

Nos. 08-4241, 08-4243, 08-4244

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

OTIS McDONALD, ET AL., PLAINTIFFS-APPELLANTS,

v.

CITY OF CHICAGO, DEFENDANT-APPELLEE.

CASE No. 08-CV-3645

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. ET AL., PLAINTIFFS-APPELLANTS,

v.

VILLAGE OF OAK PARK, DEFENDANT-APPELLEE.

CASE No. 08-CV-3696

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. ET AL., PLAINTIFFS-APPELLANTS,

v.

CITY OF CHICAGO, DEFENDANT-APPELLEE.

CASE No. 08-CV-3697

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
THE HONORABLE MILTON I. SHADUR

BRIEF OF *AMICI CURIAE* CHICAGO BOARD OF EDUCATION, INSTITUTE OF
MEDICINE OF CHICAGO, WAYMAN AFRICAN METHODIST EPISCOPAL CHURCH OF
CHICAGO, ILLINOIS COUNCIL AGAINST HANDGUN VIOLENCE, LEGAL
COMMUNITY AGAINST VIOLENCE, COALITION TO STOP GUN
VIOLENCE/EDUCATIONAL FUND TO STOP GUN VIOLENCE, VIOLENCE POLICY
CENTER, STATES UNITED TO PREVENT GUN VIOLENCE, AND FREEDOM STATES
ALLIANCE IN SUPPORT OF DEFENDANTS-APPELLEES URGING AFFIRMANCE OF
JUDGMENT

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Freedom States Alliance

(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:

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STATEMENT OF INTEREST AND AUTHORITY TO FILE

With the consent of all parties, the following *amici curiae* submit this brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure in an effort to assist the Court in evaluating the scope of the traditional police power exercised by the states to regulate firearms after *District of Columbia v. Heller*.

Amici curiae are the Board of Education of the City of Chicago and the non-profit organizations Institute of Medicine of Chicago, Wayman African Methodist Episcopal Church of Chicago, Illinois Council Against Handgun Violence, Legal Community Against Violence, Coalition to Stop Gun Violence/Educational Fund to Stop Gun Violence, Violence Policy Center, States United to Prevent Gun Violence, and Freedom States Alliance. *Amici* are governmental, civic and religious organizations actively engaged in efforts to reduce handgun violence and the destructive impact it has on the local communities and urban centers they serve. A brief description of each organization's mission is set forth in Appendix A.

SUMMARY OF ARGUMENT

The right to arms, even for self-defense, is fundamentally different from all other liberties retained by individuals in society because of the inherent lethality of firearms. We tolerate few restrictions on the right to free speech because of its salutary effects, and because, “sticks and stones may break my bones but words can never hurt me,” as the nursery rhyme goes. Guns, on the other hand, will kill you.

The Second Amendment right to have arms for self-defense in the home, recognized last year by the Supreme Court in *District of Columbia v. Heller*, ultimately is subordinate to the greater right of all individuals to “personal security.” That is how Blackstone understood the right to arms for self-defense, and that is how it has been understood in the states since the founding. In virtually every state, the right to arms for self-defense is subject to reasonable regulation under the police power, which includes the power in urban areas to prohibit classes of arms in order to prevent crime and protect public safety. Even *Heller* recognized that the right to arms must yield to the crime-prevention and safety needs of the community at times. The only question in this case is whether *Heller* forecloses all possibility of a local legislative handgun ban under the police power. We argue that *Heller* should not be so construed.

The *Heller* majority held that the Second Amendment protects firearms in common use, and struck down the federal ban on handguns in Washington, D.C. because the ordinance “amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.” The Court did not find that a right to handguns is “fundamental” or even reasonably necessary for

effective self-defense in the home. It simply found that “[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.” There are two fundamental problems with this ruling that should prevent its expansive application to the states.

First, to the extent the Court is suggesting that *American society* has overwhelmingly chosen handguns for self-defense in the home, that premise is false. Only 24% of all adults (35% of households) have any kind of a gun (long gun or handgun or both), and only 16% of adults (24% of households) have one or more handguns. Of those 16%, just over two-thirds – or 10.1% of all American adults – have one or more handguns primarily for self-defense or as their sole firearm(s) (*i.e.*, the only firearm available for self-defense). The same analysis for the 19.9% of adults who own long guns, with whom handgun owners overlap significantly, indicates that just over half of them – or 10.3% of American adults – have one or more long guns primarily for self-defense or as their sole firearm(s) (*i.e.*, the only firearm available for self-defense). It simply is not true that Americans overwhelmingly keep *any* firearm, much less handguns, to defend themselves – in the home or anyplace else. What is true is that respondents to a since-invalidated telephone survey (upon which the *Heller* majority obliquely relied) indicated that, among the tiny fraction who claim to have actually used a gun in self-defense, more than three-quarters (80%) used a handgun rather than a long gun.

On the other side of the “lawful self-defense” coin are the many negative externalities of handgun ownership imposed on the community. A starting point is the

simple fact that as the rate of handgun ownership increases, so do the rates of handgun criminal-homicide and handgun suicide. Handguns are used to commit more than 737,000 of the roughly 847,000 firearm violent crimes that are perpetrated each year (homicide, rape/sexual assault, robbery, assault). Handguns also are used offensively 7 times for every 1 time they are used defensively.

Second, firearm choice among the small fraction of Americans adults who have handguns is not a workable basis for examining state laws. If popularity of a weapon is the standard, the assault-weapon bans presently in place in seven states now may be vulnerable to constitutional challenge because, following the election and inauguration of President Obama, assault weapons apparently were purchased in other states *en masse* in fear of a federal ban. Does the Constitution require us to take a poll to determine which weapons are in common use and which are most preferred? If so, such a poll would show that gun ownership varies tremendously by region: in Mississippi 55% of adults own a firearm, while in Massachusetts fewer than 13% do. Do the various poll results in different states affect the constitutionality of every state's regulation?

Control of arms, and specifically firearms, to prevent crime and secure the entire community has always been primarily a matter of state and local action. *See Antonin Scalia, A Matter of Interpretation, Federal Courts and the Law* 136-137 n.13 (Amy Gutmann ed., Princeton U. Press 1997). The country has a history of prohibiting under the police power classes of firearms, including nonmilitary-use pistols that are concealable and prevalent in the commission of crime. The Court's factually incorrect "most popular

weapon” rationale for overturning the federal handgun ban in Washington, D.C. should not be construed to preclude state and local legislatures, in appropriate circumstances, from acting under their police power to prevent crime and protect *everyone’s* right to personal security. As Justice Jackson wisely cautioned 60 years ago in a case striking down an incitement-to-violence conviction on First Amendment grounds: “There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.” *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). He was vindicated two years later when the Court upheld an incitement conviction, recognizing that even broad First Amendment rights must yield to clear and present dangers to public safety. *Feiner v. New York*, 340 U.S. 315 (1951).

ARGUMENT

I. THE RIGHT TO HAVE ARMS FOR SELF-DEFENSE IS SUBORDINATE TO THE GREATER RIGHT OF ALL INDIVIDUALS TO PERSONAL SECURITY.¹

In the social-contract political theory that pervaded post-revolutionary American thought,² “civil government is the proper remedy for the inconveniences of the state of nature.” John Locke, *Second Treatise of Government* § 13, at 12, (C.B. Macpherson ed., Hackett Publ’g 1980) (1764). Locke posited that in nature people have the right to

¹ *Amici* agree with Appellees City of Chicago and Village of Oak Park that the Second Amendment incorporation arguments advanced by Appellants in these cases are foreclosed by controlling Supreme Court and Seventh Circuit precedent. *Amici* also agree with Appellees that, even if the court were free to look beyond those controlling cases, there is no fundamental right to possess a *handgun* for self-defense. The court therefore should reject Appellant’s incorporation arguments and affirm the court below.

² *See, e.g.*, Gordon S. Wood, *The Creation of the American Republic 1776-1787* 282-91 (U.N.C. Press 1969, 1998).

enforce their individual rights against others. *Id.* But since humans are partial to themselves and their friends, and susceptible to passion and revenge when punishing others, only “confusion and disorder” exist in nature. *Id.* To escape this perpetual state of anxiety and exposure, people join together to create “government to restrain the partiality and violence of men.” *Id.*

Blackstone recognized that “the principal aim of society” is to protect individuals in the enjoyment of their natural, “*absolute* rights.” 1 William Blackstone, *Commentaries on the Laws of England* 120 (Univ. of Chicago Press 1979) (1765) (emphasis added). These rights “could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities,” and therefore “the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals.” *Id.*

Blackstone’s three “absolute” rights are the rights of “personal security” (life, limb, health and reputation), “liberty” and “property.” *Id.* at 125-36. To “serve principally as barriers to protect and maintain inviolate the[se] three great primary rights,” the English constitution established five other “auxiliary subordinate rights of the subject.” *Id.* at 136. The fifth, which most immediately concerns us in this case,³ is the right of subjects to “hav[e] arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1

³ For context, first four are: (i) the constitution, powers, and privileges of parliament, 1 Blackstone, *Commentaries* at 136, (ii) the limitation of the king’s prerogative, *id.* at 137, (iii) the right to apply to the courts of justice for redress of injuries, *id.*, and (iv) the right to petition the king or either house of parliament for injuries not otherwise redressable, *id.* at 138-39.

W. & M. st. 2. c.2. [the English Bill of Rights] and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.” *Id.* at 139. According to *Heller*, this right to arms, as codified in the English Bill of Rights, is “the predecessor to our Second Amendment.” *Heller*, 128 S. Ct. at 2798.

In the United States, the people have delegated limited powers to the federal government under the Constitution. Powers not delegated “are reserved to the States respectively, or to the people.” U.S. Const. amend. X; *see also Printz v. United States*, 521 U.S. 898, 919 (1997). In the American system, the states and their political subdivisions are the branches of government with principal responsibility for enacting legislation to “maintain and regulate” Blackstone’s absolute rights through their “police power.” *The Federalist No. 17* (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

The police power has always been understood to provide the states with authority “to make extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property.” Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union* 597 (Lawbook Exch., reprint 1999) (1868). “The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others

in the enjoyment of them.” Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States Considered from both a Civil and Criminal Standpoint* 1-2 (Lawbook Exch., reprint 2001) (1886).

States and their political subdivisions thus always have been free under the police power to reasonably regulate the right to arms. Cooley, for example, explains that Blackstone’s fifth auxiliary subordinate right is preserved in America “by express constitutional provisions” but “extends no further than to keep and bear those arms which are suited and proper for the general defense of the community against invasion and oppression, and it does not include the carrying of such weapons as are specially suited for deadly individual encounters, and therefore the carrying of these, concealed, may be prohibited.” 1 *Blackstone’s Commentaries on the Laws of England* 143 n.24 (Lawbook Exch., reprint 2003) (Thomas M. Cooley ed., 1884).; *see also Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) (stating that the Second Amendment is not infringed by laws prohibiting the carrying of concealed weapons).⁴

In a prominent 19th Century case, the Tennessee Supreme Court construed the state constitutional right to keep and bear arms to be parallel to the federal right, and held that the legislature was free to “prohibit the wearing or *keeping* [of] weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defense.” *Andrews v. State*, 50 Tenn. (1 Heisk.) 165, 185 (1871) (emphasis added) (quoting *Aymette v. State*, 21 Tenn. (1 Hum.)

⁴ *See generally* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 Notre Dame L. Rev. 429 (2004); Charles Bufford, *The Scope and Meaning of Police Power*, 4 Cal. L. Rev. 269 (1916).

154, 159 (1840)). At the practical level, this meant that “the Act of the Legislature in question, so far as it prohibits the citizen ‘either publicly *or privately* to carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol,’ is constitutional.” *Andrews*, 50 Tenn. at 186 (emphasis added). The prohibition against keeping pistols extended to revolvers, and was upheld as constitutional to the extent it applied to non-military revolvers, but could not be upheld if it applied to military revolvers. *Id.* at 186-87.

An 1871 Texas statute prohibiting the carrying of deadly weapons – defined as “pistols, dirks, daggers, slingshots, sword canes, spears, brass knuckles and bowie knives” – was likewise upheld under that state’s police power. *English v. State*, 35 Tex. 473, 474-78 (1872). The court noted that almost every state in the union has “a similar law upon their statute books, and indeed, so far as we have been able to examine them, they are more rigorous than the act under consideration.” *Id.* at 479.

A well-established principle of the police power is that “the police requirements of a city are different than those of the state at large, and that stricter regulations are essential to the good order and peace of a crowded metropolis than are required in the sparsely peopled portions of the country.” *In re Cheney*, 90 Cal. 617, 620 (1891). When a city regulates under its police power “for the prevention of crime and the preservation of the public peace” and “to protect the law-abiding citizen,” it has great latitude. *Id.* at 621. Thus an ordinance prohibiting the concealed carrying of “any pistol, dirk, or other dangerous or deadly weapon” without a permit – available only to “peaceable person[s]” whose profession or occupation requires him to be “out at late hours of the night” – is a valid exercise of the power because “[i]t is a well-recognized fact that the

unrestricted habit of carrying concealed weapons is the source of much crime, and frequently leads to causeless homicides, as well as other breaches of the peace, that would not otherwise occur.” *Id.*

Significant threats to urban public safety may be met with commensurate regulation. *Darling v. Warden of City Prison*, 154 A.D. 413, 424 (N.Y. App. Div. 1913) (holding that legislature may prohibit possession of any pistol in the home without permit – “the Legislature has now picked out one particular kind of arm, the handy, the usual and the favorite weapon of the turbulent criminal class, and has said that in our organized communities, our cities, towns and villages where the peace is protected by the officers of organized government, the citizen may not have that particular kind of weapon without a permit”); *Guida v. Dier*, 375 N.Y.S.2d 826, 828 (N.Y. Sup. Ct. 1975) (“No constitutional or statutory enactment has vested our citizenry with the undeniable right to possess or carry a pistol.”).

Regulation also may extend to the complete prohibition of an entire class of arms. In upholding Cleveland’s city-wide ban on assault weapons, the Supreme Court of Ohio reaffirmed that “the police power includes the power to prohibit,” and noted that “[t]he ordinance at issue affects a class of firearms” but does not violate the right to keep arms for self-defense because it does not ban the right to “*all* firearms.” *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993). “For this reason, we are not persuaded by appellants’ argument that by banning certain firearms ‘there is no stopping point’ and legislative bodies will have ‘the green light to completely ignore and abrogate an Ohioan’s right to bear arms.’” *Id.*

An assault weapons ban in Denver has likewise been upheld against the contention that “restricting the types of weapons that may be used in exercising the right to bear arms in self-defense constitutes a *per se* violation of that right.” *Robertson v. City & County of Denver*, 874 P.2d 325, 331 (Colo. 1994). The Colorado Supreme Court observed that “[t]here can be no doubt that an ordinance, intended to prevent crime, serves a legitimate governmental interest sufficiently strong to justify its enactment” and that the “concealability” of certain weapons along with “the prevalent use of such weapons for criminal purposes establish . . . a substantial threat to the health and safety of the citizens of Denver.” *Id.* at 332. The Court concluded that, while “carving out a small category of arms which cannot be used for purposes of self-defense undoubtedly limits the ways in which the right to bear arms may be exercised,” the obstacles posed by a weapons-class ban “do not significantly interfere with this right” because “there are ample weapons available for citizens to fully exercise their right to bear arms in self-defense.” *Id.* at 333.⁵

Regulating arms under the police power to prevent crime and protect the safety of the broader community is in fact pervasive, and has been subject only to

⁵ Denver is not alone in prohibiting assault weapons. Cities with a class ban on assault weapons include: Boston (1989 Mass. Acts 596, §§ 1-7); Chicago (Chicago, Ill., Code §§ 8-24-025, 8-20-030(h)); Cleveland (Cleveland, Ohio, Code §§ 628.01 – 628.99); Columbus (Columbus, Ohio, Code §§ 2323.11(L), (M), 2323.31, 545.04(a)); and New York City (New York, N.Y., Admin. Code §§ 10-301(16), 10-303.1; New York, N.Y., Rules tit. 38, § 17-01). Seven states also ban assault weapons: California (Cal. Penal Code §§ 12275); Connecticut (Conn. Gen. Stat. §§ 53-202a-53-202o); Hawaii (Haw. Rev. Stat. Ann. §§ 134-1, 134-4, 134-8); Maryland (Md. Code Ann. §§ 4-301 – 4-306); Massachusetts (Mass. Gen. Laws ch. 140, §§ 121, 122, 123, 131, 131M); New Jersey (N.J. Stat. Ann. §§ 2C:39-1w, 2C:39-5, 2C:58-5, 2C:58-12, 2C:58-13); and New York (N.Y. Penal Law §§ 265.00(22), 265.02(7), 265.10).

“reasonableness” review in virtually every state to consider the question.⁶ As long as a regulation does not prohibit the use of *all* firearms, it does not unduly burden the right to have arms for self-defense. This only makes sense, for if the right to arms is not subordinate to everyone’s right to personal security and the power of the state to act on their behalf, then we are all on our way back to Locke’s dreaded state of nature.

II. THE *HELLER* COURT’S “MOST POPULAR WEAPON” PRINCIPLE IS GROUNDED NEITHER IN FACT NOR IN PRINCIPLE, AND THEREFORE OUGHT NOT BE INVOKED TO INVALIDATE CHICAGO’S HANDGUN LAW.

In *Heller*, the Supreme Court held that the Second Amendment protects firearms “in common use,” and struck down the federal ban on handguns in Washington, D.C., because the ordinance “amounts to a prohibition of an entire class of ‘arms’ that is

⁶ See, e.g., *Hoskins v. State*, 449 So. 2d 1269, 1270 (Ala. Crim. App. 1984); *City of Tucson v. Rineer*, 971 P.2d 207, 213 (Ariz. Ct. App. 1998); *Jones v. City of Little Rock*, 862 S.W.2d 273, 275 (Ark. 1993); *Robertson v. City & County of Denver*, 874 P.2d 325 (Colo. 1994); *Rabbitt v. Leonard*, 413 A.2d 489 (Conn. 1979); *In re Wolstenholme*, 1992 Del. Super. LEXIS 341 at *18 (Del. Super. Ct. Aug. 20, 1992); *Carson v. State*, 247 S.E.2d 68, 72 (Ga. 1978); *State v. Mendoza*, 82 Haw. 143, 153 (Haw. 1996); *State v. Hart*, 157 P.2d 72, 73 (Idaho 1945); *Kalodimos v. Morton Grove*, 470 N.E.2d 266, 278 (Ill. 1984); *Matthews v. State*, 148 N.E.2d 334, 338 (Ind. 1958); *State v. Rupp*, 282 N.W.2d 125, 130 (Iowa 1979); *Posey v. Commonwealth*, 185 S.W.3d 170, 181 (Ky. 2006); *State v. Hamlin*, 497 So. 2d 1369, 1371 (La. 1986); *Hilly v. Portland*, 582 A.2d 1213, 1215 (Me. 1990); *People v. Swint*, 572 N.W. 666, 676 (Mich. Ct. App. 1997); *In re Application of Atkinson*, 291 N.W.2d 396, 399 (Minn. 1980); *State ex rel. Oklahoma State Bureau of Investigation v. Warren*, 75 P.2d 900, 902-03 (Okla. 1998); *James v. State*, 731 So.2d 1135, 1137 (Miss. 1999); *State v. White*, 253 S.W. 724, 727 (Mo. 1923); *State v. Comeau*, 448 N.W.2d 595, 600 (Neb. 1989); *Burton v. Sills*, 53 N.J. 86, 101 (N.J. 1968); *State v. Dees*, 669 P.2d 261 (N.M. Ct. App. 1983); *State v. Rivera*, 853 P.2d 126 (N.M. Ct. App. 1993); *Grimm v. New York*, 289 N.Y.S.2d 358, 362 (N.Y. 1968); *North Carolina v. Fennell*, 95 N.C. App. 140, 143 (N.C. Ct. App. 1989); *State v. Ricehill*, 415 N.W.2d 481, 483 (N.D. 1987); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993); *Morley v. City of Phila. Licenses & Inspections Unit*, 844 A.2d 637, 641 (Pa. Commw. Ct. 2004); *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004); *Masters v. State*, 653 S.W.2d 944, 946 (Tex. Ct. App. 1983); *State v. Duranleau*, 260 A.2d 383, 386 (Vt. 1969); *Parham v. Commonwealth*, 1996 Va. App. LEXIS 758, at *5 (Va. Ct. App. Dec. 3, 1996); *City of Princeton v. Buckner*, 377 S.E.2d 139, 148 (W. Va. 1988); *State v. Rupe*, 683 P.2d 571, 597 n.9 (Wash. 1984); *State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003); *Carfield v. State*, 649 P.2d 865, 872 (Wyo. 1982).

overwhelmingly chosen by American society for that lawful purpose.” *Heller*, 128 S. Ct. at 2817. The Court did not find that a right to handguns is “fundamental,” or even reasonably necessary for effective self-defense in the home. Instead, it held, without citing a single authority or citation (conspicuous, and odd, in a 34-page majority opinion otherwise bursting with citations), that the availability of long guns as an alternative to handguns “is no answer” because “the American people have considered the handgun to be the quintessential self-defense weapon.” *Id.* at 2818. The Court listed several reasons, again without citing a single source, why “a citizen *may* prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.” *Id.* (emphasis added). The Court concluded, again without a single factual source: “Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.” *Id.*

This ruling suffers from two fundamental defects that we address below. It should not be construed to preclude states and cities, in appropriate circumstances, from banning high crime-use weapons to protect everyone’s right to personal security.

A. Americans Have Not “Overwhelmingly Chosen” Handguns for Self-Defense.

The notion that the handgun “is overwhelmingly chosen by American society for [self-defense]” is simply untrue. The overwhelming majority of American adults and

households have no gun whatsoever – hand or long. Only 25% of adults and 35% of households have some kind of gun.⁷ Handgun owners are a subset of gun owners: only 16% of adults (24% of households) have one or more handguns.⁸ Of the 16% of adults who own handguns, just over two-thirds – or 10.1% of all American adults – have one or more handguns primarily for self-defense or as their only firearm. Only 19.9% of adults own long guns, and this group overlaps substantially with handgun owners. Of those, just over half – or 10.3% of American adults – have one or more long guns primarily for self-defense or as their only firearm.⁹ Thus it is not true that Americans overwhelmingly keep *any* firearm, much less handguns, to defend themselves – in the home or anyplace else. Among the minority who do, owners of handguns and long guns are nearly evenly split in the guns they have for self-defense.

⁷ Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, National Institute of Justice, Research in Brief, May 1997, at 1-2, *available at* <http://www.ncjrs.gov/pdffiles/165476.pdf> (hereinafter “*Guns in America Overview*”); Philip J. Cook & Jens Ludwig, *Guns in America: Results of a Comprehensive National Survey on Firearms Ownership and Use* (Police Foundation 1996), *available at* <http://www.policefoundation.org/pdf/GunsinAmerica.pdf> (hereinafter “*Guns in America Report*”). More recent surveys have found even lower levels of gun ownership, concluding that in 2006 only 21% of individuals and 35% of households had at least one gun. See Tom W. Smith, National Opinion Research Center at the University of Chicago, *Public Attitudes Towards the Regulation of Firearms*, April 2007, at Figure 2, *available at* <http://www-news.uchicago.edu/releases/07/pdf/070410.guns.norc.pdf>.

⁸ Cook & Ludwig, *Guns in America Overview*, at 1-2.

⁹ *Id.*; Cook & Ludwig, *Guns in America Report*, at 13-15, 36-38. The 11.2% and 10.3% figures are derived from the text and tables in the *Guns in America Report* and *Guns in America Overview* as follows. For each class of firearm (handgun and long gun) owned, the number of owners who have one or more guns in that class “primarily for self-defense” was added to the number of those who own only guns in that class (e.g., someone who owns one or more handguns and no long guns) but did not acquire them “primarily” for self-defense. This seems essential since guns that are not acquired “primarily” for self-defense still may be used for self-defense.

While it is true that *among* handgun owners, just under two-thirds have handguns *primarily* for self-defense,¹⁰ no data indicates that such owners would be less secure in their homes with an alternative firearm (a long arm) if handguns were banned. The *Heller* Court's speculation as to why some "may" prefer a handgun does not hold up to scrutiny. Most experts say that handguns are poorly suited to self-defense in the home and that shotguns are clearly superior.¹¹ The Court's notion that a handgun is easier to store in an accessible location suffers from two problems. First, as Justice Roberts noted during oral argument in *Heller*, "there is always a risk that the children will get up and grab the firearm and use it for some purpose other than what the Second Amendment was designed to protect." Transcript of Oral Argument at 71, *District of Columbia v. Heller*, 128 S. Ct. 2783 (Mar. 18, 2008). Second, it assumes that intruders will be accommodating by breaking in only at times when occupants have sufficient proximity to their guns. For the "accessibility" argument to work, even as a matter of logic, it would appear that a gun would have to be stored in every room. Otherwise, an unprepared homeowner might find himself in the bathroom at the time of the intrusion.¹²

The suggestion that handguns cannot easily be redirected or wrestled away by an attacker must confront two facts: most handgun owners do not have proper training

¹⁰ Cook & Ludwig, *Guns in America Report*, at 38.

¹¹ *E.g.*, Chris Bird, *The Concealed Handgun Manual: How to Choose, Carry and Shoot a Gun in Self-Defense* 40 (3d ed. 2002).

¹² This subject is explored on gun-enthusiast web sites. *See, e.g.*, <http://www.thehighroad.org/showthread.php?t=7560> (discussion thread entitled "Home Defense question DO YOU HAVE A BATHROOM GUN").

to use their guns for self-defense,¹³ and even among highly trained police officers, 16% of officer homicides occur with the officers' own service weapons.¹⁴ Regardless of whether it is "easier" for those lacking upper body strength to lift a handgun, no data shows that women and the elderly are any less able to use, for example, a lightweight 20-gauge shotgun with low recoil ammunition than a handgun.¹⁵ The idea that a handgun can be pointed at a burglar with one hand while the other hand dials the police appears, on its face, to be a suboptimal solution for summoning the police – except for those physically gifted individuals who can observe, hold and dial the phone with one hand and one eyeball while leveling a handgun and keeping watch on the intruder with the other hand and eye. Much more effective is directing the intruder to dial the police, which can be accomplished persuasively with either a shotgun or a handgun.¹⁶

The International Law Enforcement Educators and Trainers Association as *amici curiae* in support of Appellants claim that Chicago's handgun ban was at least partly responsible for a "drastic" deterioration in the city's violent crime rate immediately after it was adopted (ILEETA Brief at 27-28). This claim is not serious. The chart in the

¹³ Massad F. Ayoob, *In the Gravest Extreme: The Role of the Firearm in Personal Protection 2* (Police Bookshelf 1980).

¹⁴ Andrew J. McClurg, *Child Access Prevention Laws: A Common Sense Approach to Gun Control*, 18 St. Louis U. Pub. L. Rev. 47, 78 n. 116 (1999).

¹⁵ See, e.g., Doug Little, *What is the best home defense shotgun for women?*, Arizona CCW Permit Website, June 3, 2008, available at <http://arizonaccwpermit.com/2008/06/03/what-is-the-best-home-defense-shotgun-for-women/>.

¹⁶ See *85-Year-Old Granny Pulls Gun On Intruder, Makes Him Call 911*, The Pittsburgh Channel, Aug. 21, 2008, available at <http://www.thepittsburghchannel.com/news/17232825/detail.html?rss=pit&psp=news>.

ILEETA Brief tracking each year's crime rate was constructed from FBI crime data tables, a simple review of which shows that the Chicago data for each year from 1982 through 1984 was qualified by an endnote explaining that the "figures are not comparable with previous years." This means the data in each of those years cannot be compared with data from the preceding years. The reason is that prior to 1983, Chicago had been seriously undercounting crime by categorizing 25% or more of reported crimes as "unfounded" and therefore nonexistent. At the FBI's request, this practice changed in 1983; hence the overnight 25% increase on paper in 1983.¹⁷

Most of the rest of the presentation in the ILEETA Brief is of similar rigor. For example, ILEETA also claims that Chicago's handgun ban has failed to protect police officers because "[p]olice in the Chicago area are killed at a rate about 42% higher than the national rate." ILEETA Brief at 2-3. This claim is meaningless. Major cities generally have higher rates of police-officer homicides (and crime) than the country as a whole, so one generally would expect to find disparities between any major city and the nation as a whole. We have in fact looked at the rates for officer killings in other major cities (Houston, Los Angeles) as compared to the country as a whole and, not surprisingly, found the same phenomenon.¹⁸

While handguns can be used for lawful self-defense, the social costs of handgun ownership are enormous. A starting point is the simple fact that as the rate of handgun

¹⁷ See, e.g., Bob Warner, *Criminal Math: In 25 Years, One Other City Has Had Crime Counts Tossed/Errors Uncommon*, Phila. Daily News, Oct. 21, 1997, at 4; see also, *Burying Crime in Chicago*, Newsweek, May 16, 1983, at 64.

¹⁸ The same defect plagues ILEETA's Chicago crime chart comparing city-to-country crime rates.

ownership increases, so do the rates of handgun criminal-homicide and handgun suicide.¹⁹ Handguns are used to commit more than 737,000 of the roughly 847,000 firearm violent crimes that are perpetrated each year (homicide, rape/sexual assault, robbery, assault).²⁰ No reliable data supports anything near a comparable number of defensive uses.

B. No Meaningful Data Supports Claims of Defensive Handgun Use at Levels Equal to or in Excess of Violent Criminal Handgun Use.

Defensive gun use (“DGU”) is notoriously difficult to measure, but however great the number of DGUs, *hostile* gun displays are much greater – by about a 7-to-1 ratio.²¹ Hostile gun uses at home against family members, which are typically acts of domestic violence against women, may be more common than all DGUs.²² A large number of claimed DGUs appear to be illegal and undesirable.²³

¹⁹ See, e.g., Garen Wintemute, “Guns and Gun Violence,” in *The Crime Drop in America* 46 (Alfred Blumstein & Joel Wallman eds., 2006) (“Not surprisingly, the more guns there are, the more gun crime there is. Many correlational studies, some geographic and some temporal, have established a close relationship between gun availability and rates of gun violence at the population level. The equation works for individuals, too; keeping a firearm in the home more than doubles the risk that a member of the household will be killed in a firearm homicide.”); see also Franklin E. Zimring et al., *Crime is Not the Problem: Lethal Violence in America* 110 (Oxford U. Press 1999) (1997) (“there is little doubt that limiting the availability of firearms in the United States would have a substantial effect on homicide and probably also on other violent crime”).

²⁰ Craig Perkins, “National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime,” *Bureau of Justice Statistics Special Report*, at 3 (Sept. 2003).

²¹ David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 *Violence & Victims* 257, 269 (2000).

²² Deborah Azrael & David Hemenway, *In the Safety of Your Own Home: Results from a National Survey on Gun Use at Home*, 50 *Social Science & Medicine* 285, 289-91 (2000).

²³ David Hemenway et al., *Gun Use in the United States: Results from Two National Surveys*, 6 *Injury Prevention* 263, 266-67 (2000).

The *Heller* Court unwittingly (or so it appears) relied upon an infamous DGU survey when it quoted the court of appeals' decision for the proposition that "banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' 478 F.3d [370,] at 400 [(D.C. Cir. 2007)], would fail constitutional muster." *Heller*, 128 S. Ct. at 2817-18. The authority offered by the appeals court to support the quoted language is a survey best known for its discredited claim that 2.5 million adults use guns defensively every year.²⁴ Even on its face, the survey does not show that handguns are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." Rather, it claims to show that among the tiny fraction of adults who say they have used a firearm defensively, more than three-quarters (80%) used a handgun rather than a long gun.²⁵ And even among that tiny purported cohort, most of the claimed defensive uses (63%) occurred *outside* the home.

Several of the most prominent and respected researchers in the field of gun violence have explained that the survey wildly overstates the number of DGUs; they nominated it for an award for "most outrageous number mentioned in a policy discussion by an elected official."²⁶ The survey's primary problems are telescoping (reporting incidents outside the covered time period as having occurred within it), self-

²⁴ The court of appeals cited pages 182-83 of Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150 (1995).

²⁵ *Id.* at 185.

²⁶ Philip J. Cook et al., *The Gun Debate's New Mythical Number: How Many Defensive Uses Per Year?*, 16 J. Policy Analysis & Mgmt. 463, 463 (1997).

presentation bias, and false-positives (in surveys of relatively rare events – where the actual rate of occurrence is, say, only 1 out of 100 or 1 out of 1,000 – even one or two false positives greatly skews the results).²⁷ The researchers show that, in order to believe the survey results, one has to believe a number of absurdities, based on undisputed crime rates. For example, if the survey is correct, then more burglary victims used their guns in self-defense than there were burglaries in which burglary victims were at home and not asleep.²⁸ Similar problems occur with respect to claimed DGUs and robberies, rapes and gunshot victims.²⁹ The survey results simply are not valid.

C. Popularity of Firearm Choice Is Not a Workable Principle of Constitutional Law.

The popularity of a firearm among a small fraction of Americans is not a workable principle for determining the constitutionality of state and local laws. If popularity of a weapon is the standard, the assault-weapon bans presently in place in seven states may be vulnerable to constitutional challenge because, following the election and inauguration of President Obama, assault weapons apparently were purchased *en masse*.³⁰ Smith & Wesson now makes the most powerful factory-

²⁷ *Id.*; Jens Ludwig, *Gun Self-Defense and Deterrence*, 27 *Crime & Just.* 363, 366 (2000); David Hemenway, *Private Guns, Public Health* 64-78 (U. Mich. Press 2004).

²⁸ *E.g.*, Hemenway, *Private Guns, Public Health* at 67.

²⁹ *Id.* at 67-68.

³⁰ Kevin Bohn, *Gun Sales Surge After Obama's Election*, CNN.com, available at <http://www.cnn.com/2008/crime/11/11/obama.gun.sales>; Jeff Wiehe, *Fears Drive Hordes to Gun Shops*, *Journal Gazette*, Apr. 5, 2009, available at <http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20090405/LOCAL/304059928/-1/LOCAL11&template=printart>.

production revolver in the world, a .50 caliber handgun called the Model 500. The company worked with an ammunition manufacturer to jointly develop a new magnum cartridge (bullet) that gives the 500 the power to easily penetrate the highest grade concealable body armor typically worn by law enforcement officers.³¹ If the Model 500 becomes popular enough, will it acquire constitutional protection? If the Constitution requires us to take a poll to determine which weapons are in common use and which are most preferred, how will we reconcile the fact that gun ownership varies tremendously by region: in Mississippi 55% of adults own a firearm, while in Massachusetts fewer than 13% do.³² Do the various poll results in different states affect the constitutionality of every state's regulation? The inevitable escalation of firepower on American streets from *Heller's* "popularity" standard will reduce, not increase, personal security.

CONCLUSION

Firearms regulation to prevent crime and secure the entire community has always been a matter of state and local judgment under the police power. It seems odd – and oddly short-sighted – that a Second Amendment jurisprudence could be crafted to elevate the mere *preferences* of handgun owners over the *crime-prevention* and *safety*

³¹ *E.g.*, Dick Metcalf, *Smith & Wesson's Monster Magnum*, Shooting Times, available at http://www.shootingtimes.com/handgun_reviews/monster_1103/; Chris Christian, *Smith & Wesson Model 500 .50-Cal. Magnum Is the King of Handguns*, Popular Mechanics, Sept. 2003, available at <http://popularmechanics.com/outdoors/sports/1277336.html>.

³² These figures were taken from the results of a 2001 survey conducted by the Behavioral Risk Factor Surveillance System, which were published by the Washington Post. See, e.g., *Gun Ownership by State*, Wash. Post, May 26, 2006, available at <http://www.washingtonpost.com/wp-srv/health/interactives/guns/ownership.html>.

needs of the entire community. It need not be so. The Supreme Court has always tempered pure doctrine, even when dealing with the Bill of Rights, with pragmatism when crime prevention and public safety are at stake. As Justice Roberts wrote earlier this year in an important Fourth Amendment case: “We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence. ‘[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.’” *Herring v. United States*, 129 S. Ct. 695, 700-01 (2009). That same pragmatism and awareness of consequences should inform the scope of the developing constitutional law on the right to keep and use arms for self-defense in the home.

Respectfully submitted,

Dated: April 28, 2009

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CERTIFICATE OF COMPLIANCE WITH CIR. R. 31(E)(1)

In accordance with Seventh Circuit Rule 31(e)(1), I certify that on April 28, 2009, I caused a non-scanned PDF digital version of the forgoing Brief of *Amici Curiae* to be uploaded via Seventh Circuit's website at <http://www.ca7.uscourts.gov/briefs.htm>.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

I hereby certify that the forgoing brief complies with the type-volume limitation provided in Rules 29(d) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, because this brief contains 6,662 words, excluding parts of the brief excluded by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

I further certify that this brief complies with the type-face requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b), and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure, because this brief has been prepared in a proportionately spaced 12-point Bookman Antiqua font (with footnotes in 11-point Bookman Antiqua font) using Microsoft Word 2003.

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APPENDIX A –DESCRIPTIONS OF AMICI CURIAE ORGANIZATIONS

BOARD OF EDUCATION OF THE CITY OF CHICAGO

The Board of Education of the City of Chicago, which educates more than 400,000 students in 600 schools, strongly supports the prevention of youth gun violence. Last school year, 29 Chicago Public School students were killed in gun-related violence. Since 2000, more than 100 guns have been confiscated on school grounds. Gun violence has a profoundly negative impact on the educational opportunities of children in large urban centers like Chicago. Children who live in terror of gun violence find it difficult to shed that fear at the schoolhouse door. They struggle to concentrate on their school work and some see no reason to study, doubting they will live to adulthood. Gun violence also imposes extraordinary burdens on school administrators, teachers and security personnel, who must be vigilant to keep guns out of schools and to keep children safe during the school day.

INSTITUTE OF MEDICINE OF CHICAGO

Over its ninety-year history, the Institute of Medicine of Chicago (“IOMC”) has both led and reflected the advances, the turmoil, and the challenges within the practice of medicine and the business of healthcare in the United States and, more specifically, contributed to the public health and welfare of the citizens of the metropolitan Chicago region. IOMC has partnered with the Illinois Campaign to Prevent Gun Violence, a research-based public education campaign, during which IOMC focused on providing for multiple constituencies, including both the public and state legislators in Springfield. In addition, IOMC has collaborated with the law enforcement and legal

communities to push for common sense laws to get guns, “street sweeper” 20-50 round clips, sniper rifles, assault weapons, and armor piercing ammunition out of the hands of criminals.

WAYMAN AFRICAN METHODIST EPISCOPAL CHURCH

Wayman African Methodist Episcopal Church of Chicago has been lead, since 1992, by Reverend Dr. Walter B. Johnson, Jr., a prominent community activist known for advocating education to prevent violence among inner city youth. Reverend Johnson has partnered with the Chicago Public Schools, the Chicago Department of Human Services, and the Chicago Alternative Strategy to implement the Safe Schools, Safe Neighborhoods initiative.

ILLINOIS COUNCIL AGAINST HANDGUN VIOLENCE

The Illinois Council Against Handgun Violence (“ICHV”) is the state’s oldest and largest non-profit educational organization working to reduce death and injury caused by gun violence. ICHV informs the public, the media, and policymakers about the epidemic of gun violence and serves as a clearinghouse for information on gun violence.

LEGAL COMMUNITY AGAINST VIOLENCE

Legal Community Against Violence (“LCAV”) is a national law center dedicated to preventing gun violence. Founded by lawyers after an assault weapon massacre at a San Francisco law firm in 1993, LCAV is the country’s only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV tracks and analyzes federal, state, and local firearms legislation, as well as legal

challenges to firearms laws. As an amicus, LCAV has provided informed analysis in a variety of firearm-related cases, including those brought on the basis of the Second Amendment. *See, e.g., District of Columbia v. Heller*, 128 S.Ct. 2783 (2008); *Nordyke v. King*, ___ F.3d ___, 2009 WL 1036086 (9th Cir. Apr. 20, 2009); *White v. United States*, No. 08-16010-DD (11th Cir. filed Apr. 1, 2009).

COALITION TO STOP GUN VIOLENCE

The Coalition to Stop Gun Violence is comprised of 48 member organizations working to reduce gun violence through research, strategic engagement and effective policy advocacy.

EDUCATIONAL FUND TO STOP GUN VIOLENCE

The Educational Fund to Stop Gun Violence is a national non-profit educational organization seeking to secure freedom from gun violence by educating the public about the need to close illegal firearms markets.

VIOLENCE POLICY CENTER

Violence Policy Center (“VPC”) is a national non-profit educational organization that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, organizations, researchers, advocates, and the general public. VPC examines the role of firearms in the United States, analyzes trends and patterns in firearms violence and works to develop policies to reduce gun-related deaths and injuries. VPC has conducted numerous fact-based studies on a full range of gun violence issues. These studies have influenced congressional policy-making and shaped congressional debates over gun control as well

as state regulation of firearms. VPC actively participates in the debate over the meaning of the Second Amendment by monitoring and joining in Second Amendment litigation throughout the country.

STATES UNITED TO PREVENT GUN VIOLENCE

States United to Prevent Gun Violence (“States United”) is an association of independent state-wide gun-violence-prevention organizations. The purpose of States United is to allow our members to share best practices, programs and legislative ideas in order to work effectively to prevent gun deaths and injuries. Members of States United include: Arizonans for Gun Safety, Women Against Gun Violence, Connecticut Against Gun Violence Education Fund, Florida Coalition to Stop Gun Violence, Georgians for Gun Safety, Illinois Council Against Handgun Violence, Hoosiers Concerned about Gun Violence, Iowans for the Prevention of Gun Violence, Maine Citizens Against Handgun Violence, CeaseFire Maryland, Stop Handgun Violence, Citizens for a Safer Minnesota Education Fund, Ceasefire New Jersey, New Yorkers Against Gun Violence, North Carolinians Against Gun Violence – Education Fund, Ohio Coalition Against Gun Violence, Ceasefire Oregon, CeaseFire Pennsylvania, Texans for Gun Safety, Gun Violence Prevention Center of Utah, Virginia Center for Public Safety, Ceasefire Foundation, and WAVE Educational Fund.

FREEDOM STATES ALLIANCE

The Freedom States Alliance is a national non-profit organization working to free Americans from gun violence. Its focus is to reduce gun-related deaths and injuries

through public awareness campaigns and by providing technical assistance and support to grassroots organizations.

CERTIFICATE OF SERVICE

I, Charles M. Dyke, hereby certify that on April 28, 2009, I caused two true and correct copies of the foregoing Brief of *Amici Curiae* to be served via U.S. mail, first-class postage prepaid on the parties at the mailing addresses listed below. I further certify that on April 28, 2009, I served a non-scanned PDF digital version of the forgoing Brief of *Amici Curiae* on the parties' counsel via their e-mail addresses also listed below:

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I further certify that on the same date, fifteen copies of the Brief of *Amicus Curiae* were filed by U.S. mail, first-class postage prepaid with the Clerk for the United States Court of Appeals for the Seventh Circuit.

Dated: April 28, 2009

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