

No. 08-1521

IN THE
Supreme Court of the United States

OTIS McDONALD, *et al.*,

Petitioners,

v.

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

Respondents.

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

**MOTION FOR LEAVE TO FILE BRIEF
OF LAW PROFESSOR AND STUDENTS AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS
AND BRIEF AMICI CURIAE**

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Represented by Professor Douglas Berman amici curiae hereby formally move for leave to file a brief in support of Respondents in the above-captioned case.

I, Douglas A. Berman, state as follows:

1. I am an attorney admitted to practice law in the State of New York and a member of the Supreme Court Bar and am a law professor at The Ohio State University Moritz College of Law.

2. I taught a Seminar on the Second Amendment in Fall 2009 and encouraged students to consider drafting an amicus brief for filing with the Supreme Court in the above-captioned case.

3. Two students — Jason Blake and Vasanth Ananth — helped me draft the attached amicus brief, and we wish to have the brief filed with the Court. As explained in the brief's statement of interest, we are eager to ensure that the Court consider not just whether, but also how, the Second Amendment should be incorporated against states and localities.

4. As of this writing, I have been unable to secure the *pro bono* services of a law firm without a significant conflict of interest in order to obtain needed assistance in completing the various administrative formalities involved in preparing and filing the brief. I was hopeful that the parties had filed blanket consents for the filing of such briefs, but have recently learned that they have not. Consequently, and in an effort to file this brief in a timely manner, counsel is now submitting this motion seeking leave to file with the current version of the proposed brief that amici wish to file.

Respectfully submitted,

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CITED AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	5
I. Historic Traditions Justify a Less Rigorous form of Constitutional Scrutiny of Firearm Regulations by Localities. ...	5
A. During the Framing Era, localities broadly regulated firearm possession and use.	6
B. Modern localities still regularly exercise regulatory powers to ensure the safe possession and use of firearms by law-abiding citizens. ...	9
II. Long-standing Constitutional Doctrines Justify a Less Rigorous Form of Constitutional Scrutiny for Gun Regulations Enacted and Enforced by Localities.	11
III. Modern Public Safety Concerns Justify a Less Rigorous Form of Constitutional Scrutiny of Firearm Regulations by Localities.	14

Contents

	<i>Page</i>
IV. Modern Litigation Realities and Sound Government Administration Justify a Less Rigorous Form of Constitutional Scrutiny of Firearm Regulations by Localities.	19
CONCLUSION	22

TABLE OF CITED AUTHORITIES

Page

Cases:

<i>City of Tacoma v. Taxpayers of Tacoma,</i> 357 U.S. 320 (1958)	11
<i>District of Columbia v. Heller,</i> 128 S. Ct. 2783 (2008)	<i>passim</i>
<i>Grayned v. City of Rockford,</i> 408 U.S. 104 (1972)	13
<i>Harlow v. Fitzgerald,</i> 457 U.S. 800 (1982)	12
<i>Hunter v. City of Pittsburgh,</i> 207 U.S. 161 (1907)	11
<i>Hunter v. City of Pittsburgh,</i> 207 U.S. 161 (1907)	3
<i>Lincoln County v. City of Luning,</i> 133 U.S. 529 (1890)	3
<i>Lincoln County v. Luning,</i> 133 U.S. 529 (1890)	12
<i>Metromedia, Inc. v. City of San Diego,</i> 453 U.S. 490 (1981)	14
<i>Miller v. California,</i> 413 U.S. 15 (1973)	13

Cited Authorities

	<i>Page</i>
<i>Monell v. Department of Social Services of City of New York</i> , 436 U.S. 658 (1978)	12
<i>Nixon v. Missouri Municipal League</i> , 541 U.S. 125 (2004)	11, 15
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980)	12
<i>Presser v. Illinois</i> , 116 U.S. 252 (1886)	9
<i>Romer v. Evans</i> , 517 U.S. 620 (1996)	11
<i>San Antonio Independent School Dist. v. Rodriguez</i> , 411 U.S. 1 (1978)	10
<i>Village of Bella Terre v. Boraas</i> , 416 U.S. 1 (1974)	10
 United States Constitution:	
First Amendment	2, 13, 14
Second Amendment	<i>passim</i>
Sixth Amendment	2
Eleventh Amendment	3, 12
Fourteenth Amendment	1

Cited Authorities

	<i>Page</i>
Statutes:	
KENNESAW, GA, CODE OF ORDINANCES, Part II, Chapter 34, Article II, § 34-21(a) (2009)	17
42 U.S.C. § 1983	3, 12
Other:	
ABOUT US, Kennesaw, Georgia City Website (available at http://www.kennesaw-ga.gov/ index.aspx?nid=36) (last visited on Jan. 4th, 2009)	17
Lynn A. Baker & Daniel B. Rodriguez, <i>Constitutional Home Rule and Judicial Scrutiny</i> , 86 DENV. U. L. REV. 1337 (2009) . . .	5
David J. Barron, <i>Why (and When) Cities Have a Stake in Enforcing the Constitution</i> , 115 Yale L.J. 2218 (2006)	13
Michael A. Bellesiles, <i>The Origins of Gun Culture in the United States, 1760–1865</i> , in <i>WHOSE RIGHT TO BEAR ARMS DID THE 2ND AMENDMENT PROTECT?</i> 150 (Edward Countryman ed., 2000)	7
GORDON L. CLARK, <i>JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY</i> , 188 (1985) . . .	9

Cited Authorities

	<i>Page</i>
Philip J. Cook et al., <i>Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective</i> , 56 UCLA L. REV. 1040 (2009) . . .	14, 15
M. David Gelfand, <i>The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's</i> , 21 B.C. L. REV. 763 (1980)	10-11
Eric Gorovitz et al., <i>Preemption or Prevention?: Lessons from Efforts to Control Firearms, Alcohol, and Tobacco</i> , 19 J. PUB. HEALTH POL'Y 36 (1998)	16
Kristin A. Goss, <i>Policy, Politics and Paradox: The Institutional Origins of the Great American Gun War</i> , 73 FORDHAM L. REV. 681 (2004)	15
ROBERT A. GROSS, <i>MINUTEMEN AND THEIR WORLD</i> 10 (1976)	7, 8
John C. Jeffries Jr., <i>In Praise of the Eleventh Amendment and Section 1983</i> , 84 VA. L. REV. 47 (1998)	13
LOCAL FIREARM ORDINANCES, LAWS, AND REGULATIONS (available at http://www.dgif.virginia.gov/hunting/regulations) (last visited on Jan. 4th 2009)	17, 18

Cited Authorities

	<i>Page</i>
Michael P. O’Shea, <i>Federalism and the Implementation of the Right to Arms</i> , 59 SYRACUSE L. REV. 201 (2008)	14
Romer v. Evans as the Transformation of Local Government Law, 31 URB. LAW. 257 (1999) ..	11
Richard C. Schragger, <i>Cities as Constitutional Actors: The Case of Same Sex Marriage</i> , 21 J.L. & POL. 147 (2005).	16
UNITED STATES ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION, 20–21 (1993) available at http://www.nlc.org/about_cities/cities_101/153.aspx . (last visited Dec. 4, 2009)	10
JAMES B. WHISKER, THE RISE AND DECLINE OF THE AMERICAN MILITIA SYSTEM 129 (1999)	6, 7
J. Harvie Wilkinson III, <i>Of Guns, Abortions, and the Unraveling Rule of Law</i> , 95 Va. L. Rev. 253 (2009)	20

INTEREST OF THE AMICUS CURIAE*

Amicus curiae are a law professor and law students who have been teaching, studying and writing about the scope and reach of the Second Amendment in the wake of the Court's ruling in *District of Columbia v. Heller*. The drafters of this brief are a law professor and students who recently participated in a law school seminar in which they studied this Court's *Heller* decision, its implications and its litigation aftermath.

Amici offer this brief to highlight jurisprudential principles that they fear have not received sufficient attention in the recent debate over whether the Second Amendment right to keep and bear arms is incorporated against the States by the Fourteenth Amendment's Due Process or its Privileges or Immunities Clauses. Specifically, amici seek to enhance this Court's consideration of *how* the Second Amendment should apply to state laws and local regulations if it is to be incorporated. Amici are eager for this Court to recognize that the bulk and the brunt of firearm regulation is local and to consider the importance of developing Second Amendment jurisprudence that is especially attentive to local needs and modern litigation realities.

* Under Rule 37.6 of the Rules of this Court, amici state that 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 or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

District of Columbia v. Heller clarified that the Second Amendment protects an individual right “to keep and bear arms,” and this case presents this Court’s first opportunity to consider not just *whether*, but also *how*, this right is to be incorporated against states and localities. Though “jot for jot” incorporation became the modern norm for how most constitutional rights will be applied to states and localities, the Court has sometimes taken an alternative approach to the incorporation of certain Bill of Rights provisions. For example, though the Sixth Amendment jury trial right has been incorporated against the states, the unanimity requirement applied in federal court does not apply to state criminal justice systems. Similarly, First Amendment doctrines are in various ways expressly attentive to distinctive state and local standards and to distinctive state and local concerns. The modern development of Second Amendment jurisprudence in the wake of *Heller* should likewise include a formal and express recognition of distinct state concerns and it should be especially attentive to the unique public-safety interests and distinctive structural dynamics surrounding the regulation of firearms by localities.¹

Tradition dating back before and through the Framing era, long-standing constitutional doctrines, undisputable public safety interests, and litigation

1. For the purposes of this brief, “localities” refer generally to any governmental unit smaller than a state (city, township, county, etc.) that has a governing body with rulemaking authority.

practicalities all provide significant support for developing Second Amendment jurisprudence with attentiveness to the unique interests and concerns of localities. This Court can and should demonstrate its respect for historical traditions, for established constitutional doctrines, for public safety and for sound government administration by expressly holding that local firearm regulations, assuming they are subject to Second Amendment scrutiny, are subject to a less rigorous form of constitutional scrutiny than is to be applied to federal or even state firearm regulations.

Historically, localities have been the locus of firearm regulations. Before, during, and after the framing of the Constitution, localities imposed and enforced, with great deference from the states, numerous forms of firearm regulation. Localities raised and maintained militias, conducted firearm censuses, and closely regulated the use and storage of firearms. Traditionally, varying local circumstances meant that localities needed to, and were free to, tailor regulatory solutions on a case-by-case basis. Though this Court has held that localities are instrumentalities of the states, *see Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907), states have continued to defer to localities in many regulatory areas, including regulations on the possession and use of firearms, through various home rule doctrines.

This Court, as a matter of established constitutional doctrine, has long distinguished localities from the states. More than a century ago, the Court refused to extend the sovereign immunity found in the Eleventh Amendment to localities. In *Lincoln County v. City of Luning*, 133 U.S. 529 (1890), and it has more recently

has found localities to be a “person” under 42 U.S.C. § 1983. As a result, localities are amenable to lawsuits and can be liable in damages for violations of constitutional rights. Moreover, in a variety of other constitutional contexts, this Court has acknowledged, and has often stressed, the need and value of deferring to local decision-making concerning truly local matters.

Local firearm regulations are uniquely important for public safety and in the overall development of sound public policy. Firearm ownership and use varies widely amongst localities; there must be and is considerable variation in local firearm regulations, variations that wholesale federal—and even state—firearm doctrines cannot effectively capture. Localities are especially attentive to local public safety concerns and local gun cultures and customs. Moreover, local amenability to suit, and exposure to damages, justifies an approach to Second Amendment incorporation that acknowledges that citizens may and likely will seek redress for perceived wrongs from localities, but not the states, through tort suits. Localities, which have a direct and immediate responsibility for the safety and security of their constituencies, will always have a strong incentive to balancing liberty and community interests with ever-evolving public safety needs in how they regulate gun possession and use.

Though all government actions now engender a risk of litigation, in the wake of *Heller*, local firearm ordinances are a potential wellspring of civil suits targeted at democratically enacted ordinances. Local citizens always have been, and always will be, able to check overreaching government regulation through the ballot box. But if disgruntled citizens can readily make all sorts of creative

constitutional claims against local firearm regulations, this check will be operationalized through litigation in federal courthouses, rather than through the city halls and town meetings of the local legislative process.

For these reasons, amici urge the Court to hold that local firearm regulations, assuming they are subject to Second Amendment scrutiny, are subject to a less rigorous form of constitutional scrutiny than is to be applied to federal or even state firearm regulations. Were this Court to so hold, amici respectfully suggest that this Court could and should remand this case to the Seventh Circuit to determine whether Chicago's unique local interests in firearm regulation can justify the local regulation at issue in this case under a less rigorous form of constitutional scrutiny than was applied by this Court in *Heller* to strike down a federal firearm regulation.

ARGUMENT

I. Historic Traditions Justify a Less Rigorous form of Constitutional Scrutiny of Firearm Regulations by Localities.

Whether and how the Constitution might reserve some inherent powers to localities is a complicated and widely debated topic beyond the scope of the present case and controversy.² But, whether with or without a

2. For an interesting and recent perspective on the inherent powers of localities, see Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337 (2009) (discussing the federal constitutional limits on the ability of the state to regulate localities).

mandate from the Constitution, both traditional and contemporary practices showcase that localities have long possessed and exercised inherent regulatory powers, and that these powers have often involved the regulation of firearms.

A. During the Framing Era, localities broadly regulated firearm possession and use.

The Second Amendment was written at a time when localities used numerous ordinances to control firearm sales, to arm militias, and to provide for their own defense. At the time of the framing, it was not believed that any clause of the Constitution stripped a locality of its inherent power to regulate firearms within its boundaries. Thus, localities traditionally had an inherent power to regulate firearms and their use, especially for the purpose of advancing public safety and the common defense.

As this Court has recognized, the regulation of firearm use and storage by local governments predates the Constitution, *see Heller*, 128 S. Ct. at 2819–20, and localized public safety concerns often were paramount justifications for gun regulations that sought to balance individual rights and the public welfare. For example, as early as 1648, in what was then New Amsterdam, firearms were confiscated because of fears that colonists would sell them to Native Americans. *See* JAMES B. WHISKER, *THE RISE AND DECLINE OF THE AMERICAN MILITIA SYSTEM* 129 (1999). The confiscated firearms were then redistributed to the colonists on the condition that they maintain them in their homes for self-defense. *Id.* Acceptance of a firearm opened the door to inspection

by the local government in order to ensure that the gun was accounted for and operational. *Id.*

A common colonial version of firearm registration involved localities conducting censuses of all the firearms in possession of citizens. *See* Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760–1865*, in *WHOSE RIGHT TO BEAR ARMS DID THE 2ND AMENDMENT PROTECT?* 150 (Edward Countryman ed., 2000). Other colonial-era local laws frequently placed restrictions on loaded weapons, gunpowder storage, and the discharging of weapons in streets, taverns, and, curiously, at home. *See Heller*, 128 S. Ct. 2819–20; *see also id.* at 2848–49 (Breyer, J., dissenting).

Generally, colonial localities “claimed authority over anything that happened within its borders.” ROBERT A. GROSS, *MINUTEMEN AND THEIR WORLD* 10 (1976). The militia, and the weaponry it wielded, was no exception. In Concord, town officials organized militia enlistments, training schedules, and even set enlisted pay scales through a town vote. *Id.* at 60, 132. In the early colonial militias, most firearms were made locally, and virtually all firearms were maintained and repaired by local gunsmiths. *See WHISKER, supra*, at 97.

Along with the responsibility of raising and maintaining a militia, localities across the colonies often provided for their own defense. *See id.* at 106. At the outset of colonial America, “colonists were expected to fend for themselves” and did so by constructing various fortifications to defend their fledgling towns against raids from Native Americans. *Id.* at 192. During the Revolution, localities guarded and defended military

stores as well as kept watch over British prisoners of war. *See* GROSS, *supra*, at 132–33.

Colonial localities exercised an enormous amount of control over individual firearms. This control was bound up with the preeminent role that individual firearms played in the raising and maintenance of a militia and the necessity of city defense—both firmly in the purview of the colonial-era locality. The vital role that the upkeep and accountability of firearms played in the very survival of the colonial locality made regulation indispensable. Local circumstances—such as varied community defense needs, diverse weather and wildlife concerns, and different population densities—meant that each locality had different societal demands and thus different bases to tailor regulatory solutions to their unique firearm needs and problems.

The ratification of the Constitution did not change the validity and necessity of local firearm regulations. The same local concerns over public safety and the maintenance of militias continued after ratification, and localities through the Nineteenth Century often banned or otherwise regulated the possession a use of various weapons. *See* Brief of Respondents at 28-30 (noting that weapon bans “when necessary for the public welfare . . . has ample historical pedigree” and that “bans on common weapons addressed unique local conditions”). Against this backdrop, it is especially difficult it imagine that the Framers and ratifiers of the Constitutional would have ever wanted, expected, or intended for truly local firearm regulations to be subject to repeated and robust scrutiny by federal judges.

In upholding a Nineteenth century firearm regulation, this Court recognized that the Constitution had reserved to localities “powers which relate to merely municipal legislation.” *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (internal quotations omitted). In *Presser*, the Court supported its decision by citing to numerous cases from the 1800’s that showed deference to locality regulations. *Id.* Even if *Presser* is subject to modern reconsideration, it remains a sound and important reminder of this Court’s long-standing recognition of the power of local governments to prescribe firearm regulations and of the importance of federal courts showing respectful deference to such local regulatory measures.

B. Modern localities still regularly exercise regulatory powers to ensure the safe possession and use of firearms by law-abiding citizens.

The contemporary norms of locality power include control over local services and utilities, as well as matters of municipal public safety. As evidenced by the very nature of the Respondents in this case, the regulation of firearms, as a traditional power of localities, still falls within our modern broad conception of local governance. The scope of local power is inherited from two sources: state law and this Court’s jurisprudence.³ Together, these two sources underpin locality firearm regulation.

3. A wide-ranging debate regarding the scope of local power is the subject of an entire field of law. *See* GORDON L. CLARK, *JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY*, 188 (1985).

As a matter of state law, forty-eight states have enacted city home rule doctrines and twenty-eight of these states have broad functional home rule. *See* UNITED STATES ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION, 20–21 (1993) *available at* http://www.nlc.org/about_cities/cities_101/153.aspx. (last visited Dec. 4, 2009). Broad functional home rule allows the greatest amount of discretion and autonomy in local rule making. *Id.* at 17. The vast number of home rule states indicates a preference for allowing localities to use their inherent power to self-govern. Even if this structure descends from a theory of state delegation, localities in most states still exercise a great amount of power.

In addition to state law, this Court’s jurisprudence has recognized the power of localities to exercise vast control over multiple arenas. *See, e.g., San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 54 (1978) (finding “local taxation for local expenditures” constitutional); *Village of Bella Terre v. Boraas*, 416 U.S. 1, 7–8 (1974) (upholding zoning ordinance restricting the number of unrelated people per single-family home valid). Localities have purview over many services whose funding derives from local taxes. *See, e.g., Rodriguez*, 411 U.S. at 54 (discussing local provision of services including police, fire-fighters, and hospitals). As stated by one commentator, this Court’s rulings in a line of cases regarding locality power are an “illustration of a strong trend toward deference to local government self-determination.” M. David Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors*

in the Political Dramas of the 1980's, 21 B.C. L. REV. 763, 770 (1980).⁴

Because localities traditionally regulated firearms, and because the contemporary norm of inherent local power has increased rather than decreased, localities still possess the inherent power to regulate firearms. In light of these traditions and in light of modern needs, this Court should expressly declare that local firearm regulations, assuming they are subject to Second Amendment scrutiny, are subject to a less rigorous form of constitutional scrutiny than is to be applied to federal or state firearm regulations.

II. Long-standing Constitutional Doctrines Justify a Less Rigorous Form of Constitutional Scrutiny for Gun Regulations Enacted and Enforced by Localities.

This Court's precedents generally hold that localities are mere instrumentalities of the states and as such do not have distinct legal status. *See, e.g., Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *Nixon v. Missouri Municipal League*, 541 U.S. 125, 133 (2004).

4. Furthermore, where local interests have been at odds with state law, this Court has recognized the power of a locality to countermand state law when acting under a federal mandate. *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 322 (1958). Even without an express federal grant, some cases have been read to allow local rulemaking to trump state authority. *Cf. Lawrence Rosenthal, Romer v. Evans as the Transformation of Local Government Law*, 31 URB. LAW. 257, 265–66 (1999) (reading *Romer v. Evans*, 517 U.S. 620 (1996), as an example of local law trumping state law).

But this Court has distinguished localities from the states in one critical area—amenability to suit for constitutional violations—which in turn may further justify a different standard of constitutional scrutiny for certain types of local regulations.

The main source of risk imposed upon localities emerges from the preeminent federal civil rights statute, 42 U.S.C. § 1983. Section 1983 imposes liability on “persons” acting under the color of state law when they violate federal rights. 42 U.S.C. § 1983 (2006). This Court, in *Monell v. Department of Social Services of City of New York*, held that the term “person” applied to cities, but not to the states. 436 U.S. 658 (1978). That holding was consistent with the well-settled precedent that foreclosed the sovereign immunity found in the Eleventh Amendment from localities. See *Lincoln County v. Luning*, 133 U.S. 529 (1890).

This Court has read § 1983 to apply both to local government officials as well as the locality generally. Importantly, the broad liability imposed by § 1983 is tempered when applied to individuals by various immunity doctrines. Individual officials and officers “performing discretionary functions generally are shielded from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Unlike individual officials sued in their personal capacities, however, localities do not have access to either absolute or qualified immunity. See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980). Some scholars have suggested that this legal regime essentially imposes strict liability

on localities for constitutional torts. See John C. Jeffries Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 69 (1998).

The current legal regime poses a difficult problem for localities. On one hand, localities are instrumentalities of the states and therefore are responsible for implementing and enforcing state statutes. At the same time, localities are open to the risk of liability if such actions are at some point found to be unconstitutional. “If the city is responsible for the constitutional wrong, however, then it is liable in damages, no matter how unforeseeable the judgment of unconstitutionality might have been at the time of enforcement.” David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2236 (2006).

Given the real threats of constitutional litigation and liability facing localities, constitutional doctrines should (and often do) include a formal and express attentiveness to local conditions and needs. This Court’s First Amendment jurisprudence recognizes these principles, as it has obscenity standards linked formally to local norms, *see Miller v. California*, 413 U.S. 15, 24-31 (1973) (making “contemporary community standards” central to what qualifies as protected expression), and it takes account of local needs when assessing time, place and manner regulations on forms of expression. *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (stressing that the “nature of a place [and] the pattern of its normal activities” are central assessing what regulations on protected First Amendment expression are permissible). More broadly, as the late Chief Justice William Rehnquist stressed

when fearing local billboard regulation would be subject to exacting First Amendment scrutiny, “little can be gained in the area of constitutional law, and much lost in the process of democratic decisionmaking, by allowing individual judges in city after city to second-guess such legislative or administrative determinations.” *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 570 (1981) (Rehnquist, J., dissenting) (noting the value in deferring to local decision-makers in the determination of aesthetic regulation). *Cf. generally* Michael P. O’Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201 (2008) (developing arguments “for implementing the Second Amendment, after *Heller*, in a way that is informed by federalism values”).

III. Modern Public Safety Concerns Justify a Less Rigorous Form of Constitutional Scrutiny of Firearm Regulations by Localities.

Firearm ownership and usage varies, sometimes dramatically, across localities both among and within states. “Residents of rural areas and small towns are far more likely to own a gun than residents of large cities, partly because of the importance of hunting and sport shooting in those communities.” Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1040, 1046 (2009). Additionally, the externalities of firearm ownership and crime are highly localized: “[T]he threat of gun violence in some neighborhoods is an important disamenity that depresses property values and economic development. Firearm violence, then, is a multifaceted problem that has notable effects on public health, crime,

and living standards.” *Id.* at 1049. *See also* Brief for Respondents at 17 (expressing concern with the prospect of “all levels of government [being] disabled from adopting (or even experimenting with) sensible firearm regulations that could fight crime and save lives under at least some local conditions”).

Though this Court has expressed concerns about a “national crazy quilt” if municipalities were allowed to regulate contrary to state legislatures’ will, *Nixon*, 541 U.S. at 136, cities are little different than states in this regard. *Cf. id.* at 146 (Scalia J., concurring). In the firearm context, the worry of too much local variation tends to be overblown, and local regulatory variation in fact may be beneficial. First, localities are familiar with firearm regulation. Prior to a push by states to preempt local firearm regulation, most states left regulation in the hands of localities. *See* Kristin A. Goss, *Policy, Politics and Paradox: The Institutional Origins of the Great American Gun War*, 73 *FORDHAM L. REV.* 681, 706 (2004). Additionally, the variation amongst localities would not create notice problems for citizens. As with many other regulations enacted by the locality, citizens entering the locality need only contact the appropriate authorities.

Deference to variation is also appropriate because the impact of local regulation is largely contained within the locality. Firearm regulation at the local level is in large part concerned with status conferral. Localities are largely charged with licensing gun dealers and issuing permits to its citizens. Additionally, this Court’s decision in *Heller* may and perhaps should prompt localities to directly (and democratically) consider

whether certain areas within their jurisdictions should be deemed “sensitive places” in which blanket gun prohibitions may be permissible. *See Heller*, 128 S. Ct. at 2816–17. All such local regulations generally lack external impact or problems: each regulation only applies within the jurisdiction, and when any citizen leaves the preordained jurisdictional limits the regulations no longer apply.

In addition to the obvious advantages of local government regulation in the firearm context as compared to federal authorities, localities can also have certain inherent regulatory advantages over states. First, local governments tend to be more in tune to the needs of citizens than federal or even state governments. “Local representatives also tend to be responsive to individual citizens and community organizations more directly than state or federal legislators, because local lawmakers must live and work among their constituents.” Eric Gorovitz et al., *Preemption or Prevention?: Lessons from Efforts to Control Firearms, Alcohol, and Tobacco*, 19 J. PUB. HEALTH POL’Y 36, 37 (1998). Also, it is far easier for individuals to seek more preferential regulatory regimes at the local level than even at the state level: “[t]he easy ability for individuals to exit local jurisdictions makes it unlikely that local majorities can get away with oppression for long.” Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same Sex Marriage*, 21 J.L. & POL. 147, 164 (2005).

Examples of unique local gun regulations abound. Perhaps most notable, the town of Kennesaw, Georgia has an ordinance that requires every “head of household . . . to maintain a firearm.”⁵ While Kennesaw, a town of just over 20,000 people,⁶ may desire such a law (which it does not appear to attempt to enforce), comparable legislation likely never could or would emerge from state or federal government entities. Similarly, in Virginia, every county has adopted different firearm regulations. *See* LOCAL FIREARM ORDINANCES, LAWS, AND REGULATIONS (available at <http://www.dgif.virginia.gov/hunting/regulations>) (last visited on Jan. 4th 2009) [hereinafter LOCAL FIREARM ORDINANCES]. These ordinances are tailored to the individual requirements of the locality: e.g., the city of Richmond prohibits the transport by vehicle on public streets of any loaded shotgun or rifle, but Richmond County has no such prohibition. *Id.* The county’s regulations are less concerned with transport—necessarily an issue of public safety—and are more

5. KENNESAW, GA, CODE OF ORDINANCES, Part II, Chapter 34, Article II, § 34-21(a) (2009). The full text of the ordinance is:

In order to provide for the emergency management of the city, and further in order to provide for and protect the safety, security and general welfare of the city and its inhabitants, every head of household residing in the city limits is required to maintain a firearm together with ammunition therefore.

Id.

6. According to a survey in 2000 the official population of the town was 21,675. ABOUT US, Kennesaw, Georgia City Website (available at <http://www.kennesaw-ga.gov/index.aspx?nid=36>) (last visited on Jan. 4th, 2009).

concerned with the caliber of rifle used to hunt game—necessarily an issue of conservation. *See Id.*⁷

In sum, local needs and concerns regarding gun possession and use provide an additional strong reason for this Court’s Second Amendment jurisprudence to incorporate a formal and express norm of deference to local decision-making and local regulations. This deference is justified by the localized nature of firearm rights, responsibilities and externalities. In particular, localities are generally better places, especially in the firearm context, for regulatory efforts and energies to meet the needs of their constituencies, especially in comparison to state and federal counterparts.

7. Perhaps unsurprisingly the locality with the strictest firearm ordinance in Virginia is Arlington County. Its ordinance states in part:

It shall be unlawful for any person to discharge or shoot off a firearm in the county. It shall be unlawful for any person to discharge or shoot or throw any dangerous missiles by mechanical, explosive, air-or gas-propelled means, or similar method or device onto or across any public sidewalk, path, or roadway, at any public structure or building, or at or onto the property of another.

LOCAL FIREARM ORDINANCES.

IV. Modern Litigation Realities and Sound Government Administration Justify a Less Rigorous Form of Constitutional Scrutiny of Firearm Regulations by Localities.

Especially because the scope and application of the Second Amendment rights are jurisprudentially uncertain and politically controversial, there has already been significant constitutional litigation in lower courts concerning individual gun rights and government regulations since this Court's decision in *Heller*. Were this Court to apply *Heller*'s ruling to all localities without clarifying the need and importance of judicial deference to local needs and concerns, federal and state courts could and likely would be flooded with constitutional claims and disputes concerning many local rules and regulations that impact the possession and use of guns. *See* Brief of Respondents at 19-20 (noting how many local laws "would be subject to attack" and expressing concern that jurisdictions "would have to spend scarce resources defending" against "[c]ostly Second Amendment challenges" which could force governments to repeal or revise even those local laws that "substantially contribute, under local conditions, to reducing violence, injury, and death).

Significantly, in this case, this Court is asked to strike down a pair of local regulations—as opposed to a state or federal law—as a violation of the Second Amendment. To do so without the full development of an evidentiary record concerning the local needs and problems that prompted these regulations risks sending an unduly broad and aggressive message that localities have no distinct regulatory authority or cognizable

regulatory needs in the context of firearms. Especially given that localities are already susceptible to suit in ways states are not, further erosion of local authority in the context of firearm regulation may prompt a continuous stream of plaintiffs marching to courthouse doors seeking declaratory judgments from state and federal judges precluding the application of both civil and criminal firearm regulations. While such regulations are generally reflections of local will and require democratic majorities—either through elected representatives or direct democracy ballot initiatives—there is a risk after *Heller* that a single disgruntled plaintiff can and will seek to utilize the judicial branch as a firearms super-regulator to make an end-run around the democratic lawmaking process. *See generally* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253 (2009) (expressing concerns about a Second Amendment jurisprudence that is “anti-democratic, allowing [judges] to make ‘value judgments’ that belong[] to the people themselves” and suggesting that “cases filed since *Heller* and the multitude of federal, state, and municipal gun control regulations threaten to suck the courts into a quagmire”).

In light of these practical concerns, this Court should not make a determination on whether Respondents’ regulations are a violation of the Constitution even if it concludes that the Second Amendment is applicable against states and localities. Rather, if this Court should incorporate the Second Amendment against the states, it should then remand this case to federal district court in order to determine whether, in light of the heightened deference that should

be shown toward truly local regulations, Respondents' regulations are unduly burdensome on individual rights in light of local needs and conditions. Such a remand for further development of an evidentiary record concerning local needs and demands is necessary to avoid undermining the role that localities play in the administration of the democratic process and to reemphasize, as this Court has done elsewhere, that local concerns merit considerable deference in federal courts.

Remand in this case is justified in part because the question presented only asks this court to incorporate the Second Amendment against the states and does not directly address what impact this ruling could have on local regulations, and in particular Respondent's regulation. While the application of the Second Amendment to the states necessarily implies application to its subparts, the degree of deference afforded to localities may lead to different results depending on the source of the law. That is, a law passed at the local level may survive a constitutional challenge even when a federal or state counterpart would not. This derives from the origin of local law as a true reflection of the democratic process and our nation's traditional deference to locality regulations concerning purely municipal matters.

CONCLUSION

This Court's Second Amendment jurisprudence should include an express and formal concern for the needs and values reflected in local firearm regulations. Both in tradition and modern practice, states have deferred to localities on issues truly local in nature, especially in prominent arenas involving the local public welfare such as with firearm possession and use. Historical and existing variation amongst localities showcases the need and importance of local decision-making to tailor regulations in light of the demands and desires of local constituencies. If this Court should incorporate the Second Amendment against the states, this Court should then remand this case for an initial determination of whether, in light of heightened deference to locality rulemaking authority, Respondents' ordinances violate the Second Amendment.

Respectfully submitted,

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