No. 08-________

In The
# Supreme Court of the United States

OTIS MCDONALD, ADAM ORLOV,
COLLEEN LAWSON, DAVID LAWSON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,

*Petitioners,*

v.

CITY OF CHICAGO,

*Respondent.*

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI


DAVID G. SIGALE
LAW FIRM OF
DAVID G. SIGALE, P.C.
4300 Commerce Court,
Suite 300-3
Lisle, Illinois 60532
630.452.4547

ALAN GURA*
GURA & POSSESSKY, PLLC
101 N. Columbus Street,
Suite 405
Alexandria, Virginia 22314
703.835.9085

**Counsel of Record*



COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

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

## PARTIES TO THE PROCEEDINGS

Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc. and Illinois State Rifle Association initiated the proceedings below by filing a complaint against Respondent City of Chicago and its Mayor, Richard M. Daley, in the United States District Court for the Northern District of Illinois. Mayor Daley was dismissed at an early stage of the proceedings and is no longer a party in the matter.

No parent or publicly owned corporation owns 10% or more of the stock in either Second Amendment Foundation, Inc. or the Illinois State Rifle Association.

The day after Petitioners filed their complaint in the District Court, similar cases were brought against Respondent City of Chicago and Mayor Daley; and the Village of Oak Park, Illinois and its President, David Pope, by other parties. The plaintiffs in the related Chicago case were the National Rifle Association of America, Inc., Kathryn Tyler, Anthony Burton, Van F. Welton, and Brett Benson. The plaintiffs in the related Oak Park case were the National Rifle Association of America, Inc., Robert Klein Engler, and Gene A. Reisinger.

The three cases were related, but not consolidated, in the District Court. Petitioners and the

**PARTIES TO THE PROCEEDINGS** – Continued

related case plaintiffs appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit, which consolidated the appeals. The plaintiffs in the related cases, other than Anthony Burton, have separately petitioned for certiorari. Sup. Ct. Rule 12.4.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc., and Illinois State Rifle Association, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## DECISIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, 2009 U.S. App. LEXIS 11721, is reprinted in the Appendix (App.) at 1. The decision of the United States District Court for the Northern District of Illinois in this case, reprinted at App. 17, 2008 U.S. Dist. LEXIS 98133, is unpublished. The District Court's decision in the related cases, reprinted at App. 11, 2008 U.S. Dist. LEXIS 98134, is unpublished.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the United States Constitution provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relevant provisions of the laws of the City of Chicago are reprinted in the Appendix.

## STATEMENT OF THE CASE

1. The City of Chicago enforces a handgun ban identical to that struck down by this Court as a violation of Washington, D.C. residents' Second Amendment rights. The Fourteenth Amendment guarantees that fundamental individual rights may not be violated by any form of government throughout the

United States. Accordingly, Chicago's handgun ban must meet the same fate as that which befell the District of Columbia's former law.

The federal appellate courts, and state courts of last resort, are split on the question of the Second Amendment's applicability to the states. The Ninth Circuit, applying this Court's test for selective incorporation of enumerated rights, held the states bound by the Second Amendment through the Fourteenth Amendment's Due Process Clause. *Nordyke* v. *King*, 563 F.3d 439 (9th Cir. 2009). But in this case, the Seventh Circuit declined to perform the required incorporation analysis, following inapposite pre-incorporation era precedent barring direct application of the Bill of Rights to the states. App. 3-4.[1]

This split of authority warrants speedy resolution, as it perpetuates the deprivation of fundamental constitutional rights among a large portion of the population. The split itself is not over whether the right to bear arms should be binding upon state actors, but rather, over which line of this Court's cases controls the question. Perpetuation of that dispute among the lower courts will serve no purpose. Moreover, the scholarly landscape concerning the core

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[1] The Second Circuit followed the same logic in declining to perform an incorporation analysis for the right to keep and bear arms. *Maloney* v. *Cuomo*, 554 F.3d 56 (2d Cir. 2009).

constitutional issues in the case is exceptionally well-developed, enabling a just and comprehensive treatment by this Court.

The court below also declined to incorporate the Second Amendment under the Fourteenth Amendment's Privileges or Immunities Clause, following this Court's decisions which held that the provision incorporates only so-called rights of national citizenship. App. 2.

Application of this Court's selective incorporation doctrine is "required" to resolve the question of the Second Amendment's incorporation through the Fourteenth Amendment. *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2813 n.23 (2008). Doing so for the first time in this case, this Court should reverse the judgment below.

More critically, owing to the Fourteenth Amendment's plain text, original purpose, and original public meaning, this Court should also hold the Second Amendment is incorporated through the Fourteenth Amendment's Privileges or Immunities Clause. Although consensus regarding this provision's full meaning will likely remain elusive, there is now near-uniform agreement that this Court's decision in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), which all but eviscerated the Privileges or Immunities Clause, was wrongly decided. Given the profound scope of *Slaughter-House*'s error, and the confusion

it has spawned in Fourteenth Amendment jurisprudence, overruling *Slaughter-House* remains imperative. The unique interplay between the Second and Fourteenth Amendments makes this the ideal case in which to do so.

2. Immediately upon announcement of this Court's decision in *Heller*, Petitioners brought this action in the United States District Court for the Northern District of Illinois, challenging various Chicago ordinances as violating their Second and Fourteenth Amendment rights. At issue are Chicago's laws (1) banning the registration of handguns, thus effecting a broad handgun ban;[2] (2) requiring that guns be registered prior to their acquisition by Chicago residents, which is not always feasible;[3] (3) mandating that guns be re-registered on an annual basis, including the payment of what amounts to an annual tax on the exercise of Second Amendment rights;[4] and (4) rendering any gun permanently non-registerable if its registration lapses.[5] The district court had jurisdiction over the subject matter of the case under 28 U.S.C. § 1331 and § 1343.

Respondent City of Chicago had denied each individual Petitioner's attempt to register a handgun on account of the handgun registration ban. App. 34-45.

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[2] Chicago Mun. Code § 8-20-050(c).

[3] Chicago Mun. Code § 8-20-090.

[4] Chicago Mun. Code § 8-20-200.

[5] Chicago Mun. Code § 8-20-200(c).

Petitioners Orlov and David Lawson were also denied handgun registrations on account of the city's pre-acquisition registration requirement. App. 37, 40.

Petitioners McDonald and David Lawson are the registered owners of long arms, and are thus subjected to the city's re-registration requirements. The registration for one of Petitioner David Lawson's rifles lapsed, thus rendering the rifle unregisterable. Petitioner David Lawson had also acquired a rifle through the federal Civilian Marksmanship Program ("CMP"), which sent the rifle directly to his Chicago home, rendering it automatically unregisterable as it was acquired prior to its possible registration. Respondent denied Lawson's administrative appeal of its refusal to register the CMP rifle. App. 47-48.

The day after Petitioners filed their complaint, the National Rifle Association ("NRA") and various individuals brought a separate challenge to the Chicago handgun ban, albeit not to the other provisions challenged by Petitioners. NRA also led a lawsuit challenging a similar handgun ban implemented by the Village of Oak Park, Illinois. It does not appear that the challenged provisions had been enforced against the NRA plaintiffs. This case, and the two NRA cases, were related in the District Court.

Petitioners moved for summary judgment on July 31, 2008. Subsequently, the District Court advised that the case should be resolved on a motion to narrow the legal issues under Fed. R. Civ. Proc. 16.

Heeding this advice, Petitioners filed such a motion, seeking to establish the Second Amendment's incorporation through the Privileges or Immunities and Due Process Clauses. The next day, NRA Plaintiffs sought leave to brief the incorporation issue, which was granted.

The parties advanced different arguments for incorporation. Petitioners have consistently argued that the Second Amendment is incorporated through both the Privileges or Immunities Clause and, pursuant to this Court's selective incorporation doctrine, the Due Process Clause of the Fourteenth Amendment. In contrast, NRA Plaintiffs initially posited that all rights are "fundamental" if "explicitly or implicitly protected by the Constitution," NRA Br., Dist. Ct. Nos. 08-3696, 08-3697, Dec. 4, 2008, at 12 (citation omitted), and that "[a]s such, the Second Amendment should be recognized as incorporated." *Id*. "An explicitly protected right, keeping and bearing arms is thus a fundamental right and is incorporated into the Fourteenth Amendment." NRA Br., Ct. App. Nos. 08-4241, 08-4243, Jan. 28, 2009 at 35; *cf.* Pet. for Cert., No. 08-1497 at 12 ("In recognizing substantive Bill of Rights guarantees to be incorporated, the Court has relied on their status as such rather on [sic] subjective values to determine if a constitutional right is really important.").

3. On December 4, 2008, the District Court entered orders denying both Rule 16 motions, as well as Petitioners' motion for summary judgment. Turning first to NRA Plaintiffs, the District Court termed their argument as a "simple syllogism," App. 12, that because most of the Bill of Rights has been incorporated under the Fourteenth Amendment, "[e]rgo, the Second Amendment's guaranty of the right of the people to keep and bear arms, as construed in *Heller*, also extends to Oak Park and Chicago via the Fourteenth Amendment. QED." App. 12-13. But the District Court held itself "duty bound . . . to adhere to the holding in *Quilici* [v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982)] rather than accepting [NRA] plaintiffs' invitation to 'overrule' it(!)," App. 16, referring to circuit precedent following this Court's decision in *Presser* v. *Illinois*, 116 U.S. 252 (1886) declining to apply the Second Amendment to the states.

Petitioners acknowledged that it is for this Court to grant them relief under the Privileges or Immunities Clause, but maintained that neither *Quilici* nor *Presser* addressed their Due Process selective incorporation argument. Indeed, *Quilici* had refused consideration of "historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments," *Quilici*, 695 F.2d at 270 n.8, key aspects of the selective incorporation analysis. Nonetheless, the District

Court referred to its decision in the related cases, reiterating its belief that *Quilici* controlled the outcome of Petitioners' selective incorporation claim. App. 18.

Notably, the District Court declined to opine whether the Second Amendment should be incorporated in the absence of what it considered to be binding precedent to the contrary. App. 16. Because it found the Second Amendment not to be incorporated, the District Court subsequently granted motions for judgment on the pleadings in all three cases.

On appeal, the Seventh Circuit held that this Court's opinions in *United States* v. *Cruikshank*, 92 U.S. 542 (1876), *Presser*, *supra*, and *Miller* v. *Texas*, 153 U.S. 535 (1894) "have direct application in [this] case" and are thus controlling. App. 3. The lower court reached this conclusion despite acknowledging that these three cases "did not consider [the] possibility, which had yet to be devised when those decisions were rendered," that the Second Amendment is selectively incorporated. App. 2.

The Seventh Circuit found support for its position in *Heller*'s footnote 23, observing "that *Presser* and *Miller* 'reaffirmed [*Cruikshank*'s holding] that the Second Amendment applies only to the Federal Government.'" App. 4 (quoting *Heller*, 128 S. Ct. at 2813 n.23. Notably, the Seventh Circuit did not

address the other portion of that same footnote, which Petitioners repeatedly emphasized indicate a contrary approach: "we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry *required by our later cases*." *Heller*, 128 S. Ct. at 2813 n.23 (emphasis added).

## REASONS FOR GRANTING THE PETITION

### I. The Federal Courts Of Appeals And The Highest Courts Of Numerous States Are Divided Over Whether The Second Amendment Is Incorporated As Against The States By The Fourteenth Amendment.

The decision below is consistent with the Second Circuit's opinion in *Maloney* v. *Cuomo*, 554 F.3d 56 (2d Cir. 2009), but it directly contradicts the Ninth Circuit's opinion incorporating the Second Amendment through the Due Process Clause in *Nordyke* v. *King*, 563 F.3d 439 (9th Cir. 2009). The court below acknowledged this conflict. App. 2.

State high courts are also divided on the question of whether they are bound by the Second Amendment. Several state courts consider themselves bound

to respect the Second Amendment,[6] a view advanced before this Court by the Attorneys General of thirty-two states.[7] Yet other state high courts take the opposite view, usually by cursory reference to this Court's nineteenth century direct application precedent.[8]

This split of authority is ripe for resolution at this time. At the federal level, the split encompasses the nation's three largest population centers, depriving millions of Americans of what is for others a life-saving fundamental constitutional right. Moreover, as discussed *infra*, the Fourteenth Amendment's incorporating effect has recently enjoyed significant academic attention, fully developing the historical record in a manner that would empower the Court to reach a comprehensive and just resolution of this important question.

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[6] *Brewer* v. *Commonwealth*, 206 S.W.3d 343, 347 & n.5 (Ky. 2006); *State* v. *Blanchard*, 776 So. 2d 1165, 1168 (La. 2001); *Rohrbaugh* v. *State*, 607 S.E.2d 404, 412-14 (W. Va. 2004); *Stillwell* v. *Stillwell*, 2001 Tenn. App. LEXIS 562 (Tenn. Ct. App. July 30, 2001); *State* v. *Anderson*, 2000 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Jan. 26, 2000); *State* v. *Nickerson*, 247 P.2d 188, 192 (Mont. 1952); *In re Brickey*, 70 P. 609 (Idaho 1902).

[7] The Second Amendment "is properly subject to incorporation." Br. of Amici States Texas, et al., No. 07-290, at 23 n.6. North Carolina joined the brief's thirty-one original signatories by letter.

[8] *See, e.g. State* v. *Keet*, 190 S.W. 573 (Mo. 1916); *State* v. *Mendoza*, 920 P.2d 357 (Haw. 1996); *In re Ramirez*, 226 P. 914 (Cal. 1924); *Strickland* v. *State*, 72 S.E. 260 (Ga. 1911); *Harris* v. *State*, 432 P.2d 929 (Nev. 1967); *State* v. *Kerner*, 107 S.E. 222 (N.C. 1921); *Ex parte Thomas*, 97 P. 260 (Okla. 1908).

The two circuits and various state high courts holding against Second Amendment incorporation have done so not on the grounds that incorporation would be wrong, but that it is foreclosed by a line of this Court's precedent. The question of which precedential line controls is ultimately one for this Court to decide, and would not benefit from further disagreement among the lower federal courts.

## II. The Court Below Decided An Important Question Of Law In A Manner Contrary To This Court's Precedent.

Precedent barring direct application of the Bill of Rights remains undisturbed by the Fourteenth Amendment. But contrary to the Seventh Circuit's assertion, pre-incorporation relics such as *Cruikshank*, *Presser,* and *Miller* have no direct application to the question of selective incorporation under the Due Process Clause. "[C]ases cannot be read as foreclosing an argument that they never dealt with." *Waters* v. *Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) (citation omitted). By the time this Court first incorporated the Fourth Amendment in *Wolf* v. *Colorado*, 338 U.S. 25 (1949), *overruled on other grounds*, *Mapp* v. *Ohio*, 367 U.S. 643 (1961), *Miller*'s reasoning that the Second and Fourth Amendments "operate only upon the federal power, and have no reference whatever to proceedings in state courts," *Miller*, 153 U.S. at 538, was irrelevant with respect to both amendments it addressed.

The lower court's commendable respect for this Court's precedent and prerogatives was misapplied in that the lower court followed the wrong line of cases. Thus, the lower court decided an important constitutional issue in a manner contrary to the instructions of this Court. "[W]hen a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it." *Perkins* v. *Endicott Johnson Corp.*, 128 F.2d 208, 217-18 (2nd Cir. 1942), *aff'd*, 317 U.S. 501 (1943) (footnotes omitted). "A court need not blindly follow decisions that have been undercut by subsequent cases. . . ." *United States* v. *Burke*, 781 F.2d 1234, 1239 n.2 (7th Cir. 1985) (citations omitted).

> [S]ometimes later decisions, though not explicitly overruling or even mentioning an earlier decision, indicate that the Court very probably will not decide the issue the same way the next time. In such a case, to continue to follow the earlier case blindly until it is formally overruled is to apply the dead, not the living, law.

*Norris* v. *United States*, 687 F.2d 899, 904 (7th Cir. 1982).

The lower court erred in failing to heed *Heller*'s cautionary statement that the pre-incorporation relics lack "the sort of Fourteenth Amendment inquiry required by our later cases." *Heller*, 128 S. Ct. at 2813 n.23. The lower court's decision, while faithful to *Cruikshank*, failed to follow the approach laid down by this Court in cases describing selective due process

incorporation, such as *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

Responding to Petitioners' argument that in our legal system, it is the reasoning of precedent, not its result, which is controlling, the court below offered that if this were so, "the Court's decisions could be circumvented with ease" by any judge not "too dim-witted to come up with a novel argument." App. 3.

Respectfully, this is not correct. Time and again, this Court has rejected a result under one theory, only to adopt the same result under another. For example, this Court rejected a challenge to the mandatory federal Sentencing Guidelines under separation of powers and non-delegation theories, *Mistretta* v. *United States*, 488 U.S. 361 (1989), but sustained a similar challenge under the Sixth Amendment jury trial right. *United States* v. *Booker*, 543 U.S. 220 (2005). This is essentially the history of the selective incorporation doctrine. Most selectively-incorporated rights were earlier the subject of direct application bars. *Compare*, *e.g., Cruikshank* (First Amendment not directly applicable to the states) with *Gitlow* v. *New York*, 268 U.S. 652 (1925) (First Amendment incorporated), and *Fox* v. *Ohio*, 46 U.S. (5 How.) 410 (1847) (Fifth Amendment Double Jeopardy Clause not directly applicable to the states) with *Benton* v. *Maryland*, 395 U.S. 784 (1969) (Double Jeopardy Clause incorporated).

Yet in this case, unless the Court grants the petition, Americans residing in the Seventh Circuit

will not only be deprived of their Second Amendment rights, they will also be denied consideration of whether those rights must be respected by state officials under this Court's established selective incorporation doctrine. It falls to this Court to perform the incorporation analysis that the lower court would not.

The modern incorporation test asks whether a right is "fundamental to the American scheme of justice," *Duncan*, 391 U.S. at 149, or "necessary to an Anglo-American regime of ordered liberty," *id.* at 149 n.14. *Duncan*'s analysis suggests looking to the right's historical acceptance in our nation, its recognition by the states (including any trend regarding state recognition), and the nature of the interest secured by the right.

As demonstrated by the only post-*Heller* opinion applying this Court's "required" selective incorporation analysis to the Second Amendment right, the court below erred in declining to apply the Second Amendment to the states. The Ninth Circuit began its analysis by observing that "the text of the Second Amendment already suggests that the right it protects relates to an institution, the militia, which is 'necessary to an Anglo-American regime of ordered liberty.'" *Nordyke*, 563 F.3d at 450 (quoting *Duncan*, 391 U.S. at 149 n.14). Noting *Heller*'s instruction that the right to arms codified in the Second Amendment was considered "fundamental," *Nordyke* observed that "the right contains both a political component – it is a means to protect the public from tyranny – and a personal component – it is a means to protect the

individual from threats to life or limb." *Nordyke*, 563 F.3d at 451 (citing Akhil Reed Amar, THE BILL OF RIGHTS 46-59, 257-66 (1998)).

Surveying the founding era, with respect to the Second Amendment, *Nordyke* concluded that our nation's history "reveals a right indeed 'deeply rooted in this Nation's history and tradition.'" *Nordyke*, 563 F.3d at 454, a conclusion re-enforced by the history of the Post-Revolutionary period, *id.*, and the history surrounding Reconstruction and the adoption of the Fourteenth Amendment. *Id.,* at 455-56. And surveying the protection afforded the right to arms in state constitutions over the years, as also described in *Heller*, *Nordyke* found that history "compelling." *Nordyke*, 563 F.3d at 455.

Most importantly, instead of formulating its own ideas about the nature of the right secured by the Second Amendment, the Ninth Circuit took its guidance from this Court's definition of the right to arms. "[L]anguage throughout *Heller* suggests that the right is fundamental by characterizing it the same way other opinions described enumerated rights found to be incorporated." *Nordyke*, 563 F.3d at 456-57.

In reversing the judgment below, this Court should follow the Ninth Circuit's reasoning as more faithful to precedent. Yet this Court should also reemphasize aspects of *Heller* which the Seventh Circuit appears to have not considered. In a remarkable passage, the court below suggested that the right of self-defense is a mere construct of positive law that, if rescinded, can obviate the Second Amendment right

to keep and bear arms. App. 7-9. In other words, the Second Amendment secures a right that can be revoked by mere legislation. The court below thus suggested that the right of self-defense could be legislatively modified to deprive people of the Second Amendment right to possess a handgun. App. 7.

This dicta contradicts *Heller*'s teaching that "the *inherent right* of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2817 (emphasis added). Self-defense "was the *central component* of the right itself." *Heller*, 128 S. Ct. at 2801 (emphasis original).

In a similar vein, the court below offered that reliance on the works of William Blackstone for the proposition that "the right to keep and bear arms is 'deeply rooted' not only slights the fact that Blackstone was discussing the law of another nation but also overlooks the reality that Blackstone discussed arms-bearing as a *political* rather than a *constitutional* right." App. 6 (emphasis original). The "other nation" was England in the centuries before the American Revolution, the relevance of its law established by *Duncan*'s inquiry into whether rights are "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14.

*Heller* reiterated that Blackstone "constituted the preeminent authority on English law for the founding generation," *Heller*, 128 S. Ct. at 2798 (quoting *Alden* v. *Maine*, 527 U.S. 706, 715 (1999)), and quoted with approval his description of the right to arms as "the

natural right of resistance and self-preservation" and "the right of having and using arms for self-preservation and defence." *Heller*, 128 S. Ct. at 2798 (citation omitted). On this authority, *Heller* concluded that the right to arms "was by the time of the founding understood to be an individual right protecting against both public and private violence." *Heller*, 128 S. Ct. at 2798-99. Indeed, St. George Tucker, the earliest prominent commentator on the Constitution, regarded the Second Amendment right as equivalent to Blackstone's "right of the subject," protecting "[t]he right of self defence [which] is the first law of nature." 1 St. George Tucker, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, 143, 300 (1803). This is no mere "political" right.

The lower court's refusal to recognize the right of self-defense as inherent also contradicts a multitude of this Court's decisions affirming rights under the Due Process Clause arising from recognition of the individual interest in personal autonomy and bodily integrity.

> [N]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

*Cruzan* v. *Dir., Mo. Dept. of Health*, 497 U.S. 261, 269 (1990) (citation omitted). "[T]he right to personal

security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Youngberg* v. *Romeo*, 457 U.S. 307, 315 (1982) (citation omitted); *cf*. *White* v. *Rockford*, 592 F.2d 381, 383 (7th Cir. 1979) ("the right to some degree of bodily integrity" is "chief among" the interests protected by the Due Process Clause).

"[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 851 (1992). If abortion is protected because "[a]t the heart of liberty is the right to define one's own concept of existence," *id.*, and states may not restrict contraception owing to the "indefeasible right of personal security," *Griswold* v. *Connecticut*, 381 U.S. 479, 484 n.* (1965) (citation omitted), it is unfathomable that states may abolish the right of self-defense against violent crime and thus moot its auxiliary, codified right to arms.

Also warranting this Court's attention is the suggestion that the court below would elevate an alleged state interest in federalism over the fundamental individual rights secured by our Constitution. Federalism is a venerable political institution, but since ratification of the Fourteenth Amendment, it no longer sanctions violation by state actors of Americans' civil rights.

States and localities are not laboratories of democracy when it comes to the establishment of religion, *Engel* v. *Vitale*, 370 U.S. 471 (1962); suppression

of the press, *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931); racial segregation, *Brown* v. *Bd. of Education*, 347 U.S. 483 (1954); interference with family planning, *Casey, Griswold*; intrusion into personal relationships, *Lawrence* v. *Texas*, 539 U.S. 558 (2003) – or disarmament. *Cf. Heller*, 128 S. Ct. at 2818 n.27. The Second Amendment "surely elevates above all other interests" – including federalism – "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 128 S. Ct. at 2821.

To claim that of all rights, the Second Amendment must yield to local majoritarian impulses is especially wrong considering that the rampant violation of the right to keep and bear arms was understood to be among the chief evils vitiated by adoption of the Fourteenth Amendment. At the time, the Congress was beset by horrific reports of disarmament and its aftermath. *See*, *e.g.,* Cong. Globe, 39th Cong., 1st Sess. 39, 40 (Dec. 13, 1865) (statement of Sen. Wilson) ("rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are being done in other sections of the country."); House Ex. Doc. No. 70, 39th Cong., 1st Sess., at 236-39 (1866) (Kentucky "marshal takes all arms from returned colored soldiers, and is very prompt in shooting the blacks whenever an opportunity occurs," while outlaws "make brutal attacks and raids upon freedmen, who are defenseless, for the civil law-officers disarm

the colored man and hand him over to armed marauders").

Not surprisingly,

> With respect to the proposed [Fourteenth] Amendment, Senator Pomeroy described as one of the three "indispensable" "safeguards of liberty . . . under the Constitution" a man's "right to bear arms for the defense of himself and family and his homestead."

*Heller*, 128 S. Ct. at 2811 (citing Cong. Globe, 39th Cong., 1st Sess., 1182 (1866)).

The lower court expressed lack of confidence in conducting the required incorporation analysis. "How the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict." App. 6. The lower court's observations with respect to the inherent right of self-defense, Blackstone, and federalism suggest that it would not have correctly decided the question even had it been considered. In any event, with several state and lower federal courts deferring to this Court for an authoritative answer on the critically important question of Second Amendment incorporation, this Court should provide the necessary guidance by considering this case.

## III. This Case Presents A Unique Opportunity To Correct This Court's Privileges Or Immunities Doctrine.

If reversal on substantive due process grounds is all but foretold by precedent, reversal is also commanded by adherence to the text, purpose, and original public meaning of the Fourteenth Amendment's Privileges or Immunities Clause.

The almost meaningless construction given this provision in *Slaughter-House* was wrong the day it was decided and today stands indefensible. "Virtually no serious modern scholar – left, right, and center – thinks that [*Slaughter-House*] is a plausible reading of the Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 n.178 (2001). "'[E]veryone' agrees the Court [has] incorrectly interpreted the Privileges or Immunities Clause." Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627 (1994); Thomas B. McAffee, *Constitutional Interpretation – The Uses and Limitations of Original Intent*, 12 U. Dayton L. Rev. 275, 282 (1986) ("this is one of the few important constitutional issues about which virtually every modern commentator is in agreement"); *see also* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1121, 1297 n.247 (1995) ("*[T]he Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause.").

"Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873." *Saenz* v. *Roe*, 526 U.S. 489, 523 n.1 (1999) (Thomas, J., dissenting) (citations omitted). But within that "little" agreement is the realization that however one defines the unenumerated Privileges or Immunities, at a minimum, these include the individual rights secured by the first eight amendments.

Consideration of the Privileges or Immunities Clause must start with its textual command: "No state shall." U.S. Const. amend. XIV, sec. 1. The words are identical to those introducing the prohibitions against state conduct set forth in Article I, Section 10. This is no accident. Fourteenth Amendment author Rep. John Bingham made no secret that he intended for the amendment to effectively overrule *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), barring direct application of the Bill of Rights as against the states. In doing so, Bingham

> looked to *Barron* itself for guidance. Within the words of Chief Justice John Marshall he found clear instructions: "Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention."

Michael Anthony Lawrence, *Second Amendment Incorporation Through the Privileges or Immunities and*

*Due Process Clauses*, 72 Mo. L. Rev. 1, 18 (2007) (hereafter "Lawrence") (citing Cong. Globe, 42d Cong., 1st Sess. app. at 84 (1871); *Barron*, 32 U.S. at 250).

As for the "privileges or immunities" the states were not to abridge, "'[o]ver and over [John Bingham] described the privileges-or-immunities clause as encompassing 'the bill of rights' – a phrase he used more than a dozen times in a key speech. . . .'" Lawrence, 72 Mo. L. Rev. at 19 (quoting Akhil Reed Amar, THE BILL OF RIGHTS 182 (1998)). "[T]he privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States." Cong. Globe, 42d Cong., 1st Sess. app. at 84 (Mar. 31, 1871) (Rep. Bingham).

The Fourteenth Amendment's Senate sponsor, Senator Jacob Howard, explained the Privileges or Immunities Clause's incorporating scope:

> To these privileges and immunities, whatever they may be – for they are not and cannot be fully defined in their entire extent and precise nature – to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech, . . . *and the right to keep and to bear arms*. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at

> all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (emphasis added).

"The newspaper coverage of the Bingham and Howard speeches provides substantial evidence that the national body politic, during 1866-68, was placed on fair notice about the incorporationist design of the Amendment." Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio St. L.J. 1509, 1590 (2007); David Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. 695 (forthcoming 2009), available at SSRN: http://ssrn.com/abstract=1322323.

This understanding was not limited to the Fourteenth Amendment's supporters. "Fourteenth Amendment opponent Senator Reverdy Johnson . . . agreed that the privileges and immunities protected by the Fourteenth Amendment included the right to keep and bear arms." Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57, 98 (1993) (citations omitted). Interior Secretary Orville Browning

> published widely, in the fall of 1866, a letter denouncing the proposed Amendment. The Browning letter predicted the Amendment, especially the Due Process Clause, would "subordinate the State judiciaries to Federal supervision and control" and "annihilate

> the[ir] independence . . . in the administration of State laws." Indeed, he said, "all State laws . . . will be equally open to criticism, interpretation and adjudication by the Federal tribunals, whose judgments and decrees will be supreme and will override the decisions of the State Courts. . . . " Browning specifically noted that the Amendment would authorize federal court claims by state criminal defendants.

Wildenthal, 68 Ohio St. L.J. at 1604.[9]

And until the *Slaughter-House* surprise, leading legal scholars of the day understood the incorporationist effect of this language. Describing *Barron* as "unfortunate," Dean Pomeroy added that "a remedy is easy, and the question of its adoption is now pending before the people," referring to the Fourteenth Amendment. John N. Pomeroy, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 149, 151 (1868). Judge Farrar, referring to precedent holding the Bill of Rights inapplicable to the states, wrote: "All these decisions . . . are entirely swept away by the 14th amendment." Timothy Farrar, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 546 (3d ed. 1872). Writing during the Fourteenth Amendment's ratification period, Judge Paschal offered that "[t]he

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[9] "The letter was published in numerous papers. The quotations in the text are taken from the *Cincinnati Commercial* of October 26, 1866." Wildenthal, at 1604 n.313 (other citations omitted).

new feature declared is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States." George W. Paschal, THE CONSTITUTION OF THE UNITED STATES 290 (1868).

It bears emphasizing that while the original public meaning of the Fourteenth Amendment with respect to incorporation is consistent with the Court's incorporation precedent under the Due Process Clause, the original understanding relates directly to the Privileges or Immunities Clause. The original error of eviscerating the Privileges or Immunities Clause has led to increased reliance on substantive due process, a concept which, whatever its merits, rests on shakier textual and originalist roots and is thus more prone to controversy.

This Court need not abandon substantive due process, which does not in and of itself conflict with faithful adherence to the original public meaning of the Privileges or Immunities Clause. However, when as here, substantive due process incorporation would lead to the same result as under a more straightforward, correct reading of the Privileges or Immunities Clause, the latter approach is preferable.

Justice Thomas, joined by Chief Justice Rehnquist, declared that he "would be open to reevaluating [the Privileges or Immunities Clause's] meaning in an appropriate case." *Saenz*, 526 U.S. at 528 (Thomas,

J., dissenting).[10] Complete restoration of the Privileges or Immunities Clause may not occur overnight, but as the Second Amendment is among the last provisions of the Bill of Rights whose incorporation has not been considered in the modern era, this case presents a logical starting point.

## IV. This Case Is An Excellent Vehicle For Elucidating The Protections Of The Right To Keep And Bear Arms In Relation To State And Local Governments.

Several factors render this the ideal case in which to settle the question of the Second Amendment's incorporation. First, Petitioners have clearly and consistently advanced the two traditional incorporation doctrines – selective incorporation under the Due Process Clause, and textual incorporation under the Privileges or Immunities Clause – each of which was turned away by the lower court.

Second, the laws at issue unambiguously violate the Second Amendment right, and would be unconstitutional if the Second Amendment bound Respondent.

[10] "Since the adoption of [the Fourteenth] Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights. . . . Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open." *Gideon* v. *Wainright*, 372 U.S. 335, 345-46 (1963) (Douglas, J., concurring) (citation omitted).

Finally, Respondent has already enforced these laws against Petitioners, and Petitioners have moved for summary judgment. A definitive resolution in Petitioners' favor is therefore available.

## CONCLUSION

The Seventh Circuit's deference to the precedent and prerogatives of this Court is admirable, but misplaced. The court below should have heeded *Heller*'s instruction to "engage in the sort of Fourteenth Amendment inquiry required by our later cases," *Heller*, 128 S. Ct. at 2813 n.23. *Duncan*, not *Cruikshank*, today controls incorporation questions under the Fourteenth Amendment's Due Process Clause. Moreover, *Heller* flatly precludes the concepts relating to the right to arms explored by the lower court's dicta.

As the Ninth Circuit correctly held, the modern analysis mandates incorporation of the Second Amendment right as against the states. It is vitally important that this split be resolved quickly, so that all Americans may enjoy the full measure of protection in their exercise of fundamental rights.

More critically, it is never too late to undo an error as grievous as that contained within *The Slaughter-House Cases*. Opportunities to correct such mistakes should be seized when they present themselves.

Petitioners respectfully pray that the Court grant the petition.

Respectfully submitted,

DAVID G. SIGALE
LAW FIRM OF
DAVID G. SIGALE, P.C.
4300 Commerce Court,
Suite 300-3
Lisle, Illinois 60532
630.452.4547

ALAN GURA*
GURA & POSSESSKY, PLLC
101 N. Columbus Street,
Suite 405
Alexandria, Virginia 22314
703.835.9085

**Counsel of Record*

**In the**
**United States Court of Appeals**
**For the Seventh Circuit**

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Nos. 08-4241, 08-4243 & 08-4244

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,

*Plaintiffs-Appellants,*

*v.*

CITY OF CHICAGO, ILLINOIS, and
VILLAGE OF OAK PARK, ILLINOIS,

*Defendants-Appellees.*

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Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 08 C 3645 *et al.* – **Milton I. Shadur**, *Judge*.

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ARGUED MAY 26, 2009 – DECIDED JUNE 2, 2009

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Before EASTERBROOK, *Chief Judge*, and BAUER and POSNER, *Circuit Judges.*

EASTERBROOK, *Chief Judge*. Two municipalities in Illinois ban the possession of most handguns. After the Supreme Court held in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), that the second amendment entitles people to keep handguns at home for self-protection, several suits were filed against Chicago and Oak Park. All were dismissed on the ground that *Heller* dealt with a law enacted under

the authority of the national government, while Chicago and Oak Park are subordinate bodies of a state. The Supreme Court has rebuffed requests to apply the second amendment to the states. See *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894). The district judge thought that only the Supreme Court may change course. 2008 U.S. Dist. LEXIS 98134 (N.D. Ill. Dec. 4, 2008).

*Cruikshank, Presser,* and *Miller* rejected arguments that depended on the privileges and immunities clause of the fourteenth amendment. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), holds that the privileges and immunities clause does not apply the Bill of Rights, en bloc, to the states. Plaintiffs respond in two ways: first they contend that *Slaughter-House Cases* was wrongly decided; second, recognizing that we must apply that decision even if we think it mistaken, plaintiffs contend that we may use the Court's "selective incorporation" approach to the second amendment. *Cruikshank, Presser,* and *Miller* did not consider that possibility, which had yet to be devised when those decisions were rendered. Plaintiffs ask us to follow *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), which concluded that *Cruikshank, Presser,* and *Miller* may be bypassed as fossils. (*Nordyke* applied the second amendment to the states but held that local governments may exclude weapons from public buildings and parks.) Another court of appeals has concluded that *Cruikshank, Presser,* and *Miller* still control even

though their reasoning is obsolete. *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009). We agree with *Maloney*, which followed our own decision in *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982).

Repeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). *Cruikshank, Presser,* and *Miller* have "direct application in [this] case". Plaintiffs say that a decision of the Supreme Court has "direct application" only if the opinion expressly considers the line of argument that has been offered to support a different approach. Yet few opinions address the ground that later opinions deem sufficient to reach a different result. If a court of appeals could disregard a decision of the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument.

Anyone who doubts that *Cruikshank, Presser,* and *Miller* have "direct application in [this] case"

need only read footnote 23 in *Heller*. It says that *Presser* and *Miller* "reaffirmed [*Cruikshank*'s holding] that the Second Amendment applies only to the Federal Government." 128 S. Ct. at 2813 n.23. The Court did not say that *Cruikshank, Presser,* and *Miller* rejected a particular *argument* for applying the second amendment to the states. It said that they hold "that the Second Amendment applies only to the Federal Government." The Court added that "*Cruikshank*'s continuing validity on incorporation" is "a question not presented by this case". *Ibid.* That does not license the inferior courts to go their own ways; it just notes that *Cruikshank* is open to reexamination by the Justices themselves when the time comes. If a court of appeals may strike off on its own, this not only undermines the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision.

*State Oil Co. v. Khan*, 522 U.S. 3 (1997), illustrates the proper relation between the Supreme Court and a court of appeals. After *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), held that antitrust laws condemn all vertical maximum price fixing, other decisions (such as *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977)) demolished *Albrecht*'s intellectual underpinning. Meanwhile new economic analysis showed that requiring dealers to charge no more than a prescribed maximum price could benefit consumers, a possibility that *Albrecht* had not considered. Thus by the time *Khan* arrived

on appeal, *Albrecht*'s rationale had been repudiated by the Justices, and new arguments that the *Albrecht* opinion did not mention strongly supported an outcome other than the one that *Albrecht* announced. Nonetheless, we concluded that only the Justices could inter *Albrecht*. See *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996). By plaintiffs' lights, we should have treated *Albrecht* as defunct and reached what we deemed a better decision. Instead we pointed out *Albrecht*'s shortcomings while enforcing its holding. The Justices, who overruled *Albrecht* in a unanimous opinion, said that we had done exactly the right thing, "for it is this Court's prerogative alone to overrule one of its precedents." 522 U.S. at 20. See also, e.g., *Eberhart v. United States*, 546 U.S. 12 (2005).

What's more, the proper outcome of this case is not as straightforward as the outcome of *Khan*. Although the rationale of *Cruikshank, Presser,* and *Miller* is defunct, the Court has not telegraphed any plan to overrule *Slaughter-House* and apply all of the amendments to the states through the privileges and immunities clause, despite scholarly arguments that it should do this. See Akhil Reed Amar, *America's Constitution: A Biography* 390-92 (2005) (discussing how the second amendment relates to the privileges and immunities clause). The prevailing approach is one of "selective incorporation." Thus far neither the third nor the seventh amendment has been applied to the states – nor has the grand jury clause of the fifth amendment or the excessive bail clause of the eighth.

How the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict.

*Nordyke* asked whether the right to keep and bear arms is "deeply rooted in this nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). It gave an affirmative answer. Suppose the same question were asked about civil jury trials. That institution also has deep roots, yet the Supreme Court has not held that the states are bound by the seventh amendment. Meanwhile the Court's holding that double-jeopardy doctrine is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (concluding that it is enough for the state to use res judicata to block relitigation of acquittals), was overruled in an opinion that paid little heed to history. *Benton v. Maryland*, 395 U.S. 784 (1969). "Selective incorporation" thus cannot be reduced to a formula.

Plaintiffs' reliance on William Blackstone, 1 *Commentaries on the Laws of England* *123-24, for the proposition that the right to keep and bear arms is "deeply rooted" not only slights the fact that Blackstone was discussing the law of another nation but also overlooks the reality that Blackstone discussed arms-bearing as a *political* rather than a *constitutional* right. The United Kingdom does not have a constitution that prevents Parliament and the Queen from matching laws to current social and economic circumstances, as the people and their

representatives understand them. It is dangerous to rely on Blackstone (or for that matter modern European laws banning handguns) to show the meaning of a constitutional amendment that this nation adopted in 1868. See Nicholas Quinn Rosenkranz, *Condorcet and the Constitution*, 59 Stan. L. Rev. 1281 (2007). Blackstone also thought determinate criminal sentences (*e.g.*, 25 years, neither more nor less, for robbing a post office) a vital guarantee of liberty. 4 *Commentaries* *371-72. That's not a plausible description of American constitutional law.

One function of the second amendment is to prevent the national government from interfering with state militias. It does this by creating individual rights, *Heller* holds, but those rights may take a different shape when asserted against a state than against the national government. Suppose Wisconsin were to decide that private ownership of long guns, but not handguns, would best serve the public interest in an effective militia; it is not clear that such a decision would be antithetical to a decision made in 1868. (The fourteenth amendment was ratified in 1868, making that rather than 1793 the important year for determining what rules must be applied to the states.) Suppose a state were to decide that people cornered in their homes must surrender rather than fight back – in other words, that burglars should be deterred by the criminal law rather than self help. That decision would imply that no one is entitled to keep a handgun at home for self-defense,

because self-defense would itself be a crime, and *Heller* concluded that the second amendment protects only the interests of law-abiding citizens. See *United States v. Jackson*, 555 F.3d 635 (7th Cir. 2009) (no constitutional right to have guns ready to hand when distributing illegal drugs).

Our hypothetical is not as farfetched as it sounds. Self-defense is a common-law gloss on criminal statutes, a defense that many states have modified by requiring people to retreat when possible, and to use non-lethal force when retreat is not possible. Wayne R. LaFave, 2 *Substantive Criminal Law* §10.4 (2d ed. 2003). An obligation to avoid lethal force in self-defense might imply an obligation to use pepper spray rather than handguns. A modification of the self-defense defense may or may not be in the best interest of public safety – whether guns deter or facilitate crime is an empirical question, compare John R. Lott, Jr., *More Guns, Less Crime* (2d ed. 2000), with Paul H. Rubin & Hashem Dzehbakhsh, *The effect of concealed handgun laws on crime*, 23 International Rev. L. & Econ. 199 (2003), and Mark Duggan, *More Guns, More Crime,* 109 J. Pol. Econ. 1086 (2001) – but it is difficult to argue that legislative evaluation of which weapons are appropriate for use in self-defense has been out of the people's hands since 1868. The way to evaluate the relation between guns and crime is in scholarly journals and the political process, rather than invocation of ambiguous texts that long precede the contemporary debate. See *Clark v. Arizona*, 548 U.S.

735 (2006) (state may reformulate, and effectively abolish, insanity defense); *Martin v. Ohio*, 480 U.S. 228 (1987) (state may assign to defendant the burden of raising, and proving, self-defense).

Chicago and Oak Park are poorly placed to make these arguments. After all, Illinois has *not* abolished self-defense and has *not* expressed a preference for long guns over handguns. But the municipalities can, and do, stress another of the themes in the debate over incorporation of the Bill of Rights: That the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system 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."); *Crist v. Bretz*, 437 U.S. 28, 40-53 (1978) (Powell, J., dissenting) (arguing that only "fundamental" liberties should be incorporated, and that even for incorporated amendments the state and federal rules may differ); Robert Nozick, *Anarchy, State, and Utopia* (1974). Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon. How arguments of this kind will affect proposals to "incorporate" the

second amendment are for the Justices rather than a court of appeals.

AFFIRMED

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al., Plaintiffs, v. VILLAGE OF OAK PARK, Defendant. | ) ) ) ) ) ) ) ) | No. 08 C 3696 |
| NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al., Plaintiffs, v. CITY OF CHICAGO, Defendant. | ) ) ) ) ) ) ) ) ) | No. 08 C 3697 |

MEMORANDUM OPINION AND ORDER

(Filed Dec. 4, 2008)

Fresh from a historic victory for their cause before the Supreme Court in *Dist. of Columbia v. Heller,* 128 S.Ct. 2783 (2008), the National Rifle Association of America, Inc. ("Association") and some of its members filed these two lawsuits just one day after the *Heller* decision.[1] These cases have taken aim

[1] Even so, the Association was not quite as quick on the trigger as counsel for the plaintiffs in *McDonald v. City of*

(Continued on following page)

at the gun control ordinances in the City of Chicago and the Village of Oak Park. Although counsel's constitutional arguments are set out in 15 well-written pages,[2] they may be encapsulated in a simple syllogism:

> 1. Under *Heller,* the Second Amendment's guaranty of the right to keep and bear arms has invalidated the District of Columbia's prohibition on the possession of handguns.
>
> 2. Almost all of the guaranties that apply against the federal government and its agencies under the Bill of Rights (the first ten amendments to the Constitution) have been held to have been incorporated in the guaranties that apply against the states and their subordinate units of government under the Fourteenth Amendment.
>
> 3. Ergo, the Second Amendment's guaranty of the right of the people to keep and bear arms, as construed in *Heller,* also

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*Chicago,* 08 C 3645, who actually filed suit here on the same morning that *Heller* was decided in Washington! What is eminently plain is that both sets of lawyers – the counsel who are handling both of these cases and another set of lawyers in *McDonald*-came loaded for bear, on the assumption that the Supreme Court majority would rule as it did.

[2] After brief introductory paragraphs, the remaining 14 pages of the two memoranda are word-for-word replicas of each other. This memorandum order will accordingly cite only to the memorandum filed in the City of Chicago case.

> extends to Oak Park and Chicago via the Fourteenth Amendment. QED.

That approach, however, ignores a fundamental and critical jurisprudential curb that confronts a district judge such as the writer who is asked to confirm that third proposition – the judge's duty to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent caselaw may point in a different direction. As stressed in *Sabin v. United States Dep't of Labor,* 509 F.3d 376, 378 (emphasis in original) – one of many cases standing for the same proposition:[3]

> The Supreme Court has told the lower courts that they are not to anticipate the overruling of a Supreme Court decision, but are to consider themselves bound by it until and unless *the Court* overrules it, however out of step with current trends in the relevant case law the case may be.

That posture of the Court of Appeals vis-a-vis the Supreme Court is of course echoed in the posture of this Court vis-a-vis our Court of Appeals.

In this instance our Court of Appeals has squarely upheld the constitutionality of a ban on handguns a quarter century ago in *Quilici v. Village of Morton Grove,* 695 F.2d 261 (7th Cir. 1982). And in reaching that conclusion, *Quilici, id.* at 269 relied on

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[3] See also, e.g., *United States v. Santiago-Ochoa,* 447 F.3d 1015, 1020-21 (7th Cir. 2006).

the Supreme Court's decision in *Presser v. Illinois,* 116 U.S. 252, 265 (1886):

> It is difficult to understand how appellants can assert that *Presser* supports the theory that the second amendment right to keep and bear arms is a fundamental right which the state cannot regulate when the Presser decision plainly states that "[t]he Second Amendment declares that it shall not be infringed, but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government. . . . "

In doing so, *Quilici, id.* at 270 rejected arguments (1) that later Supreme Court decisions that had incorporated other Bill of Rights provisions into the Fourteenth Amendment had effectively overruled *Presser* and (2) that the entire Bill of Rights had been implicitly incorporated into the Fourteenth Amendment to apply to the states.

Indeed, *Heller* itself (128 S.Ct. at 2812-13) confirmed that both *Presser* and the Court's predecessor decision in *United States v. Cruikshank,* 92 U.S. 542 (1876) have held that the Second Amendment applies only to the federal government. *Heller, id.* at 2812 described *Cruikshank* as having "held that the Second Amendment does not by its own force apply to anyone other than the Federal Government," after which *Heller, id.* at 2813 n.23 went on to state:

> With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois,* 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886) and *Miller v. Texas,* 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed. 812 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.

To be sure, as the just-quoted language reflects, both *Cruikshank* and *Presser* long antedated the more modern jurisprudence of implied incorporation that began with the initial suggestion in *Gitlow v. New York,* 268 U.S. 652 (1925) that the First Amendment was brought into play against the states via the Fourteenth Amendment, and then continued with selective incorporation thereafter. But *Heller* deliberately and properly did not opine on the subject of incorporation vel non of the Second Amendment (after all, that question was not before the Court). It is simply wrong – an overreaching obviously prompted by the enthusiasm of advocacy – for plaintiffs' counsel to state (Mem. 8-9, emphasis added):

> *Heller's* holding that the Second Amendment guarantees an individual right to keep and bear arms, including handguns, *squarely*

> *overrules* the Seventh Circuit's ruling that "the right to keep and bear handguns is not guaranteed by the second amendment."

This Court should not be misunderstood as either rejecting or endorsing the logic of plaintiffs' argument – it may well carry the day before a court that is unconstrained by the obligation to follow the un-reversed precedent of a court that occupies a higher position in the judicial firmament. But as later-to-be-Justice Oliver Wendell Holmes famously observed in 1881 in *The Common Law:*

> The life of the law has not been logic: it has been experience.

In sum, this Court – duty bound as it is to adhere to the holding in *Quilici,* rather than accepting plaintiffs' invitation to "overrule" it (!) – declines to rule that the Second Amendment is incorporated into the Fourteenth Amendment so as to be applicable to the Chicago or Oak Park ordinances. These actions are set for a status hearing at 8:45 a.m. December 9, 2008 to discuss further proceedings.

/s/ Milton I. Shadur
Milton I. Shadur
Senior United States
District Judge

Date: December 4, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| OTIS McDONALD, et al., Plaintiffs, | ) | |
| v. | ) | No. 08 C 3645 |
| CITY OF CHICAGO, et al., Defendants. | ) | |

MEMORANDUM ORDER

This is one of three cases on this Court's calendar that seek to extrapolate from the Supreme Court's decision in *Dist. of Columbia v. Heller,* 128 S.Ct. 2783 (2008) to invalidate municipal ordinances that ban handguns – indeed, plaintiffs' counsel brought this lawsuit only one day after *Heller* came down (obviously having anticipated the decision reached by the five-Justice majority). This case, like *National Rifle Association of America, Inc. v. City of Chicago,* 08 C 3697, attacks Chicago's handgun ordinance, while *National Rifle Association of America, Inc. v. Village of Oak Park,* 08 C 3696 (brought by the same plaintiffs' counsel who are handling 08 C 3697) challenges the Oak Park ordinance.

Today this Court has issued an opinion that rejects, as contrary to jurisprudential principles, the invitation by counsel in the other two cases to "overrule" *Quilici v. Village of Morton Grove,* 695 F.2d

261 (7th Cir. 1982). *Quilici* is an on-all-fours decision by our Court of Appeals that takes the opposite position from that now pressed by plaintiffs in all three cases before this Court.

There is no need to repeat what is said in that opinion, for it might well have been written for this case too. Instead this memorandum order simply denies (1) plaintiffs' two pending motions – their Motion for Summary Judgment (Dkt. 32) and their Motion To Narrow Legal Issues (Dkt. 43) – and (2) sets this case as well for a status hearing at 8:45 a.m. December 9, 2008.

/s/ Milton I. Shadur
Milton I. Shadur
Senior United States
District Judge

Date: December 4, 2008

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## ARTICLE II. REGISTRATION OF FIREARMS

### 8-20-030 Definitions.

* * *

(f) "Firearm" means any weapon which will, or is designed to or restored to, expel a projectile or projectiles by the action of any explosive; the frame or receiver of any such device; or any firearm muffler or silencer. Provided, that such term shall not include:

(1) antique firearm;

(2) any device used exclusively for line-throwing, signaling, or safety and required or recommended by the United States Coast Guard or Interstate Commerce Commission; or

(3) any device used exclusively for firing explosives, rivets, stud cartridges, or any similar industrial ammunition incapable of use as a weapon.

* * *

(k) "Handgun" means a firearm designed to be held and fired by the use of a single hand, and includes a combination of parts from which such firearm can be assembled.

* * *

### 8-20-040 Registration of firearms.

(a) All firearms in the City of Chicago shall be registered in accordance with the provisions of this chapter. It shall be the duty of a person owning or possessing a firearm to cause such firearm to be

registered. No person shall within the City of Chicago, possess, harbor, have under his control, transfer, offer for sale, sell, give, deliver, or accept any firearm unless such person is the holder of a valid registration certificate for such firearm. No person shall, within the City of Chicago, possess, harbor, have under his control, transfer, offer for sale, sell, give, deliver, or accept any firearm which is unregisterable under the provisions of this chapter.

(b) This section shall not apply to:

(1) Firearms owned or under the direct control or custody of any federal, state or local governmental authority maintained in the course of its official duties;

(2) Duty-related firearms owned and possessed by peace officers who are not residents of the City of Chicago;

(3) Duty-related firearms owned or possessed by corrections officers; provided, that such corrections officers are not residents of the City of Chicago;

(4) Firearms owned, manufactured or processed by licensed manufacturers of firearms, bulk transporters or licensed sellers of firearms at wholesale or retail, provided that such persons have, in addition to any other license required by law, a valid deadly weapons dealer license issued under Chapter 4-144 of this code;

(5) Any nonresident of the City of Chicago participating in any lawful recreational firearm-related activity in the city, or on his way to or from such activity in another

jurisdiction; provided, that such weapon shall be unloaded and securely wrapped and that his possession or control of such firearm is lawful in the jurisdiction in which he resides;

(6) Peace officers, while in the course of their official duties, who possess and control any firearm or ammunition issued by their department, bureau or agency in the normal course of business;

(7) Private security personnel who possess or control any firearm or ammunition within the City of Chicago; provided, that such firearms shall be owned and maintained by the security firm employing such personnel and shall be registered by the security firm in accordance with this chapter;

(8) Those persons summoned by a peace officer to assist in making an arrest or preserving the peace while actually engaged in assisting the peace officer.

(Prior code § 11.1-2; Amend. Coun. J. 7-7-92, p. 19196)

**8-20-050 Unregisterable firearms.**

No registration certificate shall be issued for any of the following types of firearms:

(a) Sawed-off shotgun, machine gun, or short-barreled rifle;

(b) Firearms other than handguns, owned or possessed by any person in the City of

Chicago prior to the effective date of this chapter which are not validly registered prior to the effective date of this chapter;

(c) Handguns, except:

(1) Those validly registered to a current owner in the City of Chicago prior to the effective date of this chapter, and which contain each of the following:

(i) A safety mechanism to hinder the use of the handgun by unauthorized users. Such devices shall include, but shall not be limited to, trigger locks, combination handle locks, and solenoid use-limitation devices; and

(ii) A loud indicator device that provides reasonable warning to potential users such that even users unfamiliar with the weapon would be forwarned and would understand the nature of the warning;

(2) those owned by peace officers who are residents of the City of Chicago,

(3) Those owned by security personnel,

(4) Those owned by private detective agencies licensed under Chapter 111.2601, et seq., Illinois Revised Statutes;

(d) Firearm muffler or silencer;

(e) Assault weapons, as defined in Section 8-20-030, unless they are owned by a person who

is entitled to own them under Section 8-24-025.

Any person who receives through inheritance any firearm validly registered pursuant to this chapter will be eligible to reregister such firearm within 60 days after obtaining possession or title, provided such person shall be qualified to do so in accordance with this chapter.

(Prior code § 11.1-3; Amend. Coun. J. 7-7-92, p. 19196; 2-7-97, p. 38729)

**8-20-060 Prerequisites to registration – Application for registration.**

(a) No registration certificate shall be issued to any person unless such person:

(1) Shall possess a valid Illinois firearm Owner's Identification Card in accordance with Chapter 38 Section 83-4 of the Illinois Revised Statutes as amended;

(2) Has not been convicted of a crime of violence, as defined herein as weapons offense, or a violation of this chapter; and

(3) Has not been convicted within the five years prior to the application of any:

(i) Violation of any law relating to the use, possession or sale of any narcotic or dangerous drug, or

(ii) Violation of Chapter 38 Section 12-2(a)(1) of the Illinois Revised Statutes,

as amended, for aggravated assault or any similar provision of the law of any other jurisdiction; and

(4) Has vision better than or equal to that required to obtain a valid driver's license under the standards established by the Illinois Vehicle Code Chapter 95-1/2, Section 506-4 Illinois Revised Statutes, as amended; and

(5) Is not otherwise ineligible to possess a firearm under any federal, state or local law, statute or ordinance.

(b) All applicants for a registration certificate under this chapter shall file with the superintendent on a form provided, a sworn application in writing. The application shall include the following:

(1) Name, social security number, residential and business address and telephone number of the applicant;

(2) The applicant's age, sex and citizenship;

(3) The applicant's Illinois firearm owner's identification number;

(4) The name of manufacturer, the caliber or gauge, the model, type and the serial number identification of the firearm to be registered;

(5) The source from which the firearm was obtained;

(6) Evidence that the applicant meets the criteria of Section 8-20-060(a) of this chapter;

(7) Two photographs of the applicant taken within 30 days immediately prior to the date of filing the application equivalent to passport size showing the full face, head and shoulders of the applicant in a clear and distinguishing manner;

(8) Such other information as the superintendent shall find reasonably necessary to effectuate the purpose of this chapter and to arrive at a fair determination whether the terms of this ordinance have been complied with.

(c) The superintendent shall be the custodian of all applications for registration under this chapter.

(Prior Code § 11.1-4)

**8-20-070 Fingerprints.**

When necessary to establish the identity of any applicant or registrant, such applicant or registrant shall be required to submit to fingerprinting in accordance with procedures and regulations prescribed by the superintendent.

(Prior code § 11.1-5)

**8-20-080 Application fees.**

(a) A nonrefundable fee in the amount indicated in subsection (d) of this section shall accompany each initial registration.

(b) A nonrefundable fee in the amount indicated in subsection (d) of this section shall accompany each reregistration application.

(c) The registration fee shall not be applicable to (1) any duty-related handgun of a peace officer domiciled in the City of Chicago, or (2) to any duty-related handgun(s) owned by a resident of the City of Chicago who retired from the Chicago Police Department in good standing and without any disciplinary charges pending, and who is, or is eligible to become, an annuitant of the Policemen's Annuity and Benefit Fund of the City of Chicago, but only if the handgun(s) is registered in that person's name at the time of separation from active duty in the Chicago Police Department.

(d) Registration fees for firearms shall be as follows:

| | |
|---|---|
| 1 firearm | $20.00 |
| 2-10 firearms | 25.00 |
| More than ten firearms | 35.00 |

(Prior code § 11.1-6; Amend Coun. J. 7-7-92, p. 19196; Amend Coun. J. 11-10-94, p. 59125; Amend Coun. J. 4-9-03, p. 106640, § 1)

**8-20-090 Filing time.**

(a) A registration certificate shall be obtained prior to any person taking possession of a firearm from any source.

(b) Any firearm currently registered must be reregistered pursuant to this chapter and in accordance with rules, regulations and procedures prescribed by the superintendent. An application to reregister such firearm shall be filed within 180 days from the effective date of this chapter; provided, however, that this section shall not apply to law enforcement officers during their tenure of continuous active duty.

(Prior code § 11.1-7; Amend Coun. J. 2-4-85, p. 13404; Amend Coun. J. 3-25-86, p. 28863)

* * *

**8-20-120 Revocation – Denial.**

A registration certificate shall be revoked or all application for registration or reregistration shall be denied by the mayor when she finds that:

(a) Any of the criteria in Section 8-20-060(a) of this chapter are not currently met; or

(b) The registered firearm is or has become an unregisterable firearm under the terms of Section 8-20-050 of this chapter; or

(c) The information furnished to the superintendent on the application for registration certificate proves to be false; or

(d) The applicant or registrant has violated any of the provisions of this chapter.

(Prior code § 11.1-10)

**8-20-130 Procedures for denial or revocation.**

(a) If it is determined that an application for registration or reregistration should be denied or that a registration certificate should be revoked, the mayor shall notify the applicant or registrant in writing of the proposed denial or revocation, briefly stating the reason or reasons therefore.

(b) The application or registrant, within ten days after receiving notice of the proposed denial or revocation, may file with the mayor a written request for a hearing before the mayor's license commission.

(c) Within ten days of receipt of a request for hearing, the commission shall give notice of a hearing to be held not less than five days after service of the notice on the person requesting the hearing.

At the hearing, the applicant or registrant may submit further evidence in support of the application for initial registration or to continue to hold a registration certificate as the case may be.

The commission shall determine whether the denial or revocation was in accordance with the provisions of this chapter and shall report its finding to the mayor within 21 days after the public hearing has been completed.

Upon a review of the commission's findings and a determination that the application should be denied or certificate revoked, the mayor shall issue a written finding stating the reasons for denial or evocation thereof and shall serve a copy of said findings upon

the applicant or registrant and all parties appearing or represented at the hearing.

(d) If the applicant or registrant does not request a hearing or submit further evidence within ten days after receiving notification of the proposed denial or revocation, it shall be deemed that the applicant or registrant has conceded the validity of the reason or reasons stated in the notice and the denial or revocation shall become final.

(c) Within three days after notification of a decision unfavorable to the applicant or registrant and all time for appeal in accordance with paragraph 8-20-130(a) through (d) having expired, the applicant or registrant shall:

(1) Peaceably surrender to the Chicago Police Department the firearm for which the applicant was denied or the registration certificate was revoked; or

(2) Remove such firearm from the City of Chicago; or

(3) Otherwise lawfully dispose of his interest in such firearm.

(f) The applicant or registrant shall submit to the superintendent evidence of the disposition of nonregisterable firearms in accordance with paragraph 8-20-130(e)(2) and (3). Such evidence shall be submitted on forms and in the manner prescribed by the superintendent.

(Prior code § 11.1-11)

**8-20-140 Additional duties of registrant.**

Each person holding a registration certificate shall:

(a) Immediately notify the Chicago Police Department on a form prescribed by the superintendent of:

(1) The loss, theft or destruction of the registration certificate or of a registered firearm immediately upon discovery of such loss, theft, or destruction;

(2) A change in any of the information appearing on the registration certificate;

(3) The sale, transfer or other disposition of the firearm not less than 48 hours prior to delivery.

(b) Immediately return to the superintendent his copy of the registration certificate for any firearm which is lost, stolen, destroyed or otherwise disposed of.

(c) Each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device, unless such firearm is in his possession at his place of residence or business or while being used for lawful recreational purposes within the City of Chicago; provided, this paragraph shall not apply to law enforcement personnel as defined in paragraph 8-20-030(k) and provided further this paragraph shall not apply to security personnel

as defined in paragraph 8-20-030(a), while in the course of their employment.

(Prior Code § 11.1-12)

**8-20-150 Exhibition of registration.**

Any person carrying or having in his possession or under his custody or control any firearm, shall have on his person or within his immediate custody a valid registration certificate for such firearm issued hereunder, which shall be exhibited for inspection to any peace officer upon demand. Failure of any such person to so exhibit his registration certificate shall be presumptive evidence that he is not authorized to possess such firearm.

Failure of any person to exhibit a registration certificate for any firearm in his possession, custody or control shall also be cause for the confiscation of such firearms and revocation of any registration certificates issued therefore under this chapter.

(Prior code § 11.1-13)

* * *

**8-20-200 Renewal of Registration.**

(a) Every registrant must renew his registration certificate annually. Applications for renewal shall be made by such registrants 60 days prior to the expiration of the current registration certificate.

(b) The application for renewal shall include the payment of a renewal fee as follows:

| | |
|---|---|
| 1 firearm ................................................ | $20.00 |
| 2-10 firearms ........................................... | 25.00 |
| More than ten firearms ........................... | 35.00 |

(c) Failure to comply with the requirement for renewal of registration of a firearm shall cause that firearm to become unregisterable.

(d) All terms, conditions and requirements of this chapter for registration of firearms shall be applicable to renewal or registration of such firearms.

(e) The renewed fee shall not be applicable to duty-related handguns of peace officers domiciled in the City of Chicago.

(Prior code § 11.1-18; Amend Coun. J. 7-7-92, p. 19196; Amend Coun. J. 11-10-94, p. 59125)

* * *

**8-20-241 Firearm used illegally – Penalty.**

The owner of an unregistered firearm that is used in any criminal act shall be subject to a fine of $500.00 for each such use, regardless of whether the owner participated in, aided or abetted the criminal act. A fine under this section shall be in addition to any other penalty imposed on the criminal act or use of the firearm.

(Added Coun. J. 11-10-94, p. 59125)

**8-20-250 Violation – Penalty.**

Any person who violates any provision of this chapter, where no other penalty is specifically provided, shall upon conviction for the first time, be fined not less than $300.00, nor more than $500.00; or be incarcerated for not less than ten days nor more than 90 days or both. Any subsequent conviction for a violation of this chapter shall be punishable by a fine of $500.00 and by incarceration for a term of not less than 90 days, nor more than six months.

(Prior code § 11.1-23, Amend Coun. J. 11-10-94, p. 59125)

**8-20-260 Severability.**

If any provision or term of this chapter, or any application thereof, is held invalid, the invalidity shall not affect other applications of the provisions or terms of this chapter which reasonably can be given effect without the invalid provision or term for the application thereof.

(Prior code § 11.1-24)

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[LOGO]

**City of Chicago/**
**Department of Police**
Gun Registration Program
3510 S. Michigan Avenue,
Room 1027
Chicago, Illinois 60653
(312) 745-5164

Richard M. Daley, Mayor
Jody P. Weis,
Superintendent of Police

June 13, 2008

Mr. OTIS MCDONALD

Chicago, IL

Dear Mr. OTIS MCDONALD:

A review of your application and the records maintained by the Chicago Police Department indicate that you are ineligible to register the below referenced firearm. Pursuant to Chapter 8-20 of the Municipal Code of the City of Chicago, your firearm registration(s) are denied for the following reason:

---- Firearm cannot be registered pursuant to Municipal Code Section 8-20-050. Hanguns [sic] cannot be registered.

The following firearm(s) are affected by this notification:

| Registration Number | Make/ Manufacturer | Model | Serial Number |
|---|---|---|---|
| **D007685L** | **Beretta Usa Corp** | **950** | **C74057** |

Pursuant to the Municipal Code Section 8-20-130, you may file a written request for hearing before the Mayor's License Commission. This request for hearing must be made in writing or by fax within 10 days after receipt of this notice. The request should be sent to:

Municipal Division Chief
Department of Administration Hearings
Municipal Hearings Division
740 N. Sedgwick, 2nd Floor
Chicago, IL 60610

The request can be faxed to (312) 742-8248

If you do not appeal this denial, you are directed to do one of the following: 1) peaceably surrender to the Chicago Police Department the firearm for which you were denied registration, or 2) remove your unregistered firearm(s) from the City of Chicago corporate limits within 10 days fo [sic] receiving this notification or within 3 days after notification of an unfavorable decision by the Mayor's License Commission, or 3) otherwise lawfully dispose of your interest in such firearm(s).

If the subject firearm has already been sold or transferred, complete the enclosed Firearm Dispositon [sic] Form (CPD-31.610) and mail the hard copy directly to the Gun Registration Program. If you are surrendering a firearm, you should call "911" and a police officer will pick up the weapon. The police officer will send

the form to the Gun Registration Program. You Should retain the top copy of this form for your records.

Gun Registration Program
Chicago Police Department

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[LOGO]

**City of Chicago/**
**Department of Police**
Gun Registration Program
3510 S. Michigan Avenue,
Room 1027
Chicago, Illinois 60653
(312) 745-5164

Richard M. Daley, Mayor
Jody P. Weis,
Superintendent of Police

May 6, 2008

Mr. ADAM ORLOV

Chicago, IL

Dear Mr. ADAM ORLOV:

A review of your application and the records maintained by the Chicago Police Department indicate that you are ineligible to register the below referenced firearm. Pursuant to Chapter 8-20 of the Municipal Code of the City of Chicago, your firearm registration(s) are denied for the following reason:

---- Firearm cannot be registered pursuant to Municipal Code Section 8-20-050. Hanguns [sic] cannot be registered.

---- A registration certificate was not obtained prior to the applicant taking possession of the firearm in violation of 8-20-090. (filing time)

The following firearm(s) are affected by this notification:

| Registration Number | Make/ Manufacturer | Model | Serial Number |
|---|---|---|---|
| **D007411S** | **S.I.G. (Swiss Industriel Gesellshaft), ig-Arms;Sig-Sauer** | **P220** | **G247678** |

Pursuant to the Municipal Code Section 8-20-130, you may file a written request for hearing before the Mayor's License Commission. This request for hearing must be made in writing or by fax within 10 days after receipt of this notice. The request should be sent to:

Municipal Division Chief
Department of Administration Hearings
Municipal Hearings Division
740 N. Sedgwick, 2nd Floor
Chicago, IL 60610

The request can be faxed to (312) 742-8248

If you do not appeal this denial, you are directed to do one of the following: 1) peaceably surrender to the Chicago Police Department the firearm for which you were denied registration, or 2) remove your unregistered firearm(s) from the City of Chicago corporate limits within 10 days fo [sic] receiving this notification or within 3 days after notification of an unfavorable decision by the Mayor's License Commission, or 3) otherwise lawfully dispose of your interest in such firearm(s).

If the subject firearm has already been sold or transferred, complete the enclosed Firearm Dispositon [sic] Form (CPD-31.610) and mail the hard copy directly to the Gun Registration Program. If you are surrendering a firearm, you should call "911" and a police officer will pick up the weapon. The police officer will send

the form to the Gun Registration Program. You Should retain the top copy of this form for your records.

Gun Registration Program
Chicago Police Department

[LOGO]

**City of Chicago/ Department of Police**
Gun Registration Program
3510 S. Michigan Avenue, Room 1027
Chicago, Illinois 60653
(312) 745-5164

Richard M. Daley, Mayor
Jody P. Weis, Superintendent of Police

January 23, 2008

Mr. DAVID LAWSON

Chicago, IL

Dear Mr. DAVID LAWSON:

A review of your application and the records maintained by the Chicago Police Department indicate that you are ineligible to register the below referenced firearm. Pursuant to Chapter 8-20 of the Municipal Code of the City of Chicago, your firearm registration(s) are denied for the following reason:

---- Firearm cannot be registered pursuant to Municipal Code Section 8-20-050. Hanguns [sic] cannot be registered.

---- A registration certificate was not obtained prior to the applicant taking possession of the firearm in violation of 8-20-090. (filing time)

The following firearm(s) are affected by this notification:

| Registration Number | Make/ Manufacturer | Model | Serial Number |
|---|---|---|---|
| **D006343L** | **Springfield Armory, Geneseo, Il** | **M1** | **3031203** |

Pursuant to the Municipal Code Section 8-20-130, you may file a written request for hearing before the Mayor's License Commission. This request for hearing must be made in writing or by fax within 10 days after receipt of this notice. The request should be sent to:

Municipal Division Chief
Department of Administration Hearings
Municipal Hearings Division
740 N. Sedgwick, 2nd Floor
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the form to the Gun Registration Program. You Should retain the top copy of this form for your records.

Gun Registration Program
Chicago Police Department

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[LOGO]

**City of Chicago/**
**Department of Police**
Gun Registration Program
3510 S. Michigan Avenue,
Room 1027
Chicago, Illinois 60653
(312) 745-5164

Richard M. Daley, Mayor
Dana V. Starks,
Interim Superintendent
of Police

January 3, 2008

Ms. COLLEEN LAWSON

Chicago, IL

Dear Ms. COLLEEN LAWSON:

A review of your application and the records maintained by the Chicago Police Department indicate that you are ineligible to register the below referenced firearm. Pursuant to Chapter 8-20 of the Municipal Code of the City of Chicago, your firearm registration(s) are denied for the following reason:

---- Firearm cannot be registered pursuant to Municipal Code Section 8-20-050. Hanguns [sic] cannot be registered.

The following firearm(s) are affected by this notification:

| Registration Number | Make/ Manufacturer | Model | Serial Number |
|---|---|---|---|
| **D006489S** | **Smith & Wesson** | **M&P** | **MPP8429** |

Pursuant to the Municipal Code Section 8-20-130, you may file a written request for hearing before the Mayor's License Commission. This request for hearing must be made in writing or by fax within 10 days after receipt of this notice. The request should be sent to:

Municipal Division Chief
Department of Administration Hearings
Municipal Hearings Division
740 N. Sedgwick, 2nd Floor
Chicago, IL 60610

The request can be faxed to (312) 742-8248

If you do not appeal this denial, you are directed to do one of the following: 1) peaceably surrender to the Chicago Police Department the firearm for which you were denied registration, or 2) remove your unregistered firearm(s) from the City of Chicago corporate limits within 10 days fo [sic] receiving this notification or within 3 days after notification of an unfavorable decision by the Mayor's License Commission, or 3) otherwise lawfully dispose of your interest in such firearm(s).

If the subject firearm has already been sold or transferred, complete the enclosed Firearm Dispositon [sic] Form (CPD-31.610) and mail the hard copy directly to the Gun Registration Program. If you are surrendering a firearm, you should call "911" and a police officer will pick up the weapon. The police officer will send

the form to the Gun Registration Program. You Should retain the top copy of this form for your records.

Gun Registration Program
Chicago Police Department

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**THE CITY OF CHICAGO, ILLINOIS**
**DEPARTMENT OF ADMINISTRATIVE HEARINGS**
**MUNICIPAL HEARINGS DIVISION**

| | | |
|---|---|---|
| IN RE PROCEEDINGS CONCERNING GUN REGISTRATION, | ) | |
| REQUESTED BY: | ) | |
| David Lawson | ) | No. 07 GR-000122 |
| Chicago, IL | ) | |
| Registration No. D006343L<br>Serial No. 3031203 | ) | |

## DECISION

1. I find that there is jurisdiction over the subject matter and the parties.

2. According to City Exhibit No. 4, applicant acquired the firearm through the mail on October 19, 2007 from the Civilian Marksmanship Program in Anniston, Arizona. The registration application was submitted November 30, 2007. Applicant testified the program periodically sells firearms and interested parties can bid for the right to buy them. In October 2007 applicant learned via e-mail that his request to purchase the firearm at issue in this case was granted. Applicant testified that the gun was delivered to his Chicago home the next day, October 19, 2007 and remained there for less than a week before being taken to Bloomington, Illinois. He said he could not register the firearm prior to receiving

possession because he would be unable to properly list the serial number and other information on the application without possessing the firearm. He added the program required delivery to his home since that is the address on both his driver's license and firearm owner's identification card. Applicant testified that the Chicago Police gun desk told him he had 30 days to register the firearm from the date of purchase. He explained that this application was beyond that time limit due to travel.

3. Section 8-20-040 of the Municipal Code of the City of Chicago requires that all firearms in the City be registered.. Section 8-20-040(a) states:

(a) All firearms *in the City of Chicago* shall be registered in accordance with the provisions of this chapter. It shall be the duty of a person owning or possessing a firearm to cause such firearm to be registered. No person shall, *within* the City of Chicago possess, harbor, have under his control, transfer, offer for sale, sell, give, deliver or accept any firearm unless such person is the holder of a valid registration certificate for such firearm. No person shall, *within* the City of Chicago, possess, harbor, have under his control, transfer, offer for sale, sell, give, deliver or accept any firearm which is unregisterable under the provisions of this chapter. (Emphasis added).

4. I find that the applicant possessed the firearm in question within the City of Chicago without first properly registering it. Applicant resides in the

City of Chicago and the firearm was delivered to his home. Section 8-20-090(a) requires a firearm be registered *before* an applicant takes possession of the firearm. This section by its plain language is applicable to firearms *within* the City of Chicago. Further, the case of City of Chicago v. Cotton, 356 Ill. App. 3d1, 826 N.E. 2d 405 (1st. Dist 2005) holds that the use of the term "shall" in the Chicago Municipal Code is mandatory, not discretionary. Therefore, I find that I have no discretion in this matter and, as a result, since Applicant did not register the firearm prior to possessing it in the City of Chicago, the firearm is unregisterable.

5. Therefore, the denial of Applicant's application for registration of this firearm is affirmed.

6. Pursuant to Section 2-14-102 of the Chicago Municipal Code, this final decision is subject to review under the Illinois Administrative Review Act.

/s/ Gregory G. Plesha
Gregory G. Plesha
Administrative Law Officer

Dated: March 8, 2008