No. 08-1521

In the
Supreme Court of the United States

OTIS MCDONALD, ET AL.,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, ET AL.,

Respondents.

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

OPPOSITION TO MOTION OF NATIONAL RIFLE ASSOCIATION, ET AL., FOR DIVIDED ARGUMENT

David G. Sigale
Law Firm of David G. Sigale, P.C.
4300 Commerce Court, Suite 300-3
Suite 300-3
Lisle, Illinois 60532
630.452.4547

Alan Gura*
Gura & Possessky, PLLC
101 N. Columbus Street
Suite 405
Alexandria, Virginia 22314
703.835.9085

Counsel for Petitioners

* Counsel of Record

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

OPPOSITION TO MOTION OF NATIONAL RIFLE ASSOCIATION, ET AL., FOR DIVIDED ARGUMENT

The National Rifle Association, et al.'s ("NRA") motion for divided argument fails to meet the heavy burden required to divide argument under the circumstances of this case. It should be denied.

Unlike the thirty-eight states to whose motion for divided argument Petitioners consent, NRA lacks any unique interest justifying its insertion into the argument. Petitioners include two groups representing countless NRA members, including the NRA's Illinois state affiliate, and even two NRA members. The cases cited by NRA in which Rule 12.6 respondents were permitted divided argument all shared one critical distinguishing factor: the motions were made by the Solicitor General, representing the federal government. That is not the case here.

Accordingly, NRA relies upon speculation regarding the argument to be offered by Petitioners' counsel. The speculation is unjustified. Petitioners' counsel argued the Due Process Clause issues in the court below, briefed the issues in this Court, and will be fully prepared to address these issues before this Court at oral argument. Any argument on this topic by NRA would at best be redundant.

1. NRA's motion fails under the Court's rules. "The petitioner or appellant shall open and may conclude the argument." Sup. Ct. R. 28.2. Although NRA filed a petition for writ of certiorari, it is not a "petitioner," as its petition has not been granted. NRA cannot now join the petition in this case. Sup. Ct. R. 12.4.

NRA also greatly overstates its role in "this litigation," Motion, at 1, throughout which NRA's due process arguments have been far from "consistent." *Id.*; *see* Petition for Cert., at 7. NRA's latter-filed case was related to, but not consolidated with Petitioners' case in the District Court. Petitioners, not NRA, filed for summary judgment, and were the first party to file a pre-trial motion seeking resolution of due process incorporation. NRA was only the "lead" party in the consolidated matter to the extent it drew lower appellate court case numbers in the simultaneously-filed appeals.

Under Rule 12.6, NRA is "entitled to file documents" – not participate in oral argument. Among the documents NRA is entitled to file is a reply brief, Sup. Ct. R. 25.3, in which NRA would be free to make any additional arguments regarding incorporation under the Due Process Clause.

"Divided argument is not favored." Sup. Ct. R. 28.4. In all four cases cited by NRA involving a Rule 12.6 respondent, the movant was a federal agency represented by the Solicitor General, whose motions for divided argument were unopposed. These governmental agencies had inherently different interests than the private petitioners they supported.

None of these cases saw argument divided as proposed by NRA: among private actors with identical interests. "In the ordinary case allotted a total of one hour for argument, the Court usually denies divided argument even if the parties on one side of the case have divergent interests or perspectives." Eugene Gressman, et al., SUPREME COURT PRACTICE at 761 (9th ed. 2007) (citations omitted).

And in no case cited by NRA did this Court grant a motion for divided argument on behalf of an unsuccessful petitioner. When the Court selects among several petitions raising the same issue,[1] Rule 28.4 does not invite unsuccessful petitioners to try again, merely because they claim to disagree with Petitioners' strategy or guess that

[1]This Court also did not grant the petition in *Maloney* v. *Rice*, No. 08-1592.

Petitioners might not lend sufficient weight to a certain point that movants would emphasize.

NRA's argument that it wants to emphasize substantive due process more than they speculate Petitioners *may* argue the issue is simply not a basis for dividing argument.

> The insistence by different parties with the same interest in being represented by different lawyers, or even more obviously, the desire of more than one lawyer to participate in the argument, is not a sufficient reason.

SUPREME COURT PRACTICE, at 760 (citation omitted).

NRA overstates the importance of its technical Rule 12.6 status. Aside from its unsuccessful petition for certiorari, the only factor separating NRA from the myriad other groups advocating for gun rights as amici curiae is the payment of filing fees. NRA's motion should be governed by the yet-more restrictive standard for amici divided argument motions lacking consent, "granted only in the most extraordinary circumstances" when an amicus "set[s] out specifically and concisely why oral argument would provide assistance to the Court not otherwise available." Sup. Ct. R. 28.7.

Accordingly, NRA's reliance upon *Citizens United* v. *Federal Election Commission*, 130 S. Ct. 31 (2009), as an example of argument divided for amici participation is misplaced. Argument time in that case totaled eighty minutes, the Court adding twenty minutes to the standard hour divided between the leading United States Senators in the debate that produced the statute at issue. More relevant is the precedent *Citizens United* re-examines, a case in which NRA's motion for divided argument was denied, twice. *Nat'l Rifle Ass'n* v. *Federal Election Commission*, 539 U.S. 974, *reconsideration denied*, 539 U.S. 979 (2003).

The cases cited by NRA teach one lesson: should this Court desire argument from parties exclusively concerned with the Due Process Clause, it should grant the motion now offered by the governmental entities uniquely impacted by the outcome of this case.

2. NRA has no unique interest in this case that would set it apart from the Petitioners. The NRA, just like Petitioner Second Amendment Foundation ("SAF"), is a large, national membership organization concerned with advancing Second Amendment rights. Petitioner Illinois State Rifle Association ("ISRA"), the main gun rights membership organization in Illinois, is the NRA's affiliate in that state. As recently

as 2006, NRA bestowed upon Petitioner ISRA its "Affiliate of the Year" award. ISRA's charter provides, in pertinent part, that "[t]he objectives of this Association shall be consistent with those of the National Rifle Association of America . . ." ISRA Charter, art. II.

Not surprisingly, all three organizations' memberships overlap. Many of Petitioner SAF's over 650,000 members, and Petitioner ISRA's approximately 21,000 members, are also NRA members. Indeed, Petitioners Adam Orlov and David Lawson are NRA Life Members.

NRA's organizational and representational interests are both reflected in, and indistinguishable from, those of the Petitioners.

3. Petitioners' counsel has argued for selective due process incorporation of the Second Amendment before, and will be fully prepared to address any of the Court's questions regarding the Due Process Clause. *See* Sup. Ct. R. 28.5 ("Regardless of the number of counsel participating in oral argument, counsel making the opening argument shall present the case fairly and completely . . ."). The due process argument is hardly abandoned by Petitioners. NRA's suggestion to the contrary, particularly when briefing is not yet completed, is

unjustified. *See* Sup. Ct. R. 28.1 ("Counsel should assume that all Justices have read the briefs before oral argument.")

Petitioners suspect NRA would have filed its motion regardless of the number of pages in Petitioners' opening brief dedicated to any particular argument.[2] In any event, the decision to spend "only" seven pages on the due process argument in Petitioners' Brief, Motion at 2, was within Petitioners' considered judgment.

> [O]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.

Greenlaw v. *United States*, 128 S. Ct. 2559, 2564 (2008) (citation omitted).

Assuming *arguendo* this is even relevant, Petitioners' page allocation was based upon a variety of factors, including:

- a belief that this Court is relatively more familiar with substantive due process theories than with the original public meaning and intent of the Fourteenth Amendment;

---

[2]In *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008), NRA notified Respondent's counsel of its intent to file a motion for divided argument, but changed its mind when advised that the deadline for doing so had passed.

- the fact that this Court's decision in *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008), recently examined in detail the factors inherent in the selective incorporation argument;
- the fact that in *Heller*, all nine members of the Court approached the issue primarily by examining the original public meaning and intent of those who framed and ratified the relevant constitutional text; and
- advance knowledge of the NRA and amicus briefs, and the desire to avoid extensive duplication of arguments already familiar to the Court.

This last point warrants some discussion. Petitioners worked closely with the amici in seeking to avoid duplication of effort, hosting a coordination conference attended by several NRA attorneys and attorneys for NRA-funded amici. NRA counsel expressed their intent to reduce duplication in the briefing, and discussed the briefing efforts with Petitioners, with whom they eventually exchanged drafts. Petitioners also received advance copies of many amicus briefs.

Petitioners correctly anticipated that the familiar due process issues would be overwhelmingly covered in other briefs, and therefore

perceived no value in belaboring the same points in briefing beyond their own merely comprehensive treatment of the issue. Were the NRA motion granted, parties in future cases would be well-advised not to coordinate briefing with amici, as efforts to reduce duplication could produce motions to divide argument time based on claims that the parties did not devote "enough" pages to an issue.

Most critically, however, the due process incorporation argument was made by Petitioners, will continue to be argued by Petitioners, and will be presented fully by Petitioners at oral argument.

4. There may be as many ways of litigating this case as there are members of the Court's bar – not all of whom can claim a portion of Petitioners' time. The motion lacks merit and should be denied.

Respectfully submitted,

David G. Sigale
Law Firm of David G. Sigale, P.C.
4300 Commerce Court, Suite 300-3
Suite 300-3
Lisle, Illinois 60532
630.452.4547

Alan Gura*
Gura & Possessky, PLLC
101 N. Columbus Street
Suite 405
Alexandria, Virginia 22314
703.835.9085

Counsel for Petitioners

* Counsel of Record

January 9, 2010

Certificate of Service

On this the 9th day of January, 2010, I served a true and correct copy of the foregoing Opposition to Motion of National Rifle Association, et al. for Divided Argument upon the following by causing said to be delivered via Federal Express and electronic mail to the following:

Stephen D. Poss
Goodwin Procter LLP
Exchange Place
Boston, MA 02109

Benna R. Solomon
Deputy Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, IL 60602-2580

Paul D. Clement
King & Spalding, LLP
1700 Pennsylvania Avenue, N.W.
Washington, DC 20006

I further certify that the original and eleven copies of the foregoing were dispatched to the Clerk, via electronic mail and via personal delivery at the following address:

The Hon. William K. Suter, Clerk
United States Supreme Court
One First Street, N.E.
Washington, DC 20543

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 9th day of January, 2010.

Alan Gura