

No. 08-1521

IN THE
Supreme Court of the United States

OTIS P. McDONALD, et al.,
Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.,
Respondents.

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

**BRIEF OF THE ASSOCIATION OF PROSECUTING
ATTORNEYS AND DISTRICT ATTORNEYS AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS
CITY OF CHICAGO, ILLINOIS, ET AL.**

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**BRIEF OF THE ASSOCIATION OF
PROSECUTING ATTORNEYS AND DISTRICT
ATTORNEYS AS *AMICI CURIAE* IN SUPPORT
OF RESPONDENTS CITY OF CHICAGO,
ILLINOIS, ET AL.**

The Association of Prosecuting Attorneys (“APA”) and the Hons. Anita Alvarez, State’s Attorney for Cook County, Illinois; Glenn F. Ivey, State’s Attorney for Prince George’s County, Maryland; Robert T. Johnson, District Attorney of Bronx County, New York; and Kim Worthy, Prosecuting Attorney for Wayne County, Michigan respectfully submit this brief as *amici curiae* in support of respondents City of Chicago, Illinois, et al.¹

STATEMENT OF INTEREST

The APA was founded as a national organization to represent all prosecutors and provide additional resources such as training and technical assistance in an effort to develop proactive and innovative prosecutorial practices that prevent crime, ensure equal justice, and make our communities safer. The APA acts as a global forum for the exchange of ideas, allowing prosecutors to collaborate with each other

¹ Pursuant to Rule 37.6, counsel for *amici curiae* states that 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 *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to the letters filed by the parties with the Clerk, *amici curiae* have permission of all parties to file because they gave all parties notice of their intent to file a brief more than ten days prior to the due date for the *amici curiae* brief.

and other criminal justice partners. The APA also serves as an advocate for prosecutors on emerging issues related to the administration of justice, among other ways by submitting briefs as *amicus curiae* in appropriate cases. The APA's board of directors includes current and former prosecutors from states throughout the nation.

The other *amici* are elected District Attorneys, who collectively represent millions of citizens in several states:

The Honorable Anita Alvarez is the elected State's Attorney for Cook County, Illinois. Cook County is the second largest county in the United States with a population of approximately 5.3 million residents.

The Honorable Glenn F. Ivey is the elected State's Attorney for Prince George's County, Maryland. The County has 850,000 residents.

The Honorable Robert T. Johnson is the District Attorney of Bronx County, New York. The County has 1.4 million residents.

The Honorable Kym Worthy is the elected Prosecuting Attorney for Wayne County, Michigan, which includes Detroit. The County has approximately 2 million residents.

Amici have a significant interest in this case. They confront serious, violent crimes on a daily basis. State and local prosecutors and the communities they help to protect rely upon the enforcement of state and local gun laws in prosecuting violent crimes. Until recently, the validity of those laws under the Second Amendment was not in doubt. This

case has far-reaching implications for the enforcement and prosecution of state and local gun laws, and *amici* believe that this Court's decision should be informed by the views of the officials responsible for enforcing state and local gun laws.

INTRODUCTION AND SUMMARY

At issue in this case is whether the Second Amendment should be held for the first time to apply to the states, where gun laws have evolved and been adapted to changing conditions without federal constraint throughout the nation's history. As the problem of gun violence has grown, these laws have become crucial instruments in keeping the public safe. As a result, prosecutors have come to rely upon state and local gun laws ("state gun laws") at every stage of law enforcement: from identifying and disrupting criminal activity; to charging criminal conduct; to obtaining convictions at trial and defending them on appeal.

First, state gun laws play a significant role in basic law enforcement functions, particularly in urban areas and increasingly in neighboring suburbs. Gun violence is an acute problem in the nation's cities, and it is especially dangerous to police officers. Guns — disproportionately handguns — are used in connection with the most serious crimes. The cities with the nation's toughest gun laws — like Chicago and New York — have reached the reasonable and permissible judgment on behalf of their residents that rigorous gun laws are necessary and effective. These cities have determined that such laws reduce violent crime in a number of ways. Most directly, the laws reduce the gun supply, thereby keeping dangerous weapons out of the hands of dangerous criminals. In their view, gun laws also assist police in enforcing the laws by making it safer to execute search warrants and providing the basis for police disruption of violent crime before it happens.

Second, state gun laws are important to prosecutors in bringing cases to trial, a power that is fundamental to ordered liberty. *Illinois v. Allen*, 397 U. S. 337, 347 (1970) (Brennan, J., concurring) (“Constitutional power to bring an accused to trial is fundamental to a scheme of ‘ordered liberty’ and prerequisite to social justice and peace.”). Because the Second Amendment previously has not been interpreted to operate as an independent restriction on state authority to enact and enforce gun laws, criminal defendants typically enjoy little leverage over the charging decision when it comes to illegal possession of a firearm. Thus, the Second Amendment has to date not generated litigation in state criminal cases on a scale comparable to litigation under the Fourth Amendment, whose protections often present prosecutors with difficult decisions when evidence may be subject to exclusionary rule challenges. In the face of such challenges, prosecutors often are forced to drop charges altogether or to enter into plea agreements under terms that do not hold defendants fully accountable for their criminal conduct.

Extension of the Second Amendment’s restrictions to the states will undermine regulation of violent criminal conduct at every stage of the criminal justice process. If possession of a firearm is presumptively legal, police will be less able to intervene and prevent violent crime before it occurs. Incorporation of the Second Amendment would also promote routine challenges to firearms possession charges on Second Amendment grounds and thereby significantly increase the burden on prosecutors in obtaining convictions for violation of state firearms laws and defending them on appeal. Incorporation would

threaten to embroil a wide range of firearms prosecutions in litigation similar to litigation under the Fourth Amendment's exclusionary rule. Indeed, it also would complicate Fourth Amendment litigation itself by threatening to redefine "probable cause" and "reasonable suspicion" in firearms prosecutions.

The implications of incorporation would be dramatic in scope. Ninety percent of firearms convictions are obtained at the state level. These convictions are based on laws that have been carefully calibrated to local conditions based on experience. Subjecting states and localities to an unbending national standard concerning the right to bear arms would ignore the importance of these local solutions and substantially undermine the ability of elected representatives to take actions to ensure public safety. The position of state and local prosecutors throughout the nation is quite different from that of federal prosecutors who, by definition, operate under a single national standard.

For these reasons, and for the reasons stated by respondents City of Chicago, Illinois, et al., the Court should affirm the judgment of the Court of Appeals.

ARGUMENT

I. State Gun Laws Are Critical To Law Enforcement Efforts In Many Jurisdictions.

For many jurisdictions, state and local gun legislation has been crucial to promoting public safety. Gun violence is an enormous challenge, against which prosecutors and police are the public's primary line of defense. For some of the nation's larg-

est cities, state and local lawmakers have determined that strict gun laws are the most effective solution to fighting violent crime. The experience of these jurisdictions has shown, in their considered judgment, that tough laws reduce criminals' access to dangerous weapons and improve the safety and efficacy of law-enforcement efforts. These important gains, as understood by the representatives elected to protect public safety, would be substantially undercut by a decision to incorporate the Second Amendment against the states, which would cast doubt on the constitutionality of a wide range of state gun laws.

Reasonable people may disagree about the wisdom of a particular policy, or about conclusions to be drawn from the extensive research on gun violence. That is why such decisions and determinations appropriately are left, under the Constitution, to state and local governments, who may change and adapt their policies over time in light of experience, exigency, and democratic preference. The healthy process of democratic experimentation in this vital area of public safety should not be distorted or truncated by a national constitutional mandate that strips state and local governments of important authority and flexibility.

A. Gun violence is a serious problem in urban areas and a direct threat to law enforcement personnel.

“[P]rosecutors have the duty to seek justice and the obligation to protect public safety.” Jennifer A. Fahey, U. S. Dep’t of Justice, *Using Research to Promote Public Safety: A Prosecutor’s Primer on Evi-*

dence-Based Practice 25 (2008), available at <http://nicic.org/Downloads/PDF/Library/023361.pdf>. Gun violence presents a singular challenge to the prosecutor's obligation to protect public safety. During 2006, 67% of the 17,034 murders nationally — more than two thirds — were committed with firearms. See Carl T. Bogus, *Gun Control and America's Cities: Public Policy and Politics*, 1 Alb. Gov't L. Rev. 440, 443, 447 (2008). Likewise, in 2006, firearms were used in 155,770 aggravated assaults and 153,285 robberies. *Id.* at 448-49.

Handguns are disproportionately more likely to be used to commit violent crimes than are other firearms. Although handguns account for only 35% of nearly 200 million firearms in the United States, they accounted for 88% of all firearms murders in 2006 and 60% of murders overall. See *id.* at 447; see also Firearm & Injury Ctr. at Penn, *Firearm Injury in the U. S.* 7-8 (rev. 2009), <http://www.uphs.upenn.edu/ficap/resourcebook/pdf/monograph.pdf>; Craig Perkins, U. S. Dep't of Justice, *Weapon Use and Violent Crime*, at 8 tbl. 10 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/wuvc01.pdf> (1993-2001 statistics).

Handguns are a weapon of choice for violent crime due to their easily concealable nature, their light weight, their ease of use, and their lethal power. See Garen J. Wintemute, *The Relationship Between Firearm Design and Firearm Violence: Handguns in the 1990s*, 275 J. Am. Med. Ass'n 1749, 1753 (1996); Firearm & Injury Ctr. at Penn, *supra*, at 7. Indeed, in a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates said that they were

armed with a handgun. Caroline Wolf Harlow, U. S. Dep't of Justice, *Firearm Use by Offenders* 3 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fuo.pdf>.

Although the problem of gun violence is national in scope, its severity depends greatly on local circumstances. Between 1976 and 2005, firearms homicides were unevenly distributed across the nation: 59.3% took place in large cities, while only 10.4% occurred in rural areas, 10.6% in small cities, and 19.8% in suburban areas. See Bureau of Justice Statistics, U. S. Dep't of Justice, *Homicide Trends in the U. S., Trends by City Size*, <http://bjs.ojp.usdoj.gov/content/homicide/city.cfm> (last visited Dec. 29, 2009). Several large cities have suffered particularly dramatic firearms homicide rates: In 2007, 80% of homicides in Los Angeles, 82% of homicides in Baltimore, and 84% of homicides in Philadelphia were committed with firearms. See Brief for Major American Cities et al. as *Amici Curiae* Supporting Petitioners at 6-7, *District of Columbia v. Heller*, 128 S. Ct. 2783 (filed Jan. 11, 2008) (No. 07-290).

Furthermore, the disproportionate use of handguns in firearms homicides is especially pronounced in large cities. In Baltimore, nearly 99% of all of the homicides committed using a firearm in 2007 involved handguns. See *id.* at 7. Likewise, in Chicago, over 96% of homicides committed using a firearm and approximately 73% of all homicides in 2005 involved handguns. See Chi. Police Dep't, *2005 Murder Analysis* 25-26 (2006), available at http://egov.cityofchicago.org/webportal/COCWebPortal/CO_C_EDITORIAL/Murder2005.pdf. In addition, hand-

guns accounted for more than 86% of “crime guns,” defined as firearms used in a crime, suspected to have been used in a crime, or illegally possessed, recovered and traced by police in Chicago in 2000. See Bureau of Alcohol, Tobacco & Firearms, Dep’t of the Treasury, *Crime Gun Trace Reports (2000) Chicago IL 6* (2002), available at <http://www.atf.gov/publications/download/ycgii/2000/cityreports/chicagoil.pdf>.

The prevalence of gangs substantially contributes to the danger of firearms. In the mid-1980s, as the cocaine supply increased and as crack cocaine emerged as the drug of choice in urban areas, drug dealers recruited large cohorts of teenage distributors. See Alfred Blumstein, *Youth Violence, Guns, and the Illicit Drug Industry*, 86 J. of Crim. L. & Criminology 10, 29-30 (1995). During this period, gang membership rose rapidly, and gang involvement in drug dealing grew. See Ray Risley, *A Police Officer’s Perspective on Gangs, Drugs, and Guns on the Streets of Chicago*, Compiler, Fall 1998, at 4, 6, available at <http://www.icjia.state.il.us/public/pdf/compfall98.pdf>. The growth of gang-operated street drug-markets spurred territorial conflict, and teenage gang members peddling crack cocaine armed themselves with guns. See *ibid.* Once some gang members acquired guns, their peers followed suit. See David Hemenway et al., *Gun Carrying Among Adolescents*, 59 Law & Contemp. Probs. 39, 44-46 (1996); see also David Hemenway, *Private Guns Public Health* 115-16, 245 (2004). Once strictly an urban problem, gang-related violent crime now also occurs increasingly in suburbs, “where gangs have expanded their drug distribution operations.” Nat’l Gang Intelligence Ctr., U. S. Dep’t of Justice, *Na-*

tional Gang Threat Assessment 2009, at 8 (2009), available at <http://www.fbi.gov/publications/ngta2009.pdf>.

Studies demonstrate that gang members and individuals involved in drug trafficking carry firearms at elevated rates. See, e. g., Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 *Urb. Law.* 1, 18-19 (2009); Joseph F. Sheley & James D. Wright, *In the Line of Fire: Youth, Guns and Violence in Urban America* 95-103 (1995). For instance, a study of gang members in Rochester found that gang membership increased the likelihood of carrying a firearm between seven and twelve times, depending on age, even when controlling for past and current offending. Rosenthal, *supra*, at 18 (citing Terence P. Thornberry et al., *Gangs and Delinquency in Developmental Perspective* 128-31 (2003)). Among a sample of 99 St. Louis gang members studied, 80 owned guns and the median number of firearms owned was four. *Id.* at 18 n. 85 (citing Scott H. Decker & Barrick Van Winkle, *Life in the Gang: Family, Friends and Violence* 175-76 (1996)). Of the weapons owned by these gang members, 75% were handguns. See *ibid.*

The results of gang members' penchant for carrying and owning firearms were devastating: 94% of all gang-related homicides in 2004 involved firearms. Nat'l Inst. of Justice, U. S. Dep't of Justice, *Gun Violence*, <http://www.ojp.usdoj.gov/nij/topics/crime/gun-violence/welcome.htm> (last visited Dec. 29, 2009). Likewise, between 1991 and 2005, approximately 95% of all gang-motivated murders in Chicago were

committed using firearms. See Chi. Police Dep't, *supra*, at 50, 58. In Chicago, the most frequent cause of murder in 2005 was altercations between street gangs, and such altercations together with gang-related narcotics activity accounted for over 38% of all murders committed in 2005 in Chicago. See *id.* at 28-30. Overall, Chicago saw a significant increase from 1991 through 2005 in the percentage of murder incidents caused by altercations between street gangs and gang-related narcotics activities. See *id.* at 29. For instance, between 2004 and 2005 alone, the percentage of murder incidents caused by street gang altercations in Chicago increased by 7.5%. See *id.* at 29-30, 58. Likewise, gang-related homicides in Chicago increased five-fold between 1985 and 1994. See Risley, *supra*, at 4-5.

Moreover, the prevalence of gang violence in gang-dominated neighborhoods creates a contagion effect. See Rosenthal, *supra*, at 19. High levels of gang violence in gang-ridden neighborhoods become a further stimulus to the carrying of firearms, for offensive or defensive purposes, real or imagined. See *ibid.* For instance, an ethnographic study of at-risk youth in New York indicated that inner-city youth are more likely to both arm themselves and respond to real or perceived threats and provocations with lethal violence when they live under the increasing threat of violence in an environment in which firearms are prevalent. See *id.* at 19-20 (citing Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence, and Social Identity, in Youth Violence* 105, 137-74 (Michael Tonry & Mark H. Moore eds., 1998)). Indeed, studies have shown that gang-related homicides have an independent and upward effect on the

overall homicide rate. See *id.* at 20. For instance, one study demonstrated that firearms violence in New York had a contagion effect: firearms violence stimulated additional firearms violence in nearby areas. See *id.* (citing Jeffrey Fagan et al., *Social Contagion of Violence*, in *The Cambridge Handbook of Violent Behavior and Aggression* 688, 701-10 (Daniel J. Flannery et al. eds., 2007)).

The dramatic increase in gun-related violence among gangs had a particularly pronounced impact on large cities. One study, for example, concluded that 69.3% of all gang-related homicides occurred in cities with populations over one million. See *id.* at 18 (citing James Alan Fox et al., *The Will to Kill: Making Sense of Senseless Murder* 56 & tbl. 3.6 (rev. ed. 2008)).

Gun violence poses a significant risk to law-enforcement personnel. Of the 562 law enforcement officers killed in the line of duty in the United States between 1997 and 2006, 521 — approximately 93% — were killed with firearms.² See Fed. Bureau of Investigation, U. S. Dep't of Justice, *Law Enforcement Officers Killed & Assaulted, 2006*, at tbl. 27 (2007), <http://www.fbi.gov/ucr/killed/2006/table27.html>. Of the 521 officers killed by firearms, 380, or about 73%, were killed with a handgun. See *id.* In 2006, 46 of the 48 officers killed in the line of duty, or approximately 96%, were killed with firearms, and of those 46 officers killed by firearms, 36, or about 78%, were killed with handguns. See *id.* at pt. "Officers Feloniously Killed," <http://www.fbi.gov/ucr/>

² These figures exclude the law-enforcement officers killed in the terrorist attacks of September 11, 2001.

killed/2006/feloniouslykilled.html. Furthermore, firearms caused the deaths of over 90% of law enforcement officers who were killed while responding to felonies. See Josh Sugarmann, *Every Handgun Is Aimed at You: The Case for Banning Handguns* 79 (2001). Of these fatalities involving firearms, 77% were caused by handguns. See *ibid.*

B. *Many jurisdictions have enacted state gun laws — and handgun restrictions in particular — to reduce violent crime.*

In the view of many jurisdictions, state gun laws play an important role in reducing violent crimes. Supporting the permissibility of these conclusions, scholars and researchers have concluded that these bans have had a demonstrated empirical effect of reducing violent crime. Their research explains that this reduction in crime occurs because bans on handguns have been effective at limiting access to such firearms.

Empirical research demonstrates that handgun bans have succeeded in reducing gun violence. For instance, according to one study, the proportion of homicides and robberies between 1994 and 1996 that involved guns was about six percentage points lower in Cook County, Illinois, which is dominated by Chicago, compared to the other 200 largest counties in the country. See Philip J. Cook et al., *Underground Gun Markets*, 117 *Econ. J.* F558, F580 (2007).³ Ac-

³ These conclusions were reached after controlling for factors such as race, geography, population, and the burglary rate. See Cook, *Underground Drug Markets*, *supra*, at F580. The result is similar when the burglary rate is not controlled for. See *id.* at F580 & n. 39.

ording to another report, in 1982, the year when Chicago's handgun ban came into effect, the number of handgun homicides in Chicago dropped significantly and remained at similar low levels for the next seven years, followed by a short spike, and a return to levels nearly as low as those observed in 1982. See Carolyn Rebecca Block & Antigone Christakos, Ill. Criminal Justice Info. Auth., *Major Trends in Chicago Homicide: 1965-1994*, at 1, 18 (1995).

Likewise, one group of commentators noted that around the time the District of Columbia enacted its recently invalidated handgun ban in 1976, homicides and suicides in the District declined by approximately 25%. See Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. Rev. 1041, 1076 (2009) (citing Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615, 1616-17 (1991)). Another commentator reported that gun-related homicides fell by more than 25%. Bogus, *supra*, at 457 (citing Loftin et al., *supra*, at 1615). While the decline in homicides occurred abruptly after the handgun ban came into effect, the mean murder rate in Washington was 25% lower in the nine years following the enactment of the handgun ban than in the preceding nine years. See *id.* at 457-58 (citing Loftin et al., *supra*, at 1615, 1616 tbl. 1). Meanwhile, there was no statistically significant change in gun-related homicides in immediately surrounding areas in Maryland and Virginia or in homicides with other weapons within the District, suggesting that criminals did not switch to other weapons. See *id.* at 457. Furthermore, while Baltimore,

which did not have a handgun ban, also experienced a decline in firearms homicides around 1976, unlike Washington, it exhibited a reduction in non-gun as well as gun homicides, suggesting that there was some general change in Baltimore during this time frame that was not specific to guns. See Cook et al., *Gun Control After Heller*, *supra*, at 1077 (citing David McDowall et al., *Using Quasi-Experiments to Evaluate Firearms Laws: Comment on Britt et al.'s Reassessment of the D. C. Gun Law*, 30 *Law & Soc'y Rev.* 381 (1996)). Similarly, while Washington exhibited a 23% decline in gun-related suicides, there was no decline in gun suicides in Baltimore. See *ibid.* (citing McDowall et al., *supra*); Bogus, *supra*, at 457 n. 118 (citing Loftin et al., *supra*, at 1615).

Notably, a 1990 Maryland law that banned one type of handgun (the short-barreled inexpensive handguns known as “Saturday Night Specials”) appeared to have reduced homicides by 9% without any increase in homicides with other weapons. See Bogus, *supra*, at 458 (citing Hemenway, *supra*, at 170 (citing Daniel W. Webster et al., *Effects of Maryland's Law Banning “Saturday Night Special” Handguns on Homicides*, 155 *Am. J. Epidemiology* 406 (2002))). These data support elected representatives’ conclusions that rigorous gun laws, and handgun bans in particular, can be effective at reducing violence and murder when implemented at the local level. See *id.* at 457-58.

The reason handgun bans reduce violent crime is simple: bans have been found to be effective at restricting criminal access to handguns. According to one group of researchers, obtaining a gun in Chicago, where private handgun ownership was essentially

banned in 1982, is now more difficult than in other cities. See Cook et al., *Underground Gun Markets*, *supra*, at F573. Accordingly, many young people and criminals in Chicago face serious difficulty obtaining a gun. Cook et al., *Gun Control After Heller*, *supra*, at 1078 (citing Cook, *Underground Gun Markets*, *supra*, at F598, F601-02). Underground gun markets in Chicago are characterized by high transaction costs and price mark-ups, as compared to gun markets elsewhere. See Cook et al., *Underground Gun Markets*, *supra*, at F558, F561, F564-65, F572, F580-81; Philip J. Cook & Jens Ludwig, *Aiming for Evidence-Based Gun Policy*, 25 *J. Pol'y Analysis & Mgmt.* 691, 713-14 (2006); Robert Blau, *Cop Death Resurrects Guns as Issue*, *Chi. Trib.*, Jan. 11, 1991, at 1. For instance, interviews with Chicago youths and illegal gun brokers report that certain types of low quality guns that typically sell legally outside of Chicago for between \$50 and \$100 sell for between \$150 and \$400 within the city. See Cook et al., *Underground Gun Markets*, *supra*, at F564. Likewise, in June 1990, a Chicago illegal-gun dealer was arrested for attempting to sell seven semi-automatic handguns purchased legally outside the city for \$1800 to an undercover police officer in Chicago for \$2800. See Blau, *supra*. In addition, illegal gun brokers in Chicago typically charge \$30-50 per transaction. See Cook et al., *Underground Gun Markets*, *supra*, at F565.

Furthermore, according to one study, approximately 30% to 40% of attempted illegal gun transactions in Chicago fail. See *ibid.* Reasons for this failure include the broker's inability to procure a gun from a supplier, failure of the customer and broker

to agree on a place for the transaction, the broker's distrust of the customer's intentions, and the broker's suspicion that the customer is a law enforcement officer. *Id.* Likewise, according to empirical research, ammunition (which, like handguns, is generally illegal in Chicago) carries a markup up to fifty times higher in Chicago than elsewhere. See *id.* at F567-68. Ammunition in Chicago reportedly is scarce: waits of one to four weeks in the underground market are not uncommon. See *id.* at F567.

Interviews with individuals arrested in Chicago conducted in 1996 and 1997 also demonstrate the difficulties prospective criminals face in obtaining a gun in Chicago. About 70% of surveyed Chicago arrestees who never owned a gun but said that they might want a gun said that it would take them at least one week to procure a gun or that they would be unable to obtain one. *Id.* at F574. Only about 60% of such arrestees surveyed in other cities said the same. *Ibid.* Likewise, around 15% of this group of Chicago arrestees — compared to around 20% of such arrestees surveyed in other cities — said that they could obtain a gun in one day. *Ibid.*

Not surprisingly, gun ownership among arrestees in Chicago is lower than in other parts of the country. In Chicago, 21% of surveyed arrestees reported that they have owned a gun at some point prior to their arrest, while the respective mean and median percentages for twenty-two cities across the country in which arrestees were surveyed were 31% and 33%. *Ibid.* Among gang members arrested in Chicago and surveyed, 30% reported having owned a gun while 58% of gang members arrested in other cities stated that they had owned one. See *id.* at

F577. In addition, some commentators have noted that Chicago’s handgun ban may also have helped to reduce criminal access to guns by preventing licensed gun dealers from locating in high-crime neighborhoods in the city and by rendering “owners . . . less likely to resell their guns through unregulated secondary market transactions.” *Id.* at F576.

C. *Prosecutors and police rely on gun laws — especially handgun restrictions — in stopping violent crime.*

State prosecutors and police rely on gun laws in important ways — both in avoiding escalation of already dangerous enforcement activities and in preventing violent crime before it occurs.

1. *State gun laws help keep police safe.*

First, state gun laws play an important role in preventing escalation of violence in already dangerous law-enforcement activities. Execution of warrants is one of the most dangerous duties that a police officer routinely undertakes. The presence of an armed occupant exacerbates the danger of the situation, for both the officers and the occupant. See, e. g., William Lee, *2 Officers Shot Serving Warrant*, Chi. Trib., July 17, 2009, at 10 (indicating that two Chicago police officers were shot when they entered an apartment to execute a search warrant for drugs); Joseph J. Simeone, *Duty, Power, and Limits of Police Use of Deadly Force in Missouri*, 21 St. Louis U. Pub. L. Rev. 123, 130 (2002) (indicating that Kansas City police officers shot a man while serving a search warrant during a drug raid when he approached them with a gun). Gun laws render it less likely

that police officers executing warrants will be met by an occupant wielding a gun, thus reducing the risk of escalation. Indeed, a report from the International Association of Chiefs of Police indicated that gun laws can help protect police officers operating on the front lines against gun violence. See Christine Allred & Valerie Denney, Int'l Ass'n of Chiefs of Police, *Taking a Stand: Reducing Gun Violence in Our Communities* 26-27 (2007), available at <http://www.theiacp.org/LinkClick.aspx?fileticket=fdvruXg%3d&tabid=328>. Laws that restrict gun possession also make it less likely that law-abiding citizens could inadvertently escalate a confrontation with police in a case of mistaken identity. Cf. *Bletz v. Gribble*, 640 F. Supp. 2d 907, 922 (WD Mich., 2009) (indicating application of Second Amendment presents “difficult conceptual issues” when police enter the wrong home and the occupant is shot while brandishing a weapon at police).

Expansion of the Second Amendment’s prohibitions to the states would, at the very least, give constitutional immunity to gun possession in the home and make law enforcement more dangerous. Police would face a legal regime in which every house could be defended by a firearm, substantially increasing the risk of miscalculation and escalation, thereby endangering police and citizens alike. And state and local governments would be hamstrung in their efforts to protect their police officers — “the foot soldiers of society’s defense of ordered liberty,” *Roberts v. Louisiana*, 431 U. S. 633, 647 (1977) (Rehnquist, J., dissenting) — during the execution of one of their most dangerous duties.

2. *State gun laws help to prevent crime before it occurs.*

Second, state gun laws — and handgun restrictions in particular — aid police in heading off violent illegal conduct before it occurs. When applicable law bans the possession and carrying of firearms, courts have held that police officers have reasonable suspicion to stop an individual who appears to be carrying a firearm, such as when the officer observes a suspicious bulge in a person’s waistband indicative of the presence of a handgun. Rosenthal, *supra*, at 38 & n. 201 (collecting cases); see also, *e. g.*, *Terry v. Ohio*, 392 U. S. 1, 24 (1968) (“When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.”); see also, *e. g.*, *United States v. Black*, 525 F. 3d 359, 364-66 (CA4 2008); *United States v. Mayo*, 361 F. 3d 802, 807-08 (CA4 2004).

Gun laws thus have important implications for law enforcement. For example, New York City’s aggressive enforcement of its gun laws — including police intervention where an individual appears to be carrying a gun — has reportedly played an important role in reductions in violent crime observed in the City since the early 1990s. See Rosenthal, *supra*, at 39-44. New York City requires application for a handgun permit, and such permits are rarely issued. See *id.* at 39 (citing N. Y. Penal Law § 400.00(6)). Issuance of these permits is highly dis-

cretionary, and the applicant must face some extraordinary personal danger that requires the applicant to carry a handgun. See *ibid.* (citing Rules of the City of N. Y. tit. 38, § 5-03 (2008)). Thus, because individuals are rarely permitted to carry guns in New York, especially handguns, when an officer has reasonable suspicion that an individual is carrying a handgun or other firearm, the Fourth Amendment permits intervention because possession itself is suggestive of criminal activity. See *ibid.*

Indeed, weapons stops pursuant to New York's enforcement regime are central to New York's policing strategy. See *id.* at 39-40. Data collected by the New York Attorney General indicates that suspected weapons charges were the most common reason for New York police to stop an individual in 1998 and the first three months of 1999, when 44.6% of stops involved a suspected weapons charge, and weapons stops were the type of stop most likely to result in a frisk. See *id.* at 31, 39-40 & tbl. 1 (citing Civil Rights Bureau, Office of the Att'y Gen. of the State of N. Y., *The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General* app. tbl. I.A.5, tbl. I.B.3 (1999) [hereinafter *N. Y. Police Report*]). The police department's rationale behind the strategy was "to eradicate gun violence by stepping up efforts to find and seize illegal firearms." *N. Y. Police Report, supra*, at 53.

New York City's enforcement strategy has resulted in an increased number of arrests and decreased violent crime. See Rosenthal, *supra*, at 31-32. In particular, the data suggest a substantial reduction in violent crime in areas surrounding New

York public housing projects, especially visible crime in public places, the type of crime most likely to be reduced by New York City's enforcement tactics. *Id.* at 32-33. And New York's focus on concealed handguns has contributed to the disruption of open-air drug sales and a reduction in associated violent crime. See *id.* at 31, 34.

Because New York City's gun laws render handgun purchase difficult, policing of weapons possession may be especially effective because it is difficult to replace handguns seized by the police. See *id.* at 44. Legal and practical difficulties of leaving New York to purchase a firearm legally, or purchasing one illegally from a gunrunner, may reduce the replacement rate. See *ibid.* Additionally, modest increases in the price of handguns due to illegality may have a significant inhibitory effect on gang crime since the wages of foot soldiers are not much higher than wages in the legitimate low-skill labor market. *Ibid.* When a jurisdiction bans the possession and sale of handguns, raising the cost and difficulty of replacing them once they are seized, offenders may be less likely to carry handguns in public places where they are vulnerable to search upon reasonable suspicion of carrying a handgun. See *ibid.*

Incorporation of Second Amendment rights against the states would erect a significant obstacle to the kind of policing strategy that has proven so effective in New York City, Chicago, and other jurisdictions. Although the Second Amendment right recognized in *Heller* concerned possession in the home for self-defense, the boundaries and contours of that right have not been charted, and significant litigation about its reach beyond the immediate con-

text of *Heller* (if any) is inevitable. For example, to the extent that *Heller* recognized “a right to possess and carry firearms in case of confrontation,” Rosenthal, *supra*, at 46 (quoting *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008)), it may be argued that such “confrontation” is equally (if not more) likely to occur outside the home as inside.⁴

Accordingly, incorporation of the Second Amendment would at least cast doubt on (and perhaps eliminate) important law enforcement techniques. In New York City, for example, “the ability of the authorities to conduct weapons searches consistent with constitutional limitations is vitally dependent on” the City’s strict gun laws; police intervention based on more generalized indicia of criminality — such as the refusal to answer questions or provide identification, avoidance of the police, nervous reaction on questioning, or presence in a high crime area — is impermissible. Rosenthal, *supra*, at 40 (citing *N. Y. Police Report*, *supra*, at 30-34, 36-40). Even if handgun possession could still be regulated heavily through licensing, such a legal regime might not permit an officer to stop an individual based solely on

⁴ Some states already have expressly provided by law for a right to carry and use firearms in self-defense outside the home. Steven Jansen & M. Elaine Nugent-Borakove, Nat’l Dist. Att’ys Ass’n, *Expansions to the Castle Doctrine* 5-8 (2008), available at http://www.ndaa.org/pdf/282500-NDAA_F1.pdf. Some commentators have cautioned other jurisdictions not to adopt such laws out of a concern that such laws have multiplied the incidence and severity of violent confrontations. See *id.* at 8 (noting that the murder rates in Florida increased 42% in the months following adoption of self-defense law). The implications of incorporating the Second Amendment on this ongoing democratic deliberation are, at the very least, unclear.

speculation that a suspect lacks the requisite license. See *Commonwealth v. Couture*, 552 N. E. 2d 538, 541 (Mass. 1990) (“The mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun [without a license] and the stop [of the suspect’s vehicle] was therefore improper under Fourth Amendment principles.”). Thus, if it were legal to possess and carry handguns, the ability of police and prosecutors to implement an aggressive intervention regime based on the officers’ visual perception of handgun possession could be sharply circumscribed.

Legal precedent bears this out. Even before *Heller*, courts had held that, where applicable law does not ban the carrying of a firearm, the Fourth Amendment does not permit a stop-and-frisk on the basis that the suspect is armed and potentially dangerous: in the absence of a strict gun prohibition, there is no indication that he is violating the law by possessing the gun. Rosenthal, *supra*, at 38 & n. 202 (collecting cases); see, e. g., *United States v. Ubiles*, 224 F. 3d 213, 217-18 (CA3 2000). The reasoning of these cases has been extended in the wake of *Heller*. Some courts have suggested that, if the Second Amendment applies, mere possession would never give law-enforcement personnel reasonable suspicion for a detention. For example, one federal district court suggested that possession of firearms and ammunition would no longer serve as the basis for probable cause to stop and search a vehicle. Cf. *United States v. Moore*, No. RWT-08-203, 2009 U. S. Dist. LEXIS 47882, at *3-4 (D Md., June 4, 2009) (upholding such a search and seizure after *Heller* on the basis that it occurred before *Heller* was decided).

Another district court offered the same conclusion as to possession of a firearm in public. See *Lund v. Salt Lake City Corp.*, No. 2:07-CV-0226BSJ, 2008 U. S. Dist. LEXIS 98722, at *24 n. 9 (D Utah, Dec. 4, 2008) (noting that “possession of a firearm in public . . . may well represent the exercise of a fundamental constitutional right guaranteed by the Second Amendment” in holding that a police officer was not entitled to qualified immunity on the issue of unreasonable or excessive force under the Fourth Amendment).

In sum, as one commentator has concluded, the “data suggest that New York’s gun control laws deserve a good part of the credit for New York’s precipitous decline in violent crime.” Rosenthal, *supra*, at 40. Incorporation of the Second Amendment would pose a significant threat to the ability of states and cities to employ similar laws to combat violent crime, leaving urban residents to rely on other means of protection — including arming themselves. Such a result would undermine the

“function of law in preserving ordered liberty. Civilized people refrain from ‘taking the law into their own hands’ because of a belief that the government, as their agent, will take care of the problem in a organized, orderly way with as nearly a uniform response as human skills can manage.” *Rosenfeld v. New Jersey*, 408 U. S. 901, 902 (1972) (Burger, C. J., dissenting).

The Court should decline to upset these settled expectations and safeguard “ordered liberty” by af-

firming the authority of state and local governments to enact and enforce gun laws that, in their considered judgment, protect the public from violence and deadly assaults by strictly limiting or banning handguns.⁵

II. State Gun Laws Play A Significant Role In Prosecuting Gun Crimes.

The law governing gun crimes plays an important role in prosecuting criminal conduct. Gun violence is destructive, pervasive, and costly. In light of these realities, even outright bans on the possession of entire classes of weapons had been almost universally upheld by the courts prior to this Court's decision in *Heller*. And even following that decision, it has remained relatively easy to charge and try gun possession as criminal conduct under state laws precisely because settled precedent from this Court has precluded use of the Second Amendment to challenge or invalidate state or local gun laws. While there has been some satellite litigation over the constitutionality of laws criminalizing gun possession, courts have been able to deal with these issues quickly in light of the understanding that the Second Amendment does not bind the states in their gun laws. See, e. g., *Wilson v. Cook County*, 914 N. E. 2d 595, 603 (Ill. App. Ct. 2009); *Williams v. State*, No. 01999, 2009 Md. App. LEXIS 169, at *11 (Md. Ct. Spec. App., Oct. 30,

⁵ As the City of Chicago and Village of Oak Park point out, other constitutional provisions also are not incorporated, such as the grand-jury requirement of the Fifth Amendment and the civil-jury requirement of the Seventh Amendment. Brief of Respondents City of Chicago and Village of Oak Park at 40-41.

2009); *People v. Abdullah*, 870 N. Y. S. 2d 886, 887 (N. Y. Crim. Ct. 2008).⁶

The utility of gun laws in prosecuting violent crimes is not limited to cases of mere gun possession. Drug possession charges are often accompanied by gun charges. For example, a 2005 study observed that drug and gun possession charges were highly correlated in Brooklyn. N. Y. City Criminal Justice Agency, *New York City's Gun Court Initiative: The Brooklyn Pilot Program* 19 tbl. 6 (2005), available at <http://www.cjareports.org/reports/guncourt.pdf>.

Other violent crimes, such as homicide and rape, are likewise often accomplished with the assistance of a gun. Gun possession charges can serve as important alternative charges in cases where a prosecutor has clear evidence of weapons possession but is unable to prove a defendant's role in drug activity or other violent conduct.

Incorporation of the Second Amendment against the states would radically transform the prosecution of violent crimes. Most obviously, every gun crime would be subject to potential challenge on the ground that the law in question infringed the right to keep and bear arms. Moreover, heightened gun-possession rights would translate to heightened Fourth Amendment protection in a broad range of cases: any arrest precipitated by an officer's suspi-

⁶ Some of the post-*Heller* decisions alternatively hold that the law would survive scrutiny even if the Second Amendment were incorporated and applied against the states. See, e. g., *State v. Knight*, 218 P. 3d 1177, 1189-90 (Kan. Ct. App. 2009). These decisions generally have avoided extensive Second Amendment analysis.

cion of weapons possession would be subject to a challenge that the officer lacked reasonable suspicion of criminal activity. These challenges would imperil both weapons-possession charges and any related charges of criminal conduct, such as drug possession. The result would be fewer arrests, more dropped charges, and more favorable plea deals for armed offenders. And even cases that were successfully tried to conviction would be more difficult to defend on appeal.

First, there is no question that an incorporation decision would greatly complicate prosecution of gun crimes. The *Heller* decision itself — despite expressly avoiding the incorporation issue — already has prompted some litigation in state courts in contexts that range far beyond the context presented in *Heller*. In Missouri, for example, the constitutionality of a law that bars possession of a loaded firearm while intoxicated was recently litigated all the way to that state's supreme court. See *State v. Richard*, No. SC89832, 2009 Mo. LEXIS 531 (Mo. Nov. 17, 2009); see also, *e. g.*, *Pistol-Packing Soccer Mom Sues County Sheriff*, Press-Register (Mobile, Ala.), Nov. 25, 2008, at A2 (Pennsylvania woman sued sheriff for revoking her gun permit after she took her gun to a child's soccer game, claiming she had a Second Amendment right to carry); Lisa Redmond, *Top Court Considers Local Gun-Lock Appeal*, Sun (Lowell, Mass.), June 24, 2009, available at 2009 WLNR 12063805 (Westlaw); *Trial Over Gun at Obama Rally to Begin*, Beaver County Times (Beaver, Pa.), July 14, 2009, available at 2009 WLNR 13389121 (Westlaw) (man arrested by state police for disturbing the peace claimed he had a Second

Amendment right to bring semiautomatic handgun to Obama rally).

Such litigation would mushroom and become significantly more complicated in the wake of a decision by this Court concluding that state and local gun laws may be challenged under the Second Amendment. These undeniable consequences already are on display in the federal courts, which have heard more than 100 Second Amendment challenges since *Heller* was decided less than two years ago. And the federal courts already have begun to question the constitutionality of gun laws under the Second Amendment — even as to categories of laws that are defended as “longstanding prohibitions” that were not to be “cast” in “doubt” by *Heller*. See *Heller*, 128 S. Ct. at 2816-17. In *United States v. Skoien*, for example, the Seventh Circuit vacated a district court order, which had relied on this statement in *Heller*, as an insufficient justification for dismissing a Second Amendment challenge to 18 U. S. C. § 922(g)(9) (which bars persons convicted of a misdemeanor crime of domestic violence from possessing a firearm). No. 08-3770, 2009 U. S. App. LEXIS 25375, at *11 (CA7 Nov. 18, 2009) (“We note for starters that it is dicta, and although we can hardly ignore it, we think it would be a mistake to uphold this or other gun laws simply by invoking the Court’s reference to these ‘presumptively lawful regulatory measures,’ without more.”); see also *United States v. McCane*, 573 F. 3d 1037, 1048 (CA10 2009) (Tymkovich, J., concurring) (“[T]he felon dispossession dictum may lack the ‘longstanding’ historical basis that *Heller*

ascribes to it.”), *petition for cert. filed*, 78 U. S. L. W. 3221 (U. S. Oct. 1, 2009) (No. 09-402).⁷

Second, an incorporation decision would further complicate prosecution of violent crimes by providing defendants with a new Fourth Amendment basis to challenge *any* arrest in which the arrestee was armed. As previously explained, an officer would likely require more than mere suspicion of weapons possession to make a stop if the Second Amendment were held to protect a person’s right to carry a firearm in public, either as a general rule or in certain circumstances (for example, when an individual concluded that such possession in a public place was necessary for self-defense). Thus, any arrest that began with a police stop could be challenged as having been unreasonably based upon suspicion of mere gun possession.

Applying the Second Amendment to states, for the first time in the nation’s history, would lead to a tidal wave of new Second Amendment challenges by defendants in weapons-related cases. Beyond the Second Amendment itself, such a decision by this Court would profoundly reshape the concepts of reasonable suspicion and probable cause in weapons-related contexts. Accordingly, it is appropriate to consider the effects of this dramatic expansion.

⁷ By citing these decisions, *amici* do not agree with their interpretations. Rather, these decisions, which already have been issued less than two years after *Heller*, illustrate the confusion and uncertainty that likely would result from a ruling by this Court that the Second Amendment’s restrictions apply to the states.

Experience demonstrates the significance of such a development. While the Fourth Amendment exclusionary rule serves important constitutional values, it also unquestionably exacts very real costs on prosecution of dangerous crimes. See *Hudson v. Michigan*, 547 U. S. 586, 591 (2006) (“The exclusionary rule generates ‘substantial social costs,’ . . . which sometimes include setting the guilty free and the dangerous at large.” (quoting *United States v. Leon*, 468 U. S. 897, 907 (1984))). Indeed, issues related to the Fourth Amendment exclusionary rule can be the deciding factor for prosecutors when deciding whether to bring charges in the first place, and prosecutors routinely decide not to file charges in cases where critical evidence is likely to be challenged and suppressed under the Fourth Amendment exclusionary rule. See David W. Neubauer, *America’s Courts and the Criminal Justice System* 265 (9th ed. 2008) (“Prosecutors may refuse to file charges because of a search-and-seizure problem”); Robert C. Fellmeth, *The Optimum Remedy for Constitutional Breaches: Multiaccessed Civil Penalties in Equity*, 26 Pepp. L. Rev. 923, 933 (1999) (“[T]he influence of police constitutional error is considerable on decisions to issue a case, which crimes to charge, and the bargained disposition of a case.”); L. Timothy Perrin et al., *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 Iowa L. Rev. 669, 675 (1998) (“[A] prosecutor would be reluctant to file a case where suppression of critical evidence seemed likely.”); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 688, 707 (1970) (indicating that prosecutors in the District of Columbia exercised a screening function by engaging in this practice); see also Frank

W. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* 36-40 (1969).

Similarly, the exclusionary rule has a major impact on the number of charges that make it to trial. Prosecutors may be forced to drop some or even all charges prior to trial, including charges that are dismissed after evidence is suppressed. See, e. g., *United States v. Tejada*, 956 F. 2d 1256, 1259-60 (CA2 1992) (indicating that the government dropped a firearms charge after a gun was suppressed but went to trial and secured a conviction on drug charges); Sharon Tubbs, *Faith and the Top 40*, *St. Petersburg Times*, Oct. 3, 2004, at 1E (indicating that all charges were dropped in a Polk County, Florida case against singer R. Kelly because police obtained evidence illegally); Oaks, *supra*, at 746 (indicating that charges were dismissed “in every single one of these cases in which a motion to suppress was granted”).

The prospect of excluding evidence necessary to secure a conviction also affects prosecutors’ decisions regarding plea agreements and related sentencing decisions, including charging and sentencing recommendations. See Fellmeth, *supra*, at 933; Oaks, *supra*, at 748; cf. Robert L. Misner, *In Partial Praise of Boyd: The Grand Jury as Catalyst for Fourth Amendment Change*, 29 *Ariz. St. L. J.* 805, 817 n. 73 (1997). If the prosecutor believes that the defendant may prevail on a motion to suppress based on police conduct that is invalid or arguably invalid, she is likely to try to eliminate the risk of dismissal or acquittal by offering more favorable plea agreement terms, resulting in a shorter sentence than the defendant would otherwise receive to induce the defen-

dant to plead guilty. See Oaks, *supra*, at 748; see also Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 80-82 (1968); cf. Misner, *supra*, at 817 n. 73; Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 Harv. L. Rev. 564, 573 (1977) ("The policies behind the exclusionary rule thus are expressed in the form of sentencing discounts in numerous uncertain cases rather than in total acquittal in only a few cases.").

Finally, the exclusionary rule leads to delay inasmuch as it complicates the charging process as described above. The exclusionary rule — with its attendant motions to dismiss, which consume prosecutorial resources at the trial as well as appellate levels — weighs heavily on the scarce time and resources of prosecutors and increases their backlog of cases. As commentators have explained,

"it is beyond dispute that the exclusionary rule increases the monetary cost of criminal prosecutions. Even if one accepts that the majority of these motions are denied, the motions are quite costly to the system in terms of attorney and court costs. Each motion brought by the defense demands a response from the prosecution, followed by full evidentiary judicial hearings. These motions consume a large amount of court time, lawyer time, and witness time, which are compounded if the issues are relitigated on appeal." Perrin et al., *supra*, at 677.

Accord *Oaks*, *supra*, at 748; see also *Fellmeth*, *supra*, at 935-37.

Application of the Second Amendment to the states, bringing with it a complex array of new constitutional challenges, thus would substantially complicate prosecution of gun crimes and would further stretch prosecutorial resources that are already under tremendous strain. The negative impact of these developments cannot be overstated. As this Court observed in *Heller*, “[f]or most of our history, . . . the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens.” 128 S. Ct. at 2816. That remains true even today. States are on the front line in the fight against gun violence: “90 percent of all weapons convictions occur in state courts.” Linda Hirsch, *The Gun Fight: Analyzing NRA Statistics*, ABC News, Oct. 9, 2000, <http://abcnews.go.com/print?id=95437>. A holding that the Second Amendment binds the states would thus be far more sweeping in effect than this Court’s decision in *Heller*.

Moreover, a ruling extending the Second Amendment’s reach would interfere with laws that, unlike federal gun laws, are highly adapted to local conditions. In this way, too, an incorporation ruling would be far more profound than this Court’s ruling in *Heller*. Indeed, Justice Kennedy has previously observed that “the reserved powers of the States are sufficient to enact” gun restrictions and that such measures reveal the “theory and utility of our federalism” as “the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.” *United States v. Lopez*, 514 U.S. 549, 581 (1995)

(Kennedy, J., concurring). But the states “would find their own programs for the prohibition of guns in danger of displacement by the federal authority,” *id.* at 583, were they to become subject to a national, monolithic Second Amendment standard.

The Court should therefore decline to extend *Heller*’s rule to state laws. Such an extension would unduly restrict the police powers of the states and significantly disrupt the prosecution of the most dangerous and violent crimes. Incorporation would thereby threaten the very value the Second Amendment was intended to promote — “the security of a free State.” U. S. Const. amend. II. Public safety would better be preserved by leaving the states with the flexibility they have always enjoyed to craft and enforce gun laws that are tailored to local conditions.

CONCLUSION

For the foregoing reasons, and for the reasons stated by respondents City of Chicago, Illinois, et al., the Court should AFFIRM the judgment of the Court of Appeals.

Respectfully submitted,

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