Nos. 08-1497 and 08-1521

IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al.,
Petitioners,

v.

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

OTIS MCDONALD, et al.,
Petitioners,

v.

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

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

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

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the Godly principles of law upon which this country was founded. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has directly assisted, or filed *amicus* briefs, in several cases concerning the right to keep and bear arms (*District of Columbia v. Heller*), religious freedom, the sanctity of life, and others that implicate the fundamental freedoms enshrined in our Bill of Rights.

The Foundation has an interest in this case because it believes that our God-given freedom starts with the natural right of self-defense, a right recognized by the Second Amendment's protection of the individual ownership and use of firearms. This

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[1] *Amicus curiae* Foundation for Moral Law files this brief with blanket consent from both Petitioners and Respondents, granted with the condition of prior notice. Counsel of record for all parties received timely notice of the Foundation's intention to file this brief, copies of which are on file in the Clerk's Office. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

brief primarily focuses on the God-given nature of the right of the people protected by the Second Amendment and how such a right is a privilege and immunity of all United States citizens.

SUMMARY OF ARGUMENT

The text is paramount in constitutional interpretation, and properly interpreting the text requires reading it with an eye toward what it meant by common understanding at the time of its enactment. This Court confirmed in *District of Columbia v. Heller* that constitutional "words and phrases were used in their normal and ordinary as distinguished from technical meaning." 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008) (quotation omitted). The plain meaning of the Constitution's text should also guide the Court in this case.

The right to keep and bear arms, like many rights, was not granted by the Constitution; it codified and protected a "pre-existing right." *Id.* at 2797. It is pre-existing not merely because the English Bill of Rights codified it, but because it is derived from the natural, inalienable right of self-defense given by Almighty God. This natural right was recognized as early as ancient Israel, in the Roman Republic, and at the founding of the United States Constitution. The Founders knew that the Second Amendment was protecting a right of the people derived not from mere men or manuscripts, but from the law of nature and of nature's God.

The Fourteenth Amendment prevents states from abridging "the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV. This Court affirmed in *Heller* that "the right of the people

to keep and bear arms" was an individual right, one that "belongs to all Americans," a "class of persons who are part of a national community." *Id.* at 2791 (quotations omitted). Given the deeply-rooted importance of the Second Amendment right to American history, independence, and liberty, U.S. citizens should be able to assert this privilege and immunity against such abridgement seen in the Chicago and Oak Park, Illinois, handgun bans.

Although *Amicus* does not agree that the original meaning of the Due Process Clause of the Fourteenth Amendment protects substantive rights incorporated to the states, the right to keep and bear arms in the Second Amendment fits the criteria this Court has used in past cases to incorporate certain other rights and interests in the Bill of Rights. Instead of continuing the subjective and unpredictable method of "selective incorporation," however, this Court should adopt the relatively more principled approach of "total incorporation," which would sweep in the Second Amendment's right along with all the others enumerated in the Bill of Rights.

Even if this Court continues to use the "selective" approach to incorporation, there are several reasons to incorporate the "right to keep and bear arms" through the Due Process Clause. First, the text of the Second Amendment provides a general prohibition, contrary to the proscription on "Congress" found in the First Amendment, thus rendering its "right of the people" more textually amenable to incorporation against the states and local governments than the undoubtedly important rights protected in the First. Second, as *Heller* took great pains to explain, the right to keep and bear arms was and is a fundamental right of the

people to preserve not only personal safety but also the civil and political liberties of a "free state." Third, for similar reasons, this right ought to be incorporated because it is so deeply rooted in our nation's history and tradition. Indeed, the right to keep and bear arms articulated in the Constitution may be *more* qualified for incorporation than many of the other, extra-textual "rights" that this Court has found to deserve constitutional protection.

The Chicago and Oak Park handgun bans are as draconian in their infringement of the people's right to keep and bear arms as the District of Columbia laws struck down in *Heller* and should suffer the same fate.

ARGUMENT

I. THIS COURT SHOULD AGAIN BE GUIDED IN THIS CASE BY THE ORIGINAL MEANING OF THE CONSTITUTIONAL TEXTS AT ISSUE.

James Madison once wrote that, "As a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison*, at 228 (Philip R. Fendall, ed., 1865). This is almost axiomatic when dealing with any legal instrument, let alone a constitution. "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). A textual reading of the Constitution, Madison said, requires "resorting to the sense in which the Constitution was accepted and

ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

"In expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). In *Heller* this Court reaffirmed the premise that the meaning of the Constitution was not solely the province of federal judges and lawyers:

> [W]e are guided by the principle that "[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."

District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 2821.

II. THE RIGHT TO KEEP AND BEAR ARMS IS A PRE-EXISTING RIGHT NATURALLY DERIVED FROM THE INALIENABLE RIGHT OF SELF-DEFENSE GIVEN BY GOD.

In last year's *Heller* decision, this Court acknowledged that the Second Amendment did not create the right to keep a bear arms, it "codified a *pre-existing* right." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

> The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we

> said in *United States v. Cruikshank*, "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed."

Id. at 2797-98 (citation omitted).

The *Heller* Court looked for the source of this right's pre-existence to the right of "Protestants" to "have arms for their defense" protected in the English Bill of Rights of 1689, "long understood to be the predecessor to our Second Amendment." *Id.* at 2798. Sir William Blackstone, in turn, wrote that the arms provision in the English Bill of Rights was derived from "the *natural right* of resistance and self-preservation." *Id.* (quoting 1 William Blackstone, *Commentaries on the Laws of England* 139 (1765)) (emphasis added). The Court also cited a New York article from 1769 calling the right to keep arms "a *natural right*." *Id.* at 2799 (emphasis added). In its discussion of legal commentary published after the amendment's ratification, this Court quoted from St. George Tucker's version of Blackstone's Commentaries, describing the "right to self-defence" as "the first law of nature." *Id.* at 2805. This law of nature, according to J. Ordronaux's legal commentary, was not just pre-existing, "*it had always existed*." *Id.* at 2812 (quoting Ordronaux, *Constitutional Litigation in the United States* 241-242 (1891)) (emphasis added).

What *Heller* described as a pre-existing, natural right, however, was not granted by mere legal documents or positive law:

> The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, *by the hand of the divinity itself*; and can never be erased or obscured by mortal power.

Alexander Hamilton, *The Farmer Refuted* (1775) (emphasis added). The natural right to self-defense is among the inalienable rights given by nature and nature's God and recognized in antiquity.

This natural right predates not just the Constitution but America and even England. The Israel of the Old Testament, which influenced western law in general and Anglo-American law in particular,[2] relied upon a citizen militia of men who bore their own arms for defense against foreign enemies. As Chaim Herzog and Mordechai Gichon observe,

> The military organization of the Israelites was, like that of all nations emerging from tribal status, based on the duty of every able-bodied male to bear

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[2] On October 4, 1982, the United States Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible." The opening sentence of the bill read, "Whereas Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States . . . ." President John Adams wrote, "As much as I love, esteem and admire the Greeks, I believe the Hebrews have done more to civilize the world. Moses did more than all their legislators and philosophers." John Adams, Handwritten comments on his copy of a book by the Marquis de Concorcet, *Outlines of an Historical View of the Progress of the Human Mind, in* Zoltan Haraszti, *Adams and the Prophets* 225 (Harvard Univ. Press 1952).

> arms and serve, whenever necessary, in his tribal contingent in the national host. According to the Bible, Moses and Aaron organized the first Israelite army when leaving the Egyptian bondage:
>
> > Take ye the sum of all the congregation of the children of Israel, after their families, by the house of their fathers, with the number of their names, every male by their polls; from twenty years old and upward, all that are able to go forth to war in Israel: thou and Aaron shall number them by their armies. And with you there shall be a man of every tribe; everyone head of the house of his fathers. (Num. 1:2-4)

Chaim Herzog and Mordechai Gichon, *Battles of the Bible* 37 (Greenhill Books, 1997).

In classical Rome, Marcus Tullius Cicero spoke of the right to use arms in self-defense:

> And indeed, gentlemen, there exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. . . . [A] man who has used arms in self-defense is not regarded as having carried them with homicidal aim.

Cicero, *Selected Political Speeches* 222, in Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 17 (Independent Institute 1994).[3]

Hugo Grotius, whom the Framers of our Constitution frequently quoted and who is sometimes called the "Father of International Law," likewise recognized the right of self-defense with arms, "for all animals are provided by nature with means for the very purpose of self-defence." Halbrook 26.

The Founders believed that the right to self-defense was a natural right given by God and essential to the preservation of life and liberty alike. The language of the Declaration of Independence allows for this, it being a "self-evident" truth that "all men are created equal, that they are endowed by their Creator with certain unalienable rights, that *among these* are life, liberty, and the pursuit of happiness." (Emphasis added.) The three unalienable (or inalienable) rights listed in the Declaration were not exhaustive but were "among" others granted by the Creator. Religious liberty was another such right, according to James Madison in his *Memorial and Remonstrance* of 1785:

> Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may

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[3] Halbrook adds, "James Otis relied on this passage in arguing self-defense in a trial held in 1771. Most of the passage is quoted in William Eden, *Principles of Penal Law* 213-14 (London 1772), a work heavily relied on by Thomas Jefferson." Halbrook 203 n.76 (citations omitted).

> dictate. This right is in its nature an unalienable right.

The Founders considered the right to self-defense to be of like stature and origin. Alexander Hamilton acknowledged that "*the Supreme Being* gave existence to man . . . [and] invested him with an inviolable right to personal liberty and personal safety." Hamilton, *Farmer Refuted* (emphasis added). George Mason, considered the "Father of the Bill of Rights," argued at the Virginia Ratifying Convention, "*divine providence* has given to every individual the means of self-defense." George Mason, Debate in Virginia Ratifying Convention (June 14, 1788), in 3 *The Founders' Constitution* 156 (Phillip Kurland & Ralph Lerner eds., 1987) (emphasis added).[4]

This gift of God cannot be alienated by man or his laws. Justice James Wilson, one of the first Supreme Court justices and a signer of both the Declaration and the Constitution, wrote that the "great natural law of self-preservation cannot be repealed, or superseded, or suspended by any human institution." 3 *The Works of*

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[4] Even Revolutionary pamphleteer Thomas Paine credited God for the right to bear arms in self-defense:

> I am thus far a Quaker [pacifist], that I would gladly agree with all the world to lay aside the use of arms, and settle matters by negotiation: but unless the whole will, the matter ends, and I take up my musket and thank heaven he has put it in my power.

Thomas Paine (attributed), *Thoughts on Defensive War*, from *Pennsylvania Magazine* (July 1775), in 1 *The Writings of Thomas Paine* 55 (Moncure Daniel Conway ed. 1906).

the Honourable James Wilson, L.L.D., *Lectures on Law* 84 (Bird Wilson publisher 1804); Barton, *Second Amendment* 16 n.9. James Kent, considered one of the fathers of American jurisprudence, wrote that the law of self-defense "is founded on the law of nature, and is not and cannot be superseded by the law of society." 2 James Kent, *Commentaries on American Law* 16 (1826) (O. W. Holmes, Jr. ed., 12th edition, 1896).

From this God-given natural right of "resistance and self-preservation," as Blackstone called it, is derived the people's right of "having arms for their defense." 1 Blackstone 139; *Heller*, 128 S. Ct. at 2798. Richard Henry Lee, a signer of the Declaration, wrote, "To preserve liberty, it is essential that the *whole body* of the people *always* possess arms, and be taught alike, especially when young, how to use them." Richard Henry Lee, Letter XVIII (January 25, 1788), *in An Additional Number of Letters From the Federal Farmer to The Republican* 170 (1788) (emphasis added). And not just civil liberty: Zechariah Johnston, a Virginia legislator and Constitutional Ratification Convention, declared that the right to bear arms is "a principle which secures religious liberty most firmly." Zechariah Johnston, *Debates in the Convention of the Commonwealth of Virginia*, June 25, 1788, in Barton, *supra* 26 n.9. Mason argued that "disarm[ing] the people [is] the best and most effectual way to enslave them." Mason, Virginia Ratifying Convention, in 3 *Founders' Constitution* 156. Given the importance of this right, he wondered aloud, "Why should we not provide against the danger . . . ?" *Id.*

Less than two years before the ratification of the Second Amendment, President George Washington

told Congress: "A free people ought . . . to be armed." G. Washington, First Annual Meeting Message to Congress (January 8, 1790), in 1 *American State Papers: Documents, Legislative and Executive, of the Congress of the United States* 11 (Washington: Gales & Seaton 1833). Justice Joseph Story wrote in his *Commentaries on the Constitution* about the "importance" of the Second Amendment "as the palladium of the liberties of a republic since it offers a strong moral check against the usurpation and arbitrary power of rulers." 3 Joseph Story, *Commentaries on the Constitution* § 1890 (1833), in 5 *The Founders' Constitution* 214.

Since this Court's *Heller* decision did much to elucidate the importance of the right to keep and bear arms to America's historic concept of personal and civil liberty and security, *Amicus* need not further belabor that point. But what *Heller* called a "natural" and "pre-existing" right had those attributes precisely because it did not spontaneously generate out of positive law or "musty parchments"; the right to keep and bear arms is rather an inalienable gift from "the hand of divinity itself," the Creator God.

III. THE CHICAGO AND OAK PARK HANDGUN BANS VIOLATE THE RIGHT TO KEEP AND BEAR ARMS, A PRIVILEGE AND IMMUNITY UNDER THE FOURTEENTH AMENDMENT.

For the natural, inalienable right to keep and bear arms to be enforceable by this Court, however, it must be protected by the text of the Constitution. For a right as important to the life and liberty of every U.S. citizen, it is hardly a surprise that the right to keep

and bear arms would be one of the "privileges and immunities" protected by the Fourteenth Amendment.

The Fourteenth Amendment, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge *the privileges or immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV (emphasis added). While "any person" may claim a Fourteenth Amendment right to due process and equal protection, only the particular class of "citizens of the United States"—defined as "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof"—are protected against state abridgement of their "privileges or immunities."

In *Heller*, this Court affirmed that the right to keep and bear arms was an individual "right of the people," not a right limited to those in an organized militia or military body. 128 S. Ct. at 2790-91. In protecting the right of "'the people', the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 2791. The "Second Amendment right is exercised individually," but not by all persons within the borders of the United States; rather, it "belongs to *all Americans*." *Id.* (emphasis added).

> "'[T]he people' protected by the . . . Second Amendment[] . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

Id. at 2791 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). American *citizens* fit that definition of "a class of persons" with "sufficient connection" to the "national community." Thus, the right to keep and bear arms should be considered one of the "privileges or immunities" of citizens of the United States. "The right to bear arms has always been the distinctive privilege of freemen." *Id.* at 2812 (quoting Ordronaux, *Constitutional Litigation* 241).

Heller dealt only with a federal District of Columbia handgun ban and, therefore, did not analyze the Fourteenth Amendment question now presented. *See Heller*, 128 S. Ct. at 2813 n.23 (noting question of incorporation "not presented by this case"). But this Court did say that, "whatever else [the Second Amendment] leaves to further evaluation, it surely elevates above all other interests the right of law-abiding, responsible *citizens* to use arms in defense of hearth and home." *Id.* at 2821 (emphasis added). The Chicago and Oak Park handgun prohibitions in this case are akin to the "severe restriction of the District's handgun ban," and just as constitutionally infirm: "a complete prohibition of [handgun] use is invalid" under the right to keep and bear arms. *Id.* at 2818. As citizens of the United States, the citizens of Illinois enjoy the same privilege or immunity to keep and bear arms under the Fourteenth Amendment as do the

citizens of Washington, D.C. under the Second Amendment.

IV. THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS IS A FUNDAMENTAL AND DEEPLY-ROOTED AMERICAN RIGHT THAT EASILY SATIFIES THE COURT'S CRITERIA FOR INCORPORATION THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

As Chief Justice Marshall observed for a unanimous Court in *Barron v. Baltimore,* 32 U.S. (7 Pet.) 243 (1833), the Bill of Rights as originally written restricted only the federal government. *See also Heller*, 128 S. Ct. at 2816 (noting that "[f]or most of our history, the Bill of Rights was not thought applicable to the States"). For vindication of their rights against violations by state and local governments, citizens looked to their respective state courts and state constitutions.

When the people ratified the Fourteenth Amendment in 1868, however, states were not only prevented from abridging the "privileges or immunities" of citizens, they were prohibited from "depriv[ing] any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. Beginning in the mid-1920s, the Court began to hold that various rights found in the Bill of Rights—such as freedom of speech, freedom of religion, freedom of the press, the right to counsel—are "incorporated" as a substantive right through the "liberty interest" of the Due Process Clause and thereby applied to state and

local governments. *See, e.g., Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (freedom of the press); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to assistance of counsel). Some of these incorporated "rights" have no express textual origin in the Constitution, such as the "right to privacy" in its varying manifestations. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Lawrence* v. *Texas*, 539 U.S. 558 (2003) (sodomy). This interpretation of the Fourteenth Amendment is known as the "incorporation doctrine."

This Court has generally used two different rules for determining whether a right in the United States Constitution is incorporated against the states through the Fourteenth Amendment. In *Palko v. Connecticut,* the Court held that the criterion is whether the right at issue involves "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." 302 U.S. 319, 328 (1937) (quotation omitted). On other occasions, such as in *Moore v. East Cleveland,* the Court asks whether this constitutional protection is "deeply rooted in this Nation's history and tradition." 431 U.S. 494, 503 (1977).[5]

Amicus does not accept the incorporation doctrine. But if one does accept the incorporation doctrine, there are more persuasive reasons to incorporate the "right

[5] Another question that is sometimes asked, whether the right is essential to fundamental fairness, applies to procedural rights and is not germane to the issues involved in this case.

of the people to keep and bear arms" guaranteed by the Second Amendment than other rights which have been incorporated.

A. Compared to Total Incorporation, Selective Incorporation is Subjective and Unreliable.

Justice Hugo Black insisted that the Bill of Rights is totally incorporated into the Fourteenth Amendment and is as fully applicable to state and local governments as to the federal government.

> My study of the historical events that culminated in the Fourteenth Amendment . . . persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.

Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting). Justices Murphy and Rutledge also dissented in *Adamson*, stating that they were "in substantial agreement with the views of Mr. Justice Black," *id.* at 123 (Murphy, J., dissenting), but wanted to go further and state that the Fourteenth Amendment is not "entirely and necessarily limited by the Bill of Rights": "Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due

process despite the absence of a specific provision in the Bill of Rights." *Id.* at 124.

The majority of this Court, however, has not accepted Justice Black's "total incorporation" interpretation, preferring instead "selective incorporation," whereby some of the rights found in the Bill of Rights are incorporated and some are not.

Justice Felix Frankfurter noted the subjectivity of the selective incorporation approach. In his concurring opinion in *Adamson* he wrote:

> There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. The protection against unreasonable search and seizure might have primacy for one judge, while trial by a jury of twelve for every claim above twenty dollars might appear to another as an ultimate need in a free society. In the history of thought "natural law" has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth.

Id. at 65 (Frankfurter, J., concurring).

Similarly, Justice Harlan, joined by Justice Stewart, criticized the subjectivity of the selective incorporation approach in his dissent in *Douglas v. Louisiana*:

> Today's Court still remains unwilling to accept the total incorporationists' view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial by trial jury in the situation before us, or in other situations, is fundamentally unfair. Consequently the Court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is "in" rather than "out."

391 U.S. 145, 180-81 (1968) (Harlan, J., dissenting).

The opinions of Justices Black, Frankfurter, and Harlan demonstrate the danger of relying upon the subjective preferences of individual Judges and Justices to determine whether rights like those guaranteed by the Second Amendment are incorporated and applied to the states. Whether the Justices personally find firearms and/or hunting distasteful should not determine the extent of this constitutional protection. "The very enumeration of the right [to keep and bear arms] takes out of the

hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really* worth insisting upon." *Heller*, 128 S. Ct. at 2821. Rather, the decision should rest upon the prominent place this constitutional protection holds in the American constitutional framework.

B. The Second Amendment's Prohibition is General, Protecting a Right of the People Against Encroachment by Anyone.

The Second Amendment protects a right of the people that "shall not be infringed," but does not identify who or what is prohibited from infringing the right.[6] U.S. Const. amend. II. The First Amendment's constitutional protections, by contrast, are incorporated against the states and local governments—all three branches—despite the fact that the text of the amendment is a limitation on the power of the United States "Congress" alone. U.S. Const. amend. I. All other incorporated amendments likewise employ the passive voice to protect rights:

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[6] The open-ended prohibition permitted William Rawle, pre-*Barron*, to write of the Second Amendment:

> The prohibition is general. No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

Heller, 128 S. Ct. at 2806 (quoting Rawle, *A View of the Constitution of the United States of America* 121-22 (1825)).

e.g., "The right of the people . . . shall not be violated . . ." (Fourth Amendment); "No person shall be held . . . nor shall be compelled . . ." (Fifth Amendment); "the accused shall enjoy the right . . ." (Sixth Amendment); and "nor cruel and unusual punishments inflicted" (Eighth Amendment). The Second Amendment leaves open-ended the identity of the proscribed actor, prohibiting not simply "Congress" from infringement of the right to keep and bear arms. Thus, the text of the Second Amendment lends itself to incorporation more readily than the First.

C. The Right to Keep and Bear Arms Lies at the Base of Our Civil and Political Institutions.

This Court has maintained a "longstanding view that the Bill of Rights codified venerable, widely understood liberties." *Heller*, 128 S. Ct. at 2804. The Second Amendment's own text explains the right's purpose: to prevent the elimination of the militia, which in turn was "necessary to the security of a free state." *Id.* at 2800-01. Like the other rights protected in the first ten amendments, the Framers debated not whether the right to keep and bear arms "was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution." *Id.* at 2801. "It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id.* "[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Id.*

The Second Amendment was codified in the Bill of Rights precisely because it was deemed essential to the maintenance of liberty. It is the only right with "teeth," and the one by which the people can defend and maintain all their other rights. Indeed, if the right that is expressly protected as "necessary to the security of a free state" and considered the "true palladium of liberty" is not "fundamental" enough to be incorporated through the Due Process Clause of the Fourteenth Amendment, then it is hard to imagine what right qualifies.

D. The Right to Keep and Bear Arms Is Deeply Rooted in This Nation's History and Tradition.

Heller upheld the individual right to keep and bear arms precisely because of its prominence in American history and tradition. Any other reading of the opinion would be patently untenable. The "historical reality" is "that the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors.'" 128 S. Ct. at 2801-02 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

The right may have been bequeathed by England, but Americans made the right to keep and bear arms their own. Madison assured the American people they need not fear the federal government because of, among other reasons, "the advantage of being armed, which the Americans possess over the people of almost every other nation." *The Federalist No. 46* (James Madison) 247 (Carey & McClellan eds. 2001). Noah Webster, an influential confidante of many Constitutional Convention delegates, similarly tried to

allay these fears of federal power in a pro-Constitution pamphlet by matter-of-factly stating: "The supreme power in America cannot enforce unjust laws by the sword; *because the whole body of the people are armed*, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States." Noah Webster, "An Examination of the Leading Principles of the Federal Constitution," (1787) *reprinted in* 1 *The Debate on the Constitution* 155 (Bernard Bailyn ed. 1993) (emphasis added).

These arguments preceded the Constitution (and therefore the Bill of Rights) and were not premised on a future right but on a then-present reality: "the people are armed." Americans were armed because they were free, and they were free because they were armed. This inalienable right that was deeply rooted in America's founding, and practically necessary for winning independence, was presumed by the Founders to remain evermore.

Americans deeply valued the "ancient right" of keeping and bearing arms, *Heller*, 128 S. Ct. at 2801, and still do. The reasons for its codification in the Second Amendment are still as valid today as in 1791: preserve the militia, self-defense, hunting, and the liberty of a free state and people. *Id.* at 2801. *Amicus* does not agree with the "incorporation doctrine"; but if this Court continues to employ it in its constitutional jurisprudence, the Second Amendment right deserves to be incorporated against the states through the Fourteenth Amendment's Due Process Clause.

CONCLUSION

Last year, this Court refused to "pronounce the Second Amendment extinct." *Id.* at 2822. The Court

now has the opportunity to pronounce that the people's right to keep and bear arms is alive and well beyond the city limits of Washington, D.C.

For the reasons stated, this Honorable Court should reverse the decision of the Court of Appeals and invalidate the gun ordinances at issue as violations of the Fourteenth Amendment.

Respectfully submitted,

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