No. 08-1521

IN THE
Supreme Court of the United States

OTIS MCDONALD, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

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

BRIEF OF *AMICI CURIAE* AMERICAN CITIES, COOK COUNTY, ILLINOIS AND POLICE CHIEFS IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae comprise ten major American cities (Baltimore, Maryland; Columbus and Cleveland, Ohio; Oakland, Richmond, Sacramento and San Francisco, California; Portland, Oregon; Philadelphia, Pennsylvania; and Seattle, Washington); Cook County, Illinois; the Commissioner of the Philadelphia Police Department, and the Chief of Police for the City of Seattle.[1] Each *amicus* is actively engaged in efforts to reduce the costs, both social and economic, inflicted by gun-related violence upon local, and especially urban, communities, to the full extent authorized by their State Constitution and/or statute(s):

(1) *Amici* Oakland, Richmond, Sacramento, and San Francisco, California have plenary authority to pass local regulations in furtherance of their police powers, as long as they do not conflict with the Constitution and laws of the State or the United States. CAL. CONST. art. XI, § 7; CAL. GOV'T CODE § 37100 (2009). Such ordinances include the regulation of firearms except in the

[1] In compliance with Rule 37.6 of this Court, *amici curiae* represent that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 7 days prior to the due date of *amici curiae's* intention to file this brief.

limited fields excluded by statute. CAL. GOV'T CODE §§ 53071, 53071.5 (2009); CAL. PENAL CODE § 12026 (2009).

(2) *Amicus* Baltimore, Maryland has plenary authority to enact local laws in furtherance of its police powers, subject to the Constitution and public general laws of the State. MD. CONST., art. XI-A, § 3; BALT. CITY CHARTER (1996 ed.), art. II, §§ 27, 47. Local governments in Maryland may regulate firearm purchase, ownership, possession, transportation and discharge as provided by statute. MD. CODE ANN., Criminal Law, § 4-209(a), (b) (2009); MD. CODE ANN., Criminal Law, § 4-209(d) (2009).

(3) *Amicus* Columbus and Cleveland, Ohio have plenary authority to adopt and enforce within their limits regulations in furtherance of their police powers, as long as they do not conflict with the general laws of the State. OHIO CONST. art. XVIII, § 3 (2009).

(4) *Amicus* Portland, Oregon has plenary authority to pass local laws in furtherance of its police powers, subject to the Constitution and the criminal laws of the State. OR. CONST. art. XI, § 2 (2007); *City of Portland v. Dollarhide,* 714 P.2d 220, 224-25 (Or. 1986). The State maintains exclusive authority over certain areas of firearms regulations,

however. OR. REV. STAT. §§ 166.170 to 166.176 (2007).

(5) *Amicus* Philadelphia, Pennsylvania, as a First Class City governed by a Home Rule Charter, has plenary authority to enact ordinances, rules and regulations in furtherance of its police powers, as long as they do not conflict with State law. PA. CONST. art. 9, § 2; 53 PA. CONS. STAT. Ann. § 13133 (2009). Thus, the City has been granted power coextensive with the General Assembly with respect to its municipal functions, limited only by the Charter, the Constitution or the acts of the General Assembly itself. *See County of Delaware v. Township of Middletown*, 511 A.2d 811, 813 (Pa. 1986). The Commissioner of the Police Department, Charles H. Ramsey, is an official of the City.

(6) *Amicus* Seattle, Washington has plenary authority to adopt and enforce within its limits regulations in furtherance of its police powers, as long as they do not conflict with the general laws of the State. WASH. CONST. art. XI, § 11 (2009). Regulations relating to firearms, however, have to be authorized by statute. WASH. REV. CODE ANN. §§ 9.41.290 & 9.41.300 (2009). The Chief of Police, Interim Chief John Diaz, is an official of the City's Police Department.

(7) *Amicus* Cook County, Illinois, as a Home Rule county, has plenary authority to pass local laws in furtherance of its police powers, subject to the Constitution and as long as the State legislature has not specifically declared its exercise of authority over the subject area to be exclusive. ILL. CONST. art. VII, § 6(a), (i) (2009).

Based on their plenary authority to pass laws in furtherance of their police powers, *amici* cities and Cook County stand in the shoes of their respective States, and must therefore comply with the Fourteenth Amendment and any of the Bill of Rights that it incorporates. *Avery v. Midland County,* 390 U.S. 474, 480 (1968). Accordingly, except as otherwise stated in this brief, all references to the "State" or "States" include *amici* as local governments within their respective States.

Like Respondent Chicago, *amici* have suffered extensive loss of life, threats to the safety and security of law enforcement personnel, disruption to their economies, and massive health care costs associated with gun-related violence. They have developed regulatory programs to address the particular risks and threats posed by gun-related violence in their own communities. *Amici* thus have a critical interest in ensuring that they and their States retain maximum flexibility to counter the risks of guns and to protect public safety through reasonable firearms regulations. Incorporation of the right to bear arms under the Second Amendment will handcuff the ability of *amici* and other local

governments to respond to gun-related violence in their communities and impede their efforts to tailor laws to address their individual situations.

SUMMARY OF THE ARGUMENT

The Second Amendment recognizes an individual right to bear arms that preexisted the Constitution and the founding of the Republic. It has codified that right for the limited purpose of ensuring that the Federal Government does not interfere with the ability of the States to raise citizen militias. In other words, the Amendment's purpose makes clear that it is essentially a "federalism provision" designed to protect the States and their citizens from excessive federal power. In view of the Second Amendment's stated purpose, it makes no sense to incorporate the right to bear arms against the States.

The States, as independent sovereigns and through the exercise of their plenary police powers, have long regulated the right of their own citizens to bear arms. The right had existed in the common law, long before the Framers chose to codify it in the Second Amendment. Incorporation would disrupt the delicate federal-state balance struck by the Constitution by forcing the States to regulate in accordance with a uniform federal constitutional standard. It would hamper the States' exercise of their own judgment to tailor laws and regulations to the conditions and problems involving gun-related violence that they see as prevailing in their local communities. It would also handcuff the States in their experimentation in local communities with solutions for gun-related violence.

An inherent tension exists between an individual's exercise of his or her Second Amendment right to bear arms in self-defense and the States' police powers to ensure the health, safety and welfare of all of their citizens. As this Court has noted, the Second Amendment right is not unlimited and is subject to presumptively valid regulatory measures. But the States should retain the prerogative to define the limits of this right consistent with the exercise of their police powers and outside the shadow of any federal constitutional standard.

Incorporation would result in an unwarranted intrusion by the Federal Government into a field that falls exclusively within the States' police powers. The States have a paramount interest in protecting their citizens and property from loss of life, injury and damage occasioned by violence and breach of peace. Even if each individual enjoys the right to bear at least some sort of arms for self-defense, the exercise of that right carries with it the risk of violence and breach of peace, which the States naturally would want to minimize for the good of the community as a whole.

At bottom, the Second Amendment right cannot be considered implicit in the concept of ordered liberty, so as to justify its incorporation under the Due Process Clause of the Fourteenth Amendment. Instead of promoting social order, justice and peace, it functions in situations where the rule of law has broken down, and the States may have to call their citizens to militia duty under their emergency powers. While the notion of citizens using force of

arms to protect themselves from harm is not unreasonable or unjustified in a vacuum, it must be tempered in a community setting in which each citizen must conduct himself so as not to cause unnecessary injury or death to fellow citizens.

ARGUMENT

I. INCORPORATION OF THE SECOND AMENDMENT RIGHT AGAINST THE STATES WOULD DISRUPT THE DELICATE FEDERAL-STATE BALANCE

In *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008), this Court construed the right protected by the Second Amendment as an individual right to keep and bear arms. *Id.* at 2799. This right, however, "'is not a right granted by the Constitution [and] [n]either is it in any manner dependent upon that instrument for its existence.'" *Id.* at 2797 (quoting *United States v. Cruikshank,* 92 U.S. 542, 553 (1876)). Rather, it is a right born of English common law, *id.* at 2805, and the Second Amendment merely protects it from infringement by Congress, *id.* at 2797-98.

In *Cruikshank,* this Court further observed that a State, through the exercise of its police powers, may have already provided to its citizens protection of this right that was subsequently recognized and guaranteed by the Second Amendment. 92 U.S. at 553 (quoting *New York v. Miln,* 36 U.S. (11 Pet.) 102, 139 (1837)). Accordingly, in cases of alleged

infringement of the right by a fellow citizen, an aggrieved complainant should look not to the Second Amendment but to the State for relief. *Id. Accord Presser v. Illinois,* 116 U.S. 252, 267-68 (1886).

The preceding observations made in *Heller* and *Cruikshank* about the nature of the right recognized by the Second Amendment lead to the conclusion that incorporation of this right against the States would be inconsistent with constitutionally cherished principles of federalism. When the Second Amendment came into being, the States had already recognized the right in the common law and provided for its protection and regulation. *See, e.g.,* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America,* 25 LAW & HIST. REV. 139, 162-164 (2007) (summarizing various State and local laws in force during the Revolutionary period that limited the times and places where guns could be used); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control,* 73 FORDHAM L. REV. 487, 505-12 (2004) (discussing several categories of State laws regulating firearms in the 18th century). All that the Second Amendment did was to prevent the Federal Government from infringing the right and thereby interfering with the ability of the States to muster citizen militias. Incorporation therefore would be inconsistent with the Second Amendment's original intent and would infringe upon the States' sovereignty to regulate the right to bear arms in accordance with and in response to the circumstances and needs of their local communities, and to experiment with legislative

and regulatory solutions to problems of gun-related violence.

A. The Second Amendment Plays a Structural Role in Preventing Federal Elimination of State Militias.

This Court has held that the First Amendment does more than just safeguard a right for its own sake; it plays a structural role "in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring) (observing that the First Amendment's structural role "entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication"). Similarly, in *Heller,* this Court reaffirmed that the Second Amendment has its own structural role in preserving what the Founders viewed to be a cornerstone of a free country—namely, the States' ability to raise citizen militias, given that standing armies were disfavored. 128 S. Ct. at 2800-01. Unlike the First Amendment, however, the Second Amendment does not also safeguard a right for its own sake; it does so only as a means to the end of preserving citizen militias. *Id.* at 2801.

The *Heller* Court observed that history had shown

> that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a

> select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.

128 S. Ct. at 2801. No differently, and as its prefatory clause makes clear, the Second Amendment codified the right to bear arms in order "to prevent the elimination of the militia." *Id.* "[T]he threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution." *Id. See also United States v. Miller,* 307 U.S. 174, 179 (1939) ("The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.").

In *Presser,* it was this recognition of the Second Amendment's limited purpose that led this Court to conclude that the Amendment operates as "a limitation only upon the power of Congress and the National government, and not upon that of the States." 116 U.S. at 265. Because the right to bear arms preexisted the Constitution, its codification in the Second Amendment was merely a stipulation that the right shall not be infringed *by Congress*. *Id. Presser* thus upheld the constitutionality of sections of the State of Illinois' Military Code that forbade men from associating together as military organizations, or drilling or parading with arms in

cities and towns unless authorized by law. *Id.* at 264-65.

As *Presser* implies, it makes no sense for the Second Amendment to constrain the States when it is the States' activities that the Framers sought to protect from federal interference, namely, raising militias from the ranks of their able-bodied citizens. *See Miller,* 307 U.S. at 178-79 (describing the Militia that the States were expected to maintain and train as comprising "all males physically capable of acting in concert for the common defense" and "bearing arms supplied by themselves and of the kind in common use at the time").

Given its structural role, the Second Amendment should be understood as a "federalism provision" that resists incorporation. Although the underlying right to bear arms is an individual right, the Second Amendment does not create the right. *Heller,* 128 S. Ct. at 2797; *Cruikshank,* 92 U.S. at 553. And while the Second Amendment admittedly does protect the right itself from infringement, it does so for the purpose stated in its prefatory clause—to prevent the Federal Government from eliminating State militias. *Heller,* 128 S. Ct. at 2801; *Presser,* 116 U.S. at 265. It therefore makes no sense to bind the States, via the Fourteenth Amendment, to the same restriction as the Federal Government when they are the indirect beneficiaries of the Second Amendment and when it was well understood that they could and did recognize a right to bear arms in their own fashion. *Heller,* 128 S. Ct. at 2802-03 (describing pre-Second Amendment provisions in the constitutions of

Massachusetts, North Carolina, Pennsylvania and Vermont codifying a right to bear arms).

B. The States Should Retain Their Independence and Autonomy with Respect to Regulation of the Second Amendment Right.

Under the Constitution's system of dual sovereignty, it is essential that the States "remain independent and autonomous within their proper sphere of authority." *Printz v. United States,* 521 U.S. 898, 928 (1997). In this case, the Second Amendment right to bear arms falls within the States' proper sphere of authority under at least two areas of substantive law, namely, criminal law and tort law, because as this Court has held, "the inherent right of self-defense has been central to the Second Amendment right." *Heller,* 128 S. Ct. at 2817; *see also id.* at 2801 (concluding that self-defense is the central component of the right).[2] Incorporation of the right would therefore interfere with the States' recognized independence and autonomy to regulate in the fields of criminal law and tort law.

First, self-defense can serve as a justification for the use of physical force in the context of criminal liability. *See, e.g.,* CONN. GEN. STAT. § 53a-19 (2008); DEL. CODE ANN. tit. 11, § 464 (2009); GA. CODE ANN.

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[2] More specifically, *Heller* described the right to bear arms as having to do with the "home, where the need for defense of self, family, and property is most acute." 128 S. Ct. at 2817. *See also id.* at 2821 & 2822.

§ 16-3-21 (2009); 720 ILL. COMP. STAT. 5/7-1 through 7-9 (2010); N.J. STAT. ANN. § 2C:3-4 (2009); N.Y. PENAL LAW § 35.15 (2009); 18 PA. CONS. STAT. § 505 (2009); TEX. PENAL CODE ANN. § 9.32 (2009). The States, of course, "possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac,* 456 U.S. 107, 128 (1982)). Consistent with that view, this Court has in the past dismissed, for want of jurisdiction, appeals challenging the trial court's definition of the right of self-defense to the jury because they fail to raise a substantial federal question. *Hart v. Virginia,* 298 U.S. 34, 35 (1936) (challenge brought under the Due Process and Equal Protection Clauses); *Kelley v. Oregon,* 273 U.S. 589, 590-91 (1927) (challenge made generally under the Constitution). *See also Hankerson v. North Carolina,* 432 U.S. 233, 244-45 (1977) (holding that a jury instruction on the burden of proof for self-defense is essentially a question of state law). This Court has also declined to find a due process violation in the State of Ohio's common-law practice of requiring self-defense to be proven by the defendant at trial. *Martin v. Ohio,* 480 U.S. 228, 236 (1987) (adding that the question of whether Ohio's holdover practice violates the Constitution "is not answered by cataloging the practices of other States").

Second, self-defense can serve as an affirmative defense to the tort of wrongful death. *See, e.g., Hargress v. Montgomery,* 479 So. 2d 1137 (Ala. 1985); *Ewurs v. Pakenham,* 290 N.E.2d 319 (Ill. App. Ct. 1972); *Sturgeon v. Baker,* 227 S.W.2d 202 (Ky. 1950); *Ross v. Glaser,* 559 N.W.2d 331 (Mich. Ct. App. 1996); *Young v. Warren,* 383 S.E.2d 381 (N.C. Ct.

App. 1989); *Fields v. Dailey,* 587 N.E.2d 400 (Ohio Ct. App. 1990); *Foster v. Emery,* 495 P.2d 390 (Okla. 1972). The development of tort law, including the rules of liability, also falls within the States' proper sphere of authority. This Court has repeatedly reminded litigants that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis,* 424 U.S. 693, 701 (1976). *See also County of Sacramento v. Lewis,* 523 U.S. 833, 863-64 (1998) (declining "[t]o hold, as respondents urge, that all government conduct deliberately indifferent to life, liberty, or property, violates the Due Process Clause"); *Daniels v. Williams,* 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society").

One way that incorporation of the Second Amendment right could impact state criminal or tort law standards for self-defense is with respect to the amount of defensive force reasonably necessary under the circumstances to counter a threat. *See, e.g., Benjamin v. Bailey,* 662 A.2d 1226, 1232 (Conn. 1995) (observing that "[t]he common law principle permitting one to use deadly force in self-defense has long been restricted by the general rule of reason" and concluding that "the [State] constitution protects each citizen's right to possess a weapon of reasonably sufficient firepower to be effective for self-defense"); Paul H. Robinson, *Essay: A Right to Bear Firearms But Not to Use Them? Defensive Force Rules and the*

Increasing Effectiveness of Non-Lethal Weapons, 89 B.U. L. Rev. 251, 253 (2009) (describing current defensive force laws as setting a necessary force limitation and a proportionality limitation). This issue of defensive force would likely engender litigation over whether the Second Amendment right must yield to a reasonableness standard under State statutory or common law.

Incorporation of the Second Amendment right against the States would draw this Court, and indeed the entire federal judiciary, into the States' business of defining criminal and tort law standards of justification and liability with respect to self-defense. *Cf. Smith v. Robbins,* 528 U.S. 259, 274 (2000) (emphatically reaffirming that the Constitution "has never been thought [to] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure" (quoting *Spencer v. Texas,* 385 U.S. 554, 564 (1967))). Although the right to bear arms in self-defense is an important right from the perspective of the individual citizen, the implications and consequences of its exercise in a society in which the rights of fellow citizens have to be taken into account, are traditional matters for the States to address as sovereigns. The States' independence and autonomy in this regard should therefore be respected.

C. The States' Judgment in Regulating the Second Amendment Right Should Not Be Replaced with a Federal Constitutional Standard.

Under this Court's selective incorporation cases, provisions in other Bill of Rights have been incorporated against the States based on a legitimate concern that the fundamental liberties covered by those provisions cannot be adequately protected without a uniform national standard subject to this Court's constitutional review. For example, First Amendment rights of speech, press and assembly have been recognized as grounded in the concept of promoting the democratic form of government through open political discourse. *See, e.g., Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 227 (1997) (purpose of First Amendment is to promote public discussion and informed deliberation necessary for democratic government); *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."). This goal of open discourse cannot be achieved unless all citizens in the Nation have the same opportunity to express their views, regardless of the State or locality in which they reside. Consequently, State and local governments are reasonably subject to the same constitutional limitations as the federal government in terms of their ability to regulate the rights of free speech, press and assembly.

By contrast, there is no compelling need to impose upon State and local governments a single national standard with respect to the Second Amendment right to bear arms in self-defense. Even if the Court were to accept Petitioners' contention that the right to bear arms is inextricably intertwined with the principle of self-defense, the scope of an individual's self-defense right has always been subject to varying interpretations by the States. For example, some States adhere to the traditional common law rule that one who is attacked outside of the home has a duty to attempt to retreat before force can be used against an attacker in self-defense. *See, e.g.*, ARK. CODE ANN. § 5-2-607 (2009); NEB. REV. STAT. § 28-1409(4)(b) (2009). Other States, however, have enacted "stand your ground" laws that allow the use of force in self-defense at any location where the individual has a right to be, with no requirement of retreat. *See, e.g.,* ALA. CODE § 13A-3-23(b) (2009); FLA. STAT. ANN. § 776.013(3) (2009); TEX. PENAL CODE ANN. § 9.31(e) (2009). *See generally* P. Luevonda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statutes: From the Doctrine of Retreat to the Right to Stand Your Ground,* 35 S.U. L. REV. 1 (Fall 2007). Similarly, laws with respect to the carrying of firearms for self-defense purposes outside of the home vary widely among the States. *Compare* N.M. STAT. ANN. § 30-7-2 (2009) (permitting carrying of concealed, loaded firearm in a private automobile for personal protection) *with* CAL. PENAL CODE § 12025(a) (2009) (prohibiting carrying of concealed firearm in any type of vehicle).

These differences in State laws regarding self-defense reflect not only varying policy choices that State governments have made in the interests of public safety, but also significant cultural differences among the States. For instance, *amici curiae* for Petitioners have highlighted the fact that, in certain regions of the American West, the notion of possessing firearms for self-defense is grounded in the traditions and practicalities of life on the frontier. *See* Amicus Curiae Brief of Rocky Mountain Gun Owners and National Association for Gun Rights in Support of Petitioners, at 8. Plausibly, in certain sparsely populated regions of the West, the individual's need to possess firearms for self-protection may be more compelling. *See id.* at 16-17. In more urban areas that have the benefit of a concentrated and highly trained police force, however, the need for individuals to arm themselves for self-defense is less compelling. In fact, statistics suggest that the availability of firearms in urban areas only increases the danger of violent crimes, rather than protects against their commission. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: TRENDS BY CITY SIZE, *available at* http://bjs.ojp.usdoj.gov/content/homicide/city.cfm (approximately 60% of gun homicides between 1976 to 2005 occurred in large cities).

Thus, there has never been agreement among the States as to the proper scope of an individual's self-defense rights, and States have remained free to develop their own self-defense standards under their criminal and tort laws. Given the relationship between firearms possession and self-defense, the

incorporation of the Second Amendment right against the States could potentially subject to constitutional review numerous State and local laws that regulate not just the right to possess firearms, but also the propriety of their use in different self-defense situations. *See* Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1236-37 (2009).

In past cases, this Court has stressed the importance, in keeping with its status as a court in a federal system, "to avoid imposing a single solution on the States from the top down." *Smith,* 528 U.S. at 275. This case is no different; this Court should avoid imposing its own, counter-majoritarian formulation of the Second Amendment right on the States. With regard to regulations affecting the Second Amendment right, this Court should leave alone the "patchwork of rules representing the diverse policy judgments of lawmakers in 50 States" as it determined it should do in *BMW, Inc. v. Gore,* 517 U.S. 559, 570 (1996), because "reasonable people may disagree" about the scope and limitations of the right, *see id.*

Moreover, with respect to a right that has been codified in State constitutions (a handful even prior to codification in the Second Amendment), members of this Court have pointed out that "[s]tate courts interpreting state law remain particularly well situated to enforce individual rights against the States," given the fact that this Court's reluctance "to intrude too deeply into areas traditionally regulated

by the States" may limit its ability to enforce the federal constitutional guarantees. *Arizona v. Evans,* 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting). This Court should regard state constitutions as having independent significance and continued importance, based on "their own unique origins, history, language, and structure," and state courts as remaining "primarily responsible for reviewing the conduct of their own executive branches, for safeguarding the rights of their citizenry, and for nurturing the jurisprudence of state constitutional rights which it is their exclusive province to expound." *Delaware v. Van Arsdall,* 475 U.S. 673, 706-07 (1986) (Stevens, J., dissenting). Here, such concerns should give this Court pause regarding incorporation of the Second Amendment right against the States. There is arguably no need to enforce a federal constitutional guarantee when all but six of the States have codified in their own fashion a right to bear arms into their Constitutions and developed case law interpreting the nature and scope of the right.

D. The States Should Be Allowed to Continue Experimenting with Solutions for Gun-Related Violence in Their Local Communities.

This case also emphasizes the importance of another aspect of federalism—the States' ability to allow their local governments to act as "laboratories" for testing new solutions to legal and social problems such as gun-related violence. *Chandler v. Florida*,

449 U.S. 560, 579 (1981) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" (quoting *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))); *Whalen v. Roe,* 429 U.S. 589, 597 (1977) ("[W]e have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern."). Just as Justice O'Connor viewed *Gonzalez v. Raich,* 545 U.S. 1 (2005), a case involving the State of California's own conclusion regarding the palliative uses of marijuana, as exemplifying the role of States as laboratories, so too does this case because it implicates States' core police powers, which "have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens." *Id.* at 42-43. As discussed at length in Part II *infra*, the Second Amendment right to bear arms in self-defense carries with it the risk of violence and breach of peace, a risk which the States have a paramount interest in minimizing based on their obligation to protect their citizens.

Many local governments, including *amici*, have implemented a variety of recent initiatives aimed at combating gun-related violence, many of which may be called into question if the Second Amendment is incorporated against the States. In 2007, for example, Baltimore became the second city in the United States to enact a gun offender registry law requiring individuals convicted of gun offenses to

make periodic reports to its police department. *See* City of Baltimore, *Press Release*, Oct. 1, 2007, *available at* http://www.baltimorecity.gov/LinkClick.aspx?fileticket=LniIUg7Sp04%3d&tabid=1177&mid=2108. That same year, Sacramento enacted an ammunitions ordinance (that has since been followed by similar California legislation) requiring vendors of firearms ammunition to maintain detailed records of their ammunitions sales. *See* Marcos Breton, *City Ammo Ordinance Is on Target*, SACRAMENTO BEE, Oct. 7, 2009, at B1. Seattle has taken yet a different approach towards gun control, recently adopting a rule prohibiting the possession or display of firearms at certain city parks and recreation facilities where children are likely to be present. *See* City of Seattle, *News Advisory*, Oct. 14, 2009, *available at* http://www.seattle.gov/news/detail.asp?ID=10197&Dept=40. Cook County has an ordinance banning the sale or ownership of certain types of firearms deemed to be assault weapons. *See Wilson v. Cook County*, 914 N.E.2d 595 (Ill. App. 2009).

In its continuing effort "to deal with the 'unfortunate and tragic proliferation of gun crimes in the city,'" Philadelphia recently persuaded a state appeals court to approve local gun control measures requiring the reporting of lost or stolen handguns, allowing the temporary seizure of guns by police after probable cause is demonstrated, and barring gun ownership by people subject to protection-from-abuse orders. Joseph A. Slobodzian, *Court Rejects 2 Phila. Gun Controls, Allows 3,* PHILA. INQUIRER, June 19, 2009, at A01. In Memphis, Tennessee, the City Council recently passed an ordinance banning guns in parks, playgrounds and other public recreational

buildings, under a provision that allows city councils and county commissions to exempt local parks under their control from newly passed State handgun carry permit laws. Amos Maki, *City Council Votes to Ban Guns in Parks; Measure Follows Action by G'town, County,* COM. APPEAL, July 22, 2009, at B2. The article quoted a Council member expressing her view that "We do not live in the wild, wild West where everybody can just shoot it out[.]" *Id.*

As the preceding sampling of articles underscores, local governments around the country continue to devise new legislative and administrative solutions to problems of gun-related violence in their local communities. Given the importance of such innovation, incorporation of the Second Amendment right against the States would be manifestly unwise. This Court in the past has cautioned that it will not "cavalierly impede" the States' ability to experiment with new solutions. *Smith,* 528 U.S. at 275. "Principles of federalism should not so readily be compromised for the sake of a uniformity finding sustenance perhaps in considerations of convenience but certainly not in the Constitution." *Crist v. Bretz,* 437 U.S. 28, 39-40 (1978) (Blackmun, J., concurring). *See also District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2322 (2009) (declining to recognize a freestanding right under substantive due process to DNA evidence because "[t]o suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response" and because "judicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures.")

(quoting *Murray v. Giarratano*, 492 U.S. 1, 14 (1989)).

In the case of the Second Amendment right, there is no compelling need for a uniform national standard. Principles of federalism therefore counsel against incorporation. The States should be left alone to exercise their own policy judgments about the scope of the right and the limits on its exercise, and to implement solutions for gun-related violence without fear of triggering a spate of litigation seeking federal constitutional review.

II. INCORPORATION OF THE SECOND AMENDMENT RIGHT AGAINST THE STATES WOULD INTRUDE UPON THE STATES' CORE POLICE POWERS

In *Heller*, this Court recognized that the individual right to bear arms in self-defense is "not unlimited" with respect to the manner in or the purpose for which the right may be exercised. 128 S. Ct. at 2799, 2816. Instead, the right is subject to "presumptively valid regulatory measures" such as laws prohibiting possession "by felons and the mentally ill," and carrying "in sensitive areas like schools and government buildings," and laws imposing "conditions and qualifications on the commercial sale of firearms." *Id.* at 2816-17 & n.26.

Another "important limitation on the right to keep and carry arms" is that the right applies only to weapons that were "in common use at the time." *Heller,* 128 S. Ct. at 2817 (quoting *United States v.*

Miller, 307 U.S. 174, 179 (1939)). In other words, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Id.* at 2815-16. This interpretation accords with the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." *Id.* at 2817.

Both of these pronouncements—that the right to bear arms is subject to "presumptively valid regulatory measures" and that it applies only to weapons "in common use" and excludes "dangerous and unusual weapons"—underscore the importance of allowing the States to retain their plenary authority to regulate the right to the full extent of their police powers. The States are in the best position to determine what regulatory measures are necessary and proper to ensure the health, safety and welfare of their own citizens and communities. *See, e.g., United States v. Lopez,* 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (recognizing that States may properly lay claim to the area of guns on school premises "by right of history and expertise"). They are in the best position to determine what weapons should be considered dangerous or unusual, and therefore not fit for possession for lawful purposes. *See, e.g., Bell v. State,* 8 So. 133, 133-34 (Ala. 1889) (affirming a conviction under a statute that outlawed concealed brass knuckles as a "barbarous weapon" not recognized for self-defense and as to which "good reason to apprehend an attack" is not justification or mitigation); N.H. REV. STAT. ANN. § 159:20 (2009) (defining "self-defense weapons"). Incorporation of the Second Amendment

against the States would intrude upon the traditional prerogative of the States to make such determinations on behalf of the citizens in their local communities.

A. The States Have a Paramount Interest in Protecting Their Citizens from Violence Arising from Armed Self-Defense.

In *Munn v. Illinois*, 94 U.S. 113 (1877), this Court explained that the source of the police powers reserved to the States comes from the inherent authority of a sovereignty to establish laws requiring each citizen to conduct himself or herself, and to use his or her property, so as not to injure others unnecessarily. *Id.* at 124-25. This inherent authority stems from the social compact between each citizen and the community to which he or she chooses to belong, agreeing to be governed by certain laws and regulations necessary for the common good. *Id.* at 124. In making this compact and becoming a member of society, each citizen "necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain." *Id.*

The right to bear arms protected by the Second Amendment is unquestionably one of those rights or privileges that must necessarily yield to some measure of regulation by the State for the common good. As the *Heller* Court makes clear, "the inherent right of self-defense has been central to the Second Amendment right." 128 S. Ct. at 2817. Self-defense,

however, refers to an individual's particular relation to another person, often marked by violence, and carries with it the risk of injury or death, whether necessarily or unnecessarily caused, to the parties involved, as well as to others, including innocent bystanders.

Given the potentially negative societal consequences of armed self-defense, it is not surprising that this Court has made clear that the "individual right to keep and bear arms . . . was not unlimited." *Heller,* 128 S. Ct. at 2799. But simply announcing that the Second Amendment right to bear arms is not unlimited does not justify its incorporation. The States must retain their prerogative as independent sovereigns to set the *limits* of that right, consistent with the exercise of their police powers to ensure the health, safety and welfare of their citizens and outside the shadow of some federal constitutional standard. The very prospect of violence and breach of peace that is associated with any exercise of a right to bear arms implicates the State's core police powers.

In the context of a case upholding the State of Wisconsin's power to enjoin violent union conduct that may also be an unfair labor practice under the National Labor Relations Act, this Court recognized that "[t]he States are the natural guardians of the public against violence" and their "dominant interest . . . in preventing violence and property damage cannot be questioned." *United Auto., Aircraft & Agric. Implement Workers v. Wis. Employment Relations Bd.,* 351 U.S. 266, 274 (1956). "It is the local communities that suffer most from the fear and

loss occasioned by coercion and destruction," hence making violence a "matter of genuine local concern." *Id.* at 274-75.

In the context of a case upholding the constitutionality of the State of Illinois' mob and riot indemnity law under the Fourteenth Amendment, this Court recognized that the States have an obligation "to preserve social order and the property of the citizen against the violence of a riot or a mob." *Chicago v. Sturges,* 222 U.S. 313, 322 (1911). This obligation inheres in a government in which citizens entrust the protection of their lives, liberty and property:

> Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty and property against the conduct of the indifferent, the careless and the evil-minded may be regarded as lying at the very foundation of the social compact. A recognition of this supreme obligation is found in those exertions of the legislative power which have as an end the preservation of social order and the protection of the welfare of the public and of the individual. . . .

Id.

Moreover, the States may create "subordinate municipal governments" and vest "in them the police powers essential to the preservation of law and order." *Sturges,* 222 U.S. at 323. Local governments—i.e., cities, counties, villages and towns—may thus be charged with the responsibility of protecting

the lives and property of citizens living within their territorial limits from violence occasioned by public breaches of the peace, such as mobs and riots. *Id.* Not inconsistently with this responsibility, they may also be charged by the State with the liability and obligation to indemnify private property owners for damages and losses caused by such breaches of the peace. *Id.*

United Automobile Workers and *Sturges* thus confirm that the States—and their subordinate municipal governments (such as *amici* in this case)—have a paramount interest in protecting their citizens from the negative consequences of violence, which are primarily matters of local concern, and not national concern.[3] Armed self-defense carries with it the potential of inciting violence and breach of peace and hence falls within the ambit of the States' core police powers. Incorporation would impede the States' ability to regulate arms that may be used in self-defense and other interpersonal engagements.

[3] Local governments must also deal with the economic burden that gun violence has on their communities. For example, Stroger Hospital of Cook County, a public hospital operated by Cook County and renowned for its trauma center, routinely treats victims of gun violence on an emergency basis.

B. Police Power Limitations on Free Speech Counsel Against Incorporation of the Second Amendment Right Through the Due Process Clause.

In *Heller,* this Court likened the limits on the Second Amendment right to bear arms to the limits placed on the First Amendment right of free speech:

> Of course the right was not unlimited, just as the First Amendment's right of free speech was not, *see, e.g., United States v. Williams,* 553 U.S. —, 128 S.Ct. 1830, — L.Ed.2d — (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.

128 S. Ct. at 2799 (emphases in the original). Although both rights are subject to limits, the similarity ends then and there. Importantly, the limits recognized by this Court on the First Amendment right of free speech in its early cases further support the conclusion that the Second Amendment right should not be incorporated against the States.

In *Gitlow v. New York,* 268 U.S. 652 (1925), this Court first took the view that the freedoms of speech and press are among the "fundamental personal rights and liberties" protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States. *Id.* at 666. At the same

time, however, the Court acknowledged the principle "[t]hat a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." *Id.* at 667 (citations omitted). Consistent with the preceding principle, the Court upheld the constitutionality of a New York statute criminalizing anarchy as being a proper exercise of the State's police power:

> By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power.

Id. at 668.

Two years later, in *Whitney v. California,* 274 U.S. 357 (1927), this Court, following *Gitlow*, similarly upheld the constitutionality of California's Syndicalism Act, which penalized membership in or assistance in the organization of "an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes." *Id.* at 371. The Court accorded due deference to the State legislature's determination that the proscribed conduct "involves such danger to the public peace and the security of the State, that [the conduct] should be penalized in the exercise of its police power." *Id.* California's criminal statute

therefore did not offend the Due Process Clause of the Fourteenth Amendment. *Id.* at 372.

Subsequently, in *Stromberg v. California,* 283 U.S. 359 (1931), this Court again confirmed that the right of free speech falls within the conception of liberty under the Due Process Clause of the Fourteenth Amendment but held that the right is not absolute and is subject to punishment for "utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means." *Id.* at 368-69. In this case, however, the Court concluded the challenged statute in question, which criminalized the display of a red flag in a public place as a sign or symbol of opposition to organized government, was unconstitutionally vague and therefore invalid. *Id.* at 369-70.

In incorporating the right of free speech against the States through the Due Process Clause of the Fourteenth Amendment, this Court has thus recognized that the freedom of speech, properly exercised, nourishes and strengthens this Nation's constitutional form of democratic government. *Stromberg,* 283 U.S. at 369 ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."); *Gitlow,* 268 U.S. at 668 (characterizing the freedom of press as instrumental to "[t]he safeguarding and fructification of free and constitutional institutions"). *See also Richmond Newspapers,* 448 U.S. at 575 (observing that the

freedoms of speech, press, assembly and petition safeguarded by the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government").

At the same time, however, this Court has upheld the exercise of police power to curb violence, breach of peace, and corruption of public morals that threaten the very order and stability of the State as a constitutional government, and speech that incites such conduct is not immune. *Stromberg,* 283 U.S. at 368-69; *Whitney,* 274 U.S. at 371; *Gitlow,* 268 U.S. at 667-68. Such are the limits that this Court's early incorporation cases placed on the First Amendment right of free speech.

Applying the same framework that this Court has used for the First Amendment right of free speech, it becomes clear that the Second Amendment right to bear arms is distinguishable from free speech considerations. For one thing, its existence is not central to the functioning of a free and democratic government; on the contrary, as the Amendment's prefatory clause makes clear, one of the reasons for its existence (and the only reason of constitutional significance to the Framers)[4] is to provide the States with the ability to raise a militia in the event of

[4] Other reasons for exercising the Second Amendment right of course would be self-defense and hunting. *Heller,* 128 S. Ct. at 2801. Although these reasons are no less important than preserving the militia, it was "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms" that caused this right, unlike some other English rights, to be codified in a written Constitution. *Id.*

disaster, emergency, or breakdown in the constitutional order. *Heller,* 128 S. Ct. at 2801. *See, e.g.,* ALA. CODE § 31-2-46 (2009); CAL. MIL. & VET. CODE § 128 (2009); GA. CODE ANN. § 38-2-72 (2009); 20 ILL. COMP. STAT. ANN. 1815/2 (2009); MICH. COMP. LAWS SERV. § 32.555 (2009); N.C. GEN. STAT. § 127A-80 (2009); VA. CODE ANN. § 44-86 (2009). Thus, rather than furthering the preservation and improvement of the incumbent constitutional government, the Second Amendment right provides a failsafe in the event the constitutional government fails by reason of disaster, emergency or other cause.

Furthermore, unlike speech, bearing arms for self-defense almost always gives rise to a risk of violence and breach of peace. Accordingly, while speech has enjoyed considerable room under this Court's precedent free from State regulation, the same cannot be said of the right to bear arms under the reasoning in *Gitlow, Whitney* and *Stromberg*. If anything, the Court's early incorporation cases regarding the right of free speech pay obeisance to the States' police powers in preventing and fighting violence, breach of peace and corruption of morals in their communities.

C. The Second Amendment Right to Bear Arms Should Not Be Viewed as Implicit in the Concept of "Ordered Liberty."

In view of the attributes described above, the Second Amendment right should not be considered "implicit in the concept of ordered liberty" in the way

that the First Amendment rights, for example, have been considered under this Court's selective incorporation doctrine. *Palko v. Connecticut,* 302 U.S. 319, 324-25 (1937); *see, e.g., Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment."). There are sound reasons for drawing this distinction.

In *Illinois v. Allen,* 397 U.S. 337 (1970), Justice Brennan equated "ordered liberty" with "social justice and peace," and contrasted it with "the breakdown of lawful penal authority—the feud, the vendetta, and the terror of penalties meted out by mobs or roving bands of vigilantes" and with the perversion of penal authority "through secret denunciation followed by summary punishment" or "the caprice of tyrants." *Id.* at 347-48 (Brennan, J., concurring). In other words, "ordered liberty" refers to those rights and procedures that one would expect a government of the sort created by the Constitution to provide to its citizens in the pursuit of justice and fairness. Its antithesis would be a society that has suffered a breakdown in the constitutional order, such that conditions of vigilantism, mob rule and tyranny can breed.

As discussed above, the First Amendment right of free speech unquestionably promotes the existing constitutional order by preserving the opportunity for political discussion in a participatory democracy. The Second Amendment right, however, does not promote the constitutional order. Rather, it functions in situations in which the constitutional order has broken down, and the States must therefore look to

their able-bodied citizens for militia assistance in restoring order. The right to bear arms thus is not implicit in the concept of "ordered liberty," and it should not be incorporated against the States through the Due Process Clause of the Fourteenth Amendment under this Court's selective incorporation doctrine.

D. Under *Slaughter-House Cases*, the Second Amendment Right Should Not Be Incorporated Through the Privileges or Immunities Clause Either.

The Privileges or Immunities Clause of the Fourteenth Amendment does not provide for the incorporation of the Second Amendment right against the States either. In *Slaughter-House Cases,* 83 U.S. 36 (1873), this Court construed this Clause as protecting from State infringement only those privileges or immunities "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. Importantly, the Court did not view this Clause as transferring from the States to the Federal Government the responsibility for the security and protection of an "entire domain of civil rights heretofore belonging exclusively to the States." *Id.* at 77. The Court held that this latter class of civil rights encompasses those rights that belong to an individual as a citizen of a State and that the State was created to establish and secure. *Id.* at 76.

A right to bear arms should be regarded as one of those civil rights that the States have long

recognized and regulated. As already discussed, this right is not granted by the Constitution and does not depend upon that instrument for its existence. *Heller,* 128 S. Ct. at 2797; *Cruikshank,* 92 U.S. at 553. Instead, this is an ancient right emanating from English common law. *Heller,* 128 S. Ct. at 2805. In short, the right does not owe its existence to the Federal Government, its National character, the Constitution, or any federal law, and therefore cannot be considered a privilege or immunity of National citizenship.

Moreover, as this Court recognized in *Cruikshank,* the States had protected and regulated a right to bear arms under their plenary police powers long before the Fourteenth Amendment came into being. 92 U.S. at 553. The rationale in *Slaughter-House Cases* thus squarely applies here: surely the Reconstruction Congress did not intend, through the Privileges or Immunities Clause, to transfer the primary responsibility of protecting and regulating a civil right to bear arms recognized under State law from the States to the Federal Government. Such a result would turn the Second Amendment on its head—transforming the Amendment from its original conception as a limitation on Federal power with respect to the right to bear arms and the States' ability to muster citizen militias, into a broader Federal constitutional mandate on the States with respect to firearms possession.

That cannot have been the intent of a clause that was designed to combat discrimination against freedmen. *See, e.g.,* John Harrison, *Reconstructing*

the Privileges or Immunities Clause, 101 YALE L.J. 1385, 1474 (1992) (concluding that the Privileges or Immunities Clause constitutionalizes the Civil Rights Act of 1866). A more plausible reading is that the States were commanded by the Fourteenth Amendment to treat freedmen no differently from whites with respect to the right to bear arms. It was never the intent of the Fourteenth Amendment to strip the States of their existing sovereignty to protect and regulate the right to bear arms and replace it with a Federal standard.

CONCLUSION

For the reasons stated above, *amici* join Respondents in asking that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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