No. 07-290

In the Supreme Court of the United States

DISTRICT OF COLUMBIA, et al.,

Petitioners,

v.

DICK A. HELLER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE CITY OF CHICAGO AND THE BOARD OF EDUCATION OF THE CITY OF CHICAGO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The City of Chicago and the Board of Education of the City of Chicago will address the following question:

Whether the Second Amendment constrains the power of state and local governments to regulate possession and use of firearms.

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BRIEF OF THE CITY OF CHICAGO AND THE BOARD OF EDUCATION OF THE CITY OF CHICAGO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The City of Chicago, the third-largest city in the United States, has regulated handguns within its borders since at least the passage of the Chicago Weapons Ordinance in 1982. The Board of Education of the City of Chicago, a municipal corporation, oversees the Chicago Public Schools (CPS), the third-largest school district in the country.[1]

Chicago, like other big cities, has a compelling interest in reducing crime related to firearms. Chicago Police Department statistics show that from 2004 to November 2007 there were 43,685 firearms-related violent crimes in the city. Public schools feel this epidemic with particular acuteness. During the last school year, 29 CPS students were killed in firearms-related violence. During the first semester of the current school year, eight more students have been murdered. These figures might be even higher if CPS had not confiscated nearly 100 guns *on school grounds* since 2000.

Against this backdrop, the *amici* (collectively, Chicago) consider it imperative that the democratic

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[1] The parties have each filed letters giving blanket consent to the filing of *amicus* briefs in this case. 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 the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

process be uninhibited by federal constitutional constraints that were never intended to apply against state and local governments, and that the States be free to regulate firearms as they deem appropriate to the particular conditions in their communities.

Chicago is especially well situated to address the incorporation issues this case raises. Like the District, Chicago extensively regulates private firearms possession and use, and many of these regulations resemble the ordinances at issue in this case. For example, Chicago bans the possession of handguns by most residents; requires the registration of all other firearms; forbids carrying firearms on one's person or in a vehicle unless broken down to a nonfunctional state; and outlaws the transfer of firearms except through a licensed dealer. Municipal Code of Chicago, Ill. §§ 4-144-070 and 8-20-010 to 8-20-050 (rev. 2000).

INTRODUCTION AND SUMMARY OF ARGUMENT

Whether the Second Amendment was originally intended to protect private rights from federal interference or to apply solely to militia-linked rights, a central purpose of that Amendment was to protect the States against the threat to their sovereignty posed by the power of the federal government to raise and maintain a standing army. This federalist objective was not altered or abandoned by the adoption of the Fourteenth Amendment. Accordingly, the Second Amendment remains to this day inapplicable to the States.

This Court repeatedly reached this conclusion in the immediate aftermath of the Reconstruction amendments, holding, for example, that the Second

Amendment did not restrict the State of Illinois' authority to prohibit 400 armed men from marching through the streets of Chicago. *Presser* v. *Illinois*, 116 U.S. 252 (1886).

As the Court again considers the meaning of the Second Amendment, Chicago urges it to respect these settled non-incorporation precedents. The precedents are right—they are supported by text, by historical context, and by more than 200 years of state and local practice. Non-incorporation is also the correct result applying this Court's selective incorporation doctrine. Indeed, it would be fundamentally perverse to transform this provision, designed to protect state interests against federal interference, into a federal restriction on traditional state regulatory powers.

While we agree with the District that the Second Amendment protects not private rights but rather militia-linked rights, the position we urge is important if the Court should hold that there is a private right protected against federal interference. Further, we submit that even if the Second Amendment applies to state and local governments, it does not preclude handgun bans, such as those enacted by the District and Chicago.

ARGUMENT

I. The Second Amendment Should Not Be Incorporated Against The States.

As we explain below, the Second Amendment—regardless of how this Court defines the right it creates—is essentially a federalism provision. From this follows the conclusion that the Amendment cannot be incorporated against the States. It is, therefore, wholly unnecessary for this Court to undertake the incorporation analysis of *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). See Part I.A, *infra*. Nevertheless, the *Duncan* analysis supports affirmance of the non-incorporation holdings. See Part I.B, *infra*.

A. Because the Second Amendment is a federalism provision, it should not be incorporated against the States.

The Bill of Rights consists of two types of provisions. Some, like the Free Speech Clause, the Free Exercise Clause, the Fourth Amendment, or the right to trial by jury, are substantive provisions that were motivated primarily by the protection of private rights. Such provisions were at most only incidentally about the balance of power between the federal government and the States. Smith, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 22–27 (1995). Over time this Court has held that the Fourteenth Amendment incorporated most such provisions against the States. *Duncan*, 391 U.S. at 148.

Other constitutional amendments, however, are federalism provisions—that is, they assign jurisdiction between the federal and state governments and protect state authority against federal encroachment. They determine not the limitations on government

power but rather who decides where those limits are. Examples include the Tenth and Eleventh Amendments; Section Two of the Twenty-First Amendment; and perhaps the Third[2] and Ninth[3] Amendments. Federalism provisions by their very nature "resist[] incorporation." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in the judgment); see also *id.* at 49–52.[4]

The Second Amendment is of the latter sort. First, its text simultaneously allocates power to the States and denies to the federal government the power to encroach on the States' prerogatives. Sec-

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[2] See Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms"*, 22 L. & HIST. REV. 119, 143 n.69 (2004) (noting that only four of the original States' constitutions prohibited peacetime quartering).

[3] *Griswold* v. *Connecticut*, 381 U.S. 479, 520 (1965) (Black, J., dissenting) (Ninth Amendment not incorporated because it was "enacted to protect state powers against federal invasion"); see also *id.* at 492 (Goldberg, J., concurring) (rejecting incorporation); Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 327 (2005). On Professor Amar's view of the effect of the Fourteenth Amendment, see n.18, *infra*.

[4] Perhaps because of the obvious nature of the Tenth Amendment, analysis of federalism provisions has largely occurred in the context of the Establishment Clause, where this Court's incorporation holdings have been subjected to sustained criticism. *E.g.*, Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990). We cite this debate not to challenge the incorporation of the Establishment Clause, but rather to suggest that a similar—but significantly stronger—argument may be made for non-incorporation of the Second Amendment. Not only do the text and history decisively support a federalism reading, but this Court has repeatedly and consistently reached this conclusion.

ond, the Amendment's historical context reveals that it was a response to two threats to the power of the state militias: the national government (as demonstrated by English history and reflected in anxiety about a standing national army); and private persons not in a state militia (as in Shays' Rebellion). Finally, understanding the Amendment as a federalism provision is the only interpretation consistent with state and local governments' exercise over two centuries of broad police powers to control firearms and militias.

1. The Second Amendment's text identifies it as a federalism provision.

The state-protective character of the Second Amendment is manifested in its two-clause structure, with each clause corresponding to a different sovereign in our constitutional system:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. CONST. Amend. II.

The first clause identifies state-based concerns: "A well regulated Militia being necessary to the security of a free State * * *." U.S. CONST. Amend. II, cl. 1. This clause affirms the States' concurrent power to regulate the militia. U.S. CONST. Art. I, § 8, cl. 16; *United States* v. *Miller*, 307 U.S. 174, 178–182 (1939). In doing so, the clause reflects the States' duties and powers under the Articles of Confederation and the originally ratified Constitution. Under the Articles, each State was required to maintain "a well-regulated and disciplined militia." Articles of Confederation, Art. VI. The Constitution demarcates exactly which aspects of the militia are under federal

control, and establishes that authority over all other aspects is "reserved" to the States. U.S. CONST. Art. I, § 8, cl. 15–16; *id.* Amend. X; *Miller*, 307 U.S. at 178–179. And in fact, at the time of the ratification of the Second Amendment, the States did pervasively regulate their militias—they defined "who was part of the militia, who was excused from duty, and what weaponry the citizens were required to procure to meet this obligation." Cornell & DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 508–509 (2004).

The second clause speaks to the federal government: "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. Amend. II, cl. 1. This clause denies the federal government the power to disarm the militia. As this Court has held—even after the Reconstruction amendments—this clause "means no more than that [the right] shall not be infringed by Congress." *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1876).

As the District argues, the Second Amendment created a militia-linked and not a private right. But whatever the reach of the Second Amendment right, the text of the second clause was widely understood before and after the ratification of the Fourteenth Amendment as protecting only against disarmament by the federal government. *Ibid.*[5] Indeed, by 1908

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[5] See also Konig, *Missing Transatlantic Context*, 22 L. & HIST. REV. at 127–135 (describing fear of federal disarmament); Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 506–508 (describing laws that disarmed enemies of the States); Amar, AMERICA'S CONSTITUTION 325 (describing the original Second Amendment as "barr[ing] the *federal* government from using its authority under Article I to dissolve America's militia structure") (emphasis in original).

one state supreme court noted that "the ultimate conclusion to which practically all of the courts of the Union have finally arrived, including the United States Supreme Court, is that this amendment is a limitation on the federal government only." *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908).

These clauses do not decide how much regulation of arms and militias there may or should be. Instead, they determine which level of government—namely, the States—has the constitutional authority to decide such questions. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 & n.38 (1986) (noting that the Second Amendment is "explicitly concerned with questions of federalism" and is thus one of those amendments that "it makes no * * * sense" to incorporate).[6]

This Court has already acknowledged that the Second Amendment is a federalism provision. Not long after ratification of the Fourteenth Amendment, the Court held that the Second Amendment both re-

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[6] It makes no difference that the Amendment lacks express language such as "reserved to the States." "[N]umerous constitutional provisions" reflect "[o]ur system of dual sovereignty," "not only those, like the Tenth Amendment, that speak to the point explicitly." *Printz* v. *United States*, 521 U.S. 898, 924 n.13 (1997). Indeed, there are rules of construction (Ninth and Eleventh Amendments), an express prohibition (Third Amendment), an express reservation (Tenth Amendment), and an endorsement of whatever local laws exist (Section Two of the Twenty-First Amendment). The Second Amendment thus is *more* complete than most other federalism provisions because its two clauses reflect, respectively, a reservation to the States and a prohibition on the federal government.

stricts the power of the federal government and reinforces the police power of the States. According to this Court, the Second Amendment is "one of the amendments that has no other effect than to restrict the powers of the national government," and it therefore leaves preeminent "the powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police." *Cruikshank*, 92 U.S. at 553 (internal quotation marks omitted). A decade later, in *Presser*, this Court reaffirmed *Cruikshank*'s holding that "the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States." 116 U.S. at 265. And yet another decade later, in *Miller* v. *Texas*, this Court rejected a pistol owner's challenge to a "law of the State of Texas forbidding the carrying of weapons" because, among other things, it was "well settled" that the Second Amendment "operat[ed] only upon the Federal power." 153 U.S. 535, 538 (1894). As described below, these cases have continued to be cited favorably by this Court and the courts of appeals. See Part I.B, *infra*.

2. The Second Amendment's historical context confirms that it is a federalism provision.

The historical context in which the Second Amendment was ratified confirms that it was aimed at preserving state power against federal encroachment. First, as with most of the Bill of Rights, it was "substantially conditioned by contemporary opposition to specific British practices"[7]—in particular, the English example of a national government that for a century had demeaned and weakened its subordinate

[7] Primus, THE AMERICAN LANGUAGE OF RIGHTS 97 (1999).

sovereigns by restricting their control of arms and militias. Second, the recent experience of Shays' Rebellion underscored the need for a government monopoly on the regulation of the use of force.

a. When the Second Amendment was ratified in 1791, the people of the United States knew all too well how much a central government might seek to subvert the militias of its subordinate sovereigns. Most obviously, the founders knew this from their own experience as colonists under the authority of King George. As Elbridge Gerry argued in the debate over the Second Amendment, "Great Britain * * * used every means in their power to prevent the establishment of an effective militia," and Massachusetts's efforts to this end "were always defeated by the influence of the crown." Gerry, THE CONGRESSIONAL REGISTER, Aug. 17, 1789, reprinted in Veit *et al.*, CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 182 (1991).

The founders had also taken to heart the century of political humiliation that the English government had inflicted on Scotland by depriving it of control of arms and militias. Konig, *A Missing Transatlantic Context*, 22 L. & HIST. REV. at 127–135. For example, in 1708 the Queen vetoed a bill to restore the Scottish militia. *Id.* at 128. Then, in 1715, Parliament enacted a ban on the public possession of weapons, including "side-pistols," in the Scottish Highlands by all but the most wealthy Scots. *Ibid*. Throughout the Eighteenth Century the Scots chafed under what they regarded as unwarranted domination by the English government. As one Scottish leader declared at the beginning of the century, "[t]he essential quality of a militia consistent with freedom, is, [t]hat the

officers be named, and preferred, and they, and the soldiers maintained, not by the prince but by the people." *Id*. at 136 (quotation marks omitted).

This Scottish history was well known to the founders and was often cited at the founding. *Id.* at 124–127, 140–147. And the Anti-Federalists, whose concerns animated the Second Amendment and the rest of the Bill of Rights, were especially troubled by the prospect that the federal government would undermine the States by "disarming" the people. *Id.* at 149–152 (quoting, among others, Elbridge Gerry, William Grayson, George Mason, and the New Hampshire and North Carolina ratifying conventions).

b. Shays' Rebellion provides a second aspect of the historical context for the Amendment. In 1786, Daniel Shays led a revolt in western Massachusetts, which was suppressed the following year by the militias of Massachusetts and several other States.[8] Capturing attention throughout the colonies, Shays' Rebellion was an "important military event that precipitated demands for a stronger national government" and was, in James Madison's words, one of the "ripening incidents" that led to the Constitutional Convention in Philadelphia.[9] This incident is more fully described in the briefs of other *amici*, *e.g.*, Br. of *Amici Curiae* Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schwoerer *et al.* at

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[8] Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588, 627 (2000); Weatherup, *Standing Armies And Armed Citizens: An Historical Analysis of The Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 981 (1975).

[9] Weatherup, 2 HASTINGS CONST. L.Q. at 981.

33, but it has special relevance for the States' interest in controlling arms and the use of force. The founders understood that the state militias had a central role in suppressing local revolts, THE FEDERALIST No. 28 (Hamilton) (supporting the use of the militia in putting down insurrection)—and Shays' Rebellion was a particularly vivid example of the States' need to remain vigilant.

c. These two aspects of the historical context explicate how the Second Amendment's aims were fundamentally about federalism. By preserving state militias from the effect of a federal disarmament, the Amendment was understood to further the three purposes for state militias: (1) contributing to the common defense, (2) enabling the States to control the use of force within their own borders, and (3) checking federal tyranny and the power of a federal standing army. Story, 3 COMMENTARIES ON THE CONSTITUTION § 1890 (1833), reprinted in Kurland & Lerner, eds., 5 THE FOUNDERS' CONSTITUTION 214 (1987) ("The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers.").[10] These aims are exactly what a federalism

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[10] For more on these aims, see, *e.g.*, Washington, "Sentiments on a Peace Establishment," May 2, 1783, reprinted in 3 THE FOUNDERS' CONSTITUTION 129 (finding "conceded on all hands the Policy and expediency of resting the protection of the Country on a respectable and well established Militia"); Gerry, THE CONGRESSIONAL REGISTER, Aug. 17, 1789, reprinted in Veit, CREATING THE BILL OF RIGHTS 182 ("Whenever government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins."); Burgh, POLITICAL DISQUISITIONS (1774), reprinted in 3 THE FOUNDERS' CONSTITUTION 125 ("We all know, that * * * princes have never suffered a militia to be put upon

provision would be expected to protect, and they would be wholly subverted were the Amendment to apply to the States.

3. The practice of state and local governments for two centuries confirms the Second Amendment as a federalism provision.

With the concurrence of this Court, state and local governments have exercised broad police powers over arms and militias for more than 200 years. At the time of the founding, state law pervasively regulated the disarmament of rebels and enemies of the State, the identity and armament of the militia, and the safe storage and transport of ammunition.[11] In particular, this pervasive state regulation focused on arms in urban centers.[12] For example, a 1783 Massachusetts statute, which applied specifically to Boston, forbade loaded firearms in "any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building."[13]

In the Nineteenth Century, States additionally prohibited the carrying of concealed weapons, including handguns.[14] In the 1830s, for example, Tennes-

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any good foot, lest standing armies should appear unnecessary.").

[11] Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 506–512.

[12] *Id*. at 511–512.

[13] Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218. See also Act of June 26, 1792, ch. 10, 1792 Mass. Acts 208 (restricting the storage of gunpowder in Boston); Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 511–512.

[14] Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 512–516.

see banned the sale of any concealable weapon, including all pistols, "except such as are used in the army and navy of the United States, and known as the navy pistol."[15] Act of Jan. 27, 1838, ch. 137, 1837–1838 Tenn. Pub. Acts 200. See also Act of Apr. 1, 1881, no. XCVI, 1881 Acts of Ark. 191; Act of Dec. 25, 1837, 1837 Ga. Laws 90. Such laws are also extremely common today.[16]

The Fourteenth Amendment did not change the widespread state and local regulation of arms and militias. It is impossible to imagine that the States would have ratified *sub silentio* an amendment that removed their traditional and deeply cherished police powers over armaments.[17] Indeed, the States' con-

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[15] Tellingly, the exemption from the Tennessee prohibition was for military arms. State laws regulating private firearms were consistent with the views of many state courts that a right to bear arms extended only to firearms used in the public defense. *E.g.*, *State* v. *Buzzard*, 4 Ark. 18, 1842 WL 331 (1842); *Aymette* v. *State*, 21 Tenn. (2 Hum.) 154, 1840 WL 1554 (1840); *State* v. *Reid*, 1 Ala. 612, 1840 WL 229 (1840); *State* v. *Mitchell*, 3 Blackf. 229, 1833 WL 2617 (Ind. 1833). See also Bishop, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 793 (2d ed. 1883).

[16] Many States authorize local governments to exercise this police power over arms. For example, an 1825 Tennessee statute enabled two towns, consistent with state law, to "make any rules and laws regulating the police [and] * * * to restrain and punish * * * shooting and carrying guns, and enact penalties and enforce the same." Act of Dec. 3, 1825, ch. CCXCII, § 4, 1825 Tenn. Priv. Acts 307; Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 515. On the relevance of political subdivisions, cf. *Miller*, 307 U.S. at 182 (quoting at length a 1785 Virginia statute that allowed the militias of different counties to have different characteristics).

[17] Indeed, the scant consideration given to such an outcome is strong evidence that the Second Amendment's status as a fed-

tinuing tradition of exercising broad police powers over private arms disproves any incorporation theory in which the Fourteenth Amendment tacitly but radically transformed the Second Amendment from a federalism provision into an anti-State principle of private autonomy.[18]

True, at the time of the Fourteenth Amendment some legislators supported incorporation of the Second Amendment. But, even setting aside the ordinary problems of divining congressional intent from individual legislators,[19] these statements are riddled with inconsistencies.[20] The evidence to the contrary,

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eralism provision was unchanged by the Fourteenth Amendment.

[18] For objections to one such theory, Professor Amar's "refined incorporation," see n.20, *infra*; Goldstein, *The Specter of the Second Amendment: Rereading* Slaughterhouse *and* Cruikshank, 21(2) STUDIES IN AMERICAN POLITICAL DEVELOPMENT 131 (Sept. 2007); Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571, 591–595 & n.94 (2006); Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 615, 616–626 (2006); Merkel, *A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment*, 17 STAN. L. & POL'Y REV. 671, 690–692 (2006); Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 517–525; Thomas, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 199–214 (2001).

[19] *Rapanos* v. *United States*, 126 S. Ct. 2208, 2231 (2006) (plurality opinion) ("Congress takes no governmental action except by legislation.").

[20] For example, John Bingham claimed that the Fourteenth Amendment would protect private gun rights; but he also admitted that the Fourteenth Amendment would "take[] from no State any right which hitherto pertained to the several States of the United States." Bingham, *The Constitutional Amendment*

including this Court's Reconstruction-era precedents and the contemporaneous and uninterrupted state firearms regulation, is simply overwhelming. The views of a handful of individual Radical Republicans do not overcome the conclusion that the Second Amendment, as a federalism provision, could not possibly be incorporated.

B. This Court's selective-incorporation doctrine confirms that the Second Amendment should not apply to the States.

As we explain above, incorporation of the Second Amendment would both destroy its animating federalism principle and invade the States' traditional police powers. But incorporation remains inappropriate even under the criteria this Court applies to provisions predominantly focused on individual rights.

Under this Court's selective-incorporation doctrine, the Due Process Clause of the Fourteenth Amendment incorporates a substantive federal constitutional right against the state governments where the right is "fundamental to the American [or Anglo-American] scheme of justice." *Duncan*, 391 U.S. at 149. The Court applies a four-factor framework to implement its selective-incorporation doctrine, examining (1) the Anglo-American history of the putative right; (2) its recognition in the constitutions of the original States; (3) subsequent popular regard for the right; and (4) the purpose it serves. *Id.* at 151–158.

(Aug. 24, 1866), *in* CINCINNATI COMMERCIAL, Aug. 27, 1866, at 1; see also Cornell & DeDino, *A Well Regulated Right*, 73 Fordham L. Rev. at 523–524.

As demonstrated below, a private right to keep and bear arms outside of a government-sponsored militia or military is not "fundamental" under these factors. Indeed, this Court has repeatedly held—in *Presser*, 116 U.S. 252; *Cruikshank*, 92 U.S. 542; and *Miller* v. *Texas*, 153 U.S. 535—that the Second Amendment is not incorporated (albeit under its earlier incorporation tests). Although the Court has not revisited these non-incorporation holdings since clarifying the doctrine of selective incorporation, federal courts have reaffirmed their vitality,[21] and state courts have concurred with some frequency.[22]

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[21] *E.g.*, *Cases* v. *United States*, 131 F.2d 916, 921–922 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943); *Bach* v. *Pataki*, 408 F.3d 75, 84 (2d Cir. 2005), cert. denied, 546 U.S. 1174 (2006); *United States* v. *Tot*, 131 F.2d 261, 269–270 (3d Cir. 1942), rev'd on other grounds, 319 U.S. 463 (1943); *Love* v. *Pepersack*, 47 F.3d 120, 123 (4th Cir), cert. denied, 516 U.S. 813 (1995); *Peoples Rights Org.* v. *Columbus*, 152 F.3d 522, 538 n.18 (6th Cir. 1998); *Quilici* v. *Village of Morton Grove*, 695 F.2d 261, 269–270 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983); *Fresno Rifle & Pistol Club, Inc.* v. *Van de Kamp*, 965 F.2d 723, 730–731 (9th Cir. 1992).

[22] *E.g.*, *Fife* v. *State*, 31 Ark. 455 (1876); *In re Application of Rameriz*, 226 P. 914 (Cal. 1924); *Brewer* v. *State*, 637 S.E.2d 677 (Ga. 2006); *State* v. *Mendoza*, 920 P.2d 357 (Haw. 1996); *Kellogg* v. *City of Gary*, 562 N.E.2d 685 (Ind. 1990); *State* v. *Amos*, 343 So. 2d 166 (La. 1977); *State* v. *Goodno*, 511 A.2d 456 (Me. 1986); *Scherr* v. *Handgun Permit Review Bd.*, 880 A.2d 1137 (Md. Ct. Spec. App. 2005); *Commonwealth* v. *Davis*, 343 N.E.2d 847 (Mass. 1976); *State* v. *Keet*, 190 S.W. 573 (Mo. 1916); *Harris* v. *State*, 432 P.2d 929 (Nev. 1967); *State* v. *Sanne*, 364 A.2d 630 (N.H. 1976); *Burton* v. *Sills*, 248 A.2d 521 (N.J. 1968); *People* v. *Morrill*, 475 N.Y.S.2d 648 (App. Div. 1984); *State* v. *Kerner*, 107 S.E. 222 (N.C. 1921); *Arnold* v. *City of Cleveland*, 616 N.E.2d 163 (Ohio 1993); *Ex parte Thomas*, 97 P. 260 (Okla. 1908); *State* v. *Kessler*, 614 P.2d 94 (Or. 1980); *Mosby* v. *Devine*, 851 A.2d 1031 (R.I. 2004); *Masters* v. *State*, 685

Moreover, state legislatures have repeatedly relied on this Court's precedents to enact a whole host of gun control laws, as this Court apparently recognized in *Miller*. 307 U.S. at 179–182 (describing at length the States' pervasive and detailed regulation of arms, ammunition, and militias).

This Court has in fact encouraged such reliance by signaling the stability of this rule. For starters, the Court has explicitly distinguished the Second Amendment from nearly all the incorporated provisions of the Bill of Rights. *Malloy* v. *Hogan*, 378 U.S. 1, 4 n.2 (1964).

Moreover, just months after clarifying the modern incorporation framework in *Duncan*, the Court dismissed, "for want of a substantial federal question," the appeal in *Burton* v. *Sills*, 248 A.2d 521 (N.J. 1968), dismissed, 394 U.S. 812 (1969). The New Jersey Supreme Court had ruled in that case that the Second Amendment differs from other amendments that protect private rights and, unlike them, is not incorporated by the Fourteenth Amendment against the States. 248 A.2d at 528. As one commentator has noted, "it is logical to view *Burton* as a reaffirmance of *Presser*." Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said about the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 145 (1999).

Finally, under modern doctrine only fundamental rights are incorporated; yet as recently as 1980 this Court stated that the private right to gun ownership by an individual not associated with a gov-

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S.W.2d 654 (Tex. Crim. App. 1985); *State* v. *Hopkins*, 706 N.W.2d 704 (Wis. Ct. App. 2005); *Mecikalski* v. *Office of Atty. Gen.*, 2 P.3d 1039 (Wyo. 2000).

ernment-sponsored militia or military is not fundamental. *Lewis* v. *United States*, 445 U.S. 55, 65 n.8 (1980) (observing that federal restrictions prohibiting a convicted felon from possessing a firearm "are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties").

The stability of these non-incorporation precedents, and the States' extensive reliance upon them, counsel strongly against altering the rule. *John R. Sand & Gravel Co.* v. *United States*, __ U.S. __, 2008 WL 65445, *7 (2008).[23] But even if the Court intends to revisit its precedents on incorporation of the Second Amendment, application of the selective-incorporation test confirms these prior holdings.

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[23] When this Court confronts a question of abiding political controversy, its history cautions it to act with restraint. *Planned Parenthood* v. *Casey*, 505 U.S. 833, 854–855 (1992). Here, this wisdom is reinforced by two considerations. First, state and local governments have had a free hand to regulate arms and militias—or not, as they see fit—for more than 200 years, and incorporation could upend thousands of longstanding, democratically adopted legislative decisions. Second, gun policy at state and local levels is influenced not only by empirical evidence but also by the vastly different cultural significance of firearms of various sorts in different parts of the United States. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3 (2003). Allowing a local option thus not only allows a State "as a laboratory [to] try novel social and economic experiments without risk to the rest of the country," *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), but also allows communities to define themselves culturally and morally.

1. The history of the Second Amendment demonstrates that any private right to own guns outside of a militia context is not fundamental.

The *Duncan* Court observed that "by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries." 391 U.S. at 151. The same cannot be said of the private right to possess firearms, and especially handguns, for a non-military purpose.

a. Private gun rights were far from universal in England prior to the founding of the United States. English law, as early as Edward III, prevented all persons, whatever their condition, "to go or ride armed by night or day." Statute of Northampton, 2 Edw. III, c. 3 (1328); see also Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 473 (1915); *Sir John Knight's Case*, 87 Eng. Rep. 75 (K.B. 1686), reprinted in 5 THE FOUNDERS' CONSTITUTION 209. English common law granted only limited gun rights and required that they be exercised for a civic end. In the events precipitating the Glorious Revolution, King James II disarmed the Protestant population and quartered Catholic soldiers among them. Parliament restored the Protestants' rights, but only for their collective security. Feller & Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46, 48 (1966) (describing Protestant gun rights as "a class right rather than an individual right," and noting that "individual self-defense was not within its protective purpose"). Moreover, gun ownership was limited to the wealthy, and only "as allowed by law." *Id.* at 49. The combination of these qualifications meant that the "a large proportion of the people were entirely

disarmed." *Aymette*, 21 Tenn. (2 Hum.) 154, 1840 WL 1554, *2.

b. As discussed above (Part I.A.2), the historical context of the Second Amendment also precludes the idea that a private right to own guns was fundamental. After the national government gained the powers to raise a standing army and muster the state militias, Anti-Federalists complained that Congress could render these militias a nullity by design or neglect. The result would be a standing army fully outside the control of the States and no effective counterbalancing state militias. To guard against such a possibility, the Second Amendment protects not only the independence but also the existence of effective state militias.

Rather than take up the proposals for an amendment from Massachusetts, New Hampshire, or Pennsylvania—proposals that explicitly recognized a private right to gun ownership outside of a state-sponsored militia—the First Congress started with a proposal Madison had originally suggested for Article I, § 9 of the Constitution:

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (Cogan ed. 1997).

Far from what one would expect for any right considered fundamental, not a single statement in the congressional debate over Madison's proposal suggests any legislative intent to create a private

right to keep and bear arms distinct from participation in a state-sponsored militia. Instead, the debate focused almost exclusively on the religious exemption from bearing arms. *Id.* at 171–172; see also Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 127–128 (2000).

That Madison proposed such an exemption at all speaks to the civic nature of the amendment. If the "right of the people to keep and bear arms" referred to a private right to keep and bear arms outside of state-sponsored military service, the exemption for conscientious objectors would have been unnecessary: true rightholders need no permission *not* to exercise a right.[24]

c. The *Miller* Court highlighted the fact that the laws of three original States—Massachusetts, New York, and Virginia—required residents to equip themselves for state militia service and penalized failure to do so. 307 U.S. at 179–182. Because state governments historically *compelled* individuals to keep and bear arms, despite the Second Amendment, there can be no serious claim that the amendment makes private gun ownership outside of a military context a right fundamental to the American scheme of justice. This is far different from the fundamental right to free speech under the First Amendment, which States may not compel citizens to exercise. *Wooley* v. *Maynard*, 430 U.S. 705, 713–715 (1977).

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[24] The substitution of "free State" for "free country" was also intended to emphasize the primacy of the state militia over the federal standing army. Yassky, *Structure, History and Constitutional Change*, 99 MICH. L. REV. at 610.

2. A private right for persons not associated with any state militia even arguably exists in the constitution of at most one of the original States.

The *Duncan* Court observed that all of the original States constitutionally guaranteed the right to trial by jury. 391 U.S. at 153. By contrast, only one of the original States' constitutions—Pennsylvania's—even arguably guaranteed a private right to keep and bear arms outside of a state-sponsored military context.

In particular, the founding documents (including colonial charters, constitutions, and declarations of rights) in ten of the original States either make no mention of an armed populace or do so without establishing a right.[25] THE COMPLETE BILL OF RIGHTS at 183–184; see also Lieber, *The* Cruikshank *Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court's Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079, 1112 (2005).

The constitutions of two other States, Massachusetts and North Carolina, contained provisions protecting the "right" to arms, but, in harmony with the militia-linked interpretation of the Second Amendment, each specifically limited that right to the common defense. *E.g.*, MASS. CONST. Pt. 1, Art. XVII

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[25] These include Connecticut, Delaware, Georgia, Maryland, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, and Virginia. The 1776 Maryland Declaration of Rights provides an example of States that made allowances for an armed population without explicitly creating a right. Md. Decl. of Rights, § 15 ("That a well regulated militia is the proper and natural defence of a free government.").

(1977) ("The people have a right to keep and bear arms for the common defence.").

Only the Pennsylvania Constitution even arguably protects a private right to bear arms outside of the militia context:

> That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

PA. DECL. OF RIGHTS, § XIII (1776). Even then, the private right is limited to self-defense.[26] Moreover, Pennsylvania's contemporaneous legislation reveals that the state constitution was not thought to confer an absolute right. A 1778 law required gun owners to swear loyalty to the State. Any person who "refuse[d] or neglect[ed] to take the oath or affirmation" was required to turn in his arms and was barred from keeping any firearms or ammunition in his "house or elsewhere." Act of Apr. 1, 1778, ch. LXI, § 5, 1777–1778 Pa. Laws 123, 126; see also Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 39 RUTGERS L.J. 1041 (forthcoming 2008) (challenging private-right reading of PA. DECL. OF RIGHTS, § XII (1776)). Other laws limited the amount of ammunition a person could keep in his home, Act of Dec. 6, 1783, ch. 104, 2 Pa. Laws 256, and prohibited firing guns in towns and cities.

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[26] These restrictions are significant since Pennsylvania's Constitution also separately addressed hunting rights. PA. CONST. § XLIII (1776).

Act of Feb. 9, 1750, ch. CCCLXXXVIII, 1750–1751 Pa. Laws 108.

Such regulation was common elsewhere, too. New York, for example, regulated the storage of gun powder (Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627), while Delaware prohibited firing guns in towns and cities (Act of Feb. 2, 1812, ch. CXCV, 1812 Del. Laws 522). See also Part I.A.3, *supra*.

Thus, from the inception of the Nation, the original state governments exercised plenary police powers to regulate private gun ownership, and their state constitutions were never understood to prevent that. It would be anomalous, to say the least, to use these same constitutional provisions as a basis for incorporating the Second Amendment against the States and thus curtailing the States' police powers.

3. Many later state constitutions do not preclude gun regulation, and state and local governments have implemented myriad gun control regulations with strong popular support.

In *Duncan*, the Court stressed that the constitutions of every State to enter the Union after the original thirteen States also protected the right to trial by jury in criminal matters. 391 U.S. at 153–154. Moreover, the Court noted, the right to trial by jury continued to receive strong support, with no State having dispensed with it or having made any movement toward dispensing with it. *Id.* at 154. Again, experience with the Second Amendment is in stark contrast.

a. Numerous state constitutions did not (and do not) preclude regulation or prohibition of private

ownership of guns outside the context of a state militia.

Six state constitutions currently make no mention of any gun rights whatsoever.[27] An additional thirteen States entered the Union without including such a right in their constitutions.[28] Two other States explicitly protect only a militia-related right to keep and bear arms.[29]

Some States ostensibly protect a private right, but they do so less broadly than might appear at first glance. In Maine, where the constitution proclaims that "Every citizen has a right to keep and bear arms and this right shall never be questioned," ME. CONST. Art. I, § 16, the private right to gun ownership is limited. *Hilly* v. *Portland*, 582 A.2d 1213, 1215 (Me.

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[27] These include the California, Iowa, Maryland, Minnesota, New Jersey, and New York constitutions.

[28] Of the original States, Connecticut, Delaware, Georgia, New Hampshire, Rhode Island, and South Carolina did not adopt constitutional provisions dealing with gun ownership until well after the founding. CONN. CONST. Art. I, § 15 (1818); DEL. CONST. Art. I, § 20 (1987); GA. CONST. Art. I, § 4 (1865); N.H. CONST. Pt. 1, Art. 2-a (1982); R.I. CONST. Art. I, § 22 (1842); S.C. CONST. Art. I, § 28 (1868). The adoption of limited gun rights also lagged behind statehood in Illinois (admitted 1818), Louisiana (1812), Nebraska (1867), Nevada (1864), North Dakota (1889), West Virginia (1863), and Wisconsin (1848). ILL. CONST. Art. I, § 22 (1970); LA. CONST. Art. 3 (1879); NEB. CONST. Art. I, § 1 (1988); NEV. CONST. Art. I, § 11(1) (1982); N.D. CONST. Art. I, § 1 (1984); W. VA. CONST. Art. III, § 22 (1986); WIS. CONST. Art. I, § 25 (1998).

[29] Both Kansas and Massachusetts have interpreted their state constitutional provisions to protect only a militia-linked right. *City of Salina* v. *Blaksley*, 83 P. 619, 620 (Kan. 1905) (KAN. BILL OF RIGHTS, § 4); *Commonwealth* v. *Davis*, 343 N.E.2d 847, 848–850 (Mass. 1976) (MASS. CONST. Pt. 1, Art. XVII).

1990) (upholding a concealed-carry ban in Portland). In Alaska, which amended its constitution in 1994 to add a private right to keep and bear arms, the result is similar. *Gibson* v. *State*, 930 P.2d 1300, 1301–1302 (Alaska Ct. App. 1997) (finding that the Alaska legislature did not intend to overturn existing gun control measures). And in Illinois, where the constitution provides that "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed," ILL. CONST. Art. I, § 22, the state supreme court upheld an ordinance prohibiting the possession of any operable handgun. *Kalodimos* v. *Village of Morton Grove*, 470 N.E.2d 266, 269 (Ill. 1984).

b. As the above examples demonstrate, States have long implemented wide-ranging restrictions on private possession or use of firearms not linked to any civic purpose. Indeed, these regulations date to the beginning of the Republic, and "the evidence for robust regulation is extensive" if one "looks at the gun laws adopted in the Founding Era and early Republic." Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 502–505. These regulations became more extensive and expanded with the growth of the Nation; they remain pervasive. See Part I.A.3, *supra*.

c. Widespread popular support for state gun control legislation is likely attributable in part to changes in the country's circumstance since the founding.[30] Today, the majority of households do not

[30] Based on the General Social Survey, the majority of Americans support some form of gun control. Smith, *Public Attitudes towards the Regulation of Firearms* (NORC/U. Chi. March 2007). Such support has only increased this century. *Ibid*.

contain a firearm of any sort. See Polston & Weil, *Unsafe by Design: Using Tort Actions to Reduce Firearm-Related Injuries*, 8 STAN. L. & POL'Y REV. 13, 14 (1997). The frontier is gone. In domestic matters and international affairs, state militias have been displaced by organized police forces, the National Guard, and the federal military. And criminals with firearms—especially handguns—wreak havoc in American cities.[31] Thus the widespread public support for significant regulation of gun ownership is unsurprising.

4. The federalist purpose of the Second Amendment further confirms that even if incorporation were a theoretical possibility, the Court should nonetheless affirm Presser.

Finally, the unique federalist purpose of the Second Amendment, see Part I.A, *supra*, distinguishes the rights incorporated in *Duncan* and other cases from any private right to keep and bear arms outside of a state-sponsored militia.

The Second Amendment has always been understood to limit federal power by ensuring a counterweight to a standing army. But it would serve no purpose to incorporate the Amendment against state governments already prohibited from maintaining their own standing armies. U.S. CONST. Art. I, § 10. Indeed, Madison worried about the possibility that the federal government would use its standing army to aggrandize itself vis-à-vis the States; he saw the

[31] For the Court's convenience, we have included Chicago's startling data. See Appendix, *infra*.

States and their militias as indispensable safeguards against such a possibility.[32]

The Second Amendment strikes a balance between state and federal power. To States reluctant to cede authority to a strong central government, it was vitally important to know that they retained their police powers and that the new federal government could not subvert these powers by disarming the people.

The concern about disorderly private rebellions at the founding also belies the notion that a private right to gun ownership outside of state aegis might enhance democracy. The inability of the federal government, under the Articles of Confederation, to fashion a well-coordinated military response to Shays' Rebellion provided a major impetus for the Constitutional Convention.[33] With state militia companies quelling the armed insurrection, it is difficult to imagine that the founders saw their purpose in Philadelphia that summer as protecting private gun ownership. See *Silveira* v. *Lockyer*, 312 F.3d 1052, 1078 (9th Cir. 2002); Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.–KENT L. REV. 291, 320 (2000) ("Yet when the rebels took up arms, they were put down by the militia because, in the unsurprising judgment of the properly constituted governments, no tyrannical conditions justified the

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[32] See THE FEDERALIST NO. 46 (Madison) ("Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the Federal Government; still it would not be going too far to say, that the State Governments, with the people on their side, would be able to repel the danger.").

[33] See n.9, *supra*.

revolt."). And one of the first orders of business after ratification of the Second Amendment was suppression of yet another privately armed insurrection—the Whiskey Rebellion in 1794. Kohn, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802 at 169–170 (1975).

Finally, it is a historical truism that governments retain a monopoly on the regulation of the use of force. Together with the militia clauses of Article I, the Second Amendment allocates portions of this monopoly between the federal government and the States. To incorporate the Amendment against the States would cede large parts of this traditional government monopoly—it would imply that *no level of government* possesses the traditional police power over private arms. Such an unprecedented abdication is made even less probable by the Fourteenth Amendment's exclusion from political office of those who took up arms against the federal government. U.S. CONST. Amend. XIV, § 3. Indeed, the Reconstruction amendments are concerned with the problems of excessive decentralization of political decision-making and use of force. It would be truly perverse to read them as establishing a private autonomy against regulation by any level of government whatsoever.[34]

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The Second Amendment is susceptible to incorporation neither as a matter of logic nor under this Court's doctrine of selective incorporation. As such,

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[34] For the same reason, it makes no sense for the Second Amendment to apply to District-specific legislation.

the right guaranteed by the Amendment—whether private or militia-linked—is a protection against federal disarmament and does not restrict state and local governments from regulating firearms.

II. In Any Event, State Or Local Handgun Bans—And The District's Handgun Ban—Are Constitutional.

Regardless of this Court's view on incorporation, or whether it even reaches that issue, the District's gun laws—and Chicago's similar regulations—are lawful. We urge the Court, if it holds by whatever theory that the Second Amendment applies to the District and protects some form of private right, to uphold the ordinances challenged here.

The text of the Second Amendment expressly envisions regulation. Its opening clause calls for a "well regulated" militia. None of the rights that are fundamental, and therefore require strict scrutiny of regulation, contains such a grant of government regulatory power. There is no mention of a "well regulated" press, for instance, in the First Amendment.

As set out in greater detail by other *amici*, *e.g.*, Br. of Law Professors Erwin Chemerinsky and Adam Winkler as *Amici Curiae*, this textual commitment to regulation means that the standard for judging a regulation under the Second Amendment is whether it is reasonable.[35] Under that standard, prophylactic

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[35] Of course, all other constitutional limits that apply to government regulation—such as the Privileges or Immunities Clause, the Equal Protection Clause, substantive due process, and the "void-for-vagueness" doctrine—would also continue to apply.

measures reasonably directed to saving lives or reducing serious crime should be upheld. See, *e.g.*, *Lewis*, 445 U.S. at 67 (upholding prohibition on possession of firearms by convicted felons because Congress rationally could have wanted to keep weapons away from "potentially dangerous persons"). And a handgun ban is just such a regulation—reasonable because it greatly reduces the harm inflicted by handguns. See Pet. Br. 50–54.

Further, concealed weapons are both the primary tool of violent street crime and the primary method by which gangs control turf to sell drugs and intimidate communities. Handguns are the most readily concealable firearms. See, *e.g.*, Act of Jan. 27, 1838, ch. 137, 1837–1838 Tenn. Pub. Acts 200. While their small size and limited range make handguns unsuitable for general military use, *e.g.*, *Aymette*, 21 Tenn. (2 Hum.) 154, 1840 WL 1554, *3–4, their essential attribute of concealability makes them well suited to gang-related crime, as well as urban violence more generally. *E.g.*, Appendix, *infra*; Br. of *Amici Curiae* Major American Cities, The United States Conference of Mayors, and Legal Community Against Violence at 4–8; Pet. Br. 4. For precisely this reason, many state and local governments ban the carrying of concealed weapons. Indeed, laws prohibiting concealed-carry are a particularly valuable law-enforcement tool because they can be enforced under *Terry* v. *Ohio*, 392 U.S. 1 (1968), and when enforced on the street, allow the police to remove guns from circulation and effectively drive down violent crime.

The constitutionality of a ban on concealed-carry has been regularly upheld. Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 717 (2007). See also *Robertson* v. *Baldwin*, 165 U.S. 275,

281–282 (1897) ("the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons"). No such ban is challenged in this case.

A ban on possession of handguns directly serves state and local governments' interest in preventing concealed weapons. Banning possession of handguns can rationally be expected to reduce the availability of handguns and, in turn, reduce the number of handguns that can be used as concealed weapons. This Court has repeatedly sustained regulation of certain conduct as a prophylactic means of addressing another evil. See, *e.g.*, *New York* v. *Ferber*, 458 U.S. 747, 759–762 (1982); *Andrus* v. *Allard*, 444 U.S. 51 (1979); *Champion* v. *Ames*, 188 U.S. 321 (1903) ("The Lottery Case"). That kind of broad regulatory power is particularly appropriate in dealing with deadly objects, where reasonable regulation may include stringent controls and even an outright ban.

Allowing state and local governments to approach this issue politically is also consistent with democratic traditions for addressing socially divisive issues. Citizens may voice their support or objections to state and local gun control at the ballot box—or by moving to another jurisdiction with a laxer approach to gun regulation.

In sum, regardless whether this Court reaches the incorporation issue, if it examines the challenged ordinances on the merits, the Court should hold that laws such as the District's do not violate the Second Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

TOTAL NUMBER OF INDEX CRIMES INVOLVING FIREARMS (DETAILED OFFENSE INFORMATION) CITY OF CHICAGO, 2004-2006 AND YTD 2007

PRIMARY	SECONDARY	2004	2005	2006	JAN - NOV 2007
MURDER TOTAL		**338**	**340**	**384**	**307**
CRIM SEXUAL ASSAULT	AGGRAVATED: HANDGUN	114	90	82	101
GRIM SEXUAL ASSAULT	AGGRAVATED: OTHER FIREARM	1	2	0	5
CRIM SEXUAL ASSAULT	ATTEMPT AGG: HANDGUN	11	13	7	5
CRIMINAL SEXUAL ASSAULT TOTAL		**126**	**105**	**89**	**111**
ROBBERY	ARMED: HANDGUN	5,456	5,392	5,312	4,633
ROBBERY	ARMED: OTHER FIREARM	84	73	72	66
ROBBERY	ATTEMPT: ARMED-HANDGUN	520	534	507	454
ROBBERY	ATTEMPT: ARMED-OTHER FIRE-ARM	18	13	10	15
ROBBERY TOTAL		**6,078**	**6,012**	**5,901**	**5,168**
ASSAULT	AGG PRO.EMP: HANDGUN	13	20	16	21
ASSAULT	AGG PRO.EMP: OTHER FIREARM	8	3	8	7
ASSAULT	AGGRAVATED PO: HANDGUN	52	51	56	44
ASSAULT	AGGRAVATED PO: OTHER FIREARM	4	5	5	4
ASSAULT	AGGRAVATED: HANDGUN	3,169	2,852	2,662	2,386
ASSAULT	AGGRAVATED: OTHER FIREARM	119	110	123	99
AGGRAVATED ASSAULT TOTAL		**3,365**	**3,041**	**2,870**	**2,561**
BATTERY	AGG PRO.EMP: HANDGUN	13	9	19	14
BATTERY	AGG PRO.EMP: OTHER FIREARM	2	1	4	1
BATTERY	AGGRAVATED DOMESTIC BATTERY: HANDGUN	21	28	38	49
BATTERY	AGGRAVATED DOMESTIC BATTERY: OTHER FIREARM	13	21	40	24
BATTERY	AGGRAVATED PO: HANDGUN	11	10	9	23
BATTERY	AGGRAVATED PO: OTHER FIREARM	1	0	1	2
BATTERY	AGGRAVATED: HANDGUN	1,671	1,594	1,636	1,445
BATTERY	AGGRAVATED: OTHER FIREARM	48	42	43	52
RITUALISM	AGG RITUAL MUT: HANDGUN	0	0	4	0
AGGRAVATED BATTERY TOTAL		**1,780**	**1,705**	**1,794**	**1,610**
TOTAL VIOLENT INDEX CRIMES INVOLVING FIREARMS		**11,687**	**11,203**	**11,038**	**9,757**

Source: CHRIS_DWH_CRIMES_ALLV and Detective Division Homicide Database queries on 27 Dec 2007.

Battery incidents involve only those cases when actual physical contact is made between the victim and offender. There are three possible aggravating factors:
(1) the victim suffered great bodily harm (serious injury);
(2) the offender used a dangerous weapon capable of causing death or great bodily harm AND there was contact made with the victim during the attack; or
(3) there was contact made with the victim during the attack (including minor contact or injury) AND the victim was a police officer or other, protected employee.

Assault incidents, without exception, involve the use of force but do not involve any actual contact between the victim and offender. All unsuccessful attempts at force by an offender that do not involve a deadly weapon (*e.g.*, attempting to punch someone or throwing a stone at another person but no one is actually struck) are classified as an assault. All unsuccessful attempts at force by an offender that do involve a deadly weapon (*e.g.*, shooting a firearm at another person but no one is actually struck) are classified as an aggravated assault.

Please note, the FBI Uniform Crime Report guidelines define aggravated assault as a combination of both the aggravated assault and aggravated battery categories described above.

AGG PRO EMP: Protected employees Includes peace officer, community policing volunteer, fireman, correctional officer, emergency medical technician, paramedic, ambulance driver, other medical assistance personnel, public transportation employee, Illinois State or municipal corporation employee, teacher, school employee, park district employee on school/park district grounds/property, or employee of the State Dept. of Public Aid, County Dept. of Public Aid, Dept. of Human Services on public aid grounds/in a residence of public aid applicant/recipient, while in performance of official duties.

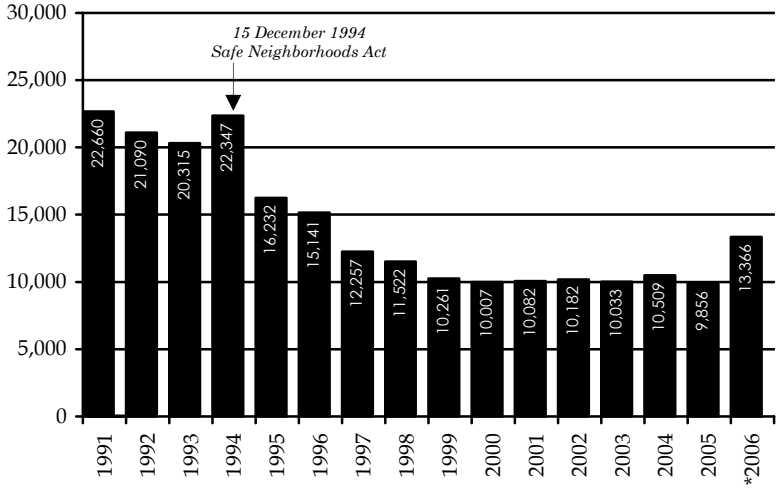
AGGRAVATED PO: Against a police officer.

ARRESTS FOR UUW-FIREARM
CITY OF CHICAGO
2004 – YTD 2007

STATUTE	DESCRIPTION	2004	2005	2006	JAN-NOV 2007
430 ILCS 65.0/2-A-1	FIREARM W/O VALID FOID/ELIG	255	244	144	148
430 ILCS 65.0/2-A-1	POSSESS EXPIRED FIREARM FOID	9	3	2	4
430 ILCS 65.0/2-A-1	POSSESS REVOKED FIREARM FOID	4	4	3	0
430 ILCS 65.0/3-A	ILLEGAL TRANSFER FIREARMS	8	5	6	6
430 ILCS 65.0/3-B	FAIL KEEP RECORD OF TRANSFER/FIREARM	38	29	25	26
720 ILCS 5.0/16-16.1-A-2	AGG POSSESSION OF 6-10 STOLEN FIREARMS	0	1	0	0
720 ILCS 5.0/16-16.1-A-4	AGG POSSESSION OF 21-30 STOLEN FIREARMS	5	0	0	0
720 ILCS 5.0/16-16-A	POSSESSION OF STOLEN FIREARM	10	8	4	2
720 ILCS 5.0/24-1.1	UNLAWFUL USE FIREARM BY FELON	1	0	0	0
720 ILCS 5.0/24-1.1-A	UUW - WEAPON - FELON, POSSESS/USE FIREARM	1,116	1,011	854	667
720 ILCS 5.0/24-1.1-A	UUW - WEAPON - FELON/PAROLE-POSSESS/USE FIREARM PRIOR	78	97	128	77
720 ILCS 5.0/24-1.1-A	UUW - WEAPON - FELON POSS/USE FIREARM/PAROLE	0	0	0	33
720 ILCS 5.0/24-1.1-A	UUW - WEAPON - FELON POSS/USE MACHINE GUN	0	0	0	2
720 ILCS 5.0/24-1.2	AGGRAVATED DISCHARGE FIREARM	0	1	0	0
720 ILCS 5.0/24-1.2-A-1	AGGR DISCHARGE FIREARM - BLDG/SCHOOL	3	2	1	2
720 ILCS 5.0/24-1.2-A-1	AGGR DISCHARGE FIREARM - OCCUPIED:BLDG	22	14	12	9
720 ILCS 5.0/24-1.2-A-2	AGGR DISCHARGE FIREARM - OCCUPIEDVEHICLE	45	37	40	16
720 ILCS 5.0/24-1.2-A-3	AGGR DISCHARGE FIREARM - PO/FIREMAN	5	2	3	2
720 ILCS 5.0/24-1.2-A-5	AGGR DISCHARGE FIREARM - 1 ST AID PERSON	3	3	1	0
720 ILCS 5.0/24-1.2-A-7	AGGR DISCHARGE FIREARM - SCH EMPLOYEE/SCHOOL	1	0	0	2
720 ILCS 5.0/24-1.5-A	RECKLESS DISCH FIREARM - ENDANGER	23	32	26	22
720 ILCS 5.0/24-1.5-B	RECKLESS DISCHARGE FIREARM - PASSENGER	5	7	5	3
720 ILCS 5.0/24-1.6-A-3-I	AGG UUW-UNDER 21 HANDGUN 1ST OFFNS	41	53	87	111
720 ILCS 5.0/24-1-A-4	UUW - WEAPON - CARRY/POSSESS FIREARM/2ND &SUBQ	43	22	15	7
720 ILCS 5.0/24-1-A-4	UUW - WEAPON - CARRY/POSSESS FIREARM/SCHOOL/PARK	77	65	26	35
720 ILCS 5.0/24-1-A-4	UUW - CARRY/POSSESS FIREARM/1ST	0	0	0	9
720 ILCS 5.0/24-1-A-5	UUW - WEAPON - SET SPRING GUN	9	8	4	2
720 ILCS 5.0/24-1-A-7-I	UUW - WEAPON - MACHINE GUN /AUTOMATIC WEAPON	9	8	6	5
720 ILCS 5.0/24-1-A-7-I	UUW - MACHINE GUN/AUTO WEAPON/SCH/PK	5	0	1	0
720 ILCS 5.0/24-1-A-7-II	UUW - WEAPON - RIFLE<16IN - SHOTGUN<18IN	40	35	42	29
720 ILCS 5.0/24-1-A-7-II	UUW - WEAPON - UUW/RIFLE<16IN SHOT-GUN<18IN/SCHOOL/PARK	8	5	2	1
720 ILCS 5.0/24-3.1-A1	UUW - UNLAWFUL POSSESS FIREARM <18	66	47	26	18
720 ILCS 5.0/24-3.1-A-1	UUW - UNLAWFUL POSSESS HANDGUN	46	40	44	47
720 ILCS 5.0/24-3.1-A-2	UUW - UNLAWFUL POSSESS FIREARM/DELQ <21	4	2	5	5
720 ILCS 5.0/24-3.1-A-2	UUW - UNLAWFUL POSSESS HANDGUN	32	19	20	16
720 ILCS 5.0/24-3.1-A-6	UUW - UNLAWFUL POSSESS FIREARM/ EXPLOSIVE BULLET	0	0	0	2
720 ILCS 5.0/24-3.5-C	UUW - PURCHASE 6<10 FIREARMS - FALSE INFORMATION	3	4	2	3
720 ILCS 5.0/24-3.5-C	UUW - WEAPON - PURCHASE 1 FIREARM/FALSE INFO	0	0	0	1
720 ILCS 5.0/24-3-A-A	UUW - WEAPON - SELL FIREARM MINOR/PUB HS/PARK	0	1	0	0
720 ILCS 5.0/24-3A-A	GUNRUNNING	2	3	3	3
720 ILCS 5.0/24-3-A-D	UUW - WEAPON - UNLAWFUL SALE FIREARM/FELON	1	4	0	0
720 ILCS 5.0/24-3-A-G	UUW - UNLAWFUL SALE FIREARM/BEFORE 72 HOURS	5	5	0	0
720 ILCS 5.0/24-3-A-H	UUW - WEAPON - UNLAWFUL SALE NON APPROVED FIRE-ARM	2	2	0	0
720 ILCS 5.0/24-3-A-I	UUW - SELL FIREARM TO MINOR W/O FOID	1	1	0	0
720 ILCS 5.0/24-3-A-K	SELL FIREARM/NO VALID FOID	0	0	2	2
720 ILCS 5.0/24-4	FAIL KEEP REGIS/FIREARM SALES	3	0	1	0
720 ILCS 5.0/24-5-A	DEFACE FIREARM ID MARKINGS	163	85	19	2
720 ILCS 5.0/24-5-B	POSS FIREARM W/DEFACED SERIAL NUMBER	0	6	9	11
720 ILCS 5.0/24-9-A	ALLOW MINOR ACCESS TO FIREARM	2	0	0	1
8/16/1990	FIREARMS FOR MINORS	0	1	0	0
8/20/1915	POSSESSION OF FIREARM IN MOTOR VEHICLE	0	1	1	0
8/20/1940	REGISTRATION OF FIREARMS	105	76	83	71
8/20/1950	UNREGISTERABLE FIREARMS	13	34	31	17
8-20-050(A)	WEAPONS VIOLATION POSS SAWD-OFF SHOTGUN	1	0	0	2
8-20-050(B)	WEAPONS VIOLATION OWN/POSS LONG GUN	0	0	3	0
8-20-090(A)	WEAPONS VIOLATION POSS FIREARM PRIOR REG RCPT	0	0	0	1
8-20-090(B)	WEAPONS VIOLATION FAIL RE-REGISTR FIREARM	3	3	3	0
8-20-140(C)	WEAPONS VIOLATION FAIL SECURE FIREARM	0	0	1	0
8-20-170(A)	WEAPONS VIOLATION SALE/TRANS HANDGUN	0	1	0	0
8-20-170(C)	WEAPONS VIOLATION UNLAWFUL LOAN FIREARM/AMMO	2	0	0	1
8-20-240	ACQUISITION/POSS FIREARM PROHIBITED BY LAW	2	2	0	0
8/24/1910	WEAPONS VIOLATION UNLAWFUL USE HANDGUN	4	10	15	13
TOTAL		2,323	2,043	1,705	1,436

Source: CHRIS_DWH_ARREST ALL query on 28 Dec 2007.
Note: Excludes arrests for toy or replica guns.

GUNS RECOVERED, 1991 TO 2006



* Note: The 2006 figure includes the number of guns received during two gun turn-ins: 2,944 guns were turned in on April 29, 2006, and 1,115 guns were turned in on December 16, 2006.

FY2007 CPS SPENDING ON SCHOOL SECURITY

(1) CPS Security Spending by Expenditure Category				
Security Personnel Salary & Benefits:				
- School buildings, Rapid Response, Night Stalker		$62,044,345		
- AIO offices, Medill, Warehouse, eLearning		1,338,402		
- Central Office Security and Administration		1,706,204		
Salary & Benefits Sub-total (A)				65,088,951
Chicago police patrol service for high schools		8,000,000		
Security camera, metal detector, uniforms, and supplies		968,741		
Student ID cards supply		252,162		
Volunteer background check		40,000		
Non-Personnel Cost Sub-total (B)				9,260,903
Total FY07 Security Spending (A+B)				$74,349,854
(2) CPS Security Spending by Funding Sources				
General Fund		$ 1,053,726		
Tort Fund		53,580,005		
PBC O&M		4,675		
Board-funded Security Cost (a)				54,638,407
Supplemental General State Aid Fund		18,835,665		
Federal Title I and IV		875,782		
Other Government Funded Security (b)				19,711,447
Total FY07 Security Spending (a+b)				$74,349,854
CPS Average Cost of		Avg Cost		
a desktop computer		$ 1,000		
a laptop computer		$ 1,400		
science textbook		$ 58		
English textbook*		$ 61		

* Information Source: Purchasing

BUREAU OF SAFETY AND SECURITY
FIREARMS ON SCHOOL PROPERTY

	DATE	UNIT	SCHOOL	GUN RECOV-ERED	WHERE RE-COVERED	PERMANENT M/D ON-SITE	HOW GUN ENTERED SCHOOL	STUDENT	HOW DIS-COVERED
5	12/13/2007	1030	Dunbar H.S.	No	DNA	Yes	UNK	Yes	Teacher Observation
4	12/3/2007	1390	Hyde Park H.S.	Yes	Off Property	Yes	Bookbag	Yes	Police Investigation
3	11/21/2007	3030	Dewey Elm.	Yes	Off Property	No	UNK	Yes	Teacher Observation
2	11/20/2007	1640	Wells H.S.	No	DNA	Yes	On person	No	Teacher Observation
1	11/9/2007	1340	Gage Park H.S.	Yes	In School	Yes	Book Bag Front Door	Yes	Security Check X-ray
	TOTAL FOR 2007/08 (through Dec. 14, 2007)						**5**		
6	6/4/2007	6970	Tanner Elm.	Yes	In School	No	Bookbag	Yes	Student Turn In
5	4/20/2007	3000	Delano Elm.	Yes	On Property	No	Not in School-On Campus	DNA	Teacher Observation
4	4/10/2007	1010	CVS H.S.	Yes	On Property	Yes	On person	Yes	Police Investigation
3	1/25/2007	1030	Dunbar H.S.	Yes	In School	Yes	On person	Yes	Police Investigation
2	1/16/2007	7380	South Shore	Yes	In School	Yes	Bookbag	Yes	Security Check X-ray
1	1/3/2007	7210	Higgins	Yes	On Property	Yes	Not in School-On Campus	DNA	Janitor Found
	TOTAL FOR 2006/07						**6**		