No. 08-1521

IN THE

Supreme Court of the United States

OTIS McDONALD, *et al.*,

Petitioners,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

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Cases

Chandler v. Florida, 449 U.S. 560 (1981)....................18

District of Columbia v. Heller, 128 S. Ct. 2783 (2008) ....*passim*

Duncan v. Louisiana, 391 U.S. 145 (1968)....................19

Morse v. Frederick, 551 U.S. 393 (2007) 14

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)....................18

PDK Labs., Inc. v. Drug Enforcement Admin., 362 F.3d 786 (D.C. Cir. 2004) 14

Plyler v. Doe, 457 U.S. 202 (1982)....................21

United States v. Lopez, 514 U.S. 549 (1995) 18

Secondary Authorities

Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683 (2007)....*passim*

ADL, *ADL Trains Over 2,000 Law Enforcement Officers in October*, November 19, 2009 2

ADL, *Extremism in America*, available at http://www.adl.org/lear/ext_us....................*passim*

ADL, *Father and Son Convicted on Bank Robbery, Murder Charges for Anti-Government Plot*, September 30, 2005....................8

ADL, *FBI Hate Crime Numbers Disturbing; Calls for 'Coordinated Campaign' To Confront Hate Violence*, November 23, 2009.................. 12-13

ADL, *James Von Brunn: An ADL Backgrounder*, June 11, 2009..10

ADL, *Pittsburgh Man Sentenced to Five Death Sentences for Racist Killing Spree*, September 7, 2001...7

ADL, *Rage Grows in America: Anti-Government Conspiracies* available at http://www.adl.org/special_reports/rage-grows-in-America/default.asp 11-12

ADL, *White Supremacists Celebrate Holocaust Museum Shooter Suspect as a Martyr and Hero*, June 11, 2009...10

ADL, *White Supremacists Ratchet up Anti-Hispanic Action as U.S. Immigration Debate Rages,* May 24, 2006...21

Allan Bullock, *Hitler, A Study in Tyranny* 149 (Harper & Row) (abridged ed. 1991)............... 13-14

Bernard E. Harcourt, *On Gun Registration, the NRA, Adolph Hitler, and Nazi Gun Laws*, 73 Fordham L. Rev. 653 (2004)..................................13

Calvin Massey, *Guns, Extremists, and the Constitution*, 57 Wash. & Lee L. Rev. 1095 (2000) 26, 27

Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 Harv. L. Rev. 246 (2008) 15

Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443 (2009)..28

Jason T. Anderson, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 82 S. Cal. L. Rev. 547 (2009)..........22, 23, 27

Lawrence Rosenthal, District of Columbia v. Heller *Sand Originalism*, 103 Nw. U. L. Rev. 966 (2009) 16-17

Lawrence B. Solum, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Law. 1 (2009) 21

Mark Tushnet, *Permissible Gun Regulations after* Heller*: Speculations about Method and Outcomes*, 56 UCLA L. Rev. 1425 (2009)...23, 27, 28

Philip J. Cook, Jens Ludwig, & Adam M. Samaha, *Gun Control After* Heller*: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. Rev. 1041 (2009) ..4, 18, 22

Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004) ...26

Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford University Press 2006)...26

Stuart Banner, *The Second Amendment, So Far*, 117 Harv. L. Rev. 898 (2004) 22

Transcript of Oral Argument at 45, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) 29

INTEREST OF *AMICUS CURIAE*

The Anti-Defamation League ("ADL") submits this brief as *amicus curiae* in support of Respondents.[1]

ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races. Its charter holds that it was founded "to stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike." ADL fights anti-Semitism and all forms of bigotry, defends democratic ideals, protects civil rights for all, and, most relevant to this case, has a long history of investigating, monitoring, exposing, and combating extremists.

ADL's efforts to monitor and expose extremists — and to educate the public about the threats posed by extremists — are reflected, in part, in its extensive online reporting on violent extremism and terrorism, including the encyclopedic *Extremism in America*.[2]

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[1] ADL gave at least ten days' notice of intention to file this brief to counsel of record for the parties. The parties themselves lodged letters of consent with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than ADL or its counsel made a monetary contribution intended to fund its preparation or submission.

[2] *See* ADL, *Extremism in America*, http://www.adl.Org/learn/ext_us/ (last visited December 22, 2009); http://www.adl.org/main_Extremism/ (extensive news and resources on extremism), www.adl.org/learn (extremist news and information for law enforcement), and http://www.adl.org/main_Terrorism/default.htm (information relating to domestic

(Continued…)

That report includes detailed descriptions of extremist individuals, leaders, groups, movements, and media. ADL has also made good use of its expertise in this area, regularly providing training on extremists and terrorists to law enforcement professionals, and has become the leading non-governmental organization training law enforcement on this critical subject. For example, in October of 2009 alone, ADL trained more than 2,000 law enforcement professionals nationwide on topics related to extremism and hate crimes.[3]

Since 1967, ADL has also advocated for strong, effective, and sensible gun control legislation. ADL has done so, in part, because of its recognition that a culture of guns and violence is pervasive among extremists. In order to address the real and imminent threats posed by extremists and by those who engage in hate crimes, ADL has long maintained that federal, state, and local units of government must have the latitude to adopt measures to regulate the sale, transfer, and possession of firearms.

ADL recognizes that numerous organizations and individuals have submitted helpful *amicus curiae* briefs to the Court focusing on the constitutional

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and international terrorism). *See also* http://www.adl.org/combating_hate/ (hate crimes).

[3] *See* ADL, *ADL Trains Over 2,000 Law Enforcement Officers in October*, November 19, 2009, http://www.adl.org/learn/adl_law_enforcement/le+training+october+2009.htm?LEARN_Cat=Training&LEARN_SubCat=Training_News.

issue presented in this case. Accordingly, while ADL supports Respondents' position that the right to bear arms protected by the Second Amendment is not incorporated against the states through the Fourteenth Amendment, this brief will touch only lightly on this well-trod issue. For the same reason, this brief only summarily addresses the point that, if the Court does hold that the Second Amendment is incorporated against the states, then it should do so through the Due Process Clause of the Fourteenth Amendment, and in a manner that avoids the serious risk of destabilizing long-standing constitutional jurisprudence.[4]

While these matters are important, they are thoroughly and competently briefed by others. Accordingly, this brief largely focuses on a different but no less important point: that this case, perhaps more than any other in the recent memory of the Court, calls for the keenest exercise of judicial restraint because of the nature of the governmental interest in gun control and regulation. Restraint is

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[4] Respondents and other *amici* have provided the Court with useful data regarding gun violence and firearms casualties generally. *See*, *e.g.,* Brief for Respondents City of Chicago and Village of Oak Park at 13-16, *McDonald v. City of Chicago*, No. 08-1521 (December 2009); Brief for *Amici Curiae* Brady Center to Prevent Gun Violence, The International Association of Chiefs of Police, The International Brotherhood of Police Officers, and The National Black Police Association in Support of Neither Party at 6-11, *McDonald v. City of Chicago*, No. 08-1521 (November 2009). This brief therefore does not address those issues, although ADL's position on gun control also stems from those concerns.

necessary to allow this Court the opportunity to develop a full and considered Second Amendment jurisprudence as time and occasion demand. And restraint is necessary to allow federal, state, and local units of government the latitude to continue to experiment with varying approaches to firearms regulation in the interest of preserving the safety both of the general public and of members of groups that may be targeted by the disciples of bigotry, extremism, and terror.[5]

Heller (*District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008) (hereinafter "*Heller*")) devoted hundreds of pages to a *backward-looking* analysis of constitutional language and precedent. ADL respectfully urges the Court to remain mindful of the *forward-looking* implications of the language it uses, of the precedent it lays down, and of the unintended and potentially tragic consequences that might follow from deciding more than this case requires. Plainly put, it is imperative that nothing said in the decision of this case threaten the ability of federal, state, and local governments to address the daunting "on the ground" challenges posed by trying to keep guns out of the hands of extremists, terrorists, and hate criminals.

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[5] Restraint that leaves room for state and local experimentation is arguably more important here than in *Heller* since "[t]he federal government has not been the principal source of gun control." Philip J. Cook, Jens Ludwig, & Adam M. Samaha, *Gun Control After* Heller*: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. Rev. 1041, 1069 (2009).

In an effort to assist the Court in this regard, this brief will provide information about the threat posed by extremism in America — a threat about which ADL has acquired unique expertise. Furthermore, in order to demonstrate the importance of deciding this case on the narrowest possible grounds, this brief will describe the scholarly debate that has emerged regarding possible future directions of Second Amendment jurisprudence — a debate that is lively but, in critical respects, still in its infancy. ADL hopes that these discussions will assist the Court in recognizing the signal significance of exercising judicial restraint in deciding this case.

SUMMARY OF ARGUMENT

Extremists and those who commit hate crimes pose a serious threat to the safety of the general public and, more specifically, to the members of discrete racial, ethnic, and religious groups who often become their targets. Extremist individuals and groups, in particular, tend to share several characteristics: an obsessive fascination with firearms; a paranoiac distrust of the government or a deep-seated hatred for particular minority groups — or both; and a willingness to engage in acts of shocking, often deadly, violence. *Armed* extremism leads to *violent* extremism with profoundly unsettling frequency and profoundly tragic effects.

ADL respectfully urges that the Court's decision in this case must take this threat into account. This holds true for several reasons. *First*, some of the arguments that have been raised against incorporating Second Amendment rights through the Fourteenth Amendment apply with even greater

force when the extremist threat enters consideration. *Second*, a ruling that incorporates Second Amendment rights through the Privileges or Immunities Clause of the Fourteenth Amendment, and that destabilizes longstanding constitutional jurisprudence, would likely feed the current wave of extremist antagonism toward non-citizens. *And*, *finally*, lower courts and legal scholars have only recently begun to interpret *Heller* and to consider critical questions like the proper standard of review for firearms regulation. The extremist threat described below counsels that the Court should decide this case narrowly, so the dialogue below — and experimentation with effective gun control measures — can continue.

ARGUMENT

I.

VIOLENT EXTREMISTS AND EXTREMIST GROUPS POSE A SERIOUS THREAT IN THE UNITED STATES

Richard Baumhammers

Richard Baumhammers was a Pittsburgh attorney and white supremacist. He spent much of his time on the computer, visiting white supremacist Web sites, and tried to start an extremist group of his own. In April of 1999, Baumhammers purchased a .357 magnum revolver — a weapon that would become the instrument of one of the most horrific white supremacist rampages in recent history.

On April 28, 2000, Baumhammers went to the home of his elderly next door neighbor, a Jewish

woman named Anita Gordon. He shot and killed Gordon and set her home on fire. He then drove to a nearby synagogue, where he fired shots into its windows and spray-painted swastikas on its walls.

Continuing his attack, Baumhammers fatally shot Anil Thakur, an Indian-American who was buying groceries, and shot Sandeep Patel, the store manager, also an Indian-American. Patel survived, but suffered permanent paralysis and died from complications related to his injuries in 2007.

Baumhammers next made his way to a second synagogue, firing shots into it as well. He drove to a shopping center, walked into a Chinese restaurant, and killed its manager, Ji-ye Sun, and a Vietnamese-American cook, Theo Pham. Finally, he drove to a martial arts school, where he murdered an African-American man, Garry Lee. The gruesome shooting spree, which left five dead and a sixth paralyzed, lasted over two hours.

Pittsburgh police arrested Baumhammers. He was convicted on multiple counts of murder, arson, and hate crimes, and sentenced to death.[6]

Wade and Christopher Lay

Wade and Christopher Lay were two anti-government extremists from Oklahoma who decided to seek revenge for the deadly FBI standoffs at Ruby Ridge, Idaho, in 1992, and Waco, Texas, in 1993. On May 24, 2004, they entered the Mid-First Bank in

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[6] *See* ADL, *Pittsburgh Man Sentenced to Five Death Sentences for Racist Killing Spree*, September 7, 2001, http://www.adl.org/learn/news/Pitt_man.asp.

Tulsa to commit an armed robbery to help fund their war against the government. When Wade Lay pulled out a gun and pointed it at a bank clerk, security guard Kenneth Anderson drew his weapon and opened fire, wounding both men. The Lays fired back, hitting Anderson multiple times and fatally injuring him. As he died in a pool of his own blood, the Lays took flight.

A police search of their residence turned up a trove of anti-government and conspiracy literature, as well as lists of "allies" and "enemies." Eventually apprehended, the Lays sought to conduct a "necessity defense" at trial, claiming that their actions were justified because of the conduct of the federal government. An unrepentant Wade Lay declared that he and his son had acted "for the good of the American people."

A jury convicted both men of murder. On September 28, 2005, Wade Lay was sentenced to death, and Christopher Lay was sentenced to life in prison without parole.[7]

James Von Brunn

James Von Brunn was born in 1920 and grew up in the Midwest, attending college at Washington University in St. Louis. He served in the Navy during World War II. After his military service, he

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[7] *See* ADL, *Father and Son Convicted on Bank Robbery, Murder Charges for Anti-Government Plot*, September 30, 2005, http://www.adl.org/learn/extremism_in_the_news/Anti_Government/lay_convicted_92705.htm?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_the_News.

worked in a variety of jobs in half a dozen states. He also began what would become a long and deep relationship with right-wing extremists and anti-Semites.

Von Brunn gained prominence among white supremacists and neo-Nazis by "talking the talk." He published an anti-Semitic book, *Kill the Best Gentiles*. And he operated a notorious anti-Semitic website, which he called "The Holy Western Empire." But Von Brunn gained special stature among extremists because of his willingness to "walk the walk." He conspicuously demonstrated his capacity to do so in 1981, when he charged the Federal Reserve Building with a sawed-off shotgun and other weapons — while the Board was meeting — because of his view that Jewish bankers controlled the international monetary system. Police caught up with Von Brunn just outside the meeting room and arrested him; he was convicted of multiple felonies and sentenced to a lengthy prison term.

After emerging from prison, Von Brunn continued his extremist activities. On June 10, 2009, Von Brunn concluded that the time to "walk the walk" had come again. He made his way to the United States Holocaust Museum, where he opened fire on a security guard before being critically wounded

himself.[8] White supremacists across the country celebrated him as a martyr and a hero to the cause.[9]

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Richard Baumhammers, Wade and Christopher Lay, and James Von Brunn do not stand alone in their extremist views, their penchant for violence, and their attraction to firearms. They have company; and lots of it. Indeed, ADL could match the voluminous briefing filed in this case, page for page, with stories like these — even if it limited its attention to the events of recent years.

It is an ugly but inarguable fact that a deeply embedded subculture of extremism has developed in the United States of America. ADL's *Extremism in America* report identifies dozens of notorious extremist leaders, groups, and movements — but these numbers do not even scratch the surface.[10] Consider this: Stormfront — the most popular Internet meeting-place for anti-Semites, neo-Nazis, and other white supremacists — has exploded into a forum with over 6,000,000 posts, 490,000 discussion

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[8] *See* ADL, *James Von Brunn: An ADL Backgrounder*, June 11, 2009, http://www.adl.org/main_Extremism/von_brunn_background.htm?Multi_page_sections=sHeading_1.

[9] *See* ADL, *White Supremacists Celebrate Holocaust Museum Shooter Suspect as a Martyr and Hero*, June 11, 2009, http://www.adl.org/main_Extremism/White-Supremacists-Celebrate-Shooter.htm.

[10] *See* ADL, *Extremism in America*, *supra*.

threads, and 170,000 members.[11] Following Barack Obama's election, so many white supremacists tried to post messages to Stormfront's server that they overloaded it and the site temporarily shut down.[12]

In its recent report *Rage Grows in America*, ADL concludes that "[s]ince the election of Barack Obama as president, a current of anti-government hostility has swept across the United States."[13] This development has many dimensions, but one of its most troubling aspects is a corresponding resurgence in the extremist militia movement, which has a long history of criminal violence. Within the past two years, the movement has almost quadrupled in size,

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[11]*See ADL, Extremism in America, Don Black/Stormfront,* http://www.adl.org/learn/ext_us/Don-Black/Stormfront.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=5&item=DBlack (last visited December 22, 2009). The pace of activity on the site is profoundly unsettling. For example, on January 4, 2009 Stormfront reported that in the prior sixty days it had gained 10,153 new members, 15,198 new threads, and 227,432 new posts.

[12] *See* ADL, *Extremism in America*, *supra*. *Extremism in America* raises several important points about the number of extremists in our nation. It observes that the population of the United States passed 300,000,000 early in this century, "which means that the fringe of the fringe is still a large number." Furthermore, because extremists are willing to use violence in furtherance of their cause, they can cause harm in amounts disproportionate to their number. *See id.*

[13] *See* ADL, *Rage Grows in America: Anti-Government Conspiracies* at http://www.adl.org/special_reports/rage-grows-in-America/default.asp (last visited December 22, 2009).

growing to more than 200 groups across the United States.[14]

Of course, extremists come in many shapes and sizes; not all raise concerns of equal magnitude. But even a cursory review of the profiles of the extremist individuals, groups, movements, and media contained in *Extremism in America* reveals that extremist subculture is permeated with an obsessive fixation on firearms and a perverse fascination with the possible need for a violent "final solution" to fantasized "threats" posed by racial minorities, Jews, non-citizens, the government itself, the Obama administration, and so on. It is therefore unsurprising that this grim potential so often hardens into tragic reality.

Tracking extremist violence and hate crime poses unique challenges; available statistics substantially understate the problem. Nevertheless, even the conservative numbers that can be cited with certainty paint a chilling portrait. According to ADL data, there have been more than 100 domestic extremist-related killings in the United States since 2005, more than half of which involved a firearm. In the last eight years alone, twenty-one police officers have been killed by domestic extremists; all without exception involved a firearm.[15] The FBI documented 7,783 hate crimes in 2008 — the highest national total since 2001.[16] And that was without receiving

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[14] *Id.*

[15] Unpublished data are on file with ADL.

[16] *See* ADL, *FBI Hate Crime Numbers Disturbing; Calls for*

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data from more than 4,000 law enforcement agencies.

A skeptic might respond that gun control legislation will not keep firearms out of the hands of determined extremists. But this argument proves too much. After all, a skeptic might say the same about determined felons and the mentally ill, yet the Court in *Heller* acknowledged the wisdom of longstanding prohibitions on the possession of firearms by such individuals.[17] In any event, the question before the Court is not whether the states will succeed in frustrating the efforts of extremists and hate criminals to take up arms and commit violent acts. Rather, the question is whether this Court will interpret the Constitution in a manner that prevents the states from trying.[18]

'Coordinated Campaign' To Confront Hate Violence, November 23, 2009, http://www.adl.org/PresRele/HatCr_51/5657_51.htm.

[17] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008).

[18] Some arguments against gun control laws have been raised, ironically, by extremists themselves. One such is that gun control laws act to facilitate the empowerment of extremists. For example, some suggest that gun control eased Hitler's rise to power. In fact, however, "[t]he history of gun control in Germany from the post-World War I period to the inception of World War II is a history of declining, rather than increasing, gun control." Bernard E. Harcourt, *On Gun Registration, the NRA, Adolph Hitler, and Nazi Gun Laws*, 73 Fordham L. Rev. 653, 671 (2004). It was the inability of the German *government* to remain sufficiently strong that allowed Hitler's "street gangs" to "seize[] control of the resources of a great modern State," causing "the gutter to come to power." Allan Bullock, *Hitler, A*

(Continued…)

II.

THE COURT'S DECISION SHOULD TAKE INTO ACCOUNT THE SPECIAL THREAT POSED BY EXTREMISTS AND EXTREMIST GROUPS

The foregoing discussion demonstrates the threat posed by violent extremists and extremist groups. Appropriate gun control laws play an important part in addressing that threat. What the Court does in this case could have a profound impact on those laws and, consequently, on the safety of the general public as well as of the discrete groups which find themselves the targets of extremist violence.

These considerations counsel the exercise of the highest degree of judicial restraint.[19] Exercising that

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Study in Tyranny 149 (Harper & Row) (abridged ed. 1991). While Germany had discriminatory laws that barred Jews from having firearms, that proves only the evils of discrimination — prohibited in our country by operation of the First and Fourteenth Amendments regardless of the meaning or even existence of the Second. Surely, historical fact does not support the myth that arming all might allow an oppressed minority, no matter how courageous, to restore democracy and liberty when confronted with a demagogue's larger (and better-armed) army.

[19] The Court has repeatedly expressed the importance of exercising such restraint. *See*, *e.g.*, *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part) ("[I]f it is not necessary to decide more, it is necessary not to decide more."), quoting *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment).

restraint now will afford this Court the opportunity in the future to craft, gradually and incrementally, the sort of nuanced jurisprudence that the Second Amendment demands.[20] Furthermore, the exercise of such restraint will help ensure that federal, state, and local units of government retain as much flexibility as possible to experiment with measures designed to prevent tragedies like those recounted above. Fortunately, the law applicable to this case supports, indeed urges, the exercise of such restraint.

A. The Threats Posed by Extremists and Extremist Organizations Support a Decision that Second Amendment Rights are not Incorporated through the Fourteenth Amendment

As noted above, ADL does not intend to brief fully the question of whether the rights secured by the Second Amendment are incorporated against the states through the Fourteenth Amendment. Other *amicus* and party briefs provide an exhaustive analysis of this question. In this connection, however, ADL does wish to emphasize two points.

First, some of the arguments that have been raised against incorporation become even more

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[20] In a recent law review article, Cass Sunstein predicts that as the jurisprudence of the Second Amendment unfolds the Court "will proceed cautiously, upholding most of the laws on the books and invalidating only the most draconian limitations . . . . We have entered a period of Second Amendment minimalism." Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 Harv. L. Rev. 246, 272, 274 (2008). This elegantly summarizes the approach advocated by ADL.

compelling when one considers the threats posed by extremists. For example, Lawrence Rosenthal contends that incorporation of Second Amendment rights is not dictated by either the Privileges or Immunities Clause[21] or the Court's current Due Process jurisprudence.[22] With respect to the latter point, Rosenthal observes that "an incorporated Second Amendment would make it effectively impossible for police to raise the risks of carrying guns in public through stop-and-frisk tactics, since gang members would have a constitutional right to carry firearms, as long as they did so openly."[23] He cautions that, in an "urban landscape" where gangs can "act as virtual occupying armies," the "Second Amendment [would become] the enemy of ordered liberty, not its guarantor."[24]

The prospect of law enforcement without authority to detain someone openly carrying a gun in public becomes even more chilling when we direct our concern toward violent extremists. As *Extremism in America* documents, in the last ten years there have been a number of incidents where violent extremists have walked or driven through a community, making little or no effort to conceal their weapons, destroying property and murdering people

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[21] Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Law. 1, 75 (2009).

[22] *Id.* at 84-90.

[23] *Id.* at 87.

[24] *Id.*

who had no reason to suspect they were about to become targets of violence. If Rosenthal is correct, and if Second Amendment incorporation creates the risk that individuals will have a constitutional right to carry firearms openly, then that would offer considerable aid and comfort to the next Richard Baumhammers.

Rosenthal's observations about gangs invite other considerations as well. Gangs operate in specific urban areas; violent extremists can — and do — strike anywhere, including places with limited law enforcement resources. Gangs, by definition, involve groups of individuals whose movements and activities can be monitored; extremists are often isolated individuals who act alone (or with family members). Gangs, Rosenthal suggests, are unlikely to engage in violence in the presence of a law enforcement officer;[25] extremists often direct their violence *against* those law enforcement officers. Rosenthal's point applies *a fortiori* when we take the extremist threat into account. And, in light of that threat, the idea that "ordered liberty" is served by allowing an individual with an openly displayed weapon to walk down a sidewalk toward a synagogue, mosque, or church is not only constitutionally perverse; it is morally appalling.

The *second* point is that a decision against incorporation would preserve our nation's ability to adopt the most effective and appropriate measures to keep guns out of the hands of extremists and

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[25] *Id.*

terrorists. This follows because most gun control legislation has come from the states, not from the federal government. A decision against incorporation would provide the states with the greatest leeway to innovate and experiment.[26]

Such an approach advances the principle of federalism that states and local units of government "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). In this spirit, Justice Kennedy has written:

> While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.

United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring opinion). The "best solution" for keeping deadly weapons out of the hands of violent extremists is similarly "far from

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[26] *See* Cook, Ludwig, & Samaha, *supra*, at 1069 ("[A]ggressive gun control efforts tend to occur in a select set of states and cities; the absence of incorporation would leave those jurisdictions untouched by Second Amendment norms").

clear." But it is exquisitely clear that no successful experiment has ever emerged from a laboratory that has been shuttered. Incorporation threatens precisely that effect.

B. A Ruling that Incorporates Second Amendment Rights Through the Privileges or Immunities Clause and that Destabilizes Longstanding Fourteenth Amendment Jurisprudence Could Feed Extremist Antagonism and Violence Toward Non-Citizens

As noted above, good reasons exist to doubt that an individual right to bear arms is "necessary to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968), and is therefore incorporated as to the states through the Due Process Clause of the Fourteenth Amendment. Perhaps for just this reason, Petitioners primarily argue that this Court should incorporate that right through the Privileges or Immunities Clause. Indeed, Petitioners appear to invite the Court into a wholesale reexamination of the meaning of that clause and the predicates for incorporation.

Other *amici curiae* have thoroughly briefed the substantial risks inherent in venturing into this largely uncharted territory.[27] Furthermore, as those briefs explore in considerable detail, this case does not require the Court to reevaluate its existing Due Process Clause decisions, to rethink the bases on

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[27] *See*, *e.g.*, Brief of *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc. in Support of Neither Party at 15-26, *McDonald v. City of Chicago*, No. 08-1521 (November 23, 2009).

which other rights have already been incorporated, or to otherwise destabilize a settled jurisprudence that protects rights and liberties treasured by millions of Americans, including — of particular interest to ADL — freedom from discrimination and religious persecution.[28] ADL will not re-argue points persuasively argued by other amici.

ADL does, however, wish to raise an issue not touched upon in the other briefs. Some briefs have expressed concern about a ruling that would broadly call into question the constitutional validity of state gun control laws; others have expressed concern about a ruling that would bring uncertainty to the textual foundation for rights that have already been incorporated and that protect discrete populations that have historically been the targets of discrimination and persecution. But it does not appear that any other *amicus* has pointed out the terrible, if wholly unintended, consequences that could follow from a decision that does both of these things simultaneously.

Consider, for example, a decision that rules precisely as Petitioners ask, *i.e.*, it incorporates the right to bear arms through the Privileges or Immunities Clause and it suggests that this provision, rather than the Due Process Clause, provides the constitutionally correct vehicle for incorporation. Among other things, such a decision

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[28] *Id.*

would cast into doubt the civil rights of non-citizens[29] while at the same time granting broader rights to extremists to arm themselves against the fantasized non-citizen "threat."[30] In a nation with a rising tide of extremism, hate crime, and rage — and rising numbers of immigrants — this would be a perilous coincidence of precedents.

C. Judicial Restraint Is Appropriate Here Because Lower Courts and Legal Scholars Have Only Just Begun to Interpret *Heller*

Finally, ADL urges judicial restraint in this case because, in many important respects, interpretation by the lower federal courts and the scholarly community of the Second Amendment rights acknowledged in *Heller* has only just begun. *Heller* was decided less than two years ago and it intentionally and explicitly left a number of issues open for scholarly consideration and debate. And, as to at least one of the most significant of those issues — the proper standard of review for gun control

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[29] While the Due Process and Equal Protection Clauses of the Fourteenth Amendment allude to "person[s]," the Privileges or Immunities Clause refers to "citizens." Existing precedent under the Due Process clause makes clear that the protections of the Bill of Rights apply to non-citizens. *See*, *e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982). In contrast, the reach of the Privileges or Immunities Clause is, at best, unclear. *See*, *e.g.*, Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 Nw. U. L. Rev. 923, 966 (2009).

[30] *See* ADL, *White Supremacists Ratchet up Anti-Hispanic Action as U.S. Immigration Debate Rages,* May 24, 2006, http://www.adl.org/PresRele/Extremism_72/4822_72.htm.

legislation — the scholarship has only begun to emerge.[31]

The scholarship to date raises a wide array of issues and possibilities with respect to potential approaches to the standard of review. One recent article assesses the state of affairs in these terms: the Court in *Heller* did not "prescrib[e] any particular model for judicial review of Second Amendment claims over the long term. And there is no consensus model that judges could import from other fields of constitutional adjudication."[32]

Another article that has proved influential actually appeared shortly before the Court decided *Heller*. In that article, Adam Winkler examined the arguments supporting application of the strict scrutiny standard and found them unpersuasive.[33]

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[31] Jason T. Anderson, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 82 S. Cal. L. Rev. 547, 548 (2009).

[32] Cook, Ludwig, & Samaha, *supra*, at 1066. ADL offers the following description of the existing scholarship in order to provide the Court with an overview of the variety and kinds of issues and arguments that have been raised. ADL does not do so in order to endorse or advance any of the positions reflected in that scholarship.

[33] Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683 (2007). Winkler notes that "the important question of what standard of review would apply to laws burdening the right to bear arms" has been "[m]ostly overlooked in the literature." *Id.* at 685. *See also* Stuart Banner, *The Second Amendment, So Far*, 117 Harv. L. Rev. 898, 907-08 (2004) (book review) ("A final area that could use more

(Continued…)

After *Heller*, others have concurred in Winkler's analysis.[34] Because that article has become foundational to the post-*Heller* debate, a brief summary of Winkler's thinking may be useful.

Winkler identifies and analyzes three arguments that might be raised in support of applying strict scrutiny in this context. The first "is that, as a textual provision in the original Bill of Rights, the individual right to bear arms necessarily warrants [such] heightened review."[35] Winkler points out that this argument errs in its premise that all rights based in the provisions of the Bill of Rights trigger strict scrutiny. In fact, Winkler observes, most of the Bill of Rights guarantees do not do so. As Winkler notes, the Court has applied strict scrutiny in cases involving the First and Fifth Amendments, but not in cases involving the Third, Fourth, Sixth, Seventh, Eighth, Ninth, or Tenth Amendments. "From this," he argues, "we might conclude that textual grounding in the Bill of Rights creates a presumption *against* strict scrutiny."[36]

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attention is the plumbing. What exactly will the doctrine look like? What kinds of regulation will be unconstitutional? Which guns? Which people? Which situations? This is lawyerly detail, well below the level of most of the debate thus far, but it is detail that may be important one day.").

[34] *See*, *e.g.*, Anderson, *supra*; Mark Tushnet, *Permissible Gun Regulations after* Heller*: Speculations about Method and Outcomes*, 56 UCLA L. Rev. 1425, 1428 (2009).

[35] Winkler, *supra*, at 693.

[36] *Id.* at 694 (emphasis added).

Furthermore, Winkler observes, "even the individual rights in the Bill that do trigger strict scrutiny only receive the protection of such review some of the time."[37] Strict scrutiny does not apply, for example, to content-neutral restrictions on speech, to regulations of public employee speech, to generally applicable laws that burden religious practices, or to limitations on a number of rights secured by the Fifth Amendment.[38] Winkler concludes that "one thing is clear: strict scrutiny is not automatically the applicable standard simply because the right is textually grounded in the Bill of Rights." Instead, the Court has often protected those rights through rational basis scrutiny, reasonableness review, and other tests.

Winkler next turns his attention to the related argument that strict scrutiny should apply because the rights protected by the Second Amendment are "fundamental."[39] Winkler responds by observing that, even among rights the Court has deemed fundamental or "preferred," strict scrutiny is not

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[37] *Id.* at 695.

[38] *Id.* at 695-96.

[39] Winkler notes that the Court has never precisely explained what determines whether a right fits the definition of fundamental. He therefore identifies three potential bases for concluding that a right qualifies as such: (1) it appears in the Bill of Rights; (2) it has been incorporated against the states; or (3) it has been clothed with special judicial protection. *Id.* at 698. For purposes of argument, Winkler assumes that Second Amendment rights qualify as fundamental for one or more of these reasons. *Id.*

always applied. He notes, for example, that the Court has not applied strict scrutiny where the burden placed on a fundamental right is incidental, rather than substantial. Indeed, he concludes that "[t]his approach is common in speech, religion, and privacy cases."[40]

Finally, Winkler analyzes the rationales offered to support the application of strict scrutiny to laws burdening other rights and finds they have little or no application with respect to gun control laws. One such rationale is that strict scrutiny is essential to "smoke out" invidious and illegitimate motives that may underlie regulation. But, as Winkler observes, "[t]he motive behind most gun control laws is to enhance public safety[,] a perfectly legitimate goal for government."[41] Strict scrutiny, he contends, should be "reserved for areas of law, such as race discrimination and restriction on political speech, where we would expect most, if not all, regulation to be invidious."[42]

A scholarly consensus appears to be emerging in support of Winkler's conclusion and around the

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[40] *Id.*

[41] *Id.* at 701.

[42] *Id.* at 702. Winkler also discusses the rationale that strict scrutiny exists to provide breathing room to certain rights — such as those embodied in the free speech clause of the First Amendment — that are central to the functioning of the democratic process. He questions whether an individual right to bear arms fits this description. *Id.* at 704.

proposition that the traditional strict scrutiny standard is neither constitutionally required nor practically sensible with respect to the right to bear arms.[43] Beyond that, however, the literature goes in a number of different directions. Indeed, it has the hallmarks of a conversation that has only begun.

Winkler himself argues for application of a "reasonable regulation" standard, based on the text of the Second Amendment;[44] the history of firearm regulation by the states both before and after the adoption of the Second Amendment;[45] considerations of federalism, separation of powers, and institutional competence;[46] and the interpretations state courts have offered of concomitant state constitutional provisions.[47] He acknowledges that this test is highly deferential to governmental decision making,

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[43] *See* note 33, *supra*. *See also* Calvin Massey, *Guns, Extremists, and the Constitution*, 57 Wash. & Lee L. Rev. 1095, 1132 (2000).

[44] Winkler points out that the First Amendment states that "Congress shall make no law" abridging the rights it protects, but the Second Amendment explicitly incorporates the "necessity" of a "well regulated Militia": "One provision suggests the invalidity of any legislation; the other invites regulation." Winkler, *supra*, at 707.

[45] *Id.* at 708-712. *See also* Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004); Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford University Press 2006).

[46] Winkler, *supra*, at 712-15.

[47] *Id.* at 715-18.

even though not as forgiving as the "rational basis" standard found in Equal Protection cases.[48] All of this said, Winkler further concedes that the core of contemporary gun control legislation might survive an intermediate standard or even strict scrutiny itself.[49]

But others have raised different possibilities. Some have advocated for rational basis "with bite."[50] Some have suggested the adoption of something like traditional intermediate scrutiny.[51] Some have proposed a kind of "semi-strict scrutiny," residing between strict and intermediate standards.[52] And some have even proposed eschewing existing

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[48] Winkler points out, for example, that a state's decision to disarm its citizenry completely might survive rational basis review but would not pass the reasonable regulation test. *Id.* at 717. Interestingly, the examples Winkler offers of the types of regulations state courts have upheld under the reasonable regulation test, *see id.* at 720-22 (bans on particular kinds of weapons, bans on the possession of firearms by convicted felons, and licensing laws) are remarkably consistent with this Court's rulings in *Heller* that (1) various kinds of weapons can be banned, (2) "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons", and (3) Heller won only the right "to register his handgun" — assuming he was not otherwise disqualified from doing so. *Heller*, 128 S. Ct. at 2817, 2816-17, and 2822.

[49] *Id.* at 727-32.

[50] Tushnet, *supra*, at 1426.

[51] Anderson, *supra*, at 548.

[52] Massey, *supra*, at 1133.

standards of scrutiny altogether.[53] This dialogue is engaging, insightful, and informative, but also still in its formative stage.

In a law review article written shortly after the Court decided *Heller*, Mark Tushnet presciently observed that "[a]fter *Heller*, the first important question the Supreme Court will have to decide is incorporation. And, in doing so, it need not address any substantive questions about the Second Amendment's scope."[54] Like *Heller* itself, this case does not present a necessary or even appropriate occasion for the Court to address the nettlesome issues of scope and scrutiny — issues where further lower court developments and scholarly analysis would inform and assist the Court's analysis in deep and important ways. But perhaps the point is best made by invoking an observation offered by the Chief Justice during the oral argument of *Heller* itself: "But I don't know why when we are starting afresh, we would try to articulate a whole standard that

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[53] *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1446 (2009) (arguing that "the question should not be whether federal or state right-to-bear-arms claims ought to be subject to strict scrutiny, intermediate scrutiny, an undue burden standard, or any other unitary test. Rather, as with other constitutional rights, courts should recognize that there are [differing] categories of justifications for a restriction on the right to bear arms.").

[54] Tushnet, *supra*, at 1426.

would apply in every case?"[55] Indeed, for the reasons explored above, such an effort would not only be jurisprudentially imprudent; it would be extraordinarily dangerous.

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[55] Transcript of Oral Argument at 45, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-290.pdf.

CONCLUSION

The principle of judicial restraint dictates that when it is not necessary to decide more, then it is necessary not to decide more. This principle applies with singular force to this case. After all, the exercise of judicial restraint reflects the kind of reasoned caution that is appropriate when the stakes are high. In this case, the stakes are, quite literally, a matter of life and death. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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