

No. 08-1521

In The
Supreme Court of the United States

OTIS McDONALD, ET AL.,
Petitioners,

v.

CITY OF CHICAGO, ET AL.,
Respondents.

*On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit*

**MOTION TO FILE AND BRIEF OF
AMICUS CURIAE AMERICAN LEGISLATIVE
EXCHANGE COUNCIL
IN SUPPORT OF PETITIONERS**

RICK A. HABERMAN
Counsel of Record
K. SCOTT HAMILTON
DICKINSON WRIGHT PLLC
500 WOODWARD AVENUE
SUITE 4000
DETROIT, MI 48226-3425
(313) 223-3500
rhaberman@dickinsonwright.com
khamilton@dickinsonwright.com
Counsel for Amicus Curiae ALEC

November 23, 2009

**MOTION OF AMERICAN LEGISLATIVE
EXCHANGE COUNCIL FOR LEAVE TO
FILE AN *AMICUS CURIAE* BRIEF IN
SUPPORT OF PETITIONER**

The American Legislative Exchange Council (“ALEC”) seeks leave under Supreme Court Rule 37.3(b) to file an *amicus curiae* brief in support of Petitioner and urging reversal of the opinion of the Court of Appeals for the Seventh Circuit. The Respondent City of Chicago, Illinois is the only party that has withheld its consent to filing this Brief.

ALEC has a keen interest in the outcome of this matter, just as it did in *District of Columbia v. Heller*, in which it also filed an *amicus curiae* brief. As more fully set out below in its Statement of Interest, ALEC is a non-partisan association of over 1,500 state legislators from across the United States and, as part of its duties, has frequently considered and implemented policy statements and resolutions concerning the individuals’ right to keep and bear arms, as well as proposing model legislation concerning gun ownership, use and regulation. ALEC’s fundamental focus in such activities is advancing and protecting the individual right to keep and bear arms against encroachment by state, local and federal lawmakers. Toward that end, ALEC seeks to support application of Second Amendment rights to the states and therefore requests leave to file the instant *amicus curiae* brief.

Respectfully submitted,

DICKINSON WRIGHT PLLC

Rick A. Haberman

Counsel of Record

K. Scott Hamilton

Attorneys for *Amicus Curiae* ALEC

500 Woodward Avenue, Suite 4000

Detroit, MI 48226

(313) 223-3500

TABLE OF CONTENTS

	Page
Motion of American Legislative Exchange Council for Leave to File an <i>Amicus Curiae</i> Brief in Support of Petitioner	i
Table of Authorities	v
Statement of Interest of <i>Amicus Curiae</i> American Legislative Exchange Counsel	1
Summary of the Argument	3
Argument	6
A. Modern Incorporation Jurisprudence Under the Due Process Clause of the Fourteenth Amendment	9
B. The Second Amendment Is Incorporated To The States Under The Fourteenth Amendment Due Process Clause Because The Right To Keep And Bear Arms is “Necessary To An Anglo-American Regime Of Ordered Liberty,” And Is A Right “Deeply Rooted In Our Nation’s History and Tradition.”	10
1. By Its Terms, The Second Amendment’s Guarantee of the Individual’s Right To Keep And Bear Arms Is Necessary To An Anglo-American Regime Of Ordered Liberty.	12

2. English Antecedents Of The Right To Keep And Bear Arms.	15
3. The Post Ratification Understanding of the Right to Keep and Bear Arms	15
4. The Period Before and After the Civil War	17
Conclusion	21

TABLE OF AUTHORITIES

Cases

<i>Agostini v. Felton</i> , 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed. 301 (1997)	5
<i>Alden v. Maine</i> , 529 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)	16
<i>Barron v. Mayor of Baltimore</i> , 32 U.S (7 Pet.) 243, 8 L.Ed. 672 (1833)	4, 19
<i>Cantwall v. Connecticut</i> , 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)	7
<i>District of Columbia v. Heller</i> , -- U.S. --, 128 S.Ct. 2783, 171 L.Ed. 2d 637 (2008) . . <i>passim</i>	
<i>Duncan v. Louisiana</i> , 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968)	<i>passim</i>
<i>Elk Grove Unified School District v. Newdew</i> , 542 U.S. 1, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004)	7
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	6
<i>Malloy v. Hogan</i> , 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 2d 653 (1964)	6
<i>Mapp v. State of Ohio</i> , 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1962)	6

<i>Monell v. Dep't of Social Services</i> , 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)	19
<i>Nordyke v. King</i> , 563 F.3d 439 (9 th Cir. 2009) <i>passim</i>	
<i>Nunn v. State</i> , 1 Ga. 243 (1846)	18
<i>Pointer v. Texas</i> , 380 U.S. 400, 414, 85 S.Ct. 1065, 1073, 13 L.Ed.2d 923 (1965) . . .	1
<i>Presser v. Illinois</i> , 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886)	3, 4, 5
<i>Roth v. State of California</i> , 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1959)	7
<i>St. Joseph Stock Yards Co. v. United States</i> , 298 U.S. 38, 94. 56 S.Ct. 720, 80 L.Ed. 1033 (1936)	5
<i>The Slaughter-House Cases</i> , 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1872)	3, 4, 5
<i>Twining v New Jersey</i> , 211 U.S. 78, 29 S.Ct. 14, 43 L.Ed. 97 (1908)	6
<i>United States v. Cruikshank</i> , 92 U.S. 542, 23 L.Ed. 588 (1876)	3, 4, 5, 9, 16
<i>United States v. Miller</i> , 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1930)	13
<i>Washington v Glucksberg</i> , 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed. 2d 772 (1977) . . .	6, 10

Other Authorities

CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (May 23, 1866)	20
CONG. GLOBE, 39th Cong., 1st Sess., 362 (1866)	19
CONG. GLOBE, 42nd Cong., 1st Sess., App. 84 (Mar. 31, 1871)	19
J. Ordronaux, <i>Constitutional Legislation of the United States</i> , 241 (1891)	20
Justice Joseph Story, <i>Commentaries on the Constitution of the United States</i> § 1890 at 746 (1833)	12
<i>Malcolm To Keep and Bear Arms: The Originals of An Anglo-American Right</i> , 115 (1994)	15
St. George Tucker, <i>View of the Constitution of the United States</i> , 1 Blackstone's at 300 (1803)	12
Stephen Halbrook, <i>A Right to Bear Arms</i> 7 (1989)	17
T. McCauley, <i>1 Critical and Historical Essays, Contributed to the Edinburgh Review</i> 154 (1850)	15
The Portable Thomas Jefferson 520 (M. Peterson ed. 1975)	13

*William Blackstone, 1 Commentaries on the
Laws of England* 15, 16

Rules

Supreme Court Rule 37(3)(b) i
Supreme Court Rule 37.6 1

Constitutional Provisions

U.S. Const. amend. XIV, § 1 6

**STATEMENT OF INTEREST OF *AMICUS*
CURIAE AMERICAN LEGISLATIVE
EXCHANGE COUNSEL**

The American Legislative Exchange Council (“ALEC”) is the nation’s largest non-partisan individual membership association of state legislators.¹ ALEC has more than 1,500 members in state legislatures across the United States. It serves to advance Jeffersonian principles of free markets, limited government, federalism, and individual liberty. Although it may initially appear counter-intuitive for an association of state legislators to support a ruling that would limit state legislative authority by incorporating the Second Amendment to the states, ALEC’s position is in keeping with the Jeffersonian vision of limited government and the spirit of the state legislatures during Reconstruction that ratified the Fourteenth Amendment’s limit on state abuse of individual rights.² ALEC’s interests are reflected in several of its official policies and publications.

ALEC has carefully considered myriad public policy issues concerning state and local firearms regulation, including the rights of citizens to keep guns in their

¹ Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this Brief, in whole or in part, nor has any party or party’s counsel made any monetary contribution intended to fund the preparation or submission of this Brief.

² Moreover, “to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual.” *Pointer v. Texas*, 380 U.S. 400, 414, 85 S.Ct. 1065, 1073, 13 L.Ed.2d 923 (1965) (Goldbert, J., concurring).

homes. In particular, ALEC's *Castle Doctrine Act* codifies and bolsters the common-law right of a person violently assaulted in his or her own house to stand ground and use such force as may appear to a cautious and prudent person to be necessary to save his or her life or to prevent great bodily harm. ALEC has also adopted important model state legislation concerning personal protection on college campuses, concealed carry permit requirements and reciprocity, criminal history record checks for firearm sales, and the rights of firearms owners during public emergencies.

ALEC's *Resolution on the Second Amendment to the U.S. Constitution* declares ALEC's overall views on the constitutionally-protected rights of individual citizens to keep and bear arms. The *Resolution* voices ALEC's concern that "several local, state, and federal lawmakers continue to propose measures aimed at restricting firearms including bans, taxation, waiting periods, registration, licensing, and confiscation." Declaring that "the Second Amendment to the Constitution of the United States guarantees each law-abiding citizen the right to keep and bear arms of his choice," the *Resolution* expresses ALEC's view that such problematic restrictions infringe upon the federal constitution protections of an individual's right to keep and bear arms from infringements by federal or state and local government. Instead, the *Resolution* "recommends the rejection of further restrictive firearms laws that only serve to limit law-abiding citizens in the exercise of their constitutionally guaranteed rights while having no effect on the activities of the criminal element in our society."

Consistent with ALEC's current Statement of Interest, and as further testament to it, ALEC also

filed an *amicus curiae* brief with the Court in *District of Columbia v. Heller*.

SUMMARY OF THE ARGUMENT

Amicus curiae American Legislative Exchange Council (“ALEC”) urges the Court to narrowly hold that the Second Amendment is selectively incorporated to the states under the Due Process clause of the Fourteenth Amendment. Such a holding (1) avoids the need to reconsider the vitality and validity of *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1872), (2) avoids the need to reconsider or overrule *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876), and *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886), which cases did not address selective incorporation under the Fourteenth Amendment Due Process clause,³ and (3) is compelled by the Court’s prevailing selective incorporation doctrine and its implicit recognition in *District of Columbia v. Heller*, -- U.S. --, 128 S.Ct. 2783, 171 L.Ed. 2d 637 (2008), that the individual right to keep and bear arms is a fundamental right, deeply rooted in our nation’s history and traditions and necessary to a regime of ordered liberty.⁴

³ See *Nordyke v. King*, 563 F.3d 439, 448, rehearing *en banc* granted, 575 F.3d 890 (9th Cir. 2009) (“*Cruikshank* and *Presser* involved direct application and incorporation through the Privileges or Immunities Clause, but not incorporation through the Due Process Clause”).

⁴ *Heller* explicitly left open the question presented in this case, which is whether the Second Amendment applies to the states through the Fourteenth Amendment, although it also explicitly noted that *Cruikshank*, in holding that it does not, “did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.” 127 S.Ct. at 2813. n. 23.

The Second Amendment can theoretically be applied to the states in one of three ways. One is by direct application, which is foreclosed by this Court's long-standing precedent that the Bill of Rights applies directly only to the federal government. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247-51, 8 L.Ed. 672 (1833).

The second avenue is by incorporation through the Fourteenth Amendment's Privileges or Immunities clause. That avenue is arguably blocked by *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1872), which held that the Privileges or Immunities clause applies only to rights that are founded upon United States citizenship, but does not protect rights that pre-existed the United States' founding. *Id.* at 74-80. Given this Court's recognition in *Heller* that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right," *Heller*, 128 S.Ct. 2797 (emphasis added), under the Court's existing precedent the Second Amendment cannot be incorporated through the Privileges or Immunities clause because the right to keep and bear arms that is protected by the Second Amendment is a right which existed before that amendment, and is therefore not a right that originates in or derives from United States citizenship. That was the holding of this Court in *Cruikshank* and *Presser*.

The third avenue – one which is not blocked by *Barron*, *The Slaughter-House Cases*, or *Cruikshank* and *Presser* – is incorporation under the Due Process clause of the Fourteenth Amendment. Selective incorporation of the Second Amendment through the Fourteenth Amendment Due Process clause is not

foreclosed by any of this Court's previous cases, and holding that the Second Amendment is incorporated to the states under the Due Process clause would not require any reconsideration, or disruption of, this Court's existing precedent.

The pivotal question upon which incorporation of the Second Amendment through the Fourteenth Amendment's Due Process clause turns is whether the right to keep and bear arms is a fundamental right, deeply rooted in the Nation's history and traditions, and "necessary to an Anglo-American regime of ordered liberty." In analyzing the historical meaning of the Second Amendment phrases "well regulated Militia, being necessary to the security of a free State" and "keep and bear arms," this Court in *Heller* implicitly and convincingly acknowledged that it is. Therefore, *amicus curiae* ALEC urges that the Court narrowly hold that the Second Amendment right to keep and bear arms be incorporated to the states via the Due Process clause of the Fourteenth Amendment, and reverse the ruling of the Court of Appeals for the Seventh Circuit.⁵

⁵ ALEC does not oppose this Court overruling *The Slaughter-House Cases*, *Cruikshank* or *Presser* upon a holding that incorporates the Second Amendment to the states through the Privileges or Immunities clause of the Fourteenth Amendment. Indeed, this Court has always recognized that the "doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law," *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94, 56 S.Ct. 720, 80 L.Ed. 1033 (1936) (Stone and Cardozo, JJ., concurring in result), and the Court has "held in several cases that *stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law." *Agostini v. Felton*, 521 U.S. 203, 235-236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). ALEC's position is simply that the Court can

ARGUMENT

The Fourteenth Amendment provides, in relevant part, that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. This Court has held that the Due Process clause “guarantees more than fair process, and the ‘liberty’ it protects is more than the absence of physical restraint.” *Washington v Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 138 L.Ed. 2d 772 (1977). For over one hundred years this Court has acknowledged “some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law”. *Twining v New Jersey*, 211 U.S. 78, 99, 29 S.Ct. 14, 43 L.Ed. 97 (1908).

Although many of the rights from the first eight amendments that this Court has incorporated to the states under the Fourteenth Amendment Due Process clause involve matters of criminal procedure,⁶ this Court has never hesitated to hold that various substantive individual rights guaranteed by the Bill of Rights, but wholly unrelated to criminal procedure, are

selectively incorporate the Second Amendment to the states through the Due Process clause without disrupting any of this Court’s existing precedent or Constitutional doctrine.

⁶ See, e.g., *Mapp v. State of Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1962) (incorporating to states Fourth Amendment right against unreasonable search and seizure, and exclusion of illegally seized evidence at trial), *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 2d 653 (1964) (incorporating to states Fifth Amendment right against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (incorporating to states Sixth Amendment right to counsel).

incorporated against state action by the Due Process clause of the Fourteenth Amendment. Thus, the First Amendment's guarantee against infringement of the right to "freedom of speech and press . . . may be incorporated in the liberty protected from state action by the Due Process clause of the Fourteenth Amendment." *Roth v. State of California*, 354 U.S. 476, 480, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1959).

Similarly, the First Amendment right to free exercise of religion has been incorporated to the states under the Fourteenth Amendment Due Process clause. A state law establishing or prohibiting the free exercise of religion is a deprivation of "liberty without due process of law in contravention of the Fourteenth Amendment" because the "fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). Therefore, the "Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." *Id.* To be sure, the First Amendment's free exercise clause "clearly protects an *individual* right, [and] applies against the States through the Fourteenth Amendment." *Elk Grove Unified School District v. Newdew*, 542 U.S. 1, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (Thomas, J. concurring in the judgment) (emphasis added).

Indeed, virtually every right protected by the first eight amendments -- with the notable exception of the Second Amendment -- has been incorporated to the states under the Due Process clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968), explained that the

Fourteenth Amendment Due Process clause has incorporated to the states numerous rights, both those relating to matters of criminal procedure, as well as those unconnected to criminal procedures, guaranteed by the first eight Amendments:

[M]any of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State; the rights of speech, press and religion covered by the First Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses.

391 U.S. at 148 (footnotes and citations omitted). *See also id.* at 164 (“our Court has . . . held most of the specific Bill of Rights’ protections applicable to the States to the same extent they are applicable to the Federal Government”) (Black and Douglas, J.J., concurring).

The simple, straight-forward question presented in this Brief is whether the Second Amendment’s prohibition of infringement of the right to keep and bear arms, held in *Heller* to be an individual right,

should be incorporated to the states under the Fourteenth Amendment's Due Process clause.

A. Modern Incorporation Jurisprudence Under the Due Process Clause of the Fourteenth Amendment

Heller's reference to the “sort of Fourteenth Amendment inquiry required by us in later cases,” which *Heller* noted that *Cruikshank* did not engage in, is a reference to *Duncan*. *Duncan* announced the modern and prevailing test for determining whether an Amendment guaranteeing a right in the Bill of Rights is selectively incorporated to the states under the Due Process clause of the Fourteenth Amendment.⁷ That test requires the Court to ask whether the right at issue “is fundamental,” meaning whether it is “[it] is necessary to an Anglo-American regime of ordered liberty.” *Duncan*, 391 U.S. at 149, n. 14. The test has also been restated as asking whether the right at issue is “deeply rooted in this Nation’s history and traditions,” *Nordyke*, *supra*, 563 F.3d at 449, which is a variation of this Court’s test of whether a right is “fundamental” for purposes of substantive due process under the Fourteenth Amendment. *See, e.g., Glucksburg*, *supra*, 521 U.S. at 719. *See also Nordyke*, 563 F.3d at 449 (“Both selective incorporation and substantive due process require us to pose the same question: is a right so fundamental that the Due Process Clause guarantees it?

⁷ *Duncan* announced that “recent cases applying provisions of the first eight Amendments to the States represent a new approach to the ‘incorporation’ debate,” 391 U.S. at 149, n. 14, one which asks whether the right guaranteed in the first eight amendments and sought to be incorporated to the states is one that is essential to the English and American system of ordered liberty.

Substantive due process addresses unenumerated rights; selective incorporation, by contrast, addresses enumerated rights.”). If the Second Amendment’s guarantee of the right to keep and bear arms is such a right, then it is selectively incorporated to the states; if it is not, it does not limit states from denying the right protected from infringement by the federal government.⁸

B. The Second Amendment Is Incorporated To The States Under The Fourteenth Amendment Due Process Clause Because The Right To Keep And Bear Arms is “Necessary To An Anglo-American Regime Of Ordered Liberty,” And Is A Right “Deeply Rooted In Our Nation’s History and Tradition.”

In determining whether the right to keep and bear arms is “necessary to an Anglo-American regime of ordered liberty,” *Duncan*, 391 U.S. at 149, n. 14, or has “any place in our Nation’s traditions,” *Glucksberg*, 521 U.S. at 723, this Court need look no further than the text of the Second Amendment and its own analysis in *Heller*. *Heller* determined whether the Second Amendment protects an individual or collective right. In holding that it protects an individual right, the Court examined the historical context of the right to keep and bear arms and the understanding of that right at critical points in the Nation’s history. *Heller*,

⁸ As the Court of Appeals for the Ninth Circuit summarized in *Nordyke*, the “task is to determine whether the right to keep and bear arms ranks as fundamental, meaning ‘necessary to an *Anglo-American* regime of ordered liberty,’” and “[i]f it does, then the Fourteenth Amendment incorporates it.” 563 F.3d at 450 (quoting *Duncan*).

128 S.Ct. at 2805 – 2812. Although it was looking for an answer to a different question, *Heller's* historical analysis of the Second Amendment right to keep and bear arms also answered the question of whether the right is “necessary to an Anglo-American regime of ordered liberty” and is “deeply rooted in this Nation’s history and tradition.” Indeed, Court of Appeals for the Ninth Circuit held in *Nordyke*:

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. It has long been regarded as the ‘true palladium of liberty.’ 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.

Nordyke, supra, 563 F.3d at 450.

The right to keep and bear arms has been consistently recognized as a cornerstone of liberty from the time of ratification through Reconstruction. Accordingly, this Court should protect it from infringement by the State of Illinois under the Due Process Clause of the Fourteenth Amendment.

1. By Its Terms, The Second Amendment's Guarantee of the Individual's Right To Keep And Bear Arms Is Necessary To An Anglo-American Regime Of Ordered Liberty.

Before even reviewing its historical context, inherent in the very words of the Second Amendment is the notion that the right to keep and bear arms is necessary to an Anglo-American regime of ordered liberty, for the Amendment itself states that the right it protects is “necessary to the security of a free State.” It is, therefore, perhaps the *most* necessary right to an American regime of ordered liberty, since it is the palladium⁹ upon which all other rights of liberty in our free society depended for their origin, and upon which they depend for their continued existence.

The Second Amendment, in announcing its purpose in its prefatory clause, *Heller*, 128 S.Ct. at 2789, recognizes that a “well regulated Militia [is] necessary to the security of a free State.” *Heller* held that phrase to mean “necessary to the security of a free polity.” *Heller*, 128 S.Ct. at 2800. *Heller* also held that the “well regulated Militia” that is “necessary to the security of a free” polity is equivalent to “all able-bodied individuals capable of bearing arms,” rather

⁹ St. George Tucker, who edited “the most important American selection of Blackstone’s Commentaries,” *Heller*, 128 S.Ct. at 2799, said that the right to bear arms is the “true palladium of liberty.” St. George Tucker, *View of the Constitution of the United States*, 1 Blackstone’s at 300 (1803). See also Justice Joseph Story, *Commentaries on the Constitution of the United States* § 1890 at 746 (1833) (“[t]he right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic”).

than a specific military institution, body or organization. *Heller* noted that “[i]n *United States v. Miller*, 307 U.S. 174, 179, 59 S.Ct. 816, 83 L.Ed. 1206 (1930), we explained that ‘the militia comprised all males physically capable of acting in concert for the common defense.’” *Heller*, 128 S.Ct. at 2799. *Heller* further observed that “[t]he militia of the State . . . [is] every man in it able to bear arms” (quoting *The Portable Thomas Jefferson* 520, 524 (M. Peterson ed. 1975)), that “the ordinary definition of militia [is] all able-bodied men,” and that “the militia consists of all able-bodied men.” *Heller*, 128 S.Ct. at 2799-2800. *Heller* summarized the equivocation of “militia” with “all citizens capable of bearing arms” as follows:

[A]s we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to military duty.

Heller, 128 S.Ct. at 2817.

Thus, *Heller* held that the Second Amendment means that a well regulated body of able-bodied individuals capable of bearing arms is “necessary to the security of a free” polity, and the right of individuals to so keep and bear them, even if untethered to a discrete militia organization, cannot be infringed. Under that interpretation of the Second Amendment, the right of individuals to keep and bear arms is a right that is “necessary to the security of a free State” or polity in which the American regime of ordered liberty exists. ALEC submits that it necessarily and unequivocally follows that the right of

individuals to keep and bear arms is “necessary to an Anglo-American regime of ordered liberty.”

One need go no further than the text of the Second Amendment and *Heller* to conclude that the right guaranteed by the Second Amendment is “necessary to an Anglo-American regime of ordered liberty,” and is therefore incorporated to the states under the Fourteenth Amendment. However, the English and American historical antecedents of the right to keep and bear arms further confirm that it is a long-standing, fundamental right necessary to ordered liberty and deeply rooted in history and tradition.

Heller observed that the Second Amendments’ “preface fits [perfectly] with an operative clause that creates an individual right to keep and bear arms” because “history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents.” 128 S.Ct. at 2801. That the right to keep and bear arms is “necessary to an Anglo-American regime of ordered liberty” is clear from *Heller*’s conclusion that “[i]t was understood across the political spectrum that the right [to keep and bear arms] helped to secure the ideal of a citizen militia, which might be necessary to oppose an aggressive military force *if the constitutional order broke down.*” *Id.* (emphasis added).

2. English Antecedents¹⁰ Of The Right To Keep And Bear Arms.

The 1689 English Bill of Rights described the right of arms for self-defense to be a “true, ancient, and indubitable” proposition. *Malcolm, To Keep and Bear Arms: The Origins of An Anglo-American Right*, 115 (1994). William Blackstone noted that the rights and “personal security, personal, liberty, and private property” were the three primary rights, or “to vindicate these rights, the subjects of England are entitled to the right of having or using arms for self-preservation and defense.” *W. Blackstone, 1 Commentaries* 143-44. Indeed, the right to keep and bear arms was fundamental to the Anglo conception of ordered liberty, because the “Englishman’s ultimate security depended not upon the Magna Carta or Parliament, but upon the powers of the sword,” and represented “the security without which every other is insufficient.” T. McCauley, *1 Critical and Historical Essays, Contributed to the Edinburgh Review* 154, 162 (1850).

3. The Post Ratification Understanding of the Right to Keep and Bear Arms

Heller examined the right to keep and bear arms at the time of the Constitution’s ratification. The Court

¹⁰ *Duncan’s* reference to an “Anglo-American regime of ordered liberty” is significant, for it unambiguously calls for examination of both how the United States, and England before it, considered the right at issue. The Seventh Circuit expressly and erroneously rejected Petitioner’s proper “reliance on William Blackstone, *1 Commentaries on the Laws of England* at 123-24, for the proposition that the right to keep and bear arms is ‘deeply rooted’ . . .” 567 F.2d at 859.

concluded that this right was woven into the fabric of the Nation even before the Nation's founding:

[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing right*. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'

Heller, 128 S. Ct. at 2797.

Thus, "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." *Id.* (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)). In support of its conclusion, *Heller* noted that early commentators such as Tucker and Rawle recognized that an individual's right to keep and bear arms was necessary to the "first law of nature," the right of self defense, and akin to the rights contained in the First Amendment. *Heller*, 128 S.Ct. at 2805. As such, it existed as "one of the fundamental laws of Englishmen" enshrined in the English Bill of Rights long before the American colonies existed. *Id.* at 2797. Not only did the right to bear arms insure a nation able to resist tyranny, it provided the necessary means to self defense. William Blackstone, whom *Heller* called "the preeminent authority on English law for the founding generation," 128 S.Ct. at 2798 (quoting *Alden v. Maine*, 529 U.S. 706, 715, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)), considered the right to bear arms one of the "bulwarks of personal rights." *Id.*

The views expressed by legal commentators were reflective of the views of the colonists themselves. As

Heller pointed out, American colonists resisted the English Crown's attempts to limit their right to bear arms. *Heller* at 128 S.Ct. at 2799. As one colonist observed:

It is a natural right which the people have reserved to themselves, confirmed by the English Bill of Rights to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when sanctions of society and law are found insufficient to restrain the violence of oppression.

Stephen Halbrook, *A Right to Bear Arms* 7 (1989) (quoted in *Nordyke*, 563 F.3d at 453).

Similarly, state constitutions ratified in the founding era reflected that the right to bear arms was an essential right. As of 1820, thirteen of the twenty three states admitted to the Union contained Second Amendment analogues. *Nordyke*, 563 F.3d at 454-455. The fact that so many states sought to guarantee the right to keep and bear arms constitutes potent historical evidence that the right to is necessary to an Anglo-American regime of ordered liberty and should be incorporated through the Due Process clause to the states. *See Duncan*, 391 U.S. 153 (analyzing state constitutions with respect to whether right to trial by jury is incorporated to states under Due Process clause.)

4. The Period Before and After the Civil War

Heller continued its analysis by looking to the periods before and after the Civil War, which gave

birth to the Fourteenth Amendment. *Heller*, 128 S.Ct. 2808-2813. In the antebellum period, at least two state supreme courts – Georgia and Louisiana – recognized the right to bear arms as protecting the “natural right of self defence.” *Heller*, 128 S.Ct. at 2809 (quoting *Nunn v. State*, 1 Ga. 243, 251 (1846)). In fact, the portion of *Nunn* highlighted by the Court is equally applicable to the case at bar as it was to *Heller*:

Our opinion is, that any law, state or Federal, is repugnant to the Constitution, and void, which contravenes this right originally belonging to our forefathers, trampled by Charles I and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta!

Heller, 128 S.Ct. at 2809.

The passionate defense of the right to bear arms continued after the Civil War when debate arose over the right of freed slaves to possess firearms. *Heller*, 128 S.Ct. at 2810. Many expressed the view that disarming freed men was a violation of their most basic rights. With respect to the freed slaves, Sen. Eliot stated: “Their arms are taken from them by the civil authorities Thus the right of the people to keep and bear arms as provided in the Constitution is infringed” This rendered the freedmen “defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders.” *Heller* 128 S. Ct. at 2775. Similarly, *Heller* discussed the importance of the right to bear arms in debate on Reconstruction legislation:

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

Later in the discussions surrounding the Fourteenth Amendment and the Civil Rights Act of 1871, the ability to keep arms was described as "indispensable" to the "safeguard of liberty." *Heller*, 128 S.Ct. at 2811 (quoting Sen. Pomeroy). There is little, if indeed there is any, difference between the right to keep and bear arms being indispensable to the safeguard of American liberty, and it being necessary to an American regime of ordered liberty.

Passage of the Fourteenth Amendment was explicitly linked to the right to bear arms by many involved in the process. For example, "Representative [John] Bingham ... explained that he had drafted §1 of the Fourteenth Amendment with the case of *Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833), [which held the Bill of Rights was not directly applicable to the states], especially in mind." *Monell v. Dep't of Social Services*, 436 U.S. 658, 686-87 (1978). Bingham himself 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 (Mar. 31, 1871).

Similarly, when the Fourteenth Amendment was introduced to Congress by Sen. Jacob Howard, the Senator referred to “the personal rights guaranteed and secured by the first eight amendments of the Constitution, such as ... the right to keep and bear arms The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these *great fundamental guarantees*.” CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (May 23, 1866) (emphasis added). See *Duncan*, 391 U.S. at 166-67 (Black, J. concurring)(citing these comments). This sentiment continued as late as 1891:

The right to bear arms has always been the distinctive privilege of freemen ... It was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed.

Heller, 128 S.Ct. at 2812 (quoting J. Ordronaux, Constitutional Legislation of the United States, 241-42 (1891).) See also *Nordyke*, 563 F. 3d at 456 (concluding that framers of the Fourteenth Amendment considered right to bear arms a crucial freedom).

The historical record surveyed in *Heller* and *Nordyke* unmistakably reflects that Americans have always viewed their right to bear arms as a distinctive, fundamental and necessary instrument of their liberty. Indeed, as the Court of Appeals for the Ninth Circuit noted, “we have here both a right they [the colonists] fought for and the right that allowed them to fight.” *Nordyke*, 563 F.3d at 454. This Court should therefore protect both the cause and effect of our liberty by

incorporating the Second Amendment in the Fourteenth Amendment.

CONCLUSION

The Court should hold that the Second Amendment right to keep and bear arms is incorporated to the states under the Due Process clause of the Fourteenth Amendment and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

DICKINSON WRIGHT PLLC

Rick A. Haberman
Counsel of Record
K. Scott Hamilton
Attorneys for *Amicus Curiae* ALEC
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500

Dated: November 23, 2009