No. 08-1521

IN THE
Supreme Court of the United States

OTIS MCDONALD, ET AL.,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, ET AL.

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

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

Eagle Forum Education and Legal Defense Fund ("EFELDF"), is an Illinois nonprofit corporation organized in 1981. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF therefore has a strong inter-

[1] This brief is filed with the written consent of all parties, with timely notice provided. Pursuant to its Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

est in protecting the right of individuals to keep and bear arms, as set forth in the Second Amendment.

SUMMARY OF ARGUMENT

At a minimum, incorporation of the protections of the Bill of Rights should apply against state and local governments when the underlying right requires national uniformity. Stated another way, where lack of incorporation frustrates the enjoyment of an individual right in connection with the recognized constitutional right to travel, then incorporation doctrine should apply to protect that individual right. The right to self-defense, like the right to free speech, is such a right that requires national uniformity and thus should be included within incorporation doctrine.

Federalism has always protected against local tyranny as well as tyranny at a national level. James Madison's *The Federalist No. 10* explains how a larger, federal union provides *greater* protection against factions gaining control of government at a local level. This argument, which has been repeatedly accepted and applied by this Court, has its greatest force with respect to the liberty of self-defense enshrined in the Second Amendment.

Finally, the Second Amendment unambiguously protects an individual right, and the court below erred in looking to "contemporary debate" rather than original intent or textualism in interpreting that provision. Whatever the merits of deferring to scholarly analysis of other issues may be, the strength of expressly established constitutional rights is not a hostage to the political winds and whims of academic opinion. A robust individual right under the Second

Amendment is disfavored among many legal scholars and judges, but this Court's ruling in *District of Columbia v. Heller* resolved this "contemporary debate" squarely in favor of the individual right to keep and bear arms. 128 S. Ct. 2783 (2008). The lower court erred in giving undue legal significance to ever-changing contemporary opinion in a matter of constitutional interpretation. The individual right was established as part of the Constitution, and the only way to dilute that right would be by constitutional amendment, not a flood of so-called expert opinions.

ARGUMENT

In rejecting incorporation of the Second Amendment against the States, the court below made three errors. First, it viewed incorporation doctrine as though it were a random process incapable of a coherent foundation. In fact, incorporation doctrine looks to whether a right is part of "ordered liberty" and, as in this case concerning the right of self-defense, it should be applied against the States. We explain below how rights similar in nature to the Second Amendment protection have already been applied against the States.

Second, the court below erred in viewing federalism as disfavoring application of the Second Amendment against the States. Quite the contrary, a full view of federalism requires incorporation, in the spirit of *The Federalist No. 10*, which explained that occasionally a national structure can protect against local tyranny.

Third, the lower court erred in giving undue priority to "contemporary debate." The time for debate was closed when the Second and Fourteenth Amend-

ments were ratified, and they fully protect the individual right to bear arms against governmental encroachment. The safeguard against tyranny established by the Second Amendment would be meaningless and contrary to the intent of the Founders if guns could be banned by local governments.

I. THE SECOND AMENDMENT BY ITS NATURE REQUIRES UNIFORM APPLICATION NATIONWIDE, AND THE RIGHT OF SELF-DEFENSE IS ANALOGOUS TO RIGHTS THAT ARE INCORPORATED.

The right to self-defense is a type of individual right that can only be fully protected with some degree of national uniformity. In *Heller*, this Court expressly held that "the inherent right of self-defense has been central to the Second Amendment right," and this right is worth less if it disappears and reappears during a citizen's road trip across the nation, or as a citizen relocates from town to town, or state to state. 128 S. Ct. at 2817. A patchwork of recognition and non-recognition of the fundamental right of self-defense would make little constitutional sense, and is inconsistent with the *Heller* holding. A crazy quilt of different local restrictions on the fundamental right of self-defense is as untenable as it would be for the right of free speech.

The Second Amendment right of self-defense is an "*ordered* liberty" justifying its application against state and local governments. *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) (emphasis added). A robust right of self-defense should be recognized as an essential "prerequisite to social justice and peace." *Sell v. United States*, 539 U.S. 166 (2003) (quoting

Riggins v. Nevada, 504 U.S. 127, 135-36 (1992), which quotes *Illinois* v. *Allen,* 397 U.S. 337, 347 (1970) (Brennan, J., concurring)). Government power – including state and local governments – is limited where protection of ordered liberty so requires. Self-defense is a quintessential example of such a liberty.

At issue in the *Sell* case was a right of mental self-defense against government-mandated, mind-altering medication. Justice Breyer, writing for the 6-3 Court, held that Defendant Sell's right to decline mind-altering medication could trump the interests of the State in taking his case to trial. This Court thereby implicitly held that a type of self-defense fits squarely and comfortably within the "ordered liberty" recognized and pursued by government.

The Second Amendment right of self-defense is analogous to the Fifth and Sixth Amendment rights against forced medication, which this Court has incorporated against the States. *See Riggins v. Nevada*, 504 U.S. 127 (1992) (holding that the constitutional right against forced medication applies against the State of Nevada, and reversing a conviction for violation of that right); *Washington v. Harper*, 494 U.S. 210 (1990) (observing that the constitutional right against forced medication, though not absolute, is incorporated against the State of Washington).

Similarly, this Court recognized that the defensive right against an uncompensated "taking" of private property is fully incorporated against state and local government. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005). This protects the individual right despite the fact that "[s]ome state constitutions at the time of the founding lacked just compensation clauses and took property even without providing compensation." *Id.* at 508 n.1 (O'Connor, J., dissent-

ing). This Court has long recognized that the right of self-defense against deprivation of property is incorporated against the States. Similarly, the right of self-defense established by the Second Amendment must also be incorporated against state and local government.

The common characteristic of rights that have not been incorporated against the States is that they are inherently local in nature, and not entirely earth-shattering, such as the right to a grand jury and the right to bail (which can be denied anyway, in the discretion of a judge). *See National Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 858 (2009). In sharp contrast is the meaningful right to self-defense established by the Second Amendment, which is not inherently local given the mobility of our society and which is highly significant, often meaning the difference between life and death.

Not all the amendments in the Bill of Rights establish fundamental rights that require ordering or uniformity. There is no need or even desirability for uniformity in grand jury proceedings, for example. While the right to a grand jury is undeniably a type of liberty, it does not qualify within the meaning of the phrase "*ordered* liberty" with respect to incorporation doctrine. The Second Amendment, in contrast, does so qualify.

The lower court thus overstated ambiguities in current incorporation doctrine by declaring that "'[s]elective incorporation' thus cannot be reduced to a formula." *Id.* at 859. Compared with other areas of constitutional jurisprudence, incorporation doctrine is clear enough: incorporation applies to individual rights protected in the Bill of Rights if "necessary to an Anglo-American regime of ordered liberty," *Dun-*

can, 391 U.S. at 149 n.14, and "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks and citation omitted). As explained above, the right to bear arms easily meets these standards.

Incorporation of the Second Amendment against the States does not imply that *all* elements of the Bill of Rights should likewise be incorporated. Rights that are not *individual* in nature, for example, do not benefit from national uniformity and have no need or justification for incorporation. For example, the right to travel and enjoy individual rights is not disturbed by *religious* diversity from region to region. *See, e.g.*, *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 45-46 (2004) (Thomas, J., concurring) ("[T]he Establishment Clause is a federalism provision, which, for this reason, resists incorporation."); *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 677-680 & n.3 (2002) (Thomas, J., concurring). The right to self-defense – a right that is meaningless unless protected against state encroachment – is a far better candidate for incorporation than the "federalism provision" against establishment of religion, which arguably should not be incorporated against the many diverse States.

If any right is incorporated against the States, and many are, then the right of self-defense recognized by this Court in *Heller* should also be incorporated.

II. FEDERALISM, AS ADOPTED BY THE FOUNDING FATHERS, SOMETIMES PROTECTS AGAINST LOCAL TYRANNY AS WELL AS NATIONAL TYRANNY.

The unique American system of dual sovereignties protects against tyranny by either, and while most often it is the local sovereignty that provides an important check and balance against the national sovereignty, there are instances where nationalism provides essential protection against local tyranny. James Madison made this compelling case for nationalism as a safeguard against tyranny by factions in his *Federalist No. 10*. The issue at bar is a perfect illustration.

Madison's insight was that a new United States of America, with its large size and separation of powers, would actually guard against tyranny and evil factions better than individual colonies could:

> Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.

The Federalist No. 10 (quoting its opening sentence).[2]

This lucid justification for national protection against local tyranny has been oft repeated by Justices of this Court. For example, Justice Scalia observed that:

> [A]s American political scientists have known since James Madison pointed it out, see The Fede-

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[2] http://www.constitution.org/fed/federa10.htm (available 11/21/09).

> ralist No. 10, pp. 62-64 (H. Dawson ed. 1876), the dangers of factionalism decrease as the political unit becomes larger.

Norman v. Reed, 502 U.S. 279, 299-300 (1992) (Scalia, J., dissenting). Similarly, Justice Stevens has cited this Federalist paper to emphasize "the greater tendency of smaller societies to promote oppressive and narrow interests above the common good." *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 289 (1991) (Stevens, J., dissenting) (citing *The Federalist No. 10*).

Here, the factionalism of irrational gun control has taken hold of a small, notoriously corrupt political unit (the City of Chicago) when such gun control would not be adopted by a larger political unit (the State of Illinois). Federalism, as informed by *The Federalist No. 10*, protects against this triumph of factionalism.

The Court below errs in its indiscriminate view that "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." *NRA*, 567 F.3d at 860. Quite the contrary, the Constitution – as informed by *The Federalist No. 10* – was ratified in part to combat precisely the kind of local factionalism demonstrated by the City of Chicago.

As Justice Kennedy has explained:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Fra-

> mers that *freedom was enhanced by the creation of two governments, not one*.

United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (citing H. Friendly, "Federalism: A Foreword," 86 Yale L. J. 1019 (1977) and G. Wood, *The Creation of the American Republic, 1776-1787*, pp. 524-532, 564 (1969), emphasis added). While often that freedom-enhancing effect of a dual sovereignty arises from local government checking the power of national rights, sometimes a national right enhances freedom by checking the tyranny of local government. This is such a case here.

Federalism militates for invalidation of the gun control ordinance. Whether the lower court is correct that "[f]ederalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon" is beside the point. *NRA*, 567 F.3d at 860. Federalism supports application of the Second Amendment as a safeguard against local tyranny, just as it supports application of national standards concerning freedom of political speech against local attempts to restrict such freedom.

III. THE SECOND AMENDMENT UNAMBIGUOUSLY PROTECTS AN INDIVIDUAL RIGHT, AND THE COURT BELOW ERRED IN GIVING PRIORITY TO "CONTEMPORARY DEBATE."

The Second Amendment unambiguously protects an individual right, as confirmed by this Court in *Heller*, yet the court below erred in giving priority to contemporary debate. In *Heller*, this Court conclusively resolved any lingering doubt about the nature and scope of the Second Amendment: it *fully* protects an individual right. *See* 128 S. Ct. at 2799 ("There

seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."). In light of that unambiguous decision, it was clear error for the lower court to rule that "[t]he way to evaluate the relation between guns and crime is in scholarly journals and the political process, rather than invocation of ambiguous texts that long precede the contemporary debate." *NRA*, 567 F.3d at 860. It is not *contemporary* debate that defines the contours of the Second Amendment. What matters is the agreed-upon text at the time of its adoption (and prior to the ratification of the Fourteenth Amendment). This approach reinforces how the Second Amendment provides sweeping protection of the individual right to bear arms.

The Founding Fathers anticipated tyranny and added the Second Amendment in part as a safeguard against it, but this defense against tyranny would be meaningless if local governments could simply take it away. James Madison observed "the advantage of being armed, which the Americans possess over the people of almost every other nation" and noted how this was an important check and balance on the power of government. *The Federalist No. 46*. In 1787 Thomas Jefferson wrote, "What country can preserve its liberties if its rulers are not warned from time to time that their people preserve the spirit of resistance? *Let them take arms.*" Letter from Thomas Jefferson to William Stephens Smith, 1787, *The Works of Thomas Jefferson,* Federal Edition, Vol. 5 (1904-5) (emphasis added). Like a criminal defendant's right to trial by jury – which is also incorporated against the states – the right to bear arms is a well-recognized limit on government power.

Supreme Court Justice Joseph Story considered the Second Amendment to be the most important individual right of all:

> The right of the citizens to keep and bear arms has justly been considered the palladium of the liberties of a republic; since it offers a strong moral check against usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Joseph Story, "Commentaries on the Constitution of the United States" (1830), *quoted in* Les Adams, "The Second Amendment Primer" (1996).

If anything, "contemporary" developments reinforce the need for meaningful self-defense as envisioned by the Founders. Self-defense with firearms protects against threats to liberty by terrorism, which might be described as a modern type of tyranny. Airplanes were easy prey for the 9/11 terrorists partly because the pilots were senselessly disarmed. In contrast Israel, long experienced in combating terrorism, promotes armed self-defense. *See, e.g.*, John-Peter Lund, "NOTE: Do Federal Firearms Laws Violate the Second Amendment by Disarming the Militia?" 10 Tex. Rev. Law & Pol. 469, 500 (Spring 2006) ("[I]n Israel, teenage conscripts freely walk the streets and frequent nightclubs bearing fully automatic rifles during their military service."). Chicago's irrational, sweeping gun control leaves its population prey to the tyranny of apolitical crime and terrorism, something the Second Amendment helps safeguard against.

The only proper role for the "contemporary debate" referenced by the court below would be to amend the Constitution, not redefine it. As this Court made so clear in *Heller*, there has been "re-

liance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms," which cannot be nullified by the contemporary view of even "hundreds of judges" who might disagree. *Heller*, 128 S. Ct. at 2815 n.24. These "millions of Americans" relied on the protection of the Second Amendment against interference of their right to bear arms by state and local governments as well as by the federal government.

CONCLUSION

The full protections of the Second Amendment should be incorporated against state and local governments, and laws that violate this individual right to keep and bear arms should be declared unconstitutional.

Respectfully submitted,

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