No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD, *ET AL.*,

PETITIONERS,

v.

CITY OF CHICAGO, *ET AL.*

RESPONDENTS.

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

BRIEF FOR STATE FIREARM ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

TABLE OF CONTENTS

Page

INTERESTS OF THE *AMICI* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT.. 3

I. *Dred Scott*, *Cruikshank*, and their progeny reflect a sad legacy, and the Court should not perpetuate their obsolete anti-incorporation views. 3

II. Rights that are deeply rooted in this nation's history and traditions, or that are implicit in the concept of ordered liberty, are incorporated as against the States under the Fourteenth Amendment....................... .10

III. The Second Amendment rights are deeply rooted in this nation's history and traditions, are implicit in the concept of ordered liberty, and are properly incorporated as against the States under the Fourteenth Amendment. 11

CONCLUSION 21

TABLE OF AUTHORITIES

Page

DECLARATION OF INDEPENDENCE

THE DECLARATION OF INDEPENDENCE (U.S. 1776) 4

CONSTITUTIONS

PENNSYLVANIA CONSTITUTION (1776) 13

VERMONT CONSTITUTION (1777)................................. 14

VERMONT CONSTITUTION (1786)................................. 14

CASES

Beard v. United States, 158 U.S. 550 (1895) 14, 15

Chandler v. Florida, 449 U.S. 560 (1981)................. 21

Crandall v. Nevada, 73 U.S. 35 (1867) 16

District of Columbia v. Heller, 128 S. Ct. 2783 (2008) 2, 9, 16, 19

Duncan v. Louisiana, 391 U.S. 145 (1968) 10

Gourko v. United States, 153 U.S. 183 (1894) 15

Mapp v. Ohio, 367 U.S. 643 (1961) 10

Presser v. State of Illinois, 116 U.S. 252 (1886) 8, 9, 12

Reno v. Flores, 507 U.S. 292 (1993) 10

TABLE OF AUTHORITIES
(continued)

Page

Rowe v. United States, 164 U.S. 546 (1896) 15

Scott v. Sandford, 60 U.S. 393 (1857) 4, 5, 12

Thomson v. United States, 155 U.S. 271 (1894) 15

United States v. Cruikshank, 92 U.S. 542 (1875) 5, 6, 11

United States v. Guest, 383 U.S. 745 (1966) 17

United States v. Miller, 307 U.S. 174 (1939) 9

Washington v. Glucksberg, 521 U.S. 702 (1997) 10

STATUTES

36 U.S.C. § 40701 (2009) 18

36 U.S.C. § 40721 (2009) 18

36 U.S.C. § 40725 (2009) 18

MUNICIPAL ORDINANCES

Municipal Code of Chicago, Ill. § 8-20-010 19

OTHER AUTHORITIES

THE FEDERALIST NO. 28 (Alexander Hamilton) 14

BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) 13

TABLE OF AUTHORITIES (continued)

Page

HOLDRIGE O. COLLINS, HISTORY OF THE ILLINOIS NATIONAL GUARD (1884) 6, 7, 8

CHARLES LANE, THE DAY FREEDOM DIED (2008)......... 5

http://odcmp.com/about_us.htm 18

Maureen Martin, *Handgun Ban Plaintiff Urges Gun Rights in Crime Ridden Neighborhoods*, The Heartland Institute, Nov. 9, 2009 20

David Savage, *Supreme Court to Hear Challenge to Chicago Gun Law*, Chicago Breaking News, Sept. 30, 2009 20

INTERESTS OF THE *AMICI*[1]

The *amici* are state firearm associations from over forty of the fifty states.[2] The *amici* represent the interests of millions of citizens, members, and firearm owners across the United States from all

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part. In addition to the amici curie, the National Rifle Association Civil Defense Fund made a monetary contribution to the preparation of this brief.

[2] The state firearm associations represented include: Alabama Rifle and Pistol Ass'n, Alaska Outdoor Council, Arizona State Rifle & Pistol Ass'n, California Rifle & Pistol Ass'n, Colorado State Shooting Ass'n, Delaware State Sportsmen's Ass'n, Florida Sport Shooting Ass'n, Georgia Sport Shooting Ass'n, Idaho State Rifle & Pistol Ass'n, Indiana State Rifle & Pistol Ass'n, Iowa State Rifle & Pistol Ass'n, Kansas State Rifle Ass'n, League of Kentucky Sportsmen, Louisiana Shooting Ass'n, Pine Tree State Rifle & Pistol Ass'n (Maine), Maryland State Rifle & Pistol Ass'n, Gun Owners Action League (Massachusetts), Michigan Rifle & Pistol Ass'n, Minnesota Rifle & Revolver Ass'n, Mississippi State Firearm Owners' Ass'n, Missouri Sport Shooting Ass'n, Montana Rifle & Pistol Ass'n, Nebraska Shooting Sports Ass'n, Nevada State Rifle & Pistol Ass'n, Gun Owners of New Hampshire, Inc., Ass'n of New Jersey Rifle & Pistol Clubs, Inc., New Mexico Shooting Sports Ass'n, New York State Rifle & Pistol Ass'n, North Carolina Rifle & Pistol Ass'n, Ohio Rifle & Pistol Ass'n, Oregon State Shooting Ass'n, Pennsylvania. Rifle & Pistol Ass'n, Rhode Island State Rifle & Revolver Ass'n, Gun Owners of South Carolina, South Dakota Shooting Sports Ass'n, Tennessee Shooting Sports Ass'n, Texas State Rifle Association, Utah State Rifle & Pistol Ass'n, Vermont Federation of Sportsman's Clubs, Inc., Virginia Shooting Sports Ass'n, Washington State Rifle and Pistol Ass'n, and Wisconsin Firearm Owners, Ranges, Clubs and Educators, Inc. (collectively, "State Associations").

walks of life and with political views that cover the spectrum. What unites the State Associations in this brief is their common interest in ensuring that the right of the people to keep and bear arms is properly recognized as a fundamental right incorporated as against the States.

This Court's decision in *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008), confirmed that the Second Amendment reflects an individual right to keep and bear arms for the purpose of self-defense. The State Associations now ask the Court to confirm that the Second Amendment rights—like those of the First and Fourth Amendments—apply to the states as well as to the federal government.

This issue has concrete implications for the State Associations. Like all Americans, the State Associations' members live in a mobile society. Those members frequently participate in competitions, hunting, or other sporting events in other states. Similarly, the members' jobs will often cause them to move to other states, perhaps several times during their lives. Whether or not the members may exercise the fundamental rights recognized in the Second Amendment should not be dependent on their particular latitude and longitude within these United States of America.

SUMMARY OF THE ARGUMENT

This Court has never squarely addressed whether the Second Amendment is incorporated as against the States under the incorporation standards of modern jurisprudence. Opponents of incorporation will doubtlessly argue for the perpetuation of the anti-incorporation views from cases such as

Cruikshank and *Presser*. Those cases were written during a time of open animus toward groups such as African-Americans and labor unions, and they bear the stigma of goal-oriented decisions. This Court has long since disavowed both the biases reflected in those decisions and their view of incorporation standards.

When judged by the Court's modern standards, the question of incorporation of the Second Amendment becomes self-evident. The Second Amendment right to keep and bear arms for purposes of self-defense is both deeply rooted in this nation's history and traditions, and implicit in the Anglo-American concept of ordered liberty. Indeed, the Court admitted as much in both *Cruikshank* and *Presser*. Thus, the Second Amendment is properly incorporated as against the States.

ARGUMENT

I. *DRED SCOTT*, *CRUIKSHANK*, AND THEIR PROGENY REFLECT A SAD LEGACY, AND THIS COURT SHOULD NOT PERPETUATE THEIR OBSOLETE ANTI-INCORPORATION VIEWS.

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among them are Life, Liberty, and the pursuit of Happiness; that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Despite the magnitude of this pronouncement, the United States historically has been inconsistent in how it has applied the precept of fundamental rights. This inconsistency often manifested itself in situations where the person who might have invoked these rights was not of a favored class, such as slaves, former slaves or labor union members.

In 1857, the United States Supreme Court issued its infamous opinion in *Dred Scott*. *Scott v. Sandford*, 60 U.S. 393 (1857). Dred Scott was a slave who sued for his freedom in federal court, asserting diversity of citizenship as a basis for invoking the jurisdiction of the federal court. Chief Justice Taney, writing for the Court, held that the federal courts did not have jurisdiction over Dred Scott's claim because African-Americans that were descendents of slaves were not citizens of the United States. In support of this holding, he cited a "parade of horribles" that would occur if the Court were to hold otherwise:

> It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in

> public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went.*

60 U.S. at 417 (emphasis added).

Sixteen years later, on Easter Sunday 1873, William J. Cruikshank and 140 other white Democrats attacked a group of African-American Republicans who were defending the Grant Parish courthouse in Louisiana. After the battle, Cruikshank took charge of the African-American prisoners, marched them away from the courthouse two-by-two, and had these unarmed men executed. Cruikshank himself made it a point to line up two of the prisoners in an attempt to kill them both with a single shot. CHARLES LANE, THE DAY FREEDOM DIED (2008) at 106.

Cruikshank was subsequently tried and convicted of violating these U.S. citizens' civil rights, including their right to assemble and petition the government for a redress of grievances under the First Amendment and their right to keep and bear arms under the Second Amendment.[3]

Eventually, the case made its way to the United States Supreme Court, where the Court reversed all of the convictions. *United States v. Cruikshank*, 92 U.S. 542 (1875). To support its holding, the Court found that neither the First Amendment nor the Second Amendment was

[3] One of the witnesses against Cruikshank was Levi Nelson, who had successfully played dead after Cruikshank's above-mentioned attempt to kill two of the African-Americans with a single shot. THE DAY FREEDOM DIED at 166-68.

incorporated as against the states precisely *because* these rights were fundamental rights and not created by the Constitution:

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government.
>
> …
>
> The second and tenth counts are equally defective. The right specified there is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.

92 U.S. at 551-553.

Mere months after Cruikshank executed those African-American citizens, the United States entered a prolonged depression, beginning with the Great Panic of 1873. This led to a fear of the rising influence of labor unions. In Illinois, it also led to the formation of the privately-funded and restricted-membership Illinois National Guard.

The largest single "subscriber" or financial backer of this paramilitary force was George M. Pullman. HOLDRIDGE O. COLLINS, HISTORY OF THE ILLINOIS NATIONAL GUARD (1884) at 14. Mr. Pullman, of course, is perhaps best known for inventing and promoting the Pullman railroad car and his role in taking control of Union Pacific Railroad Company in 1871. As regards the criteria for membership, one of

the first resolutions of this regiment proclaimed that "no company of men shall be admitted to this Regimental organization, unless the company or body of men shall be recruited by recruiting officers regularly appointed by the Battalion Commander." HISTORY OF THE ILLINOIS NATIONAL GUARD at 9-10.

As later euphemistically described by one of the founding members of the Illinois National Guard: "The necessity for such a force was more apparent in the large cities and populous communities, where the civil authorities needed a powerful aid to check lawlessness and disorder." HISTORY OF THE ILLINOIS NATIONAL GUARD at 3.

There can be little doubt as to partiality of the Illinois National Guard in favor of the railroads and against the unions:

> There was a very general feeling that the Railroads had acted with oppression toward their employees, and the public almost universally sympathized with the laborers and mechanics. It was evident that unless the troubles were checked at this point, the Country would be thrown into revolution. The time had come for the Militia to show whether it were capable of the stern duty and exacting discipline of the soldier.
>
> . . .
>
> The usefulness of a well trained and reliable Militia was practically demonstrated to the Citizens of this State by the preservation of millions of dollars in Railroad, Mining and

> Manufacturing interests and the prompt suppression of disorder in July 1877.

Id at 64, 96.

In response to the threat represented by this privately-funded force, Herman Presser and other citizens joined the "Lehr und Wehr Verein."[4] This Illinois corporation was formed for the express purpose of "improving the mental and bodily condition of its members so as to qualify them for the duties of citizens of a republic. Its members shall, therefore, obtain, in the meetings of the association, a knowledge of our laws and political economy, and shall also be instructed in military and gymnastic exercises."[5]

When Presser and other members of this organization subsequently drilled with rifles, Presser was arrested for, and convicted of, violating the Illinois Military Code, which prohibited associating, drilling, or parading with arms by any group not licensed by the State of Illinois. His case reached the United States Supreme Court as *Presser v. State of Illinois*, 116 U.S. 252 (1886).

Citing *Cruikshank*, the Court again held neither the First Amendment nor the Second Amendment protected Mr. Presser from prosecution by the state of Illinois. 116 U.S. at 264-68. As before, the Court stated that the Second Amendment did not act as a prohibition against the states *because* the right to keep and bear arms is a fundamental right

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[4] "Lehr und Wehr Verein" roughly translates to "Education and Defense Association."

[5] See *Presser v. State of Illinois*, 116 U.S. 252, 256 (1886).

that was not dependent on the Constitution for its creation:

> It was so held by this court in the case of *U.S. v. Cruikshank*, 92 U.S. 542, 553, in which the chief justice, in delivering the judgment of the court, said that the right of the people to keep and bear arms "is not a right granted by the constitution. Neither is it in any manner dependent upon that instruments for its existence."

116. U.S. at 265.

These cases manifest an animus toward minorities and others that would not be tolerated by a jurist today. Yet they represent the lynchpin of the argument articulated by the opponents of incorporation.[6] The Court's refusal in these opinions to acknowledge incorporation of the Second Amendment rights is no more proper than its refusal to acknowledge incorporation of the First Amendment rights.

Nonetheless, each of these cases admits that the right to keep and bear arms is a fundamental right of citizenship under a free government. To that end, and as discussed below, these holdings confirm that the Second Amendment right to keep and bear arms is properly incorporated as against the States.

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[6] As the Court noted in *Heller*, *United States v. Miller*, 307 U.S. 174 (1939) did not even purport to be a thorough examination of the Second Amendment (which is not surprising given that the respondent made no appearance in the case, neither filing a brief nor appearing at argument). Neither did that opinion address the issue of incorporation whatsoever. As such, it is simply inapposite to the issue presently before the Court.

II. RIGHTS THAT ARE DEEPLY ROOTED IN THIS NATION'S HISTORY AND TRADITIONS, OR THAT ARE IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY, ARE INCORPORATED AS AGAINST THE STATES UNDER THE FOURTEENTH AMENDMENT.

As this Court has previously acknowledged, its earlier incorporation jurisprudence was not a model of consistency. *See Duncan v. Louisiana,* 391 U.S. 145 (1968). The Court's modern decisions have, however, consistently decided questions of incorporation based on a determination of whether the right at issue is a *fundamental* right.

The standard for determining whether a right is fundamental has been variously articulated as whether the right is "deeply rooted in this nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) or "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Reno v. Flores*, 507 U.S. 292, 303 (1993). Yet other cases have emphasized that such rights are "implicit in the concept of ordered liberty," *Mapp v. Ohio*, 367 U.S. 643, 650 (1961) or "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. at 150.

Regardless of which exact wording is used, it is clear that the right to keep and bear arms satisfies the modern standard for incorporation and should be recognized as applying against the states.

III. THE SECOND AMENDMENT RIGHTS ARE DEEPLY ROOTED IN THIS NATION'S HISTORY AND TRADITIONS, ARE IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY, AND ARE PROPERLY INCORPORATED AS AGAINST THE STATES UNDER THE FOURTEENTH AMENDMENT.

As referenced above, earlier cases from this Court held that the Second Amendment's rights were not incorporated as against the states *because* the right to keep and bear arms was a fundamental right that exists independently of the Constitution:

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government.
>
> …
>
> The second and tenth counts are equally defective. The right specified there is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.

United States v. Cruikshank, 92 U.S. 542 at 551-553.

> It was so held by this court in the case of *U.S. v. Cruikshank*, 92 U.S. 542, 553, in which the chief justice, in delivering the judgment of the court, said that the right of the people to keep and bear

> arms "is not a right granted by the constitution. Neither is it in any manner dependent upon that instrument for its existence."

Presser v. State of Illinois, 116 U.S. 252 at 265.

Those early decisions also acknowledged the scope of the fundamental rights recognized in the First and Second Amendments. As Justice Taney acknowledged in *Dred Scott*, if the Court had recognized descendents of slaves as citizens, those descendents would have had both "the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs" and the right to "keep and carry arms wherever they went." *Scott v. Sandford*, 60 U.S. 393 at 417.

Although not often admitted by opponents of incorporation of the Second Amendment, the right to self-defense—including the right to the use of arms and deadly force for self-defense—is indeed a right deeply rooted in this nation's history and traditions, and it is implicit in the Anglo-American concept of ordered liberty.

In 1765—eleven years before the founding fathers signed the Declaration of Independence—William Blackstone published his Commentaries on the Laws of England. In those Commentaries, Mr. Blackstone addressed the absolute right to personal security and the implications of that right.

> Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed in self defense, or in order to preserve them. For whatever

> is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion.
>
> …
>
> [In order] to vindicate these rights, when actually violated or attacked, the subjects of England are entitled . . . to the right of having and using arms for self-preservation and defense.

1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 126, 140 (1765).

> Self-defense therefore as it is justly called the primary law of nature, for it is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay even for homicide itself . . . .

3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 3-4 (1765).

This same right to bear arms for self-defense was also recognized from the earliest days of the United States. Within months of the signing of the Declaration of Independence, Pennsylvania adopted a state constitution. PENNSYLVANIA CONST. (September 28, 1776). In a foreshadowing of the Bill or Rights, Pennsylvania's Constitution included an explicit "Declaration of Rights of the Inhabitants of the Commonwealth or State of Pennsylvania." Among the fundamental rights set forth in that Declaration was a provision stating: "the people have a right to bear arms for the defense of themselves and the state." PENNSYLVANIA CONST. art. XIII.

A year and four days after the founding fathers signed the Declaration of Independence, Vermont also adopted a state constitution that included an express "Declaration of the Rights of the Inhabitants of the State of Vermont." VERMONT CONST (July 8, 1777). As with Pennsylvania's Constitution, Vermont's Declaration proclaimed that "the people have a right to bear arms for the defense of themselves and the state." VERMONT CONST. ch. 1, § XV (1777). When Vermont subsequently adopted a revised constitution in 1786, it continued to recognize that "the people have a right to bear arms for the defense of themselves and the state." VERMONT CONST. ch. 1, § XVIII (1786). Thus, both the early state constitutions that included an express Declaration of Rights acknowledged the right to keep and bear arms for self defense.

When Alexander Hamilton was advocating for the adoption of the United States Constitution, he once again reminded the People of the State of New York of the importance of the right to self-defense, stating that if "the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government." THE FEDERALIST No. 28 (Alexander Hamilton).

This Court has also acknowledged the right to self-defense, including the right to use a deadly weapon in self-defense. In the case of *Beard v. United States*, 158 U.S. 550 (1895), the Court reversed the murder conviction of Mr. Beard after he had defended himself against three brothers who came to take his cow. Writing for the majority,

Justice Harlan was unequivocal in recognizing the right to self-defense:

> The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life, or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, were necessary to save his own life, or to protect himself from great bodily injury.

158 U.S. at 564.

Beard is far from the only time this Court has acknowledged the right to use arms in self-defense. *See e.g.*, *Rowe v. United States*, 164 U.S. 546, 558 (1896) ("The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary, or what he had reasonable grounds to believe at the time was necessary, to save his life, or to protect himself from great bodily harm."); *Gourko v. United States*, 153 U.S. 183, 191 (1894) (recognizing the right of a person to deliberately arm himself, "provided he

rightfully so armed himself for purposes simply of self-defense"); *Thomson v. United States*, 155 U.S. 271, 283 (1894) ("The error here is the assumption that the act of the defendant in arming himself showed a purpose to kill formed before the actual affray. This was the same error we found in the instructions regarding the right of self-defense, and brings the case within the case of *Gourko v. U.S.*, previously cited, and the language of which we need not repeat.").

Most recently, the Court reaffirmed the fundamental nature of a person's right to self-defense, and that the Second Amendment embodied the fundamental nature of the individual's right to keep and bear arms for, *inter alia*, the purpose of protecting this right to self-defense. See *District of Columbia v. Heller*, 128 S. Ct. at 2817, 2821-22. Thus, the instant case implicates at least two fundamental rights that are deeply rooted in this nation's history and traditions and implicit in the Anglo-American concept of ordered liberty.

This case also implicates the fundamental right to travel among the several States.

> For all the great purposes for which the Federal Government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Crandall v. State of Nevada, 73 U.S. 35, 48-49 (1867).

> The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

United States v. Guest, 383 U.S. 745, 757 (1966).

The City of Chicago is a key hub affecting this right to travel from one State to another. It is the third largest city in the United States. Numerous interstate freeways run through Chicago, including I-55, I-57, I-80, I-88, I-90, and I-94. Like many large cities, Chicago actively solicits companies to relocate their businesses there. Boeing Aircraft is one of the better-known companies that have relocated to Chicago.

At the same time, the City of Chicago unapologetically bans the possession of handguns by all but a select group of its residents. This serves to deprive both the residents of Chicago and citizens of other states who may travel to, or through, Chicago of their right to bear arms for self-defense.

Consider the situation of a member of one of the State Associations who owns and keeps a handgun for self-defense. If her company were to relocate to the City of Chicago, she would be forced to make the Hobson's choice of forfeiting her fundamental right to keep and bear arms for self-defense, or giving up a good paying job in today's trying economic conditions. In other words, the ordinances enacted by the City of Chicago effectively

require her to forfeit one fundamental right—the right to keep and bear arms—to exercise another, her fundamental right of travel.

Consider also the situation of a State Association member who lives in a state north or west of Chicago, such as Montana, and wishes to compete in the National Matches at Camp Perry, Ohio. The National Matches are an annual firearms competition expressly authorized by federal statute. The National Matches consist of "rifle and pistol matches for a national trophy, medals, and other prizes [and] shall be held as prescribed by the Secretary of the Army." 36 U.S.C. § 40725 (2009). Along with the rest of the Civilian Marksmanship Program, the National Matches are supervised and controlled by a federally chartered corporation - the Corporation for the Promotion of Rifle Practice and Firearms Safety. 36 U.S.C. §§ 40701, 40721 (2009).[7]

The drive for our competitor from Billings, Montana to Camp Perry, Ohio is over 1,500 miles and requires more than 23 hours of driving time. The most direct route is along I-90 and takes the competitor directly through Chicago. According to the City of Chicago, however, our competitor may not

[7] The Civilian Marksmanship Program goes back to late 19th century efforts by U.S. military and political leaders to strengthen our country's national defense capabilities by improving the rifle marksmanship skills of members of the Armed Forces. The Civilian Marksmanship Program traces its direct lineage to 1903 when Congress and President Theodore Roosevelt established the National Board for the Promotion of Rifle Practice and the National Matches. The National Matches were first held in 1903, moved to Camp Perry, Ohio, in 1907, and continue to take place every summer at Camp Perry. The National Matches currently have well over 6,000 annual participants. *See generally*, http://odcmp.com/about_us.htm.

take that most direct route unless she is willing to sacrifice her fundamental right to self-defense and her right to bear arms for self-defense while en route.

In order for our competitor to avoid prosecution, any firearm she has with her must be "broken down in a nonfunctioning state." Municipal Code of Chicago, Ill. § 8-20-010(10). As the Court noted in *Heller*: "This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." 128 S. Ct. at 2818. Once again, the ordinances enacted by the City of Chicago effectively require her to forfeit one fundamental right—the right to keep and bear arms—to exercise another, her fundamental right of travel.[8]

Now consider the case of Otis McDonald—the petitioner in this matter. Otis McDonald is a 76-year old resident of the City of Chicago with a personal history that would make any citizen proud. He moved to Chicago when he was 16 years old. As an African American, few job opportunities were available to Mr. McDonald. While working at a series of menial jobs, he repeatedly applied for apprentice maintenance engineering positions. Mr. McDonald was finally hired for such a position at the University of Chicago on the condition that he go to school.

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[8] The choice of a female member for these illustrations is intentional. Admittedly, *some* citizens may be able to defend themselves against *some* attacks without arms. However, it would be no more proper to effectively limit the fundamental right to self-defense to young males with above-average strength and skills than it would be to effectively limit the right to vote to those who could timely complete a grueling obstacle course.

In order to pay for college, Mr. McDonald volunteered for the U.S. Army and was stationed in Germany. True to his word, he eventually obtained his associates degree in Applied Science. Mr. McDonald also played a pioneering role in integrating his labor union, working his way up through the ranks until he became the head of the union local.

Now retired, Mr. McDonald is a community activist, working with the Chicago Alternative Policing Strategies program to address crime and community problems in his south side neighborhood. This has led to Mr. McDonald being repeatedly threatened by drug dealers and other criminals. Nonetheless, the City of Chicago will not allow Mr. McDonald to keep a handgun in the city for his own defense. This trampling of Mr. McDonald's fundamental right to keep and bear arms for his self-defense led directly to the instant suit.[9]

Otis McDonald is a citizen of the United States of America and a member of both classes of citizens unfairly targeted in *Cruikshank* and *Presser*. Mr. McDonald is no less worthy of the fundamental right to keep and bear arms for self-defense than any other citizen. This Court should not permit the City of

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[9] *See generally*, David Savage, *Supreme Court to Hear Challenge to Chicago Gun Law*, Chicago Breaking News, Sept. 30, 2009 (available at http://www.chicagobreakingnews.com/mt-search.cgi?search=otis+mcdonald&IncludeBlogs=2&limit=20); Maureen Martin, *Handgun Ban Plaintiff Urges Gun Rights in Crime Ridden Neighborhoods*, The Heartland Institute, Nov. 9, 2009 (available at http://www.heartland.org/article/26330/Handgun_Ban_Plaintiff_Urges_Gun_Rights_in_CrimeRidden_Neighborhoods.html).

Chicago to deprive this great American of such a fundamental right.

Finally, in its brief in opposition to the petition for a writ of certiorari, the City of Chicago argued to justify its trampling of the fundamental right to keep and bear arms as a "novel social experiment." It is beyond peradventure that fundamental rights are not appropriate subjects for such experiments.[10] For confirmation of this principle, one need look no further than the "social experiment" that William J. Cruikshank and his cohorts attempted to impose on the newly-emancipated African-Americans that sad Easter morning in 1873.

The right to keep and bear arms, like the right to self-defense itself, is a right that is deeply rooted in this nation's history and traditions, and it is implicit in the Anglo-American concept of ordered liberty. As such, the right to keep and bear arms is properly incorporated as against the States by the Fourteenth Amendment's Due Process Clauses.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that this Court hold that the Second Amendment's right to keep and bear arms is incorporated as against the States, and reverse the decision of the court below.

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[10] *See, e.g., Chandler v. Florida*, 449 U.S. 560, 574 (1981) (holding that the Court could consider permitting Florida to allow photographic or broadcast coverage of a criminal trial only because the Court's precedent "did not announce a constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial of due process").

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