No. 08-1521

In The
Supreme Court of the United States

OTIS MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

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

BRIEF OF *AMICAE CURIAE* WOMEN STATE LEGISLATORS AND ACADEMICS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STUDIES AND OTHER SOURCES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

SCHOLARLY AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICAE CURIAE*[1]

Amicae Curiae, listed in the Appendix, are an ad hoc group of seventy five women state legislators and academics from across the United States. *Amicae* assert that women have a fundamental right to self-defense and that possession of a handgun in the home should be a legal option for any law-abiding woman. The case now before the Court directly implicates that right, as the City of Chicago currently criminalizes any woman who feels such a decision would be best for her.

Amicae often strenuously disagree among themselves about the tenability of the Court's privacy and personal autonomy jurisprudence that parallels women's self-defense concerns. What *Amicae* share is the belief that self-defense is as integral to women's personhood as are the previously incorporated yet unenumerated rights that directly affect women's lives. It is an abiding belief of *Amicae* that women are

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[1] Rule 37.6 notice. Counsel of Record is an Assistant General Counsel to the National Rifle Association of America, a party in this case. Additional named counsel serves on the Board of Directors of the National Rifle Association. Lindsay Charles provided assistance while serving a one-year Fellowship with the NRA Civil Rights Defense Fund during leave from Goodwin Procter LLP in Boston, Massachusetts. Funding for printing and submission of this brief was provided by the NRA Civil Rights Defense Fund. This brief is filed with the written consent of all parties, reflected in letters filed by the parties with the clerk. *Amicae* complied with the conditions of those consents by providing advance notice of at least 10 days of their intention to file this brief.

capable of determining for themselves whether a handgun will best protect them, and that this decision must be free from governmental paternalism and others' personal value judgments. It is therefore with hope that this Court will respect women's decisions regarding self-defense that *Amicae* submit this Brief for the Court's consideration.

SUMMARY OF THE ARGUMENT

Plaintiff Colleen Lawson is a 51-year-old woman who wishes to possess a handgun in her Chicago home. She is not a felon or domestic abuser, nor does she meet any of the other firearms prohibitions contained in federal law.[2] In Mrs. Lawson's judgment, possessing a handgun in Chicago would decrease her chances of suffering serious injury or death should she ever be threatened again in her home. Mrs. Lawson understands that a handgun is a potentially dangerous tool, and she is willing to assume the moral responsibility that attends handgun ownership.

The City of Chicago is denying Mrs. Lawson that choice. To women like Mrs. Lawson, the ability to defend themselves effectively is not an activity or an interest. It is not an "untouchable right to keep guns in the house to shoot burglars." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2848 (2008) (Breyer, J.,

[2] Mrs. Lawson already lawfully owns a handgun that she keeps outside the City of Chicago. (McDonald Compl. ¶ 19.)

dissenting). It is the very means by which millions of women[3] who have decided to own handguns protect the personal autonomy and bodily privacy guaranteed them in other areas of jurisprudence. These women recognize the unique threats they face as women and deserve that their choices be respected by male dominated legislatures and others who would deny them that choice.

In *Heller*, this Court emphasized that the text of the Second Amendment was the driving force behind the Court's decision to find an individual right to firearms possession. This right includes the right to possess a handgun within the home. The Court's previous Fourteenth Amendment selective incorporation jurisprudence is sufficient on that basis alone to hold Chicago's handgun ban unconstitutional. However, because of the special importance to women of owning handguns, the Court could also consider incorporating that right using the Court's privacy and personal autonomy jurisprudence

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[3] L. Hepburn *et al.*, *The U.S. Gun Stock: Results From the 2004 National Firearms Survey*, Inj. Prev. 2007; 13:15-19 (12% of women living alone and 30% of all women own at least one firearm.); *see* Philip J. Cook, *et al.*, National Institute of Justice, *Guns in America: National Survey on Private Ownership and Use of Firearms* 3, NIJ Research in Brief (May 1997) (67% of women gun owners possessed firearms (usually handguns) primarily for protection against crime.), *available at* http://www.ncjrs.gov/pdffiles/165476.pdf.

protected by substantive due process.[4] Not only would this approach be jurisprudentially consistent, but it could serve to strengthen the arguments that the rights of privacy and personal autonomy are likewise incorporated even though unenumerated.

Amicae also proffer that women's personal liberty interests affected by the Chicago handgun ban merit incorporation under the Fourteenth Amendment's Privileges or Immunities Clause. A resurrection of the Privileges or Immunities Clause would reinforce the right to self-defense and buttress the Court's jurisprudence for implied unenumerated liberties that may not rise to the level of fundamental rights.

Amicae therefore urge the Court to consider closely the importance to women of holding that the Second Amendment's core right to self-defense may not be thwarted by individual municipalities and states. The women of Chicago deserve the Court's favorable consideration of this highly personal decision regarding their autonomy.

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[4] *See* Glenn Harlan Reynolds, *Guns and Gay Sex: Some Notes on Firearms, the Second Amendment, and "Reasonable Regulation",* 75 Tenn. L. Rev. 137, 142-47 (Fall 2007).

ARGUMENT

I. The Second Amendment Is a Fundamental Right that Should Be Incorporated Under the Due Process Clause of the Fourteenth Amendment

Last year this Court decided that the Second Amendment guarantees the right of individuals to keep and bear arms. This right includes, at the least, the right of individuals to keep a handgun in the home for the purpose of immediate self-defense. *Heller*, 128 S. Ct. at 2822.

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court established its current standard by which a particular right is to be made binding upon the individual states through selective incorporation. Courts are to weigh whether the right "is fundamental – whether, that is, [it] is necessary to an Anglo-American regime of ordered liberty." *Id.* at 149, n.14. Without directly answering the question of whether the Second Amendment is necessary to "ordered liberty," *Heller* emphasized that the right was indeed "one of the fundamental rights of Englishmen." *Heller*, 128 S. Ct. at 2798. Another factor to consider is whether the right has been recognized by the states themselves. Under the *Duncan* analysis, a right's recognition by the states would indicate widespread acceptance of that right as sufficiently "fundamental" to merit codification in state constitutions. That was indeed the case, as at least seven of the nine state constitutional arms provisions enacted between 1789

and 1820 expressly protected the individual citizen's right to self-defense.[5] Under the Court's *Duncan* test, the expressly enumerated right to keep and bear arms should therefore be recognized as protected by the Fourteenth Amendment's Due Process Clause.

Chicago or its *amici* may counter that current crime levels decrease the relevance of state constitutional arms provisions passed in the 18th and 19th centuries. At the time of this case, however, forty-four states now have constitutional provisions expressly protecting a right to arms, and no municipality or state has attempted to prohibit all firearms ownership. *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 193-205 (2006). The fact that no states have amended their constitutions despite changing social conditions is indication of how deeply rooted the right to arms is across the nation. In fact, Chicago is one of only two municipalities that ban the possession of handguns in the home.

There is little evidence that states considered women's self-defense as a primary concern when drafting these constitutional rights to arms. The male drafters most likely considered it a man's prerogative and responsibility to protect the women in their lives.

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[5] *See* Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. Ill. U. L.J. 251, 259-260 (1992). *E.g.*, Conn. Const., Art. I, § 17 (1818) ("Every citizen has a right to bear arms in defence of himself and the state.")

Recognizing that, however, the authors of the constitutional guarantees later used to protect privacy and reproductive autonomy rights were likely not considering those rights the Court has since found so essential to women's equality. Nonetheless, the Court has held that those rights may not be infringed by states even though those liberty interests have less textual support than the Second Amendment.

Of greater importance to women than 19th Century Constitutional law, however, is the self-defense component in the *Heller* decision. The Court emphasized the "natural," "fundamental," and "inherent right of self-defense" as "central" to the Second Amendment, and noted that the right to arms in the English Bill of Rights was "an individual right protecting against both public and private violence." *Heller*, 128 S. Ct. at 2798-99. The Court's recognition of the right of self-defense is further buttressed by the Court's previous eleven cases applying the federal common law right of armed self-defense. David Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-first*, 27 AM. J. CRIM. L. 293 (2000). The right to arms, particularly the right to keep a handgun in the home, must therefore be considered "fundamental" in the sense articulated in the Court's substantive due process decisions.

Increasing numbers of women of all political backgrounds are choosing to exercise the right to own

a handgun.[6] Women who have never owned a firearm are being trained in large numbers and opting to purchase their first handguns.[7] These women recognize that their right to personal autonomy, ignored for generations by the courts, continues to expand and now encompasses their right to protect their bodily integrity using the means they decide is most appropriate. *See* Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 Rutgers L. Rev. 97 (1997). The Court should give this contemporary understanding of women's rights the same respect it has afforded other life decisions that determine women's autonomy. *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965).

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[6] L. Hepburn *et al., supra* note 3, at 17-18. (Of men and women who own firearms, 16% described themselves as having liberal political views, 26% moderate political views, and 32% conservative political views. Those who own only handguns are just as likely to live in an urban environment as a rural one and are demographically more diverse than owners of only long guns who are more likely to be rural men.)

[7] *Number of Women Buying Handguns Increasing* (CBS Chicago Channel 2, Oct. 27, 2009), *available at* http://cbs2chicago.com/local/women.handguns.increasing.2.1274866.html. *See also* The National Shooting Sports Foundation, Inc., *First Shots Handgun Seminars: Female Perspective* 2, 5 (August 2009), *available at* http://www.firstshots.org/PDF/Female_Perspective.pdf (Nearly half of all participants in nationwide handgun seminars are female; 74% of female participants listed personal protection as their main reason for purchasing a handgun.)

II. For Women, the Fundamental Right to Self-Defense Must Include the Right to Possess a Handgun in the Home

Increasing numbers of women live alone. In Chicago, these women do not have access to handguns that equalize the inherent biological differences between a female victim and her most likely male attacker. Without the means to protect themselves or the help of housemates, women in Chicago have therefore been compelled to rely upon the protections of a government-provided police force.

Courts have found that such reliance is unfounded. *See* Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection from Crime*, 90 A.L.R.5th 273 (2001). Despite women's expectations, courts across the nation have ruled that the Constitution does not "requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Soc. Servs.*, 489 U.S. 189, 195 (1989). Women simply have no legal right to law enforcement protection unless they are able to prove special and highly narrow circumstances. *Castle Rock v. Gonzales,* 545 U.S. 748 (2005). In *Castle Rock*, the Court found that a temporary restraining order, a mandatory arrest statute passed with the clear legislative intent of ensuring enforcement of domestic abuse restraining orders, and Gonzalez's repeated pleas for help were insufficient for her to demand protection. *Castle Rock* therefore left open the question of just what a woman

and her legislature would have to do to create a right to police protection from a known and specific threat.

Even if courts did find a duty to protect individuals, municipalities simply do not have the resources to provide anything but investigative services and auxiliary crime deterrents. Given "the crushing nature of the burden," the police cannot be expected to protect an individual citizen from all threats at all times. *Weiner v. Metro. Transp. Auth.*, 433 N.E.2d 124, 127 (N.Y. 1982). Illinois courts have likewise recognized this reality and exonerated law enforcement from not fulfilling the non-existent duty to guarantee individuals' protection. *Keane v. City of Chicago*, 240 N.E.2d 321 (Ill. 1968). Consequently, women cannot rely upon the state to provide them protection or sue for damages when this protection is not available.

A. Women Themselves Have the Responsibility to Provide Their Own Security Within the Home

Widespread demographic changes now make it more likely that women will live alone and be responsible for their own safety. Today women are less likely to be married than in earlier years,[8] more

[8] U.S. Census Bureau, *Living Together, Living Alone*, 5 Population *Profile of the United States: 2000*, p.5-2, www.census.gov/population/www/pop-profile/2000/chap05.pdf. (Between 1970 and 2000, the proportion of women aged 20 to 24 who had never married increased from 36 to 73%; for women aged 30 to 34, that proportion tripled from 6 to 22%.)

commonly divorced, and more frequently widowed as female longevity rates outstrip those of men.[9] Women may therefore not depend upon male relatives, an often inadequate and unaccountable police force, or tools of self-defense that are currently prohibited under Chicago gun ordinances. They remain, however, among those who feel most highly vulnerable to violent crime given the unique threats they face as women.

As householders, these women are the most immediate and often sole source of protection for themselves and any children in their care. Many do not have the resources to install expensive monitoring systems and alarms, or to choose neighborhoods in which they and their children face few threats. Moreover, many will not have the knowledge or social network to access those violence prevention services that are available.[10] An affordable handgun, responsibly stored to prevent access to children, could therefore very well be the sole means available

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[9] Frank Hobbs *et al.*, U.S. Census Bureau, *Demographic Trends in the 20th Century*, Series CENSR-4, p. 137 (2002). (In 2000, women aged 65 and over accounted for a single digit percentage of the total population but more than 30% of households consisting of only one person.) This population of older women living alone will only increase as baby boomers age and fewer children are capable of caring for aging parents.

[10] Immigrant women suffering from domestic violence may face a more difficult time escaping abuse because of immigration laws, language barriers, a misunderstanding of U.S. domestic abuse laws, a lack of financial resources, and social isolation.

for these women to protect themselves and their children.

The City of Chicago perhaps does not appreciate the injustice of denying the right to have a handgun to women who have no other real options. The City cannot guarantee all women complete protection from grave injury, nor can it eliminate those threats that will always exist. In light of these realities, those recognizing the inherent value of each woman should cede to women the best option available until conditions in the City are perfect. Authorities and women may deem this a "second best option," but the constitutional theory that second best options must be available is commonly cited for abortion rights as well. *Cf.* Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of Casey*, 45 Hastings L.J. 961, 967 (1994) (arguing that "[u]ntil the societal demand that the women's right to choose be exercised justly and responsibly is circumscribed by a requirement that society itself be minimally just – the imposition by the state of a requirement that the woman make the decision to abort justly. . . . constitutes, itself, an arrogant act of injustice.").

Since Chicago cannot provide a safe environment for women nor guarantee police protection, the City cannot disrespect a woman's privacy interests in her home. As this Court found that the state had no legitimate interest in consenting adults' private sexual lives in residences, the state here "cannot demean their existence or control their destiny" by denying

women a tool that harms no one unless used criminally or irresponsibly. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The home is the area most protected from governmental interference in U.S. law, especially in those areas of life where reasonable people most deeply disagree. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 37 (2001); *Griswold*, 381 U.S. at 485; *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting). Even more than choices concerning reproduction and intimate activity, a woman's reasoned decision to possess a handgun to protect her life is a liberty interest the state must have more than fear or moral passions before infringing.

A woman's decision to defend her personal safety as she chooses should be considered as inviolate as is the home.[11] Moreover, to deny a woman the right of self-defense is as egregious a constitutional violation as if the state were to commit injury to a woman directly. No government would pass a law forbidding doctors from treating rape survivors, but the City of Chicago is depriving women of the right to protect themselves from harm in the first place. *See* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Pa. L. Rev. 119, 127 (1989) (noting in the context of abortion, "the state would plainly infringe its citizens' bodily

[11] Linda C. McClain, *Inviolability and Privacy: The Castle, The Sanctuary, and the Body*, 7 Yale J.L. & Human. 195, 201-203 (1995) (associating the female body's inviolability with privacy jurisprudence).

integrity whether its agents inflicted knife wounds or its laws forbade surgery or restricted blood transfusions in cases of private knifings.") Whether prohibiting treatment for the physical effects of rape, or denying women the ability to prevent it, the result is an intrusion upon the "realm of personal liberty which the government may not enter." *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992).

B. Handguns Provide Special Benefits to Women

For years women were advised not to fight back and to attempt to sympathize with their attackers while looking for the first opportunity to escape. Well-meaning women's advocates counseled that such passivity would result in fewer and less serious injuries than if a woman attempted to defend herself. However, recent empirical studies indicate that owning a firearm is one of the best means a woman can have for preventing crime against her. In fact, the National Crime Victimization Survey (NCVS) and other researchers have concluded that women who offer no resistance are 2.5 times more likely to be seriously injured than women who resist their attackers with a gun. John R. Lott, Jr. & David B. Mustard, 26 Journal of Legal Studies 1, 23 (No. 1, Jan. 1997). While the overall injury rate for both men and women was 30.2%, only 12.8% of those using a firearm for self-protection were injured. Gary Kleck & Jongyeon Tark, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*,

42 Criminol. 861, 902 (2005); *see* Lawrence Southwick, *Self-Defense with Guns: The Consequences*, 28 J. CRIM. JUSTICE 351-370 (2000) (concluding that "[t]he use of a gun by the victim significantly reduces her chance of being injured . . . ").

Providing women handguns simply increases their ability to defend themselves far more than does providing handguns to generally more physically able men. *See* Paxton Quigley, *Armed and Female* (E.P. Dutton 1989). The NCVS indicates that allowing a woman to have a gun has a "much greater effect" on her ability to defend herself against crime than providing that same gun to a man.

Given relative size disparities, men who threaten women can easily cause serious bodily injury or death using another type of weapon or no weapon at all. Of women murdered between 1990 and 2005, 10% of wives and 14% of girlfriends were killed by men using only the men's "force" and no weapon of any type.[12] It should also be noted that a violent man turning a gun on a woman or child announces his intent to do them harm. A woman using a gun in self-defense does so rarely with the intent to cause death to her attacker. Instead, a woman in such a situation has the intent only to stop the assault and to gain control of the situation until she can summon assistance. The simple

[12] U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.: Intimate Homicide*, http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm.

brandishing of a weapon often results in the assailant choosing to discontinue the crime without a shot having been fired.[13]

The value of widespread handgun ownership lies not only in the individual instances in which a violent act is thwarted, but in the general deterrent effects created by criminals' knowledge of firearms ownership among potential victims. Researchers confirm the common-sense notion that those wishing to do harm often think closely before confronting an individual who *may* be armed. Some 39% of the felons interviewed said they personally had been deterred from committing at least one crime because they believed the intended victim was armed. Almost three-quarters agreed that "[o]ne reason burglars avoid houses when people are at home is that they fear being shot during the crime." James D. Wright & Peter H. Rossi, *Armed and Considered Dangerous, a Survey of Felons and Their Firearms* 145 (Aldine de Gruyter, 1986). As it is now in Chicago, those inclined to harm women know that all law-abiding women will be unarmed.

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[13] In almost half a million cases each year, an intruder is scared away by an individual in the home with a firearm. Robert Ieda *et al.*, *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 VIOLENCE & VICTIMS 363 (1997); *see* Gary Kleck, *Policy Lessons From Recent Gun Control Research*, 49 Law and Contemporary Problems 35, 44 (No. 1, Winter 1986) (noting that only 8.3% of defensive gun uses resulted in the assailant's injury or death).

Stalkers and abusive boyfriends, spouses, or ex-spouses may be even more significantly deterred than the hardened, career felons participating in this survey. Under current Chicago gun regulations, stalkers and violent intimate partners may be confident that their female victims have not armed themselves since the threats or violence began. Many of these men have already been emboldened by women's failure to report previous threats, or by the oftentimes inadequate resources available to help such women. Allowing women the option to own a serviceable handgun will not deter all stalkers and abusive intimate partners willing to sacrifice their own lives. However, the fact that men inclined toward violence will know that women have that choice, and may well have exercised it, will no doubt inhibit those less willing to pay that price.

Chicago would like to appropriate women's choice of firearm rather than to allow rational women the ability to decide whether a handgun is best suited to their needs. A shotgun is certainly better than nothing and could provide deterrence benefits. However, most women are best served by a lighter handgun, less unwieldy for women with shorter arm spans, and far more easily carried around the home than a shotgun or rifle. Moreover, women holding a handgun are able to phone for assistance, while any type of long gun requires two hands to keep the firearm pointed at an assailant. The fact that others may choose differently should not impinge upon a

woman's ability to select the firearm with which she feels most comfortable.

C. Allowing Women to Own Handguns in Private Residences Will Not Increase Murders and Accidental Injury

Amici for Chicago will likely claim that permitting handguns in the home will increase the number of women murdered by abusive husbands and the number of accidental injuries and death by firearms. Empirical evidence supports neither assertion.

A firearm in the home does not increase a woman's risk of being murdered. A common statistic cited and misconstrued is that, when a gun is in the home, an abused woman is six times more likely to be killed than other abused women. Jacquelyn C. Campbell, *et al.*, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study* in 93 Am. J. Pub. Health 1090-1092 (No. 7, July 2003). However, this statistic has some verifiable basis only when particular adjustments for other risk factors are weighed. Most importantly, any validity that statistic holds is only for battered women who live with abusers who have guns. The odds for an abused woman living apart from her abuser, when she herself has a firearm, are only 0.22, far below the 2.0 level required for statistical significance. The most important risk factor for the murder of abused women is the male's unemployment. *Id.* Programs

that help women leave already terribly violent situations and that decrease unemployment should therefore be keys to the abatement of femicide, not laws that serve only to disarm potential victims.

Respondents' *amici* may also claim that allowing handguns in homes will lead to an increase in accidental injuries and deaths, particularly among children. These fears have proven unfounded. From 2000 to 2006, the rate of accidental death from firearms was 1.6% of that for motor vehicles.[14] The accidental firearms fatality rate has dropped dramatically over the last three decades (a 73.2% decrease between 1981 and 2006)[15] while the number of guns in circulation has risen. Fatal gun accidents are generally caused by "an unusually reckless subset of the population" who often have a long record of violent crime, heavy drinking, and other types of accidents.[16] Moreover, gun accidents involving preadolescent children are exceedingly rare.[17] Other hazards in

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[14] Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, http://webappa.cdc.gov/sasweb/ncipc/mortrate.html. Firearms involved in 5,150 deaths (0.25 per 100,000 people); motor vehicles involved in 312,871 deaths (15.4 per 100,000 people).

[15] *Id.* 0.82 deaths per 100,000 people in 1981; 0.22 deaths per 100,000 people in 2006.

[16] *See* Gary Kleck, *Guns and Violence: An Interpretive Review of the Field*, 1 SOC. PATH. 12, 29 (1995). Many of these people would be barred from firearm ownership under existing federal and state law.

[17] *See supra* note 14.

the home are far more dangerous to children. In 1997 alone, approximately 550 children under the age of 10 drowned in residential swimming pools; only 48 were accidentally killed by firearms.[18] Responsible parents can be trusted to exercise due care in storing their firearms safely away from children.

III. The Harms of Denying Women the Choice to Possess a Handgun in the Home Exceed the Social Costs Claimed for Handgun Ownership

Amicae do not deny that there are social costs to handgun ownership in the home. There are murders and accidental injury, although such incidences are significantly lower than those who wish to deny women their autonomy will claim. Despite those costs, however, denying a woman her rational decision to possess a handgun in her home does little but perpetuate her vulnerability to crime and disallows her the moral responsibility that attends firearms ownership. These too are costs that must be considered.

The effects of violent crime on women are well-documented and understandable. Female victims of violent crime suffer a complete disregard of their will and bodily integrity that the Court does not tolerate in other areas of jurisprudence affecting women. This disregard of a woman's will in the case of serious

[18] *Id.*

violent injury is far greater than the disregard shown by those who would demand that she carry a child to term or would criminalize her for consensual sexual intimacy within the home. Rape has been described as "an incursion into the private, personal inner space without consent . . . that constitutes a deliberate violation of emotional, physical and rational integrity,"[19] "the closest one can come to destroying the ego except for murder," and an "intrusion upon the most sacred and the most private repository of the self."[20] Many victims of rape remain emotionally debilitated for the rest of their lives.

Less well documented and understood are the civic costs associated with denying women the ability to make decisions that so profoundly affect their lives. Recognizing women's right to possess an effective means of self-defense and to choose motherhood is an acknowledgement of women's dignity, autonomy, and ability to make highly personal decisions for themselves. This sense of "responsibility as autonomy connotes self-governance" and entrusts women to "exercise moral responsibility in making decisions guided by conscience." Linda C. McClain, *Rights and Irresponsibility*, 43 Duke L.J. 989, 994 (1994) (referring to reproductive rights). Women refused these choices, for whatever reason, are denied the right to

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[19] Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN AND RAPE, p. 422 (1976).

[20] D.J. Hicks, *Rape: Sexual Assault*, 137(8) AM. J. OBST. & GYN. 931, 932-33 (1980).

exercise their intellectual and moral capabilities by a paternalistic state. Such denial impedes women's capacity for responsible citizenship. *Id.* at 1038.

This Court has already deemed women's self-autonomy worthy of Fourteenth Amendment protection in cases involving contraception and abortion. The Court found these liberties of fundamental importance even though there was significant disagreement as to whether the right even existed and whether women could make those decisions responsibly. Women's "authority to make . . . traumatic and yet empowering decisions" is linked to "basic human dignity"[21] to an even greater extent in protecting their very lives than in the decision of whether to give birth to a child.[22] When deciding whether to protect themselves by owning a handgun, women are exercising "the moral right – and the moral responsibility – to confront the most fundamental questions about the meaning and value of their own lives for themselves, answering to their own consciences and convictions." Ronald Dworkin, LIFE'S DOMINION: AN

[21] *Casey*, 505 U.S. 833, 916 (1992) (Stevens, J., concurring in part and dissenting in part).

[22] Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 791 (1989) (noting that abortion restrictions "radically and affirmatively redirect women's lives" and "it is difficult to conceive of a particular legal prohibition with a more total effect on the life and future of the one enjoined" than a law that limits reproductive choice.).

ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM at 166 (1993). Such decision-making is at the very core of this Court's Fourteenth Amendment jurisprudence.

IV. It Is Not Legally Sufficient to Deny Women the Choice to Possess a Handgun by Citing Social Costs

Well-meaning advocates of Chicago's gun restrictions often imply that women will act irresponsibly if afforded this right. This is not the first time that the denial of a right to women has been premised on women's supposed inability to: (1) consider the interests of others, (2) gauge how their actions affect the community, or (3) comply with what a majority feels is the correct moral decision. Those arguments demean women's personhood and devalue their individuality. Moreover, they have not worked to restrict reproductive choice and intimate sexual conduct, and they should not work to deny a woman the choice to own a handgun in this case. In fact, this Court expressly rejected the idea that costs of handguns could serve to prohibit their ownership, stating that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 128 S. Ct. at 2822.

Courts have respected these individual liberties because of the greater danger created by replacing individual decision-making and responsibility with

edicts from the state. In their judgment, "the risk that some people may make irresponsible decisions is a lesser evil than the outright denial to everyone of the right to make decisions profoundly affecting their individual destiny." *Thornburgh v. Amer. Coll. of Obst. & Gyn.*, 476 U.S. 747, 781-82 (1986) (Stevens, J., concurring). In cases involving deeply personal choices, courts have often been convinced that society's bearing those costs is preferable to a political regime less protective of human freedom and moral autonomy. *See* Ronald Dworkin, TAKING RIGHTS SERIOUSLY 194 (1977). The societal benefits gained by increasing individual autonomy outweigh the costs in this case as well.

V. The Right to Keep and Bear Arms for Self-Defense Is a Privilege or Immunity of Citizens of the United States and All Other Legal Residents

The Due Process Clause is the most likely avenue for incorporation of the Second Amendment, as the Privileges or Immunities Clause has been largely a dead letter for over one hundred thirty-six years. However, the present case affords this Court the rare opportunity to expand its Privileges or Immunities jurisprudence. Read together with the Court's decision in *Saenz v. Roe*, 526 U.S. 489 (1999), incorporation of the Second Amendment through the Privileges or Immunities Clause of the Fourteenth Amendment

would breathe new life into this often-overlooked and potentially powerful Constitutional clause.

This Court could decide that the right to keep and bear arms should be enforced against the states through selective incorporation under the Due Process Clause. Moreover, the substantive due process doctrine has been a valuable means of protecting women from state interference with rights such as access to contraception, the ability to choose a safe and legal abortion, and the freedom to engage in intimate activity within the home. However, Due Process may not be the best way to protect both unenumerated and textual rights.

A. Incorporation of the Right to Keep a Handgun in the Home for Self-Defense May Be Accomplished Through the Privileges or Immunities Clause Without Overruling the *Slaughter-House Cases*

The *Slaughter-House Cases,* 83 U.S. 36 (1873), were heavily criticized at the time and remain so to this day. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1258-59 (1992). Detractors have noted that the case was decided "without full regard for the congressional purpose or popular understanding" of the Fourteenth Amendment. *Adamson v. California*, 332 U.S. 46, 78 (1947) (Black, J., dissenting). Nor does the case reflect modern understandings of the Fourteenth Amendment. The day after issuing *Slaughter-House*,

the Court summarily disposed of Mary Bradwell's application to practice law in Illinois, which had been denied in part because of her status as a married woman. *Bradwell v. Illinois*, 83 U.S. 130 (1873). Relying on *Slaughter-House*, the Court held that the right to practice law was not one of the "privileges and immunities" belonging to citizens of the United States. Since then, courts have therefore been compelled to look to the Due Process Clause to protect those rights that the Privileges or Immunities Clause was intended to cover.

Substantive Due Process has not been free of criticism, however. John Hart Ely has observed that the phrase "'substantive due process' is a contradiction in terms – sort of like 'green pastel redness.'" DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980). Due process mandates the procedures that are required in a given situation; it does not lend itself well to a guarantee of substantive rights. The Privileges and Immunities Clause does protect civil rights and liberties; it announces "that there is a set of entitlements that no state is to take away." *Id.* at 24. Properly interpreted, this clause may be a more logical and less assailable source of certain rights already recognized by this Court, as well as the origin of other fundamental enumerated and unenumerated rights.

However, until the *Slaughter-House Cases* are overruled, it is necessary to at least consider hewing to the opinion issued by this Court in 1873. The *Slaughter-House* Court held that the Privileges or

Immunities Clause of the Fourteenth Amendment protected only those rights "belonging to a citizen of the United States as such." *Slaughter-House*, 83 U.S. at 79. However, the Court did not purport to give an exhaustive list of the rights pertaining to national citizenship, but merely "venture[d] to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.*

Since the Court was clear that the rights discussed were only examples and not meant to define the outer limits of rights pertaining to national citizenship, protecting the right to keep and bear arms as a privilege or immunity of United States citizenship is entirely consistent with the text and spirit of the *Slaughter-House Cases*. The colonists' proficiency in the use of their firearms enabled them to defeat the much larger and better-trained English forces, and secured America's independence.

B. A Renewed Privileges or Immunities Clause Supports Incorporation of the Second Amendment and Other Personal Liberties

Although the Court could incorporate the Second Amendment through the Privileges or Immunities Clause consistent with the *Slaughter-House Cases*, the better approach would be to overrule that case, and interpret Privileges or Immunities as intended by the framers of the Fourteenth Amendment. It is

debatable whether the Bill of Rights could have operated as a limitation on states' power before the Fourteenth Amendment. It is clear, however, that the amendment was intended in part to overrule *Barron v. Baltimore*, 32 U.S. 243 (1833), and enforce at least the first eight amendments against the states. Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 12-27 (2007).

The legislative history of the Fourteenth Amendment supports incorporation of the entire Bill of Rights and unenumerated rights. Representative Bingham, the principal drafter of Section 1 of the Fourteenth Amendment, repeatedly stated that the amendment would incorporate the Bill of Rights. *See Adamson*, 332 U.S. at 94-118 (appendix). Senator Howard, chair of the Joint Committee on Reconstruction, interpreted the meaning of the Amendment to his fellow Senators in this way:

> It would be a curious question to solve what are the privileges or immunities of the citizens of each of the States in the several States. . . . Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be – for *they are not and cannot be fully defined in their entire extent and precise nature* – to these should be added the personal rights guaranteed and secured by the first eight amendments of the

> Constitution; such as the freedom of speech and of the press . . . [and] *the right to keep and to bear arms*. . . . The great object of the first section of this amendment is, therefore, *to restrain the power of the States* and compel them at all times to respect these great *fundamental guarantees*.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (emphasis added). The views expressed by Bingham and Howard are persuasive, but especially telling is that no one disagreed with their interpretation. Proponents and critics of the amendment seemed to agree that Section 1 would prevent the states from interfering with all substantive rights guaranteed in the Bill of Rights, and certain other unenumerated rights under the broad language of the Privileges or Immunities Clause. *See* Lawrence, *supra*, at 27.

Numerous scholars have urged expansion of Privileges or Immunities to protect individual rights. Laurence Tribe has suggested that the Supreme Court may, at some point in the future, decide to use the Privileges or Immunities Clause to protect personal rights:

> One should not rule out the possibility that courts and lawyers, growing weary of the heavily encumbered and often sputtering vehicles of due process and equal protection, might yet turn to the still shadowy privileges or immunities clause not only for the rhetorical lift or for a reminder of such peculiarly "national" interests as interstate travel, but for a fresh source of distinctly

> personal rights. . . . [A]dvocates of constitutional progress may find themselves in good company if they treat the clause as alive and potentially robust.

AMERICAN CONSTITUTIONAL LAW 426 (1st ed. 1978). Because the Second Amendment has not yet been incorporated, and in fact had been largely ignored until *Heller*, it presents an ideal opportunity to begin expanding the scope of the Privileges or Immunities Clause. Rather than erasing or amending complicated jurisprudence, the Court will be writing on a nearly blank slate.

Although reasonable minds may differ on the desirability of gay marriage, unfettered access to abortion, and other controversial social issues, it should be recognized that the most logical legal basis for these potential rights is the Privileges or Immunities Clause. Rather than attempting to discover these rights in a nebulous "green pastel redness," the Court could simply recognize them as a privilege or immunity of citizens of the United States.

C. Privileges or Immunities May Be the Best Way for Courts to Recognize Unenumerated Rights in the Future

The Privileges or Immunities Clause was drafted using language capable of growth and recognition of changing circumstances. No matter one's political views, or opinions about women's decision-making abilities, there is common ground: justifying access to

abortion under the "right to privacy" is less than ideal. Recognizing the right to an abortion as a liberty interest that furthers personal autonomy is a more compelling justification for protection from governmental intrusion. The right to reproductive autonomy and the right to keep a handgun in the home for self-defense are liberties which "allow what might be crucial private choices in extreme personal crises." Johnson, *supra*, at 98.

The present case is the key to future protection of both textual and unenumerated rights. If the Second Amendment right to keep and bear arms is incorporated through the Privileges or Immunities Clause, it would expand the set of rights protected by the clause. Other rights currently protected under the Due Process Clause could eventually be invited to take shelter under the Privileges or Immunities umbrella as well. Moreover, if new unenumerated rights are declared in the future, the Court's opinions will be viewed as logically consistent provided that the enumerated right to keep and bear arms has already been protected against the states in the same way.

As Justice Stevens has articulated, "[d]ecisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best." *Casey*, 505 U.S. at 916 (Stevens, J., concurring). This applies not just to the abortion choice, but to all potentially life-altering choices a woman can make. Choices regarding where she will live and whether to have a child carry enormous consequences that can change the course of her life.

Each individual woman is trusted to make the best choice for herself, because no one else can know her life as well as she does. Yet the City of Chicago restricts women from making a choice that could not only alter the course of their lives, but protect their very existence. This Court should recognize an individual's right to choose the best method of self-defense, just as it has entrusted women with other life-altering choices.

This Court must strive to protect all civil liberties, without imposing its own moral code.[23] The decision to keep a firearm in the home for self-defense is not the best choice for all women, but every woman deserves the right to make that choice for herself – whether she lives in the District of Columbia or in the City of Chicago. Failing to incorporate a civil right treasured by many Americans can only make already-protected rights weaker and erode the public's faith in the courts.

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[23] *Cf. Casey*, 505 U.S. at 850: "Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."

D. The Right to Keep and Bear Arms, Recognized as a Privilege or Immunity of Citizenship, Will Apply to All Legal Residents of the United States Through the Equal Protection Clause

The Privileges or Immunities Clause is a source of substantive rights only for citizens of the United States. This does not, however, mean that only citizens may enjoy the freedoms protected by that clause. While the amendment references the privileges and immunities of *citizens*, the same sentence makes clear that all *persons* within the United States' jurisdiction enjoy equal protection of its laws. Therefore, once the Court finds that a right is guaranteed by the Privileges or Immunities Clause, it will evaluate any subsequent legislation that discriminates based on alienage using strict scrutiny.[24] *See Graham v. Richardson*, 403 U.S. 365 (1971).

Legal residents of the United States have "developed sufficient connection with this country to be considered part of [the national] community," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), and enjoy many of this country's liberties. Certainly there are some restrictions on gun ownership by legal

[24] A different standard of scrutiny may be used for alienage classifications made by the federal government, or in cases involving a political function or illegal aliens. None of these exceptions to strict scrutiny are applicable to statutes that would infringe a legal resident's right to keep and bear arms for self-defense.

aliens that would meet strict scrutiny, such as a length of residency requirement or background checks and fingerprinting. These restrictions could be narrowly tailored to accomplish the compelling governmental interest in public safety. However, those who come to the United States would not be guaranteed the right to protect themselves under already extant Equal Protection jurisprudence.

CONCLUSION

Modern incorporation jurisprudence demands that the fundamental right of an individual to keep and bear arms for personal self-defense be protected from state infringement. The stakes in this case are especially high for women. A woman's right to keep a handgun in her home must be secured in order to provide her with the most effective means of protecting her bodily integrity and her life. Moreover, recognition of the right to self-defense and the importance of personal dignity and autonomy could lead to greater protection for other individual rights in the future.

For the foregoing reasons, the decision of the Seventh Circuit below should be reversed.

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Representative Terri Austin (IN-36)

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Representative Karen Boback (PA-117)

Representative Ellen Brandom (MO-160)

Representative Michele Brooks (PA-017)

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