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 *AMICUS CURIAE* OAK PARK CITIZENS COMMITTEE FOR HANDGUN CONTROL IN SUPPORT OF RESPONDENTS

CARTER G. PHILLIPS
JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

CHRISTOPHER G. WALSH, JR.
CHAIRMAN
OAK PARK CITIZENS COMMITTEE FOR HANDGUN CONTROL
111 West Washington
Chicago, IL 60602
(312) 372-1155

ROBERT N. HOCHMAN*
MEGAN M. WALSH
JAMIE E. HANEY
ZACHARY A. MADONIA
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Counsel for Amicus Curiae

* Counsel of Record

January 6, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES

SCHOLARLY AUTHORITIY

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

INTERESTS OF *AMICUS CURIAE*

The Oak Park Citizens Committee for Handgun Control ("Committee")[1] is an unincorporated, voluntary association of Oak Park residents who lobbied the Oak Park Village Board to enact an ordinance banning handguns in Oak Park over 25 years ago, and who later organized the campaign in support of the ban in a public referendum called by the Village Board.

The Committee was formed after an Oak Park attorney, James Piszczor, was shot with a handgun in a Chicago courtroom on October 21, 1983, while representing a client in court. His murderer, Hutchie Moore, was the respondent in the proceeding. Moore appeared in court in a wheelchair and hid the handgun under a blanket which he carried on his lap. Moore first shot the presiding judge, Henry Gentile, in the forehead and then fired on Piszczor. Judge Gentile died on the scene. Piszczor died shortly thereafter while undergoing emergency surgery.

The morning after his murder, Piszczor's widow issued a press release urging enactment of stricter laws on the possession and carrying of handguns. It received significant coverage in the Chicago media, and the Committee was formed shortly thereafter.

The Oak Park ordinance prohibits the possession of handguns in the community. Oak Park, Ill., Mun. Code § 27-1-1. Police officers, members of the Armed

---

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* and its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Forces and National Guard, private security guards and federally licensed firearms collectors are exempt from the ban. *Id.* So also are gun clubs and theatre organizations. *Id.* Rifles and shotguns may be kept and carried on one's own land or place of business. *Id.* Violations are punishable by a fine of not more than $1,000 for a first offense and $2,000 for any subsequent offense, but not imprisonment. *Id.* at § 27-4-1(A). Oak Park does not require registration or licensure of any weapon and does not prohibit possession and use of tasers.

Amicus has a substantial interest in ensuring the continued legality of Oak Park's handgun ban to help protect the public health and safety of the community from criminal violence, accidental deaths and injuries, and suicides committed with handguns. In the ten years before enactment of the ban, the community was plagued by instances of handgun crime and other handgun-related violence, including the accidental death of a four-year-old child. *See* Section II *infra*. Since enactment of the ban in 1984, crime has gone down in the community, *see* Addendum, and there have been no accidental deaths related to handguns.

SUMMARY OF ARGUMENT

This Court has incorporated against the states only those enumerated constitutional rights that are "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 324-25 (1937), *overruled on other grounds by Benton* v. *Maryland*, 395 U.S. 784 (1969). This phrase reflects not only a theoretical standard, but also a practical reality. Incorporated rights "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against

federal encroachment." *Malloy* v. *Hogan*, 378 U.S. 1, 10 (1964). Thus, as this Court observed when incorporating the right against self-incrimination against the states, incorporation makes sense when it would be "incongruous to have different standards" concerning the exercise of the right, regardless of whether it is the state or the federal government which is threatening the personal interest the right protects. *Id.* at 11.

According to this Court, the Second Amendment protects the right to handgun ownership because handguns are the "quintessential self-defense weapon." *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2818 (2008). And, as relevant here, the self-defense significance of the Second Amendment renders it particularly inappropriate for incorporation against the states. The right of self-defense has unquestionably been the subject of varying state standards throughout our nation's history. There is nothing incongruous about states and local communities adopting different standards concerning the role handguns play, if any, in ensuring the right of self-defense, especially in light of the vastly different circumstances that communities face regarding the public safety implications of handguns. Incorporating the Second Amendment right to *own* arms for self-defense would entail developing uniform federal standards for the *use* of those protected firearms in self-defense. To incorporate the Second Amendment right to possess handguns in one's home would portend a massive federal intrusion into the administration of the right to self-defense that is as unwarranted as it is unnecessary.

The People of Oak Park, through their elected representatives—and themselves, collectively, in an advisory referendum called by their representa-

tives—have determined that handguns in the home pose a menace to their public health and safety. After long debate and careful consideration of thoroughly presented arguments advanced by both handgun proponents and opponents, they chose to ban handguns from their community. There is no reason in law or sound public policy why any supposed contrary nationwide judgment regarding the quintessence of handgun ownership in American society should trump the more specifically tailored considerations of the people of Oak Park and the role handguns play in their community. Other guns remain available to Oak Parkers for self-defense in the home and other lawful purposes. Oak Park asks only for the right to decide for itself what weapons best protect the public health and safety of its own citizens and their homes. The Constitution of the United States does not require otherwise.

ARGUMENT

This Court's decision in *Heller* carefully examined the text and historical roots of the Second Amendment—both its prefatory clause (referring to "a well regulated militia") and its operative clause (referring to the "right of the people")—to explain its present-day content. Looking to the English roots of the right, the Court observed that the right to arms was "by the time of the founding understood to be an individual right protecting against both public and private violence." 128 S. Ct. at 2798-99. That is, the right served to protect an individual's ability both to resist government oppression and to act in self-defense "when 'the intervention of society in his behalf may be too late to prevent an injury.'" *Id.* at 2799 (quoting Blackstone, 1 *Commentaries* 145-46 n.42 (1803)).

This Court recognized that the interest in protecting against government oppression was directed particularly toward the new *federal* government. As this Court recounted, "the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric." *Id.* at 2801. To be sure, this Court noted that various state constitutions and statutes from the founding era and the early post-ratification period connected the right to arms with self-defense. But notably, those provisions all connected the right to arms with defense *of* the individual states, not defense *from* attack by the individual states. *Id.* at 2802-03 (quoting Pennsylvania Decl. of Rights of 1776 § XIII ("'That the people have a right to bear arms for the defense of themselves, and the state . . . .'"(emphasis omitted)), North Carolina Decl. of Rights § XVII ("'That the people have the right to bear arms, for the defence of the State . . . .'"), 19 Colonial Records of the State of Georgia 137-39 (A. Cander ed. 1911 (pt. 2)) (right to bear arms "'for the security and defence of this province'" (emphasis omitted)), 1780 Massachusetts Constitution Pt. First, Art. XVII ("'That the people have a right to keep and bear arms for the common defence . . . .'")).

The ratification-era history recounted in *Heller* brings the incorporation question into sharp relief. Unlike the other individual rights enumerated in the first eight amendments to the Constitution, the Second Amendment was uniquely rooted in the importance of *preserving* the states.[2] This Court

---

[2] As *Heller* says, "the purpose" of the Second Amendment was to preserve the "citizens' militia" as a means of protecting the states against the "oppressive military force" of the national government's standing army "if the constitutional order broke

should reject the view that today this same amendment is a limitation on the states' ability to exercise their most fundamental of sovereign powers: to adopt regulations that reflect localized consideration for how best to protect the health and safety of their citizens.

I. THE VALUE OF SELF-DEFENSE THAT THE RIGHT TO ARMS SERVES HAS TRADITIONALLY AND PROPERLY BEEN THE SUBJECT OF VARYING STATE REGULATION.

As *Heller* noted, "modern developments have limited the degree of fit between the prefatory clause and the protected right." *Id.* at 2817. Today, the right to arms conferred by the Second Amendment is significant not because it empowers the people to resist governmental oppression with force, but rather because it effectuates the right of self-defense. As this Court noted, "it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right." *Id.* Put simply, self-defense may have had "little to do with the right's *codification,*" but it is "the *central component* of the right itself." *Id.* at 2801 (emphasis in original).

---

down." 128 S. Ct. at 2801. The text of the Second Amendment is distinctive in that it is the only one of the Bill of Rights having its own preamble, a linguistic structure "unique in our Constitution", *id.* at 2789, and also the only one of the Bill of Rights which expresses a purpose to protect the common good, and not merely the interests of the individuals on whom the constitutional right is conferred.

While the "limited degree of fit between" the clauses may not change the right itself, the centrality of self-defense as the basis of the modern right to arms has considerable significance for whether that right ought to be incorporated against the states. Incorporation of a right inevitably involves the development of uniform standards for the exercise of the right. As relevant here, an individual right to handguns for self-defense purposes applicable nationwide would require nationwide standards concerning the circumstances under which a handgun may be used in self-defense. Such questions have always been considered a matter for state lawmakers in the exercise of their police power to protect the health and safety of their citizens. To hold that the right to own handguns in the home for self-defense applies nationwide would portend a massive and unwarranted invasion of the states' sovereign powers to develop and apply their own standards for the use of weapons in self-defense.

A. Incorporating The Second Amendment Would Involve The Development Of Uniform National Standards For Self-Defense.

To declare a right incorporated against the states is likewise to declare that a uniform federal standard governs the lawful exercise of the right and the proper authority of the states to limit the individual interest the right protects. Incorporation of the right to free speech means that state power to enforce appropriate time, place and manner restrictions is subject to uniform federal standards. *Cox* v. *Louisiana*, 379 U.S. 536 (1965). Incorporation of the right to be free from unreasonable searches and seizures means that state power to admit evidence obtained in violation of the right is limited by the

uniformly applicable exclusionary rule, *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961), with uniform federal standards concerning exceptions to the exclusionary rule likewise applying in state courts, *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984) (good faith exception); *Nix* v. *Williams*, 467 U.S. 431 (1984) ("inevitable discovery" exception). Incorporating the Fifth Amendment right against self-incrimination means that state power to use a defendant's statement against him in court is limited by the uniform federal requirements of *Miranda* v. *Arizona*, 384 U.S. 436, 478-79 (1966). The Sixth Amendment right to jury trial means that the state's power to convict is subject to uniform federal standards regarding the standard of proof to convict, *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 (1993) (reasonable doubt standard), the minimum number of jurors needed for a fair jury trial, *Ballew* v. *Georgia*, 435 U.S. 223, 239 (1978) (plurality) (no fewer than six jurors), qualifications of jurors, *Morgan* v. *Illinois*, 504 U.S. 719 (1992) (establishing voir dire requirements in capital cases), and the proportion of jurors required to vote in favor of a conviction, *Burch* v. *Louisiana*, 441 U.S. 130 (1979) (conviction by nonunanimous six-person jury violates accused's right to trial by jury). And the Eighth Amendment right against cruel and unusual punishment means that the state's power to impose the death penalty is subject to numerous uniform federal restrictions. *Kennedy* v. *Louisiana*, 128 S. Ct. 2641 (states cannot impose the death penalty for child rape that did not end in death of the victim), *modified on denial of reh'g*, 129 S. Ct. 1 (2008); *Roper* v. *Simmons*, 543 U.S. 551 (2005) (executing juveniles violates the Eighth Amendment); *Atkins* v. *Virginia*, 536 U.S. 304 (2002) (holding unconstitutional the execution of mentally retarded criminals); *Lockett* v. *Ohio*, 438 U.S. 586,

604-05 (1978) (plurality) (jurors must not be precluded from considering mitigating evidence in capital sentencing).

To incorporate the right to keep in one's home a handgun—the "quintessential self-defense weapon," *Heller*, 128 S. Ct. at 2818—would require the development of uniform standards regarding the exercise of the right to self-defense with such a weapon. Such a step would intrude on what has traditionally been the subject of state regulation. And such a step would be particularly inappropriate because the circumstances that warrant allowing an individual to use a handgun in self-defense, if any, will differ depending on demographic and cultural characteristics that vary widely across the United States.

B. State Self-Defense Law Varies Widely.

State legislatures have long been responsible for ensuring public safety both by regulating when an individual is justified in using deadly force against another in self-defense, and by setting limits on what weapons are fit for private ownership and where they may be kept. State legislatures, and sometimes even local authorities, are better positioned than federal courts to determine both the appropriate contours of the right of self-defense and the types of gun regulations needed to balance the competing interests in individual self-defense and public safety.

Self-defense is a long-recognized affirmative defense to what would otherwise be a criminal act of harming another, potentially fatally. 2 W.R. LaFave, *Substantive Criminal Law* § 10.4(a) (2d ed. 2009). The "authority of States over the administration of their criminal justice system lies at the core of their sovereign status." *Oregon* v. *Ice*, 129 S. Ct. 711, 718 (2009). And in exercising their sovereign right to

define the circumstances under which self-defense is permitted, as well as the degree of force permitted to be employed in various circumstances, different states facing different geographic circumstances and bearing different cultural heritages have reached different conclusions.

The circumstances under which an individual may use deadly force in self defense varies from state to state. Most states require individuals to have a "reasonable belief" that they are faced with an imminent threat of death or serious bodily harm before permitting the use of deadly force in self-defense. Most states also require that the level of force used in self defense be proportional to the threat posed. But even these general guidelines mask material differences. Whether an individual has the right to use a gun to defend himself has always varied from state to state.

For example, with respect to what constitutes a "reasonable belief" that the defendant faced an imminent threat of deadly force, some states have adopted objective, "reasonable person" standards.[3] Others give significant weight to whether the individual had an honest, good faith, personal belief that he

---

[3] *See*, *e.g.*, Georgia: *Nelson* v. *State*, 331 S.E.2d 554 (Ga. 1985) ("reasonable man" standard governs resolution of whether defendant's belief is reasonable); Idaho: *State* v. *Rodriguez*, 460 P.2d 711, 716 (Idaho 1969) ("The appellant's fear alone is not a legally sufficient reason upon which to base an inference that appellant acted in self-defense . . . . there must be in addition circumstances sufficient to excite the fears of a reasonable man."); New Hampshire: N.H. Rev. Stat. Ann. § 627:3 Competing Harms (judging the urgency of self-defense by "ordinary standards of reasonableness").

was in danger of being killed or seriously harmed.[4] Still other states require both an objective and subjective belief of imminent harm.[5] To individuals claiming self-defense, the standard that is used can mean the difference between a criminal sentence and a justified act.

For example, in North Dakota, the factfinder looks to the defendant's subjective belief to determine if force was used in self-defense: "once the factfinder determines under a claim of self-defense that the actor honestly and sincerely held the belief that the use of defensive force was required to protect himself against imminent unlawful injury, the actor may not be convicted of more than a crime of recklessness or negligence," even if his belief was objectively unreasonable. *State* v. *Leidholm*, 334 N.W.2d 811, 816 (N.D. 1983). Yet if the same defendant had been across the border in Minnesota, the affirmative defense would not be available to him. In *State* v. *Bland*, the prosecution conceded that the defendant had an honest belief that his life was in danger, yet the court upheld a conviction of assault with a deadly

---

[4] *See*, *e.g.*, North Dakota: *State* v. *Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983) (explaining that "an accused's actions are to be viewed from the standpoint of a person whose mental and physical characteristics are like the accused's and who sees what the accused sees and knows what the accused knows."); Kentucky: *Hilbert* v. *Commonwealth*, 162 S.W.3d 921, 925 (Ky. 2005) ("'the focus of the penal code is on the defendant's actual subjective belief in the need for self-protection and not on the objective reasonableness of that belief'" (quoting *Elliott* v. *Commonwealth*, 976 S.W.2d 416, 419 (Ky. 1998))).

[5] *See*, *e.g.*, Colorado: *People* v. *Darbe*, 62 P.3d 1006, 1009 (Colo. Ct. App. 2002) (Colo. Rev. Stat. § 18-1-704 requires both that an individual "'had reasonable grounds to believe, and did believe, that she or another person was in imminent danger of being killed or of receiving great bodily injury'").

weapon when the defendant's testimony proved that, objectively, a reasonable man would have found defendant's "response was unnecessary, unreasonable, and excessive." 337 N.W.2d 378, 381 (Minn. 1983).

An individual who provokes an attack by another will, in most states, be deemed the "aggressor" in the confrontation and lose the right to employ force in self-defense. 2 W.R. LaFave, *supra* § 10.4(e). What constitutes provocation varies widely, to the point where different states have articulated contradictory standards. In some jurisdictions, a defendant's aggressive words may be sufficient provocation to deprive the defendant of a claim of self-defense.[6] In other states, words alone do not constitute provocation for purposes of self-defense: if a defendant initiates a confrontation using only aggressive words and is then physically attacked by his opponent, the defendant can still avail himself of the affirmative defense of self-defense even though he initiated the confrontation. *See McDonald* v. *State*, 764 P.2d 202, 205 (Okla. Crim. App. 1988) (citing Commission comments to Oklahoma Uniform Jury Instructions defining "aggressor").[7] States also differ on the type of acts that can constitute provocation. Some state courts have gone so far as to say that even overt acts which are criminal in and of themselves are not provocation which can deprive a defendant of a self-

---

[6] *See People* v. *Barnard*, 567 N.E.2d 60, 66 (Ill. App. Ct. 1991); *Scott* v. *Commonwealth*, 129 S.E. 360 (Va. 1925); *State* v. *Council*, 123 S.E. 788 (S.C. 1924).

[7] Other states, like New Hampshire, look to the intent of the defendant: aggressive words may be sufficient to deprive the defendant of the self-defense justification if the defendant intended to kill or seriously injure his opponent when the words were uttered. *State* v. *Bashaw*, 785 A.2d 897, 899 (N.H. 2001).

defense claim.[8] Others have taken a far more lenient approach. For instance, in some states individuals can leave an altercation, arm themselves with a weapon, and seek out the opponent from the earlier altercation without losing their claim to self-defense.[9]

Traditionally, the use of force in self-defense is justified only when the force used was proportional to the threat faced. 2 W.R. LaFave, *supra* § 10.4(b). However, some states allow greater leeway when an individual uses force, even deadly force, in defense of a home or dwelling. States that take this approach

---

[8] *See King* v. *State,* 13 Tex. App. 277 (1882), *available at* 1882 WL 9355, at *3 (trespassing on the victim's property with a gun following a dispute may not be an act of provocation that prevents a claim of self-defense), *State* v. *Borwick*, 187 N.W. 460 (Iowa 1922) (shooting at a tire of a vehicle in motion not provocation under the standard for self-defense).

[9] *See State* v. *Bristol,* 84 P.2d 757, 766 (Wyo. 1938) (where a defendant armed himself with a pistol following an argument with a neighbor, went to a restaurant where the neighbor was dining, and "glared" at his direction, defendant was not an aggressor. The neighbor attacked the defendant without a weapon and the defendant shot and killed the neighbor in response, yet the court held the prosecution had presented "no evidence in the case which in any way limited defendant's right of self-defense."). *Compare State* v. *Neeley*, 20 Iowa 108 (1866), *available at* 1866 WL 125, in which a defendant took a shotgun to a field near the property of a neighbor, with whom he had a long-standing dispute. When his neighbor approached with a pistol, defendant shot and killed him. Defendant claimed that the neighbor had fired the first shot, but the court found this was no defense, writing,

> if the prisoner, with a loaded weapon, sought the deceased with a view of provoking a difficulty or with the intent of having an affray, and a difficulty did ensue, he cannot, without some proof of change of conduct or action, excuse the homicide upon the ground that the deceased fired the first shot.

Id. at *4.

have enacted "castle laws," which allow an individual to use deadly force in response to any intrusion into the home. Florida, for example, passed an amendment to its self-defense laws in 2005 which created a presumption that "[a] person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence." Fla. Stat. § 776.013(4). Homeowners can thus use deadly force against an individual who unlawfully and forcefully enters a residence, without any requirement to first order the trespasser to leave, as long as the homeowner knows that the trespasser had entered unlawfully and forcefully. *Id.* § 776.013(1).[10] Castle laws such as these disregard the proportionality requirement and justify the use of deadly force against an intruder in the home even if the intruder poses no physical threat.[11] In contrast, Virginia, a state which has not adopted the castle doctrine, requires the defendant to

---

[10] The California penal code contains a similar presumption, but California courts have held that "the intentional use of deadly force merely to protect property is never reasonable." *People* v. *Curtis*, 37 Cal. Rptr. 2d 304, 318 (Cal. Ct. App. 1994); *see also People* v. *Ceballos*, 526 P.2d 241 (Cal. 1974) (use of deadly force to protect property that is not a dwelling is not justified).

[11] *See also* Colo. Rev. Stat. § 18-1-704.5 (providing that "citizens of Colorado have a right to expect absolute safety within their own homes" and justifying the use of deadly force where: (1) The intruder made an unlawful entry into the occupant's dwelling; (2) The occupant had a reasonable belief that the intruder had committed a crime in the dwelling (in addition to the uninvited entry), or was committing or intended to commit a crime against person or property (in addition to the uninvited entry); and (3) The occupant reasonably believed that the intruder might use physical force, no matter how slight, against any occupant of the dwelling).

have a reasonable fear of imminent bodily harm or death and to have faced an "overt threat" of violence before he is justified in using deadly force in self-defense in his own home.[12] And though Virginia law allows an inhabitant to order a trespasser to leave and, once refused, to use force to compel the trespasser's departure, it does not allow for the use of deadly force against the trespasser, except in "extreme circumstances." *Pike* v. *Commonwealth,* 482 S.E.2d 839, 840 (Va. Ct. App. 1997); *Montgomery* v. *Commonwealth*, 36 S.E. 371, 372 (Va. 1900). Further, individuals cannot even brandish a weapon in defense of property in Virginia, much less fire it. *Commonwealth* v. *Alexander*, 531 S.E.2d 567, 569 (Va. 2000) (a "deadly weapon may not be brandished solely in defense of personal property.").

States also differ over whether the use of force is justified only as a last resort. Some states have adopted a "duty to retreat law" which requires an individual to retreat from any situation where he faces deadly force if it is possible to do so safely.[13] Others have expressly adopted "no duty to retreat" statutes, in which a person has *no* requirement to retreat if he is in a place he has a legal right to be, even if he is able to escape the situation safely and avoid using deadly force.[14] Some states have adopted a "no duty to retreat" rule for self-defense in the home, but require retreat if one is outside the home,

---

[12] *Yarborough* v. *Commonwealth*, 234 S.E.2d 286, 292 (Va. 1977) (man who reached down to his boot which held a knife did not make an overt act that would justify the use of self-defense in response).

[13] *See, e.g.*, Conn. Gen. Stat. § 53a-19(b).

[14] *See, e.g.*, Alaska Stat. § 11.81.350(f); Fla. Stat. § 776.013(3); Ga. Code. Ann. § 16-3-23.

while others have extended the "no duty to retreat" privileges to places of employment,[15] vehicles,[16] and airplanes.[17] Still other states, far from requiring retreat, even permit individuals to seek out an attacker even after the two have been separated. *State* v. *Starks*, 627 P.2d 88, 91 (Utah 1981) (defendant may use deadly force in self-defense even after defendant armed himself and went to a location where he knew he would find the deceased); *Thomas* v. *State*, 51 S.W. 1109, 1109-10 (Tex. Crim. App. 1899) (deadly force may be used in self-defense even if defendant seeks out deceased to provoke difficulty, so long as there was no actual provocation).

C. Differing State Laws Regarding The Permissible Use Of Weapons Reflect The Different Value Judgments Of Different Communities That Have Never Been Thought Subject To A Uniform National Standard.

The distinctions in state self-defense law, including many going directly to the questions when and whether an individual may brandish or use a deadly weapon like a handgun, are evidence that different communities face different circumstances and possess different values concerning an individual's use or threatened use of force in general, and use or threatened use of guns in particular. Variations in state self-defense law reflect value judgments that no

---

[15] *See, e.g.*, Alaska Stat. §§ 11.81.335(b), .350(f); Del. Code Ann. tit. 11, § 464(e)(2)(b); Haw. Rev. Stat. § 703-304(5)(b)(i).

[16] *See, e.g.,* Okla. Stat. tit. 21, § 1289.25(B)(1).

[17] *See, e.g.*, Ind. Code § 35-41-3-2(d) (providing that a person is justified in using deadly force to stop a hijacking while on an airplane).

court has ever questioned properly belong to the various states. Whether, for example, a man's home is his castle, and the owner ought to be permitted to protect his home by whatever means he deems necessary is hardly a question amenable to a uniform national answer. Some states might conclude that "[l]ife is too valuable to be sacrificed solely for the protection of property. Rather than slay the aggressor to prevent a mere trespass, when no felony is attempted, he should yield, and appeal to the courts for redress." *Carpenter* v. *State*, 36 S.W. 900, 907 (Ark. 1896). That certain western states (Texas and Utah) have chosen to permit victims of crime to seek out their attackers so that they may employ deadly force in their own defense may well reflect the extent to which fewer of their citizens live in the tight confines characteristic of cities, where the presence of armed individuals seeking out others in self-defense poses greater risks to the public. States with a larger proportion of densely populated urban areas like Chicago, where gang rivalries are an everyday concern, might reasonably and appropriately place greater restrictions on the permissible use of force, and especially deadly force.

State courts have been explicit about how their laws concerning weapons take local circumstances into consideration. For example, in *City of Seattle* v. *Montana*, 919 P.2d 1218 (Wash. 1995), the Washington Supreme Court upheld the validity of a Seattle Municipal Code provision which prohibited the carrying of "dangerous knives." *Id.* at 1225. The court explained that:

> Given the realities of modern urban life, Seattle has an interest in regulating fixed blade knives to promote public safety and good order. Seattle may decide fixed blade knives are more

> likely to be carried for malevolent purposes than for self-defense, and the burden imposed on innocent people carrying fixed blade knives is far outweighed by the potential harm of other people carrying such knives concealed or unconcealed.

Id.

Likewise, in *California Rifle & Pistol Ass'n* v. *City of West Hollywood*, 78 Cal. Rptr. 2d 591 (Cal. Ct. App. 1998), the court upheld the validity of a city ordinance banning the sale within city limits of any handgun classified as a "Saturday Night Special." The court explained that California state regulations over firearms were not intended to "strip local governments of their [state] constitutional power to ban the local sale of firearms which the local governments believe are causing a particular problem within their borders." *Id.* at 604. The court further noted, "'[t]hat problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority.'" *Id.* at 601 (quoting *Galvan* v. *Superior Court*, 70 Cal.2d 851, 864 (1969)). *See also Benjamin* v. *Bailey*, 662 A.2d 1226, 1229 (Conn. 1995) (citing with approval the trial court's reliance on evidence that assault weapons had "'appeared more frequently as a risk factor to police officers on the street, and to innocent victims in densely-populated areas'" in upholding the constitutionality of a statute banning the possession of assault weapons).

It would be as surprising as it is inappropriate for this Court, by incorporating the Second Amendment right to arms against the states, to undermine the authority of state governments over an area so closely connected to the core sovereign power to regulate public health and safety.

Self-defense is one of those areas to which "States lay claim by right of history and expertise" *United States* v. *Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring), and state and local legislatures ought to be allowed to adopt the policies that work best for their own communities. To incorporate the Second Amendment against the states would unavoidably involve federal courts in setting uniform national standards for the right to brandish and use handguns in self-defense. Just as the nationally applicable right to free speech has required this Court to set standards for lawful time, place and manner restrictions regarding when, where and how individuals may speak, so too would a nationally applicable right to handguns for self-defense require this Court to set standards for lawful "time, place and manner" restrictions on when, where and how individuals may use their guns in self-defense. Federal courts would be ill suited to the task, even if it were possible. In fact, uniform national standards do not exist that can properly capture the diversity of values and circumstances to which a national rule would have to be applied.

In addressing the propriety of applying the federal Gun-Free Zones Act to the possession of a gun in a local school zone in *Lopez*, Justice Kennedy observed that

> [w]hile it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experiment-

> tation to devise various solutions where the best solution is far from clear.

Id. at 581. The same is true here with respect to whether a particular weapon, such as a handgun, is quintessentially a weapon of self-defense in the setting of a particular community, or quintessentially a weapon of violent crime and tragic accidental harm. Imposing such a judgment on a nationwide basis would be an unprecedented and unwarranted intrusion into an area which "lies at the core" of the states' "sovereign status." *Ice*, 129 S. Ct. at 718.

Moreover, the diverging standards for self-defense demonstrate that there is no definitive version of this right that could be "implicit in the concept of ordered liberty." *Palko*, 302 U.S. at 325. Far from the rights for which it would be "incongruous to have different standards," *Malloy*, 378 U.S. at 11, the right to self-defense, as discussed *supra*, at 9-16, has always been defined and applied in widely different ways. State standards diverge to the point that a justified act of force in one state may be criminal in another. States have protected the right to self-defense since before the Bill of Rights was adopted. *See Heller*, 128 S. Ct. at 2802-03, 2805 (referencing Blackstone's *Commentaries* calling self-defense "'the first law of nature'" and discussing the history of self-defense provisions in state constitutions adopted before and shortly after the Bill of Rights). Yet at no point in the history of the right has any court questioned whether an individual's basic right to self-defense was infringed because he would have had a stronger case for self-defense in a different state.

What is more, this Court has consistently given states free rein to adopt differing standards in their criminal justice systems, which includes the law of

self-defense, without finding violations of the right of Due Process. As this Court has explained,

> The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Powell v. *Texas*, 392 U.S. 514, 536 (1968) (plurality). It is unthinkable that the option to possess a handgun in one's home can be "implicit in the concept of ordered liberty" when there is no uniform, national standard which defines the circumstances in which that weapon can be used justifiably in self-defense. As such, the Second Amendment right to keep and bear arms should not be incorporated against the states.

II. THE OAK PARK HANDGUN BAN REFLECTS THE CONSIDERED JUDGMENT AND VALUES OF THE OAK PARK COMMUNITY.

In the aftermath of the shooting death of Oak Park attorney James Piszczor in a Chicago courtroom that led to the formation of the Oak Park Citizens Committee for Handgun Control, the Committee spent months gathering information on the issue of handgun control. It learned that 89% of the firearms involved in crimes committed in Oak Park in the first nine months of 1983 were handguns. Motivated by data illustrating that handgun ownership and use posed a serious threat to the community's public health and safety, the Committee petitioned the

citizens of Oak Park to support a ban on the private possession of handguns. After obtaining nearly six thousand signatures in support of a handgun ban, the Committee formally presented the petitions to the Oak Park Village Board ("Board") at its March 5, 1984 meeting.

The Board listened to spirited arguments from ban proponents and opponents throughout March and held a formal public hearing on the proposed ban in early April 1984. Two weeks later, the Trustees of the Village enacted Oak Park's ban on the private possession of handguns into law by a vote of 4-3. Controversy over the ban continued, and in July 1985, the Board voted to hold an advisory referendum in order to provide an opportunity for Oak Park voters to decide whether to keep the ban in place.

In the course of the referendum campaign, the Committee brought to the community's attention hundreds of handgun-related incidents which had been reported in local newspapers in the ten-year period before the ban's enactment. The Committee focused attention on handgun misuse by Oak Park residents, especially in and around the home. Among the handgun-related incidents were multiple suicides, *e.g., Police Report*, Oak Leaves (Oak Park), Apr. 24, 1974, at 8-B (22 year-old shoots self with revolver), some accidental deaths and injuries, including the tragic accidental death of a four-year-old child killed by another juvenile playing with a handgun, *e.g., Police Report,* Oak Leaves (Oak Park), June 26, 1974, at 92-B (reporting accidental killing of four-year-old child), many homicides or injuries resulting from domestic disputes or other arguments, *e.g., Oak Park Man Held on Murder Charge*, Oak Leaves (Oak Park), June 17, 1981, at 7 (Oak Parker uses revolver to kill neighbor trying to halt argument over liquor),

Man Accused of Killing His Son, Shooting Wife, Oak Leaves (Oak Park), Nov. 22, 1983, at 3 (man shoots wife with handgun), and numerous cases in which one or more handguns were stolen from homes and apartments, *e.g.*, *Police Report*, Oak Leaves (Oak Park), Apr. 28, 1976, at 9-C (more than twenty handguns stolen from Oak Park home). The data made clear that unfettered access to handguns in and around Oak Park homes posed a significant threat to the public health and safety of the community.

The Committee also researched local newspapers to determine how often handguns had been lawfully used in self-defense in the same time period and challenged opponents of the ban to come forward with evidence of such use. In contrast to all the harmful handgun-related incidents in and around Oak Park homes which the Committee uncovered, in the same 1974-1983 time frame, there was only one reported instance in which a handgun was lawfully used to ward off an intruder in an Oak Park home. *Police Report*, Oak Leaves (Oak Park), Nov. 6, 1974, at 8-B.

The balance of harms and benefits resulting from possession of handguns in Oak Park homes was clear: Oak Parkers were much more likely to take their own lives with handguns, or to injure or kill another in a domestic dispute or accident, than they were to defend themselves with a handgun kept in the home. The collective judgment of the community expressed in the referendum was to keep the ban by a vote of 8,031 to 6,368. *A Fitting Memorial for Gun Victim James Piszczor*, Wednesday J. (Oak Park), Oak Park Stories Commemorative Issue, 2002, at 28. Oak Park is the *only* American community which has held a referendum on a handgun ban after having actual experience living with a ban. *See Oak Park Voters*

Stand Behind Gun Ban, Chi. Trib., Nov. 6, 1985, at D1.

The people of Oak Park and their elected representtatives carefully considered whether handguns are useful weapons of self-defense and concluded that the harmful costs of handgun possession in the home far outweigh any potential benefits. Their handgun ban does not deprive Oak Parkers of access to other guns which may be used for self-defense, including shotguns and rifles, or other defensive weapons such as tasers, security alarms, etc.

It makes no sense to displace the considered judgment of the citizens of Oak Park, rooted in their local values, circumstances and community experience, and expressed through the most direct form of democracy—the referendum—with the judgment of an unelected judiciary purporting to apply a uniform national standard relating to use of handguns in self-defense. The Constitution does not require so dramatic an intrusion upon the traditional authority of state and local governments to determine for themselves the legal standards for self-defense and the type of weapons which are most appropriate to their local circumstances and which best protect the public health and safety of their communities.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

CARTER G. PHILLIPS
JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

CHRISTOPHER G. WALSH, JR.
CHAIRMAN
OAK PARK CITIZENS
COMMITTEE FOR HANDGUN
CONTROL
111 West Washington
Chicago, IL 60602
(312) 372-1155

ROBERT N. HOCHMAN*
MEGAN M. WALSH
JAMIE E. HANEY
ZACHARY A. MADONIA
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Counsel for Amicus Curiae

* Counsel of Record

January 6, 2010

ADDENDUM

ADDENDUM

Oak Park Crime Statistics 1982-2008

Year	Population	Rate per 100,000	Total Crime Index	Murder & Vol. Manslaughter	Criminal Sexual Assault	Robbery	Agv. Aslt. & Battery	Burglary/breaking and entering	Theft	Motor Vehicle Theft	Arson
1982[1]	54,887	6196.4	3401	0	9	249	65	740	2094	237	7
1983[2]	54,887	7743.2	4250	5	5	293	66	1068	2420	377	16
1984[3]	54,887	7156.5	3928	3	3	302	96	973	2120	415	16
1985[4]	54,887	7367.9	4044	1	24	264	66	1314	1972	383	20
1986[5]	54,887	7655.7	4202	1	18	278	89	1254	2151	401	10
1987[6]	54,887	7588.3	4165	2	18	331	83	996	2295	411	18
1988[7]	54,320	7864.5	4272	0	14	275	92	1159	2319	402	11
1989[8]	53,650	7606.7	4081	0	11	308	72	863	2471	344	12
1990[9]	53,648	6410.3	3439	2	10	276	31	629	2186	292	13
1991[10]	53,648	7929.5	4254	1	13	295	69	859	2715	292	10
1992[11]	53,648	7579.0	4066	1	18	284	65	871	2484	337	6
1993[12]	54,217	6778.3	3675	2	13	209	32	749	2352	305	13
1994[13]	54,385	6678.3	3632	1	11	202	46	609	2397	361	5
1995[14]	54,385	6080.7	3307	1	6	193	30	680	2159	236	2
1996[15]	51,585	6185.9	3191	3	2	180	43	871	1887	196	9
1997[16]	51,585	6149.1	3172	3	8	172	35	732	2020	195	7
1998[17]	51,585	6026.9	3109	0	12	159	17	538	2182	197	4
1999[18]	50,646	4855.3	2459	0	4	149	26	367	1713	190	10
2000[19]	52,524	4674.1	2455	0	6	140	19	411	1662	215	2
2001[20]	52,524	5026.3	2640	1	2	156	16	580	1694	183	8
2002[21]	52,524	4862.5	2554	0	5	180	28	541	1575	218	7
2003[22]	51,601	4629.8	2389	2	9	174	22	501	1509	169	3
2004[23]	50,824	5241.6	2664	1	16	148	37	525	1765	167	5
2005[24]	50,993	3863.3	1970	1	11	130	58	437	1160	165	8
2006[25]	50,757	3983.7	2022	0	12	153	41	351	1365	98	2
2007[26]	50,272	3938.6	1980	1	8	113	37	343	1389	86	3
2008[27]	49,865	4143.2	2066	1	2	160	46	425	1327	102	3

Crime Statistics: 1983 (Year Prior to Enactment of Handgun Ban) Compared to 2008 (Most Recent Crime Statistics)

Year	**Pop.**	**Rate per 100,000**	**Total Crime Index**	**Murder & Vol. Manslaughter**	**Criminal Sexual Assault**	**Robbery**	**Agv. Assault &**	**Burglary & Breaking**	**Theft**	**Motor Vehicle Theft**	**Arson**

							Battery	**and Entering**			
1983	54,887	7743.2	4250	5	5	293	66	1068	2420	377	16
2008	49,865	4143.2	2066	1	2	160	46	425	1327	102	3
%?	-9.15%	-46.5%	-51.4%	-80.0%	-60.0%	-45.4%	-30.3%	-60.2%	-45.2%	-72.9%	-81.3%

---

[1] Crime in Illinois 1983, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 99 (1983), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[2] Crime in Illinois 1983, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 99 (1983), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[3] Crime in Illinois 1985, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 104 (1985), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[4] Crime in Illinois 1985, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 104 (1985), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[5] Crime in Illinois 1987, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 118 (1987), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[6] Crime in Illinois 1987, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 118 (1987), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[7] Crime in Illinois 1989, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 155 (1989), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[8] Crime in Illinois 1989, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 155 (1989), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[9] Crime in Illinois 1991, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 85 (1991), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[10] Crime in Illinois 1991, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 85 (1991), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[11] Crime in Illinois 1993, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 56 (1993), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[12] Crime in Illinois 1993, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 56 (1993), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[13] Crime in Illinois 1995, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 35 (1995), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[14] Crime in Illinois 1995, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 35 (1995), *available* by request, see http://www.isp.state.il.us/crime/ucrhome.cfm.

[15] Crime in Illinois 1997, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 33 (1997), *available at* http://www.isp.state.il.us/docs/cii/cii97/cii97section2.pdf.

[16] Crime in Illinois 1997, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 33 (1997), *available at* http://www.isp.state.il.us/docs/cii/cii97/cii97section2.pdf.

[17] Crime in Illinois 1998, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 41(1998), *available at* http://www.isp.state.il.us/docs/cii/cii98/cii98section2.pdf

[18] Crime in Illinois 1999, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 41 (1999), *available at* http://www.isp.state.il.us/docs/cii/cii99/SECTIONII.PDF.

[19] Crime in Illinois 2000, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 48 (2000), *available at* http://www.isp.state.il.us/docs/cii/cii00/section_2.pdf.

[20] Crime in Illinois 2001, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 58 (2001), *available at* http://www.isp.state.il.us/docs/cii/cii01/cii01SectionII_CrimeIndex&Rate.pdf.

[21] Crime in Illinois 2002, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 58 (2002), *available at* http://www.isp.state.il.us/docs/cii/cii02/cii02sectionii_crimeindex&rate.pdf.

[22] Crime in Illinois 2003, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 58 (2003), *available at* http://www.isp.state.il.us/docs/cii/cii03/cii03sectionii_crimeindex&rate.pdf.

[23] Crime in Illinois 2004, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 58 (2004), *available at* http://www.isp.state.il.us/docs/cii/cii04/CII04_Sect_II_27to198.pdf.

[24] Crime in Illinois 2005, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 33 (2005), *available at* http://www.isp.state.il.us/docs/cii/cii05/cii05_Section_II_Pg27_to_198.pdf.

[25] Crime in Illinois 2006, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 58 (2006), *available at* http://www.isp.state.il.us/docs/cii/cii06/cii06_Section_II_Pg27_to_198.pdf.

[26] Crime in Illinois 2007, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 58 (2007), *available at* http://www.isp.state.il.us/docs/cii/cii07/cii07_Section_II_Pg27_to_200.pdf.

[27] Crime in Illinois 2008, Annual Uniform Crime Report, Section II, Crime Index Offense/Crime Rate Data (Cook County) at 58 (2008), *available at* http://www.isp.state.il.us/docs/cii/cii08/cii08_Section_II_Pg27_to_194.pdf.