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

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BRIEF OF THE UNITED STATES CONFERENCE OF MAYORS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Fourteenth Amendment prohibits state and local governments from exercising their police powers to prohibit the possession of handguns based on a judgment that these firearms are unreasonably likely to be misused by criminals.

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BRIEF OF THE UNITED STATES CONFERENCE OF MAYORS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The United States Conference of Mayors is the official non-partisan organization of all United States cities with populations of 30,000 or more. Its members suffer a disproportionate share of gun violence in the United States and have a common interest in maintaining the flexibility to address this problem in the manner local officials determine to be most effective and appropriate.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and

SUMMARY OF ARGUMENT

The violent crime surge of the late 1980s and the early 1990s was largely a product of violent competition in urban drug markets. Intensive stop-and-frisk tactics targeting "hot spots" of crime proved to be critical in the fight against urban crime. Stringent gun control laws facilitate aggressive stop-and-frisk tactics by granting police authority to conduct a stop-and-frisk when they reasonably believe that a suspect is violating a gun control law. These tactics make it difficult for gang members and drug dealers to go about while armed, and constrict firearms markets as well. When gang members and drug dealers cannot obtain and carry firearms with impunity, in turn, their ability to use violence as a means of competing for control of drug markets is sharply circumscribed. The eighteenth-century version of the right to bear arms codified in the Second Amendment, however, imperils law-enforcement strategies with enormous promise in the fight against violent crime.

The first eight amendments are properly applied against state and local governments by virtue of the Fourteenth Amendment when they secure rights implicit in the concept of ordered liberty. The available historical evidence suggests that the eighteenth-century conception of the right to bear arms has given way to a more vigorous conception of state and local police powers. Moreover, in high-crime, gang-ridden neighborhoods, it may be effectively impossible to grant a right to bear arms while preserving ordered liberty. The Second Amendment's right to bear arms

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no person or entity other than the *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

accordingly is not enforceable against state and local governments by virtue of the Fourteenth Amendment.

ARGUMENT

I. GUN CONTROL LAWS PLAY CENTRAL ROLE IN FIGHTING VIOLENT CRIME.

A strong case can be made that stringent regulation of concealable weapons is critical to the ability of cities to control violent crime.

A. The Rise and Fall of Crime in Cities

The story of violent crime over the past few decades is one of a dramatic rise and fall:

> Over the past 20 years, the United States has seen dramatic swings in violent crime. Its path can be broken into three periods: a rise, a drop, and a flattening. The rise period began in 1985 when a five-year national decline from 1980 was reversed almost entirely by a sharp spike in violence by adolescent and young adult males. This spike outweighed an ongoing downtrend in violence among the much larger older population that began at least as early as 1980. The rise period ended around 1993 with the beginning of a pronounced and much discussed crime drop in which the murder rate declined by 42% and robbery by 44%, resulting in levels not seen since the 1960s. The drop was succeeded by a third period, a flattening of violent crime rates beginning around 2000.

Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond*, 2006 Am. Rev. Soc. Sci. 125, 125.

This crime spike was limited to major cities; during this period, homicide rates were essentially flat in cities with populations below 250,000, and the rise and subsequent fall in homicide was concentrated in cities with populations exceeding 1,000,000. *See* James Alan Fox, Jack Levin & Kenna Quinet, The Will to Kill: Making Sense of Senseless Murder 44-45 & fig. 3.2 (rev. 2008). Moreover, virtually all of the increase in homicide during this period was a consequence of an increase in handgun-related killings. *See* Comm. To Improve Res. Inf. & Data on Firearms, Nat'l Res. Council, Firearms and Violence: A Critical Review 61 (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds., 2005) [hereafter "Firearms and Violence"].

B. The Crime Rise

There is something of a consensus among criminologists that the violent crime spike of the late 1980s and early 1990s was a function of the introduction of crack cocaine into cities and the violent competition that ensued. *See, e.g.*, Alfred Blumstein & Jacqueline Cohen, Diffusion Processes in Homicide 6-9 (Nat'l Crim. Just. Ref. Serv. July 17, 1999); Fox, Levin & Quinet, *supra* at 87-88; Philip J. Cook & John H. Laub, *After the Epidemic*: *Recent Trends in Youth Violence in the United States, in* Crime & Justice: A Review of Research 1, 21-31 (Michael Tonry ed., 2002); Blumstein & Wallman, *supra* at 131.

Probably the best study of this issue—an examination of homicides in New York City during an eight-month period in 1988—found that 52.7% of homicides were drug-related, of those 60% involved crack, and 74% of drug-related homicides were classified as "systematic" or involving "the normally aggressive patterns of interactions within the systems of drug

use and distribution" as opposed to homicides that were a function of the pharmacological effects of drugs or the economic compulsion to commit crimes to finance drug use. *See* Paul J. Goldstein *et al*., *Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis*, 16 Contemp. Drug Probs. 651, 655-56, 681-82 (1989).

One type of criminal organization is particularly well suited to the violent competition typical of the drug trade—the criminal street gang. A persistent observation in the scholarly literature about gangs is their heavy involvement in drug distribution. *See, e.g*., Herbert C. Covey, Scott Menard & Robert J. Franzese, Juvenile Gangs 51-54 (2d ed. 1997); James C. Howell & Scott H. Decker, U.S. Dep't of Justice, The Youth Gangs, Drugs, and Violence Connection 2-5, 7 (Jan. 1999). Ethnographic research indicates that gangs endeavor to organize drug markets in order to maximize the economic benefits of drug dealing while using the threat of violence to suppress competition. *See, e.g*., Scott H. Decker & Barrick Van Winkle, Life in the Gang: Family, Friends and Violence 163-64 (1996); Martin Sanchez Jankowski, Islands in the Street: Gangs and American Urban Society 126-29 (1991); Felix M. Padilla, The Gang as an American Enterprise 129-66 (1993); Irving A. Spergel, The Youth Gang Problem: A Community Approach 47-49 (1995); Ansley Hamid, *The Political Economy of Crack-Related Violence*, 17 Contemp. Drug Probs. 31, 61-63 (1990).

Given the violent world of gang members, it should come as no surprise that they carry firearms at elevated rates. *See, e.g*., Joseph F. Sheley & James D. Wright, In the Line of Fire: Youths, Guns, and Violence in Urban America 95-103 (1995); Terence P.

Thornberry et al., Gangs and Delinquency in Developmental Perspective 123-55 (2003). The same is true of drug traffickers. *See, e.g.*, Sheley & Wright, *supra* at 75-76, 83-93; Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. Crim. L. & Criminology 10, 29-31 (1995). A U.S. Department of Justice study of six large cities in the early 1990s, for example, found that "70% of the people who report using crack and selling drugs also report carrying a firearm, compared to 62% who use marijuana and sell drugs, 67% who use heroin and sell drugs, and 64% who use power cocaine and sell drugs." K. Jack Riley, *Homicide and Drugs*: *A Tale of Six Cities*, 2 Homicide Stud. 176, 199 (1998).

C. The Crime Drop

The explanation most frequently offered for the crime decline is that it was produced by a decrease in crack-related violence and a stabilization of drug markets. *See, e.g.*, Fox, Levin & Quinet, *supra* at 92-96; Blumstein & Wallman, *supra* at 130-31; Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Drop and Six that Do Not*, 18 J. Econ. Persp. 163, 179-81 (2004). Still, it is critical to understand why crack markets acquired a less violent character during the crime-decline period.

There is little evidence that a drop in the demand for crack cocaine explains the crime decline. Cocaine-related emergency room admissions, for example, actually rose from 1994 to 2001, as did the proportion that involved crack. *See* Substance Abuse & Mental Health Admin., Dep't of Health & Hum. Servs., Emergency Department Trends from the Drug Abuse Warning Network: Final Estimates 1994-2001, at 50,

53 fig. 3 (Aug. 2002). Trends in the price of crack were also not noticeably different during the crime-rise and crime-decline periods. *See* Off. of Nat'l Drug Control Pol'y, Executive Off. of the President, The Price and Purity of Illicit Drugs: 1981 through the Second Quarter of 2003, at 9-10, 29 fig. 10 (Nov. 2004). Indeed, the United States Department of Justice estimates that cocaine abuse and cocaine-related crime remain at levels exceeding any other drug. *See* Nat'l Drug Intelligence Center, U.S. Dep't of Justice, National Drug Threat Assessment: 2009, at 1-2 (Dec. 2008).

In contrast, the evidence that law enforcement played an important role in the crime drop is abundant. There was, for example, a statistically significant relationship between increasing numbers of police officers and decreases in violent crime during the crime-decline period. *See* Levitt, *supra* at 176-77.

As it happens, the 1990s saw alterations in the tactics employed by a great many local police departments that moved from reactive systems of patrol to proactive and aggressive patrol targeting specific high-crime areas. *See, e.g.*, John E. Eck & Edward G. McGuire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, *in* The Crime Drop in America 207, 228-45 (Alfred Blumstein & Joel Wallman eds., 2d ed. 2006) [hereafter "The Crime Drop in America"]; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 572-84 (1997). The experience of New York is illuminating.

Homicide in New York City rose from a rate of 4.7 per 100,000 in 1960 to a 1991 peak of 31.0 in waves that roughly corresponded to drug epidemics, with the increases concentrated in firearms-related

homicide. *See* Jeffrey Fagan, Deanna L. Wilkinson & Garth Davies, *Social Contagion of Violence*, *in* The Cambridge Handbook of Violent Behavior 688, 694-99 (Daniel J. Flannery *et al*. eds., 2007). New York was no outlier; in 1990, its homicide rate was at the average for large cities. *See* Franklin E. Zimring, The Great American Crime Decline 139 (2006). Yet, over the 1990s, the decline in New York in each of the seven categories of "index" crime tracked by the Federal Bureau of Investigation was approximately double of the decline in the rest of the country. *See* Andrew Karmen, New York Murder Mystery: The True Story Behind the Crime Crash of the 1990s 54 graph 2.2 (2000). By 2000, when compared to the other nine of the ten largest cities, New York had the lowest rates for five of the seven index crimes, and for murder, its rate in 2000 of 8.7 per 100,000 population was nearly half of the nine-city average of 16.3. *See Zimring, supra* at 139-41 & fig. 6.3. Since then, homicide in New York City has continued to decline to rates not seen in more than forty years. *See* Al Baker, *Homicide Near Record Low Rate in New York City*, N.Y. Times, Dec. 29, 2009, at A1.[2]

There were substantial increases in the size of New York City's police force during the crime-decline period, and a leading study found a statistically significant

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[2] One paper has suggested that the crime decline in New York could reflect no more than a regression to the mean. *See* Bernard Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. Chi. L. Rev. 271, 287-97 (2006). The magnitude and duration of New York's homicide decline, however, does not exhibit the characteristics of a regression to the mean. *See, e.g*., Karmen, *supra* at 17; Zimring, *supra* at 136-41; Michael D. Maltz, *Which Homicides Decreased*? *Why*?, 88 J. Crim. L. & Criminology 1489, 1490-96 (1998).

relationship between increases in the size of the force and crime reductions. *See* Hope Corman & H. Naci Mocan, *A Time-Series Analysis of Crime, Deterrence, and Drug Abuse in New York City*, 90 Am. Econ. Rev. 584 (2000). Moreover, reductions in violent crime were concentrated in visible crimes committed in public places, suggesting that offenders were responding to the tactics of officers on patrol. *See* Zimring, *supra* at 141-42. Crime reductions were also concentrated in crimes involving handguns, suggesting that patrol tactics directed at handguns were responsible. *See* Steven F. Roth, *Decreasing Violent Crime in New York City: A Result of Vigorous Law Enforcement Efforts, Other, or Both*?, *in* Proceedings of the Homicide Research Working Group Meetings, 1997 and 1998, at 179, 179-83 (1999).

There were important changes in policing tactics in New York that corresponded to the crime drop. In 1991, not only did the size of New York's police force begin to increase, but it also adopted a community policing model that employed an increased emphasis on foot patrols and low-level disorder. *See* Civil Rights Bur., Off. of the Att'y Gen. of the St. of N.Y., The New York City Police Department's "Stop and Frisk" Practices: A Report to the People of New York from the Office of the Attorney General 47-52 (Dec. 1, 1999) [hereafter "Stop and Frisk Report"]. In 1994, after the appointment of a new police chief, the department placed greater emphasis on aggressive stop-and-frisk tactics, misdemeanor arrests for drug and public-order offenses, and it adopted a system of statistical analysis that directed enforcement efforts at statistical "hot spots" of criminal activity and imposed greater managerial accountability. *See id*. at 52-56. Stop-and-frisk was ubiquitous in New York during the crime-decline period; the New York

Attorney General's review of the reports covering stops during 1998 and the first three months of 1999 disclosed 126,753 stops. *See id*. at tbl. I.A.5. By 2006, there were 506,491 reported stops. *See* Greg Ridgeway, RAND Corp., Technical Report: Analysis of Racial Disparities in the New York City Police Department's Stop, Question and Frisk Practices 7 (2007).

The conclusion that policing tactics were responsible for the crime drop is powerfully suggested by studies finding statistically significant relationships between decreases in crime and available proxies for the rate of search and seizure. *See, e.g*., Jeffrey Fagan, Garth Davies & Jan Holland, *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 Geo. J. L. & Pol'y 415, 442-53 (2006) (intensive patrols near public housing in New York resulted in substantial reductions in violent crime in nearby areas); Hope Corman & H. Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J. Law & Econ. 235 (2005) (citywide felony arrest rates had a statistically significant effect in reducing all seven index crimes, and misdemeanor arrests had a statistically significant effect on robbery, motor vehicle theft, and grand larceny); George L. Kelling & William H. Sousa, Jr., The Manhattan Inst., Do Police Matter?: An Analysis of New York City's Police Reforms 6-10 (1999) (finding an inverse relationship between New York precinct's misdemeanor arrests between 1989 and 1998 and the rate of violent crime).

Ethnographic evidence supports this view of the efficacy of New York's aggressive stop-and-frisk tactics. One study of Brooklyn neighborhoods concluded that after police crackdowns beginning in 1992, gang drug dealing was largely driven indoors, producing a

decline in violent crime. *See* Richard Curtis, *The Improbable Transformation of Inner-City Neighborhoods: Crime, Violence, Drugs, and Youth in the 1990s*, 88 J. Crim. L. & Criminology 1233, 1267-74 (1998). Another concluded that aggressive policing in the 1990s, in particular stop-and-frisk tactics that focused on discovering concealed handguns, reduced crime by disrupting open-air drug sales. *See* Bruce D. Johnson, Andrew Golub & Eloise Dunlop, *The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York*, *in* The Crime Drop in America, *supra* at 164, 185-89. An ethnographic study of the Bushwick neighborhood similarly concluded that aggressive police tactics employed since 1992 pushed drug dealing indoors. *See* Terry Furst *et al*., *The Rise of the Street Middleman/Woman in a Declining Drug Market*, 7 Addiction Res. 103, 108-09, 126-27 (1999). Another researcher concluded: "The shift indoors reduced the risk of being 'ripped off', including murderously . . . . The effects of this shift can be directly related to the reduction in homicide. As one police officer put it: 'There are no more drive-by shootings. There's no one on the corner to drive by and shoot.'" *See* Benjamin Bowling, *The Rise and Fall of New York Murder*, 39 Brit. J. Criminology 531, 54 (1999).

The 1994 management reforms stressed the role of weapons searches in the new policing strategy. *See* Stop and Frisk Report, *supra* at 53. Moreover, "the result of persistent stop, frisk, and arrests meant that young men thought twice before carrying their guns . . . . That guns were not immediately accessible during routine confrontations was a frequently cited explanation for the reduction in murder in the mid-

1990s." *Bowling, supra* at 546.[3] The evidence on this point is not limited to New York. An impressive number of studies throughout the nation have found that aggressive policing at hot spots with an emphasis on finding guns reduces levels of violent crime. *See* Firearms and Violence, *supra* at 230-35; Blumstein & Wallman, *supra* at 136-37; Lawrence W. Sherman, *Reducing Gun Violence: What Works, What Doesn't, What's Promising*, *in* Perspectives on Crime and Justice: 1999-2000 Lecture Series 69, 78-79 (Nat'l Inst. of Justice, U.S. Dep't of Justice 2001); Lawrence W. Sherman & John E. Eck, *Policing for Crime Prevention, in* Evidence-Based Crime Prevention 295, 308-10 (Lawrence W. Sherman et al. eds., rev. 2006).[4]

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[3] Jeffrey Fagan and Garth Davies, examining the stop-and-frisk data obtained by the New York Attorney General, found that the rate of stops in a precinct in 1998 did not predict homicide rates in the first three months of 1999. *See* Jeffrey Fagan & Garth Davies, *Policing Guns*: *Order Maintenance Policing and Crime Rates in New York, in Guns*, Crime, and Punishment in America 191, 205-06 (Bernard E. Harcourt ed., 2003). This data, however, came relatively late in New York's crime drop, and given the short span of time and the small number of homicides in any given precinct, this finding is not particularly probative.

[4] Some architects of the New York policing strategy of the 1990s single out as responsible for the crime drop the use of "Broken Windows" policing tactics that focus on reducing signs of physical and social disorder in the streetscape. *See* William Bratton & Peter Knobler, Turnaround: How America's Top Cop Reversed the Crime Epidemic 152-56, 228-29, 233-39 (1998); George L. Kelling, *Why Did People Stop Committing Crimes? An Essay About Criminology and Ideology*, 28 Fordham Urb. L.J. 567, 573-79 (2000). The Broken Windows thesis, however, is not a promising explanation for the crime drop; most studies to date of the theory have failed to provide it with convincing support. *See* Comm. To Review Res. On Police Pol'y and Practices, Nat'l Res. Council, Fairness and Effectiveness in Policing: The Evidence 229-30 (Wesley Skogan & Kathleen Frydl eds., 2005).

With stop-and-frisk at high levels at targeted "hot spots," outdoor drug markets could be expected to go into decline as suspects perceive elevated risks in carrying guns or drugs, or in attempting to purchase the latter. If gang members and drug sellers cannot go about armed, in turn, their ability to defend their turf against rival gang or drug dealers, or simply to walk about with the confidence that they can defend themselves if they encounter a rival, will be substantially reduced. In short, high rates of stop-and-frisk may make gang and drug crime more risky and less lucrative by increasing the threat of arrest and the difficulty of establishing stable drug-market monopolies.

D. The Importance of Gun Control Laws to the Crime Decline

As we explain above, there is ample evidence that aggressive stop-and-frisk tactics played an important role in the crime decline. Gun control laws, in turn, play an important role in the ability of police departments to utilize these tactics.

Stop-and-frisk tactics are regulated by the Fourth Amendment's prohibition on "unreasonable search and seizure." U.S. Const. amend. IV. A forcible stop and brief detention is considered constitutionally reasonable when the officer reasonably suspects that criminal activity is afoot. *See, e.g.*, *Florida v. J.L.*, 529 U.S. 266, 269-74 (2000); *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000); *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989). A frisk during such a stop is considered reasonable when an officer reasonably suspects that the subject may be armed and dangerous. *See, e.g.*, *Minnesota v. Dickerson*, 508 U.S. 366, 374 (1993); *Michigan v. Long*, 463 U.S. 1032, 1046-50 (1983).

Firearms regulation plays a central role in enhancing police authority to engage in stop-and-frisk tactics. When applicable law bans the possession or carrying of firearms, a stop and frisk conducted by an officer who reasonably suspects that an individual is illegally carrying a firearm—such as a suspicious bulge in a waistband—is considered constitutionally reasonable. *See, e.g.*, *United States v. Black*, 525 F.3d 359, 364 (4th Cir. 2004); *United States v. Mayo*, 361 F.3d 802, 807-08 (4th Cir. 2004); *United States v. Gibson*, 64 F.3d 617, 624 (11th Cir. 1995), *cert. denied*, 517 U.S. 1173 (1996). When applicable law generally permits individuals to carry firearms, however, the Fourth Amendment does not permit a stop-and-frisk even when there is reason to believe that a suspect is armed or dangerous because there is no indication of a violation of law. *See, e.g.*, *United States v. Burton*, 228 F.3d 524, 528-30 (4th Cir. 2000); *United States v. Ubiles*, 224 F.3d 213, 217-18 (3d Cir. 2000). *See generally* 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.6(a) (4th ed. 2004).

In New York, state law prohibits possession of a handgun without a license and generally requires that handguns be kept within the licensee's home or place of business except for those engaged in law enforcement. *See* N.Y. Penal Laws § 400.2 (McKinney 2007). In New York City, an additional permit must be obtained to possess or carry a handgun. *See id.* § 400.0(6). The issuance of these permits is highly discretionary and generally requires an applicant to demonstrate some extraordinary danger. *See* Rules of the City of N.Y. tit. 38, §§ 5-01 to -04 (2007). The New York authorities sparingly exercise their discretion to issue permits, creating what amount to an effective handgun ban. *See, e.g.*, Jesse Matthew Ruhl,

Arthur L. Rizer III & Mikel J. Wier, *Gun Control: Targeting Rationality in a Loaded Debate*, 13 Kan. J. L & Pub. Pol'y 413, 449-50 (2004).[5] Because individuals are rarely permitted to carry guns in New York, a stop-and-frisk is permissible when an officer reasonably suspects that an individual is carrying a firearm. *See* Stop and Frisk Report, *supra* at 36-40.

The data makes evident the importance of weapons searches to New York's regime of stop-and frisk:

Suspected Charge	Stops	% of Stops
Violent Crime	23,587	18.6
Weapon	56,499	44.6
Property Crime	14,822	11.7
Drug Sale/Possession	10,684	8.4
Misdemeanor/ Quality of Life	9,731	7.7
Other	3,818	3.0
Missing Charge	7,612	6.0

Stop and Frisk Report, *supra* at App. tbl. I.A.5. Thus, weapons searches were central to the New York stop-and-frisk strategy. New York's restrictive gun control laws, in turn, facilitated this strategy; without such restrictive laws, the most important legal basis for stop-and-frisk would have disappeared. Moreover, although some have questioned whether New York's stop-and-frisk practices reflect racial profiling, the most thorough study to date found no evidence of racial discrimination. *See* Ridgeway, *supra* at 13-19.

Increasing the authority of the police to engage in stop-and-frisk tactics may not be the only means by

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[5] As petitioners' *amici* acknowledge, only some 18,000 permits have issued, ILEETA Br. 28, in a city of over 8,000,000.

which New York's gun control laws contribute to the success of its policing tactics. Because it is difficult to purchase a handgun legally in New York, it may be the case that stop-and-frisk tactics are especially effective because of the difficulty in replacing handguns that are seized by the police. *See* Zimring, *supra* at 157-58. Although there is no study of New York gun markets on this point, a study of Chicago found "the existence of substantial transaction costs in the underground gun market," and that "the most likely explanation for these transaction costs is that the gun market is both illegal and 'thin,' that is, has few buyers and sellers. The illegality of the gun market increases search costs for prospective trading partners." Philip J. Cook *et al.*, *Underground Gun Markets*, 117 Econ. J. F588, F589 (2007).[6]

Thus, it is reasonable to believe that when a jurisdiction generally bans the possession and sale of handguns, authorizing search for and seizure of illegal guns and raising the cost and difficulty of replacing handguns once seized, offenders become less likely to carry them in places where they are vulnerable to stop-and-frisk tactics. Similarly, when it is illegal to carry rifles and other non-concealable firearms in public, the risk that violent public confrontations will turn deadly is reduced. And, as we have seen, when firearms disappear from public places, levels of violence are likely to subside.

Some of petitioners' *amici* attack the efficacy of Chicago's gun-control laws by observing that its crime rate exceeds national averages. *See* Heartland Inst. Br. 6-8; ILEETA Br. 17-22. In fact, studies on

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[6] Some of petitioners' *amici* seriously distort this study by taking isolated sentences out of context. *See* ILEETA Br. 25.

the efficacy of handgun bans have reached conflicting results. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2857-61 (2008) (Breyer, J., dissenting). More fundamentally, *amici* confuse cause and effect. It was a rising crime rate that produced the political will to enact Chicago's handgun ban; the persistence of violent crime produced the political will to retain it. In fact, high levels of violent crime in Chicago are attributable to the high levels of gang membership and intergang competition in Chicago. *See* Ill. Crim. Just. Inf. Auth., Street Gangs and Crime: Patterns and Trends in Chicago 10-12, 14-16, 19-22 (Sep. 1996). Accordingly, the relevant consideration is not Chicago's absolute crime rate, but whether the rate would be higher without its handgun ban. On this point, the data we discuss above suggests an affirmative answer. In any event, even petitioners and their *amici* do not question the role that New York's gun control laws have played in reducing violent crime in that city.

II. THE FOURTEENTH AMENDMENT DOES NOT PROTECT THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS.

This Court has used varying formulations in describing its approach to incorporating into the Fourteenth Amendment the rights enumerated in the first eight amendments. When it incorporated the right to a jury in criminal cases and the protection against Double Jeopardy, the Court considered whether the right at stake was "fundamental to the American scheme of justice." *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)). When it incorporated the rights to counsel, to confront adverse witnesses, and to compulsory process, the Court asked whether these

rights were "fundamental and essential to a fair trial." *Washington v. Texas*, 388 U.S. 14, 17 (1967); *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). When it incorporated the Fifth Amendment right against compelled self-incrimination, the Court wrote that "the American system of justice is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its mainstay." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

These decisions dealt with the rights of an accused in the adjudicative process; hence the references to rights considered fundamental to the administration of justice are natural. The Second Amendment, in contrast, addresses conduct outside the courtroom. Accordingly, the Court's decisions regarding constitutional rights directed at primary conduct are more instructive, such as the decision to incorporate the Fourth Amendment's protection against unreasonable search and seizure against the States because "the 'security of one's privacy against arbitrary intrusion by the police' is 'implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause.'" *Mapp v. Ohio*, 367 U.S. 643, 650 (1961) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (internal quotations omitted)). Similarly, the incorporation of the First Amendment rights of free speech, freedom of the press, free exercise of religion and the right to peaceably assemble was premised upon these rights being "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Even the cases involving trial rights have been attentive to question whether a given right is "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14.

Whatever the formulation, it is essential to characterize the right at stake in order to determine whether it merits incorporation. To be sure, the right to bear arms was thought sufficiently fundamental warrant inclusion in the first set of constitutional amendments, but if that were sufficient for incorporation, the Court would have adopted a regime of total incorporation rather than the approach we describe above. Thus, a more discriminating analysis is required.

A. The Second Amendment Protects A Largely Obsolete Eighteenth-Century Right.

In *Heller*, this Court, adopting what it characterized as "the original understanding of the Second Amendment," invalidated the District of Columbia's prohibition on the possession of handguns. 128 S. Ct. at 2788, 2817-22. The Court defined the right to "keep" arms as the right to possess them, *id*. at 2792, and it defined the right to "bear" arms as the right to "carry[] for a particular purpose—confrontation." *Id*. at 2793. The Court added that the term includes "the carrying of the weapon . . . for the purpose of 'offensive or defensive action,'" *id*. at 2793 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). The Court considered only the application of the Second Amendment to the federal government; it expressly reserved decision on whether the Second Amendment is applicable to state and local governments by virtue of the Fourteenth Amendment. *Id*. at 2813 n.23.

The scope of Second Amendment rights recognized in *Heller* is not unlimited. For example, the Court wrote that the Second Amendment "does not protect those weapons not typically possessed by law-abiding

for lawful purposes, such as short-barreled shotguns," 128 S. Ct. at 2816, or otherwise "dangerous and unusual weapons." *Id*. at 2783, 2817. The Court also noted that "the majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or its state analogues," *id*. at 2816, and added that "nothing in our opinion should be taken to cast doubt on prohibitions on the possession of firearms by felons or the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools or government buildings," *id*. at 2816-17. The Court also assumed that cities can require that handguns be licensed. *Id*. at 2819. Still, *Heller* creates the alarming possibility that gang members have a Second Amendment right to carry firearms, at least if visible. Distressingly, the Court noted that early nineteenth-century cases had understood the Second Amendment to secure a right to carry firearms openly in public. *See id*. at 2809.

Accordingly, if applicable to state and local governments and confined to framing-era understandings, the eighteenth-century conception of the right to bear arms would imperil the use of stop-and-frisk tactics against drug dealers and gang members, at least as long as they carry firearms openly and have not been previously convicted of a felony or otherwise fall within the scope of the regulatory authority acknowledged in *Heller*.[7] This would facilitate violent competition in the drug trade, terrorizing law-abiding citizens, with police left helpless as long as gang members or drug

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[7] Notably, petitioners' counsel has filed suit challenging under the Second Amendment the District of Columbia's prohibition on carrying handguns in public places. *See Palmer v. District of Columbia*, No. 1-09-cv-01482 (D.D.C. filed Aug. 6, 2009).

dealers do not sell drugs or otherwise breach the peace in the view of officers on patrol. Cities could license firearms, but in the context of vehicles, this Court has held that the Fourth Amendment forbids investigative stops to check the driver's license and registration of a vehicle absent particularized reason to believe that there has been a violation of a licensing or other law. *See Delaware v. Prouse*, 440 U.S. 648, 655-63 (1979). *See also City of Indianapolis v. Edmond*, 531 U.S. 32, 40-48 (2000) (invalidating roadblocks to check vehicles for guns and drugs in high-crime areas).

Equally alarming, police-power justifications for limiting the right to carry firearms are given all too little sway under the Second Amendment's eighteenth-century conception of the right to bear arms. In *Heller*, the Court rejected Justice Breyer's view that reasonable gun-control regulations should be upheld, 128 S. Ct. at 2817 n. 27, 2821, as well as a balancing test that would weigh the right to bear arms against police-power justifications for regulation not rooted in framing-era understandings: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id*. at 2821.

Accordingly, if incorporated within the Fourteenth Amendment, there is a serious risk that the eighteenth-century conception of the right to bear arms could become a critical obstacle to the cities' efforts to combat violent crime. History, however, suggests that this conception is far from a fundamental characteristic of our nation's approach to ordered liberty.

As early as the 1820s, American law began to retreat from the notion of a right to carry firearms in

case of confrontation, as states adopted prohibitions on carrying concealed weapons unknown in the framing era in response to a surge in violent crime. *See* Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America 138-44 (2000). By the framing of the Fourteenth Amendment, police-power justifications for reasonable regulation of the right to keep and bear arms were well accepted. For example, shortly after it approved what became the Fourteenth Amendment, the Thirty-Ninth Congress abolished the militia in most southern states and prohibited any effort to arm militias in those states. *See* Act of March 2, 1867, ch. 170, § 6, 14 Stat. 485, 487 (1866). The measure's sponsors dismissed Second Amendment objections, arguing that the prohibition was justified by armed groups "dangerous to the public peace and to the security of Union citizens in those states." Cong. Globe, 39th Cong., 1st Sess. 1849 (1866) (Sen. Lane). *Accord id*. at 1848-49 (Sen. Wilson).[8] This legislation was one of a series of gun control measures undertaken at the time in an effort to suppress violence in the then-turbulent south. *See* Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 621-23 (2006).

Since the Fourteenth Amendment's ratification, reasonable police-power regulation of firearms has been the rule, not the exception. As Adam Winkler has demonstrated, although forty-four states afford constitutional protection for the right to bear arms,

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[8] The lone concession that the sponsors made was to delete language requiring that militias be "disarmed." *See* David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 417-20 (2008).

over the past century, state courts have reached consensus on a reasonable regulation standard that carefully weighs the justification for the regulation at issue against the extent of the burden it creates on the right to bear arms. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 686-87, 711-12, 716-17 (2007).

Thus, history has not been kind to the eighteenth-century conception of the right to bear arms explicated in *Heller*. To the contrary, the reasonableness test rejected in *Heller* has been the rule, not the exception, throughout most of our nation's history. There is accordingly ample reason to doubt that Second Amendment rights are sufficiently fundamental to warrant incorporation within the Fourteenth Amendment.

Petitioners have a different view of the relevant history. For example, they note that in the wake of the Civil War, there was concern about efforts to disarm the newly-freed slaves which produced statutory protection for the right to bear arms in the Freedmen's Bureau Act. *See* Pet. Br. 11-12. The Act provided:

> *[I]n every State or district where the ordinary course of judicial proceedings has been interrupted by rebellion, and until the same shall be fully restored* . . . the right to make and enforce contracts . . . and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real, and personal, including the constitutional right to bear arms, shall be secured and enjoyed by all citizens of such State or district *without respect to race or color, or previous condition of slavery.*

Act of July 10, 1866, § 14, 14 Stat. 173, 176 (1866) (emphasis supplied). The first italicized passage, however, indicates that this legislation was not an effort to articulate the fundamental rights of citizens but an emergency measure applicable only in areas where rebellion persisted. The second indicates this provision was an antidiscrimination provision—if the statute were read to recognize a substantive right, the second italicized passage becomes surplusage. Indeed, many of the statements in the Thirty-Ninth Congress about the right to bear arms are, at best, ambiguous; it is unclear whether the concern is about substantive rights or selective and discriminatory treatment of freedmen. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 3210 (1866) (Rep. Julian) ("Florida makes it a misdemeanor for colored men to carry weapons without a license . . . . South Carolina has the same enactments . . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.").

Beyond this, petitioners argue that the Fourteenth Amendment's framers considered the first eight amendments to the Constitution to be protected against the states by virtue of the Amendment's "Privileges or Immunities" Clause, U.S. Const. amend. XIV, § 1. This claim, however, founders on the proposition "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *Heller*, 128 S. Ct. at 2788 (internal quotations omitted). The critical inquiry accordingly involves "the *public understanding* of a legal text," *id*. at 2805 (emphasis in original).

Although petitioners and their *amici* scour the legislative history of the Fourteenth Amendment, they

can identify only two legislators—Senator Howard and Representative Bingham—who expressly stated that the Privileges or Immunities Clause incorporated the first eight amendments. *See* Pet. Br. 24-25, 29-30. Others denied that the phrase had any settled meaning. *See* Cong. Globe, 39th Cong., 1st Sess. 2466 (1866) (Rep. Boyer); *id*. at 3039 (Sen. Hendricks); *id*. at 3041 (Sen. Johnson). Indeed, one eminent scholar found "some support in the legislative history for no fewer than four interpretations of the . . . Privileges and Immunities Clause: it would authorize Congress to enforce the Privileges and Immunities Clause of Article IV; it would forbid discrimination between citizens with respect to fundamental rights; it would establish a set of basic rights that all citizens must enjoy; and it would make the Bill of Rights applicable to the States." David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 406 (2008). It is far from clear what the public made of this cacophony.

The Fourteenth Amendment's Privileges or Immunities Clause was sufficiently similar to Article IV's Privileges and Immunities Clause, *see* U.S. Const. art. IV, § 2, cl. 1, that the public might have thought the new clause echoed its Article IV predecessor; even Bingham and Howard looked to Article IV as a model for the new amendment. *See* Cong. Globe, 39th Cong., 1st Sess. 2542 (1866) (Rep. Bingham); *id*. at 2765 (Sen. Howard). Yet, the opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), was, as petitioners acknowledge, the "most-influential early definition of these 'privileges and immunities,'" Pet. Br. 16, and it did not identify the Second Amendment, or indeed any of the first eight amendments, as among the privileges and immunities of citizenship. *See* 6 Fed. Cas. at 551-52. The leading legal treatises of the day, citing *Corfield*, characterized the Article

IV protection for the privileges and immunities of citizenship as a protection for citizens of one state when traveling to another against discrimination with respect to common-law rights regarded as fundamental. *See, e.g.*, Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 15-16 (1868).

Accordingly, the public could have understood the new Privileges or Immunities Clause as extending the Article IV nondiscrimination obligation to all citizens, even when in their state of residence. Indeed, some scholars have argued that the Fourteenth Amendment's Privileges or Immunities Clause should was originally understood as an antidiscrimination provision, while the Fourteenth Amendment's Equal Protection Clause provided specific recognition of a right to nondiscriminatory protection from private lawbreakers. *See* David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, at 342-51 (1985); John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 Yale L.J. 1385, 1397-432 (1992). Thus, statements in the congressional debates suggesting that the Fourteenth Amendment would permit enforcement of existing constitutional rights identified by petitioners and their *amici*, *e.g.*, Pet. Br. 32, may reflect no more than an understanding that the new amendment would broaden the scope and enhance the enforceability of the Article IV nondiscrimination requirement. *See* Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, 40 Am. J. Leg. Hist. 41, 50-61 (1996).

The ratification debates also provide important evidence of the public's understanding. Although petitioners and their *amici* discuss the handful of incorporationist statements made during ratification, more evenhanded inquiries have concluded that in the main, the ratification debates characterized the Fourteenth Amendment as embodying the nondiscrimination principle of the recently-enacted Civil Rights Act of 1866 rather than extending the Bill of Rights to the states. *See, e.g.*, James E. Bond, No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment 10, 19-24, 45, 56-58, 80-81, 86-90, 103-07, 111, 123-24, 127-28, 148-50, 173-77, 180-82, 199, 215-17, 220-23, 234-38, 241-42, 252-55 (1997); James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 445-54 (1985); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5, 84-126 (1949); George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know about Section 1?*, 18 J. Contemp. Legal Issues__(forthcoming 2009), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392961*. Indeed, even a leading incorporation advocate acknowledges that when the *New York Times* gave "prominent front-page coverage to Congress's final passage and submission of the Amendment to the States . . . there was no mention of incorporation." Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in* 1866-67, 68 Ohio St. L.J. 1509, 1595 (2007). At best, "the evidence from the ratification process seems vague and scattered when it comes to any strong public awareness of nationalizing the entire Bill of Rights." *Id*. at 1601.

Significantly, the Fourteenth Amendment's ratification produced little evidence of an incorporationist understanding. Ratification, for example, produced no movement in the states toward bringing their laws into compliance with the first eight amendments; to the contrary, soon after ratification, five states modified their grand jury requirements in ways inconsistent with the Fifth Amendment's Grand Jury Clause. *See* George C. Thomas III, *The Riddle of the Fourteenth Amendment*: *A Response to Professor Wildenthal*, 68 Ohio St. L.J. 1627, 1654-55 (2007).

Leading legal scholars of the era also failed to perceive that the Fourteenth Amendment had made the first eight amendments applicable to the states. *See, e.g.*, 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure §§ 99, 145, 891-92, 946, 981 (2d ed. Rev. 1872); 2 Joseph Story, Commentaries on the Constitution of the United States §§ 1934-37 (4th ed. Thomas L. Cooley rev. 1873); 1 Francis Wharton, A Treatise on the Criminal Law of the United States: Principles, Pleading and Evidence §§ 213, 573 (7th ed. 1874); 3 *id*. § 3405; *The Right to Keep and Bear Arms for Public and Private Defense* (Part 3), 1 Cent. L.J. 295 (John F. Dillon ed., 1874). *See also* Donald A. Dripps, About Guilt and Innocence: The Origins, Development, and Future of Constitutional Criminal Procedure 30-34 (2003) (surveying framing-era legal scholarship). Similarly, in the wake of ratification, this Court wrote: "The second amendment declares that it shall not be infringed; but this, as we have seen, means no more than that it shall not be infringed by Congress." *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 553 (1875). Of the Fourteenth Amendment, the Court observed: "The equality of the rights of citizens is a principle of

republicanism . . . . This the amendment guarantees, but no more." *Id*. at 555.

If there had been a widely-shared public understanding that the Fourteenth Amendment had rendered the first eight amendments applicable to the states, it is passing strange that the states themselves, so many leading scholars of the era, and even this Court failed to get the message. The available historical evidence is, at best, in deep conflict. It supplies no firm basis for incorporation.[9]

B. Second Amendment Rights Are Not an Aspect of Ordered Liberty.

As we explain above, the historical evidence reflects no consistent acceptance of the eighteenth-century conception of the right to bear arms. By the time of the Fourteenth Amendment, police-power justifications for reasonable restriction of the right to keep and bear arms unknown during the framing era had gained widespread acceptance. Beyond that, the consequences for recognizing an eighteenth-century right poorly suited to the conditions found in our nation's cities are also relevant to the incorporation inquiry.

As it incorporated the Sixth Amendment right to jury trial in criminal cases in *Duncan*, this Court noted "the long debate . . . as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings," but distinguished the unincorporated Seventh Amendment right to a

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[9] For a more elaborate argument on this point, *see* Lawrence Rosenthal, *Second Amendment Plumbing after* Heller: *Of Standards of Scrutiny, Incorporation*, *Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Law. 1, 48-78 (2009).

civil jury by noting that "most of the controversy has centered on the jury in civil cases." 391 U.S. at 156-57, 157. *Heller*, for its part, acknowledged as "debatable" the question whether "the Second Amendment is outmoded in a society in which our standing army is the pride of the Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem." 128 S. Ct. at 2822. The potential obsolescence of the eighteenth-century conception of the right to bear arms accordingly counsels against incorporation of the Second Amendment within the Fourteenth.

Indeed, in high-crime neighborhoods, the Second Amendment is something of a non sequitur. The Second Amendment states that "[a] well-regulated militia," that is, a populace subject to "proper discipline and training," *Heller*, 128 S. Ct. at 2800, is "necessary to the security of a free state," and for that reason "the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. The preamble and the operative clause may have been easy to reconcile in eighteenth-century America, but in contemporary cities, they will often be at odds. In high-crime drug and gang-ridden communities, gang members and drug dealers are all too likely to exploit a right to bear arms to terrorize the community and engage in a violent competition for the spoils of the drug trade; this is not a world in which one can speak of "proper discipline and training" of a "well-regulated" urban "militia." Contemporary street gangs likely bear greater resemblance to the violent militias that led the Reconstruction Congress to effectively suspend the right to bear arms than to any eighteenth century conception of a "well-regulated militia." In all too many cities, it may be effectively impossible to grant

a right to bear arms while preserving the "security of a free state."

Under a reasonableness test of the type that has prevailed in the nineteenth and twentieth centuries, a ban on handguns in a high-crime, gang-ridden area could readily be sustained; whatever the marginal benefits of handguns for self-defense and other legitimate purposes as compared to rifles and other weapons more difficult to conceal, *see Heller*, 128 S. Ct. at 2818, handguns are far more prone to unlawful use as concealed weapons, and as we have seen, there is reason to believe that a handgun ban will increase the cost and difficulties facing gang members seeking to compete in the violent drug trade. Indeed, as *Heller* acknowledged, there is a serious case to be made for the wisdom of handgun bans in urban areas. *See* 128 S. Ct. at 2822.[10]

To be sure, the problems posed by recognition of a right to carry firearms in case of confrontation can exist in jurisdictions of all sizes. Still, our jurisprudence reflects a conception of federalism in which state and local governments "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Chandler v.*

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[10] Some of the petitioners' *amici* argue that handguns yield substantial benefits since they are frequently used for purposes of self-defense. *See* ILEETA Br. 3-11. If so, it is unclear that long guns cannot provide equivalent benefits; when they criticize the efficacy of long guns, *amici* are conspicuously unable to supply supporting data. *See id*. at 40-44. In any event, the reliability of studies that depend on self-reports of defensive gun use is doubtful. *See, e.g*., Philip J. Cook & Jens Ludwig, U.S. Dep't of Justice, Guns in America: National Survey on Private Ownership and the Use of Firearms 8-11 (May 1997); David Hemenway, Private Guns, Public Health 66-69, 239-40 (2004).

Florida, 449 U.S. 560, 579 (1981) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). *Accord, e.g., United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *Arizona v. Evans*, 514 U.S. 1, 8 (1995); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 (1973). Cities facing especially difficult law-enforcement problems should be able to devise innovative solutions. It is hardly a fundamental aspect of our jurisprudence that an eighteenth-century conception having limited relevance to contemporary America must control contemporary law enforcement policy.[11]

This conclusion does not mean that the Fourteenth Amendment holds nothing for a right of defense. If the eighteenth-century version of the right to bear arms is not sufficiently fundamental to merit incorporation, a more limited right of defense may nevertheless qualify for constitutional protection under the Fourteenth Amendment. *Heller* concluded that Second Amendment embodied what was widely thought to be a natural right of defense. *See* 128 S. Ct. at 2793-94, 2798-99, 2805, 2807. Given its historical grounding, the right to defend oneself, one's family, and one's property may well be one of the unenumerated rights that qualifies for Fourteenth Amendment protection. If so, a complete prohibition on the possession in one's home of any type of weapon reasonably useful for defense could impose an impermissible burden on this right. Such a right of defense, however, need not go so far as a "right to

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[11] For a more elaborate defense of this submission, *see* Rosenthal, *supra* at 84-92.

possess and carry weapons in case of confrontation," *Heller*, 128 S. Ct. at 2797, which, as we explain above, could wreak havoc in high-crime communities. A right carefully calibrated to balance the competing interests is consistent with the longstanding approach used to assess firearms rights, rather than the eighteenth-century version of the right to bear arms at issue in *Heller*.

There is doubtless appeal to the notion that the populace should be able to defend itself from law-breakers. There is less appeal to the notion that in a contemporary city of a type utterly alien to the eighteenth-century Framers, everyone should have a right to carry firearms in case of confrontation. In a community defined by conflict over street gang territorial prerogatives, a right to bear arms seems more likely to imperil ordered liberty than secure it.

CONCLUSION

For the preceding reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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