

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**

**BRIEF FOR STATE FIREARM
ASSOCIATIONS AS AMICI CURIAE IN
SUPPORT OF PETITIONERS**

James W. Hryekewicz
BLAIES & HIGHTOWER, LLP
777 Main St.
Suite 1900
Fort Worth, TX 76102
Tele: (817) 334-0800
Fax: (817) 334-0574
Counsel for Amici Curiae

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.

DRAFT 11.11.09

TABLE OF CONTENTS

	Page
INTERESTS OF THE <i>AMICI</i>	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT.....	3
I. <i>Dred Scott, Cruikshank</i> , and their progeny reflect a sad legacy and their obsolete anti-incorporation views should not be perpetuated.....	3
II. Rights that are deeply rooted in this nation’s history and traditions, or that are implicit in the concept of ordered liberty are incorporated as against the States under the Fourteenth Amendment.....	10
III. The Second Amendment rights are deeply rooted in this nation’s history and traditions, are implicit in the concept of ordered liberty, and are properly incorporated as against the States under the Fourteenth Amendment.	11
CONCLUSION	19

TABLE OF AUTHORITIES

	Page
<u>CASES</u>	
<i>Beard v. United States</i> , 158 U.S. 550 (1895)	13, 14
<i>Chandler v. Florida</i> , 449 U.S. 560 (1981)	
<i>Crandall v. Nevada</i> , 73 U.S. 35 (1867)	16
<i>District of Columbia v. Heller</i> , 128 S. Ct. 2783 (2008)	2, 9, 15
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968)	10
<i>Gourko v. United States</i> , 153 U.S. 183 (1894)	14
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	10
<i>Presser v. State of Illinois</i> , 116 U.S. 252 (1886)	2, 3, 8, 12
<i>Reno v. Flores</i> , 507 U.S. 292 (1993)	10
<i>Rowe v. United States</i> , 164 U.S. 546 (1896)	14
<i>Scott v. Sandford</i> , 60 U.S. 393 (1857)	3, 4, 5, 12
<i>Thomson v. United States</i> , 155 U.S. 271 (1894)	15
<i>United States v. Cruikshank</i> , 92 U.S. 542 (1875)	2, 3, 5, 6, 8, 11
<i>United States v. Guest</i> , 383 U.S. 745 (1966)	16

TABLE OF AUTHORITIES
(continued)

	Page
<i>United States v. Miller</i> , 307 U.S. 174 (1939)	9
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997).....	10

STATUTES

36 U.S.C. § 40701 (2009)	17
36 U.S.C. § 40721 (2009)	17
36 U.S.C. § 40725 (2009)	17

OTHER AUTHORITIES

BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765).....	13
CHARLES LANE, THE DAY FREEDOM DIED (2008).....	5
HOLDRIGE O. COLLINS, HISTORY OF THE ILLINOIS NATIONAL GUARD (1884)	6, 7, 8
http://odcmp.com/about_us.htm	17
THE FEDERALIST NO. 28 (Alexander Hamilton)	13

INTERESTS OF THE *AMICI*¹

The *amici* are state firearm associations from forty of the fifty states.² The *amici* represent the interests of millions of citizens, members and firearm owners across the United States from all walks of life and with political views that cover the spectrum.

¹ The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part. In addition to the amici curie, the National Rifle Association Civil Defense Fund made a monetary contribution to the preparation of this brief.

² The state firearm associations represented include: Alaska Outdoor Council, Arizona State Rifle & Pistol Ass'n, California Rifle & Pistol Ass'n, Colorado State Shooting Ass'n, Delaware State Sportsmen's Ass'n, Florida Sport Shooting Ass'n, Georgia Sport Shooting Ass'n, Idaho State Rifle & Pistol Ass'n, Indiana State Rifle & Pistol Ass'n, Iowa State Rifle & Pistol Ass'n, Kansas State Rifle Ass'n, League of Kentucky Sportsmen, Louisiana Shooting Ass'n, Pine Tree State Rifle & Pistol Ass'n (Maine), Maryland State Rifle & Pistol Ass'n, Gun Owners Action League (Massachusetts), Michigan Rifle & Pistol Ass'n, Minnesota Rifle & Revolver Ass'n, Mississippi State Firearm Owners' Ass'n, Missouri Sport Shooting Ass'n, Montana Rifle & Pistol Ass'n, Nebraska Shooting Sports Ass'n, Nevada State Rifle & Pistol Ass'n, Gun Owners of New Hampshire, Inc., Ass'n of New Jersey Rifle & Pistol Clubs, Inc., New York State Rifle & Pistol Ass'n, North Carolina Rifle & Pistol Ass'n, Ohio Rifle & Pistol Ass'n, Oregon State Shooting Ass'n, Pennsylvania Rifle & Pistol Ass'n, Rhode Island State Rifle & Revolver Ass'n, Gun Owners of South Carolina, South Dakota Shooting Sports Ass'n, Tennessee Shooting Sports Ass'n, Texas State Rifle Association, Utah State Rifle & Pistol Ass'n, Vermont Federation of Sportsman's Clubs, Inc., Virginia Shooting Sports Ass'n, Washington State Rifle and Pistol Ass'n, and Wisconsin Firearm Owners, Ranges, Clubs and Educators, Inc. (collectively, "State Associations").

What unites the State Associations in this brief is their common interest in ensuring that the right of the people to keep and bear arms is properly recognized as a fundamental right incorporated as against the States.

This Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), confirmed that the Second Amendment reflects an individual right to keep and bear arms for the purpose of self-defense. The State Associations now ask the Court to confirm that the Second Amendment rights—like those of the First and Fourth Amendments—apply to the states as well as to the federal government.

This issue has concrete implications for the State Associations. Like all Americans, the State Associations' members live in a mobile society. Those members frequently participate in competitions, hunting, or other sporting events in other states. Similarly, the members' jobs will often cause them to move to other states, perhaps several times during their lives. Whether or not the members may exercise the fundamental rights recognized in the Second Amendment should not be dependent on their particular latitude and longitude within these United States of America.

SUMMARY OF THE ARGUMENT

This Court has never squarely addressed whether the Second Amendment is incorporated as against the States under the incorporation standards of modern jurisprudence. Opponents of incorporation will doubtlessly argue for the perpetuation of the anti-incorporation views from cases such as *Cruikshank* and *Presser*. Those cases were written

during a time of open animus toward groups such as African-Americans and labor unions, and bear the imprimatur of goal-oriented decisions. Both the biases reflected in those decisions and their view of incorporation standards have long since been disavowed by this Court.

When the question of incorporation of the Second Amendment is judged by the Court's modern standards, the outcome borders on the self-evident. The Second Amendment right to keep and bear arms for purposes of self defense is both deeply rooted in this nation's history and traditions, and implicit in the Anglo-American concept of ordered liberty. Indeed, the Court admitted as much in both *Cruikshank* and *Presser*. Thus, the Second Amendment is properly incorporated as against the States.

ARGUMENT

I. ***DRED SCOTT*, *CRUIKSHANK*, AND THEIR PROGENY REFLECT A SAD LEGACY AND THEIR OBSOLETE ANTI-INCORPORATION VIEWS SHOULD NOT BE PERPETUATED.**

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed.

Despite the soaring nature of this pronouncement from the Declaration of Independence, the United States has sometimes been reticent regarding fundamental rights. This includes the right to keep and bear arms and was especially true in cases where the person who might have kept and borne arms were not of a favored class, such as slaves, former slaves, or labor union members.

In 1857, the United States Supreme Court issued its infamous opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). Dred Scott was a slave that sued for his freedom in federal court, asserting diversity of citizenship as a basis for invoking the jurisdiction of the federal court. Chief Justice Taney, however, held that the federal courts did not have jurisdiction over Dred Scott's claim because he found that African-Americans who were slaves or descendents of slaves were not citizens of the United States. In support of this holding, he cited a parade of horrors that would occur if he were to hold otherwise:

It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in

public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went.*

60 U.S. at 417 (emphasis added).

Sixteen years later, on Easter Sunday 1873, William J. Cruikshank and 140 other white Democrats attacked the Grant Parish courthouse in Louisiana, along with the African-American Republicans who were defending it. After the battle, Cruikshank took charge of the African-American prisoners, marched them away from the courthouse two-by-two, and had these unarmed men executed. Cruikshank himself made it a point to line up two of the prisoners in an attempt to kill them both with a single shot. CHARLES LANE, *THE DAY FREEDOM DIED* (2008) at 106.

Cruikshank was subsequently tried and convicted of violating numerous civil rights of these U.S. citizens, including their right to assemble and petition the government for a redress of grievances under the First Amendment, and their right to keep and bear arms under the Second Amendment.³

Eventually, the case made its way to the United States Supreme Court, where all of the convictions were reversed. *United States v. Cruikshank*, 92 U.S. 542 (1875). In so holding, the Court found that neither the First Amendment nor the Second Amendment were incorporated as against

³ One of the witnesses against Cruikshank was Levi Nelson, who had successfully played dead after Cruikshank's above-mentioned attempt to kill two of the African-Americans with a single shot. *THE DAY FREEDOM DIED* at 166-68.

the states precisely *because* the underlying rights were fundamental rights and were not created by the Constitution:

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government.

...

The second and tenth counts are equally defective. The right specified there is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.

92 U.S. at 551-553.

Mere months after Cruikshank executed those African-American citizens, the United States entered a prolonged depression beginning with the Great Panic of 1873. This led to a fear of the rising influence of labor unions. In Illinois, it also led to the formation of the privately-funded and restricted-membership Illinois National Guard.

With regard to funding, the largest single "subscriber" to this paramilitary force was George M. Pullman. HOLDRIDGE O. COLLINS, HISTORY OF THE ILLINOIS NATIONAL GUARD (1884) at 14. Mr. Pullman, of course, is perhaps best known for inventing and promoting the Pullman railroad car and his role in taking control of Union Pacific Railroad Company in 1871. As regards the criteria for membership, one of

the first resolutions of this regiment proclaimed that “no company of men shall be admitted to this Regimental organization, unless the company or body of men shall be recruited by recruiting officers regularly appointed by the Battalion Commander.” HOLDRIDGE O. COLLINS, HISTORY OF THE ILLINOIS NATIONAL GUARD (1884) at 9-10.

As later euphemistically described by one of the founding members of the Illinois National Guard: “The necessity for such a force was more apparent in the large cities and populous communities, where the civil authorities needed a powerful aid to check lawlessness and disorder.” HOLDRIDGE O. COLLINS, HISTORY OF THE ILLINOIS NATIONAL GUARD (1884) at 3.

There can be little doubt as to partiality of the Illinois National Guard in favor of the railroads and against the unions:

There was a very general feeling that the Railroads had acted with oppression toward their employees, and the public almost universally sympathized with the laborers and mechanics. It was evident that unless the troubles were checked at this point, the Country would be thrown into revolution. The time had come for the Militia to show whether it were capable of the stern duty and exacting discipline of the soldier.

...

The usefulness of a well trained and reliable Militia, was practically demonstrated to the Citizens of this State, by the preservation of millions of

dollars in Railroad, Mining and Manufacturing interests and the prompt suppression of disorder in July 1877.

Id at 64, 96.

In response to the threat represented by this privately-funded force, Herman Presser and other citizens joined the “Lehr und Wehr Verein.”⁴ This Illinois corporation was formed for the express purpose of “improving the mental and bodily condition of its members so as to qualify them for the duties of citizens of a republic. Its members shall, therefore, obtain, in the meetings of the association, a knowledge of our laws and political economy, and shall also be instructed in military and gymnastic exercises.”⁵

When Presser and other members of this organization subsequently drilled with rifles, Presser was arrested for, and convicted of, violating the Illinois Military Code. His case reached the United States Supreme Court as *Presser v. State of Illinois*, 116 U.S. 252 (1886).

Citing *Cruikshank*, the Court again held neither the First Amendment nor the Second Amendment protected Mr. Presser from prosecution by the state of Illinois. 116 U.S. at 264-68. As before, the Court stated that the Second Amendment was not a limitation on the states *because* the right to keep and bear arms is a fundamental right that is not dependent on the Constitution for its creation:

⁴ “Lehr und Wehr Verhein” roughly translates to “Education and Defense Association.”

⁵ See *Presser v. State of Illinois*, 116 U.S. 252, 256 (1886).

It was so held by this court in the case of *U.S. v. Cruikshank*, 92 U.S. 542, 553, in which the chief justice, in delivering the judgment of the court said that that the right of the people to keep and bear arms “is not a right granted by the constitution. Neither is it in any manner dependent upon that instruments for its existence.”

116. U.S. at 265.

These cases, each of which manifests an animus that would not be tolerated by a jurist today, are the lynchpins of the opponents of incorporation.⁶ The refusal of these opinions to acknowledge incorporation of the Second Amendment rights is no more proper than their refusal to acknowledge incorporation of the First Amendment rights.

Nonetheless, each of these cases admits that the right to keep and bear arms is a fundamental right of citizenship under a free government. As discussed below, these holdings confirm that the Second Amendment right to keep and bear arms is properly incorporated as against the States.

II. RIGHTS THAT ARE DEEPLY ROOTED IN THIS NATION’S HISTORY AND TRADITIONS, OR THAT ARE IMPLICIT IN

⁶ As the Court noted in *Heller*, *United States v. Miller*, 307 U.S. 174 (1939) did not even purport to be a thorough examination of the Second Amendment (which is not surprising given that the respondent made no appearance in the case, neither filing a brief nor appearing at argument). Neither did that opinion address the issue of incorporation whatsoever. As such, it is simply inapposite to the issue presently before the Court.

**THE CONCEPT OF ORDERED LIBERTY
ARE INCORPORATED AS AGAINST THE
STATES UNDER THE FOURTEENTH
AMENDMENT.**

As previously acknowledged by the Court, its earlier incorporation jurisprudence was not a model of consistency. *E.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968). Nonetheless, the Court's modern decisions have consistently decided questions of incorporation based on a determination of whether the right at issue is a *fundamental* right.

The standard for determining whether a right is fundamental has been variously articulated as whether the right is "deeply rooted in this nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) or "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Reno v. Flores*, 507 U.S. 292, 303 (1993). Yet other cases have emphasized that such rights are "implicit in the concept of ordered liberty," *Mapp v. Ohio*, 367 U.S. 643, 650 (1961) or "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 150 (1968).

Regardless of the exact wording chosen, the right to keep and bear arms satisfies the modern standard for incorporation and should be recognized as applying against the states.

**III. THE SECOND AMENDMENT RIGHTS ARE
DEEPLY ROOTED IN THIS NATION'S
HISTORY AND TRADITIONS, ARE
IMPLICIT IN THE CONCEPT OF ORDERED
LIBERTY, AND ARE PROPERLY
INCORPORATED AS AGAINST THE**

**STATES UNDER THE FOURTEENTH
AMENDMENT.**

As referenced above, earlier cases from this Court held that the Second Amendments rights were not incorporated as against the states *because* the right to keep and bear arms was a fundamental right that exists independently of the Constitution:

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government.

...

The second and tenth counts are equally defective. The right specified there is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.

United States v. Cruikshank, 92 U.S. 542 at 551-553.

It was so held by this court in the case of *U.S. v. Cruikshank*, 92 U.S. 542, 553, in which the chief justice, in delivering the judgment of the court said that that the right of the people to keep and bear arms "is not a right granted by the constitution. Neither is it in any manner dependent upon that instruments for its existence."

Presser v. State of Illinois, 116 U.S. 252 at 265.

Those early decisions also acknowledged the scope of the fundamental rights recognized in the First and Second Amendments. For, if the Court were to have recognized descendents of slaves as citizens: “It would give to persons of the negro race . . . the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.” *Scott v. Sandford*, 60 U.S. 393 at 417.

Although not often acknowledged by opponents of incorporation of the Second Amendment, the right to self defense—including the right to the use of arms and deadly force for self defense—is indeed a right that is deeply rooted in this nation’s history and traditions, and is implicit in the Anglo-American concept of ordered liberty.

In 1765—eleven years before the founding fathers signed the Declaration of Independence—William Blackstone published his Commentaries on the Laws of England. In those Commentaries, Mr. Blackstone addressed the absolute right to personal security and the implications of that right:

Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed in self defense, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion.

...

[In order] to vindicate these rights, when actually violated or attacked, the

subjects of England are entitled . . . to the right of having and using arms for self-preservation and defense.

1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 126, 140 (1765).

Self-defense therefore as it is justly called the primary law of nature, for it is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay even for homicide itself

3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 3-4 (1765).

When Alexander Hamilton was advocating for the adoption of the United States Constitution, he reminded the People of the State of New York of the importance of the right to self defense, stating that if “the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government.” THE FEDERALIST No. 28 (Alexander Hamilton).

Further, this Court has acknowledged the right to self-defense, including the right to use a deadly weapon in self-defense. In the case of *Beard v. United States*, 158 U.S. 550 (1895), the Court reversed the conviction of Mr. Beard after he had defended himself against three brothers who came to take a cow away from Mr. Beard. Justice Harlan was unequivocal in recognizing the right to self defense:

The defendant was where he had the right to be, when the deceased advanced

upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life, or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, were necessary to save his own life, or to protect himself from great bodily injury.

158 U.S. at 564.

Beard is far from the only time that this Court has acknowledged the right to use arms in self defense. *E.g.*, *Rowe v. United States*, 164 U.S. 546, 558 (1896) (“The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary, or what he had reasonable grounds to believe at the time was necessary, to save his life, or to protect himself from great bodily harm.”); *Gourko v. United States*, 153 U.S. 183, 191 (1894) (recognizing the right of a person to deliberately arm himself, “provided he rightfully so armed himself for purposes simply of self-defense”); *Thomson v. United States*, 155 U.S. 271, 283 (1894) (“The error here is the assumption that the act of the defendant in arming

himself showed a purpose to kill formed before the actual affray. This was the same error we found in the instructions regarding the right of self defense, and brings the case within the case of *Gourko v. U.S.*, previously cited, and the language of which we need not repeat.”).

Most recently, the Court has reaffirmed the fundamental nature of the right to keep and bear arms. *District of Columbia v. Heller*, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (detailing a multitude of additional supporting authorities). The Court also reaffirmed the fundamental nature of a person’s right to self-defense and that the Second Amendment protected an individual’s right to use arms for self-defense. *E.g.*, 128 S. Ct. at 2811, 2821-22. Thus, at least two fundamental rights that are deeply rooted in this nation’s history and traditions and implicit in the Anglo-American concept of ordered liberty are implicated in the instant case.

The instant case also implicates the fundamental right to travel among the several States.

For all the great purposes for which the Federal Government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Crandall v. State of Nevada, 73 U.S. 35, 48-49 (1867).

The constitutional right to travel from one State to another, and necessarily to

use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

United States v. Guest, 383 U.S. 745, 757 (1966).

The City of Chicago is a key hub affecting this right to travel from one State to another. It is the seventh largest city in the United States. Numerous interstate freeways run through Chicago, including I-55, I-57, I-80, I-88, I-90, and I-94. Like many large cities in the United States, Chicago actively solicits companies to relocate their businesses there; Boeing Aircraft being one of the better-known prizes captured by Chicago.

At the same time, the City of Chicago unapologetically bans the possession of handguns by all but a select group of its residents. This serves to deprive both the residents of Chicago and citizens of other states who may travel to or through Chicago of their right to bear arms for self defense.

Consider the situation of a member of one of the State Associations who owns and keeps a handgun for self-defense. If her company were to relocate to the City of Chicago, she could be forced to make the Hobson's choice of effectively forfeiting her fundamental right to keep and bear arms for self-defense or giving up a good paying job in today's trying economic conditions. Either way, the ordinances of the City of Chicago have the effect of penalizing her exercise of the fundamental right of travel.

Consider also the situation of a State Association member who lives in a state such as Montana and wishes to compete in the National Matches at Camp Perry, Ohio. The National Matches is an annual firearms competition expressly authorized by federal statute. The National Matches consist of “rifle and pistol matches for a national trophy, medals, and other prizes [and] shall be held as prescribed by the Secretary of the Army.” 36 U.S.C. § 40725 (2009). Along with the rest of the Civilian Marksmanship Program, the National Matches are supervised and controlled by a federally chartered corporation - the Corporation for the Promotion of Rifle Practice and Firearms Safety. 36 U.S.C. §§ 40701, 40721 (2009).⁷

The drive for our competitor from Billings, Montana to Camp Perry, Ohio is over 1500 miles and will require more than 23 hours of driving time. The most direct route would be along I-90, which would take the competitor directly through Chicago. According to the City of Chicago, however, our competitor may not take that most direct route unless she is willing to sacrifice her fundamental right to self-defense and her right to bear arms for

⁷ The Civilian Marksmanship Program goes back to late 19th century efforts by U.S. military and political leaders to strengthen our country’s national defense capabilities by improving the rifle marksmanship skills of members of the Armed Forces. The Civilian Marksmanship Program traces its direct lineage to 1903 when Congress and President Theodore Roosevelt established the National Board for the Promotion of Rifle Practice and the National Matches. The National Matches were first held in 1903, moved to Camp Perry, Ohio, in 1907 and continue to take place every summer at Camp Perry. The National Matches currently have well over 6,000 annual participants. http://odcmp.com/about_us.htm.

self defense while en route.⁸ Again, the ordinances of the City of Chicago have the effect of penalizing her exercise of the fundamental right of travel.

In its brief in opposition to the petition for a writ of certiorari, the City of Chicago also seeks to justify its trampling of the fundamental right to keep and bear arms as a novel social experiment. It is beyond peradventure that fundamental rights are not appropriate subjects for such experiments.⁹ One need look no further than the “social experiment” that William J. Cruikshank and his cohorts attempted to impose on the newly-emancipated African-American Republicans that sad Easter morning in 1873 for confirmation of this principle.

The right to keep and bear arms, like the right to self-defense itself, is a right that is deeply rooted in this nation’s history and traditions, and is implicit in the Anglo-American concept of ordered liberty. As such, the right to keep and bear arms is properly incorporated as against the States by the Fourteenth Amendment’s Due Process Clauses.

⁸ The choice of a female member for these illustrations is intentional. Admittedly, *some* citizens may be able to defend themselves against *some* attacks without arms. However, it would be no more proper to effectively limit the fundamental right to self-defense to young males with above-average strength and skills than it would be to effectively limit the right to vote to those who could timely complete a grueling obstacle course.

⁹ See, e.g., *Chandler v. Florida*, 449 U.S. 560, 574 (1981) (holding that the Court could permit Florida to allow photographic or broadcast coverage of a criminal trial only because the Court’s precedent “did not announce a constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial of due process”).

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that this Court hold that the Second Amendment's right to keep and bear arms is incorporated as against the States, and reverse the decision of the court below.

DRAFT 11.11.09

Respectfully submitted,

James Hryekewicz
BLAIES & HIGHTOWER, LLP
777 Main St.
Suite 1900
Fort Worth, TX 76102
Tele: (817) 334-0800
Fax: (817) 334-0574
(Counsel for Amici Curiae)

November 23, 2009

DRAFT 11.11.09