No. 08-1521

IN THE
SUPREME COURT OF THE UNITED STATES

OTIS MCDONALD, ET AL.,
Petitioners,
v.
CITY OF CHICAGO, ILLINOIS, ET AL.,
Respondents.

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

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BRIEF FOR *AMICI CURIAE* REPRESENTATIVES CAROLYN McCARTHY, MIKE QUIGLEY, AND 53 OTHER MEMBERS OF THE UNITED STATES CONGRESS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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INTEREST OF *AMICI CURIAE*

Amici Curiae are Representative Carolyn McCarthy, Representative Mike Quigley, and 53 additional members of the 111th Congress, and have several important interests in this case.[1]

First, as members of Congress bound by oath or affirmation "to support th[e] Constitution," U.S. Const. art. VI, cl. 3, *Amici* have an interest in assisting the Court to arrive at an appropriate construction of the Second and Fourteenth Amendments and resolution of this case.

Second, Congress has for decades exercised the power assigned it by the Constitution to regulate, and in some cases ban, the use or possession of certain weapons. In so doing, Congress has regularly considered, interpreted, and applied the Second Amendment in view of its obligation to support the Constitution.

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[1] A list of members of Congress appears in the Appendix to this brief. *Amici* file this brief with the written consent of the parties, which is on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Amici submit this brief in their individual capacities, not on behalf of Congress itself, but their views are informed and animated by their experiences as members of Congress and their interest in Congress's standing as an institution.

Third, Congress has consistently sought through legislation to support the authority of the states to restrict possession and use of firearms in the interests of public safety. The judiciary has recognized Congress as a coordinate and coequal branch of government, and generally assumes Congress "legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). *Amici* have an interest in ensuring that the Court considers Congress's experience interpreting and applying the Second and Fourteenth Amendments.

SUMMARY OF THE ARGUMENT

The United States Constitution does not bar citizens from enacting gun control legislation at the local level, through their elected state and municipal representatives, that is reasonably necessary to protect their lives and well being from the risks of gun violence common to their localities. The Second Amendment was not understood either at time of the founding or following ratification of the Fourteenth Amendment as abrogating the traditional state police power to legislate for the safety of all persons, including through firearms regulations and prohibitions on categories of arms.

Over the last century, Congress has enacted legislation setting certain minimum standards for gun possession and gun commerce, including prohibitions on certain classes of weapons and on the sale and possession of firearms by, among others, felons, the mentally ill, and misdemeanant domestic violence offenders. These restrictions do not violate the Second Amendment. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."); *United States v. Hayes*, 129 S. Ct. 1079, 1082 (2009) (upholding conviction

under statute prohibiting possession of firearms by persons convicted of misdemeanor domestic violence offenses).

In addition to setting federal requirements for gun possession and gun commerce, Congress has repeatedly sought to aid states and municipalities in the enforcement of stricter regulations when the citizens of those localities determine that, in view of local conditions, additional restrictions are reasonably necessary for the public safety. Such state regulations, including prohibitions on specific categories of weapons, pose no threat to Congress's war or militia powers.

Reversing the decision below would not only cast doubt upon the constitutionality of the decision of the citizens of Chicago that, within the confines of their city, the dangers of handguns outweigh any benefits that may be supposed to flow from their possession, but also could throw into question virtually every state and local firearm regulation. Given the inherent dangerousness of firearms, and the number of deaths from gun accidents, crimes, and suicides each year, such uncertainty in the ability of states and localities to respond to localized threats to public health and safety could be catastrophic. As a matter of sound policy and constitutional theory, the right of Chicago's citizens to determine through their elected representatives what kinds of dangerous weapons may be in common use for lawful purposes within their city must be respected.

ARGUMENT

I. The Second Amendment Has Never Been Understood to Abrogate the Police Powers of the States to Enact Gun Control Legislation that is Reasonably Necessary For the Public Safety

At the time of the founding, before the advent of cheap and concealable firearms or the urbanization that increased the risks associated with such weapons, state gun regulations were common.[2] The period following the founding saw an increase in these restrictions because changes in technology and population density rendered such restrictions necessary for the public safety. Thus, as firearms grew smaller and more dangerous, and cities more populous, states and cities responded to the growing threat of armed crime by enacting extensive firearm regulations, including prohibitions on categories of weapons.[3]

The passage of the Fourteenth Amendment did not alter the common understanding that states possess a broad authority to restrict firearm ownership and use. Contrary to *amici* for Petitioners, the contemporaneous legislation and legislative history does not demonstrate a focus on

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[2] *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 505 (2004).

[3] *See* CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC 133-52 (collecting state statutes).

protecting an absolute right to bear arms. (*See* Br. for *Amici Curiae* Sen. Kay Bailey Hutchison *et al.* ("Hutchison Br.") 6-12.) Instead, Congress plainly sought to protect former slaves and their descendents from discriminatory laws, and to ensure they were able to participate in civil society on an equal basis. Thus, the legislation passed alongside the Fourteenth Amendment, the Civil Rights Act and the Freedmen's Bureau Act, prohibited states from enacting or enforcing *discriminatory* legislation, including discriminatory gun control legislation, but did not abrogate generally applicable gun control regulations enacted for the protection of all people.

In passing the Civil Rights Act of 1866, the 39th Congress sought to guarantee "all persons born in the United States and not subject to any foreign power … *shall have the same right[s]*, in every State and Territory in the United States … *enjoyed by white citizens*, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (emphasis added). The same Congress ensured, by passing the Freedmen's Bureau Act, that rights "shall be secured to and enjoyed by all the citizens of such State or district *without respect to race or color, or previous condition of slavery*." Freedmen's Bureau Act, ch. 200, § 14, 14 Stat. 173, 176-77 (1866) (emphasis added).

The protections of these rights extended beyond the protections of the Bill of Rights. The Civil Rights Act forbids discrimination in the conferral of the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." Civil Rights Act of 1866 § 1. Though some of these rights have their roots in the federal Constitution, others do not.

The immediate point of these acts was not to incorporate the Second Amendment against the states, but to ensure the states could not create different classes of citizens by discriminating among them, a problem at the forefront of discussions in the Congress at the time. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1832 (1866) (stating the Civil Rights Act "is scarcely less to the people of this country than Magna Charta was to the people of England. It declares who are citizens"); *id.* at 1837 ("Mr. Speaker, this nation must settle the question whether among her own citizens there may be a discrimination in the enjoyment of civil rights. It should not be settled in the spirit of passion or prejudice, but in the light of liberty and justice").

While it is true that some members of Congress expressed concern during these debates about state laws restricting the possession of firearms, the

legislative history makes clear those laws were targeted because they were *discriminatory*, not because of any relation to the Bill of Rights.[4] For example, *amici* cite the remarks of Congressman Eliot of Massachusetts, who recounted an "'ordinance relative to the police of recently emancipated negroes or freedmen within the corporate limits of the town of Opelousas,' Louisiana, that provided '[n]o freedman who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer, in writing, and approved by the mayor or president of the board of police.'" Cong. Globe, 39th Cong., 1st Sess. 516-17 (1866). The same ordinance offended because it limited the rights of former slaves to rent property, sell merchandise, and drink alcohol within the town limits. *Id.*

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[4] *Amici* in support of Petitioners mistakenly rely on a statement by Senator Zachariah Chandler that "'[t]he right of the people to keep and bear arms' must be so understood as not to exclude the colored man from the term 'people.'" (Hutchison Br. 7.) In fact, Senator Chandler was quoting this line from a speech delivered outside of Congress and offered it as a reason to deny former slaves the right to vote in the District of Columbia, *see* CONG. GLOBE, 39th Cong., 1st Sess. 217 (1866), which, he argued, would cause "the term 'the people' [to] be made to include the negro race throughout the Union, and thereby pervert the intention of the framers of the Constitution as declared in the preamble," *id.* at 216.

Moreover, while some states adopted constitutions at the time of or following the ratification of the Fourteenth Amendment which included a right to bear arms, the majority of those constitutional provisions specifically granted the state legislatures the power to regulate the exercise of that right.[5] Even when new state constitutions contained a right to bear arms not expressly subject to legislative regulation, state legislatures enacted gun control measures.[6] Thus, the individual states did not view their ratification of the Fourteenth Amendment as abrogating their right to enact non-

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[5] *See* FLA. CONST. of 1885, art I, § 20 (providing a right to "bear arms" and affording the legislature the power to "prescribe the manner in which they may be borne"); IDAHO CONST. of 1889, art. I, § 11 ("[T]he legislature shall regulate the exercise of this right by law."); TEX. CONST. of 1868, art. I, § 13 (subjecting "the right to bear arms" to such "regulations as the legislature may prescribe"); UTAH CONST. of 1895, art. I, § 6 ("[T]he legislature may regulate the exercise of this right by law."); *see also* GA. CONST. of 1877, art. I, § 22; KY. CONST. of 1891, § 1.7; LA. CONST. of 1879, art. III; MISS. CONST. of 1890, art. III, § 12; TENN. CONST. of 1870, art. I, § 26; TEX. CONST. of 1876, art. I, § 23; *see also* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193-204 (2006) (gathering state constitutional provisions).

[6] *See, e.g.*, 1885 Or. Laws p. 33, § 1; *McDonald v. State*, 102 S.W. 703, 703 (Ark. 1907) (quoting Ark. Act of Apr. 1, 1881, §§ 1-2); *State v. Johnson*, 16 S.C. 187, 188 (S.C. 1881) (quoting S.C. Act of December 24, 1880, 17 Stat. 447 (1880) (South Carolina)).

discriminatory gun control laws responsive to local conditions.

II. Congress Has Long Recognized and Supported the Right of States to Enact Locally Appropriate Measures Restricting Gun Possession and Use

Congress has consistently recognized and supported the authority of the states to restrict possession and use of firearms in the interests of public safety. Over the last century, Congress has thus enacted both minimum federal standards and measures expressly designed to enhance the ability of states and municipalities to enact and enforce stricter gun controls they judge suitable to local safety needs.

A. Congress Supported State and Local Gun Control Legislation Between the World Wars

Following World War I, state legislatures showed a renewed interest in handgun control legislation for the protection of public safety.[7] In response to concerns about the effective enforcement of such state and local laws, in 1927 Congress enacted the first federal law relating to gun control. That law, which remains in effect, declared "pistols, revolvers and other firearms capable of being concealed are ... nonmailable." Act of Feb. 8, 1927, ch. 75, § 1, 44 Stat. 1059, 1059 (codified as amended

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[7] Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 135 (1975).

at 18 U.S.C. § 1715). Introducing the bill in the House of Representatives, Representative Miller of Washington stated:

> The purpose of this bill … is to prohibit the use of the mails as a transportation medium for firearms capable of being concealed on the person; and the reasons that have prompted the introduction of this measure are patent to everybody. Because of the prevalence of crime through the country … every well-regulated city these days has local regulations regarding the local sale of firearms, many of them drastic. But … the mails have always been open to the transportation of these weapons, and they can be readily obtained through the mails by a class of people who can not obtain them locally; and this bill is to undertake to cure what we think is a bad state of affairs.[8]

According to the House Report:

> Pistols, revolvers, and other firearms capable of concealment on the person … constitute mailable matter which the

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[8] *Carrying of Pistols, Revolvers, and Other Firearms Capable of Being Concealed on the Person in the Mails: Hearings on H.R. 4502 Before a Subcomm. of the H. Comm. on the Post Office and Post Roads*, 69th Cong. 3 (1926).

> post office is required to transport and deliver to the addressee when offered for mailing. In many States and municipalities this post-office service operates to defeat the local laws and regulations prohibiting the purchase and possession of such articles.[9]

Citing the House Report, this Court concluded that "the purpose of the bill … was to avoid having the Post Office serve as an instrumentality for the violation of local laws which prohibited the purchase and possession of weapons." *United States v. Powell*, 423 U.S. 87, 91 (1975). Supporters of the bill had effectively argued "the postal department[] ought to refuse to assist in the violation of law and ought to respond to the appeals from the cities."[10] Thus, from its first legislative act concerning gun control, Congress has recognized and supported the right of states and municipalities to restrict or prohibit the possession and sale of firearms in response to localized threats to public safety.[11]

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9 H.R. REP. NO. 69-610, at 1 (1926).

10 67 CONG. REC. 9695 (1926) (statement of Rep. Lowrey).

11 *Amici* in support of Petitioners argue that Congress supported an absolute right to own pistols in the home during this period and cite in support of that argument firearm legislation enacted in 1932. (Hutchison Br. 29.) That legislation, however, regulated firearms in the District of Columbia and is irrelevant to the issue of state and local

Congress also affirmed that handguns are especially dangerous weapons, particularly in urban environments. One expressed general purpose of the 1927 Act was to prevent criminals in large cities from easily obtaining mail-order small firearms. Several speakers pointed out that the statute was not designed to preclude mailing of shotguns or rifles, which were appropriate for home defense. Representative Miller, for example, stated the pistol "is not like the shotgun, the rifle, or any firearm used in hunting."[12] In support of the bill, Representative Ragon argued, "[i]f you want something in the home for defense, there is the shotgun and the rifle."[13]

Congress subsequently enacted the first nationwide legislation restricting gun possession and gun commerce. The National Firearms Act of 1934, ch. 757, 48 Stat. 1236, limited commerce in machine guns and sawed-off shotguns and established a mandatory national registration program for all dealers in such weapons. Four years later, Congress enacted the more expansive Federal Firearms Act of 1938 ("FFA"), ch. 850, 52 Stat. 1250, which required all firearm dealers to obtain a license and prohibited them from knowingly shipping firearms in interstate

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firearm legislation under the federal system. *See* Act of July 8, 1932, ch. 465, 47 Stat. 650.

12 66 CONG. REC. 727 (1924).

13 66 CONG. REC. 729 (1924).

commerce to some felons, fugitives, and persons under indictment. *Id.* §§ 2(d), 3(a). Felons and fugitives were likewise prohibited from receiving any weapon that had been shipped in interstate commerce. *Id.* § 2(f).

In addition, under the FFA licensed gun dealers were prohibited from shipping or transporting a firearm to a resident of a state that required a license to purchase that weapon unless the license was produced to the dealer. *Id.* § 2(c). Dealers that sold firearms to persons who did not produce the licenses required by state law faced federal criminal penalties in addition to any state law penalties. *Id.* § 5. The aims of the FFA were thus to establish minimum federal gun controls "and *to aid state and local efforts at tighter control* by prohibiting transactions that would violate local laws."[14]

Amici in support of Petitioners argue that the Property Requisition Act of 1941, ch. 445, 55 Stat. 742, demonstrates that Congress supported a universal right to possess any sort of weapon for self-defense but the text of the statute proves otherwise. The statute provides that nothing within it shall be construed to authorize the requisitioning of any firearm owned for personal protection or sport "*the possession of which is not prohibited … by existing law*." *Id.* § 1 (emphasis added).

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[14] Zimring, *supra* note 7, at 140 (emphasis added).

Moreover, while *amici* in support of Petitioners find the exclusion of personal firearms from the Property Requisition Act "remarkable" because those firearms would have been useful to the national defense (Hutchison Br. 29), the legislative history establishes that the exclusion was adopted because Congress understood the requisition of privately owned firearms was *not* necessary for any purpose. For example, when the question of requisitioning lawfully owned firearms arose during the debates concerning the Act, Representative Elston asked Robert P. Patterson, the Under Secretary of War:

> [Y]ou do not anticipate that it would ever be necessary for the Government to requisition any firearms of any kind in the light of the present program of turning out Garand rifles and other arms and ammunition in huge quantities?[15]

Patterson replied: "That is true."[16]

Patterson explained that, given the number of weapons currently owned by the government, a shortage of firearms for military use "would be almost inconceivable."[17] There is thus nothing at all

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15 *Authorizing the Requisition of Personal Property: Hearings on S. 1579 and H.R. 4959 Before the H. Comm. on Military Affairs*, 77th Cong. 12 (1941).

16 *Id.*

17 *Id.* at 13.

remarkable about the exclusion of lawfully owned firearms from the Property Requisition Act.

B. Congress Continues to Support State and Local Gun Control Legislation

Congress revisited gun control in the 1960s and strongly affirmed, once again, the right of states and localities to enact legislation restricting the possession and use of firearms. In 1966, the Senate Committee on the Judiciary recommended a bill to amend the FFA with the purpose of reducing the likelihood that firearms would "fall into the hands of the lawless or those who might misuse them" and to "assist the States and their political subdivisions to enforce their firearms control laws and ordinances."[18] The bill was specifically aimed at the handgun because "[i]ts size, weight, and compactness make it easy to carry, to conceal, to dispose of, or to transport," which "make it the weapon most susceptible to criminal misuse."[19] As the Committee concluded, "[t]he handgun as the most formidable and most frequently used tool of the criminal is well recognized and established by first, the existence in many States of laws controlling it; and, second, by statistics showing its dominance as the weapon used in unlawful activities."[20] The Committee thus recommended a bill that would,

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18 S. REP. NO. 89-1866, at 1 (1966).

19 *Id.* at 4.

20 *Id.*

among other things, prohibit sales of handguns to an expanded list of federally disqualified persons and prohibit the shipment of handguns to out-of-state residents if the receipt or possession of the handgun would be illegal under the laws of the state of the purchaser's residence.[21]

In 1968 Congress enacted the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197, which imposed stricter federal restrictions than those previously recommend by the Senate Committee on the Judiciary and provided substantial support for state and local gun control measures. Title VII of the Act made it unlawful for any person who had been convicted of a felony, dishonorably discharged from the armed forces, or declared incompetent, and for any illegal alien or former citizen who had renounced his citizenship, to possess a firearm and imposed criminal penalties for such possession. *Id.* § 1201.

In addition, Title IV of the Act, entitled "State Firearms Control Assistance," sought to aid states in the enforcement of additional locally appropriate gun controls. In Title IV, Congress found and declared that (1) existing federal laws did not "adequately *enable the States to control* [firearms] traffic within their own borders through the exercise of their police power," (2) "the ease with which any person can acquire firearms other than a rifle or shotgun ... is a

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[21] *Id.* at 1-2.

significant factor in the prevalence of lawlessness and violent crime in the United States," (3) "only through adequate Federal control over interstate and foreign commerce in these weapons ... can ... *effective State and local regulation of this traffic be made possible*," (4) "the acquisition on a mail-order basis of firearms other than a rifle or shotgun by nonlicensed individuals, from a place other than their State of residence, has materially tended to thwart the *effectiveness of State laws and regulations, and local ordinances*," and (5) "the sale or other disposition of concealable weapons ... to nonresidents of the State ... has tended to make ineffective *the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms*." *Id.* § 901 (emphasis added).

To further the ability of states and municipalities to enforce local gun control legislation, Congress prohibited any person from transporting or importing into his state of residence any firearm obtained outside of that state, other than a rifle or shotgun, or any firearm that it would be unlawful for him to purchase or possess in the state or locality in which he resided. *Id.* § 922(a)(3). Congress likewise prohibited licensed firearms dealers from selling or delivering any firearm, other than a rifle or shotgun, to any person who did not reside in the state in which the licensee's business was located, and prohibited interstate shipments of any firearm to any person who was not a licensed dealer. *Id.* § 922(a)(2),(b)(3). Finally, Congress prohibited licensed firearms dealers from selling any

firearm to any person if the sale or possession of the firearm would be unlawful at the place of delivery or sale or in the state or locality of the purchaser's residence. *Id.* § 922(b)(2).

"In effect, the interstate mail-order shipments of firearms (other than rifles and shotguns) and ammunition would be banned so that *State and local authorities may better exercise the controls they deem desirable over the acquisition and possession of such firearms*."[22] The Act was also "designed *to prevent the avoidance of State and local laws controlling firearms* other than rifles and shotguns by the simple expediency of crossing a State line to purchase one."[23] As Senator Tydings explained, the purpose of these provisions was "simply to help the states enforce whatever gun laws each wishes to enact."[24]

Congress subsequently enacted the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-928, 26

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[22] S. REP. NO. 90-1097, at 85 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2203 (emphasis added).

[23] S. REP. NO. 90-1097, at 86, *as reprinted in* 1968 U.S.C.C.A.N. at 2204 (emphasis added).

[24] S. REP. NO. 90-1097, at 129, *as reprinted in* 1968 U.S.C.C.A.N. at 2248; *see also* 113 CONG. REC. S13404 (daily ed. Sept. 21, 1967) (Sen. Tydings explaining that the restrictions on interstate handgun sales "will help the States enact and enforce whatever local laws are necessary to control gun crimes within the States").

U.S.C. §§ 5801-5872). The Gun Control Act substantively continued each of the prohibitions in the Omnibus Crime Control Act previously described. Among other things, the Gun Control Act makes it unlawful for any licensed dealer to (1) ship or transport any firearm in interstate commerce to any non-licensee; (2) sell any firearm to any person in any state in which the purchase or possession of such firearm by such person would be in violation of any state or local law or ordinance; and (3) sell a firearm to an out-of-state resident, with an exception for rifles and shotguns sold to residents of contiguous states if the purchaser's state of residence permitted the sale or delivery by law. The Gun Control Act also makes it unlawful for any person, other than a licensed dealer, to transport or import a firearm purchased or obtained in another state into his state of residence. *Id.* at § 922. Thus, with enactment of the Gun Control Act, Congress continued to recognize and support the right of states and local governments to restrict the sale and possession of firearms.

In the debates preceding the passage of the 1968 legislation, legislators from both parties uniformly expressed support for local legislation in this area. As Senator Thurmond argued, "Conditions and traditions vary widely from State to State, and the needs of one State should not necessarily be imposed upon another. The Federal Government should take

no measures which pressure or require States to adopt uniform Federal standards."[25]

Senator Moss argued:

> [C]riminal and other misuse of firearms is essentially a local or generally regionalized problem. Utah presents an entirely different situation than does southern California or New York City, for example.[26]

Since the 1960s, Congressional support for state and local gun control legislation has continued unabated.[27] Such support is plainly evident even in the legislation cited by *amici* in support of Petitioners. The Firearm Owners Protection Act of

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[25] S. REP. NO. 90-1501, at 104 (1968); *see also Federal Firearms Act: Hearings on S. 1 Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 90th Cong. 910 (1967) (Senator Dominick arguing "[e]ach State should be left to deal with firearms in a manner which it determines to be best suited to its particular circumstances").

[26] 114 CONG. REC. S3729 (daily ed. Apr. 2, 1968).

[27] The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110201, 108 Stat. 1796 (codified at 18 U.S.C. § 922(x) (2006)), for example, added new restrictions on the possession of handguns by juveniles subject to certain enumerated exceptions. However, "if a state or local law bans or restricts transfer or possession to a juvenile, even under the enumerated circumstances, then the exceptions to the federal offense are not available." H.R. REP. NO. 103-389, at 4 (1994); *see also* 18 U.S.C. § 922(x)(3)(A)(iv).

1986 ("FOPA"), Pub. L. No. 99-308, 100 Stat. 449, for example, amends the provisions of the Gun Control Act concerning the sale of rifles and shotguns by licensed dealers to out-of-state purchasers. *Id.* § 102(4)(B). FOPA requires that such sales be made in person and that the sales comply with the laws of the states in which the purchaser and the seller reside. *Id.* Moreover, FOPA, as amended by a bill passed on the same day, permits individuals, not otherwise disqualified, to transport firearms between states but only if the possession of the firearm is lawful in both the place of origin and the place of destination and it is unloaded and inaccessible during transport. *See* Act of July 8, 1986, Pub. L. No. 99-360, § 1, 100 Stat. 766 (codified at 18 U.S.C. § 926A).

Thus, while *amici* in support of Petitioners argue FOPA prevents states from restricting the lawful ownership of guns, (Hutchison Br. 32), it does no such thing. As Representative Volkmer, one of the primary sponsors of the Act, explained:

> [W]e had never intended ... to make any change in any local or State law. We didn't want to do that. ... I did not want to impose any additional requirements on any State nor take away any from any other State. Let the States make those decisions, let the

> local municipalities make those decisions.[28]

Nor does the Protection of Lawful Commerce in Arms Act of 2005 ("PLCA"), Pub. L. 109-92, 119 Stat. 2095, show Congress to be retreating from its longstanding position that states are entitled to enact gun control measures that are reasonably necessary for public safety. The PLCA prohibits lawsuits against firearm manufacturers for damages arising from the criminal or unlawful misuse of firearms by third parties. 15 U.S.C. §§ 7902(a), 7903(5)(A). The Act does not apply, however, to actions involving a firearm manufacturer or seller that "knowingly violated *a State* or Federal statute applicable to the sale or marketing of [firearms]." *Id.* § 7903(5)(A)(iii) (emphasis added). As Senator Craig argued in support of the Act, "[m]anufacturers or sellers of firearms or ammunition could still be sued if they violated Federal or State law."[29]

Amici in support of Petitioners argue the PLCA evidences Congressional support for incorporation of the Second Amendment because Congress specifically invoked its power under the Fourteenth Amendment's enforcement clause. (Hutchison Br. 31.) But the PLCA lists as one of its purposes,

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[28] *Legislation To Modify the 1968 Gun Control Act: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 785 (1985).

[29] 150 CONG. REC. S1539 (daily ed. Feb. 25, 2004).

among many others,[30] the protection of manufacturers' *First* Amendment rights, which Congress has the authority to enforce under Section 5 of the Fourteenth Amendment. 15 U.S.C. § 7901(b)(5).

In any event, Congress did not rely on its enforcement power under the Fourteenth Amendment to enact the PLCA. To the contrary, the *only* constitutional authority identified for the Act by the House Committee on the Judiciary is the commerce clause, U.S. Const. art. I, sec. 8, cl. 3.[31]

Finally, *amici* in support of Petitioners rely on legislation enacted by Congress concerning the seizure of firearms during disasters by agencies receiving federal funds. (Hutchison Br. 31.) But that statute applies only to firearms "the possession of which is *not prohibited* under Federal, *State, or local law*." 42 U.S.C. § 5207(a)(1) (emphasis added). As Representative Jindal, the sponsor of the legislation in the House, explained:

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[30] The Act also lists among its purposes the preservation of the separation of powers, preventing unreasonable burdens on interstate and foreign commerce, and exercising Congressional powers under the full faith and credit clause. *See* 15 U.S.C. § 7901(b)(4), (b)(6) and (b)(7).

[31] H.R. REP. NO. 109-124, at 40 (2005). The Committee issued the Report concerning H.R. 800. The bill enacted, S. 397, contains the same substantive provisions as H.R. 800.

> This bill does not create nor does it delete any existing rights or State laws. So for example if there are existing State laws prohibiting guns in State shelters, this bill would do nothing to remove that prohibition. For example, many States already have existing laws prohibiting guns or firearms in schools, in sports arenas, or in other areas commonly used as shelters. Nothing in this bill would override that prohibition.[32]

Senator Vitter similarly explained that the Senate version of the bill, which he sponsored, "would not prevent funding for law enforcement officers who confiscate firearms because someone is in violation of Federal, State, or local law."[33]

Moreover, while *amici* in support of Petitioners rely on the disaster relief provisions and on the exclusion of lawfully owned firearms from the Property Requisition Act, they fail to acknowledge that Congress has expressly provided that firearms possessed or transferred in violation of state law may be subject to criminal forfeiture. *See* 18 U.S.C. § 924(d).

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[32] 152 CONG. REC. H5758 (daily ed. July 25, 2006).

[33] 152 CONG. REC. S7458 (daily ed. July 13, 2006).

III. Incorporation of the Second Amendment is Not Necessary to the Effective Exercise of Congress's War and Militia Powers

Amici in support of Petitioners argue that state restrictions on firearm possession threaten to impede Congress's ability to exercise its powers under the war and militia clauses of the Constitution by depriving Congress of access to an armed citizenry familiar with the proper use of firearms. (Hutchison Br. 33.) Even if such access were essential to Congress's ability to exercise its enumerated martial powers, incorporation of the Second Amendment would be neither necessary nor sufficient to guarantee private ownership of and familiarity with arms capable of use in defense of the nation.

Incorporation of the Second Amendment is not necessary to ensure that firearms suitable for the national defense are privately owned because the possession of such firearms is already lawful in every state. The constitutions of forty-four states provide a right to bear arms.[34] Even in states without such a constitutional provision, the private ownership of firearms is not prohibited by law.[35] Indeed, Chicago

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[34] Volokh, *supra* note 5, at 192.

[35] *See* CAL. PENAL CODE § 12050 (West 2010) (providing for licenses to carry pistols and revolvers); IOWA CODE § 724.4(4) (2009) (providing a number of exceptions to the prohibition on the carrying of weapons, including when a person "goes armed with a dangerous weapon in the person's own dwelling or place of business, or on land owned or

permits the ownership of long guns, which are suitable for national defense.

If a citizenry armed with some particular kind of firearm were somehow necessary for the effective exercise of its martial powers, Congress could achieve this result by enacting legislation to mandate firearm ownership. Indeed, Congress has done so in the past. In 1792, Congress exercised its authority to legislate in this area by enacting the Militia Act of 1792, which specifically required that every "free able-bodied white male citizen of the respective States … shall severally and respectively be enrolled in the militia" and

> That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than

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possessed by the person" or has a permit to carry such weapons); MD. CODE ANN., PUB. SAFETY § 4-203(b) (West 2009) (enumerating exceptions to the prohibition on the carrying of weapons, including when "a permit to wear, carry, or transport the handgun has been issued"); MINN. STAT. § 624.711 (2009) ("It is not the intent of the legislature ... to confiscate or otherwise restrict the use of pistols or semiautomatic military-style assault weapons by law-abiding citizens."); N.J. STAT. ANN. § 2C:58-4 (2009) (providing for permits to carry handguns); N.Y. PENAL LAW § 400.00(b) (McKinney 2009) (providing the circumstances under which a person may obtain a license to obtain and carry a pistol or revolver).

> twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.

Militia Act, ch. 33, § 1, 1 Stat. 271, 271 (1792).

No state firearm legislation would prevent Congress from again exercising its powers under the war and militia clauses. In fact, militia jurisprudence set the stage for the development of the doctrine of federal preemption. In *Houston v. Moore*, a militia case decided in 1820, this Court considered whether or not the state of Pennsylvania could, under authority of a Pennsylvania statute, convict a delinquent militia man for violating the federal Militia Act of February 28, 1795. 18 U.S. (5 Wheat.) 1, 12-14 (1820). After thorough debate, the Justices agreed state militia law would be preempted by federal law in all cases of actual conflict between the state and federal militia acts. *Id.* at 24. The Court then held that the Pennsylvania militia legislation was preempted by Congress. *Id.* ("Upon the subject of the militia, Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation

by the States on these subjects, except so far as it has been permitted by Congress.").

The doctrine of preemption has continued to develop, precluding any doubt that an act of Congress under its enumerated martial powers would preempt contrary state legislation. *See Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 617-18 (1842) ("[I]f congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be, that the state legislatures have a right to interfere."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824) ("[T]he States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution").

Incorporation of the Second Amendment would also not be sufficient if a citizenry privately armed and effectively trained in firearm use were indeed necessary for the exercise of Congress's martial powers. The Second Amendment does not mandate the private ownership of weapons suitable for national defense. And in most states a citizen may lawfully own a firearm without having any understanding of how to properly and safely use it.[36]

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[36] *See* David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense,* 22 B.Y.U. J. PUB. L. 43, 55 n.52 (2007) ("While … most states require safety training in order to obtain a permit to carry a concealed handgun for protection in public places, very few states require a safety test

Because the Second Amendment requires neither firearm ownership nor firearm training, its incorporation would not remedy any theoretical impediment to the exercise by Congress of its enumerated martial powers.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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or formal training to possess a handgun, and almost none impose a test or training requirement for long guns.").

APPENDIX

THOSE JOINING IN AMICI CURIAE BRIEF

The following members of the United States Congress join in this brief:

Representative Gary L. Ackerman (NY-05)
Representative Timothy H. Bishop (NY-01)
Representative Robert A. Brady (PA-01)
Representative Lois Capps (CA-23)
Representative Michael E. Capuano (MA-08)
Representative Yvette D. Clarke (NY-11)
Representative Wm. Lacy Clay (MO-01)
Representative Gerald E. Connolly (VA-11)
Representative Joseph Crowley (NY-07)
Representative Elijah E. Cummings (MD-07)
Representative Danny K. Davis (IL-07)
Representative Diana DeGette (CO-01)
Representative Eliot L. Engel (NY-17)
Representative Sam Farr (CA-17)
Representative Chaka Fattah (PA-02)
Representative Luis V. Gutierrez (IL-04)
Representative Mazie K. Hirono (HI-02)
Representative Michael M. Honda (CA-15)
Representative Steve Israel (NY-02)
Representative Jesse L. Jackson, Jr. (IL-02)
Representative Sheila Jackson-Lee (TX-18)
Representative Henry C. Johnson, Jr. (GA-04)
Representative Patrick J. Kennedy (RI-01)
Representative Carolyn C. Kilpatrick (MI-13)
Representative James R. Langevin (RI-02)

Representative John B. Larson (CT-01)
Representative John Lewis (GA-05)
Representative Nita M. Lowey (NY-18)
Representative Carolyn McCarthy (NY-04)
Representative James P. McGovern (MA-03)
Representative Carolyn B. Maloney (NY-14)
Representative Doris Matsui (CA-05)
Representative Gregory W. Meeks (NY-06)
Representative George Miller (CA-07)
Representative Gwen Moore (WI-04)
Representative James P. Moran (VA-08)
Representative Jerrold Nadler (NY-08)
Representative Grace F. Napolitano (CA-38)
Representative Bill Pascrell, Jr. (NJ-08)
Representative Donald M. Payne (NJ-10)
Representative David E. Price (NC-04)
Representative Mike Quigley (IL-05)
Representative Charles B. Rangel (NY-15)
Representative Steven R. Rothman (NJ-09)
Representative Lucille Roybal-Allard (CA-34)
Representative Bobby L. Rush (IL-01)
Representative Linda T. Sánchez (CA-39)
Representative Janice D. Schakowsky (IL-09)
Representative José E. Serrano (NY-16)
Representative Louise McIntosh Slaughter (NY-28)
Representative Fortney Pete Stark (CA-13)
Representative Edolphus Towns (NY-10)
Representative Debbie Wasserman Schultz (FL-20)
Representative Anthony D. Weiner (NY-09)

Representative Lynn C. Woolsey (CA-06)