporationist view. Before being reversed by the Supreme Court in *Slaughter-House*, Justice Bradley held that the Privileges or Immunities Clause forbade states from “interfer[ing] with the fundamental privileges and immunities of American citizens,” *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649 (C.C.D. La. 1870), “a theory of the Fourteenth Amendment consistent with Bingham’s own: the new Amendment enforced the Bill of Rights against the states through the Privileges or Immunities Clause.” Aynes, 103 Yale L.J. at 97. Justice Bradley thereafter urged this view upon future Justice William Woods, who had written him seeking advice in deciding the then-pending case of *United States v. Hall*, 26 F. Cas. 79 (S.D. Ala. 1871). Aynes, at 97. *Hall* squarely held that the Bill of Rights was within the Privileges or Immunities of the Fourteenth Amendment that the states could not abridge. *Hall*, 26 F. Cas. at 81-82.

And contrary to the assertions by Defendants and their amici, the leading treatises of the Fourteenth Amendment’s brief pre-*Slaughter-*

house period did, indeed, assert that the Amendment incorporated the Bill of Rights. Defendants’ amici put forth that Thomas Cooley’s 1868 treatise “was silent on total incorporation,” but favorably cited *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), concluding that had the Fourteenth Amendment impacted *Barron*, “Cooley’s ignorance would be surprising.” Cornell Br. at 9. This is rather disingenuous; Cooley’s 1868 treatise was *entirely* “silent” on the Fourteenth Amendment, which had only been ratified in the middle of that year.⁴

The same problem inheres in amici’s discussion of Joel Bishop and Francis Wharton, neither of whom mentioned the Fourteenth Amendment prior to 1880. Scholarship, at 25. But amici’s reliance on Bishop is particularly misguided – as Bishop repeatedly urged that the Second Amendment, on its face, applied to the states. In 1865, Bishop wrote that “though most of the amendments are restrictions on the General Government alone, not on the States, this one [the Second

⁴Cooley’s 1871 edition, not discussed by Defendants’ amici, contained statements that can be construed as endorsing incorporation. See Aynes, 103 Yale L.J. at 91-93.

Amendment] seems to be of a nature to bind both the State and National legislatures.” In the 1868 edition of his treatise, Bishop repeated this language, adding: “; and doubtless it does.” Scholarship, at 27 (citing Joel Prentiss Bishop, COMMENTARIES ON THE CRIMINAL LAW (Little, Brown, 2 vols., 3d ed. 1865, 4th ed. 1868)).

Also misleading is amici’s treatment of Dean Pomeroy, whom they suggest “hinted at antidiscrimination interpretations of the Privileges or Immunities Clause.” Cornell Br. at 10 (citation omitted). Whatever his views on the clause’s impact on the states’ ability to discriminate, Dean Pomeroy was an ardent incorporation proponent. In the very same treatise cited by Defendants’ amici, Pomeroy referred to “the immunities and privileges guarded by the Bill of Rights.” John N. Pomeroy, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 147 (1868). Describing *Barron* as “unfortunate,” *id.*, at 149, Pomeroy added that “a remedy is easy, and the question of its adoption is now pending before the people,” referring to the Fourteenth Amendment. *Id.*, at 151.⁵

⁵The other authors cited by Defendants amici were writing post-*Slaughter-house*.

Other scholars of the day agreed. Judge Farrar, referring to precedent holding the Bill of Rights inapplicable to the states, wrote: “All these decisions . . . are entirely swept away by the 14th amendment.” Timothy Farrar, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES* 546 (3d ed. 1872). Writing during the Fourteenth Amendment’s ratification period, Judge Paschal offered that “[t]he new feature declared is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States.” George W. Paschal, *THE CONSTITUTION OF THE UNITED STATES* 290 (1868).

The historical record is replete with evidence that the public understood the Fourteenth Amendment to incorporate the Bill of Rights. Of course, this was understood to occur primarily through the Fourteenth Amendment’s Privileges or Immunities Clause, not any theory of selective incorporation as also argued by *McDonald* Plaintiffs, or the implicit, holistic approach advocated by *NRA* plaintiffs. Yet selective incorporation, which neatly approximates the Fourteenth Amendment’s original meaning, mandates reversal in this case.

II. DEFENDANTS' ARGUMENTS REGARDING THE SCOPE AND PURPOSE OF THE SECOND AMENDMENT ARE FORECLOSED BY *HELLER*.

Defendants' argument that only the Supreme Court can overrule its own decisions, Appellees' Br. at 14, is excellent – and dispositive of their claims contesting the plain language of *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

This is not the forum for Defendants to re-argue *Heller*. This Court can spend no time reconsidering claims that the Second Amendment protects only an interest of the states to militarily resist the federal government, as imagined by the alternative history rejected in *Heller*. This Court cannot adopt Justice Breyer's eloquent but non-authoritative interest-balancing approach to Second Amendment questions. Nor can this Court question that the Second Amendment codified a pre-existing right based on self-defense, or that it protects the individual possession of common arms, including handguns, regardless of what other arms the city deigns to "allow."

A. The Second Amendment's Content, Not Its Alleged Purpose, Is Controlling.

Defendants at times acknowledge that *Heller's* various holdings

preclude their claims. However, they largely ignore those holdings and instead re-argue *Heller*, from start to finish, asserting that everything rejected in *Heller* must be the governing law because that would better comport with the Second Amendment's asserted purpose: "the scope of the Second Amendment's protection is circumscribed by its primary purpose of preventing federal disarmament of the militia." Appellees' Br. at 10.

Defendants thus deny *Heller*'s basic premise, that the actual content of the Second Amendment right trumps whatever purposes, lurking in its preambular language, lay behind the Amendment's adoption. But it does not matter that Defendants continue to believe the Second Amendment "was not codified to protect individual liberties." Appellees' Br. at 30. What matters is that *it did so*.

Heller addressed Defendants' argument, raised by Justice Breyer's dissent – and flatly rejected it:

It is . . . entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new

Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. JUSTICE BREYER's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self defense had little to do with the right's *codification*; it was the *central component* of the right itself.

Heller, 128 S. Ct. at 2801 (emphasis original) (citation omitted).

Indeed, the purpose-based approach adopted by Defendants is particularly ironic, if not self-defeating here. For whatever purpose lay behind adoption of the Second Amendment, among the *Fourteenth* Amendment's purposes was unquestionably the intent to have the states respect individual Second Amendment rights.

In any event, the task before this Court is not to re-consider *Heller* by asking whether everything that holding says of the Second Amendment right is consistent with the Second Amendment's purpose. Rather, the task before this Court is to take the Second Amendment right, as defined by the Supreme Court, and decide whether the characteristics of that right are such that it must be incorporated through the Fourteenth Amendment. It must.

B. The Content of the Second Amendment Right Refutes Defendants' Purpose-Based Theories.

Although Defendants' purpose-based arguments are irrelevant to the question before the Court, *McDonald* Plaintiffs are nonetheless constrained to briefly address them. Because Defendants' approach in this area is an attempt to re-argue *Heller*, that decision is dispositive of their claims.

Defendants assert that “the purpose of the common-use right [to arms] was to ensure the militia, and not to protect essential individual liberties.” Appellees' Br. at 29 n.8. “Unlike other enumerated rights, the Second Amendment was not codified to protect individual liberty.” Appellees' Br. at 9-10.

The Supreme Court takes a different view of what the Second Amendment actually does. “[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.” *Heller*, 128 S. Ct. at 2797 (emphasis original). The English right to arms “has long been understood to be the predecessor to our Second Amendment. It was clearly an individual right, having nothing whatever to do with service in a militia.” *Id.*, at

2798 (citation omitted). Blackstone's

description of it cannot possibly be thought to tie it to militia or military service. It was, he said, 'the natural right of resistance and self-preservation,' and 'the right of having and using arms for self-preservation and defence.'

Id., at 2798 (citations omitted).

"[T]he right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence." *Heller*, 128 S. Ct. at 2798-99.

"There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *Id.*, at 2799.

"[T]he inherent right of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2817. The Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 128 S. Ct. at 2821.

And in doing so, the Second Amendment is not "atypical of the Bill of Rights." Appellees' Br. at 33. To the contrary, the Supreme Court explained that "the right of the people," as used in the Second

Amendment, is no different than the same language as used in the First and Fourth Amendment. *Heller*, 128 S. Ct. at 2790. Accordingly, the rational basis test

could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.

Heller, 128 S. Ct. at 2818 n.27 (citing *United States v. Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938)).

Yet rational basis review is precisely what Defendants would do in exploring the reach of Second Amendment rights. Although the *Heller* decision is not yet a year old, Defendants declare that the very idea of “extending blanket protection to a particular class of arms is no longer sensible,” Appellees’ Br. at 29, and that *Heller*’s test for protected Second Amendment arms is “utterly unworkable.” *Id.*, at 43.

Defendants would thus defy the Supreme Court’s considered judgment that handguns are, in fact, covered by the Second Amendment right: “[w]hile the Court in *Heller* considered them to fall within the ambit of Second Amendment protection, it is reasonable for the States to refuse to provide a right to such dangerous weapons.” Appellees’ Br. at 44.

This argument is untenable. “Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.” *Heller*, 128 S. Ct. at 2818. “[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.” *Id.*, at 2822.⁶ Handguns come within the scope of the Second Amendment right, regardless of whether the Defendants believe that the Second Amendment extends categorical protection to classes of arms, and despite what Defendants think of the Supreme Court’s reasoning.⁷

⁶The various arguments raised by Defendants’ amici, asserting that handguns are unacceptably dangerous or distorting our nation’s history of gun regulation, are not new. These arguments were exhaustively considered in *Heller* and warrant no re-examination.

⁷Amici Mayors’ hyperbolic claim that the “version of the right to bear arms found in the Second Amendment . . . threatens to cripple state and local law enforcement by granting gang members and drug dealers a right to carry firearms,” Mayors Br. at 1, is not well-taken. Plaintiffs are law-abiding, and *Heller* makes clear that dangerous people can be deprived of arms. *Heller*, 128 S. Ct. at 2817. Gang members and drug dealers in Chicago do, however, enjoy constitutional rights, *see, e.g. City of Chicago v. Morales*, 527 U.S. 41 (1999). Enforcing the Constitution qualifies as “law enforcement,” too.

Undaunted, Defendants offer another reason to ignore the Second Amendment’s protection of handguns. Again rejecting the Supreme Court’s common use test, Defendants claim that

where . . . the government allows the possession of other firearms . . . 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.

Appellees’ Br. at 22. “[T]he issue is whether plaintiffs have a fundamental liberty interest in self-defense that requires access to a handgun because cannot [sic] be meaningfully exercised in any other way.” *Id.*, at 28.

The interest in self-defense does not depend on handguns. It can be served by many means and even many types of firearms. Self-defense, especially of one’s home, is furthered by alarms, guard dogs and, in Chicago and Oak Park, rifles and shotguns.

Id., at 45-46.

Self-defense informs the Second Amendment right, but the right is a right to “arms” – not alarms or guard dogs. The question is which arms are protected, not whether other means of self-defense are allowed.

In defending its handgun ban, the District of Columbia made the identical claim – that handguns can be banned because the availability

of other arms is sufficient to allow the exercise of Second Amendment rights. The D.C. Circuit labeled the argument “frivolous.” *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff’d sub nom. Heller*.

It could be similarly contended that all firearms may be banned so long as sabers were permitted. Once it is determined . . . that handguns are “Arms” referred to in the Second Amendment, it is not open to the District to ban them.

Id. (citation omitted). The observation holds true for other constitutional rights. Defendants may not ban newspapers because magazines are available, and they may not shutter a church because it “permits” others to operate in a manner deemed to satisfy spiritual needs.

Undeterred by the D.C. Circuit’s determination that its alternative-arms argument was frivolous, the District of Columbia presented the Supreme Court with the following question on petition for certiorari: “Whether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns.” Pet. for Cert., No. 07-290 (Sept. 4, 2007). Respondent successfully opposed this framing of the question, and the

Supreme Court granted certiorari to answer the question whether people may “keep handguns and other fire-arms for private use in their homes.” Writ of Certiorari, 07-290 (Nov. 20, 2007).

If the alternative-arms argument was “frivolous” before the Supreme Court’s decision in *Heller*, it is even more so now that the Supreme Court has explained:

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.

Heller, 128 S. Ct. at 2818.

Finally, Defendants appear unimpressed with the level of protection afforded the right to arms in state constitutions. But that has nothing to do with the purpose of the right, and everything to do with its content,⁸ and level of importance to the American people. On that score, *Heller*’s treatment of the issue – not Defendants’ contrarian view – is

⁸Depriving people of classes of arms, including types of handguns, typically fails to pass muster under state constitutional arms provisions. *See, e.g. State v. Delgado*, 298 Or. 395, 692 P.2d 610 (1984); *City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921); *Andrews v. State*, 50 Tenn. 165 (1871).

what controls the outcome before this Court. The Supreme Court was impressed by the fact that four of the original states had an individual right to bear arms in their state constitutions, and at least another seven adopted such a right by 1820. *Heller*, 128 S. Ct. at 2802-03. The Court might also have been impressed by the fact that thirty-two states filed an amicus brief not only endorsing the individual rights model of the Second Amendment, but also asserting that the right “is properly subject to incorporation.” *McDonald* Br. at 29.

III. A MODERN SELECTIVE INCORPORATION ANALYSIS, NOT ANTIQUATED PRE-INCORPORATION PRECEDENT, IS REQUIRED TO DECIDE THIS CASE.

Defendants’ reliance upon pre-incorporation cases to show that a right is not incorporated is unavailing. For example, in referring to the Second Amendment, Defendants quote *Miller v. Texas*, 153 U.S. 535, 538 (1894) for the proposition that ““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.” Appellees’ Br. at 14.

But what lies behind the brackets of “th[is] amendment[]?” “[T]hese amendments,” referring to the Second and *Fourth* Amendments. *Miller*, 153 U.S. at 538. Defendants would be hard-pressed to invoke *Miller* as good law for the proposition that the Fourth Amendment has “no reference whatever to proceedings in state courts.” *Id.*

Defendants also fail to note the citations supporting the quoted statement. The first of these is *Barron*, which held the Fifth Amendment’s Takings Clause did not bind the states, followed by *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847), holding that states are not bound by the Fifth Amendment’s Double Jeopardy Clause; *Twitchell v. Commonwealth*, 74 U.S. (7 Wall.) 321 (1869), exempting the states from the Sixth Amendment’s information requirement, and *United States v. Cruikshank*, 92 U.S. 542 (1876), “which . . . said that the First Amendment did not apply against the States.” *Heller*, 128 S. Ct. at 2813 n.13.⁹

⁹*Miller* also relied on *Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1869) and *Spies v. Illinois*, 123 U.S. 131 (1887) for the proposition that the Bill of Rights, originally understood, binds only the federal government.

None of these propositions remain true today, because under a modern incorporation analysis, the Fourteenth Amendment mandates that states respect enumerated fundamental rights. *Miller* and the cases upon which it relied remain good law only to the extent that the original Bill of Rights is considered in isolation, without regard to a modern Fourteenth Amendment analysis. This notion is not controversial, but it is also largely irrelevant to the work of a federal court in the current century.

Of course, *Heller*'s admonition to engage in "the sort of Fourteenth Amendment inquiry required by our later cases," *Heller*, 128 S. Ct. at 2813 n.23, "does not give license to ignore binding Supreme Court cases," Appellees' Br. at 16 – but it does confirm that this Court is to ignore as non-binding those ancient pre-incorporation cases that lack the required analysis, because such cases lack "direct application" to the issue at hand. Appellees' Br. at 16 (citations omitted). The Supreme Court in *Heller* made it quite clear that modern Fourteenth Amendment incorporation analysis of the Second Amendment is *not* among the "issues that the Supreme Court has already decided."

Appellees' Br. at 16.

Defendants' attempted reliance on *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) is unavailing. With respect to *Quilici*, *McDonald* Plaintiffs make two arguments. First, nothing claimed in this case actually conflicts with any holding in *Quilici*, see *McDonald* Br. at 33-36; second, even if there were a conflict between *McDonald's* claims and *Quilici*, the latter has been undercut by later precedent, most notably, *Heller*. *McDonald* Br. at 36-41.

Defendants do not answer the first argument. It remains true that *Quilici* expressly declined to engage in a modern selective incorporation analysis of the sort urged by *McDonald* Plaintiffs, and at best rejected the holistic incorporation approach urged only by *NRA* Plaintiffs. To the extent *Quilici* rejected Privileges or Immunities incorporation based on *Slaughter-House*, *McDonald* Plaintiffs assert only that this error must be corrected by the Supreme Court.

Defendants' also claim *Quilici* rejected the argument that the relevance of *Presser v. Illinois*, 116 U.S. 252 (1886) has been undercut by subsequent authority. Appellees' Br. at 19. But the subsequent

higher authority noted here is *Heller*, handed down over a quarter century after *Quilici*.

The Ninth Circuit reads *Quilici* the same way *McDonald* Plaintiffs do. Facing a Second Amendment incorporation argument in *Nordyke*, the Ninth Circuit was confronted with its own *Quilici*-era precedent, *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992). Just like *Quilici*, *Fresno Rifle* had held the Second Amendment did not bind the states without specifying which part of the Fourteenth Amendment was being rejected “as the instrument of incorporation.” *Nordyke*, slip op. at 4479. The only thing the Ninth Circuit could say of its earlier precedent was that it rejected total, implicit incorporation, whether under the Privileges or Immunities Clause or under “a brief, quixotic argument that the Fourteenth Amendment ‘automatically incorporates every provision of the Bill of Rights,’” *id.*, at 4480 (citation omitted), “but it still left untouched the theory of selective incorporation.” *Id.*, slip op. at 4480 n.7.¹⁰

¹⁰*NRA* Plaintiffs’ brief, which does not contain the words “selective incorporation,” apparently relies upon the same “automatic” incorporation theory rejected in *Fresno Rifle*. *McDonald* Plaintiffs advance incorporation arguments only under the Privileges or

[W]e did not . . . reach the question of whether the Second Amendment is selectively incorporated through the Due Process Clause. Perhaps because neither party raised the predicate arguments, we certainly “did not engage in the sort of Fourteenth Amendment inquiry required by [the Supreme Court’s] later cases.” *Heller*, 128 S. Ct. at 2813 n.23.

Nordyke, at 4481.

In a footnote, the Ninth Circuit then added: “Other circuits have similarly relied on *Presser* to reject arguments for direct application or total incorporation, without addressing selective incorporation. *See, e.g., . . . Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 269-70 (7th Cir. 1982) (rejecting direct application and total incorporation).” *Nordyke*, slip op. at 4481 n.8.

The Ninth Circuit’s views of *Quilici* are particularly relevant given Defendants’ endorsement of *Fresno Rifle*, Appellees’ Br. at 18 n.4 – which is no longer good law.

Unlike *Quilici*, the District Court below, or Defendants’ brief and those of their amici, the Ninth Circuit conducted a selective incorporation analysis of the Second Amendment, based on the actual

Immunities Clause, and under the traditional Due Process selective incorporation approach.

content of the Second Amendment right as defined by the Supreme Court. The analysis is persuasive.

Nordyke started by observing that “the text of the Second Amendment already suggests that the right it protects relates to an institution, the militia, which is ‘necessary to an Anglo-American regime of ordered liberty.’” *Nordyke*, slip op. at 4485 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968)). Noting *Heller*’s instruction that the right to arms codified in the Second Amendment was considered “fundamental,” *Nordyke* observed that “the right contains both a political component—it is a means to protect the public from tyranny—and a personal component—it is a means to protect the individual from threats to life or limb.” *Nordyke*, slip op. at 4485 (citing Amar, at 46-59, 257-66).

Surveying the founding era, with respect to the Second Amendment, *Nordyke* concluded that our nation’s history “reveals a right indeed ‘deeply rooted in this Nation’s history and tradition.’” *Nordyke*, slip op. at 4490, a conclusion re-enforced by the history of the Post-Revolutionary period, *id.*, and the history surrounding Reconstruction

and the adoption of the Fourteenth Amendment. *Id.*, at 4492-95. And surveying the protection afforded the right to arms in state constitutions over the years, as also described in *Heller*, *Nordyke* found that history “compelling.” *Nordyke*, slip op. at 4492.

The defendants in *Nordyke*, much like Defendants here, could not conduct a modern incorporation analysis without “rely[ing] on general assertions that run afoul of *Heller*.” *Nordyke*, slip op. at 4495. The Ninth Circuit did not dwell long on such claims, foreclosed as they are by the Supreme Court. Addressing the same argument advanced by Defendants here, that *Heller* did not officially label the Second Amendment “fundamental,” *Nordyke* answered, “[t]he point is that language throughout *Heller* suggests that the right is fundamental by characterizing it the same way other opinions described enumerated rights found to be incorporated.” *Nordyke*, slip op. at 4495.

Again, the focus was kept on the nature and content of the right, not the alleged purpose in codifying it.

IV. AS THE CHALLENGED LAWS ARE UNCONSTITUTIONAL ON THEIR FACE, *McDONALD* PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT.

Defendants' claims that summary judgment cannot be granted by this Court lack merit. This Court is empowered to, and does, grant summary judgment motions in reversing lower courts. *See, e.g. Jones v. Wilhelm*, 425 F.3d 455 (7th Cir. 2005); *Rice v. Burks*, 999 F.2d 1172 (7th Cir. 1993).

Indeed, *Heller* was just such a case. The District Court denied plaintiffs' motion for summary judgment in that case as moot, as it granted the city defendants' motion to dismiss for failure to state a claim. *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004). However, the D.C. Circuit reversed, ordering that summary judgment be granted, *Parker*, 478 F.3d at 401, and the Supreme Court affirmed, *Heller*, 128 S. Ct. at 2822.

This case is no different. It is a facial, not as-applied challenge, in which the facts of the city's laws, and their enforcement against Plaintiffs and others, are not in any conceivable dispute. Discovery would be utterly pointless – the laws are either constitutional, or not,

with respect to everyone, and the answer to that question lies purely within the law. The District Court correctly stayed discovery as irrelevant to any issue in the case.

That a municipal handgun ban offends the Second Amendment is clearly established by *Heller*. The other laws challenged by *McDonald* Plaintiffs do not require much discussion, either. Defendant City of Chicago asserts that the Second Amendment might be “infringed only by regulation that effectively vitiates the right to arms,” Appellees’ Br. at 61, and that the annual registration requirement “is, at most, inconvenient.” *Id.*

Whatever the standard of review for Second Amendment claims, Defendants’ asserted “effective vitiation” cannot be it. *See McDonald* Br. at 42. In any event, the city is silent on the pre-acquisition requirement’s impact on Plaintiff David Lawson, for whom it has made impossible the acquisition of a rifle from the federal Civilian Marksmanship Program.

The annual registration requirement is not merely “inconvenient” – it requires being photographed, spending time in a police station filling

out forms, and paying an annual tax for the privilege of exercising a constitutional right. Doing so advances no interest of the city, because the city separately requires registrants to notify it of any change in their registration status. Chicago Mun. Code § 8-20-140.

Arguing that the annual re-registration and pre-acquisition requirements “allow Chicago to keep an up-to-date inventory of legally-possessed guns; to facilitate fast and reliable tracing of crime guns; and to reduce illegal firearms sales by creating accountability for gun owners,” Appellees’ Br. at 62, does not save the provisions where, again, changes in notification status must already be reported – a less-restrictive regulation that accomplishes the same ends. Moreover, as alleged in the Complaint, these requirements have actually had the opposite effect, prompting the city to institute a registration amnesty for lapsed guns when a leading Alderman neglected to timely re-register his gun collection. App. at 8, 9. In any event, these measures are extreme and incompatible with the notion that individuals enjoy a fundamental right to keep arms.

Finally, Chicago does not adequately address the equal protection problem generated by its non-registrability penalty. *McDonald* Plaintiffs do not assert that “individuals who do not comply with registration laws cannot be treated differently than individuals who have.” Defendants’ Br. at 63. Presumably, if a proper registration law is violated, appropriate sanctions might issue. The problem here is that the penalty creates two classes of firearms, which are treated very differently although they are otherwise identical. Since individuals – even those who had nothing to do with the initial registration failure – have a fundamental right to possess the firearm, the “taint” imposed by the classification system violates principles of equal protection.

CONCLUSION

“It is a basic and well-known fact of American history that the true meaning and promise of the Reconstruction Amendments was betrayed at numerous levels after 1877 and for most of the following century.” Scholarship, at 7. With this case, the Court should now continue the work of restoring the Fourteenth Amendment’s meaning and promise, by restoring to the people of Chicago their fundamental right to keep

and bear arms. The judgment below must be reversed, and the case remanded with instructions to grant *McDonald* Plaintiffs' motion for summary judgment.

Dated: May 14, 2009

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,882 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

On this, the 14th day of May, 2009, I served two true and correct copies of the foregoing Appellants' Reply Brief on the following by Federal Express:

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The brief was also filed this day by dispatch to the Clerk via personal delivery.

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

Executed this the 14th day of May, 2009.

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