Nos. 08-4241, 08-4243 and 08-4244 (Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

National Rifle Association of America, Inc., et al.,
Plaintiffs-Appellants,

v.

City of Chicago and Village of Oak Park,
Defendants-Appellees.

Otis McDonald, et al.,
Plaintiffs-Appellees,

v.

City of Chicago,
Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Illinois
Case Nos. 08-C-3645, 08-C-3696, and 08-C-3697
The Honorable Judge Milton I. Shadur

AMICUS CURIAE BRIEF OF SIXTY-NINE STATE LEGISLATORS FROM ILLINOIS, INDIANA, AND WISCONSIN

Supporting Appellants' Prayer for Reversal of the Judgment

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AMICUS CURIAE BRIEF

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Interest of *Amici Curiae*

Amici curiae are sixty-nine State legislators from Illinois, Indiana, and Wisconsin. These legislators, whose names and offices are listed in an appendix to this brief, desire a timely and legally sound decision from this court that will guide them and their legislative colleagues in respecting the constitutional rights of the citizens of their States. This brief brings to the court's attention arguments and authorities that supplement the arguments presented in the Appellants' briefs in this case.

The parties have consented to the filing of this brief, and a Rule 29(a) motion has been filed.

Summary of Argument

The Second Amendment right recently recognized in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), is applicable to the States under the Supreme Court's Fourteenth Amendment substantive due process jurisprudence. This court is required to apply that jurisprudence now, without waiting for the Supreme Court to do so. Lower courts have repeatedly taken this approach with respect to other constitutional rights, and the Supreme Court has repeatedly approved their doing so.

Carrying out this task does not require the court to disregard any Supreme Court decision. This court can best perform its role in our hierarchical judicial system by issuing a well reasoned decision applying the legal analysis that the Supreme Court has adopted in its modern incorporation decisions.

Argument

I. *Cruikshank* and *Presser* left open the issue of incorporating the right to arms under substantive due process

United States v. Cruikshank, 92 U. S. 542, 552-553 (1875), and *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886), relied on *Barron v. Baltimore*, 32 U.S. 243 (1833), for the proposition that the Second Amendment, like the other provisions of the Bill of Rights, applies of its own force only to the federal government. *Cruikshank* and *Presser* also implicitly relied on the *Slaughter-House Cases*, 83 U.S. 36, 79 (1873), for the proposition that the only rights protected by the Privileges or Immunities Clause of the Fourteenth Amendment are those that "owe their existence to the Federal government, its National character, its Constitution, or its laws."[1] These

[1] *Cruikshank*, 92 U.S. at 549 (citing *Slaughter-House*); *Presser*, 116 U.S. at 267 (right to associate as a military company "not an attribute of national citizenship").

conclusions are now well settled in the Supreme Court's jurisprudence.[2]

When *Cruikshank* declared that the Second Amendment "has no other effect than to restrict the powers of the national government," 92 U.S. at 553, it simply reaffirmed what *Barron v. Baltimore* had established, and perhaps implicitly reaffirmed *Slaughter-House*'s interpretation of the Privileges or Immunities Clause.[3] Similarly, *Presser*'s conclusion that the right at issue is not "expressly or by implication placed under [the federal government's] jurisdiction," 116 U.S. at 266 (quoting *Cruikshank*), means only that the Second Amendment does not apply to State legislation of its own force or by force of the Privileges or Immunities Clause.

A. *Cruikshank*'s state action analysis left incorporation under substantive due process open

Cruikshank arose from a Reconstruction Era incident known to history as the Colfax Massacre, a gun battle that resulted in the killing of a large

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[2] *See, e.g.*, *Maxwell v. Dow*,176 U.S. 581, 587-97 (1900), overruled in part on other grounds, *Williams v. Florida*, 399 U.S. 78 (1970); *Twining v. New Jersey*, 211 U.S. 78. 93-99 (1908), overruled in part on other grounds, *Malloy v. Hogan*, 378 U.S. 1 (1964); *Adamson v. California*, 332 U.S. 46, 51-53 (1947), overruled in part on other grounds, *Malloy v. Hogan*, 378 U.S. 1 (1964).

[3] Those portions of the indictment that seemed most plausibly to rest on the Privileges or Immunities Clause were disposed of on Sixth Amendment grounds. 92 U.S. at 557-59.

number of blacks who had gathered together for mutual protection from a white paramilitary group. The federal government prosecuted the white defendants under the Enforcement Act of 1870, which made it a crime for two or more persons to band or conspire together with intent to hinder or prevent a citizen in the "free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States." *Cruikshank*, 92 U.S. at 548 (quoting Act of May 31, 1870, ch. 114, 16 Stat. 141). The defendants were convicted on several counts, including two charges that specified intent to interfere with the "right to keep and bear arms for a lawful purpose." 92 U.S. at 553.

The Court held that these counts could not serve as a basis for indictment. "This [i.e. the right of bearing arms for a lawful purpose] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." *Id.* The Second Amendment means only that Congress may not infringe the right, "leaving the people to look for their protection against any violation by their fellow-citizens" to the police power of the States, a power that was in this respect not removed from the State governments or delegated to the federal government. *Id.* This conclusion has no bearing on the issues now before this court.

B. *Presser*'s Privileges or Immunities Clause analysis left incorporation under substantive due process open

Presser upheld an Illinois statute that forbade bodies of men to associate together as military organizations, or to drill or parade with arms unless authorized by law. On the authority of *Barron* and subsequent cases, including *Cruikshank*, the Court once again held that the Second Amendment of its own force "has no other effect than to restrict the powers of the national government." 116 U.S. at 265.

Presser also rejected an argument that the statute violated the Privileges or Immunities Clause. Quoting *Cruikshank*, the Court held that this constitutional provision covers only those rights or privileges "expressly or by implication placed under [the federal government's] jurisdiction." *Id.* at 266. Because the Court could identify no provision of the Constitution or statutes of the United States conferring a right to form private military organizations, or to conduct private military drills, the Privileges or Immunities Clause had no applicability. *Id.* at 267. This conclusion has no bearing on the substantive due process issue now before this court.

C. The due process discussions in *Cruikshank* and *Presser* left the incorporation issue open

Consistent with its focus on state action, *Cruikshank* also rejected those portions of the indictment charging that the defendants acted with the intent to deprive the victims "of their respective several lives and liberty of person without due process of law." 92 U.S. at 553-54. The Fourteenth Amendment's Due Process Clause, said the Court, "adds nothing to the rights of one citizen as against another." *Id.* at 554. *Cruikshank*'s due process holding turns on what is now called the state action doctrine, not on any view of substantive due process.

Presser summarily dismissed claims based on due process, as well as on bill of attainder and *ex post facto* grounds, as "so clearly untenable as to require no discussion." 116 U.S. at 268. If one reads this as a casual and implicit rejection of the entire doctrine of substantive due process, which is the only way it could have any bearing on the case now before this court, it has already been overruled by many twentieth century Supreme Court decisions.

In sum, neither *Cruikshank* nor *Presser* considered or resolved whether the Second Amendment right was incorporated through substan-

tive due process. These two decisions stand only for the well-established propositions that the Second Amendment does not of its own force restrict the States, and that the right to keep and bear arms is not among the rights protected by the Privileges or Immunities Clause of the Fourteenth Amendment. For further detail, see Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse L. Rev. 185, 187-91 (2008).[4]

II. *Quilici* left open the issue of incorporating the right to arms under substantive due process

The court below mistakenly concluded that *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), forecloses incorporation of the right to arms under the Supreme Court's modern substantive due process analysis. In *Quilici*, this court held "that the second amendment does not apply to the states." *Id.* at 270. The court rested this conclusion on *Presser*'s statement that "[t]he Second Amendment declares that it shall not be infringed, but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other

[4] Downloadable at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1239422

effect than to restrict the powers of the National government." *Id.* at 269 (quoting *Presser*, 116 U.S. at 265). As shown above, *Presser* held only that the Second Amendment does not itself apply to the States, and that the Privileges or Immunities Clause does not make it applicable to the States. Because *Presser* itself went no further than this, *Quilici* could not possibly have decided more than this on *Presser*'s authority.

The *Quilici* court also noted that the Supreme Court has "rejected the proposition that the entire Bill of Rights applies to the states through the fourteenth amendment." 695 F.2d at 270 (citations omitted). This is unquestionably correct. The Supreme Court has indeed rejected the theory of total incorporation,[5] and this court was and is precluded from adopting that theory. At no point, however, does the *Quilici* opinion address whether the Second Amendment is applicable to the States through the Due Process Clause under the principles set out in the Supreme Court's modern incorporation case law. Accordingly, circuit precedent does not preclude this court from addressing that question now.

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[5] *E.g.*, *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972).

III. Supreme Court precedent requires incorporation of the Second Amendment right through the Due Process Clause

Barron v. Baltimore has never been overruled. Technically, it remains true that the various provisions of the Bill of Rights do not themselves apply to the States. Some of the same *rights* listed in the first eight amendments are also protected by the Fourteenth Amendment's Due Process Clause, but those amendments themselves still apply only to the federal government. This was clear in the Court's early incorporation decisions, which did not distinguish between incorporation and substantive due process more generally.[6] When the Court began issuing decisions declining to find any difference between the rights that are protected both by the Bill of Rights and by substantive due process,[7] it became common to say things like, "The First Amendment forbids Texas to outlaw desecration of the flag." This is a shorthand that everyone now employs, but it is still only shorthand. Technically, it is the Due Process Clause of

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[6] *E.g.*, *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 235-366 (1897); *Stromberg v. California*, 283 U.S. 359, 368 (1931).

[7] *E.g.*, *Ker v. California*, 374 U.S. 23 (1962); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Pointer v. Texas*, 380 U.S. 400 (1965). The one exception is the unanimity requirement for criminal jury verdicts, which is imposed on the federal government by the Sixth Amendment, but not on the States by due process. *Apodaca v. Oregon*, 406 U.S. 404 (1972).

the Fourteenth Amendment, not the First Amendment as such, that forbids Texas to outlaw flag desecration.

The most general description of the rights protected by substantive due process encompasses those rights that the Court regards as "fundamental." The most demanding test of fundamentality articulated by the Court in the incorporation context was adopted in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), where the Court said that the test is whether a particular immunity is "implicit in the concept of ordered liberty," meaning that the immunity must be "of the very essence of a scheme of ordered liberty." The Court offered an example from the First Amendment: freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom." *Id.* at 327.

Under this most stringent of standards, the text of the Constitution itself demands the incorporation of Second Amendment rights. The Second Amendment, unlike any other provision of the Bill of Rights, includes a prefatory phrase expressing its sense of the fundamental importance of the Amendment. Moreover, that phrase contains language whose meaning is virtually identical to that of the language in the *Palko* incorporation test. The Supreme Court's reference to those rights that are "of the very essence

of a scheme of ordered liberty" is nothing but a slightly reworded version of the Second Amendment's reference to what is "necessary to the security of a free State." It is as though the Court took its legal test for incorporation directly from the Second Amendment itself, and this stunning similarity gives the right to arms a much stronger textual claim to being "fundamental" in the Court's stated sense of the term than any other right listed in the Bill of Rights.[8]

It is possible to conceive of a scheme of ordered liberty that does not include the right to keep and bear arms. But it is at least as easy to conceive of such a scheme that does not include our right of free speech, such as the scheme of ordered liberty in England, where this constitutional right has never existed. If the *Palko* test requires incorporation of the right of free speech, as *Palko* said it does, the very text of the Second Amendment requires that the right to keep and bear arms must be incorporated under the same test.

Even if this court does not regard the textual argument based on *Palko*

[8] It is, of course, a well regulated militia that the Second Amendment says is necessary to the security of a free state. That, however, does not detract from the fact that the constitutional text identifies the security of a free state as the purpose served both by a well regulated militia and by the constitutional protection extended to the right of the people to keep and bear arms.

as dispositive, the Second Amendment must unquestionably be incorporated under the Supreme Court's more recent and less stringent test in *Duncan v. Louisiana*, 391 U.S. 145 (1968). *Duncan* jettisoned *Palko*'s insistence that a right be *essential* to a scheme of ordered liberty, and replaced it with a requirement that the right be "necessary to an *Anglo-American* regime of ordered liberty." *Id.* at 149 n.14 (emphasis added). This alteration of the standard was articulated in the realm of criminal procedure, but the Court has never suggested that some different standard would apply elsewhere.[9] Thus, *Duncan* merely adjusted the *Palko* test by adopting an historical rather than philosophic mode of deciding what rights are "necessary" to our scheme of ordered liberty.

The right to arms unquestionably meets this revised, historical test. Like the right to a jury trial in criminal cases, which was at issue in *Duncan* itself, "[i]ts preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689." *Duncan*, 391 U.S. at 151. That English Declaration and Bill of

[9] *Duncan* has already been applied outside the context of criminal procedure. *Mayes v. Ellis*, 409 U.S. 943 (1972) (summarily affirming *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La.)).

Rights states "[t]hat the subjects which are Protestants may have arms for their defence suitable to their Conditions and as allowed by Law." 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689).

The right to arms, moreover, like the right to a criminal jury, "came to America with English colonists, and received strong support from them." *Duncan*, 391 U.S. at 152. When the Second Amendment was adopted, almost half the States with bills of rights included provisions protecting the right to arms,[10] and no State sought to deny that right to its citizenry.

The right protected by the Second Amendment thus meets the Supreme Court's test of what is "fundamental" far more easily than other rights that have already been incorporated, some of which were never even included in the fundamental documents of the English constitution.[11]

Finally, *Heller* itself comes very close to characterizing the right to arms as a fundamental right in the *Duncan* sense of the term. In the

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[10] Donald S. Lutz, *The States and the U.S. Bills of Rights*, 16 S. Ill. U. L.J. 251, 259-60 tbl. III (1992).

[11] Conspicuous examples include the religious rights protected by the First Amendment, the First Amendment rights of speech and press, the Fifth Amendment's prohibition against uncompensated takings of private property, and several of the Fifth and Sixth Amendment rights of the criminally accused. Lutz, *supra*, at 253 tbl. I (listing documents that first protected Bill of Rights guarantees).

course of showing that the right to arms in the English Bill of Rights was "an individual right protecting against both public and private violence," 128 S. Ct. at 2798-99, *Heller* emphasizes that this was "one of the fundamental rights of Englishmen," *id.* at 2798. *Heller* also stresses that the inherent right of self-defense has been central to the Second Amendment right, *id.* at 2817, which further confirms that the right to arms must be "fundamental" in the sense articulated in *Duncan*'s incorporation test.

The Supreme Court's incorporation jurisprudence is the law, and it is binding on this court. Taking that jurisprudence seriously as law leads inexorably to the conclusion that the Fourteenth Amendment Due Process Clause protects the right of the people to keep and bear arms against action by the States, just as the Second Amendment protects that right against the federal government.

IV. This court is obliged to decide the due process incorporation issue on the merits

Prior to *Heller*, lower courts had declined to perform the kind of Second Amendment incorporation analysis presented above, which *Heller* has now said is "required." 128 S. Ct. at 2813 n.23. Whatever the reason for this reluctance, it was not a response to instructions—either express or

implicit—from the Supreme Court. That Court has indeed said that it reserves to itself the role of reconsidering or overruling its prior decisions, *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997), but it has never said that the lower courts should wait for the Supreme Court to make the initial application of well-settled incorporation principles to specific provisions of the Bill of Rights.

In *Heller*, the Court had no reason to remind itself that it will be required to perform this analysis when it reviews a Second Amendment incorporation case. This reminder could only have been directed at the courts below, including this court. And *Heller*'s comment was emphatically a reminder, not a newly announced rule. The lower courts have repeatedly, and with the Supreme Court's approval, applied modern incorporation analysis to important constitutional rights before the Supreme Court itself has done so.

In *United States* ex rel. *Latmore v. Sielaff*, 561 F.2d 691, 693 n.2 (7th Cir. 1977), for example, this court treated the Sixth Amendment right to a public trial as applicable to the States. Although this decision came before the Supreme Court so held in *Gannett Co. v. DePasquale*, 443 U.S. 368, 379 (1979), the Court did not rebuke the Seventh Circuit. Instead, it

denied a petition for certiorari. 434 U.S. 1076 (1978).

The Third Circuit had reached the same conclusion even earlier, in *United States* ex rel. *Bennett v. Rundle*, 419 F.2d 599 (3rd Cir. 1969) (en banc). The Supreme Court also denied a petition for certiorari in that case, 409 U.S. 916 (1972), and twice cited the Third Circuit's opinion with approval in *Waller v. Georgia*, 467 U.S. 39, 46, 49 n.9 (1984).

In an opinion by Judge John Minor Wisdom, a three-judge district court considered incorporation of the Seventh Amendment right to a civil jury. *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972). Although the court concluded that substantive due process did not require incorporation, it did so only after performing an analysis based on the Supreme Court's *Duncan* principles. Far from questioning this approach, or suggesting that the court below should have waited for the Supreme Court to undertake this task, the Supreme Court summarily affirmed the decision. *Mayes v. Ellis*, 409 U.S. 943 (1972).

In *United States* ex rel. *Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965), the Second Circuit was presented with a habeas petition raising a double jeopardy claim. The defendant had been convicted of first degree murder in a trial at which the jury had been given the option of convicting him on

that charge or on one of several lesser homicide charges. He appealed and the conviction was reversed on procedural grounds. The defendant was tried again under the same indictment, and again convicted of first degree murder. He appealed, and this conviction was also reversed on procedural grounds. In a third trial, on the same indictment, the defendant was convicted of second degree murder.

Although the Supreme Court had not yet held the Double Jeopardy Clause applicable to the States, then-Judge Thurgood Marshall wrote a lengthy and complex opinion concluding that due process was violated when the State reprosecuted the defendant for first degree murder after the first conviction was reversed. The court held that it was also unconstitutional to convict him of second degree murder in the third trial because that trial was based on an indictment that included the charge of first degree murder. The Supreme Court denied certiorari in the case, *Mancusi v. Hetenyi*, 383 U.S. 913 (1966), and later went out of its way to cite the Second Circuit's opinion with approval in a unanimous double jeopardy case. *Price v. Georgia*, 398 U.S. 323, 331-32 (1970).

Even if some of these decisions might have been questioned because of their treatment of arguably adverse Supreme Court precedent, the

Supreme Court itself in fact did not question them. In any event, no such adverse precedent affects the cases now before this court. Neither *Presser* nor *Cruikshank* held that the right to keep and bear arms is unprotected by substantive due process, and *Heller* has reminded the lower courts that they are *required* to perform the analysis mandated by the Supreme Court's modern incorporation jurisprudence.

This court is obliged to take the Supreme Court's incorporation jurisprudence seriously as law, not to abdicate its own role as a court of law. If this court issues a well reasoned opinion applying that jurisprudence, it will assist the Supreme Court when it faces the issue of Second Amendment incorporation directly, as it presumably will in due course. Such a well reasoned opinion from this court will conclude that the right to keep and bear arms is protected from infringement by the State governments, just as *Heller* has now held that it is protected against the federal government.

Conclusion

This court should reverse the judgment below, and hold that the right to keep and bear arms is protected against action by the States under the Fourteenth Amendment, just as it is protected against action by the federal government under the Second Amendment.

February 6, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the *amici curiae*, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 3858 words.

Dated: February 6, 2009

GAINES & PULJIC, LTD.

s/Peter Ordower
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Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

The undersigned hereby certifies that I have filed a version of this brief electronically in PDF format, pursuant to Circuit Rule 31(e).

s/Peter Ordower
Peter Ordower

APPENDIX

NAMES AND OFFICES HELD BY AMICI CURIAE

Illinois

Rep. David Reis, lead Illinois Legislator

Sen. Will R. Haine

Sen. Linda Holmes

Sen. Deanna Demuzo

Sen. Mike Jacobs

Rep. Mark H. Beaubien, Jr.

Rep. Daniel V. Beiser

Rep. Bob Biggins

Rep. William B. Black

Rep. Mike Bost

Rep. John E. Bradley

Rep. Rich Brauer

Rep. John D. Cavaletto

Rep. Jim Durkin

Rep. Roger L. Eddy

Rep. Robert F. Flider

Rep. Gary Hanning

Rep. Jay C. Hoffman

Rep. Donald L. Moffitt

Rep. Richard P. Myers

Rep. Brandon W. Phelps

Rep. Raymond Poe

Rep. Robert W. Prichard

Rep. Harry R. Ramey, Jr.

Rep.Chapin Rose

Rep. Jim Sacia

Rep. Angelo Saviano

Rep. Timothy L. Schmitz

Rep. Ron Stephens

Rep. Ed Sullivan, Jr.

Rep. Michael W. Tryon

Rep. Patrick J. Verschoore

Rep. Ronald A. Wait

Rep. Jim Watson

Rep. Dave Winters

Indiana

Senator Johnny Nugent, lead Indiana legislator

Senator John Waterman

Senator Brent Steele

Senator Greg Walker

Senator Brandt Hershman

Senator Jean Leising

Senator Brent Waltz

Senator Sue Landske

Senator Jim Buck

Senator Richard D. Bray

Representative Cindy Noe

Representative Kathy Kreag Richardson

Representative William J. Ruppel

Representative Jerry Torr

Representative P. Eric Turner

Representative Jackie Walorski

Representative Matt Bell

Representative Bruce Borders

Representative Brian C. Bosma

Representative Woody Burton

Representative Bob Cherry

Representative Jacque Clements

Representative Cleo Duncan

Representative Bill Friend

Representative Sean Eberhart

Representative Eric Gutwein

Representative Eric A. Koch

Representative Matt Lehman

Representative Dan J. Leonard

Representative Mark Messmer

Representative Timothy Neese

Wisconsin

Rep. Scott Gunderson, lead Wisconsin legislator

Rep. Marlin Schneider

Rep. Leah Vukmir

PROOF OF SERVICE

The undersigned, counsel for the amici curiae, hereby certifies that on February 6, 2009, two copies of the Amicus Curiae Brief were served by mail and a digital version containing the brief and appendix were delivered electronically to counsel for all parties in the case.

Dated: February 6, 2009

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