No. 08-1497

In the Supreme Court of the United States

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

Petitioners

v.

CITY OF CHICAGO AND VILLAGE OF OAK PARK,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondents forthrightly acknowledge that "the Court has not decided whether, under its modern selective incorporation cases, the Second Amendment right to keep and bear arms in common use, including handguns, is incorporated into the Due Process Clause so that it binds the States." Opp. at 6. "This case," they admit, "is a vehicle for doing so," *id*. at 7, and thus the NRA's "petition[] should be granted" if the Court wishes to address this issue. *Id*. at 6. In addition, some thirty-four States as amici curiae are asking this Court to resolve the issue.

The Court should take up this issue because it is a fundamental question of federal law that has not been, but should be, settled by this Court. Admittedly, a Circuit split on the issue no longer exists, *see Nordyke v. King*, No. 07-15796 (July 29, 2009 order),[1] but according to Respondents, no such split ever should or will exist, Opp. at 8 n.4. That reality should not deter the Court from deciding whether all Americans, and not just residents of federal enclaves, enjoy a right that it has deemed "fundamental." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008).

The rights of some eighty million Americans who choose to keep and bear arms, as well as the powers of State and local governments to regulate

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[1] http://www.ca9.uscourts.gov/datastore/opinions/2009/07/29/0715763ebo.pdf.

those rights, are in need of clarification. See Brief of the States of Texas *et al.* 1 ("Without this Court's review, millions of Americans may be deprived of their Second Amendment right to keep and bear arms as a result of actions by local governments"); Brief of the State of California 1 ("the Court should extend to the states *Heller*'s core Second Amendment holding . . . but also provide guidance on the scope of the States' ability to reasonably regulate firearms").

Supreme Court decisions from 1876, 1886, and 1894 contain statements to the effect that the Second Amendment does not apply to the States. *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876); *Presser v. Illinois,* 116 U.S. 252, 265 (1886); *Miller v. Texas*, 153 U.S. 535, 538 (1894). But those cases were decided before the advent of the incorporation doctrine – indeed, before the Court even hinted that fundamental provisions of the Bill of Rights are incorporated through the Fourteenth Amendment. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 237-39 (1897).

Accordingly, none of those cases addressed whether the Second Amendment applies against the states through the Fourteenth Amendment. They addressed only whether the Second Amendment applies directly against the states – a question not presented here – and simply reiterated the bedrock holding of *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). *See also Heller*, 128 S. Ct. at 2812 (*Cruikshank*, "in the course of vacating the convictions of members of a white mob for depriving blacks of their

right to keep and bear arms, held that the Second Amendment does not *by its own force* apply to anyone other than the Federal Government.") (emphasis added).

Thus, while we submit that the panel opinion in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), was correct, it does appear that the majority of Circuits take a different view of the effect of the *Cruikshank* line – namely, that they foreclose incorporation and thus the generation of a meaningful disagreement of circuit authority. *See Maloney v. Cuomo*, 554 F.3d 56, 59 (2d Cir. 2009) (*per curiam*), *petition for writ of cert. filed* (No. 08-1592); Opp. n.3 (listing cases from the First, Second, Fourth, Sixth, and Ninth Circuits holding that the Second Amendment is not incorporated). *See also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls"); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (same). In other words, the courts of appeal have found that only this Court may decide whether the Second Amendment is incorporated.

This Court expressly stated in *Heller* that *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases," but reserved the question for another day as it was "not presented" in *Heller*. 128 S. Ct. at 2813 n.23. Thus, the courts of appeal appear to view the *Cruikshank* line as

still-binding authority, even if "*Heller* might be read to question [its] continuing validity." *Maloney*, 554 F.3d at 59 (citing *Rodriguez de Quijas*, 490 U.S. at 484). *See also* the opinion below, App. 3a (same).

Certiorari is appropriate where a court of appeals decision is based upon a point expressly reserved or left undecided in a prior opinion of this Court. *See, e.g., El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 161-162 (1999); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976). Certiorari is also appropriate where the question presented involves an issue upon which prior decisions of the Court are deeply inconsistent and in need of clarification, which as *Heller* noted in citing the tension between the *Cruikshank* line and modern incorporation precedent, is the case here. *See* Robert L. Stern *et al.*, *Supreme Court Practice* (8th ed. 2002) 235.

This Court has determined that the Second Amendment protects an individual right to keep and bear arms, including the possession of handguns in the home. *Heller*, 128 S. Ct. 2783. This Court must now "engage in the sort of Fourteenth Amendment inquiry required by our later cases," *id*. at 2813 n.23, to decide whether that Amendment incorporates the Second Amendment.

The panel below commented: "How the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict." App. 6a. Yet that jurisprudence would appear as subjective only if the right to keep and bear

arms is not recognized as protected by the Fourteenth Amendment's Due Process Clause, in that virtually every other substantive Bill of Rights guarantee has been so recognized.[2] Respondents articulate no principled basis for exclusion of a substantive guarantee from incorporation. Opp. at 10-11.

The panel undertook no analysis of "whether the right to keep and bear arms is 'deeply rooted in this nation's history and tradition.'" App. 6a, citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). It noted that the Seventh Amendment right to civil jury trials where the amount in controversy is over twenty dollars "also has deep roots." App. 6a. Actually, that right was recognized for the first time with the adoption of the Bill of Rights in 1791.

Again, the holding that the privilege against double-jeopardy is not fundamental, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), according to the panel, "was overruled in an opinion that paid little heed to history." App. 6a, citing *Benton v. Maryland*, 395 U.S. 784 (1969). But *Benton* traced the privilege to ancient Greece and Rome and to the English common law. 395 U.S. at 795.

Respondents would eschew "*Heller*'s focus on original intent as of 1791 for purposes of interpreting the words in the Second Amendment," and would give it meaning from "our laws and traditions in the past

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[2] *See Englom v. Carey*, 677 F.2d 957, 961-62 (2nd Cir. 1982) (recognizing incorporation of the Third Amendment right against quartering soldiers in homes).

half century." Opp. at 11, citing *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003). But if the Due Process Clause of the Fourteenth Amendment prohibits a State from banning same-sex sodomy, surely it prohibits a State from prohibiting the preservation of one's life with a handgun in the home. "In our tradition the State is not omnipresent in the home." *Id*. at 562.

Respondents criticize *Nordyke*'s reliance on the "post-Civil War period," Opp. at 11 n.5, despite that being when the Fourteenth Amendment was adopted. In denying that the Amendment's framers had any common intent, they rely on opponents such as Senator Thomas A. Hendricks. Opp. at 29. Hendricks unsuccessfully moved to strike out the section of the Freedmen's Bureau Act declaring that the rights to "personal liberty [and] personal security . . . includ[e] the constitutional right to bear arms," and referring to "the free enjoyment of such immunities and rights." Cong. Globe, 39th Cong., 1st Sess., 3412 (1866). This was enacted by over two-thirds of the same Congress that proposed the Fourteenth Amendment. § 14, 14 Stat. 176-177 (1866).

The panel slights reliance on Blackstone for the proposition that "the right to keep and bear arms is 'deeply rooted'" because "Blackstone was discussing the law of another nation," and the Amendment at issue was adopted in 1868. App. 7a. Yet England was the nation from which the American traditions of liberty were derived and improved upon. The Framers of both the Second and Fourteenth Amendments were influenced by Blackstone's exposition of the right of

having arms to protect personal security and personal liberty.[3]

Respondents maintain that in urban areas, the Second Amendment undermines ordered liberty. Opp. at 12. This would provide the basis for the panel's suggestion that a state may decide "that people cornered in their homes must surrender rather than fight back," which "would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime . . . ." App. 8a.

This would flaunt our legal traditions. "Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society." Blackstone, *Commentaries* *4. As Justice James Wilson wrote: "The defence of one's self, justly called the primary law of nature, is not, nor can it be abrogated by any regulation of municipal law." 2 *Works* at 496. "[T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. " *Heller*, 128 S. Ct. at 2817.

By requiring non-resistance to deadly force, the

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[3] *E.g.,* 1 *Writings of Samuel Adams* 317 (G.P. Putnam's Sons 1904); 2 *Works of the Honourable James Wilson* 496 (Lorenzo Press 1804); and compare Cong. Globe, 39th Cong., 1st Sess., 1117 (1866) (Rep. James Wilson) with Freedman's Bureau Act, 14 Stat. 176-177 (1866). Blackstone was the "preeminent authority on English law for the founding generation." *Alden v. Maine*, 527 U.S. 174, 179 (1999).

State would literally "deprive [a] person of life . . . without due process of law." But in Justice Holmes' memorable words:

> Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.

Brown v. United States, 256 U.S. 335, 343 (1921).

The "States-as-laboratories" dictum is cited as an argument against incorporation. *See* Opp. at 16-17; App. 9-10a, quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But as *New State Ice Co.* states:

> It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the Federal Constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.

285 U.S. at 279-80, citing, *inter alia*, *Near v.*

Minnesota, 283 U.S. 697 (1931) ("the theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press.").

The panel concluded: "Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon." App. 10a. Yet the Second Amendment embodied a right "inherited from our English ancestors," *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897), while "federalism was the unique contribution of the Framers to political science and political theory." *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).

Federalism divides authority "for the protection of individuals," *New York v. United States*, 505 U.S. 144, 181 (1992), and "is one of the Constitution's structural protections of liberty," *Printz v. United States*, 521 U.S. 898, 921 (1997). "And to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual." *Pointer v. Texas*, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring).

Similarly, respecting both the arms right and the militia function have the ultimate purpose of protecting individual liberty. While the individual right to keep and bear common arms does indeed support the militia, Opp. at 12, it also protects "the security of a free state" by allowing defense of self and others from criminality.

Since this Court has never ruled on whether the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right, Opp. 6, it would not need to overrule any of its precedents to do so.[4] When *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937), decided that the First Amendment right to assemble is incorporated, it *embraced* the words of *Cruikshank*, 92 U.S. at 552: "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." This Court could just as easily rely on *Cruikshank* to recognize that the Second Amendment is incorporated, for it treated the arms right (like assembly) as a preexisting right which antedated the Constitution. 92 U.S. 551, 553.[5]

When *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), *rev'd. on other grounds, Mapp v. Ohio*, 367 U.S. 643 (1961), decided that the Fourth Amendment right

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[4]When it is stated that a State law violates the First Amendment, this is only shorthand for saying that the law violates substantive due process, not that the First Amendment actually applies. See Nelson Lund, "Anticipating Second Amendment Incorporation: The Role of the Inferior Courts," 59 *Syracuse L. Rev*. 185, 193 (2008).

[5]Respondents aver that *Presser* held the right to keep and bear arms not to be "a privilege or immunity of United States citizenship." Opp. at 18, citing 116 U.S. at 265. Yet the Second Amendment discussion in *Presser* contains not one word about any privilege or immunity of citizenship or the Fourteenth Amendment.

against unreasonable search and seizure is incorporated, it did not mention, much less overrule, *Miller v. Texas*, which held the Second and Fourth Amendments not to apply directly to the States and refused to consider a Fourteenth Amendment Privileges-or-Immunities argument. 153 U.S. at 538-39. Holding the Second Amendment to be incorporated would not require any different treatment.

Since this Court has never decided the issue of Second Amendment incorporation, no reasonable reading of *Cruikshank* and its progeny would justify reliance on the issue as having been settled. Some judges may have "overread" such cases, just as "they overread [*United States v. Miller*, 307 U.S. 174 (1939)]," *Heller*, 128 S. Ct. at 2815 n.24. While that overreading "cannot nullify the reliance of millions of Americans . . . upon the true meaning of the right to keep and bear arms," such cases would not "necessarily have come out differently under a proper interpretation of the right." *Id.*[6] Others may and

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[6]*See Heller*, 128 S. Ct. at 2816 (approving prohibitions on carrying concealed weapons, possession by felons and the mentally ill, and carrying firearms in sensitive places); *Peoples Rights Organization, Inc. v. Columbus*, 152 F.3d 522, 538-39 (6th Cir. 1998) (invalidating "assault weapon" ban as vague, but adding in dictum that the Second Amendment protects only a "collective" militia right which is not incorporated); *Cases v. United States*, 131 F.2d 916, 921-22 (1st Cir.1942) (upholding conviction for receipt of firearm by person convicted of crime of violence and stating in dictum that the Second Amendment is inapplicable to States).

should come out differently.[7] The ordinances of Chicago and Oak Park here, which prohibit possession of a handgun even in the home, fall in the latter category.[8]

CONCLUSION

This Court should grant this petition for a writ of certiorari.

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[7] *E.g.*, *Love v. Pepersack*, 47 F.3d 120, 123-24 (4th Cir. 1995) (police violated state law in denying woman's application to purchase firearm based on incomplete arrest record, when she had no disabling conviction; court held that Second Amendment protected a "collective" militia right inapplicable to the states).

[8] Petitioners *McDonald et al.* in the related case claim that "[i]t does not appear that the challenged provisions had been enforced against the NRA plaintiffs." Cert Pet., No. 08-1521, at 6. But Petitioners here alleged that, but for the challenged ordinances, they would forthwith obtain handguns, or retrieve handguns they already own and must store outside the jurisdictions, and keep them in their homes, and also that numerous NRA members must divert their travel plans to avoid the jurisdictions. Chicago Compl. ¶s 14-19; Oak Park Compl. ¶s 18-22. Petitioners were not required to violate the law to challenge it, particularly where enforcement was certain. *See, e.g., Steffel v. Thompson*, 415 U.S. 452, 462 (1974) ("[A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding"); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268-74 (1981); *Buckley v. Valeo*, 424 U.S. 1, 117 (1976).

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