No. 08-1521

IN THE Supreme Court of the United States

OTIS MCDONALD, et al., Petitioners,

v.

CITY OF CHICAGO, *Respondent*.

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

BRIEF FOR THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, INSTITUTE OF MEDICINE OF CHICAGO, WAYMAN AFRICAN METHODIST EPISCOPAL CHURCH OF CHICAGO, ILLINOIS COUNCIL AGAINST HANDGUN VIOLENCE, LEGAL COMMUNITY AGAINST VIOLENCE, VIOLENCE POLICY CENTER, STATES UNITED TO PREVENT GUN VIOLENCE, FREEDOM STATES ALLIANCE, CONNECTICUT AGAINST GUN VIOLENCE, MAINE CITIZENS AGAINST GUN VIOLENCE, **CITIZENS FOR A SAFER MINNESOTA, OHIO** COALITION AGAINST GUN VIOLENCE, WISCONSIN ANTI-VIOLENCE EFFORT EDUCATIONAL FUND, AND GUNFREEKIDS.ORG IN SUPPORT OF RESPONDENTS CITY OF CHICAGO AND VILLAGE OF OAK PARK

> CHARLES M. DYKE Counsel of Record YI-YI CHANG NIXON PEABODY LLP One Embarcadero Center 18th Floor San Francisco, CA 94111 (415) 984-8200

January 6, 2010

DOCKE

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. THE SECOND AMENDMENT'S STRUC- TURE PRECLUDES ITS INCOR- PORATION.	6
II. THE DUE PROCESS CLAUSE DOES NOT SUPPORT INCORPORATION	8
III. EVEN IF THE COURT INCORPO- RATES THE RIGHT TO KEEP AND BEAR ARMS, THE RIGHT REMAINS SUBORDINATE TO THE GREATER RIGHT OF ALL INDIVIDUALS TO PERSONAL SECURITY.	11
A. States Always Have Exercised Their Police Power Over Arms, Including the Banning of Common Use Weapons	11
B. The Court's "Most Popular Weapon" Rationale in <i>Heller</i> is not a Workable Principle of Constitutional Law	21
1. Americans have not "overwhelm- ingly chosen" handguns for self- defense	22
2. No meaningful data supports claims of defensive handgun use at levels equal to or in excess of violent criminal handgun use	29

TABLE OF CONTENTS—Continued

ii

	Page
3. Popularity of firearm choice is not a workable principle of constitu-	
tional law	31
CONCLUSION	32
APPENDIX	
Descriptions of Amici Curiae Organizations	1a

iii TABLE OF AUTHORITIES

CASES

Page

Andrews v. State 50 Terry (1 Hojak) 165	
Andrews v. State, 50 Tenn. (1 Heisk.) 165 (1871)	8, 15
Arnold v. City of Cleveland, 616 N.E.2d	0, 10
163 (Ohio 1993)	17.19
Aymette v. State, 21 Tenn. (1 Hum.) 154	, _0
(1840)	15
Burton v. Sills, 53 N.J. 86 (N.J. 1968)	19 19
,	19
Carfield v. State, 649 P.2d 865 (Wyo. 1982)	-
Carson v. State, 247 S.E.2d 68 (Ga. 1978)	19
City of Chicago v. Morales, 527 U.S. 41	
(1999)	10
City of Princeton v. Buckner, 377 S.E.2d	
139 (W. Va. 1988)	19
City of Tucson v. Rineer, 971 P.2d 207	
(Ariz. Ct. App. 1998)	19
Darling v. Warden of City Prison, 154 A.D.	
413 (N.Y. App. Div. 1913)	16
District of Columbia v. Heller, 128 S. Ct.	
2783 (2008)p	assim
Duncan v. Louisiana, 391 U.S. 145 (1968).	9
Dycus v. State, 74 Tenn. 584 (1880)	15
Elk Grove Unified Sch. Dist. v. Newdow,	
542 U.S. 1 (2004)	7
<i>English v. State</i> , 35 Tex. 473 (1872)	
<i>Feiner v. New York</i> , 340 U.S. 315 (1951)	10, 10 6
Grimm v. New York, 289 N.Y.S.2d 358	0
· · · · · · · · · · · · · · · · · · ·	10
(N.Y. 1968)	19
Herring v. United States, 129 S. Ct. 695	0.0
(2009)	33
Hilly v. Portland, 582 A.2d 1213 (Me.	
1990)	19
Hoskins v. State, 449 So. 2d 1269 (Ala.	
Crim. App. 1984)	19

TABLE OF AUTHORITIES—Continued

Handen v Marris 10 HC (F Wheet) 1	
Houston v. Moore, 18 U.S. (5 Wheat) 1	0
(1820)	8
In re Application of Atkinson, 291 N.W.2d	
396 (Minn. 1980)	19
In re Cheney, 90 Cal. 617 (1891)	16
In re Wolstenholme, 1992 Del. Super. LEXIS	
341 (Del. Super. Ct. Aug. 20, 1992)	19
James v. State, 731 So.2d 1135 (Miss.	
1999)	19
Jones v. City of Little Rock, 862 S.W.2d	
273 (Ark. 1993)	19
Kalodimos v. Morton Grove, 470 N.E.2d	
266 (Ill. 1984)	19
Masters v. State, 653 S.W.2d 944 (Tex. Ct.	
App. 1983)	19
Matthews v. State, 148 N.E.2d 334 (Ind.	
1958)	19
Medtronic, Inc. v. Lohr, 518 U.S. 470	
(1996)	20
Michael H. v. Gerald D., 491 U.S. 110	
(1989)	10
Miller v. California, 413 U.S. 15 (1973)	20
Morley v. City of Phila. Licenses & Inspec-	
tions Unit, 844 A.2d 637 (Pa. Commw.	
Ct. 2004)	19
Mosby v. Devine, 851 A.2d 1031 (R.I. 2004)	19
New State Ice Co. v. Liebmann, 285 U.S.	20
262 (1932)	17
North Carolina v. Fennell, 95 N.C. App.	
140 (N.C. Ct. App. 1989)	19
<i>NRA v. Chicago</i> , 567 F.3d 856 (7th Cir.	10
2009)	17
	т,

iv

DOCKET A L A R M



Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.