No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD, *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

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

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BRIEF FOR RESPONDENTS CITY OF CHICAGO AND VILLAGE OF OAK PARK

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QUESTION PRESENTED

Whether the Second Amendment's right to keep and bear arms is incorporated into the Due Process Clause or the Privileges or Immunities clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting possession of handguns in the home.

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STATEMENT OF THE CASE

Chicago's 1982 handgun ban attempts to cut down on homicide, aggravated assaults, and armed robbery, believing that convenient availability of handguns increased these crimes. The ban prohibits possession of unregistered firearms. Most handguns are prohibited, but rifles and shotguns that are not short-barreled, sawed-off or assault weapons can be regisitered.

McDonald and several other plaintiffs filed a lawsuit against Chicago, claiming they legally possess their handguns to exercise a right to self-defense (a right not listed in the Constitution). They claim the banning of these weapons violates their Second Amendment right to keep and bear arms as allegedly incorporated into the Fourteenth Amendment's Due Process Clause and Privileges or Immunities Clause. the long-established precedent *Slaughter-House* would need to be overruled. The National Rifle Association made the lawsuit a national issue by challenging Chicago with two lawsuits, one against Oak Park and one against Chicago.

After McDonald and the NRA were forced to narrow their appeals, the district court held that the Second Amendment is not incorporated into the Fourteenth Amendment and applicable to the States. The court of appeals then consolidated the three cases and confirmed, stating it was bound by this Court's prior decisions. They reasoned that current jurisprudence involving "selective incorporation" does not provide extensive justification to overrule precedent. The court of appeals observed that local differences are to be cherished, not cast aside in favor of establishing a nationwide rule. Their decision rests on the fact that federalism, or the power of states to make individual decisions, is a deeply rooted, concrete tradition of our country that is far superior to the right to carry any particular type of weapon.

ARGUMENT

II. THE DUE PROCESS CLAUSE DOES NOT INCORPORATE THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS.

A. Provisions Of The Bill Of Rights Apply To The States Under The Due Process Clause When "Implicit In The Concept Of Ordered Liberty."

This Court held long ago that "the provisions of the Bill of Rights apply only to the federal government and do not limit state or local governments." *Barron v. Mayor of Baltimore (1833).* This Court has recognized that the Due Process Clause of the Fourteenth Amendment incorporates only fundamental rights included in the Bill of Rights that are "implicit in the concept of ordered liberty" *Palko v. Connecticut (1937).* For example, in *Mapp v. Ohio (1961),* reasonable search and seizure was found to be such a right, and was incorporated into the Due Process Clause.

The petitioners claim that owning a gun is a fundamental right and must be incorporated. However, it is not. If it was, and the rules governing it were applicable to the entire country, self-defense as defense in trial would always be accepted. As it exists now, self-defense can be rejected as a defense. Thus, the petitioners' use of *Gitlow v. New York (1925)* is incorrect.

a. In context, implicit means "essential." So, for a constitutional provision to be incorporated, it must be determined that neither liberty nor justice would exist if the provision were to be sacrificed. This Court has upheld this notion in several cases. In *Duncan v. Louisiana (1968),* it was found that "if a civilized system could be imagined that would not accord with the particular protection," incorporation is not appropriate.

b. Incorporation is a necessary tool for democratic government, but in this particular case

it threatens two key points of federalism: (1) Conditions vary from one place to another, so residents of different locales should be able to address social problems in the ways they wish, and (2)Even if the first point does not apply, a single courageous state can experiment with novel ideas even of they are disagreeable.

The appropriateness of the right to own a certain type of gun is determined by idiosyncratic conditions and should be accepted or denied by the states themselves. If every city and county were completely identical, any one of them should still have the right to try something new. Without experimentation, it will never be know if a new law might have improved life for everyone. Handgun bans improve safety in many localities.

B. Regulation Or Prohibition Of Firearms, Particularly Handguns, Preserves Ordered Liberty.

We do not mean to say guns should be banned everywhere. Second Amendment incorporation hurts people who think it doesn't suit local conditions, so it should be rejected.

a. In all of the United States, handguns are used to kill more than all other weapons combined. More than two out of three fatalities from firearms caused by handguns, even though two-thirds of guns owned by Americans are rifles or shotguns. There is clear evidence as to the danger of guns in some communities, particularly handguns. They were used in 402 of the 412 firearm homicides in Chicago in 2008. Since 60 percent of all homicides are committed in urban areas, it's a reasonable assumption that handgun bans should be most prominent in high-population cities.

b. The people of Chicago want the ban to stay in place. They believe it is a reasonable approach to solving the homicide problem. It is, because handguns are purposefully designed to kill or inflict serious injury on another person. Just recently in *D.C. v. Heller (2008),* the term

"bear" in the Second Amendment was found to "refer to carrying for a particular purpose." Chicago citizens wish to preserve ordered liberty by protecting their personal security. Removing guns is a much better way to promote self-defense than allowing gun ownership to keep increasing. Police would be able to remove guns from gang members; because it is reasonable for police to search a person they deem to be wearing gang-style clothing. The petitioners attempt to graphically show that the handgun ban increased handgun homicides. However, they do not take into account other factors such as an increase in poverty or population that may also influence handgun homicides, so their inference of the graph is incorrect.

We contend that incorporation would not threaten state and local regulations involving schools and convicted felons, but it would place at risk many firearm regulations that reduce fear, violence, and injury (thus fostering ordered liberty). If this Court were to side with the petitioners, all levels of government would be banned from enacting regulations that (under some local conditions) would save lives.

c. England, Canada, Australia and the United States all stem from the same law and all value "ordered liberty." However, the first three have strict regulations on firearms that would be questionable with Second Amendment Incorporation. England, the country with which the United States has the most in common legally, bans handguns altogether.

C. The Treatment Of Firearms Rights By The States Does Not Support Second Amendment Incorporation.

Heller specifies that the Second Amendment protects weapons in "common use." As stated in *U.S. v. Miller (1939),* "people in the militia are called to use arms in common use at that time." The militia commonly uses semi-automatics and various high-destruction weapons. So, under the *Miller* rule, the federal government may not ban these highly dangerous military

weapons because of the *Heller* decision. We wish the Court to question the truth of the decision in *Heller* in light of the fact that states' firearms regulations vary widely, and do not stick to those in common use.

a. Even states recognizing firearms rights balance the interest of government with the burden on the people. For example, whether it would inhibit a person's right to defend themselves. Because self-defense is not a fundamental right, local governments have the right to say whether self-defense should be taken care of by increasing or decreasing run ownership,

b. In *City of Cleveland v. Turner* and *State v. Boen,* both state-court cases, handgun bans were upheld because other weapons were allowed. Thus, banning them did not infringe on the Second Amendment right to keep and bear arms. In the States, availability of other weapons permits bans of particular weapons.

This practice by the states has been going on the years and has yet to be questions at this level. In the 19th century, certain self-defense weapons were banned. This was for reasons unique to local conditions: it was necessary in cattle drives to ban the weapons.

D. Other Arguments of Petitioners And Supporters Should Be Rejected

1. The status of a right to self-defense is not at issue.

Leaving the Second Amendment unincorporated does not threaten the existence of self-defense. This right has not even been officially recognized as a fundamental right; it has only been acknowledged as a defense to criminal charges. Even assuming that it extends beyond this recognition doesn't support incorporation. In *United States v. Cruikshank (1876)*, the Court stated the "right to bear arms is not dependent upon the Constitution for its existence." As long as States allow other types of guns, such as the long guns allowed by Chicago and Oak Park, a persons' right to self-defense is alive and well.

Contrary to what the petitioners state in their brief, handguns are the least effective firearms for self-defense. They are hard to shoot accurately, and may have unintended consequences. In previous trials, handgun supporters proved that handguns are a dangerous choice for self-defense.

2. Incorporation of other Bill of Rights provisions does not support Second Amendment incorporation.

We ask this Court to avoid using the petitioners suggested “me too” approach to furthering government control of the people. The First, Fourth, Fifth, Sixth, and Eighth Amendment rights have been incorporated because they are core aspects of ordered liberty. Regulating a right to possess a highly dangerous weapon is under much more scrutiny as to its being necessary for ordered liberty. With this range of doubt, States should maintain the right to work out this issue.

Both regularizing the institutionalization of criminals by an impartial decision maker, the Fifth Amendment Grand Jury and Seventh Amendment Civil Rights Clauses appear to be just as important as the Second Amendment, yet neither have been incorporated.

II. THE COURT SHOULD ADHERE TO PRECEDENT REJECTING INCORPORATION UNDER THE PRIVILEGES OR IMMUNITIES CLAUSE.

A. This Court Has Repeatedly Held That The Privileges Or Immunities Clause Does Not Incorporate Any Provisions Of The Bill Of Rights.

a. In the *Slaughter-House Cases (1873),* the Chase court said the Privileges or Immunities Clause means only rights dependent on U.S. citizenship. Therefore, since there is a distinction between sate citizenship and U.S. citizenship, it is not “intended as a protection to the citizen of a State against the legislative power of his own state.”

b. In addition its decision in *United States v. Cruikshank (1876)*, this Court has rejected

incorporation of Bill of Rights provisions under the Privileges or Immunities Clause in *Presser v. Illinois (1886),* when it reaffirmed that the right to keep and bear arms is not a privilege or immunity of U.S. citizenship.

c. The Fifth, Sixth, Eighth and Seventh Amendments, were incorporated under the Due Process Clause, not the Privileges or Immunities Clause.

B. *Stare Decisis* Militates Strongly For Adherence To Precedent.

The petitioner wishes to overrule *Slaughter-House* and the many cases that have relied on it. This means they want to use a Privileges or Immunities Clause that includes all of the first eight amendments as well as a "broad array of preexisting national rights believed to be secured by all free governments." This is completely vague. Overruling *Slaughter-House* would upset strong reliance interests. Precedents need to be upheld because "the very concept of the rule of law underlying our own Constitution requires continuity over time, so a respect for precedent is indispensable." *Planned Parenthood v. Casey (1992). Stare decisis* is not applicable in every case, but here it clearly is, due to the antiquity, reliance, and easy workability of *Slaughter-House.*

C. History Provides No Basis For Incorporating The Second Amendment.

In *Heller*, this Court said that the people must understand the Constitution. However, history does not show public understanding of total incorporation.

1. a. The text of the Bill of Rights does not contain the word privileges or immunities. Thus, it is not clear that privileges or immunities can be considered rights. Furthermore, contemporary dictionaries do not find the words privileges or immunities synonymous with the word "right." If the founders aimed to tell the public Privileges or Immunities would incorporate the Bill of Rights, it was clearly in an indirect way that would not be obvious to the people.

b. According to *Heller*, cases surrounding a provision's ratification are important in determining their meaning. *Slaughter-House* was decided only five years after the Fourteenth Amendment's ratification, and did not incorporate any provisions of the Bill Of Rights. This Court should utilize both contemporary court decisions such as *Slaughter-House* and the people's opinions, and see that they do not agree with the petitioners argument.

c. The Fourteenth Amendment was indeed created to assisted freedmen, but only so that "law which operates upon one man shall operate equally upon all," as said by James Madison in an editorial. It is to prevent discriminating laws, not laws in which all people are affected equally.

2. Concerns about discriminatory disarmament do not show public understanding that the Fourteenth Amendment incorporates the Second Amendment.

The NRA argues that "[m]ore evidence exists that the right to keep and bear arms referenced in the Second Amendment was intended or commonly understood to be protected by the Fourteenth Amendment than exists for any other element of the Bill of Rights." However, Senators concerned about disarmament voiced the opinion only that equal treatment was needed, not specifically that all persons should be allowed to possess weapons. For example, Senator Sumner did not hint that the equality requirement in the Fourteenth Amendment wouldn't suffice in helping problem with freedmen's weapons being taken away. Senator Wilson observed freedmen being disarmed, but said he wanted a bill that would void laws allowing inequality based on color, race, descent or previous status of slavery.

If the public understood that the Fourteenth Amendment incorporates the Second Amendment, they would not readily accept arms bans. Contemporary people were not opposed

to state regulation. For example, several states banned weapons of 'common use' that *Heller* says are protected.

C. Petitioners Fail To Carry Their Burden Of Showing That This Court Should Abandon Its Traditional Due Process Approach To Incorporation.

The petitioners' argument has been rejected by post-Civil War justices, who were in the position to understand the meaning of The Privileges or Immunities Clause. Analyzing history around that time does not show that Slaughter-House and its progeny were incorrect. Rather, it shows no less than four interpretations of the Privileges or Immunities Clause. Such a wide array of views does not provide extensive justification for incorporation of an Amendment to the States.

CONCLUSION

The petitioner claims "one of the main purposes for the founding fathers' inclusion of the second amendment was to allow the people of the country to protect themselves from a tyrannical government." We would like to agree.

The judgment of the court of appeals should be affirmed.

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