



REPORT TO COUNCIL 28 City of Sacramento

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Staff Report
December 15, 2009

**Honorable Mayor and
Members of the City Council**

Title: City of Sacramento Amicus Support in *McDonald v. Chicago*

Location/Council District: City-wide

Recommendation: Discuss and consider whether to authorize the City Attorney's Office to take the necessary steps to have the City of Sacramento join as amicus curiae with various cities in *McDonald v. Chicago*, United States Supreme Court Case no. 08-1521, in support of the position that the Second Amendment to the United States Constitution does not apply to the States and local governments.

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Presenters: Matthew D. Ruyak,
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Department: City Attorney's Office

Division: N/A

Organization No. 03001011

Description/Analysis: In 2008 the United States Supreme Court issued its landmark decision, *District of Columbia v. Heller*. In that case, the Court held that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use a firearm for self-defense within the home. However, the case arose from a District of Columbia (D.C.) law; D.C. is a federal enclave, not part of any state. Thus, the Court's decision left a question unanswered: does the Second Amendment apply to the States and local governments?

A case pending before the United States Supreme Court, *McDonald v. Chicago*, will answer that question. The City of Sacramento has an opportunity to join as amicus curiae with several other cities in support of the position that the Second Amendment does not apply to States and local governments.

Policy Considerations: It is the City Council's prerogative to decide whether to participate as amicus curiae in controversial cases.

Committee/Commission Action: None.

Environmental Considerations: N/A.

Rationale for Recommendation: This report is presented in response to Council member McCarty's request at the November 24, 2009, City Council meeting. Council's meeting of December 15, 2009, is the last practical date for the Council to decide before amicus briefs are due in early January 2010. The Supreme Court has set oral argument for March 2, 2010.

Joining as amicus in this case would be consistent with the City of Sacramento's recent attempts to reduce gun violence, as well as the assertion of local control over public safety issues. A competing concern is the City's respect for individual rights.

Financial Considerations: Council's decision will not result in a fiscal impact. The amicus brief is being prepared by attorneys for another entity.

Emerging Small Business Development (ESBD): No goods or services are being provided under this report.

Respectfully Submitted by: 
Matthew D. Ruyak, Supervising Deputy City Attorney

Approved by: 
Eileen M. Teichert, City Attorney

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Background

The Second Amendment, part of the original Bill of Rights ratified in 1791,¹ provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

A recurrent issue in the interpretation of the Bill of Rights is its application to the states. In 1833 the Supreme Court ruled that the Fifth Amendment applied only to the federal government.² By the 1920s, however, the Court had begun to apply selected elements of the first ten amendments to the states, using a principle known as the incorporation doctrine. According to this doctrine, elements of the Bill of Rights may be applied to the states through the Due Process Clause of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."³

Incorporation has since been used often to strike down state laws found to be in violation of the Constitution's Bill of Rights. Indeed, nearly all of the provisions in the Bill of Rights have been declared binding on the states. Only a few of the numerous provisions within the Bill of Rights have not yet been applied to the states. These include the Second Amendment's right to bear arms; the Third Amendment's prohibition against involuntary quartering of troops; the Fifth Amendment's requirement of grand jury indictment in capital cases; the Seventh Amendment's provision for trial by jury in civil cases; and the Eighth Amendment's prohibition of excessive bail and fines.

1 Although the fundamental structure of the Constitution was drafted over several months of intense debate during the Spring and Summer of 1787, it took some time for the Constitution to supplant the Articles of Confederation as the organizing document for the federal government. The Articles were replaced by the Constitution on June 21, 1788, when the requisite ninth state legislature (New Hampshire) ratified it. The federal government commenced operations pursuant to the Constitution's terms on March 4, 1789. The Bill of Rights was not a part of the Constitutional Convention's adopted document; rather it was an outcome of the debate on ratification of the Constitution. To allay deep concerns of an overbearing federal government, supporters promised to add a bill of rights if the Constitution was ratified. This promise influenced some states' decisions to ratify the Constitution. On September 25, 1789, the First Congress sent twelve amendments to the states for ratification, but the first two failed to be ratified. It took more than two years for ratification. As a point of pure coincidence, December 15 – the date of this report – was the date in 1791 on which the Bill of Rights was ratified by Virginia, the eleventh of the fourteen states (Vermont joined the United States in 1791), to ratify the ten amendments, making them part of the Constitution. December 15 was thus declared "Bill of Rights Day" by President Franklin D. Roosevelt in 1941.

2 *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

3 See *Gitlow v. New York*, 268 U.S. 652 (1925) [holding that the First Amendment protections of freedom of speech applied to the states].

In *District of Columbia v. Heller*, the United States Supreme Court held for the first time that the Second Amendment protects an individual's right to possess a firearm. More specifically, the Court held that D.C.'s "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."⁴

After the Supreme Court's decision in *District of Columbia v. Heller*, several suits were filed against the Illinois cities of Chicago and Oak Park, both of which ban the possession of certain handguns. All of those suits were dismissed on the ground that *Heller* dealt with a law enacted under the authority of the national government, while Chicago and Oak Park are subordinate bodies of a state.

The federal appellate court affirmed.⁵ The *McDonald v. Chicago* court reasoned that so far the Supreme Court has rebuffed requests to apply the Second Amendment to the states.⁶ Because those cases had direct application to the case before it, fundamental principles of jurisprudence dictated the court affirm the lower court, leaving the Supreme Court to resolve the issue of incorporation. In its decision, the court further explained, "it is difficult to argue that legislative evaluation of which weapons are appropriate for use in self-defense has been out of the people's hands since 1868 [when the Fourteenth Amendment was adopted]," and that a legitimate issue of debate over incorporation of the Bill of Rights is that "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule."⁷

On September 30, 2009, the Supreme Court granted certiorari in *McDonald v. Chicago* and certified the following question for briefing and oral argument: "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."

Given the Court's rationale and decision in *Heller*, it appeared certain the Court would address this issue quickly. And the presumed inevitability of incorporation has been the subject of prodigious analysis and debate since that decision. Dozens of amicus briefs, on both sides of the issue, have been filed with the Court, representing diverse interest groups. The City of Sacramento has the opportunity to join other American cities on a brief in support of the contention that the Second Amendment to the United States Constitution does not apply to the States or local governments.

4 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821-2822 (2008).

5 *McDonald v. Chicago*, 567 F.3d 856 (7th Cir. 2009).

6 See *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894).

7 567 F.3d at 860.

The amicus brief has not been finalized. However, the argument is anticipated to be as follows:

First, relying upon the Supreme Court's rationale in *D.C. v. Heller* that the right to self-defense pre-existed the Constitution, it follows that this right had been subject to State and local government regulation long before the founding of the country. The Second Amendment therefore acted only as a check against the federal government, while the States and local governments retained their historical prerogative to regulate the manner in and purpose for which firearms are possessed and carried.

Second, this right is subject to limitation when an individual engages with society; he or she may not exercise it so as to endanger others or to disturb the peace. The State or local government therefore properly exercises one of its core police powers when it regulates the keeping and carrying of firearms. Incorporation would allow individuals to challenge the constitutionality of local regulations measured against a purported national standard, even though the standards and circumstances of the local community, which provide the context in which the regulations were passed, should control. The exercise of a right to self-defense must always be subject to State police power lest it harm the public welfare, incite crime, disturb public peace, or otherwise threaten the very order and stability of the State as a government.

Third, in *United States v. Cruikshank*,⁸ the Court held that the Second Amendment right does not apply against the States through the Due Process Clause of the Fourteenth Amendment. In deciding whether to overrule *Cruikshank* and its progeny, the Court must overcome the principle of *stare decisis*. Not only has that case controlled for over 125 years, but it was also reaffirmed by two subsequent decisions (in the late nineteenth century), and it has not been openly questioned in any of the Court's incorporation cases. Moreover, that precedent has provided the basis for current State and local laws, regulations and ordinances relating to firearms.

At the time this staff report is being drafted, the following cities have been contacted to participate: Baltimore, Cleveland, Los Angeles, Milwaukee, New York, Oakland, Philadelphia, San Francisco, Seattle, and Trenton (all of whom joined as amicus in *D.C. v. Heller*), as well as Atlanta, Austin, Boston, Dallas, Detroit, Houston, Miami, Memphis, and Richmond (California), and Cook County, Illinois.

The Supreme Court's decision could have significant impact on states' local governments' ability to regulate firearms. However, it would be premature to measure the extent of such impact. *Heller* currently stands for the proposition that individuals have a right to in-home possession of a firearm for self-defense. It did not overturn D.C.'s licensing scheme. The Court may go no further than

⁸ 92 U.S. 542 (1876).

that if it does apply the Second Amendment to the States. Further, the Court recognized in *Heller* that even Constitutional rights have limits; undoubtedly, the major debate after the Court's decision in *McDonald v. Chicago*, if the Second Amendment is incorporated, will be over the extent of such limits. Additionally, it is worth noting that the City already is preempted by California state law with respect to some firearm regulations.