NO.08-1202

APPEAL TO APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Matthew D. Wilson, Troy Edhlund ,
and Joseph Messineo

Plaintiffs-Appellants

vs.

Cook County, a public body and corporate, Todd Stroger, Board President, in his official capacity, and its Board of Commissioners in their official capacities, namely: Earlean Collins, Robert Steele, Jerry Butler, William M. Beavers, Deborah Sims, Joan Patricia Murphy, Joseph Mario Moreno, Robert Maldonado, Peter N. Silvestri, Mike Quigley, John P. Daley, Forest Claypool, Larry Suffredin, Gregg Goslin, Timothy O.Schneider, Anthony J. Peraica, Elizabeth Ann Doody Gorman ,and Thomas Dart, Sheriff of Cook County, in his official capacity,

Defendants-Appellees

Appeal from the
Circuit Court
of Cook County, Illinois,
County Department
Chancery Division
07 CH 04848

Calendar 5

The Honorable
Mary K. Rochford
Judge Presiding

FILED APPELLATE COURT
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STEVEN W. RAMID
CLERK OF COURT

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANTS

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IV. McDonald's holding that the same standards apply to the states as apply to the United States requires application of the test of whether a type of firearms is commonly possessed for lawful purposes.

JURISDICTION

On 5/7/08 Plaintiffs appealed to this court the lower court's dismissal of its amended complaint. After the parties filed briefs and oral argument was heard, this Court entered its Order affirming the lower court's dismissal of Plaintiffs' amended complaint on 8/19/09 (A-1); denied Plaintiffs timely Motion for Rehearing on 9/25/09 (A-II), and corrected its Order of 8/29/10 with Notice to Plaintiffs on 10/9/10 (A-II(a). On 10/20/09 Plaintiffs filed a Petition for Leave to Appeal before the Illinois Supreme Court (A-II(b). On 9/29/10 the Illinois Supreme Court entered judgment in the exercise of its supervisory authority directing this Court to vacate its Order of 8/19/09, "and reconsider the matter in light of McDonald, et al. v. City of Chicago . . .to deter mine if another result is warranted," noting its mandate would issue on November 3, 2010, pursuant to Supreme Court Rule 368. (A-II(c). This Court retains its jurisdiction pursuant to Supreme Court Rule 303. On 11/9/10 Plaintiffs filed a Petition for Leave to File Supplemental Brief, and this Court ruled it "moot" and entered two Orders on 11/12/10, on the Court's own motion: (i). vacating its Order of 8/19/09, and (ii) granting all parties leave to file Supplemental Briefs on or before December 1, 2010. (A-II(d).(*)

(*) NOTE: Separate Appendix is filed herewith containing pertinent Court Orders, County Ordinance, pertinent constitutional and statutory provisions, excerpt of pleadings reflecting named parties-plaintiffs, and table of contents of record on appeal.

ISSUES PRESENTED FOR REVIEW

I. WHETHER STRICT SCRUTINY IS THE APPROPRIATE STANDARD OF REVIEW, GIVEN THAT THE RIGHT IS FUNDAMENTAL AND THAT *HELLER* AND *McDONALD* REJECT RELIANCE ON LEGISLATIVE "FINDINGS."

II. WHETHER THE SECOND AMENDMENT, GIVEN *McDONALD'S* RECOGNITION THAT IT IS A FUNDAMENTAL RIGHT, APPLIES EQUALLY TO THE FEDERAL GOVERNMENT AND STATES IN THE SAME MANNER AS DO OTHER BILL OF RIGHTS PROVISIONS.

III. WHETHER THE SECOND AMENDMENT'S CENTRAL COMPONENT OF THE FUNDAMENTAL RIGHT OF SELF-DEFENSE PRECLUDES *McDONALD*'S HOLDING OF THAT RIGHT PURPORTEDLY APPLYING ONLY TO HANDGUNS.

IV. WHETHER *McDONALD*'S HOLDING THAT THE SAME STANDARDS APPLY TO THE STATES AS APPLY TO THE UNITED STATES REQUIRES APPLICATION OF THE TEST OF WHETHER A TYPE OF FIREARM IS COMMONLY POSSESSED FOR LAWFUL PURPOSE.

ARGUMENT

Introduction

The Supreme Court ordered this Court to "reconsider the matter in light of *McDonald, et al. v. City of Chicago*, 130 S.Ct. 3020 (06/28/10), to determine if another result is warranted." See this Court's Order of 11/12/10 reciting, in pertinent part, Illinois Supreme Court Order of 9/29/10, and this Court's vacating and reinstating of appeal. Plaintiffs' Appendix, Exhibit A.

This Court's entire prior decision is based on the assumption that the right to keep and bear arms is not fundamental and does not apply to the states.[1] *McDonald* held that because the right is fundamental, it does apply to the states. Accordingly, this Court should reverse the lower court's dismissal of the complaint and remand the case for further proceedings.

As the following shows, the holding in *McDonald* that the right is fundamental signifies that strict scrutiny is the standard of review and that the right applies to the states according to the same common-use test for firearms as applies to the United States. The claims based on the right to keep and bear arms, vagueness, due process, and equal protection should all be reinstated.

I. STRICT SCRUTINY IS THE APPROPRIATE STANDARD OF REVIEW

II. A. The Right is Fundamental and Requires Strict Scrutiny

[1]See *Wilson v. Cook County,* 394 Ill.App.3d 534, 539, 914 N.E.2d 595 (2009) ("*Heller* does not support plaintiffs' argument that Cook County may not violate their second amendment rights by banning assault weapons"); *id.* ("*Heller* does not support plaintiffs' argument that the second amendment is incorporated to be applicable to the states through the fourteenth amendment"); *id.* at 542 ("*Heller* does not stand for the creation of a broad fundamental right"); *id.* at 544 ("*Heller* did not pronounce the second amendment right as fundamental. Accordingly,plaintiffs' overbreadth argument fails"); *id.* at 545-46 (vagueness challenge fails because "*Heller* did not mandate strict scrutiny review, or any level of review"); *id.* at 546 (equal protection challenge fails as no "fundamental right" involved, "rational basis" met).

McDonald repeatedly characterized the right as fundamental in holding that the Second Amendment is incorporated through the Due Process Clause of the Fourteenth Amendment because "the right to keep and bear arms is fundamental to *our* scheme of ordered liberty," and is "deeply rooted in this Nation's history and tradition . . . ." 130 S.Ct. at 3036.

Blackstone's view that the arms right was fundamental was "shared by the American colonists." *Id.* at 3037. "The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights." *Id.* Its inclusion in the Bill of Rights "is surely powerful evidence that the right was regarded as fundamental in the sense relevant here." *Id.*

The efforts of the Reconstruction Congress, *McDonald* continued, "to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental." *Id.* at 3040. "[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id.* at 3042.

McDonald concluded that the Second Amendment is "a provision of the Bill of Rights that protects a right that is fundamental from an American perspective" and thus "applies equally to the Federal Government and the States." *Id.* at 3050.

Just as *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), rejected rational-basis standard of review,[2] *McDonald* rejected the power "to allow state and local governments any gun control law that they deem to be reasonable . . . " 130 S.Ct. at 3046. It further

[2] "Obviously, the same [rational basis] test could not be used to evaluate the extent which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms." 128 S.Ct. at 28118 n. 27.

rejected the argument of municipalities that:

> [a]lthough most state constitutions protect firearms rights, state courts have held that these rights are subject to "interest-balancing" and have sustained a variety of restrictions. . . . In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing . . . .

Id. at 3047, citing *Heller*, 128 S.Ct. at 2820-2821.[3]

Justice Breyer suggested that the *Heller* majority "implicitly" rejected strict scrutiny based on *dictum* about "presumptively lawful" restrictions on possession by felons and the mentally ill, possession in sensitive locales, and commercial sales. *Heller*, 128 S.Ct. at 2851 (Breyer, J., dissenting). Yet a compelling state interest for narrowly tailored restrictions of these types may be easily articulated. The existence of exceptions to a right hardly disqualifies strict scrutiny. *See Heller*, 128 S. Ct. at 2821 (noting First Amendment exceptions and stating that "[t]he Second Amendment is no different.").[4]

Since the Second Amendment recognizes an explicitly-protected, fundamental right, restrictions thereon are subject to strict scrutiny. A right is "fundamental" if it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973). "[C]lassifications affecting fundamental rights . . . are given the most exacting

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[3]The "interest-balancing inquiry" would allow "arguments for and against gun control" and the upholding of a handgun ban "because handgun violence is a problem . . . ." *Id.* at 2821. Interest balancing is a form of intermediate scrutiny. *See id.* at 2852 (Breyer, J., dissenting), citing *Burdick v. Takushi*, 504 U.S. 428 (1992).

[4]"No fundamental right – not even the First Amendment – is absolute. The traditional restrictions go to show the scope of the right, not its lack of fundamental character." *McDonald*, 130 S. Ct. at 3056 (Scalia, J., concurring). Recognition of the right still allows "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms . . . ." *United States* v. *Emerson*, 270 F.3d 203, 261 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution").[5] "Under the strict-scrutiny test," the government has the burden to prove that a restriction "is (1) narrowly tailored, to serve (2) a compelling state interest." *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002).[6]

B. *McDonald* Followed *Heller*'s Categorical Approach Rejecting Reliance on Legislative "Findings"

McDonald barely mentioned Chicago's legislative finding and accorded it no discussion. 130 S.Ct. at 3026 (quoting Journal of Proceedings of the City Council stating that handgun ban was enacted to protect residents "from the loss of property and injury or death from firearms"). Instead, *McDonald* upheld the right of residents to enhance their safety by having arms for their defense, noting that "the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials." *Id.* at 3049.

Similarly, without any consideration of legislative findings, *Heller* took a categorical approach and held: "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred

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[5] *See also Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 n.14 (1985) ("governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied"); *Washington v. Glucksberg*, 521 U.S. 702, 766-67 (1997) (Souter, J., concurring) (citing *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) for proposition that "an 'enactment involving . . . a most fundamental aspect of liberty . . . [is] subject to strict scrutiny"); and *Foucha v. Louisiana*, 504 U.S. 71, 115 (1992) (Thomas, J., dissenting) ("Certain substantive rights we have recognized as 'fundamental'; legislation trenching upon these is subjected to 'strict scrutiny,' and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring.").

[6] The government bears the burden of proof to show that the interests are compelling and that the law is narrowly tailored. *Miller* v. *Johnson*, 515 U.S. 900, 920 (1995).

firearm in the nation to "keep" and use for protection of one's home and family,' . . . would fail constitutional muster." *Heller*, 128 S.Ct. at 2817-18.

Justice Breyer, whose"interest-balancing inquiry" the majority rejected, *id.* at 2821, would have relied on a legislative report and empirical studies filled with allegations denouncing the type of firearm it sought to ban. *Id.* at 2854-61 (Breyer, J., dissenting).

The prefatory clauses to the ordinance here made negative comments about firearms in general and made two allegations about "assault weapons." *Wilson,* 394 Ill.App.3d at 535-36. First, it claims that "assault weapons are 20 times more likely to be used in the commission of a crime than other kinds of weapons," *id.* at 535, but the U.S. Department of Justice study found that "AWs [assault weapons] were used in only a small fraction of gun crimes prior to the [federal] ban: about 2% according to most studies and no more than 8%."[7]

Second, it stated that "there was no legitimate sporting purpose for the military-style assault weapons . . . ." *Id.* at 536. Yet since the banned firearms with this pejorative label[8] are only semiautomatic, meaning that they fire once per trigger pull, they are not used by any military force in the world – military forces use true assault

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[7]C. Koper, *An Updated Assessment of the Federal Assault Weapons Ban* (Report to National Institute of Justice, U.S. Dep't of Justice 2004), at 2. http:www. sas. upenn.edu/jerryllee/ research/aw final2004.pdf. "Should it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement." *Id.* at 3. That ban expired in 2004.

[8]"Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of 'assault rifles' so as to allow an attack on as many additional firearms as possible on the basis of undefined 'evil' appearance." *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (citation omitted).

weapons which fire continuous shots automatically with a single pull of the trigger.[9] The term "assault weapon" has become a classic case of an "Alice-in-Wonderland world where words have no meaning." Welsh v. United States, 398 U.S. 333, 354 (1970) Harlan J. concurring).

Under the *McDonald-Heller* approach, the legislative findings are accorded no deference. But even if a lesser standard is applied, such as that applied to adult bookstores under the First Amendment, a municipality cannot "get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002). If plaintiffs "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings," then "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* But " it is the Court's task in the end to decide whether Congress has violated the Constitution," and thus "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law . . ." *Sable Commons of Cal., Inc. v. FCC,* 492 U.S. 115, 129 (1989).

In sum, the right to possess firearms is fundamental, giving rise to the strict scrutiny standard of review. Taking a categorical approach, *Heller* and *McDonald* invalidated bans on firearms without paying any deference to legislative "findings,"

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[9] *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 804 (1988) (describing the M-16 selective fire (full automatic) rifle as the "standard assault rifle"). "Assault rifles are . . . selective-fire weapons . . . . Assault rifles . . . are capable of delivering effective full automatic fire . . . ." Harold E. Johnson, *Small Arms Identification & Operation Guide – Eurasian Communist Countries* (Defense Intelligence Agency 1980), p. 105.

which in this case are inaccurate and unworthy of deference even under a lower standard of review.

II. *McDONALD* RECOGNIZES THAT THE SECOND AMENDMENT FUNDAMENTAL RIGHT APPLIES EQUALLY TO THE FEDERAL GOVERNMENT AND STATES IN THE SAME MANNER AS DO OTHER BILL OF RIGHTS PROVISIONS

McDonald addressed an argument by the *City of Chicago* not unlike those raised by the County Defendants in this case—that is, the Second Amendment differs from all the other provisions of the Bill of Rights "because it concerns the right to possess a deadly implement and thus has implications for public safety." [citing City of Chicago Brief for Municipal Respondents.] Responding to this concern, *McDonald* concluded:

> The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category. See, *e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) ("The exclusionary rule generates 'substantial social costs,' *United States v. Leon*, 468 U.S. 897, 907, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), which sometimes include setting the guilty free and the dangerous at large"); *Barker v. Wingo*, 407 U.S. 514, 522, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (reflecting on the serious consequences of dismissal for a speedy trial violation, which means "a defendant who may be guilty of a serious crime will go free"); *Miranda v. Arizona*, 384 U.S. 436, 517, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (Harlan, J., dissenting); *id.*, at 542, 86 S.Ct. 1602 (White, J., dissenting) (objecting that the Court's rule "[i]n some unknown number of cases ... will return a killer, a rapist or other

> criminal to the streets ... to repeat his crime"); *Mapp*, 367 U.S., at 659, 81 S.Ct. 1684. Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.

McDonald at 3045.

The firearms identified in the subject County Ordinance as "assault weapons," and those falling within the overbroad and vague descriptions stated therein for which possession alone constitutes a criminal offense, are treated in the same manner as hand-grenades, narcotics and counterfeit money—as if the item itself is repugnant to the county. This "repugnancy" attribute applied to firearms in general, that finds expression in various cases cited in purported support of "public safety implications" arguments, fails to find any authority in our State Supreme Court rulings, and the repugnancy of firearms in general has been shown not to represent a correct portrayal thereof, as the U.S. Supreme Court has noted in cases decided prior to *McDonald*.

The United States Supreme Court has stood up to similar challenges in the past based on the purported repugnancy of firearms and the adverse "implications for public safety." See, for example, *Staples v. United States,* 511 U.S. 600 (1994). Responding to the broad assertion by the prosecution that"[O]ne would hardly be surprised that owning a gun is not an innocent act," *id.* at 610, and "that guns, unlike food stamps, but like grenades and narcotics, are potentially harmful devices," *id.* at 611. the Court said:

> Guns in general are not "deleterious devices or products or obnoxious waste materials," . . . that put their owners on notice that they stand "in responsible relation to a public danger," . . . But that an item is

"dangerous," in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. Id. at 610-611.

In a prior statement the Court observed "that there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Id.* at 610. This proposition is clearly the *McDonald* majority's main theme in its historical analysis of the pre-existing inalienable right of self-defense, which it recognized as the "central component of the right itself." *McDonald* at 3048.

III. THE 2ND AMENDMENT'S CENTRAL COMPONENT OF THE FUNDAMENTAL RIGHT OF SELF- DEFENSE PRECLUDES *McDONALD'S* HOLDING OF THAT RIGHT PURPORTEDLY APPLYING ONLY TO HANDGUNS

McDonald determined that whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process finds its answer in whether the right is "fundamental to our scheme of ordered liberty," *Duncan,* 391 U.S. at 149, 88 S. Ct. 1444, and whether it is "deeply rooted in this nation's history." *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S. Ct. 2302 (1997). Further clarifying the importance of *Heller's* enunciation of the inherent right of self-defense, *McDonald* continues:

> Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller,* we held that individual self-defense is "the *central component* " of the Second Amendment right. 554 U.S., at __, 128 S.Ct., at 2801-2802; see also *id.*, at __, 128 S.Ct., at 2817 (stating that the

"inherent right of self-defense has been central to the Second Amendment right").

McDonald at 3048.

While the decision in *Heller* has been argued by Defendants as limiting the right of self-defense to handguns in one's home because *Heller* confined its holding to the use of handguns, *McDonald's* historical analysis belies that interpretation. "By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense." *McDonald* at 3038 (citations omitted). "[W]hen attempts were made to disarm 'free-soilers' in what was then called 'bloody Kansas,' Senator Charles Sumner, who later played a leading role in the adoption of the Fourteenth Amendment, proclaimed that never was [the rifle] more needed in just self-defense than now in Kansas." *Id.* Continuing, *McDonald* addresses what it called a contention that:

> repackages one of the chief arguments that we rejected in *Heller*, i.e., that the scope of the Second Amendment right is defined by the immediate threat that led to the inclusion of that right in the Bill of Rights. In *Heller*, we recognized that the codification of this right was prompted by fear that the Federal Government would disarm and thus disable the militias, but we rejected the suggestion that the right was valued only as a means of preserving the militias. 554 U.S. at, 128 S. Ct. at 2801, 2892. On the contrary, we stressed that the right was also valued because the possession

of firearms was thought to be essential for self-defense. As we put it, self-defense was the central component of the right itself. *Ibid.*

McDonald at 3048.

McDonald also referenced its prior holding in *Heller* as extending to other lawful purposes, stating: "Municipal respondents' remaining arguments are at war with our central holding in *Heller*: that the Second Amendment protects *a personal right to keep and bear arms for lawful purposes*, most notably for self-defense within the home." *McDonald* at 3044 (emphasis added).

The Second Amendment's self-defense component of the right to keep and bear arms, viewed in its historical context, coupled with the clear pronouncement recognized by *McDonald* in citing *Heller* regarding the right to keep and bear arm for lawful purposes, leads to the conclusion that the Second Amendment protects a personal right to keep and bear arms commonly possessed for lawful purposes, including rifles and long-barreled shotguns. See argument below regarding applicable standards for firearms commonly possessed for lawful purposes, including those incorrectly deemed "assault weapons" and prohibited under the amended County Ordinance, which are used for self-defense, hunting and target shooting.

IV. *McDONALD*'S HOLDING THAT THE SAME STANDARDS APPLY TO THE STATES AS APPLY TO THE UNITED STATES REQUIRES APPLICATION OF THE TEST OF WHETHER A TYPE OF FIREARM IS COMMONLY POSSESSED FOR LAWFUL PURPOSES

McDonald rejected the view "that the Second Amendment should be singled out for special – and specially unfavorable – treatment." *Id.* at 3043. It refused "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of

rules than the other Bill of Rights guarantees . . . ."[10] *Id.* at 3044. "[T]his Court decades ago abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,' . . ." 130 S.Ct. at 3047. Thus, the *Heller* test for what arms are constitutionally protected is fully applicable to the states.

"[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 128 S.Ct. at 2791-92. The Court continued:

> The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. . . . We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.

Id. at 2815-16, citing *United States v. Miller*, 307 U.S. 174, 178 (1939).

Thus, "the sorts of weapons protected were those 'in common use at the time.' . . . We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' *Id.* at 2817. Under this test, full automatics like the M-16 machinegun may be restricted as may "sophisticated arms that are highly unusual in society at large." *Id.*

In sharp contrast are civilian firearms such as the Colt AR-15, which the ordinance here bans. "The AR-15 is the civilian version of the military's M-16 rifle, and

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[10]No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).

is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire." *Staples v. United States*, 511 U.S. 600, 603 (1994). Ordinary firearms such as the AR-15 rifle have "traditionally have been widely accepted as lawful possessions . . . ." *Id.* at 612.[11]

Heller found: "The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose [self-defense]." 128 S.Ct. at 2817. "It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Id.* at 2818. The same reasoning applies here.

Parker v. District of Columbia, 478 F.3d 370, 397 (D.C. Cir. 2007), which *Heller* affirmed, applied *Miller*'s "common use" test and found that "most handguns (those in common use) fit that description then and now." *Id.* (citing *Emerson,* 270 F.3d at 227 n.22). *Emerson* "assum[ed] that a Beretta pistol passed the *Miller* test." *See id.* at 216, 273 (describing a Beretta 9mm semiautomatic pistol). It is common knowledge that many, perhaps most, handguns use magazines that hold more than ten rounds. *Parker* rejected the suggestion "that only colonial-era firearms (e.g., single-shot pistols) are covered by the Second Amendment," which instead "protects the possession of the modern-day equivalents of the colonial pistol." 478 F.3d at 398.

"The modern handgun – and for that matter the rifle and long-barreled shotgun – is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal

[11]Staples mentioned both cars and AR-15 rifles in the following context: "Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation." *Id.* at 611.

descendant of that founding-era weapon, and it passes *Miller*'s standards." *Parker*, 478 F.3d at 398. Using the pejorative term "assault weapon" to describe the firearms banned here, which are mostly rifles, does not remove them from Second Amendment protection.

Heller, 128S.Ct. at 2818, approvingly quoted *Andrews v. State*, 50 Tenn. 165,187 (1871), which invalidate a ban on bearing arms. *Andrews* also held that "the rifle of all descriptions, the shotgun, the musket and repeater, are such [protected] arms; and that under the Constitution the right to *keep* such arms, cannot be *infringed* or *forbidden* by the Legislature." Id. at 79. It is commonplace that semiautomatic rifles, pistols and shotguns "are commonly kept and used by law-abiding people for hunting purposes or for protection of their persons or property ..." *Rinzer v. Carson*, 262 So.2d 661, 666 (Fla. 1972). [12]

Rejecting arguments for a handgun ban, *McDonald*, 130 S.Ct. at 3047, explicitly rejected the only state decision to sustain one, *Kalodimos v. Morton Grove*, 103 Ill.2d 483, 83 Ill.Dec. 308, 470 N.E.2d 266 (1984). *McDonald* reaffirmed the holding in *Heller* that doubt was not cast on "longstanding regulatory measures" such as "prohibitions on the possession of firearms by felons and the mentally ill." 130 S.Ct. at 3047. But bans on mere possession of common firearms by law-abiding citizens are off the table.

[12] *See also State v. Kerner*, 181 N.C. 574, 107 S.E. 222-224 (1921) (protected arms include "the rifle, the musket, the shotgun and the pistol," i.e., 'all arms' as were in common use, and borne by the people as such when this provision was adopted.") legislative "findings." This Court should not hold as a matter of law that the firearms at issue are *not* constitutionally protected based on nothing more than these disputed legislative assertions.

In sum, what are maligned as "assault weapons" are "widely owned by private citizens today for legitimate purposes," including "for self-defense, hunting, and target shooting . . ." Michael P. O'Shea, "The Right to Defensive Arms after *District of Columbia v. Heller*," 111 W.Va. L. Rev. 349, 388 (Winter 2009). Given *McDonald*'s holding that the fundamental right to have arms applies to the states, a locality may not justify banning commonly-possessed firearms by making impeachable assertions in its legislative "findings." This Court should not hold as a matter of law that the firearms at issue are *not* constitutionally protected based on nothing more than these disputed legislative assertions.

CONCLUSION

This Court should reverse the judgment below and remand the case for further proceedings.

Respectfully submitted,

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Certification of Compliance with Supreme Court Rules 341(a) and 341(b)
The undersigned certifies that this Brief conforms to the requirements of Rules 341(a) and (b) and that the length of this Brief, excluding the Appendix, is nineteen (19) pages, excluding the Rule 341(d) cover.

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