No. 08-1521

In The
Supreme Court of the United States

OTIS MCDONALD, ET AL.,

Petitioners,

v.

CITY OF CHICAGO, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE PARAGON FOUNDATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Paragon Foundation, Inc. is a New Mexico 501(c)(3) non-profit organization created to support and advance the fundamental principles set forth in the Declaration of Independence and Constitution of the United States of America.[1] The Paragon Foundation, Inc. advocates for individual freedom, private property rights, and limited government controlled by the consent of people. The Paragon Foundation, Inc. provides for education, research and the exchange of ideas in an effort to promote and support constitutional principles, individual freedoms, private property rights and the continuation of rural customs and culture, all with the intent of celebrating and continuing the Founding Fathers' vision for America. The Paragon Foundation, Inc. has several thousand current or former members nationwide; its constituents include ranchers and rural landowners. Consistent with its mission, *amicus curiae* is well positioned to bring to the Court's attention relevant material that will assist in the disposition of this case.

[1] This brief is submitted and filed with the consent of the parties via blanket consents on file pursuant to S. Ct. R. 37.3(a). Counsel of record for all parties received notice at least ten (10) days prior to the due date of the *amicus curiae*'s intention to file this brief. Pursuant to S. Ct. R. 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The court of appeals' judgment should be reversed because the Second Amendment embodies a pre-existing, fundamental right to keep and bears arms. As such, that right is incorporated as against the States by the Fourteenth Amendment's Due Process Clause. As an individual right rather than a collective one, the right to keep and bear arms is not subject to attack on federalism grounds.

ARGUMENT

I. THE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS, PRESERVED BY THE SECOND AMENDMENT, IS A FUNDAMENTAL RIGHT.

The Declaration of Independence, stating that "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," is the finest example of natural rights theory applied to public policy. Every individual has "unalienable Rights" that exist not because of government but spring wholly from the human condition itself. It is our humanity that is the fountainhead of those natural rights. As the founders of this country moved from the Declaration of Independence to other formal organizing documents, numerous natural rights were carried forward and enshrined in the Bill of Rights.

At a speech given on June 8, 1789, James Madison proposed certain amendments to the Constitution that would later become the Bill of Rights.[2] His speech and notes from that speech reflect that the proposed amendments preserved and protected certain natural rights and retained the same for individuals.[3] Among those natural rights was a right to keep and bear arms that is substantively similar to the present Second Amendment.[4]

In accord with the natural rights theory, the Court in *Robertson v. Baldwin,* 165 U.S. 275, 281-82 (1897) stated that:

> The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to

[2] House of Representatives, Debates, June 8, 1789, reprinted in David E. Young, *The Origin of the Second Amendment: a Documentary History of the Bill of Rights 1787-1792* at 651-663, 654 (2nd Ed. 2001).

[3] *Id.*; http://www.loc.gov/exhibits/madison/images/vc11.jpg.

[4] *Supra* at n. 2.

> be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion. . . .

The Court pointed out that the Second Amendment is among those individual rights that Americans "inherited from our English ancestors" and that the Bill of Rights is not a collection of "novel principles of government" but something personal and individual. The individual right of the people to keep and bear arms was thus incorporated into what the *Robertson* Court called "the fundamental law." *Id.* The Second Amendment does not lay down the right of the people to keep and bear arms as a matter of positive law but reflects that the right is more fundamental. The government is not the fount from which the Second Amendment flows. The Second Amendment functions as a means to preserve the fundamental, individual right to keep and bear arms.

In accord, in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Court all but declared the right to keep and bear arms a "fundamental right."

The *Heller* Court at 2798 stated that "[b]y the time of the founding, the right to have arms had become ***fundamental*** for English subjects . . . Blackstone, whose works, we have said, 'constituted the preeminent authority on English law for the founding generation,' . . . cited the arms provision of the Bill of Rights as one of the ***fundamental*** rights of Englishmen." (emphasis added, internal citations omitted). *Heller* speaks in the constitutional language of fundamental rights.

Moving from there, the *Heller* Court at 2799 stated that "[t]here 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," and formally held at 2821-22 that a "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Heller* lifts the Second Amendment to its appropriate place on par with the other Amendments in the Bill of Rights.

It would be Orwellian to relegate the Second Amendment to a lower tier of constitutional value that is not worthy of incorporation, i.e. all fundamental constitutional rights are equal but some rights are more equal than others. This Court has not embraced such a hierarchy. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). In simplest terms, "[t]he most familiar of the substantive liberties protected by the Fourteenth Amendment are those

recognized by the Bill of Rights." *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992).

The fundamental character of an enumerated right hinges on whether it is "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149-50, n. 14 (1968). *Heller* is instructive on the issue of "ordered liberty." *Heller* describes formulations of the right to keep and bear arms in English history and at the founding of this country. Those formulations include the "right to enable individuals to defend themselves" and "an individual right protecting against both public and private violence." *Heller* at 2798-99. Those formulations represent a "regime of ordered liberty" contemplated by *Duncan*. "Ordered liberty," at times, may very well hinge on the individual right to keep and bear arms; it is that right that may secure all others.

Coupling *Heller* with recognized, long-standing jurisprudence on fundamental rights confirms that there is no doubt that the Second Amendment right to keep and bear arms is a fundamental right.

II. ENGAGING IN THE FOURTEENTH AMENDMENT INQUIRY PRESCRIBED BY *HELLER*[5] LEADS TO THE CONCLUSION THAT THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS IS INCORPORATED AS AGAINST THE STATES BY THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

This Court begins "in all due process cases, by examining our Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (citations omitted) (recognizing enumerated and unenumerated rights); *accord, Duncan* (recognizing enumerated rights). For an exhaustive examination of the right to keep and bear arms of the sort prescribed by *Glucksberg* and *Duncan*, this Court need look no further than its recent opinion in *Heller*. The *Heller* examination squarely places the individual right to keep and bear arms in the fundamental class, worthy of incorporation.

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[5] The inquiry, as formulated by *Heller*, is "[w]ith respect to *Cruikshank's* continuing validity on incorporation . . . we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." *Heller* at 2812, n. 23.

The specific freedom – the individual right to keep and bear arms – recognized by *Heller* is also entitled to the special protection afforded by the Due Process Clause of the Fourteenth Amendment by virtue of its place in the Bill of Rights.[6] Therefore, the fundamental, individual right to keep and bear arms, preserved by the Second Amendment, must be incorporated against the States by the Due Process Clause of the Fourteenth Amendment.

To be sure, the Court carefully restrains itself when deciding in favor of incorporating a previously unincorporated fundamental right. *Glucksberg* at 721. However, here, the Court does not run afoul of its avowed restraint because the individual right to keep and bear arms is clearly enumerated in the Bill of Rights. As a constituent member of the Bill of Rights and a fundamental right, the Second Amendment is properly incorporated against the States by the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Duncan* (right to criminal jury).

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[6] *See, Glucksberg* at 719 ("[i]n a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes . . . " other unenumerated liberties).

III. RELIANCE ON FEDERALISM TO VALIDATE LOCAL HANDGUN BANS IS MISPLACED.

Federalism is central to this Republic and dearly important to *amicus curiae*. However, federalism is a shield for States against the federal government, not a sword for States against fundamental, individual rights. States cannot sacrifice those rights on the altar of federalism.

The argument that federalism validates local ordinances banning handguns is spurious in light of *Heller*. *Heller* made clear that the right to keep and bear arms is an individual right, not a collective, State right. As such, federalism does not come into play.[7]

[7] *See, Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (Thomas, J., concurring) (" . . . Free Exercise Clause, which clearly protects an individual right, applies against the States through the Fourteenth Amendment . . . the Establishment Clause is another matter. The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.") (citations omitted) and *Whitney v. California*, 274 U.S. 357, 373 (1927), *overruled by Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Brandeis, J. and Holmes, J. (joining), concurring opinion) (" . . . it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.").

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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