

No. 08-1521

In The
Supreme Court of the United States

OTIS MCDONALD, ADAM ORLOV,
COLLEEN LAWSON, DAVID LAWSON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

**BRIEF *AMICUS CURIAE* OF THE HEARTLAND
INSTITUTE IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE*¹

The Heartland Institute is a national nonprofit research and education organization, tax exempt under Section 501(c)(3) of the Internal Revenue Code, headquartered in Chicago, and founded in 1984. It is not affiliated with any political party, business, or foundation.

Heartland's mission is to discover, develop, and promote free-market solutions to social and economic problems. Heartland's nearly 200 free-market policy experts – managing editors, senior fellows, policy advisors, and contributing editors – provide testimony, articulate issue positions through the media, and help educate in other ways policymakers at all levels of government in the fifty states and Washington, D.C. Policy advisors are academics and professionals including members of the faculties of Harvard University, Georgetown University Law Center, the Massachusetts Institute of Technology, The University of Chicago, The University of Chicago Law School, UCLA School of Law, Northwestern University, and scores of other respected academic institutions. In

¹ The parties were notified 12 days prior to the due date of this brief of Heartland's intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

addition, approximately 150 elected officials – Democrats as well as Republicans – serve on Heartland’s Board of Legislative Advisors.

The Second Amendment and gun control have long been of concern to Heartland and its researchers. In 1995, Heartland published The Heartland Institute policy study *Taking Aim at Gun Control* by Daniel Polsby, now Professor of Law and Associate Dean for Academic Affairs at George Mason University School of Law, and the late Dennis Brennen, then Chairman of the Department of Economics at Harper College in Palatine, Illinois.

The Heartland Institute filed briefs *amicus curiae* in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001); *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004); and *District of Columbia v. Heller*, ___ U.S. ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).



SUMMARY OF ARGUMENT

In this case, Otis McDonald and the other Petitioners seek the right to possess handguns within their homes for the purpose of self-defense. They need handguns.

In the 25 full years since Chicago passed its handgun ban, handgun murder rates have soared, as have murders by young people in the city. Chicago schools have launched a \$30 million social program to

deter violence by public school students, but this program has literally just begun. In the meantime, Petitioners have no right to possess handguns to defend themselves, and police have no legal or constitutional duty to rescue citizens from violence.

The Chicago handgun ban has been completely ineffective in reducing handgun murders. Therefore, it does not advance the public interest, and it ought to be found unconstitutional by this Court.

◆

ARGUMENT

I. Introduction

Otis McDonald, 76, became the lead plaintiff in this case because he “resides in a high-crime neighborhood” and “has been threatened by drug dealers.” (Complaint, ¶¶1, 11.) As a result, he presently intends to possess a handgun “within his home for self-defense” but cannot do so because of the Chicago handgun ban ordinance. *Id.* at ¶11.

In a recent interview, McDonald explained the reasons why he believes he needs a gun for self-defense within his home:²

² Maureen Martin, *Handgun Ban Plaintiff Urges Gun Rights in Crime-Ridden Neighborhoods*, The Heartland Institute (November 9, 2009) available at http://www.heartland.org/article/26330/Handgun_Ban_Plaintiff_Urges_Gun_Rights_in_CrimeRidden_Neighborhoods.html.

Where I live [on Chicago's South Side], I'm always concerned about the neighborhood. I've lived here 30 some years, and I like it here, and I wanted to keep it clean, keep it protected, and keep the property value up.

I'm concerned heavily about the kids, about the real young kids coming up in this environment, because they are being trained to be what the older ones are. They're recruited daily, nightly, to be drug dealers and gangbangers.

They're only seeing the dark side. They're brought up in the dark side, and they're seeing so many kids with big cars and plenty of money. This is the only life, in their eyes. That's what they're learning. They have no respect for themselves. Therefore, you know they have no respect for police officers and certainly not the elderly people in the neighborhood.

Residents in his neighborhood are "afraid," he said, "and they have reasons to be afraid. Being out there and being confronted a few times, I know these kids; they're dangerous. They don't care about living, they have no respect for their elders, police officers."

That is why McDonald agreed to get involved in the Chicago case.

[T]he police can't do it alone. There are too many guns in here and they're coming in here too fast. They [the police] need the community to have the right to a handgun in

their own home. I believe to my heart that will help the police out, [protecting people] from home robbery, burglary.

I will not be pinned down in my house without anything to defend myself, while they walk the streets. I will not be victimized by the law that tells me I cannot have a handgun in my own home, when I know there's a right that's out there that's given to me. The people out there on the streets don't have the right to have a gun out there on the streets. But we law-abiding citizens – senior citizens, I may stress – have the constitutional right under the Second Amendment. It will make the residents, old people like myself, feel a little more secure.

Chicago Police Department crime statistics, set out and discussed below, demonstrate that McDonald's apprehensions, and those of his neighbors, are well-founded.

II. Chicago's Handgun Ban Is an Utter Failure.

Chicago's handgun ban is not working.

The purpose of the city ordinance, enacted in 1982, was to reduce gun crime. (Brief for Respondents in Opposition to McDonald's petition for *certiorari* at 1.)

Precisely the opposite has happened.

A. Handgun Murders Have Soared During the 25 Years the Ordinance Has Been in Effect.

According to Chicago Police Department data, the percentage of murders committed with handguns has skyrocketed since 1982 and handgun murder rates per 100,000 population more than doubled in the 1990s over 1982 levels. In 2008, these rates were up more than 60% over 1983. (App. 1, charting Chicago Police Department murder and handgun murder data and calculating rates per 100,000 population.)

In 1983, the first full year the handgun ban ordinance was in effect, there were 729 murders in Chicago,³ of which 290 (or 39.78%) were committed with handguns. For each increment of 100,000 population, the murder rate that year was 24.26 murders, and the handgun murder rate was 9.65. *Id.*

By 1990, there were 852 murders in Chicago, of which 513 (60.21%) were committed with handguns.

³ Chicago's murder rate by all methods is vastly higher than those rates in New York and Los Angeles. United States Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *2008 Crime in the United States* (known as FBI Uniform Crime Reports ("UCR")), available at http://www.fbi.gov/ucr/cius2008/data/table_08.html.

According to the 2008 UCR, in New York (population 8.34 million), there were 523 murders in 2008; in Los Angeles (population 3.85 million), there were 384 murders in 2008; in Chicago (population 2.83 million), there were 510 murders.

The murder rate per 100,000 population that year was 30.60, and the handgun murder rate was 18.42. Thus, in the first seven years the handgun ban was in effect, the number of handgun murders increased by more than 56%, and the gun murder rate nearly doubled. *Id.*

By 2003, the handgun murders committed increased to 442, from 290 in 1983. In 2003, 73.54% of murders were committed with handguns. The handgun murder rate was 15.26. *Id.*

By 2008, 402 handguns (compared to 290 guns used in 1983) were used to commit murders, 78.67% of all murders that year. The handgun murder rate was 13.88. *Id.*

In the 25 years since Chicago's handgun ban was enacted, the number of handguns used in murders and handgun murder rates dropped below 1983 levels in only four years (1984-87). *Id.*

There are handguns out there, and they are being used to kill.

B. Handgun Murders by Youths Are Soaring.

McDonald's and his neighbors' apprehension of violent youths is reflected in Chicago Police Department statistics, which demonstrate youths are

committing ever-increasing percentages of Chicago murders.

In 1983, 118 (or 16.18%) of the 729 murders that year were committed by youths under the age of 21 with firearms.⁴ Detective Division (Chicago Police Department) *1992 Murder Analysis* at 17. By 1990, that percentage had increased to 24.53% of the 852 murders committed that year. *Id.*

In 1991, 67.7% of 927 murders that year were committed by youths between ages 14 and 25 with any weapon. Chicago Police Department, *2008 Murder Analysis in Chicago* at 38.⁵

By 1995, the percentage in that age group rose to 72.4%, an all-time high. *Id.* In 2008, the percentage of murders committed by youth in that age group was 56.3%. *Id.*

Faced with a “national embarrassment” of youth violence, the Chicago Public Schools have launched a \$30 million initiative to connect students at risk of violence “with full-time mentors and part-time jobs.” Stephanie Banchemo and Azam Ahmed, *Chicago Public Schools announce plan to combat violence, Schools*

⁴ Firearms include revolvers, pistols, rifles, and shotguns. Detective Division (Chicago Police Department) *1992 Murder Analysis* at 12.

⁵ Available at <https://portal.chicagopolice.org/portal/page/portal/ClearPath/Search%20Results%20Page>.

chief Ron Huberman identifies students most at risk, CHICAGO TRIBUNE, September 4, 2009.⁶

But The University of Chicago Crime Lab recently studied the occurrence and prevention of gun violence by youths in Chicago and concluded “remarkably little” is known about how to stop it. The University of Chicago Crime Lab, *Gun Violence Among School-Age Youth in Chicago* (2009)⁷ at 11.

The Crime Lab has launched an initiative involving youth social intervention pilot projects of as-yet unknown types:

Despite the enormous toll gun violence takes on young people in Chicago, and across the United States, the evidence about what works to reduce youth gun violence is extremely limited. The University of Chicago Crime Lab’s mission is to work with community partners in Chicago and around the country, to learn more about what works, for whom, and why, to begin making progress in reducing the problem of crime and violence. We believe that successful innovation requires doing a better job of learning from experience.

To that end we have launched the Chicago Initiative to Reduce Gun Violence Among School Age Youth Design Competition. The

⁶ Available at <http://archives.chicagotribune.com/2009/sep/04/local/chi-huberman-cps-violence-04sep04>.

⁷ Available at http://crimelab.uchicago.edu/gun_violence/.

first phase of this initiative is to solicit letters of interest (LOI) from city agencies, non-profit and faith-based organizations, and private sector firms that have promising ideas about pilot programs to reduce youth gun violence and promote positive youth outcomes among high risk youth, which could be implemented and rigorously evaluated should private funding become available.

The University of Chicago Crime Lab, *Chicago Youth Gun Violence Initiative* (2009), available at http://crimelab.uchicago.edu/gun_violence/.

How are McDonald and his neighbors to defend themselves while social programs and experiments are conducted? And what if they do not work? McDonald says he “will not be pinned down in my house without anything to defend myself, while they walk the streets.”

But he is.

III. The Police Have No Legal or Constitutional Duty to Protect Citizens from Crime.

Under well-established Illinois law, the police have no legal duty to protect individual citizens. *DeSmet v. The County of Rock Island*, 219 Ill. 2d 497, 507, 848 N.E.2d 1030, 1037 (2006), *citing with approval Schaffrath v. Village of Buffalo Grove*, 160 Ill. App. 3d 999, 1003, 513 N.E.2d 1026, 1028 (1st Dist. 1987). In *Schaffrath*, the court stated:

Generally, law enforcement officials have no duty to protect individual citizens from criminal acts. Their responsibility is to the general public. The duty of the police to preserve the well-being of the community is owed to the public at large rather than to specific members of the community. This rule rests upon public policy considerations that a police department's negligence, oversights, blunders or omissions are not the proximate or legal cause of harms committed by others. A general duty would put the police in the position of guaranteeing the personal safety of every member of the community.

Id.

Nor do police have any federal constitutional duty to protect particular individual citizens:

Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 196 (1989). *See also Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (“The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services”).

IV. The Police Have No Practical Ability to Protect All Citizens from Every Crime.

Approximately 83% of Americans “will be victims of violent crime at some point in their lives” and “in any given year serious crime touches 25 percent of all households.” Daniel D. Polsby & Dennis Brennan, *Taking Aim at Gun Control* at 4, The Heartland Institute (1995).⁸

In the past decade, the number of Chicago Police Department sworn and exempt personnel has decreased slightly, from 13,484 in 1998 to 13,354 in 2008. (Chicago Police Department, *1998 Annual Report* at 34; Chicago Police Department, *2008 Annual Report* at 68.) In that same decade, the number of calls to 911 has skyrocketed. There were 3,770,795 calls to 911 in 1998. *1998 Annual Report, supra*, at 31. There were 5,076,219 calls made to 911 in 2007 and 4,704,590 such calls in 2008. Chicago Police Department, *2008 Annual Report* at 70. Apart from any legal duty, the Chicago Police Department has no practical ability to protect everyone at all times.

In most instances, and despite best efforts, police rarely arrive in time to prevent or interrupt a crime:

Apart from the Second Amendment’s role in deterring government oppression, the right to arms has another purpose that is every bit as important and urgent today as it was in

⁸ Available at http://www.heartland.org/policybot/results/9486/No_69_Taking_Aim_at_Gun_Control_Executive_Summary.html.

the eighteenth century. That purpose is to enable American citizens to defend themselves, not against direct oppression by the government, but against oppression from which the government fails to protect them. The principal source of such oppression today is violent criminals.

* * *

[T]he police do not and cannot protect law-abiding citizens from criminal violence. The impotence of our governments in the face of criminal violence is so obvious that it is simply preposterous to maintain that those individuals with the means and the will to arm themselves are not thereby enhancing their ability to exercise their natural right of self-defense.

NELSON LUND, A PRIMER ON THE CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS, Virginia Institute for Public Policy (2002) at 13.

While Chicago struggles to deter youthful gun crime, all McDonald and the other Petitioners ask is that this Court recognize their right to keep and bear arms under the Second Amendment, as incorporated against the States by the Fourteenth Amendment's Privileges or Immunities Clause or its Due Process Clause.

Surely, that is not too much to ask.



CONCLUSION

The founder of modern criminology, Cesare Beccaria, knew two centuries ago what Chicago is only now finding out: that gun bans cause murders:

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. . . . Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.

Lund, *supra* at 14, quoting Cesare Beccaria, *On Crimes and Punishments* 87-88 (Henry Paolucci trans., 1963) (1764).

For the foregoing reasons, The Heartland Institute respectfully requests that this Court reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

App. 1

Year	Total Murders	Total Handgun Murders	Percentage of Handgun Murders	Murder Rate per 100,000 Population ¹⁰	Handgun Murder Rate per 100,000 Population
1965	395 ¹	158 ¹	40.00% ¹	11.13	4.45
1966	510 ¹	212 ¹	41.57% ¹	14.37	5.97
1967	552 ¹	262 ¹	47.46% ¹	15.55	7.38
1968	647 ¹	274 ¹	42.35% ¹	18.22	7.72
1969	715 ¹	334 ¹	46.71% ¹	20.14	9.41
1970	810 ¹	409 ¹	50.49% ¹	24.05	12.15
1971	824 ¹	390 ¹	47.33% ¹	24.47	11.58
1972	711 ¹	398 ¹	55.98% ¹	21.12	11.82
1973	864 ¹	459 ¹	53.13% ¹	25.66	13.63
1974	970 ¹	464 ¹	47.84% ¹	28.81	13.78
1975	818 ¹	412 ¹	50.37% ¹	24.29	12.24
1976	814 ¹	397 ¹	48.77% ¹	24.17	11.79
1977	823 ¹	424 ¹	51.52% ¹	24.44	12.59
1978	787 ¹	424 ¹	53.88% ¹	23.27	12.59
1979	856 ¹	418 ¹	48.83% ¹	25.42	12.41
1980	863 ¹	396 ¹	45.89% ¹	28.72	13.18
1981	877 ¹	374 ¹	42.65% ¹	29.18	12.44
1982	668 ¹	254 ¹	38.02% ¹	22.23	8.45
1983	729¹	290¹	39.78%¹	24.26	9.65
1984	741 ¹	289 ¹	39.00% ¹	24.66	9.62
1985	666 ¹	261 ¹	39.19% ¹	22.16	8.68
1986	744 ¹	285 ¹	38.31% ¹	24.76	9.48
1987	691 ¹	260 ¹	37.63% ¹	22.99	8.65
1988	660 ¹	371 ¹	56.21% ¹	21.96	12.35
1989	742 ¹	417 ¹	56.20% ¹	24.69	13.88
1990	852 ¹	513 ¹	60.21% ¹	30.60	18.42
1991	927 ¹	542 ¹	58.47% ¹	33.30	19.47
1992	940 ¹	534 ¹	56.81% ¹	33.76	19.18
1993	855 ²	552 ³	64.64% ³	30.71	19.83
1994	931 ²	602 ³	64.66% ³	33.44	21.62
1995	828 ²	523 ⁴	63.41% ³	29.74	18.78
1996	796 ²	521 ⁴	65.58% ³	28.59	18.71
1997	761 ²	487 ⁵	64.26% ³	27.33	17.49
1998	704 ²	450 ³	63.92% ³	25.29	16.16
1999	643 ²	376 ³	58.66% ³	23.10	13.50
2000	633 ²	n/a	n/a	21.86	n/a
2001	667 ²	n/a	n/a	23.03	n/a
2002	656 ²	n/a	n/a	22.65	n/a
2003	601 ²	442 ⁶	73.54% ⁴	20.75	15.26
2004	454 ²	313 ⁷	68.94% ⁴	15.68	10.81
2005	451 ²	327 ⁸	72.50% ⁴	15.57	11.29
2006	471 ²	373 ⁹	79.19% ⁴	16.26	12.88
2007	445 ²	316 ⁹	71.01% ⁴	15.37	10.91
2008	511 ²	402 ²	78.67% ⁴	17.64	13.88

¹Detective Division (Chicago Police Department) *1992 Murder Analysis* at 14.

²Chicago Police Department, *2008 Murder Analysis in Chicago* at 2, available at <https://portal.chicagopolice.org/portal/page/portal/ClearPath/Search%20Results%20Page>.

³Detective Division (Chicago Police Department) *1999 Murder Analysis* at 14.

⁴Chicago Police Department, *1996 Annual Report* at 21, available at <https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Annual%20Reports>.

⁵Chicago Police Department, *1997 Annual Report* at 19, available at <https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Annual%20Reports>.

⁶Research and Analysis Division, Research and Development Section (Chicago Police Department) *2003 Murder Analysis* at 27, available at <https://portal.chicagopolice.org/portal/page/portal/ClearPath/Search%20Results%20Page>.

⁷Research and Analysis Division, Research and Development Section (Chicago Police Department) *2004 Murder Analysis* at 27, available at <https://portal.chicagopolice.org/portal/page/portal/ClearPath/Search%20Results%20Page>.

⁸Research and Analysis Division, Research and Development Section (Chicago Police Department) *2005*

Murder Analysis at 26, available at <https://portal.chicagopolice.org/portal/page/portal/ClearPath/Search%20Results%20Page>.

⁹Chicago Police Department, *2006-07 Murder Analysis in Chicago* at 24, available at <https://portal.chicagopolice.org/portal/page/portal/ClearPath/Search%20Results%20Page>.

¹⁰Murder rates per 100,000 population were calculated using official Chicago census data. Population data for 1960, 1970, 1980, and 1990 are from Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990*, Population Division Working Paper No. 27, Population Division, U.S. Bureau of the Census, June 1998, available at <http://www.census.gov/population/www/documentation/twps0027/twps0027.html>.

Census data for 2000 is from U.S. Census Bureau Fact Sheet, Chicago, Illinois, 2000 available at http://factfinder.census.gov/servlet/SAFFFacts?_event=ChangeGeoContext&geo_id=16000US1714000&_geoContext=01000US&_street=&_county=chicago&_cityTown=chicago&_state=04000US17&_zip=&_lang=en&_sse=on&ActiveGeoDiv=geoSelect&_useEV=&pctxt=fph&pgsl=010&_submenuId=factsheet_1&ds_name=DEC_2000_SAFF&_ci_nbr=null&qr_name=null®=null%3Anull&_keyword=&_industry.
