No. 08-1521

IN THE
Supreme Court of the United States

OTIS MCDONALD, *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

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

BRIEF FOR THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, INSTITUTE OF MEDICINE OF CHICAGO, WAYMAN AFRICAN METHODIST EPISCOPAL CHURCH OF CHICAGO, ILLINOIS COUNCIL AGAINST HANDGUN VIOLENCE, LEGAL COMMUNITY AGAINST VIOLENCE, VIOLENCE POLICY CENTER, STATES UNITED TO PREVENT GUN VIOLENCE, FREEDOM STATES ALLIANCE, CONNECTICUT AGAINST GUN VIOLENCE, MAINE CITIZENS AGAINST GUN VIOLENCE, CITIZENS FOR A SAFER MINNESOTA, OHIO COALITION AGAINST GUN VIOLENCE, WISCONSIN ANTI-VIOLENCE EFFORT EDUCATIONAL FUND, AND GUNFREEKIDS.ORG IN SUPPORT OF RESPONDENTS CITY OF CHICAGO AND VILLAGE OF OAK PARK

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STATEMENT OF INTEREST

With the written consent of the parties, the following *amici curiae* submit this brief pursuant to Rule 37 of the Rules of the Supreme Court of the United States.[1] *Amici curiae* are the Board of Education of the City of Chicago and the non-profit organizations Institute of Medicine of Chicago, Wayman African Methodist Episcopal Church of Chicago, Illinois Council Against Handgun Violence, Legal Community Against Violence, Violence Policy Center, States United to Prevent Gun Violence, Freedom States Alliance, Connecticut Against Gun Violence, Maine Citizens Against Gun Violence, Citizens For A Safer Minnesota, Ohio Coalition Against Gun Violence, Wisconsin Anti-Violence Effort Educational Fund, and Gunfreekids.org.

Amici are governmental, civic and religious organizations actively engaged in efforts to reduce handgun violence and the destructive impact it has on the local communities and urban centers they serve. A brief description of each organization's mission is set forth in the Appendix. *Amici* submit this brief to assist the Court in evaluating the merits, and wisdom, of potentially making the Second Amendment applicable to the states.

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[1] All parties have consented to the filing of *amicus* briefs in support of a party in this case and copies of their letters have been filed with this Court. Counsel of record for all parties received timely notice of the intention of *amici curiae* to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The right to arms, even for personal self-defense, is fundamentally different from all other liberties retained by individuals in society, because of the inherent lethality of firearms. We tolerate few restrictions on the right to free speech because of its salutary effects, and because "sticks and stones may break my bones but words can never hurt me," as the children's rhyme goes. Guns, on the other hand, will kill you.

1. The structure of the Second Amendment prevents incorporation against the states of the right to keep and bear arms articulated in *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008). The reason the Second Amendment was added to the Constitution was to prevent the federal government from destroying the militia, a body concurrently governed by the states and which, when "well-regulated" (*i.e.,* composed of men trained to arms), stood as a check against federal tyranny. The Amendment accomplished this by "confer[ring] an individual right to keep and bear arms (although only arms that 'have some reasonable relationship to the preservation or efficiency of a well-regulated militia')" and only "arms 'in common use at the time' for lawful purposes like self-defense." *Heller,* 128 S. Ct. at 2814, 2815 (quoting *United States v. Miller,* 307 U.S. 174, 178, 179 (1939)). It would be illogical to use the Fourteenth Amendment to turn such a federalism provision *against* the states.

2. Petitioners fail to show that the Second Amendment is incorporated under the Due Process Clause of

the Fourteenth Amendment.[2] Under that clause, a constitutionally enumerated right must be essential to ordered liberty to be incorporated. We have a long history in this country of state and local legislatures exercising their exclusive police powers to ban arms in common use that states and cities determine pose too great a danger to public safety to be allowed. The exercise of these powers has only increased since the founding.

It seems implausible that the Second and Fourteenth Amendments have been understood all along to confer a fundamental right to have *any* weapon an individual prefers merely *because* the weapon is in common use. Rather, history supports that the states always have retained their police power to ban inappropriate common-use weapons (including pistols), as long as access to other weapons sufficient for the asserted need – for example, self-defense – is preserved. This suggests perhaps there is a fundamental (though unenumerated) right to self-defense, but that the right to any particular arm is *not* fundamental, unless shown to be essential to the ability to exercise the right of self-defense.

Petitioners' position would require the Court to find that the Fourteenth Amendment was understood to elevate *all* common-use weapons beyond the reach of any legislative body's power to ban. This is not a plausible description of the country's regulatory

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[2] We fully agree with Respondents' argument that the Second Amendment is not incorporated by the Privileges or Immunities Clause, and add only that adoption of the virtually unlimited natural-law-rights definition of "privileges and immunities" advanced by Petitioners, *see Petitioner's Brief* at 6, 17, would effectively replace elected legislatures with an imperial and unelected judiciary. This Court should reject the invitation.

history of arms and, if followed to its logical conclusion, would undermine the ability of democratic government to preserve order and, ultimately, persevere. To the extent Petitioners really just want to replace local legislatures with the federal judiciary in this area of the police power, they are asking the Court, unwisely, to enter unbounded territory. *See* J. Harvie Wilkinson III, *Of Guns, Abortions and the Unraveling Rule of Law,* 95 Va. L. Rev. 253 (2009).

3. Even if the Court incorporates the right to keep and bear arms against the states, the right must be subject to normal police-power regulation and remain subordinate – as are *all* rights – to the greater right of "personal security" that *all* individuals possess in society. That is how Blackstone understood the right to arms for self-defense, and that is how it has been understood in the states since the founding. In the event of incorporation, this Court's First Amendment obscenity jurisprudence provides a useful analogue and affirms that the determination of what are appropriate common-use weapons ought to remain a local matter.

The Court in *Heller* struck down the DC handgun ban, but did not hold that a right to handguns is reasonably necessary for effective self-defense in the home. Rather it struck the federal ban because the ordinance "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller,* 128 S. Ct. at 2817-18. There are two basic problems with applying a uniform proscription against handgun bans to the states.

First, to the extent the Court is suggesting that *American society* has overwhelmingly chosen handguns for self-defense in the home, that premise is false. Only about 10.1% of all American adults have one or more handguns primarily for self-defense or as their sole firearm(s) (*i.e.,* the only firearm available for self-defense), and only about 10.3% of American adults have one or more long guns primarily for self-defense or as their sole firearm(s) (*i.e.,* the only firearm available for self-defense). It is not true that Americans overwhelmingly keep *any* firearm, much less handguns, to defend themselves – in the home or anyplace else. There are many negative externalities that handgun ownership visits on the community. Among other things, handguns are used offensively seven times for every one time they are used defensively.

Second, firearm choice among the fraction of American adults who have handguns is not a workable basis for examining state laws. If popularity of a weapon is the standard, does that mean the federal judiciary can strike down the assault-weapon bans in place in seven states because, following the election and inauguration of President Obama, assault weapons apparently were purchased in other states in large numbers in fear of a federal ban? Does the Constitution require us to take a poll to determine which weapons are in common use and which are most preferred? The results vary greatly by region, of course.

Control of arms to prevent crime and secure the entire community has always been primarily a matter of state and local action. *Cf.* Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law* 136-137 n.13 (Amy Gutmann ed., Princeton U. Press

1997) ("Of course, properly understood, [the Second Amendment] is no limitation upon arms control by the states."). The Court's "most popular weapon" rationale for overturning the federal handgun ban should not be expanded to preclude state and local legislatures from acting under their police power to prevent crime and protect *everyone's* right to personal security. As Justice Jackson wisely cautioned 60 years ago in a case striking down an incitement-to-violence conviction on First Amendment grounds: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago,* 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). He was vindicated two years later when the Court upheld an incitement conviction, recognizing that even broad First Amendment rights must yield to clear and present dangers to public safety. *Feiner v. New York,* 340 U.S. 315 (1951).

ARGUMENT

I. THE SECOND AMENDMENT'S STRUCTURE PRECLUDES ITS INCORPORATION.

The Second Amendment's "prefatory clause" makes plain that the Amendment was added to the Constitution to ensure the preservation of a "well-regulated militia." *See Heller,* 128 S. Ct. at 2799-2802. It accomplished this by "confer[ring] an individual right to keep and bear arms (although only arms that 'have some reasonable relationship to the preservation or efficiency of a well-regulated militia')" and only "arms 'in common use at the time' for lawful purposes like self-defense," *id.* at 2814, 2815 (quoting

United States v. Miller, 307 U.S. 174, 178, 179 (1939)). The states exercised control over the militia concurrently with the federal government, and they had exclusive control over training and officering the militia within their borders. They also governed the militia when it was not in actual service of the federal government.[3] The "well-regulated militia" in the Second Amendment's "prefatory clause" is the militia trained to arms. *Heller,* 128 S. Ct. at 2800. The founders protected "a well-regulated militia" because that institution rendered large standing armies unnecessary and would provide the states with the means for resisting federal tyranny. *Id.* at 2800-01.

Because the Second Amendment plainly was intended to protect the state militias from disarmament, it would be illogical to turn such a federalism provision against the states. Doing so would mean that the Fourteenth Amendment was understood to grant federal judges final authority to decide whether a state improperly has interfered with that state's ability to keep federal tyranny in check. There is no evidence to support such an understanding. *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring) (arguing for "unincorporation" of First Amendment establishment clause because it was federalism-based provision designed to allow states to establish religions without interference).

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[3] *See* U.S. Const., art. I, § 8, cl. 16; *Houston v. Moore,* 18 U.S. (5 Wheat) 1, 24 (1820) (opinion of Washington, J.); *id.* at 37 (opinion of Johnson, J.); *id.* at 50 (Story, J., dissenting on other grounds).

Insofar as the "right to keep and bear arms" articulated in *Heller* protects the keeping and bearing of weapons for any other lawful purpose, including self-defense, the right historically has been significantly regulated by the states under their police power. *See infra* pp. 11-20. Such regulation includes the banning of some "common use" weapons, *e.g., Andrews v. State,* 50 Tenn. (1 Heisk.) 165, 186 (1871) (upholding legislature's banning of, *inter alia,* non-military revolvers and dirks); Cal. Penal Code § 12125 (banning junk handguns); the determination of what purposes are lawful, *e.g.,* Cal. Penal Code § 245 (punishing more harshly the use of a firearm to commit specified offenses than commission of same offense without firearm); the allowance and determination of the scope of the common law right of self-defense, *e.g.,* Wayne R. LaFave, 2 *Substantive Criminal Law* § 10.4 (2d ed. 2003) (discussing law of self defense and duty to retreat); and specification of and control over arms for state militia purposes, *e.g.,* Va. Code Ann. § 44-54.12 (providing that "[m]embers of the Virginia State Defense Force shall not be armed with firearms during the performance of training duty or state active duty, except under circumstances and in instances authorized by the Governor"); Act of Apr. 21, 1818, ch. CCXXII, 1818 N.Y. Laws 210, 211. It would be nonsensical for the Court to begin applying a right whose scope is defined under state law against the states themselves.

II. THE DUE PROCESS CLAUSE DOES NOT SUPPORT INCORPORATION.

The Second Amendment right to keep and bear arms articulated in *Heller* does not meet the Due Process Clause test for incorporation under the

Fourteenth Amendment. To be incorporated, and therefore applied against the states, a right enumerated in the Bill of Rights must be so essential it is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969), or "necessary to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana,* 391 U.S. 145, 150 n.14 (1968). *See also* Respondents' Br. at 8-10. In determining whether a right is "implicit" in the concept of ordered liberty, the Court asks whether "neither liberty nor justice would exist if [the right] were sacrificed." *Palko,* 302 U.S. at 326. The Court also looks to the right's history, and the extent to which it is found in federal and state law. *Id.; see also Duncan*, 391 U.S. at 154.

In *Heller,* the Court indicated that "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." *Heller,* 128 S. Ct. at 2798. But the Court did not hold that in England or in the United States there is (or was) a fundamental right to have a handgun, or any particular weapon in common use. The states have long exercised their police powers to regulate, and in some cases ban, arms that, although in common use, are found to pose too great a danger to public safety to remain. *See infra* pp. 11-20. The states' exercise of these powers only increased after the founding, due to improvements in firearms and the rise in violence that accompanied the growing practice of carrying concealed deadly weapons such as pocket pistols, Bowie knives, dirks and sword canes. *E.g.,* Clayton E. Cramer, *Armed America* 224-35 (Nelson Current 2006); Saul Cornell, *A Well Regulated Militia* 138-141 (Oxford U. Press 2006); Charles G. Worman, *Firearms in American History* 44-104 (Westholme

Publishing 2007) (describing the development of the percussion cap and the emergence of repeating pistols and revolvers). Since the states have always decided which common-use weapons are acceptable, Petitioners' contention that there is a fundamental right to have *all* "weapons in common use" is not plausible.

The only way a right to arms can be fundamental in the Due Process Clause sense is if it is shown that denial of a particular weapon is tantamount to denial of a constitutionally protected liberty or of justice. Since the liberty interest at stake in this case is the right to have arms for self-defense, Petitioners must show that the handgun bans prevent them from defending themselves, *i.e.,* that there are no reasonable alternatives. This claim they do not (and cannot) make.

Although a right to self-defense may or may not be fundamental, its existence, scope and "fundamentalness" are not directly at issue in this case. The Second Amendment expressly protects a right to arms, not a right to self-defense. Finding an unenumerated right to self-defense in the Second Amendment, and applying it against the states, would have to occur under the Court's "substantive due process" jurisprudence, the judge-made doctrine that has been described as "an oxymoron" and a license for "judicial usurpation." *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring); *City of Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting).

Determining the scope of such a right would inherently require a balancing of the liberty interests of all involved, including taking into account the externalities of exercises of the right. *E.g., Michael H. v. Gerald D.,* 491 U.S. 110, 124 n.4 (1989) ("We cannot

imagine what compels this strange procedure of looking at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people – rather like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body."). If a right to self-defense were found to be fundamental and therefore incorporated, a determination still would have to be made whether the ban of a *particular* weapon amounted to a denial of the ability defend oneself. Petitioners do not try to make that showing for handguns.

Petitioners' position would require the Court to find that the Fourteenth Amendment was understood to elevate *all* common-use weapons beyond the reach of any legislative body's power to ban. This is not a plausible description of the country's regulatory history of arms and, if followed to its logical conclusion, would undermine the ability of democratic government to preserve order and itself persist.

III. EVEN IF THE COURT INCORPORATES THE RIGHT TO KEEP AND BEAR ARMS, THE RIGHT REMAINS SUBORDINATE TO THE GREATER RIGHT OF ALL INDIVIDUALS TO PERSONAL SECURITY.

A. States Always Have Exercised Their Police Power Over Arms, Including the Banning of Common Use Weapons.

Even if the Court incorporates into the Fourteenth Amendment the right to keep and bear arms articulated in *Heller*, the right should remain, like all in-

dividual liberties, subordinate to the greater right of "personal security" that all individuals acquire upon entering society from the state of nature.

In the social-contract political theory that pervaded post-revolutionary American thought,[4] "civil government is the proper remedy for the inconveniences of the state of nature." John Locke, *Second Treatise of Government* § 13, at 12, (C.B. Macpherson ed., Hackett Publ'g 1980) (1764). Locke posited that in nature people have the right to enforce their individual rights against others. *Id.* But since humans are partial to themselves and their friends, and susceptible to passion and revenge when punishing others, only "confusion and disorder" exist in nature. *Id.* To escape this perpetual anxiety and exposure, people join together to create "government to restrain the partiality and violence of men." *Id.*

Blackstone recognized that "the principal aim of society" is to protect individuals in the enjoyment of their natural, "*absolute* rights." 1 William Blackstone, *Commentaries on the Laws of England* 120 (Univ. of Chicago Press 1979) (1765) (emphasis added). These rights "could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities," and therefore "the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals." *Id.*

Blackstone's three "absolute" rights are the rights of "personal security" (life, limb, health and reputation), "liberty" and "property." *Id.* at 125-36. To "serve principally as barriers to protect and maintain

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[4] *See, e.g.,* Gordon S. Wood, *The Creation of the American Republic 1776-1787* 282-91 (U.N.C. Press 1969, 1998).

inviolate the[se] three great primary rights," the English constitution established five other "auxiliary subordinate rights of the subject." *Id.* at 136. The fifth, which most immediately concerns us in this case,[5] is the right of subjects to "hav[e] arms for their defence, suitable to their condition and degree, *and such as are allowed by law*. Which is also declared by the same statute 1 W. & M. st. 2. c.2. [the English Bill of Rights] *and is indeed a public allowance, under due restrictions*, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at 139 (emphasis added).

In the United States, the people have delegated limited powers to the federal government under the Constitution. Powers not delegated "are reserved to the States respectively, or to the people." U.S. Const. amend. X; *see also Printz v. United States,* 521 U.S. 898, 919 (1997). In the American system, the states and their political subdivisions are the branches of government with principal responsibility for enacting legislation to "maintain and regulate" Blackstone's absolute rights through their "police power." *The Federalist No. 17* (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

The police power has always been understood to provide the states with authority "to make extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall

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[5] For context, the first four are: (i) the constitution, powers, and privileges of parliament, 1 Blackstone, *Commentaries* at 136*,* (ii) the limitation of the king's prerogative, *id.* at 137, (iii) the right to apply to the courts of justice for redress of injuries, *id.,* and (iv) the right to petition the king or either house of parliament for injuries not otherwise redressable, *id.* at 138-39.

assert, enjoy, or exercise their rights, without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union* 597 (Lawbook Exch., reprint 1999) (1868). "The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them." Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States Considered from both a Civil and Criminal Standpoint* 1-2 (Lawbook Exch., reprint 2001) (1886).

States and their political subdivisions thus always have been free under the police power to reasonably regulate the right to arms. Cooley, for example, explains that Blackstone's fifth auxiliary subordinate right is preserved in America "by express constitutional provisions" but "extends no further than to keep and bear those arms which are suited and proper for the general defense of the community against invasion and oppression, and it does not include the carrying of such weapons as are specially suited for deadly individual encounters, and therefore the carrying of these, concealed, may be prohibited." 1 *Blackstone's Commentaries on the Laws of England* 143 n.24 (Lawbook Exch., reprint 2003) (Thomas M. Cooley ed., 1884); *see also Robertson v. Baldwin,* 165 U.S. 275, 281-82 (1897) (stating that the Second

Amendment is not infringed by laws prohibiting the carrying of concealed weapons).[6]

In a prominent 19th Century case, the Tennessee Supreme Court construed the state constitutional right to keep and bear arms to be parallel to the federal right, and held that the legislature was free to "'prohibit the wearing or *keeping* [of] weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defense.'" *Andrews v. State,* 50 Tenn. (1 Heisk.) 165, 185 (1871) (emphasis added) (quoting *Aymette v. State,* 21 Tenn. (1 Hum.) 154, 159 (1840)). At the practical level, this meant that "the Act of the Legislature in question, so far as it prohibits the citizen 'either publicly *or privately* to carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol,' is constitutional." *Andrews,* 50 Tenn. at 186 (emphasis added). The prohibition against keeping pistols extended to revolvers, and was upheld as constitutional to the extent it applied to non-military revolvers, but could not be upheld if it applied to military revolvers. *Id.* at 186-87; *see also State v. Wilburn*, 66 Tenn. 57, 59-60 (1872); *Dycus v. State*, 74 Tenn. 584, 585 (1880).

An 1871 Texas statute prohibiting the carrying of deadly weapons – defined as "pistols, dirks, daggers, slingshots, sword canes, spears, brass knuckles and bowie knives" – was likewise upheld under that state's police power. *English v. State,* 35 Tex. 473, 474-78 (1872). The court noted that almost every

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[6] *See generally* Randy E. Barnett, *The Proper Scope of the Police Power,* 79 Notre Dame L. Rev. 429 (2004); Charles Bufford, *The Scope and Meaning of Police Power,* 4 Cal. L. Rev. 269 (1916).

state in the union has "a similar law upon their statute books, and indeed, so far as we have been able to examine them, they are more rigorous than the act under consideration." *Id.* at 479.

A well-established principle of the police power is that "the police requirements of a city are different than those of the state at large, and that stricter regulations are essential to the good order and peace of a crowded metropolis than are required in the sparsely peopled portions of the country." *In re Cheney,* 90 Cal. 617, 620 (1891). When a city regulates under its police power "for the prevention of crime and the preservation of the public peace" and "to protect the law-abiding citizen," it has great latitude. *Id.* at 621. Thus an ordinance prohibiting the concealed carrying of "any pistol, dirk, or other dangerous or deadly weapon" without a permit – available only to "peaceable person[s]" whose profession or occupation requires him to be "out at late hours of the night" – is a valid exercise of the power because "[i]t is a well-recognized fact that the unrestricted habit of carrying concealed weapons is the source of much crime, and frequently leads to causeless homicides, as well as other breaches of the peace, that would not otherwise occur." *Id.*

Significant threats to urban public safety may be met with commensurate regulation that community legislatures find appropriate. *Darling v. Warden of City Prison,* 154 A.D. 413, 424 (N.Y. App. Div. 1913) (holding that legislature may prohibit possession of any pistol in the home without permit – "the Legislature has now picked out one particular kind of arm, the handy, the usual and the favorite weapon of the turbulent criminal class, and has said that in our organized communities, our cities, towns and villages

where the peace is protected by the officers of organized government, the citizen may not have that particular kind of weapon without a permit"). As the Court below noted, "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." *NRA v. Chicago,* 567 F.3d 856 (7th Cir. 2009) (citing *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.")).

Regulation also may extend to the complete prohibition of an entire class of arms. *See* Robert R. Dykstra, *The Cattle Towns* 121-22 (U. Nebraska Press 1968) (describing 1872 Witchita ban on pistols); Cal. Penal Code §§ 12125 (banning junk handguns), 12275.5(b) (.50 caliber rifles). In upholding Cleveland's city-wide ban on assault weapons, the Supreme Court of Ohio reaffirmed that "the police power includes the power to prohibit," and noted that "[t]he ordinance at issue affects a class of firearms" but does not violate the right to keep arms for self-defense because it does not ban the right to "*all* firearms." *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993). "For this reason, we are not persuaded by appellants' argument that by banning certain firearms 'there is no stopping point' and legislative bodies will have 'the green light to completely ignore and abrogate an Ohioan's right to bear arms.'" *Id.*

An assault weapons ban in Denver has likewise been upheld against the contention that "restricting

the types of weapons that may be used in exercising the right to bear arms in self-defense constitutes a *per se* violation of that right." *Robertson v. City & County of Denver*, 874 P.2d 325, 331 (Colo. 1994). The Colorado Supreme Court observed that "[t]here can be no doubt that an ordinance, intended to prevent crime, serves a legitimate governmental interest sufficiently strong to justify its enactment" and that the "concealability" of certain weapons along with "the prevalent use of such weapons for criminal purposes establish . . . a substantial threat to the health and safety of the citizens of Denver." *Id.* at 332. The Court concluded that, while "carving out a small category of arms which cannot be used for purposes of self-defense undoubtedly limits the ways in which the right to bear arms may be exercised," the obstacles posed by a weapons-class ban "do not significantly interfere with this right" because "there are ample weapons available for citizens to fully exercise their right to bear arms in self-defense." *Id.* at 333.[7]

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[7] Denver is not alone in prohibiting assault weapons. Cities with a class ban on assault weapons include: Boston (1989 Mass. Acts 596, §§ 1-7); Chicago (Chicago, Ill., Code §§ 8-24-025, 8-20-030(h)); Cleveland (Cleveland, Ohio, Code §§ 628.01 – 628.99); Columbus (Columbus, Ohio, Code §§ 2323.11(L), (M), 2323.31, 545.04(a)); and New York City (New York, N.Y., Admin. Code §§ 10-301(16), 10-303.1; New York, N.Y., Rules tit. 38, § 17-01). Seven states also ban assault weapons: California (Cal. Penal Code § 12275); Connecticut (Conn. Gen. Stat. §§ 53-202a-53-202o); Hawaii (Haw. Rev. Stat. Ann. §§ 134-1, 134-4, 134-8); Maryland (Md. Code Ann. §§ 4-301 – 4-306); Massachusetts (Mass. Gen. Laws ch. 140, §§ 121, 122, 123, 131, 131M); New Jersey (N.J. Stat. Ann. §§ 2C:39-1w, 2C:39-5, 2C:58-5, 2C:58-12, 2C:58-13); and New York (N.Y. Penal Law §§ 265.00(22), 265.02(7), 265.10).

Regulating arms under the police power to prevent crime and protect the safety of the broader community is in fact pervasive, and has been subject only to "reasonableness" review in virtually every state to consider the question.[8] As long as a regulation does

[8] *See, e.g., Hoskins v. State*, 449 So. 2d 1269, 1270 (Ala. Crim. App. 1984); *City of Tucson v. Rineer*, 971 P.2d 207, 213 (Ariz. Ct. App. 1998); *Jones v. City of Little Rock*, 862 S.W.2d 273, 275 (Ark. 1993); *Robertson v. City & County of Denver*, 874 P.2d 325 (Colo. 1994); *Rabbitt v. Leonard,* 413 A.2d 489 (Conn. 1979); *In re Wolstenholme*, 1992 Del. Super. LEXIS 341 at *18 (Del. Super. Ct. Aug. 20, 1992); *Carson v. State,* 247 S.E.2d 68, 72 (Ga. 1978); *State v. Mendoza*, 82 Haw. 143, 153 (Haw. 1996); *State v. Hart*, 157 P.2d 72, 73 (Idaho 1945); *Kalodimos v. Morton Grove,* 470 N.E.2d 266, 278 (Ill. 1984); *Matthews v. State,* 148 N.E.2d 334, 338 (Ind. 1958); *State v. Rupp*, 282 N.W.2d 125, 130 (Iowa 1979); *Posey v. Commonwealth*, 185 S.W.3d 170, 181 (Ky. 2006); *State v. Hamlin,* 497 So. 2d 1369, 1371 (La. 1986); *Hilly v. Portland*, 582 A.2d 1213, 1215 (Me. 1990); *People v. Swint,* 572 N.W. 666, 676 (Mich. Ct. App. 1997); *In re Application of Atkinson,* 291 N.W.2d 396, 399 (Minn. 1980); *State ex rel. Oklahoma State Bureau of Investigation v. Warren*, 75 P.2d 900, 902-03 (Okla. 1998); *James v. State*, 731 So.2d 1135, 1137 (Miss. 1999); *State v. White*, 253 S.W. 724, 727 (Mo. 1923); *State v. Comeau,* 448 N.W.2d 595, 600 (Neb. 1989); *Burton v. Sills*, 53 N.J. 86, 101 (N.J. 1968); *State v. Dees,* 669 P.2d 261 (N.M. Ct. App. 1983); *State v. Rivera*, 853 P.2d 126 (N.M. Ct. App. 1993); *Grimm v. New York,* 289 N.Y.S.2d 358, 362 (N.Y. 1968); *North Carolina v. Fennell,* 95 N.C. App. 140, 143 (N.C. Ct. App. 1989); *State v. Ricehill*, 415 N.W.2d 481, 483 (N.D. 1987); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993); *Morley v. City of Phila. Licenses & Inspections Unit*, 844 A.2d 637, 641 (Pa. Commw. Ct. 2004); *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004); *Masters v. State,* 653 S.W.2d 944, 946 (Tex. Ct. App. 1983); *State v. Duranleau*, 260 A.2d 383, 386 (Vt. 1969); *Parham v. Commonwealth*, 1996 Va. App. LEXIS 758, at *5 (Va. Ct. App. Dec. 3, 1996); *City of Princeton v. Buckner,* 377 S.E.2d 139, 148 (W. Va. 1988); *State v. Rupe,* 683 P.2d 571, 597 n.9 (Wash. 1984); S*tate v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003); *Carfield v. State,* 649 P.2d 865, 872 (Wyo. 1982).

not prohibit the use of *all* firearms, it does not unduly burden the right to have arms for self-defense.

Throughout the history of the republic, "the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically . . . matters of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996) (citation omitted). The determination of what are appropriate and inappropriate common-use weapons inherently is and should remain a local matter, even if the Court incorporates the right. *Cf. Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973) ("This Court has consistently held that obscene material is not protected by the First Amendment as a limitation on the state police power by virtue of the Fourteenth Amendment.") and *Miller v. California,* 413 U.S. 15, 30 (1973) (holding that "[u]nder a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive'" and that "these are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists").

B. The Court's "Most Popular Weapon" Rationale In *Heller* Is Not A Workable Principle Of Constitutional Law.

In *Heller*, this Court held that the Second Amendment protects firearms "in common use," and struck down the federal ban on handguns in Washington, D.C., because the ordinance "amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." *Heller,* 128 S. Ct. at 2817. The Court did not find that a right to handguns is "fundamental," or even reasonably necessary for effective self-defense in the home. Instead, it held, without citing a single authority or citation, that the availability of long guns as an alternative to handguns "is no answer" because "the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* at 2818. The Court listed several reasons, again without citing a single source, why "a citizen *may* prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police." *Id.* (emphasis added). The Court concluded, again without a single factual source: "Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id.*

This rationale suffers from two fundamental problems that should preclude application of *Heller* to "extirpate" local choices pursued to protect everyone's right to personal security.

1. Americans have not "overwhelmingly chosen" handguns for self-defense.

The notion that the handgun "is overwhelmingly chosen by American society for [self-defense]" is inaccurate. The overwhelming majority of American adults and households have no gun whatsoever – hand or long. Only 25% of adults and 35% of households have some kind of gun.[9] Handgun owners are a subset of gun owners: only 16% of adults (24% of households) have one or more handguns.[10] Of the 16% of adults who own handguns, just over two-thirds – or 10.1% of all American adults – have one or more handguns primarily for self-defense or as their only firearm. Only 19.9% of adults own long guns, and this group overlaps substantially with handgun owners. Of those, just over half – or 10.3% of American adults – have one or more long guns

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[9] Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, National Institute of Justice, Research in Brief, May 1997, at 1-2, *available at* http://www.ncjrs.gov/pdffiles/165476.pdf (hereinafter "*Guns in America Overview*"); Philip J. Cook & Jens Ludwig, *Guns in America: Results of a Comprehensive National Survey on Firearms Ownership and Use* (Police Foundation 1996), *available at* http://www.policefoundation.org/pdf/GunsinAmerica.pdf (hereinafter "*Guns in America Report*"). More recent surveys have found even lower levels of gun ownership, concluding that in 2006 only 21% of individuals and 35% of households had at least one gun. *See* Tom W. Smith, National Opinion Research Center at the University of Chicago, *Public Attitudes Towards the Regulation of Firearms,* April 2007, at Figure 2, *available at* http://www-news.uchicago.edu/releases/07/pdf/070410.guns.norc.pdf.

[10] Cook & Ludwig, *Guns in America Overview*, at 1-2.

primarily for self-defense or as their only firearm.[11] Thus it is not true that Americans overwhelmingly keep *any* firearm, much less handguns, to defend themselves – in the home or anyplace else. Among the minority who do, owners of handguns and long guns are nearly evenly split in the guns they have for self-defense.

While it is true that *among* handgun owners, just under two-thirds have handguns *primarily* for self-defense,[12] no data indicates that such owners would be *less secure* in their homes with an alternative firearm (a long arm) or other weapon if handguns were banned. This point, which we made nearly verbatim in our *amicus* brief in the Court below, is critical to Petitioners, for they have the burden under the Due Process Clause of showing that handguns are *essential* to their self-defense. Yet Petitioners and their *amici* never attempt to make the necessary showing.

The Court's articulation of reasons as to why some "may" prefer a handgun seems not to withstand careful scrutiny. Experts say that handguns are poorly suited to self-defense in the home and that

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[11] *Id.*; Cook & Ludwig, *Guns in America Report*, at 13-15, 36-38. The 11.2% and 10.3% figures are derived from the text and tables in the *Guns in America Report* and *Guns in America Overview* as follows. For each class of firearm (handgun and long gun) owned, the number of owners who have one or more guns in that class "primarily for self-defense" was added to the number of those who own only guns in that class (e.g., someone who owns one or more handguns and no long guns) but did not acquire them "primarily" for self-defense. This seems essential since guns that are not acquired "primarily" for self-defense still may be used for self-defense.

[12] Cook & Ludwig, *Guns in America Report*, at 38.

shotguns are superior.[13] The Court's notion that a handgun is easier to store in an accessible location suffers from two problems. First, as Chief Justice Roberts noted during oral argument in *Heller,* "there is always a risk that the children will get up and grab the firearm and use it for some purpose other than what the Second Amendment was designed to protect." Transcript of Oral Argument at 71, *Heller,* 128 S. Ct. 2783 (Mar. 18, 2008). Second, it assumes that intruders will be accommodating by breaking in only at times when occupants have sufficient proximity to their guns. For the "accessibility" argument to work, even as a matter of logic, it would appear that a gun would have to be stored in *every* room. Otherwise, an unprepared homeowner might find himself in the bathroom at the time of the intrusion.[14]

We made these points in an *amicus* brief we filed in the Seventh Circuit. The International Law Enforcement Educators and Trainers Association, which also filed an *amicus* brief in that Court, now challenges the argument, contending, without citation, that in "a much more typical home invasion, a burglar might enter an unoccupied room, and the noise of the entry (or an alarm, or a barking dog) would alert the victim in her bedroom to pick up the gun there." ILEETA Br. at 44. This actually makes our point, as it assumes the gun is stored in the room where the occupant already is located. It also fails to show why handguns are preferable to long guns in such situa-

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[13] *E.g.,* Chris Bird, *The Concealed Handgun Manual: How to Choose, Carry and Shoot a Gun in Self-Defense* 40 (3d ed. 2002).

[14] This subject is explored on gun-enthusiast web sites. *See, e.g.,* http://www.thehighroad.org/showthread.php?t=7560 (discussion thread entitled "Home Defense question DO YOU HAVE A BATHROOM GUN") (last visited Dec. 30, 2009).

tions since either can be stored where the occupant is located. *See* Bill Clede, *The Practical Pistol Manual* 8-9 (Jameson Books 1997).

The suggestion that handguns cannot easily be redirected or wrestled away by an attacker must confront two facts: most handgun owners do not have proper training to use their guns for self-defense,[15] and even among highly trained police officers, 16% of officer homicides occur with the officers' own service weapons.[16] Regardless of whether it is "easier" for those lacking upper body strength to lift a handgun, no data shows that women and the elderly are any less able to use, for example, a lightweight-model 20-gauge shotgun with low recoil ammunition than a handgun.[17] The ILEETA brief now contends that many people would find "a handgun to be far easier to handle than a long gun, including a 20-gauge shotgun." ILEETA Br. at 42. But this fails to address the point – people are still able to defend themselves with a lightweight-model 20-gauge shotgun.

The idea that a handgun can be pointed at a burglar with one hand while the other hand dials the police appears, on its face, to be a suboptimal solution for summoning the police – except for those physically gifted individuals who can observe, hold and

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[15] Massad F. Ayoob, *In the Gravest Extreme: The Role of the Firearm in Personal Protection* 2 (Police Bookshelf 1980).

[16] Andrew J. McClurg, *Child Access Prevention Laws: A Common Sense Approach to Gun Control*, 18 St. Louis U. Pub. L. Rev. 47, 78 n. 116 (1999).

[17] *See, e.g.,* Doug Little, *What is the best home defense shotgun for women?*, Arizona CCW Permit Website, June 3, 2008, *available at* http://arizonaccwpermit.com/2008/06/03/what-is-the-best-home-defense-shotgun-for-women/.

dial the phone with one hand and one eye while leveling a handgun and keeping watch on the intruder with the other hand and eye. Much more effective is directing the intruder to dial the police, which can be accomplished persuasively with either a shotgun or a handgun.[18] One also can direct the intruder to lie on the floor. Or one can do what police trainers advise in case of an intruder: gather the family into a safe room, call the police, and do not try to locate the burglar in order to hold him at gunpoint. Clede, *The Practical Pistol Manual* at 41-42.

The ILEETA brief in the Seventh Circuit claimed that Chicago's handgun ban was directly responsible for at least part of a "drastic" deterioration in the city's violent crime rate immediately after the ban was adopted (ILEETA 7th Cir. Br. at 27-28). The brief presented no supporting evidence other than an ILEETA-constructed chart showing differences from one year to the next in FBI crime data. The argument rested entirely on fallacious post-hoc-ergo-propter-hoc reasoning. In response, we wrote:

> This claim is not serious. The chart in the ILEETA Brief tracking each year's crime rate was constructed from FBI crime data tables, a simple review of which shows that the Chicago data for each year from 1982 through 1984 was qualified by an endnote explaining that the "figures are not comparable with previous years." This means the data in each of those years cannot be compared with data from the preced-

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[18] *See 85-Year-Old Granny Pulls Gun On Intruder, Makes Him Call 911,* The Pittsburgh Channel, Aug. 21, 2008, *available at* http://www.thepittsburghchannel.com/news/17232825/detail.html?rss=pit&psp=news.

> ing years. The reason is that prior to 1983, Chicago had been seriously undercounting crime by categorizing 25% or more of reported crimes as "unfounded" and therefore nonexistent. At the FBI's request, this practice changed in 1983; hence the overnight 25% increase on paper in 1983.[19]

In its brief in this Court, ILEETA now presents our explanation, our data and our sources on the underreporting as its own – without attribution or explanation of its erroneous presentation to the Court below. ILEETA Br. at 17-22. ILEETA also now argues that it has "adjusted" the FBI crime figures to account for the undercounting during the period in question (without explaining how), and determined that Chicago's violent crime numbers are still higher after the ban than before. Therefore, the brief concludes, the difference must be the gun ban. *Id.* But the brief presents no evidence of a causal connection.

ILEETA also argued in the Court below that Chicago's handgun ban has failed to protect police officers because "[p]olice in the Chicago area are killed at a rate about 42% higher than the national rate." ILEETA 7th Cir. Br. at 2-3. We noted the meaninglessness of this claim, since major cities generally have higher rates of police-officer homicides (and crime) than the country as a whole, so one generally would expect to find disparities between them and the nation as a whole. ILEETA now

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[19] *See, e.g.,* Bob Warner, *Criminal Math: In 25 Years, One Other City Has Had Crime Counts Tossed/Errors Uncommon*, Phila. Daily News, Oct. 21, 1997, at 4; *see also, Burying Crime in Chicago*, Newsweek, May 16, 1983, at 64.

attaches a chart to its brief in this Court ranking cities by officer-homicide rates, but the chart actually supports our position, as it clearly shows that the four largest U.S. cities have officer-homicide rates above the national average. More generally, however, it is unclear whether most of the cities listed even share traits that would make them comparable.

While handguns can be used for lawful self-defense, the social costs of handgun ownership are enormous. A starting point is the simple fact that as the rate of handgun ownership increases, so do the rates of handgun criminal-homicide and handgun suicide.[20] Handguns are used to commit more than 737,000 of the roughly 847,000 firearm violent crimes that are perpetrated each year (homicide, rape/sexual assault, robbery, assault).[21] No reliable data supports anything near a comparable number of defensive uses.

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[20] *See, e.g.,* Garen Wintemute, "Guns and Gun Violence," in *The Crime Drop in America* 46 (Alfred Blumstein & Joel Wallman eds., 2006) ("Not surprisingly, the more guns there are, the more gun crime there is. Many correlational studies, some geographic and some temporal, have established a close relationship between gun availability and rates of gun violence at the population level."); *see also* Franklin E. Zimring et al., *Crime is Not the Problem: Lethal Violence in America* 110 (Oxford U. Press 1997).

[21] Craig Perkins, "National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime," *Bureau of Justice Statistics Special Report*, at 3 (Sept. 2003).

2. No meaningful data supports claims of defensive handgun use at levels equal to or in excess of violent criminal handgun use.

Defensive gun use ("DGU") is notoriously difficult to measure, but however great the number of DGUs, *hostile* gun displays are much greater – by about a 7-to-1 ratio.[22] Hostile gun uses at home against family members, which are typically acts of domestic violence against women, may be more common than all DGUs.[23] A large number of claimed DGUs appear to be illegal and undesirable.[24]

The Court in *Heller* seems, unwittingly, to have relied upon an infamous DGU survey when it quoted the court of appeals' decision for the proposition that "banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' 478 F.3d [370,] at 400 [(D.C. Cir. 2007)], would fail constitutional muster." *Heller,* 128 S. Ct. at 2817-18. The authority offered by the appeals court to support the quoted language is a survey best known for its discredited claim that 2.5 million adults use guns defensively every year.[25]

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[22] David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey,* 15 Violence & Victims 257, 269 (2000).

[23] Deborah Azrael & David Hemenway, *In the Safety of Your Own Home: Results from a National Survey on Gun Use at Home,* 50 Social Science & Medicine 285, 289-91 (2000).

[24] David Hemenway et al., *Gun Use in the United States: Results from Two National Surveys,* 6 Injury Prevention 263, 266-67 (2000).

[25] The court of appeals cited pages 182-83 of Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and*

Even on its face, the survey does not show that handguns are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." Rather, it claims to show that among the small fraction of adults who say they have used a firearm defensively, more than three-quarters (80%) used a handgun rather than a long gun.[26] And even among that small purported cohort, most of the claimed defensive uses (63%) occurred *outside* the home.

Several of the most prominent and respected researchers in the field of gun violence have explained that the survey wildly overstates the number of DGUs; they nominated it for an award for "most outrageous number mentioned in a policy discussion by an elected official."[27] The survey's primary problems are telescoping (reporting incidents outside the covered time period as having occurred within it), self-presentation bias, and false-positives (in surveys of relatively rare events – where the actual rate of occurrence is, say, only 1 out of 100 or 1 out of 1,000 – even one or two false positives greatly skews the results).[28] The researchers show that, in order to believe the survey results, one has to believe a number of absurdities, based on undisputed crime rates. For example, if the survey is correct, then

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Nature of Self-Defense with a Gun, 86 J. Crim. L. & Criminology 150 (1995).

[26] *Id.* at 185.

[27] Philip J. Cook et al., *The Gun Debate's New Mythical Number: How Many Defensive Uses Per Year?*, 16 J. Policy Analysis & Mgmt. 463, 463 (1997).

[28] *Id.*; Jens Ludwig, *Gun Self-Defense and Deterrence,* 27 Crime & Just. 363, 366 (2000); David Hemenway, *Private Guns, Public Health* 64-78 (U. Mich. Press 2004).

more burglary victims used their guns in self-defense than there were burglaries in which burglary victims were at home and not asleep.[29] Similar problems occur with respect to claimed DGUs and robberies, rapes and gunshot victims.[30] The survey results simply are not valid.

3. Popularity of firearm choice is not a workable principle of constitutional law.

The popularity of a firearm among a small fraction of Americans is not a workable principle for determining the constitutionality of state and local laws. If popularity is determinative, the assault-weapon bans presently in place in seven states may be vulnerable because, following the election and inauguration of President Obama, assault weapons apparently were purchased *en masse*.[31] Smith & Wesson now makes the most powerful factory-production revolver in the world, a .50 caliber handgun called the Model 500. The company worked with an ammunition manufacturer to jointly develop a new magnum cartridge that gives the 500 the power to easily penetrate the highest grade concealable body armor typically worn by law enforcement officers.[32] If the Model 500 becomes popular enough,

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[29] *E.g.,* Hemenway, *Private Guns, Public Health* at 67.

[30] *Id.* at 67-68.

[31] Kevin Bohn, *Gun Sales Surge After Obama's Election*, CNN.com, Nov. 11, 2008, *available at* http://www.cnn.com/2008/CRIME/11/11/obama.gun.sales/; Jeff Wiehe, *Fears Drive Hordes to Gun Shops*, Journal Gazette, Apr. 5, 2009, *available at* http://www.journalgazette.net/article/20090405/LOCAL/304059928.

[32] *E.g.,* Dick Metcalf, *Smith & Wesson's Monster Magnum*, Shooting Times, *available at* http://www.shootingtimes.com/

will it acquire constitutional protection? If the Constitution requires us to take a poll to determine which weapons are most preferred, how will we reconcile the fact that gun ownership varies tremendously by region: in Mississippi 55% of adults own a firearm, while in Massachusetts fewer than 13% do.[33] Do the various poll results in different states affect the constitutionality of every state's regulation? The inevitable escalation of firepower on American streets from a "popularity" standard will reduce, not increase, personal security.

CONCLUSION

Firearms regulation to prevent crime and secure the entire community has always been a matter of state and local judgment under the police power. It seems odd – and oddly short-sighted – that a Second Amendment jurisprudence could be crafted to elevate the mere *preferences* of handgun owners over the *crime-prevention* and *safety* needs of the entire community. It need not be so. The Supreme Court has always tempered pure doctrine, even when dealing with the Bill of Rights, with pragmatism when crime-prevention and public safety are at stake. As Justice Roberts wrote last term in an

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handgun_reviews/monster_1103/ (last visited Dec. 30, 2009); Chris Christian, *Smith & Wesson Model 500 .50-Cal. Magnum Is the King of Handguns*, Popular Mechanics, Sept. 2003, *available at* http://popularmechanics.com/outdoors/sports/1277336.html.

[33] These figures were taken from the results of a 2001 survey conducted by the Behavioral Risk Factor Surveillance System, which were published by the Washington Post. *See, e.g., Gun Ownership by State*, Wash. Post, May 26, 2006, *available at* http://www.washingtonpost.com/wp-srv/health/interactives/guns/ownership.html.

important Fourth Amendment case: "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence. '[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." *Herring v. United States,* 129 S. Ct. 695, 700-01 (2009). That same pragmatism and awareness of consequences should inform the scope of the developing constitutional law on the right to keep and use arms for self-defense in the home.

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF *AMICI CURIAE* ORGANIZATIONS

Board of Education of the City of Chicago

The Board of Education of the City of Chicago, which educates more than 400,000 students in 600 schools, strongly supports the prevention of youth gun violence. Last school year, 29 Chicago Public School students were killed in gun-related violence. Since 2000, more than 100 guns have been confiscated on school grounds. Gun violence has a profoundly negative impact on the educational opportunities of children in large urban centers like Chicago. Children who live in terror of gun violence find it difficult to shed that fear at the schoolhouse door. They struggle to concentrate on their school work and some see no reason to study, doubting they will live to adulthood. Gun violence also imposes extraordinary burdens on school administrators, teachers and security personnel, who must be vigilant to keep guns out of schools and to keep children safe during the school day.

Institute of Medicine of Chicago

Over its ninety-year history, the Institute of Medicine of Chicago ("IOMC") has both led and reflected the advances, the turmoil, and the challenges within the practice of medicine and the business of healthcare in the United States and, more specifically, contributed to the public health and welfare of the citizens of the metropolitan Chicago region. IOMC has partnered with the Illinois Campaign to Prevent Gun Violence, a research-based public education campaign, during which IOMC focused on providing for multiple constituencies,

including both the public and state legislators in Springfield. In addition, IOMC has collaborated with the law enforcement and legal communities to push for common sense laws to get guns, "street sweeper" 20-50 round clips, sniper rifles, assault weapons, and armor piercing ammunition out of the hands of criminals.

Wayman African Methodist Episcopal Church

Wayman African Methodist Episcopal Church of Chicago has been lead, since 1992, by Reverend Dr. Walter B. Johnson, Jr., a prominent community activist known for advocating education to prevent violence among inner city youth. Reverend Johnson has partnered with the Chicago Public Schools, the Chicago Department of Human Services, and the Chicago Alternative Strategy to implement the Safe Schools, Safe Neighborhoods initiative.

Illinois Council Against Handgun Violence

The Illinois Council Against Handgun Violence ("ICHV") is the state's oldest and largest non-profit educational organization working to reduce death and injury caused by gun violence. ICHV informs the public, the media, and policymakers about the epidemic of gun violence and serves as a clearinghouse for information on gun violence.

Legal Community Against Violence

Legal Community Against Violence ("LCAV") is a national law center dedicated to preventing gun violence. Founded by lawyers after an assault weapon massacre at a San Francisco law firm in 1993, LCAV is the country's only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV tracks and analyzes

federal, state, and local firearms legislation, as well as legal challenges to firearms laws. As an amicus, LCAV has provided informed analysis in a variety of firearm-related cases, including those brought on the basis of the Second Amendment. *See, e.g., District of Columbia v. Heller*, 128 S.Ct. 2783 (2008); *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009); *White v. United States*, No. 08 –16010-DD (11th Cir. filed Apr. 1, 2009).

Violence Policy Center

Violence Policy Center ("VPC") is a national non-profit educational organization that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, organizations, researchers, advocates, and the general public. VPC examines the role of firearms in the United States, analyzes trends and patterns in firearms violence and works to develop policies to reduce gun-related deaths and injuries. VPC has conducted numerous fact-based studies on a full range of gun violence issues. These studies have influenced congressional policy-making and shaped congressional debates over gun control as well as state regulation of firearms. VPC actively participates in the debate over the meaning of the Second Amendment by monitoring and joining in Second Amendment litigation throughout the country.

States United to Prevent Gun Violence

States United to Prevent Gun Violence ("States United") is an association of independent state-wide gun-violence-prevention organizations. The purpose of States United is to allow our members to share best practices, programs and legislative ideas in order to work effectively to prevent gun deaths and

injuries. Members of States United include: Arizonans for Gun Safety, Women Against Gun Violence, Connecticut Against Gun Violence Education Fund, Florida Coalition to Stop Gun Violence, Georgians for Gun Safety, Illinois Council Against Handgun Violence, Hoosiers Concerned about Gun Violence, Iowans for the Prevention of Gun Violence, Maine Citizens Against Handgun Violence, CeaseFire Maryland, Stop Handgun Violence, Citizens for a Safer Minnesota Education Fund, Ceasefire New Jersey, New Yorkers Against Gun Violence, North Carolinians Against Gun Violence—Education Fund, Ohio Coalition Against Gun Violence, Ceasefire Oregon, CeaseFire Pennsylvania, Texans for Gun Safety, Gun Violence Prevention Center of Utah, Virginia Center for Public Safety, Ceasefire Foundation, and WAVE Educational Fund.

Freedom States Alliance

The Freedom States Alliance is a national nonprofit organization working to free Americans from gun violence. Its focus is to reduce gun-related deaths and injuries through public awareness campaigns and by providing technical assistance and support to grassroots organizations.

Connecticut Against Gun Violence

Connecticut Against Gun Violence ("CAGV") has been working since 1993 to reduce gun violence through public education and legislative advocacy. CAGV's mission is to identify, develop, and promote passage of legislation designed to enhance gun safety. CAGV will pursue this mission at the local, state of Connecticut, and national levels through the political process.

Maine Citizens Against Handgun Violence

Maine Citizens Against Handgun Violence ("MCAHV") is a non-profit organization governed by and representing Mainers who are committed to preventing injuries and deaths caused by the excessive proliferation of firearms in our society. Founded in 1999, the organization is a combination of two organizations—Maine Citizens Against Handgun Violence whose mission includes legislative and lobbying work and, Maine Citizens Against Handgun Violence Foundation whose primary mission includes education through programs like the Gun Lock Giveaway which has distributed over 23,000 locks to Maine families. MCAHV works to prevent gun violence by raising public awareness and by advocating for personal responsibility, practical legislation, enforcement of laws, and increased manufacturer responsibility.

Citizens for a Safer Minnesota

Citizens for a Safer Minnesota ("CSM") is a non-profit member-based advocacy organization dedicated to ending gun violence. CSM promotes sensible public policy at both the state and federal level. The mission of CSM is to prevent gun death and injury and to free our communities from the fear of gun violence. Over the past decade, CSM has effectively used limited resources to influence the gun policy debate in Minnesota. CSM's greatest accomplishment was passing the law that prohibits individuals convicted of domestic abuse from keeping or purchasing a firearm. Other successes include passage of the Child Access Prevention law that holds an adult responsible if a child is harmed by an improperly stored firearm. And CSM has successfully defeated

efforts to loosen the restrictions on who may carry a loaded handgun in public

Ohio Coalition Against Gun Violence

The Ohio Coalition Against Gun Violence ("OCAGV") is a non-profit organization working to prevent gun violence through education, advocacy and public awareness. OCAGV began as a volunteer committee in 1995 based on the concern about gun violence felt by the Interracial Religious Coalition, an organization promoting racial, ethnic and religious harmony. OCAGV's goal is to increase safety in Ohio in regards to firearms. OCAGV educates about gun homicides, suicides, and unintentional deaths and injuries, and supports and encourages local, state and federal legislation to reduce the accessibility of firearms in our communities and families.

Wisconsin Anti-Violence Effort Educational Fund

Wisconsin Anti-Violence Effort ("WAVE") Educational Fund is Wisconsin's only statewide grassroots organization solely dedicated to reducing gun violence, injuries and deaths. Through research, education and advocacy, WAVE Educational Fund raises awareness about firearm violence throughout the state, provides up to date information to the public and to policy makers, and promotes common sense measures that will bring our state to the forefront of gun violence prevention. Founded in 1995, WAVE Educational Fund has established a proven track record as the only viable, statewide organization solely dedicated to reducing gun violence, injuries and deaths.

GunFreeKids.org

Founded in 2007, GunFreeKids.org ("GFK") is an Internet-based issue advocacy organization, which provides tools for people to take action on pending state and national legislation and assists voters nationwide in learning about and supporting state-based candidates who favor sound gun violence prevention policies. GFK maintains a growing list of 10,000 nationwide subscribers and acts as a strategic resource for several state based gun violence prevention organizations.