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

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**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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

Plaintiffs-Appellants,

v.

CITY OF CHICAGO and VILLAGE OF OAK PARK,

Defendants-Appellees.

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# REPLY BRIEF OF PLAINTIFFS-APPELLANTS NATIONAL RIFLE ASSOCIATION, *et al.*

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*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**

Table of Contents

Table of Authorities ..... ii

Argument ..... 1

I. The Supreme Court Has Left Open Whether the Second Amendment Applies to the States Through the Due Process Clause of the Fourteenth Amendment ..... 1

A. The Supreme Court Has Never Ruled on the Issue ..... 1

B. Lower Court Decisions are Equivocal and/or Premised on the Overruled "Collective Rights" View of the Second Amendment ..... 3

II. The Second Amendment Meets the Standards for Inclusion Under the Selective Incorporation Doctrine ..... 5

A. Incorporation Factors ..... 6

B. *Heller* Considered Factors Relevant to Selective Incorporation ..... 7

C. The Right to Common Arms for Self Defense is Fundamental ..... 9

1. Second Amendment Origins ..... 9

2. The State Constitutions ..... 12

3. Handguns for Self Defense in the Home are Protected ..... 15

4. "Ordered Liberty" Does Not Entitle Localities to Violate Rights ..... 15

III. The Original Understanding By Congress And The Public That The Fourteenth Amendment Protects Second Amendment Rights ..... 16

Conclusion ..... 24

## Table Of Authorities

**Page(s)**

**CASES**

*Andrews v. State*,
50 Tenn. 165, 8 Am. Rep. 8 (1871). ..... 23

*Bach v. Pataki*,
408 F.3d 75 (2d Cir. 2005) ..... 5

*Barron v. Baltimore*,
7 Pet. 243 (1833) ..... 22

*Benton v. Maryland*,
395 U.S. 784 (1969) ..... 9

*Cases v. United States*,
131 F.2d 916 (1st Cir. 1942) ..... 5

*District of Columbia v. Heller*,
128 S. Ct. 2783 (2008). ..... *passim*

*Duncan v. Louisiana*,
391 U.S. 145 (1968) ..... 7, 9, 10, 16

*English v. State*,
35 Tex. 473 (1872) ..... 21

*Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*,
965 F.2d 723 (9th Cir. 1992) ..... 5

*Georgia v. Rachel*,
384 U.S. 780 (1966) ..... 18

*Katzenbach v. Morgan*,
384 U.S. 641 (1966) ..... 19

*Lawrence v. Texas*,
539 U.S. 558 (2003) ..... 7, 8

*Love v. Pepersack*,
47 F.3d 120 (4th Cir. 1995) ..... 5

*Malloy v. Hogan*,
378 U.S. 1 (1964) ..... 1, 2

*Maloney v. Cuomo*,
554 F.3d 56 (2d Cir. 2009) ..... 3

*McConico v. Singleton*,
2 Mill Const. 244, 1818 WL 787 (S.C. Const. Ct. 1818) ..... 9

*Miller v. Texas*,
153 U.S. 535 (1894) ..... 1, 2

*Monell v. Dept. of Soc. Serv.,*
436 U.S. 658 (1978) ..... 22

*Mr. S. v. Webb*,
No. 03: 08CV0834, 2009 WL 650542 (D. Conn. March 13, 2009)..... 3

*Nordyke v. King*,
No. 07-15763, 2009 WL 1036086 (9th Cir. April 20, 2009).....*passim*

*Nunn v. State*,
1 Ga. 243 (1846)..... 13

*Parker v. District of Columbia*,
478 F.3d 370 (D.C. Cir. 2007),
*aff'd, District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) ..... 14

*Patsy v. Board of Regents*,
457 U.S. 496 (1982) .....22, 23

*People v. Abdullah*,
23 Misc.3d 232, 870 N.Y.S.2d 886 (N.Y. Crim. Ct. 2008)..... 3

*Peoples Rights Org., Inc. v. City of Columbus*,
152 F.3d 522 (6th Cir. 1998)..... 5

*Planned Parenthood v. Casey*,
505 U.S. 833 (1992) ..... 6

*Plyler v. Doe,*
457 U.S. 202 (1982) ..... 19

*Presser v. Illinois*,
116 U.S. 252 (1886) .....*passim*

*Quilici v. Village of Morton Grove*,
695 F.2d 261 (7th Cir. 1982),
*cert. denied*, 464 U.S. 863 (1983) ..... 4

*Reynolds v. Sims*,
377 U.S. 533 (1964) ..... 19

*Rinzler v. Carson*,
262 So.2d 661 (Fla. 1972) ..... 14

*Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) ..... 3

*State v. Chandler*,
5 La. Ann. 489 (1850) ..... 13

*State v. Duke*,
42 Tex. 455 (1875) ..... 14

*State v. Johnson*,
16 S.C. 187 (1881) ..... 13

*State v. Kerner,*
107 S.E. 222 (N.C. 1921) ..... 14

*State v. Kessler*,
614 P.2d 94 (Or. 1980) ..... 14

*State v. Reid*,
1 Ala. 612 (1840) ..... 23

*Thomas v. City Council of Portland*,
730 F.2d 41 (1st Cir. 1984) ..... 5

*United States v. Cruikshank*,
92 U.S. 542 (1876) ..... 1, 2, 3

*Washington v. Glucksberg*,
521 U.S. 702 (1997) ..... 17

*Watson v. Stone*,
4 So.2d 700 (Fla. 1941) ..... 23

*Young v. Hawaii*,
No. 08-00540, 2009 WL 874517 (D. Hawaii April 1, 2009) ..... 3

**U.S. CONSTITUTION**

Amend. I ..... 1,2

Amend. II ..... *passim*

Amend. IV ..... 1

Amend. VI ..... 16

Amend. XIV ..... *passim*

Amend. XV ..... 23

**STATUTES**

14 Stat. 176 (1866) ..... 17, 18, 20

14 Stat. 428 (1867) ..... 13

14 Stat. 487 (1867) ..... 18

18 U.S.C. § 924(c) ..... 8

42 U.S.C. § 1981 ..... 18

42 U.S.C. § 1983 ..... 22

**OTHER AUTHORITIES**

Bishop, Criminal Law (4th ed. 1868) ..... 21

Congressional Globe, 39th Cong. 1st Session ..... 19

Congressional Globe, 39th Cong. 2d Session ..... 18

Congressional Globe, 42d Cong., 1st Session ..... 22, 23

Congressional Globe, 42d Cong., 2d Session ..... 22

David T. Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. _ (2009) ..... 20

George W. Paschal, *The Constitution of the United States* (1868) ..... 21

H.R. Rep. No. 37, 41st Cong., 3d Sess. (1871) ..... 22

Henry St. George Tucker, *Commentaries on the Laws of Virginia* (1831) ..... 13

*The Loyal Georgian*, Feb. 3, 1866 ..... 20

Mass. H. R. Doc. No. 149 (1867) ..... 21

Pa. Leg. App. (1867) ..... 21

*Public Laws of the State of South Carolina, from its First Establishment as a British Province to the Year 1790, Incusive* (1790) ..... 11, 13

Stephen P. Halbrook, *The Founders' Second Amendment* (Ivan Dee Publishers 2008) ..... 12

Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876* (Praeger 1998) ..... 13, 18, 20, 21

Timothy Farrar, *Manual of the Constitution* (Boston 1867) ..... 22

William Blackstone, *Commentaries* (St. George Tucker ed. 1803) ..... 11

Wis. Sen. J. (1867) ..... 21

## Argument

### I. The Supreme Court Has Left Open Whether the Second Amendment Applies to the States Through the Due Process Clause of the Fourteenth Amendment.

#### A. The Supreme Court Has Never Ruled on the Issue

The Supreme Court has never ruled on whether the Second Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. It held that the First, Second, and Fourth Amendments do not apply directly to the States. *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *Miller v. Texas*, 153 U.S. 535, 538 (1894). *Miller* refused to consider whether the Second and Fourth Amendments apply to the States through the Privileges or Immunities Clause of the Fourteenth Amendment because it was not raised in the trial court. *Miller*, 153 U.S. at 538-39. (*See* NRA Br. 26-30.)

Chicago argues that these cases are binding precedent. (Brief of Appellees City of Chicago & Village of Oak Park (hereafter "Chicago Br.") 14-15.) Yet none of them addressed incorporation of the Second Amendment into the Fourteenth. Indeed, these cases could not have addressed incorporation through the Due Process Clause, the jurisprudence of which was not developed until the twentieth century.

Chicago quotes dictum in *Malloy v. Hogan*, 378 U.S. 1, 4 n.2 (1964), which listed "[d]ecisions that particular guarantees were not safeguarded against state action by the Privileges and Immunities Clause or other provision of the Fourteenth Amendment. . . ." The Court cited *Cruikshank* on the First Amendment, *Presser* on the Second Amendment, and eight other decisions on other Amendments. *Malloy*, 378

U.S. at 4 n.2. *Malloy* did not say that each and every cited case was decided under both the Privileges or Immunities Clause and "other provision of the Fourteenth Amendment." Moreover, *Presser* made no mention of the Fourteenth Amendment in relation to the Second.

Chicago attributes no significance to *Miller's* ruling that: "if the fourteenth amendment limited the power of the states as to such rights, 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." 153 U.S. at 538. (*See* Chicago Br. 15 n.2.) Chicago quotes from *Miller* but deleted the following italicized words: "*As the proceedings were conducted under the ordinary forms of criminal prosecutions*, there certainly was no denial of due process of law . . . ." *Id.* at 539 (emphasis added). The only due process issue raised thus related to criminal procedure, not to incorporation of a substantive right.

"With respect to *Cruikshank's* continuing validity on incorporation, . . . 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." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008). Chicago asks how a question on *Cruikshank's* "continuing validity" could arise unless it decided the incorporation issue. (Chicago Br. 16.) Yet *Heller's* comment only takes cognizance of the Supreme Court's early treatment of the direct applicability of the Bill of Rights to the States; it does not suggest that *Cruikshank* decided an issue – incorporation under the Due Process Clause – that the Court would not address until decades later.

Chicago argues that *Heller's* footnote 23 does not justify ignoring precedent. (Chicago Br. 16.) Yet no Supreme Court precedent exists on whether the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment. And *Heller* admonishes that inquiry into its later cases is "required."[1]

*Nordyke v. King*, No. 07-15763, 2009 WL 1036086, at *13 (9th Cir. April 20, 2009), recognized the Second Amendment to be selectively incorporated into the Due Process Clause of the Fourteenth Amendment. The Ninth Circuit found *Cruikshank* and *Presser* inapplicable because they addressed only direct application of the Second Amendment to the States. *Id.* at *4. It also found that incorporation through the Privileges or Immunities Clause was precluded by the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *Nordyke*, 2009 WL 1036086, at *4. "Because, as *Heller* itself points out, . . . *Cruikshank* and *Presser* did not discuss selective incorporation through the Due Process Clause, there is no Supreme Court precedent directly on point that bars us from heeding *Heller's* suggestions. *Nordyke*, 2009 WL 1036086, at *13 n.16.

### B. Lower Court Decisions are Equivocal and/or Premised on the Overruled "Collective Rights" View of the Second Amendment.

Circuits holding that the Second Amendment guarantees a State "collective right" rather than an individual right have been overruled by *Heller*. Influenced by that erroneous view, some courts held that the Second Amendment is not applicable to

[1] The cited post-*Heller* decisions failed to engage in this inquiry. (Chicago Br. 17 (citing *Maloney v. Cuomo*, 554 F.3d 56, 58-59 (2d Cir. 2009) (pro se case; rote citation to *Presser*)); *Mr. S. v. Webb*, No. 03: 08CV0834, 2009 WL 650542, at *8 (D. Conn. March 13, 2009) (no analysis).) Two of the cases distinguished *Heller* because they did not involve a handgun ban in the home. *Young v. Hawaii*, No. 08-00540, 2009 WL 874517, at *4-5 (D. Hawaii April 1, 2009); *People v. Abdullah*, 23 Misc.3d 232, 234, 870 N.Y.S.2d 886, 887 (N.Y. Crim. Ct. 2008).

the States through the Fourteenth Amendment. Logically, a provision to protect State powers from federal infringement would not limit State action.

"NRA correctly observes that Heller overrules *Quilici's* holding that the Second Amendment does not protect a 'right to keep and bear handguns.'" (Chicago Br. 20.) *See Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983). *Quilici's* view of the Second Amendment may have influenced its decision on incorporation.

That the Second Amendment does not directly apply to the States does not resolve the issue of selective incorporation. *See Quilici*, 295 F.2d at 269; *Presser*, 116 U.S. at 265. *Quilici* "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." *Heller*, 128 S. Ct. at 2813 n.23. (*See* NRA Br. 30-34.)

*Quilici* focused on direct application but also rejected an argument under the Privileges or Immunities Clause. 695 F.2d at 269 (Plaintiffs "assert that *Presser* also held that the right to keep and bear arms is an attribute of national citizenship which is not subject to state restriction"). *Quilici* rejected a total incorporation argument without identifying which clause it had in mind: "The Supreme Court has specifically rejected the proposition that the entire Bill of Rights applies to the states through the fourteenth amendment."[2] *Id.* This led the Ninth Circuit to cite *Quilici* as among the circuits which "relied on *Presser* to reject arguments for direct application or total

[2] Chicago represents that *Quilici* "held that 'later Supreme Court cases incorporating other amendments' under the Due Process Clause are no reason to ignore the Court's Second Amendment cases." (Letter to Clerk, April 23, 2009.) In fact no reference to the Due Process Clause appears in the *Quilici* opinion.

incorporation, without addressing selective incorporation." *See Nordyke*, 2009 WL 1036086, at *6 n.8.[3]

Chicago cites cases from other circuits, but most adopt the invalid "collective rights" view.[4] (Chicago Br. 18 n.4.) None of them conduct the type of analysis of modern incorporation cases that *Heller* instructs is "required."

## II. The Second Amendment Meets the Standards for Inclusion Under the Selective Incorporation Doctrine.

The right to keep common arms such as handguns in the home for self defense and other lawful purposes is a fundamental right protected by the Second Amendment. Engaging in the Fourteenth Amendment inquiry required by the Supreme Court's later cases, this right is protected from infringement by the States. (*See* NRA Br. 15-17, 35-42.)

Chicago claims that "the inclusion of the Second Amendment in the Bill of Rights says *nothing* about whether the right it protects" is fundamental, and "the Second Amendment was not codified to protect individual liberty." (Chicago Br. 9 (emphasis added).) By contrast, *Heller* states: "The very text of the Second Amendment implicitly recognizes the pre-existence of the right . . . ." 128 S. Ct. at

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[3] *Nordyke* read its own precedent to have been similarly limited in its holding. 2009 WL 1036086, at *5 (distinguishing *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992)).

[4] *E.g.*, *Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) ("second amendment grants right to the state, not the individual"); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) ("the Second Amendment preserves a collective, rather than individual, right"); *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 539 n.18 (6th Cir. 1998); *Cases v. United States*, 131 F.2d 916, 921-22 (1st Cir. 1942) (dictum, Fourteenth Amendment not mentioned). *Cf. Bach v. Pataki*, 408 F.3d 75, 85 (2d Cir. 2005) ("*Bach* does not distinguish *Presser*").

2797. Moreover, the Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 2821.

*Heller* precludes Chicago's premise that Second Amendment protection is "circumscribed by its primary purpose of preventing federal disarmament of the militia." (Chicago Br. 9-10.) Self-defense "was the central component of the right itself," and "modern developments have limited the degree of fit between the prefatory [militia] clause and the protected right . . . ." *Heller,* 128 S. Ct. at 2801, 2817.

Chicago asserts that English and United States history reveals no deeply-rooted right to specific arms for self defense. (Chicago Br. 10.) *Heller* is filled with page after page to the contrary.

### A. Incorporation Factors

Chicago fails properly to apply the factors to be considered for incorporation. It misreads the development of the right in England and America, its recognition in State constitutions, and its purpose, and ignores *Heller's* analysis of each of these. (*Id.* 22-23.)

NRA did not state that enumeration in the Bill of Rights automatically incorporates a right. (*Id.* 23-24.) NRA contrasted substantive from procedural guarantees. (NRA Br. 40.) "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, 847-48 (1992) (referring to "the specific guarantees elsewhere provided in the Constitution; . . . the right to keep and bear arms").

Supreme Court decisions incorporating substantive rights did so in a sentence or two. (*See* NRA Br. 36-38.)

Chicago claims that no basis exists to distinguish substantive from procedural rights for incorporation analysis (Chicago Br. 25) but the Court does so. *Duncan v. Louisiana*, 391 U.S. 145, 150 (1968), epitomizes this approach: "The question thus is whether . . . a particular procedure is fundamental – whether, that is, a procedure is necessary to an Anglo American regime of ordered liberty."

### B. *Heller* Considered Factors Relevant to Selective Incorporation.

Ignoring its extensive discussion of rights, Chicago claims that *Heller* considered nothing pertinent to selective incorporation. "*Heller* did not decide anything beyond the original public meaning of the Second Amendment at the time of ratification in 1791." (Chicago Br. 26.)

Chicago rejects "*Heller's* focus on original intent as of 1791" and points to "our laws and traditions in the past half century" as determinative of liberty interests protected by substantive due process. (*Id.* 40 (citing *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)).) Unlike same sex sodomy, keeping arms is explicitly protected in the Bill of Rights. "Substantive due process addresses unenumerated rights; selective incorporation, by contrast, addresses enumerated rights." *Nordyke*, 2009 WL 1036086, at *6. Moreover, *Lawrence* teaches expansion, not a restriction of rights: "laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." 539 U.S. at 579.

As for Chicago's ban on handguns in the home, *Lawrence* has a lesson: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home." 539 U.S. at 562.

Chicago avers: "There are words in *Heller* that can be read out of context to support plaintiffs." (Chicago Br. 27 (citing 128 S. Ct. at 2818).) *Heller* held: "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." 128 S. Ct. at 2817-18. Further, "the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* at 2818.[5]

Yet Chicago argues that whether a handgun is useful for self defense is irrelevant to whether it is essential to exercise of a fundamental personal liberty, like self defense. (Chicago Br. 28.) But *Heller* held that "the inherent right of self-defense has been central to the Second Amendment right." 128 S. Ct. at 2817. As for the argument that the right may be exercised in other ways, *Heller* responds: "It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Id.* at 2818.

[5] The Brief of the U.S. Conf. of Mayors at 1, 21, purports to read *Heller* to say the Second Amendment guarantees a right to bear arms to "gang members and drug dealers." To the contrary, *Heller* principles would approve the mandatory prison sentences applicable to persons who use firearms in relation to crimes of violence and drug trafficking. *See* 18 U.S.C. § 924(c).

Chicago claims that the NRA did not conduct a *Duncan* analysis. (Chicago Br. 29 & n.8.) NRA analyzed the *Duncan* factors as stated in the more refined analysis set forth in *Benton v. Maryland*, 395 U.S. 784, 794-95 (1969). (NRA Br. 39-42 (explicit nature of the guarantee, Greco-Roman heritage, English common law, Blackstone, State constitutions, etc.).)

### C. The Right to Common Arms for Self Defense is Fundamental.

#### 1. Second Amendment Origins

Chicago denies the existence of any fundamental right to arms in common use for self defense. The Second Amendment's purpose is not to protect individual liberties, but to protect State militias from federal disarmament. (Chicago Br. 30-31.) Those were the District of Columbia's arguments which *Heller* rejected.

Chicago argues that the only "pre-existing" right to have arms was for militia muster. (*Id.* 32.) But Blackstone "cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. . . . His description of it cannot possibly be thought to tie it to militia or military service." *Heller*, 128 S. Ct. at 2798.

Chicago asserts that the Framers had no purpose to protect self defense. (Chicago Br. 33.) *Heller* states: "The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."[6] 128 S. Ct. at 2801.

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[6] To be sure, exercising the right for purposes such as hunting promotes the militia purpose. *McConico v. Singleton*, 2 Mill Const. 244, 1818 WL 787, at *1 (S.C. Const. Ct. 1818) ("the militia . . . necessarily constitutes our greatest security against aggression; our forest is the great field in which, in the pursuit of game, they learn the dexterous use and consequent certainty of firearms").

Chicago contends that the Congressional debates do not suggest "any view that a private arms right unconnected to preservation of the militia was fundamental." (Chicago Br. 33-34.) *Heller* found it "dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right . . . ." 128 S. Ct. at 2804.

Chicago argues that the arms right "stands in stark contrast" to incorporated liberty interests such as jury trials. (Chicago Br. 34.) *Duncan,* 391 U.S. at 155-56, states: "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." So does the Second Amendment: "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Heller*, 128 S. Ct. at 2801.

At the founding, argues Chicago, State regulation of firearms was pervasive: "States prohibited some arms and ammunition and required others. For example, Boston forbade loaded firearms in buildings." (Chicago Br. 34-35.) *Heller* referred to that very law as follows: "we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home." 128 S. Ct. at 2820. Chicago also refers to militia laws that *required* possession of firearms, but this is hardly precedent for banning them.

Chicago fails to mention the only "pervasive" State regulation banning firearms at the founding – the Slave Codes. For instance, South Carolina enacted a prohibition on any slave "to carry or make use of fire-arms, or any offensive weapons whatsoever," unless "in the presence of some white person" or with a license from the master.

*Public Laws of the State of South Carolina, From its First Establishment as a British Province to the Year 1790, Inclusive*, 168. It was also unlawful for slaves to be taught to write, to assemble and to travel. *Id.* at 174.

Chicago argues that *Heller* used the term "fundamental" when describing the right only in regard to English law, not the Second Amendment. (Chicago Br. 35.) But *Heller* states: "By the time of the founding, the right to have arms had become fundamental for English subjects." 128 S. Ct. at 2798. The right did not become "non-fundamental" when expressed in the Amendment.

Chicago finds solace in the English Bill of Rights limitation on the right to arms to Protestants, and that the poorer classes were at times disarmed through game regulations. (Chicago Br. 36.) Chicago cites Blackstone and St. George Tucker, but fails to mention their disapproval of these practices. Tucker contrasted the Second Amendment: "The right of the people to keep and bear arms shall not be infringed . . ., and this without any qualification as to their condition or degree, as is the case in the British government." William Blackstone, 1 *Commentaries* *143 n.40 (St. George Tucker ed. 1803)[7]; *see also id.*, vol. 2, at *414 n.3 (contrasting English game laws from the arms right in America). Tucker wrote of the Amendment:

> This may be considered as the true palladium of liberty. . . . The right of self defense is the first law of nature. . . . Wherever . . . the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

Tucker, *View of the Constitution*, in 1 Blackstone, App. at 300.

[7] For Blackstone's criticism, *see id.* at *143 n41.

Chicago claims the English Bill did not declare any fundamental rights, but allocated power between the Crown and Parliament, the latter of which was free to regulate. (Chicago Br. 37.) By analogy, the States may disregard the Second Amendment. That argument goes nowhere. The federal Bill of Rights bound both the President and the Congress, and the Fourteenth Amendment binds the States.

**2. The State Constitutions**

Chicago argues that State constitutions exhibit no deeply rooted right to arms in common use. (Chicago Br. 38.) But *Heller* rejected the view that "would thus treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions . . . ." 128 S. Ct. at 2802-03.

The right to have arms was considered fundamental in every State at the founding. Stephen P. Halbrook, *The Founders' Second Amendment* 126-69 (Ivan Dee Publishers 2008) (hereafter "*Founders*") (State-by-State analysis). Chicago states that 8 of the original 13 State constitutions had no arms guarantee. Yet none of those 8 States explicitly protected free speech either – two had no written constitution,[8] three had no bill of rights,[9] and three had bills of rights without any mention of free speech.[10]

Chicago avers that "only" 22 of 37 States had arms guarantees when the Fourteenth Amendment was adopted. (Chicago Br. 38.) Such statistics mean little in

[8] Connecticut and Rhode Island. Halbrook, *Founders*, 164-66.

[9] New Jersey, New York, and South Carolina. Halbrook, *Founders*, 133, 151, 127.

[10] Delaware, Maryland, and New Hampshire. Halbrook, *Founders*, 141, 143, 161.

isolation. Ten of the Southern States were required to amend their constitutions to be consistent with the Fourteenth Amendment to be readmitted to the Union.[11] Of these, six had antebellum arms guarantees; of the four that did not, two had court rulings that the Second Amendment applied to the States,[12] and the other two had legal traditions consistent therewith.[13] Revision of their constitutions in 1867-68 left seven of ten states with arms guarantees, three of which expanded the guarantee from "the free white men" to "the people" or "the citizens"; the three States that did not had court decisions or legal traditions consistent therewith.[14] Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876* 90-98 (Praeger 1998).

Moreover, 23 States had arms guarantees by the end of Reconstruction. While 12 did not, some of them had no bills of rights at all either. Halbrook, *Freedmen*, 99.

All but six of the fifty States today have arms guarantees. (Chicago Br. 39.) While the language varies, the same could be said about free speech. "Despite the many variations in wording, the states' constitutional provisions guaranteeing the

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[11] Ala., La., Va., Ga., Ark., Miss., S.C., N.C., Fla., and Tex. *See* 14 Stat. 428 (1867).

[12] *Nunn v. State*, 1 Ga. 243 (1846); *State v. Chandler*, 5 La. Ann. 489, 490 (1850).

[13] Henry St. George Tucker, *Commentaries on the Laws of Virginia* 43 (1831) ("the right of bearing arms . . . is practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation"); *Public Laws of the State of South Carolina* (1790) App. 13 ("Subjects Arms" in English Bill of Rights).

[14] They included Virginia, Louisiana, and South Carolina. *See also State v. Johnson*, 16 S.C. 187 (1881) (concealed weapon prohibition consistent with "the right of the citizen to bear arms").

right to bear arms share a common historical background." *State v. Kessler*, 614 P.2d 94, 95 (Or. 1980).

Chicago cites State court decisions upholding regulations on the carrying of arms and bans on narrow classes of firearms, such as machineguns. (Chicago Br. 40-43.) None of those cases, other than those involving Chicago and Morton Grove, concerned a ban on an entire class of common firearms, whether handguns, rifles, or shotguns. In the entire United States, currently only Chicago and Oak Park ban handguns.

Chicago objects to *Heller's* "common use" test and claims no State court adopts that test. (Chicago Br. 42-43.) *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972), held protected arms to be those that "are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles." *See also State v. Duke*, 42 Tex. 455, 458-59 (1875) ("such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense"); *State v. Kerner,* 107 S.E. 222, 224 (N.C. 1921) ("all 'arms' as were in common use"; "'pistol' *ex vi termini* is properly included within the word 'arms'").[15]

Chicago offers no test other than that States and localities should be able to "ban weapons that are, in their considered judgment, detrimental to the public welfare." (Chicago Br. 43.) That is no test at all. Chicago concludes that "handguns

[15] "Once it is determined . . . that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff'd, District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

are akin to the type of dangerous weapons that *Heller* recognized are not historically recognized." (*Id.* 43-44.) *Heller* said just the opposite.

### 3. Handguns for Self Defense in the Home are Protected.

Chicago argues that handguns may be banned because self defense in the home does not require any particular arm. (*Id.* 44.) *Heller* precludes this assertion: "It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." 128 S. Ct. at 2818.

### 4. "Ordered Liberty" Does Not Entitle Localities to Violate Rights.

Chicago claims that "ordered liberty" entitles urban areas to ban firearms in common use. (Chicago Br. 47-50.) *Heller* forecloses this argument: "The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[16] 128 S. Ct. at 2821. Allegedly "in an urban landscape, the Second Amendment becomes the enemy of ordered liberty, not its guarantor." (Chicago Br. 50.) While "some think the Second Amendment is outmoded, . . . it is not the role of this Court to pronounce the Second Amendment extinct." *Heller*, 128 S. Ct. at 2822.

Chicago argues that it "makes sense that the Constitution would restrain the federal government more than States" on the Second Amendment. (Chicago Br. 51.) Yet when the Bill of Rights was debated in 1789, Congress rejected a proposal to prohibit States from infringing on the rights to trial by jury and free speech. "This

[16] The Brief of Illinois Municipal League does not even mention the Constitution, but concedes: "Since 1982, . . . Chicago has maintained a ban on most handguns. . . . The number of murders involving the use of guns in Chicago rose by more than 80% between 1985 and 1994." (Br. Ill. Mun. League at 9-10.)

relatively clear indication that the framers of the Sixth Amendment did not intend its jury trial requirement to bind the States is, of course, of little relevance to interpreting the Due Process Clause of the Fourteenth Amendment, adopted specifically to place limitations upon the States." *Duncan*, 391 U.S. at 153 n.20. The same applies here.

Based on *Heller*, pertinent historical sources, and the jurisprudence of selective incorporation, the Ninth Circuit held in *Nordyke*, 2009 WL 1036086, at *13:

> We therefore conclude that the right to keep and bear arms is "deeply rooted in this Nation's history and tradition." Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. . . . Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.

## III. The Original Understanding by Congress and the Public That the Fourteenth Amendment Protects Second Amendment Rights.

Chicago makes three arguments regarding whether the Fourteenth Amendment was intended to incorporate Second Amendment rights. (Chicago Br. 13, 52-59.) First, confusion existed in Congress about whether the entire Bill of Rights was incorporated – yet over two-thirds voted for the Freedmen's Bureau Act's recognition of the right to bear arms. Second, the Amendment only intended to prevent discrimination – but that applies only to the Equal Protection Clause. Third,

there was no clear public understanding – but Second Amendment protection was widely understood.

"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 generally Halbrook, *Freedmen*); *see also* NRA Br. 17-26. "[T]he Framers of the Fourteenth Amendment considered the right to keep and bear arms a crucial safeguard against white oppression of the freedmen." *Nordyke*, 2009 WL 1036086, at *12 (citing Halbrook, *Freedmen*, 9-38).

More evidence exists that the Second Amendment was intended to be incorporated than exists for any other right. The same two-thirds of Congress that passed the Fourteenth Amendment enacted the Freedmen's Bureau Act, which provided that "the 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, . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens. . . ." Freedmen's Bureau Act § 14, 14 Stat. 176-177 (1866).[17] The rights to "personal liberty" and "personal security" are protected by the Fourteenth Amendment.[18]

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[17] Brief of Historians at 11-12 argues that only a few members of Congress adhered to "total incorporation." Passage of the Freedmen's Bureau Act by over two-thirds vote expressed Congressional intent to incorporate the right to have arms.

[18] *See* NRA Br. 25; *Washington v. Glucksberg*, 521 U.S. 702, 714 (1997) ("The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable") (citation omitted).

Chicago states that the Fourteenth Amendment constitutionalized the Civil Rights Act of 1866 (today's 42 U.S.C. § 1981), but limited that Act and the Freedmen's Bureau Act to non-discrimination. (Chicago Br. 56.) Yet both Acts protected the "*full and equal* benefit of all laws" concerning personal security and liberty.[19] (*See* NRA Br. 20-21, 23.) The deprivations of the Black Codes would not have been valid if they applied to all persons alike.

Chicago discounts the Freedmen's Bureau Act because it only applied in States where judicial proceedings were interrupted by the rebellion (Chicago Br. 56-57) but it also applied in States not restored to the Union. Moreover, the Civil Rights Act invalidated the same Black Code infringements on Second Amendment rights of freedmen enacted by the Southern States and enforced by their militias, which Congress disbanded.[20] Halbrook, *Freedmen*, 57-59, 68-69.

Chicago states that the explanation by Jacob Howard that the Fourteenth Amendment would make Bill of Rights guarantees applicable to the States was "just one of several views." (Chicago Br. 54.) Introducing the Amendment in the Senate, Howard distinguished the "privileges and immunities of citizens" in Article IV of the

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[19] "§14 of the amendatory Freedmen's Bureau Act . . . re-enacted, in virtually identical terms for the unreconstructed Southern States, the rights granted in § 1 of the Civil Rights Act of 1866." *Georgia v. Rachel*, 384 U.S. 780, 797 n.26 (1966).

[20] The Brief of the U.S. Conf. of Mayors at 22-23 sees curtailment of the Second Amendment in the abolition of the Southern State militias by the same Congress that framed the Fourteenth Amendment. But Congress was enforcing the Second Amendment against the States – as Senator Wilson explained, the militias "go up and down the country taking arms away from men who own arms, and committing outrages of various kinds . . . ." Cong. Globe, 39th Cong., 2d Sess. 1849 (1867). The bill was amended so that it would "disband," but not "disarm," the militias, based on Senator Willey's objection against "disarming the whole people of the South." *Id.*; 14 Stat. 487 (1867).

Constitution from "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms . . . ." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). However, this "mass of privileges, immunities, and rights" did not restrain the States. *Id.* "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." *Id.* at 2766. He did not state that every Bill of Rights guarantee so applied, and distinguished "rights" from "privileges and immunities." *Id.*

Howard's speech is weighty authority for the Fourteenth Amendment's meaning. *Plyler v. Doe,* 457 U.S. 202, 214-15 (1982) (Howard was "explicit about the broad objectives of the Amendment"); *Reynolds v. Sims*, 377 U.S. 533, 600 (1964) (quoting Howard on "those fundamental rights lying at the basis of all society"). Howard's explanation of the Enforcement Clause "was not questioned by anyone in the course of the debate." *Katzenbach v. Morgan*, 384 U.S. 641, 648 n.8 (1966). Nor did anyone question his statement that the Amendment would protect the Bill of Rights guarantees that he mentioned, including the right to keep and bear arms.

Chicago asserts that the NRA does not explain which clause of the Fourteenth Amendment makes the Second Amendment applicable to the States. (Chicago Br. 54-55.) The Framers broadly referred to the right to have arms as among the rights, privileges, and immunities protected by the Fourteenth Amendment. In its complaint, the NRA relies on both the Due Process and Privileges or Immunities Clauses as protecting the arms right. Historically, the Supreme Court rejected

incorporation under the Privileges or Immunities Clause, and established the doctrine of selective incorporation through the Due Process Clause. NRA claims the arms right is protected under either or both clauses.

Chicago contends it is unknown whether the public understood the Second Amendment to be incorporated into the Fourteenth. (*Id.* 53-54, 57-58.) Yet the Fourteenth Amendment's framers reflected the Nation's views. The fundamental character of the right to keep and bear arms was evident nationwide in view of the plight of the freedmen deprived of the right. It was expressed in debates, hearings, reports, proclamations, trials, letters, State conventions, and newspapers.[21] Halbrook, *Freedmen*, chapters 1-4.

African Americans were advised that "you have the same right to own and carry arms that other citizens have." *The Loyal Georgian*, Feb. 3, 1866, at 1, *quoted in* Halbrook, *Freedmen*, 19. The Freedmen's Bureau proclaimed: "All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves." *Id.*

State ratification records are scant but express the understanding of the Second Amendment as protecting fundamental rights. The Committee on Federal Relations in the Massachusetts General Court quoted the Second Amendment and other guarantees, stating: "Nearly every one of the amendments to the constitution grew out of a jealousy for the rights of the people, and is in the direction, more or less

[21] *See* David T. Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. _ (2009), *available at* http://works.bepress.com/david _hardy/5/.

direct, of a guarantee of human rights. . . . [T]hese provisions cover the whole ground of section first of the proposed amendments." Mass. H. R. Doc. No. 149, at 3 (1867), *quoted in* Halbrook, *Freedmen*, 71-72. The minority report agreed that the proposed Amendment asserted preexisting rights: "As a declaration of the true intent and meaning of American citizenship, it appeals to freemen everywhere." Mass H.R. Doc No. 149, at 25.[22]

The Brief of Historians at 9-11 focuses on total incorporation and disregards the clear intent to incorporate the Second Amendment. It states that Joel Bishop "failed to discuss total incorporation," but ignores his words: "This provision [Second Amendment] is found among the amendments; and, though most of the amendments are restrictions on the general government alone, not on the states, this one seems to be of a nature to bind both the state and national legislatures, and doubtless it does." 2 J. Bishop, Criminal Law, ¶ 124 (4th ed. 1868), *cited approvingly in English v. State*, 35 Tex. 473, 475 (1872).[23]

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[22] In the Pennsylvania General Assembly, it was averred that "the spirit of this section [1] is already in the Constitution, and that we are only reenacting it in plainer terms," and also that it protected "inherent and indefeasible rights," including those of "defending life and liberty." Pa. Leg. App., 59, 94 (1867). In Wisconsin, it was objected that the Constitution already protected "the absolute rights of personal security, personal liberty and the right to acquire and enjoy private property. . . . Why, then, is it necessary to engraft into the federal constitution that part of section one [of] the amendments which says: 'Nor shall any state deprive any person of life, liberty or property, without due process of law?'" Wis. Sen. J. 106 (1867) (minority report).

[23] "This clause [the Second Amendment] . . . is based on the idea, that the people cannot be oppressed or enslaved, who are not first disarmed." George W. Paschal, *The Constitution of the United States* 256 (1868). "The new feature declared [by the Fourteenth Amendment] is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States." *Id.* at 86.

Brief of Historians at 14 asserts that in 1871 members of Congress were still confused, but debates on the Civil Rights Act (today's 42 U.S.C. § 1983) that year again demonstrated the understanding that the Second Amendment was incorporated. Rep. Bingham explained that he drafted the Fourteenth Amendment to nullify *Barron v. Baltimore*, 7 Pet. 243 (1833), which held the Bill of Rights inapplicable to the states. *Monell v. Dep't. of Soc. Serv.,* 436 U.S. 658, 686-87 (1978). In the same speech, he 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, 42nd Cong., 1st Sess., App. 84 (1871).

*Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982), quoted Rep. Dawes on the judicial protection of "these rights, privileges, and immunities," which Dawes identified as follows:

> He has secured to him the right to keep and bear arms in his defense. . . . It is all these, Mr. Speaker, which are comprehended in the words, "American citizen," and it is to protect and to secure him in these rights, privileges and immunities this bill is before the House.

Cong. Globe, 42nd Cong., 1st Sess., 475-76 (Apr. 5, 1871).[24]

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> Timothy Farrar, *Manual of the Constitution* 145 (Boston 1867), stated:
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> "The right of every person to "life, liberty, and property," to "keep and bear arms," to the "writ of habeas corpus," to "trial by jury," and divers other, are recognized by, and held under, the Constitution of the United States, and cannot be infringed by individuals or States, or even by the government itself."

[24] *Patsy*, 457 U.S. at 504-06, further relied on the speeches of Rep. Butler, Rep. Coburn, and Senator Thurman. In related statements each of them held the right to arms as among the "rights, immunities, and privileges" guaranteed in the Constitution. H.R. Rep. No. 37, 41st Cong., 3d Sess., 3 (1871) (Butler); Cong. Globe, 42d Cong., 1st Sess., 459 (1871) (Coburn); *Id.*, 2d Sess., App. 25-26 (1872) (Thurman).

As if it contains only the Equal Protection Clause, Chicago argues that the Fourteenth Amendment guards only against discrimination. (Chicago Br. 58.) If only the Black Codes applied to everyone, they would not have violated the Amendment.[25]

Brief of Historians Part II surveys State constitutions that authorized regulation of carrying concealed weapons and laws which did so.[26] It cites no State constitution which authorized any prohibition on keeping firearms in the home or a single law which did so. A topic heading asserts that laws "Sometimes Bann[ed] . . . Handguns," *id.* at 25, but no law banning the keeping of handguns is cited. *See Andrews v. State*, 50 Tenn. 165, 8 Am. Rep. 8, 16 (1871) (distinguishing the bearing of arms from "the right to keep them").

Even so, as with voting rights under the Fifteenth Amendment, it cannot be assumed that all State laws on the books after the adoption of the Fourteenth Amendment were consistent therewith. *See Watson v. Stone*, 4 So.2d 700, 703 (1941) (Buford, J., concurring) ("the Act was passed for the purpose of disarming the negro laborers. . . . [T]here had never been . . . any effort to enforce the provisions of this

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"Opponents of the bill also recognized this purpose and complained that the bill would usurp the State's power." *Patsy*, 457 U.S. at 504 n.6 (citing Rep. Whitthome). On the page cited by the Court, Whitthome stated that under the civil rights bill, if a police officer seized a pistol from a "drunken negro," then "the officer may be sued, because the right to bear arms is secured by the Constitution." Cong. Globe, 42d Cong., 1st Sess. 337 (1871).

[25] Brief of Historians at 17 argues the same, but quotes Rep. Julian as stating: "Florida makes it a misdemeanor for colored men to carry weapons without a license. . . . Cunning legislative devices are being invented in most of the states to restore slavery in fact." More was at stake than mere equality – not trusting a person with a firearm was the mark of a slave.

[26] It ignores such cases as *State v. Reid*, 1 Ala. 612, 616-17 (1840) (upholding concealed weapon law but adding: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be bourne as to render them wholly useless for the purposes of defense, would clearly be unconstitutional").

statute as to white people, because it has been generally conceded to be in contravention of the Constitution").

In sum, certain State laws sought to keep African Americans in subjection by disarming them. A leading purpose of the Fourteenth Amendment was to guarantee the right to keep and bear arms to all.

## Conclusion

This Court should reverse the judgment below.

Dated: May 14, 2009

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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 6998 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), a version of this brief. 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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## CERTIFICATE OF SERVICE

The undersigned attorney states that he caused two (2) true and correct copies of **Reply Brief of 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 **14th** day of **May, 2009** and upon the Amici parties shown below via U.S. Mail on the **14th** day of **May, 2009.**

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