Nos. 08-4241 and 08-4243 (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.

BRIEF AND REQUIRED SHORT APPENDIX FOR PLAINTIFFS-APPELLANTS NATIONAL RIFLE ASSOCIATION, *et. al.*

Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division, Case Nos. 08-3696, 08-3697
Honorable Milton I. Shadur Presiding

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ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 08-4241

Short Caption: National Rifle Associationof America, Inc. v City of Chicago

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Rifle Association of America, Inc.; Dr. Kathryn Tyler; Van F. Welton;

and Brett Benson

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Stephen P. Halbrook; Brenner Ford Monroe & Scott, Ltd.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: _____ Date: January 27, 2009

Attorney's Printed Name: Stephen P. Halbrook

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 08-4241

Short Caption: National Rifle Association, et al. v. City of Chicago

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Attorney's Printed Name: William N. Howard

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Statement of Jurisdiction

This is a consolidated appeal from final judgments of the United Sates District Court for the Northern District of Illinois.[1] The District Court had jurisdiction over these actions pursuant to 28 U.S.C. § 1331 as these actions arose under the United States Constitution and laws of the United States, and under 28 U.S.C. § 1343(3), in that these actions seek to redress the deprivation, under color of the laws, statutes, ordinances, regulations, customs and usages of the State of Illinois and political subdivisions thereof, of rights, privileges or immunities secured by the Second and Fourteenth Amendments to the United States Constitution.

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1291. The NRA and other plaintiffs below (collectively, "NRA Plaintiffs") appeal from final judgments of the District Court, entered on December 18, 2008, in which the court dismissed two counts of the NRA Plaintiffs' complaints, holding that the court was bound by this Court's decision in *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), which held that the Second Amendment does not apply to the states. (SA-9, 17, 20.) In minute orders of the same date, the District Court dismissed *with prejudice* the third counts of the NRA Plaintiffs' complaints. (SA-15, 19.) The dismissal of all three counts amounts to a final, appealable order and judgment because it disposes of all claims as to all parties.

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[1] To adhere to this Court's January 15, 2009 Order, Appellant NRA counsel provided their draft brief to and conferred with McDonald's counsel on January 22, 2009 (six days before the briefs were due). McDonald's counsel responded that their appellate arguments were different and would not overlap with those in the NRA draft. Although to date NRA counsel has not been provided with a draft of the McDonald brief, no reason exists to believe the briefs would be duplicative.

The NRA Plaintiffs timely appealed the District Court's judgment of December 18, 2008. The NRA Plaintiffs filed their Notices of Appeal the same day, well within the 30-day limit set forth in Fed R. App. P. 4(a)(1). (SA-23, 25.)

Statement of Issues Presented

1. Whether a prohibition on possession of handguns, including in the home, violates the right of the people to keep and bear arms as guaranteed in the Second Amendment and incorporated into the Fourteenth Amendment to the United States Constitution.

2. Whether a prohibition on possession of handguns, including in the home, with exemptions for selected few, deprive persons of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

Statement of the Case

This consolidated appeal is the result of two separate actions filed by the NRA Plaintiffs against the Village of Oak Park and the City of Chicago. The complaint against the Village of Oak Park initiated Case No. 08-3696, *see* A-42, and the complaint against the City of Chicago initiated Case No. 08-3697. (A-31.) Count One of the complaints in each case alleges that the prohibitions on possession of handguns in the Chicago and Oak Park ordinances infringe on the right of the people to keep and bear arms as guaranteed by the Second Amendment to the U.S. Constitution, which is incorporated into the Fourteenth Amendment and is thus applicable to states and localities. (*See* A-35-36, 47.) Count Two alleges that the prohibitions coupled with exemptions of selected persons deny the NRA Plaintiffs

the equal protection of the laws. (A-36-38, 48.) The answers filed by Chicago and Oak Park deny these allegations and assert that the complaints fail to state a claim upon which relief can be granted. (A-58, 60, 62, 70, 71, 73.)

On October 22, 2008, in both cases, the NRA Plaintiffs filed motions under Fed. R. Civ. P. 16, requesting that the court narrow the issues to be litigated by ruling on the issue of whether the Second Amendment applies to the states, and thus to local handgun ordinances, by incorporation into the Fourteenth Amendment's due process clause. (A-74, 81.) The parties agreed that, if the court ruled that the Second Amendment does not apply to the states by incorporation into the Fourteenth Amendment, the NRA Plaintiffs' Second and Fourteenth Amendment claims could not proceed.

On October 28, 2008, the court granted the parties leave to file briefs on the incorporation issue, *see* A-89, 90, and on December 1, 2008, the NRA Plaintiffs filed their briefs in both cases. (A-91, 106.) Notably, neither the Village of Oak Park nor the City of Chicago filed briefs.

In response to the NRA Plaintiffs' Rule 16 briefs, on December 4, 2008, the District Court ruled that it was bound by this Court's decision in *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) that the Second Amendment does not apply to the states. (SA-6)

On December 9, 2008, the parties of both actions appeared before the District Court. At that time, the Village of Oak Park and the City of Chicago made oral motions to dismiss the NRA Plaintiffs' Second and Fourteenth Amendment claims

based on the court's ruling that the Second Amendment does not apply to the states. On December 18, 2008, the court granted those motions, and also dismissed with prejudice on separate grounds the claims the NRA Plaintiffs brought under 18 U.S.C. § 926A. (SA-15, 16, 18, 19.) The dismissal of all three counts of the NRA Plaintiffs' complaints resulted in dismissal of, and final judgment in, both actions. (SA-17, 20.) On the same day, the NRA Plaintiffs in each case filed Notices of Appeal. (SA-23, 25.)

Statement of Facts

No factual record was created in this case at the District Court level because the NRA Plaintiffs' claims were dismissed based on the District Court's ruling that, as a matter of law, the complaints' claims under the Second and Fourteenth Amendments are precluded by this Court's decision in *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982) even if the complaints' allegations are true. The below facts therefore recite the complaints' allegations in each case and state the ordinance language at issue.

The City of Chicago's Handgun Ordinance Prohibits Possession of a Handgun

The City of Chicago prohibits possession of a firearm unless it is registered. Mun. Code of Chicago, § 8-20-040(a). (A-7-8.) Section 8-20-050(c) then provides: "No registration certificate shall be issued for any of the following types of firearms: . . . (c) Handguns . . . ." Chicago defines a handgun as follows: "a firearm designed to be held and fired by the use of a single hand, and includes a combination of parts from which such firearm can be assembled." *Id.* § 8-20-030(k). (A-8-9.) The only

non-governmental exceptions are: "those validly registered to a current owner in the City of Chicago prior to the effective date of this chapter" in 1982, *see id.* § 8-20-050(c)(1), and those owned by security personnel or private detective agencies. *Id.* § 8-20-050(c)(2)&(3). (A-9.)

The registration requirement, and hence the handgun prohibition, does not apply to:

> Any nonresident of the city of Chicago participating in any lawful recreational firearm-related activity in the city, or on his way to or from such activity in another jurisdiction; provided, that such weapon shall be unloaded and securely wrapped and that his possession or control of such firearm is lawful in the jurisdiction in which he resides.

Id. § 8-20-040(b)(5). (A-8.)

Failure to exhibit a registration certificate "shall be presumptive evidence that he is not authorized to possess such firearm" and "shall also be cause for the confiscation of such firearms." *Id.* § 8-20-150. (A-15.) A confiscated firearm, when not needed as evidence, must be destroyed. *Id.* § 8-20-220. (A-19.) A first violation is punishable by a fine of not less than $300 or more than $500, and incarceration for not less than ten days or more than 90 days. *Id.* § 8-20-250. (A-19.) A subsequent conviction is punishable by a fine of $500 and by incarceration of not less than 90 days or more than six months. *Id.* (A-19.)

Plaintiffs Dr. Tyler, Welton, Benson, and the NRA (collectively, the "Chicago Plaintiffs"), as well as thousands of members of Plaintiff NRA, reside in Chicago. (A-34.) But for Municipal Code of Chicago §§ 8-20-050(c), 8-20-040(a), 8-20-250, and the enforcement thereof by the City of Chicago, they would forthwith (a) lawfully

obtain handguns to keep at home for lawful purposes, including self-protection and the protection of their families and loved ones and (b) transfer handguns which they lawfully store outside of Chicago to their homes. (A-34.) Should they do so in violation of such provisions, they would be subject to arrest, prosecution, imprisonment, and fines. Municipal Code of Chicago § 8-20-250. (A-34.)

The Chicago Plaintiffs, and thousands of members of Plaintiff NRA, either travel through or need to travel through Chicago. (A-34.) Municipal Code of Chicago §§ 8-20-50(c), 8-20-040(a), 8-20-250 and the enforcement thereof by the City of Chicago, subjects such persons who are otherwise lawfully transporting firearms to the threat of arrest, prosecution, imprisonment, and fines or requires them to travel on other routes to avoid arrest, prosecution, imprisonment and fines. (A-34.)

Plaintiff Welton wishes to obtain a handgun. (A-34.) He is eligible under the laws of the United States and of the State of Illinois to possess firearms. (*Id.*) But for Municipal Code of Chicago § 8-20-050(c), he would forthwith obtain and register a handgun to keep at home for self protection. (*Id.*)

Plaintiff Tyler is a veterinarian. He lawfully owns and stores a handgun outside the City of Chicago. (*Id.*) But for Municipal Code § 8-20-050(c), he would forthwith register his handgun to keep at his residence in the City of Chicago for self protection. (A-34.)

Plaintiff Benson wants to own a handgun but cannot as he has no place to store it outside the City of Chicago. (A-35.) If allowed to possess a handgun in the City, he and others in his position could keep handguns in their homes for lawful defense

from any unlawful, sudden, deadly attack by an intruder. (*Id.*) However, he and others face arrest, prosecution, and incarceration should they possess an unregistered handgun in violation of Municipal Code of Chicago §§ 8-20-050(c), 8-20-040(a), and 8-20-250. (A-35.) As a result of § 8-20-040(a), Defendants and their agents and employees refuse to register any handgun. (A -35.) But for § 8-20-040(a), members of NRA and the individual Plaintiffs would imminently obtain handguns and register them pursuant to § 8-20-040(a). (A-35.)

As a proximate cause of Municipal Code of Chicago §§ 8-20-050(c), 8-20-040(a), and 8-20-250, and the enforcement thereof by the City of Chicago, Plaintiffs are subjected to irreparable harm in that they are unable to obtain handguns to protect themselves in their homes, subjecting them to endangerment from criminal intruders and violating their constitutional rights as set forth herein. (A-35.)

The Village of Oak Park Prohibits Handgun Possession

Like Chicago, the Village of Oak Park prohibits possession of a handgun. (A-44.) The Oak Park Municipal Code provides: "It shall be unlawful for any person to possess or carry, or for any person to permit another to possess or carry on his/her land or in his/her place of business any firearm . . . ." Oak Park Municipal Code § 27-2-1. (A-25.) In Oak Park, a firearm is defined as follows: "For the purpose of this Article firearms are: pistols, revolvers, guns, and small arms of a size and character that may be concealed on or about the person, commonly known as handguns." *Id.* § 27-1-1. (A-23.) It is further unlawful in Oak Park "to carry" a rifle, shotgun, or firearm in a vehicle, or to permit another to do so in a vehicle one owns, "or about

his/her person, except that a person may carry any rifle or shotgun when on his/her land or in his/her abode or fixed place of business . . . ." *Id.* § 27-2-1. (A-25.) There is an exemption for licensed hunters or fishermen commuting with a rifle or shotgun to or from established game areas. *Id.* § 27-2-1(H). (A-44.) Also exempt is the transportation of weapons "broken down in a nonfunctioning state and not immediately accessible," but if it is a firearm (handgun), the transportation must not originate or terminate in Oak Park. *Id.* § 27-2-1(1). (A-25-26.)

None of the above provisions apply to "Licensed firearm collectors." *Id.* § 27-2-1(K). (A-26.) The Oak Park Municipal Code defines a licensed firearm collector as follows: "Any person licensed as a collector by the Secretary of the Treasury of the United States under and by virtue of Title 18, United States Code, Section 923; provided however, that a copy of said license is filed with the Chief of Police." *Id.* § 27-1-1. (A-23-24.)

Exempt from the handgun prohibition are: "Members of established theater organizations located in Oak Park and performing a regular performance schedule to the public, utilizing only blank ammunition in the discharge of weapons only during rehearsals, classes or performances; provided further that said organization maintains possession and control over these weapons in a safe place with a designated member of the organization when the weapons are not in use. . . ." *Id.* § 27-2-1 (L). (A-26.)

Violation of Oak Park's firearms ordinance is punishable with a fine of not more than $1,000 for the first offense and $2,000 for a subsequent offense. *Id.* § 27-4-

1(A). (A-27.) Weapons involved in offenses are to be confiscated and destroyed. *Id.* § 27-4-1(C). (A-27.) A motor vehicle which a police officer has probable cause to believe contains a weapon in violation of the above is subject to seizure and impoundment, and may be released on payment of a $500 fine. *Id.* § 27-4-4. (A-29.)

Plaintiffs in Case No. 08-3696, Engler, Dr. Reisinger, and the NRA (collectively, the "Oak Park Plaintiffs"), as well as other members of Plaintiff NRA, reside in Oak Park. (A-45.) But for Oak Park Municipal Code, § 27-2-1, and the enforcement thereof by the Village of Oak Park, the Oak Park Plaintiffs and other members of the NRA Plaintiff would forthwith (a) lawfully obtain handguns to keep at home for lawful purposes including self protection and the protection of their families and loved ones and (b) transfer handguns which they lawfully store outside the jurisdiction to their homes. (*A*-45.) Should they do so in violation of such provisions, they are subject to arrest, prosecution, imprisonment, and fines. (*Id.*)

The Oak Park Plaintiffs, and numerous members of Plaintiff NRA either travel through or need to travel through Oak Park. (A-46.) Oak Park Municipal Code § 27-2-1, and the enforcement thereof by Oak Park, subjects such persons who are otherwise lawfully transporting firearms to the threat of arrest, prosecution, imprisonment, and fines or requires them to travel on other routes to avoid arrest, prosecution, imprisonment, and fines. (A-46.)

Plaintiffs Engler and Dr. Reisinger lawfully own and store handguns outside the Village of Oak Park. (*Id.*) But for Oak Park Municipal Code § 27-2-1, they would forthwith keep their handguns at their residences in the Village of Oak Park. (A-

46.) But for Oak Park Municipal Code § 27-2-1, they have not brought their handguns into the Village of Oak Park so that they could be used for self-protection. (A-46.)

Plaintiffs Engler and Dr. Reisinger, and numerous members of Plaintiff NRA, wish to obtain and possess handguns to keep in their homes for lawful defense from any unlawful, sudden, deadly attack by an intruder and to lawfully transport their handguns through the Village of Oak Park. (A-46.) However, individuals face arrest, prosecution, and incarceration should they possess a handgun in violation of Oak Park Municipal Code, § 27-2-1. (A-46.) But for § 27-2-1, members of Plaintiff NRA would imminently obtain handguns pursuant to the laws of the United States and the State of Illinois. (A-46.)

As a proximate cause of Oak Park Municipal Code § 27-2-1, and the enforcement thereof by Oak Park and its agents and employees, Plaintiffs and members of Plaintiff NRA are subjected to irreparable harm in that they are unable to obtain handguns to protect themselves in their homes, subjecting them to endangerment from criminal intruders and violating their Constitutional rights as set forth herein. (A-46.)

Summary of the Argument

District of Columbia v. Heller, 128 S. Ct. 2783 (2008), held that the District's prohibition on possession of handguns infringes on the right of the people to keep and bear arms as guaranteed by the Second Amendment. This right is a fundamental right, and like other fundamental rights must be incorporated into the

Fourteenth Amendment so as to prevent infringement by a state or locality. Moreover, a firearm ban which exempts privileged classes denies the equal protection of the laws in violation of the Fourteenth Amendment. Chicago's and Oak Park's prohibitions on possession of handguns violate these constitutional guarantees.

The right to have arms is a personal right explicitly guaranteed by the Constitution. *Heller* describes it as a "pre-existing right" which had become "fundamental" by the time of the founding and which is on a par with First and Fourth Amendment rights. As with other constitutional rights, rational-basis review is inappropriate. Possession of handguns in the home for self defense and other lawful purposes is encompassed in the right.

The Fourteenth Amendment was understood to protect the right to have arms from state violation. *Heller* explains the intent of the Reconstruction Congress to protect the right of freed slaves to keep and bear arms from state infringement by its proposal of the Fourteenth Amendment and passage of civil rights legislation. Congress reacted to the Black Codes enacted by the Southern States, which prohibited African Americans from possessing firearms, by passage of the Civil Rights Act and the Freedmen's Bureau Act, the latter of which recognized "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . [estate], including the constitutional right to bear arms . . . ."

The Fourteenth Amendment was understood to guarantee the same rights. Senator Jacob Howard introduced the Amendment with the explanation that it would protect "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms," and would "compel [the States] at all times to respect these great fundamental guarantees."

Heller clarifies that the Court has never decided whether the Second Amendment applies to the states through the Fourteenth Amendment, but strongly suggests that it does. Nineteenth-century precedents held that the Bill of Rights does not apply to the states directly, but did not consider whether the rights therein are incorporated into the Fourteenth Amendment so as to prohibit violation of such rights by the states.

United States v. Cruikshank, 92 U.S. 542 (1876), opined that the First and Second Amendments only applied to the federal government, but no state action was involved in the case and incorporation was not mentioned. *Presser* v. *Illinois*, 116 U.S. 252, 265 (1886), held that a state ban on armed parades in cities did not violate the Second Amendment, but no mention was made of the applicability of the Fourteenth Amendment. *Miller* v. *Texas*, 153 U.S. 535, 538 (1894), held that the Second and Fourth Amendments did not apply directly to the states, and refused to consider whether they so applied through the Fourteenth Amendment as the issue had not been raised at trial.

Heller commented that "*Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." Nor did *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), which relied on *Presser* to hold that the Second Amendment is not incorporated into the Fourteenth Amendment and which further held that the Second Amendment does not guarantee a right to keep and bear handguns. *Heller* supercedes and overrules *Quilici*.

What *Heller* called "the sort of Fourteenth Amendment inquiry required by our later cases" mandates recognition of Second Amendment incorporation. From 1897 through the present, the Supreme Court has incorporated most Bill of Rights guarantees into the Fourteenth Amendment. The jurisprudence generally considers substantive guarantees to be fundamental rights which are thereby incorporated. Most procedural guarantees are also incorporated, excluding two which are unnecessary for fundamental fairness – indictment by grand jury and trial by jury in civil cases. The right to have arms allows one to protect life itself, and the Second Amendment declares its purpose to be "the security of a free state."

Given *Heller*'s holding that a handgun ban violates the Second Amendment, and because the right of the people to keep and bear arms is protected from state and local infringement by the Fourteenth Amendment, Chicago's and Oak Park's handgun bans cannot stand.

Finally, a prohibition on possession of handguns by members of the general public which exempts privileged classes of persons is a denial of equal protection of

the laws, in violation of the Fourteenth Amendment. *Heller* held that the right to defend life from deadly and unlawful attack, and to keep a handgun in the home to make such defense possible, is fundamental.

The ordinances at issue here recognize no such basic rights, but do exempt persons with comparatively frivolous reasons for possessing handguns. Chicago exempts persons who registered handguns in 1982, security personnel, and non-residents participating in firearms-related recreation. Oak Park exempts certain gun collectors, members of theater groups, and persons passing through town.

Sklar v. Byrne, 727 F.2d 633 (7th Cir. 1984), upheld, under rational basis review, Chicago's handgun ban against an equal protection challenge based on the grandfather clause for persons who registered handguns by 1982, which discriminated against new residents. *Sklar* followed *Quilici* in treating what it called "the asserted right to bear arms" as having no constitutional protection, and is superceded by *Heller*.

In conclusion, the Chicago and Oak Park ordinances prohibiting possession of handguns infringe on the right to keep and bear arms as protected by the Second and Fourteenth Amendments, and deny to persons the equal protection of the laws as guaranteed by the Fourteenth Amendment.

Argument

Standard of Review

"[B]ecause this appeal only presents questions of law, our standard of review is *de novo*." *Triad Associates, Inc. v. Robinson*, 10 F.3d 492, 495 (7th Cir. 1993). "We review . . . any questions of constitutional law under the *de novo* standard of review." *Anderson v. Milwaukee County*, 433 F.3d 975, 978 (7th Cir. 2006).

I. The Right to Have Arms is a Fundamental, Personal Right Explicitly Guaranteed by the Constitution.

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) recognizes the right to keep and bear arms as an explicitly-guaranteed right in the same category as other fundamental rights. "By the time of the founding, the right to have arms had become fundamental for English subjects." 128 S. Ct. at 2798. Blackstone "cited the arms provision of the [English] Bill of Rights as one of the fundamental rights of Englishmen. . . . It was, he said, 'the natural right of resistance and self-preservation,' . . . and 'the right of having and using arms for self-preservation and defence . . . .'" *Id.* (quoting 1 Blackstone, *Commentaries* 139-40 (1765)).

"[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" *Id.* at 2797. Thus, "[t]his is not a right granted by the Constitution. Neither is it in any

manner dependent upon that instrument for its existence." *Id.* at 2797 (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)).[2]

As with other fundamental rights, the explicit nature of "the right of the people" to have arms precludes application of the rational-basis standard of review. As *Heller* states:

> Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. *See United States v. Carolene Products Co.,* 304 U.S. 144, 152, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) ("There may be narrower scope for operation of the presumption of constitutionality [*i.e.,* narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments ...").

Id. at 2818 n.27.

Heller rejects a "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id.* at 2821. Such a test would allow "arguments for and against gun control" and the upholding of a handgun ban "because handgun violence is a problem, [and] because the law is limited to an urban area . . . ." *Id. Heller* responds:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of

[2] *Cruikshank* made the same point about the First Amendment: "The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. . . . It was not, therefore, a right granted to the people by the Constitution." 92 U.S. at 551-52.

> 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. . . . Like the First, it [the Second Amendment] is the very *product* of an interest-balancing by the people . . . . And whatever else it leaves to future 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.

The fundamental character of the right to have arms, and why that right precludes a handgun ban, is tied to the protection of life. *Heller* explains:

> the 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. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," . . . would fail constitutional muster.

Id. at 2817-18.

In sum, the Second Amendment protects the fundamental right to keep and bear arms, including the possession of handguns in the home for lawful purposes. As with other constitutional rights, regulation of this right is subject to heightened scrutiny.

II. The Fourteenth Amendment was Intended to Protect the Right to Have Arms From State Violation.

Heller noted conflicting views in the antebellum era about whether the Bill of Rights applied to the states. Some state supreme courts opined that the Second Amendment applied directly to the states. *Heller*, 128 S. Ct. at 2808-09 & n.20

(quoting *Nunn v. State,* 1 Ga. 243, 251 (1846) ("any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*")). Others upheld state prohibitions on free blacks from bearing arms on the basis that they had no constitutional rights. *Heller*, 128 S. Ct. at 2808 (citing *Aldridge v. Commonwealth*, 4 Va. 447, 2 Va. Cas. 447, 449 (Gen. Ct. 1824)).

Antebellum commentators wrote that the states may not violate the Second Amendment, but that was before *Barron v. Mayor of Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (1833), resolved that the Bill of Rights did not apply directly to the states. *Heller*, 128 S. Ct. at 2805-06 (quoting William Rawle, *A View of the Constitution of the United States of America* 121-22 (1825) (neither Congress nor the states had "a power to disarm the people," and if they attempted to do so, "this amendment may be appealed to as a restraint on both")). However, the Fourteenth Amendment was intended to overturn *Barron*.[3]

Heller explains the intent of the Reconstruction Congress to protect the right of freed slaves to keep and bear arms from state infringement by its proposal of the Fourteenth Amendment and passage of civil rights legislation. "In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." *Heller*, 128 S. Ct. at 2809-10 (citing S.

[3] "Representative [John] Bingham . . . explained that he had drafted §1 of the Fourteenth Amendment with the case of *Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833), especially in mind." *Monell v. Dep't of Social Services*, 436 U.S. 658, 686-87 (1978). On the same page of that speech, Bingham characterized "the right of the people to keep and bear arms" as one of the "limitations upon the power of the States . . . made so by the Fourteenth Amendment." CONG. GLOBE, C42nd Cong., 1st Sess., App. 84 (Mar. 31, 1871).

Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Praeger 1998)).[4] As the Court notes, "Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms."[5] *Id.* at 2810.

The understanding that the Fourteenth Amendment would protect the right to keep and bear arms is evident in the Amendment's interplay with S. 60, the Freedmen's Bureau Bill, and S. 61, the Civil Rights Bill, which were introduced by Senator Lyman Trumbull. CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866). Both bills would protect the "full and equal benefit of all laws and proceedings for the security of person and estate [or property] . . . ." *Id.* at 209, 211 (Jan. 12, 1866).

To exemplify their concerns, Rep. Zachariah Chandler endorsed the view that freedom for the slaves required that: "'The right of the people to keep and bear

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[4] This book includes an exhaustive study of the original intent that the Fourteenth Amendment incorporate the Second Amendment.

[5] *Heller* quotes the following 1866 documents: Report of the Commission of the Freedmen's Bureau (Kentucky seized arms from blacks; "Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed*."); Joint Committee on Reconstruction (firearms seized from freedmen in South Carolina, "in clear and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that 'the right of the people to keep and bear arms shall not be infringed.'"); *The Loyal Georgian* (Augusta) ("[a]ll men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves.").

See also Bell v. Maryland, 378 U.S. 226, 247-48 & n. 3 (1964) (Douglas, J., concurring) (Fourteenth Amendment intended to eradicate the black codes, under which "Negroes were not allowed to bear arms"); *Silveira v. Lockyer*, 328 F.3d 567, 577 (9th Cir. 2003) (Kleinfeld, C.J., joined by C.J. Kozinski, O'Scannlain, & T.G. Nelson, dissenting from denial of rehearing en banc) ("The 'Black Codes' often contained restrictions on firearm ownership and possession. . . . A substantial part of the debate in Congress on the Fourteenth Amendment was its necessity to enable blacks to protect themselves from White terrorism and tyranny in the South").

arms' must be so understood as not to exclude the colored man from the term 'people.'" *Id.* at 217. A convention of freedmen in South Carolina petitioned the Congress that, "inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed . . . that the late efforts of the Legislature of this State to pass an act to deprive us o[f] arms be forbidden, as a plain violation of the Constitution . . . ." 2 *Proceedings of the Black State Conventions, 1840-1865*, at 302 (1980). Senator Charles Sumner reiterated "that they should have the constitutional protection in keeping arms," and the petition was referred to the Joint Committee on Reconstruction. CONG. GLOBE, 39th Cong., 1st Sess., at 337 (Jan. 22, 1866). The Joint Committee, which would hear numerous instances of state violation of the right to have arms, would draft the Fourteenth Amendment. Halbrook, *Freedmen*, 3-6, 9-10, 14, 17-18, 33-34.

After the Senate passed S. 60, the House amended it to protect the civil right to "the security of person and estate, including the constitutional right to bear arms." CONG. GLOBE, 39th Cong., 1st Sess., at 654 (Feb. 5, 1866), 688 (Feb. 6, 1866). Senator Trumbull recommended that the Senate concur, noting that the reference to the right to bear arms "does not alter the meaning." *Id.* at 743 (Feb. 8, 1866).

As passed by both Houses, the Freedmen's Bureau Bill provided that where judicial proceedings were interrupted, military protection would be extended to protect all persons' "civil rights or immunities," including "the right . . . to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms . . . ." *Id.* at 748 (Feb. 8, 1866),

775 (Feb. 9, 1866) (passage); 1292 (Mar. 9, 1866) (text). Rep. William Lawrence quoted a military order that "civil rights and immunities" included: "The constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed . . . ." *Id.* at 908-09 (Feb. 17, 1866). However, the bill was vetoed. *Id.* at 916 (Feb. 19, 1866).

Rep. James Wilson, Chairman of the Judiciary Committee, explained the source of the Civil Rights Bill's phraseology to be taken from Blackstone, noting: "I understand civil rights to be simply the absolute rights of individuals, such as – 'The right of personal security, the right of personal liberty, and the right to acquire and enjoy property.'" *Id.* at 1117 (Mar. 1, 1866). Wilson averred that every right enumerated in the federal Constitution is "embodied in one of the rights I have mentioned, or results as an incident necessary to complete defense and enjoyment of the specific right." *Id.* at 1118-19. Anticipating the language of the Fourteenth Amendment, Rep. Henry Raymond proposed an amendment to the bill declaring that all persons born in the United States are "citizens of the United States, and entitled to all rights and privileges as such." *Id.* at 1266 (Mar. 8, 1866). This would include every right under the Constitution, such as "a right to defend himself and his wife and children; a right to bear arms . . . ." *Id.* Rep. Bingham explained that the provisions of the Freedmen's Bureau Bill "enumerate the same rights and all the rights and privileges that are enumerated in the first section of this [civil rights] bill . . . ." *Id.* at 1291-92 (Mar. 9, 1866).

The Civil Rights Act as passed reflected the above by recognizing the right of each "to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ." 14 Stat. 27 (1866). This remains the law today. *See* 42 U.S.C. § 1981.

In House debate on the Fourteenth Amendment, John Bingham, its author, argued that previously "this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States." CONG. GLOBE, 39th Cong., 1st Sess., 1033-34 (Feb. 26, 1866). Robert Hale argued that the first ten amendments were "a bill of rights for the protection of the citizen," which already "limit[ed] the power of Federal and State legislation." *Id.* at 1064 (Feb. 27, 1866). Bingham responded that the proposed amendment would "arm the Congress . . . with the power to enforce this bill of rights as it stands in the Constitution today." *Id.* at 1088 (Feb. 28, 1866).

In related debate on the representation of the Southern States in Congress, Senator James Nye opined that no State had power to "impair the natural and personal rights of the citizen" specified in the Bill of Rights, adding about the freedmen: "As citizens of the United States they have equal right to protection, and to keep and bear arms for self-defense." *Id.* at 1072 (Feb. 28, 1866).

Introducing the Fourteenth Amendment in the Senate, Jacob Howard referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and

compel them at all times to respect these great fundamental guarantees." CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (May 23, 1866). [6]

That same day, the second Freedmen's Bureau Bill, H.R. 613, was debated. *Id.* at 2773 (May 23, 1866). Rep. Eliot observed that § 8 – which recognized "the constitutional right to bear arms," *id.* at 3412 (June 26, 1866), – "simply embodies the provisions of the civil rights bill." *Id.* at 2773 (May 23, 1866). He recited a report about blacks in Kentucky: "Their arms are taken from them by the civil authorities . . . . Thus the right of the people to keep and bear arms as provided in the Constitution is infringed . . . ." *Id.* at 2774. This rendered the freedmen "defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders." *Id.* at 2775.

The same day the House passed the Freedmen's Bureau Bill, it took up the Fourteenth Amendment. *Id.* at 2878 (May 29, 1866). As explained by Rep. George W. Julian, the constitutional amendment was needed to uphold the Civil Rights Act, which:

> is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.

Id. at 3210 (June 17, 1866).

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[6] Also quoted in *Duncan v. Louisiana*, 391 U.S. 145, 166-67 (1968) (Black, J., concurring). These words would be reprinted in the *New York Times,* May 24, 1866, at 1, and other leading newspapers. Halbrook, *Freedmen*, 36.

Both Houses passed the second Freedmen's Bureau Bill, which was again vetoed. The House overrode the veto by 104 to 33, or 76%, and the Senate did so by 33 to 12, or 73%. *Id.* at 3850, 3842 (July 16, 1866). As finally passed into law, § 14 of the Freedmen's Bureau Act provided that in States where judicial proceedings were interrupted or which had not been restored to the Union: "[T]he right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery . . . ." 14 Stat. 176-177 (1866), *quoted in Heller*, 128 S. Ct. at 2810. *Heller* adds:

> The understanding that the Second Amendment gave freed blacks the right to keep and bear arms was reflected in congressional discussion of the bill, with even an opponent of it saying that the founding generation "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense." CONG. GLOBE, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis).

Heller, 128 S. Ct. at 2810. (citing CONG. GLOBE, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis)).

The Freedmen's Bureau Act was passed by over two-thirds vote of the same Congress that proposed the Fourteenth Amendment, *see* Halbrook, *Freedmen*, 41-42; CONG. GLOBE, 39th Cong., 1st Sess. 3842, 3850 (July 16, 1866), and sought to guarantee the same rights. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423-24, 436 (1968); *Regents of University of California v. Bakke*, 438 U.S. 265, 397-98 (1978) (Marshall, J.). The Act's reference to "the constitutional right to bear arms" as

included in the rights to "personal liberty, personal security, and . . . estate" is noteworthy, in that the Fourteenth Amendment protects from state infringement the "indefeasible right of personal security, personal liberty and private property." *Griswold v. Connecticut*, 381 U.S. 479, 484 n.* (1965).[7] These terms may be traced to Blackstone, who explained that certain "auxiliary" rights were necessary to "maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property." 1 Blackstone, *Commentaries* 136 (1765). Together with justice in the courts and the right of petition, these included "the right of having and using arms for self-preservation and defense." *Id.* at 140.

Heller noted that "Similar discussion attended the passage of the Civil Rights Act of 1871 and the Fourteenth Amendment." *See* 128 S. Ct. at 2810. "With respect to the proposed Amendment, Senator Pomeroy described as one of the three 'indispensable' 'safeguards of liberty . . . under the Constitution' a man's 'right to bear arms for the defense of himself and family and his homestead.'" *Id.* at 2810-11, (citing CONG. GLOBE, 39th Cong., 1st Sess., 1182 (1866)). The Court quoted similar material on the origins of the Civil Rights Act of 1871. *See Heller*, 128 S. Ct. at 2810-11 (quoting Rep. Butler on the intent "to enforce the well-known constitutional provision guaranteeing the right of the citizen to 'keep and bear arms'").

[7]"[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Estate of Porter by Nelson v. Illinois*, 36 F.3d 684, 688 (7th Cir. 1994). "Although it would be impossible to catalogue and to describe precisely each 'liberty' interest protected by the Due Process Clause, it can hardly be doubted that chief among them is the right to some degree of bodily integrity." *White v. Rochford*, 592 F.2d 381, 383 (7th Cir. 1979).

Heller concluded: "It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense." *Id.* at 2811. It was further the understanding that this right would be protected from state violation by the Fourteenth Amendment.[8]

III. Nineteenth-Century Precedents Held That the Bill of Rights Does Not Apply Directly to the States, But Did Not Decide Whether Such Guarantees are Incorporated Into the Fourteenth Amendment.

A. *Cruikshank*, *Presser*, and *Miller* "Did Not Engage in the Sort of Fourteenth Amendment Inquiry Required by Our Later Cases"

Heller clarifies that the Court has never decided whether the Second Amendment applies to the states through the Fourteenth Amendment, but strongly suggests that it does. A trio of nineteenth-century precedents held that the First, Second, and Fourth Amendments do not apply to the states directly, but did not consider whether the rights therein are incorporated into the Fourteenth Amendment so as to prohibit violation of such rights by the states.

United States v. Cruikshank, 92 U.S. 542, 553 (1876), "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." *Heller*, 128 S. Ct. at 2812. It stated about the Second Amendment right of "bearing arms for a lawful purpose" that "the people [must] look for their protection against any violation by their fellow-citizens

[8] "This history indicates that it was widely recognized that the right to keep and bear arms was to be protected by the Civil Rights Act and the Fourteenth Amendment, and that that right was understood to belong to individuals." U.S. Dep't Of Justice, Office of Legal Counsel, *Whether the Second Amendment Secures an Individual Right*, December 17, 2004, http://www.usdoj.gov/olc/secondamendment2.htm.

of the rights it recognizes" to the States' police power. *Id.* at 2812-13 (quoting *Cruikshank*, 92 U.S. at 553). No state action being involved, incorporation was not raised or argued in the case.[9]

Heller commented: "With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." *Id.* at 2813 n.23. *Heller* added that two subsequent decisions "reaffirmed that the Second Amendment applies only to the Federal Government." *Id.* (citing *Presser* v. *Illinois*, 116 U.S. 252, 265 (1886), and *Miller* v. *Texas*, 153 U.S. 535, 538 (1894)).

Heller quoted *Presser* as having held that forbidding military organizations or armed parades in cities without authorization did not violate the right to bear arms, concluding: "*Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations." *Id.* at 2813.

More specifically, *Presser* held that a prohibition on unlicensed armed marches in cities "do[es] not infringe the right of the people to keep and bear arms," adding

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[9] The indictment alleged that private individuals conspired to deprive persons of the rights to assemble and to keep and bear arms. *See Cruikshank*, 92 U.S. at 544-45. As Justice Bradley held in his circuit court opinion: "Grant that this prohibition now prevents the states from interfering with the right to assemble . . . . The second count, which is for a conspiracy to interfere with certain citizens in their right to bear arms, is open to the same criticism as the first. . . . In none of these counts is there any averment that the state had, by its laws interfered with any of the rights referred to." *United States v. Cruikshank*, 25 Fed. Cas. 707, 708-10 (C.C. D. La. 1874). In the Supreme Court, the United States brief made no argument on the First and Second Amendments, much less on incorporation under the Fourteenth Amendment. Halbrook, *Freedmen*, 168-69.

that the Second Amendment did not, in and of itself, limit state action.[10] *Presser* made no mention of the Fourteenth Amendment in this discussion.

Presser next considered whether the ban on unlicensed armed parades violated the privileges-and-immunities clause of the Fourteenth Amendment, given that the First Amendment protected the right to assemble with the purpose of petitioning the government for a redress of grievances. Since armed marches had no such purpose, and the states were entitled to suppress armed mobs, the Court rejected any such First Amendment right. *Id.* at 266-68.

Finally, *Presser* found the argument that the act "deprives him of either life, liberty, or property without due process of law . . . is so clearly untenable as to require no discussion." *Id.* at 268. As *Heller* notes, this Fourteenth Amendment due process claim was unrelated to the claim concerning the right to keep and bear arms. *Heller*, 128 S. Ct. at 2813.[11]

While *Heller* does not discuss *Miller v. Texas* further, the Court decided in that case that the Second and Fourth Amendments did not apply directly to the states, and refused to consider whether these provisions applied to the states through the privileges-and-immunities clause of the Fourteenth Amendment because that

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[10] "But a conclusive answer to the contention that *this amendment* [the Second] prohibits the legislation in question lies in the fact that *the amendment* is a limitation only upon the power of congress and the national government, and not upon that of the state." *Presser*, 116 U.S. at 265 (emphasis added).

[11] Presser's brief did not raise the issue of whether the Fourteenth Amendment protects the individual right to keep and bear arms. S. Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 140, 147 (1949). *See* S. Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. Det. Mercy L. Rev. 943, 976 (1999) (quoting from briefs in *Presser*).

argument had not been made in the courts below. *Miller*, 153 U.S. 535, 538. Specifically, "it is well settled that the restrictions of these [Second and Fourth] amendments operate only upon the federal power, and have no reference whatever to proceedings in state courts." *Miller* explicitly stated that it was *not* deciding whether the Fourteenth Amendment protects Second and Fourth Amendment rights: "If the Fourteenth Amendment limited the power of the States as to such rights [to bear arms and against warrantless searches] as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court. . . . [A] privilege or immunity under the constitution of the United States cannot be set up here . . . when suggested for the first time in a petition for rehearing after judgment." *Id.* at 538-39 (citing, inter alia, *Spies v. Illinois*, 123 U.S. 131 (1887)).[12]

Miller clarifies that the Court did not, in that case or in the preceding cases of *Cruikshank* and *Presser*, consider whether the Second Amendment is incorporated into the Fourteenth. To the contrary, that trio of cases decided only that the First, Second, and Fourth Amendments did not apply directly to the states. Had the preceding cases rejected incorporation, *Miller* would have said so; instead, it refused to consider the issue. And *Miller* refused to consider incorporation under the

[12] In *Spies*, for the first time ever, it was also argued before the Court that the Fourteenth Amendment incorporated the Bill of Rights, thereby prohibiting the States from violating "the privilege of freedom of speech and press – of peaceable assemblages of the people – of keeping and bearing arms--of *immunity* from search and seizure – *immunity from self-accusation*, from second trial – and privilege of trial by due process of law." *Spies, 123 U.S.* at 150-51, 166-67. *Spies* refused to decide that issue because it was not raised in the trial court. *Id.* at 181; *see also* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1259-60, 1270-72 (April 1992).

privileges-and-immunities clause of the Fourteenth Amendment – analysis under the due process clause of the Fourteenth Amendment would not occur until later. *See* C. Leonardatos, D. Kopel, & S. Halbrook, *Miller v. Texas*: Police Violence, Race *Relations, Capital Punishment, and Gun-Toting in Texas in the Nineteenth Century--and Today*, 9 J.L & Pol'y 737, 761-65 (2001).

No wonder, as *Heller* comments, that such cases as *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S. Ct. at 2813 n.23. It is incumbent on this Court to make such an inquiry.

B. *Heller* Supercedes Circuit Precedent Which "Did Not Engage in the Sort of Fourteenth Amendment Inquiry Required by Our Later [Supreme Court] Cases"

"We must, with exceptions not applicable here, decide cases in light of intervening Supreme Court decisions." *Consolidation Coal Co. v. Office of Workers' Compensation Programs*, 54 F.3d 434, 437 (7th Cir. 1995); *see also EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 796 (7th Cir. 2005) ("Our decisions do not bind the district court when there has been a relevant intervening change in the law."). *Heller* undermines adverse circuit precedent on the meaning of the Second Amendment and on whether it is incorporated into the Fourteenth Amendment.

Heller's holding that the Second Amendment guarantees an individual right to keep and bear arms, including handguns, squarely overrules the Seventh Circuit's ruling that "the right to keep and bear handguns is not guaranteed by the second amendment" as stated in *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

Quilici relied primarily on *Presser* to hold "that the second amendment does not apply to the states . . . ." *Id.* (citing *Presser* v. *Illinois*, 116 U.S. 252, 265 (1886)). *Presser* did indeed so hold, but *Presser* never considered whether the Second Amendment applies to the states through the Fourteenth Amendment. In misreading *Presser* to have resolved the issue, *Quilici* ignored the clarification to the contrary in *Miller v. Texas* that the Second Amendment did not apply directly to the states, but that whether it applied through the Fourteenth Amendment was undecided.

Quilici rejected the arguments "that *Presser* is no longer good law or would have been decided differently today." *Quilici*, 695 F.2d at 270. While *Presser* remains good law for the limited proposition that the Bill of Rights does not apply *directly* to the states, *Heller* makes clear that it would be decided differently today – such cases "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S. Ct. at 2813 n.23. It is unremarkable that jurisprudence evolves over time and that later cases require new inquiries not known when earlier cases were decided.

Quilici fails to cite *Miller v. Texas*, which – consistent with *Cruikshank* and *Presser* – held that the Second and Fourth Amendments did not *directly* apply to the states. *Miller*, 153 U.S. at 538. *Miller* explicitly stated that it is *not* deciding the question of whether the Fourteenth Amendment protects the right to keep and bear arms. *Id.* at 538-39.

Cruikshank, *Presser*, and *Miller* "came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and . . . they ultimately rest on a rationale equally applicable to all those amendments . . . ." *United States v. Emerson*, 270 F.3d 203, 221 n.13 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (holding that the Second Amendment protects individual rights, including possession of a handgun).

Similarly noting that *Cruikshank* and *Presser* were "decided before the Supreme Court held that the Bill of Rights is incorporated by the Fourteenth Amendment's Due Process Clause," the Ninth Circuit observed:

> Following the now-rejected *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833) (holding that the Bill of Rights did not apply to the states), *Cruikshank* and *Presser* found that the Second Amendment restricted the activities of the federal government, but not those of the states. One point about which we are in agreement with the Fifth Circuit is that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. *See Emerson*, 270 F.3d at 221 n.13.

Silveira v. Lockyer, 312 F.3d 1052, 1067, *reh. denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied*, 540 U.S. 1046 (2003).[13]

Rather than characterizing those cases as resting on a discredited principle, it suffices to note that these old precedents are simply inapplicable. They held only that the Bill of Rights does not apply directly to the states, and did not consider

[13] "We should . . . revisit whether the requirements of the Second Amendment are incorporated into the Due Process Clause of the Fourteenth Amendment." *Nordyke v. King*, 319 F.3d 1185, 1193 & n.3 & 4 (9th Cir. 2003) (Gould, C.J., specially concurring) (discussing literature on incorporation).

whether the Fourteenth Amendment incorporates those rights. For that, one must look to twentieth-century jurisprudence.

Circuit Judge Coffey's dissenting opinion in *Quilici*, which is now vindicated by *Heller*, sought to apply that jurisprudence as follows:

> The majority cavalierly dismisses the argument that the right to possess commonly owned arms for self-defense and the protection of loved ones is a fundamental right protected by the Constitution. Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 151, 82 L.Ed. 288 (1937), defined fundamental rights as those rights "implicit in the concept of ordered liberty." Surely nothing could be more fundamental to the "concept of ordered liberty" than the basic right of an individual, within the confines of the criminal law, to protect his home and family from unlawful and dangerous intrusions.

Quilici, 695 F.2d at 278 (*Coffey, C.J., dissenting*).[14]

Finally, *Quilici* rejected the normal inquiry into what was "intended by the Framers and made part of the Constitution upon the States' ratification of those of those [Civil War] Amendments . . . ." *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1010 (7th Cir. 1980).[15] *Quilici* stated:

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[14] Judge Coffey further wrote (*id.* at 280):

> A fundamental part of our concept of ordered liberty is the right to protect one's home and family against dangerous intrusions subject to the criminal law. Morton Grove, acting like the omniscient and paternalistic "Big Brother" in George Orwell's novel, "1984," cannot, in the name of public welfare, dictate to its residents that they may not possess a handgun in the privacy of their home.

[15] "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1, 5 (1964). As *Heller* itself states, citing incorporation cases, 128 S. Ct. at 2816:

> We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be

> Appellants devote a portion of their briefs to historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments. This analysis has no relevance on the resolution of the controversy before us. Accordingly, we decline to comment on it, other than to note that we do not consider individually owned handguns to be military weapons.

Quilici, 695 F.2d at 270 n.8.

Ironically, a considerable portion of the *Heller* opinion is devoted to what *Quilici* refers to above as irrelevant "historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments." As shown by *Heller*'s discussion of Reconstruction and the intent of the Fourteenth Amendment discussed above, 128 S. Ct. at 2809-11, this historical background contradicts *Quilici*'s holding against incorporation.[16]

In sum, *Heller* squarely overruled the holding in *Quilici* that the Second Amendment does not guarantee an individual right to possess handguns. Further, *Heller* supersedes the holding in *Quilici* that such rights are not incorporated into the Fourteenth Amendment, in that *Quilici* relied on cases that "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." *Heller*, 128

> unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States . . . . Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods.

[16] *Heller*'s discussion of the English common law and the debate surrounding the adoption of the Second Amendment also contradict *Quilici*'s holding that the Second Amendment does not protect individual rights. *See* 128 S. Ct. at 2798 ("By the time of the founding, the right to have arms had become fundamental for English subjects."); 2801 ("The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution.").

S. Ct. at 2813 n.23. The following sets forth the inquiry that is required by those later cases.

IV. The "Fourteenth Amendment Inquiry Required By our Later Cases" Mandates Incorporation of the Second Amendment.

The Second Amendment describes an explicitly-guaranteed right which is fundamental in the same sense as are other substantive rights in the Bill of Rights. The First, Second, and Fourth Amendments all refer to "the right of the people" to do certain things or be free from certain governmental restraints. The Second Amendment has a purpose clause clarifying that exercise of the right makes possible a well regulated militia, which is "necessary to the security of a free state."

A right is "fundamental" if it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973). An explicitly protected right, keeping and bearing arms is thus a fundamental right and is incorporated into the Fourteenth Amendment.

Beginning in 1897 and extending through today, the Supreme Court has found Bill of Rights guarantees incorporated into the due process clause of the Fourteenth Amendment. The reasoning in these opinions is *a priori*, often requiring only a sentence or two. The leading basis for incorporation is that a right has explicit constitutional recognition.

Heller referred to "the historical reality that the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors . . . .'" *Heller*, 128 S. Ct. at 2801-02 (quoting *Robertson v.*

Baldwin, 165 U.S. 275, 281 (1897)). "In incorporating those principles into *the fundamental law* there was no intention of disregarding the exceptions . . . . Thus, . . . the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons . . . ." *Robertson*, 165 U.S. at 281-82 (emphasis added). This implied that the right to bear arms applied to the states, as the carrying of concealed weapons was and is regulated by the states, not the federal government.

A month after the above decision, *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), held that the just compensation guarantee of the Fifth Amendment is incorporated into the Fourteenth Amendment's due process clause. The Court referred to "limitations on such power which grow out of the essential nature of all free governments" and "implied reservations of individual rights . . . which are respected by all governments entitled to the name." *Id.* at 237 (citation omitted). It relied on a decision by Justice Jackson as a circuit judge explaining that the Fourteenth Amendment put "limitations and restraints . . . upon their [states'] power in dealing with individual rights . . . ." *Id.* at 238-39 (quoting *Scott v. Toledo*, 36 F. 385, 395-96 (C.C. Ohio 1888)).

What were the limitations on state powers in dealing with "individual rights"? In the paragraph before the one quoted by the Court, Judge Jackson explained:

> The first 10 amendments to the constitution recognized and secured to all citizens certain rights, privileges, and immunities essential to their security. . . . So far as the states were concerned, citizens of the United States were . . . left without adequate protection and security in their

> persons and property. The fourteenth amendment was adopted to remedy and correct this defect in the supreme organic law of the land.

Scott, 36 F. at 395.

The First Amendment rights of free speech and press were incorporated into the Fourteenth Amendment in *Gitlow v. New York*, 268 U.S. 652, 666 (1925), in a single sentence: "freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the states."[17]

De Jonge v. Oregon, 299 U.S. 353, 364 (1937), recognized the incorporation of the right to assemble into the Fourteenth Amendment as follows:

> The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States v. Cruikshank*, 92 U.S. 542, 552, 23 L.Ed. 588: "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." . . . [T]he right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,--principles which the Fourteenth Amendment embodies in the general terms of its due process clause.

As noted, *Cruikshank* made similar statements about the Second Amendment. *See* 92 U.S. at 553. Reliance on *Cruikshank* to incorporate a right once again clarifies that *Cruikshank* did not consider or rule on incorporation.

Freedom of religion required little discussion to be incorporated. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), held:

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[17] *Fiske v. Kansas*, 274 U.S. 380, 387 (1927), added a single explanatory phrase: "the act is an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the 14th Amendment."

> The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

Everson v. Board of Education, 330 U.S. 1, 8 (1947), welcomed the establishment clause into the incorporation tent with a single nod: "The First Amendment, as made applicable to the states by the Fourteenth, . . . commands that a state 'shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.'"

The Fourth Amendment, which protects both substantive and procedural rights, was recognized as incorporated by *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), *rev'd. on other grounds, Mapp v. Ohio*, 367 U.S. 643 (1961), as follows:

> The security of one's privacy against arbitrary intrusion by the police--which is at the core of the Fourth Amendment--is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Edwards v. South Carolina, 372 U.S. 229, 235 (1963), brought the right to petition for a redress of grievances into the fold because "it has long been established that these First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States."

Pointer v. Texas, 380 U.S. 400, 404 (1965), found the following to be decisive: "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right . . . ."

In deciding the Sixth Amendment right to jury trial in a criminal case to be incorporated, *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968), noted about the due process clause: "In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment."

Benton v. Maryland, 395 U.S. 784, 794 (1969), held "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage" and is thus incorporated. "[T]his Court has increasingly looked to the specific guarantees of the (Bill of Rights)" as to incorporation and "has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights . . . .'" *Id.* at 794 (citations omitted).[18] The guarantee against double jeopardy was fundamental because it could "be traced to Greek and Roman times," it was "established in the common law of England," and "was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the

[18] *Benton* overruled the more narrow, subjective test in *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937), which asked if "the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty . . . ."

doctrine in his *Commentaries*." *Id.* at 795. The same is true of the Second Amendment. *See Heller*, 128 S. Ct. at 2792, 2798-99, 2805 (discussion of Blackstone and the common law); S. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 9-20 (University of New Mexico Press 1984) (recognition of right to have arms in Greek and Roman law and philosophy); S. Halbrook, *The Founders' Second Amendment* 25-26, 114, 293 (The Independent Institute 2008) (Founders' reliance on right to arms in writings of Aristotle and Cicero).

While most procedural guarantees of the Bill of Rights have been incorporated, the grand jury indictment clause has not. That is because, as *Hurtado v. California*, 110 U.S. 516, 532 (1884), explained, general maxims such as due process "must be held to guaranty, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."[19]

Nor has the Seventh Amendment right to jury trial in civil cases where the value in controversy exceeds $20. "The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment." *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974).

Substantive guarantees in the Bill of Rights are not subject to the question of whether a particular procedure is necessary for due process. In recognizing substantive Bill of Rights guarantees to be incorporated, the Court has relied on their status as such rather on subjective values to determine if a constitutional right is really important.

[19] "Although the Due Process Clause guarantees petitioner a fair trial, it does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury." *Alexander v. State of Louisiana*, 405 U.S. 625, 633 (1972).

The Second Amendment does not represent an inferior right which a court may subjectively relegate as beneath the usual rules of incorporation. "To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution." *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956). No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).

"The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights." *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992). The Amendment protects specific Bill of Rights guarantees but is not limited to them:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on." (Citation omitted.)

Id. at 848.

Currently, forty-four states have constitutional guarantees for the right to arms, and no state constitution denies the right. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Texas Rev. L. & Pol. 191, 193-205 (2006); *cf. Bartkus v. Illinois*, 359 U.S. 121, 124-25 (1959) (expressing reluctance to incorporate procedural guarantees where a significant number of states had

conflicting procedures), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969). In the *Heller* case, 31 states formally declared that "the right to keep and bear arms is fundamental and so is properly subject to incorporation." Brief Amici Curiae of the States of Texas, *et al.*, Supreme Court No. 07-290, at 23 n.6. "In the judgment of amici States, the right to keep and bear arms is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (citation omitted).

In sum, since the Second Amendment encompasses an explicitly-guaranteed, substantive right, it meets the standards of the Supreme Court's jurisprudence on incorporation of fundamental rights into the Fourteenth Amendment. Given *Heller*'s holding that a handgun ban violates the Second Amendment, and because the right of the people to keep and bear arms is protected from state and local infringement by the Fourteenth Amendment, Chicago's and Oak Park's handgun bans cannot stand.

V. Handgun Prohibitions Which Exempt Privileged Classes of Persons Violate Equal Protection.

The equal protection clause of the Fourteenth Amendment states that no state shall "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, §1. A prohibition on possession of handguns by members of the general public which exempts selected classes of persons is a denial of equal protection of the laws, in violation of the Fourteenth Amendment. While the prohibitions at issue here violate the right to keep and bear arms, the exemptions to

those prohibitions result in the denial of equal protection to the persons subject to the prohibitions.

Heller held that the right to defend life from deadly and unlawful attack, and to keep a handgun in the home to make such defense possible, is fundamental. *See* 128 S. Ct. at 2817-18. The ordinances at issue here recognize no such basic rights, but do exempt persons with comparatively frivolous reasons for possessing handguns.

The only non-governmental exceptions to Chicago's handgun prohibition are "Those validly registered to a current owner in the City of Chicago prior to the effective date of this chapter" in 1982, Municipal Code of Chicago, § 8-20-050(c)(1); those owned by security personnel or private detective agencies, § 8-20-050(c)(2) & (3); and "Any nonresident of the City of Chicago participating in any lawful recreational firearm-related activity in the city, or on his way to or from such activity in another jurisdiction . . . ." § 8-20-040(b)(5). (A-8, 9.) The only persons who have a handgun available to defend their lives are those who registered by an arbitrary deadline, excluding residents who had no handgun, newer residents, and persons who were too young (or were even unborn) in 1982; those who work in the security and detective fields, excluding persons with other jobs or who are unemployed;[20] and nonresidents enjoying recreation, excluding residents who may live in dangerous areas.

[20] This exemption also allows the wealthy to hire armed guards for protection, discriminating against those without the economic means to do so.

Exempt from Oak Park's handgun prohibition are "Licensed firearm collectors,"[21] "Members of established theater organizations,"[22] and transportation of a handgun not originating or terminating in Oak Park.[23] (A-25-26.) The only persons who may possess a handgun and who thus may have it available to defend their lives are those who are gun collectors, actors and stage crew, and persons just passing through town, excluding those who want a handgun for the far more serious purpose of defending their families and homes against unlawful intrusions.

Relying on the *Quilici* precedent, *Sklar v. Byrne*, 727 F.2d 633, 636 (7th Cir. 1984), upheld, under "rational basis review," Chicago's handgun ban against an equal protection challenge based on the grandfather clause for persons who registered handguns by 1982, which discriminated against new residents. "The

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[21] Oak Park Municipal Code, § 27-2-1(K). "LICENSED FIREARM COLLECTOR: Any person licensed as a collector by the Secretary of the Treasury of the United States under and by virtue of title 18, United States Code, section 923; provided however, that a copy of said license is filed with the Chief of Police." § 27-1-1. (A-23-24.) "The term 'collector' means any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define, and the term 'licensed collector' means any such person licensed under the provisions of this chapter." 18 U.S.C. § 921(a)(13). (A-23-24.) A federal collector's license "shall only apply to transactions in curios and relics." 18 U.S.C. § 923(b). However, Oak Park's exemption allows a licensed collector to possess any kind of handgun, not just one that is a curio or relic.

[22] "Members of established theater organizations located in Oak Park and performing a regular performance schedule to the public, utilizing only blank ammunition in the discharge of weapons only during rehearsals, classes or performances; provided further that said organization maintains possession and control over these weapons in a safe place with a designated member of the organization when the weapons are not in use . . . ." § 27-2-1(L). (A-26.)

[23] It is unlawful "to carry" a rifle, shotgun, or firearm in a vehicle, or to permit another to do so in a vehicle one owns, § 27-2-1, with an exemption for the transportation of weapons "broken down in a nonfunctioning state and not immediately accessible," but if it is a firearm (handgun), the transportation must not originate or terminate in Oak Park. § 27-2-1(I). (A-25-26.)

Chicago handgun ordinance does not impinge upon any federal constitutional right to bear arms." *Id.* at 637. Not only was that the holding in *Quilici*, by the *Sklar* court also held "the asserted right to bear arms pivotal in the effective exercise of constitutionally guaranteed rights." *Id.* *Heller* squarely rejects that reasoning: "the 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." 128 S. Ct. at 2817-18.

Sklar further concluded that "the provision does not impinge upon fundamental rights, nor is it a subtle mask for invidious discrimination." *Sklar*, 727 F.2d at 639. Yet under both the Chicago and Oak Park ordinances, privileged classes of persons may possess handguns which would thereby be available for use in an emergency to defend their lives, while the rest of the public may not. *Sklar* upheld the Chicago ordinance under the rational-basis test in reliance on the legislative finding that "handguns and other firearms play a major role in crimes and accidental deaths and injuries." *Id.* at 639-40. *Sklar* thus applied the very same rational basis and interesting-balancing tests that *Heller* would reject.

Sklar, of course, did not consider the Oak Park ordinance, which accords handgun possession to certain hobbyists, bards and actors, and non-residents riding around. Indeed, it only considered the discrimination in the Chicago ordinance in favor of persons who registered by 1982, disregarding the immunities it extended to security personnel, detectives, and nonresidents pursuing recreation.

Sklar, like *Quilici*, has been superseded by *Heller*. The right to keep and bear arms, including handguns, for protection of life is a fundamental right, and the ordinances at issue invidiously discriminate in favor of selected groups and against others.

Conclusion

This Court should reverse the judgment below and hold that the right of the people to keep and bear arms guaranteed in the Second Amendment is applicable to the states through the Fourteenth Amendment, and that Chicago's and Oak Park's prohibitions on possession of handguns violate the Second and Fourteenth Amendments. In addition, this Court should hold that said prohibitions deny the equal protection of the laws as guaranteed by the Fourteenth Amendment.

Dated: January 28, 2009 Respectfully submitted,

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Certificate of Compliance With Fed. R. App. P. 32(a)(7)

I, William N. Howard, hereby certify that this brief further complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as it contains 13,491 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6), as qualified by Circuit Rule 32(b), as it has been prepared in a 12-point proportionately spaced typeface, Century, in the body and 11-point proportionately spaced typeface, Century, in the footnotes, by using Microsoft Word 2003.

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Circuit Rule 31(E)(1) Certification

I, William N. Howard, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), versions of this brief and all of the appendix items that are available in non-scanned PDF format. An electronic copy of the brief has been submitted to the Court and to Counsel on a CD that has been checked for viruses.

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Circuit Rule 30(d) Statement

I, William N. Howard, certify under Rule 30(d) that all materials required under Circuit Rule 30(a) and (b) are included in the short appendix bound with this brief.

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CERTIFICATE OF SERVICE

The undersigned attorney states that he caused three (3) true and correct copies of **Brief and Required Short Appendix for Plaintiff-Appellants National Rifle Association, *et. al.***, together with one (1) CD containing same, to be served upon the parties of record, as shown below, via MESSENGER, on the **28th** day of **January, 2009**.

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SHORT APPENDIX

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Nos. 08-4241 and 08-4243 (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.

SEPARATE APPENDIX TO BRIEF FOR PLAINTIFF-APPELLANTS NATIONAL RIFLE ASSOCIATION, *et. al.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, Case Nos. 08-3696, 08-3697 Honorable Milton I. Shadur Presiding

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ORAL ARGUMENT REQUESTED

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