No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD ET AL.,
Petitioners,
v.
CITY OF CHICAGO ET AL.,
Respondent.

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

BRIEF FOR RESPONDENTS THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. ET AL. IN SUPPORT OF PETITIONERS

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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.

PARTIES TO THE PROCEEDING

Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc. and Illinois State Rifle Association initiated the proceedings below by filing a complaint against Respondent City of Chicago and its Mayor, Richard M. Daley, in the United States District Court for the Northern District of Illinois. Mayor Daley was dismissed at an early stage of the proceedings and is no longer a party in the matter.

The day after Petitioners filed their complaint in the District Court, similar cases were brought against Respondent City of Chicago and Mayor Daley; and the Village of Oak Park, Illinois and its President, David Pope, by other parties. The plaintiffs in the related Chicago case were the National Rifle Association of America, Inc., Dr. Kathryn Tyler, Anthony Burton, Van F. Welton, and Brett Benson. The plaintiffs in the related Oak Park case were the National Rifle Association of America, Inc., Robert Klein Engler, and Dr. Gene A. Reisinger.

The three cases were related, but not consolidated, in the District Court. Petitioners and the plaintiffs in the related cases separately appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit, which consolidated the appeals.

CORPORATE DISCLOSURE STATEMENT

Respondent National Rifle Association of America, Inc. ("NRA"), is a corporation which has no parent corporation. No publicly held company owns 10% or more of the corporation's stock.

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The decision under review, from the Court of Appeals for the Seventh Circuit, concerns firearms ordinances of two Illinois municipalities, Chicago and Oak Park, that effectively ban the private possession of handguns and unreasonably burden the possession of all firearms. There is no question that, under this Court's decision in *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008), the categorical ban on handguns, at a minimum, would run afoul of the Second Amendment to the United States Constitution were it enacted by the Federal government or the District of Columbia. The question presented by this case is whether the Constitution also prevents State and local governments from infringing the right to keep and bear arms. For the reasons given herein and in the brief submitted by Petitioners, the answer must be yes. The Court should find either that the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment, or that the right to keep and bear arms is a privilege or immunity of citizens of the United States.

STATEMENT OF THE CASE

1. Chicago prohibits possession of a firearm unless it is registered. See Chicago, Ill., Code § 8-20-040(a). Chicago law also provides that "[n]o registration certificate shall be issued for any of the following types of firearms: * * * (c) Handguns * * *."[1] *Id.* § 8-20-050(c). Handguns, accordingly, are banned. The only non-governmental exceptions to this blanket ban on handguns are for (i) "[t]hose

[1] "'Handgun' means a firearm designed to be held and fired by the use of a single hand, and includes a combination of parts from which such firearm can be assembled." *Id.* § 8-20-030(k).

validly registered to a current owner in the City of Chicago prior to the effective date of this chapter" which was *27 years ago* (1982), *id.* § 8-20-050(c)(1); (ii) those owned by security personnel or private detective agencies, *id.* § 8-20-050(c)(2) & (3); and (iii) those brought by "[a]ny nonresident of the City of Chicago participating in any lawful recreational firearm-related activity in the city, or on his way to or from such activity in another jurisdiction * * *," *id.* § 8-20-040(b)(5). Other than private eyes, non-residents under limited circumstances, and residents who have had the handgun in question registered for at least 27 years, no one in Chicago may possess a handgun.

Chicago ordinances further provide that failure to exhibit a registration certificate to a police officer on demand is presumptive evidence that a person is not authorized to possess a firearm and is cause for confiscation thereof. See *id.* § 8-20-150. A first violation is punishable by a fine of not less than $300 or more than $500, and incarceration for not less than ten days or more than 90 days. A subsequent conviction is punishable by a fine of $500 and by incarceration of not less than 90 days or more than six months. *Id.* § 8-20-250.

The Village of Oak Park, Illinois also prohibits possession of a handgun. The Oak Park Municipal Code provides that "[i]t shall be unlawful for any person to possess or carry, or for any person to permit another to possess or carry on his/her land or in his/her place of business any firearm" that is defined as a handgun. Oak Park, Ill., Code § 27-2-1.[2]

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[2] "FIREARMS: For the purpose of this Article firearms are: pistols, revolvers, guns and small arms of a size and character

Exempted from this otherwise blanket prohibition are "Licensed firearm collectors," *id.* § 27-2-1(K); "Members of established theater organizations," *id.* § 27-2-1(L); and transportation of a handgun not originating or terminating in Oak Park, *id.* §§ 27-2-1, 27-2-1(I). Thus, the only persons in Oak Park who may keep or bear a handgun are actors, non-residents under limited circumstances, and licensed "collectors."

Violation of the Oak Park law is punishable with a fine of not more than $1,000 for the first offense and $2,000 for a subsequent offense. See *id.* § 27-4-1(A). Weapons involved in offenses are to be confiscated and destroyed. See *id.* § 27-4-1(C). The Municipal Code further provides that a motor vehicle that a police officer has probable cause to believe contains a weapon in violation of the above is subject to seizure and impoundment, and may be released on payment of a $500 fine. See *id.* § 27-4-4.

2. On June 26, 2008, this Court issued its decision in *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008). *Heller* was the first decision of this Court unambiguously recognizing that the right to keep and bear arms referenced in the Second Amendment is an individual right, not a collective right belonging to the States. See U.S. Const., amend. II ("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."); *Heller*, 128 S. Ct. at 2788–816. *Heller* also held that various restrictive ordinances of the District of Columbia—including a handgun ban with only very

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that may be concealed on or about the person, commonly known as handguns." *Id.* § 27-1-1.

limited exceptions, akin to those in the Chicago and Oak Park ordinances—violated the Second Amendment. *Heller*, 128 S. Ct. at 2816–22.

In reaching its decision in *Heller*, the Court considered and rejected a number of arguments against recognizing an individual Second Amendment right and against striking down the handgun ban. Among other arguments rejected by the Court were the propositions that the Second Amendment was intended only to protect the authority of State governments to organize State militias, *id.* at 2799–803; the argument that the Second Amendment does not extend to self-defense, see *id.* at 2801; and the argument that alleged dangers associated with handguns can justify a ban on that category of firearm, see *id.* at 2821–22.

3. On the same day this Court announced its decision in *Heller*, Petitioners filed suit in the Northern District of Illinois seeking a declaration that the Chicago ordinances violate the Second and Fourteenth Amendments. The complaint alleges that the city of Chicago has denied each Petitioner's application to register handguns for possession in his Chicago home; that each Petitioner fears arrest, criminal prosecution, incarceration and fine if he were to possess a handgun within his Chicago home; and that, but for the ordinances being challenged, Petitioners would possess handguns in their homes.

The following day, Respondent National Rifle Association ("NRA"), together with Respondents Robert Klein Engler and Dr. Gene A. Reisinger, brought actions in the Northern District of Illinois seeking a declaration that the Oak Park ordinances are invalid under the Second and Fourteenth Amendments to the United States Constitution. A

similar action was filed the same day by the NRA and Respondents Dr. Kathryn Tyler, Van F. Welton, and Brett Benson with respect to the Chicago ordinances. The complaints in the two NRA actions allege that, but for the ordinances, the individual plaintiffs would forthwith keep handguns in their homes for self protection and other lawful purposes. The complaints further alleged that some of the plaintiffs own handguns that they must, because of the ordinances, store outside these jurisdictions, and would retrieve them to keep at home if lawfully allowed to do so, and that other plaintiffs would acquire handguns if it were lawful to keep them at home. In addition to having numerous members in the same predicament who reside in Chicago and Oak Park, the NRA has numerous members who would lawfully transport firearms through Chicago but must divert their travel plans to avoid that jurisdiction. Separate Appendix to Brief for Plaintiff-Appellants National Rifle Ass'n, Court of Appeals, A34-35 (Chicago Compl., ¶¶ 14–19); A45–46 (Oak Park Compl., ¶¶ 18–22).

The actions filed by Petitioners and Respondents in Support of Petitioners were assigned to a single district judge. The district court entered judgment on the pleadings for the municipalities on December 4, 2008. The court explained that, as a district court, it was bound by precedents from the court of appeals, "even though the logic of more recent caselaw may point in a different direction." *Nat'l Rifle Ass'n of Am., Inc.* v. *Village of Oak Park*, 617 F. Supp. 2d 752, 753 (N.D. Ill. 2008). The court thus looked at the Seventh Circuit's nearly thirty-year old decision in *Quilici* v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), as controlling precedent. In *Quilici* the court of appeals had rejected an argument that the

Second Amendment is incorporated into the Fourteenth Amendment, either through selective incorporation or as part of a wholesale incorporation of the Bill of Rights. *Id.* at 269–71.

4. On June 2, 2009 the Seventh Circuit affirmed the decision of the District Court. 567 F.3d 856. The court of appeals gave two principal bases for its decision. First, the court purported to explain that this Court had previously "rejected arguments that depended on the privileges and immunities clause of the fourteenth amendment." *Id.* at 857 (citing *United States* v. *Cruikshank*, 92 U.S. 542 (1876); *Presser* v. *Illinois*, 116 U.S. 252 (1886); and *Miller* v. *Texas*, 153 U.S. 535 (1894)). Second, the court stated that this Court had never considered whether the Second Amendment should be incorporated through the Due Process Clause of the Fourteenth Amendment since that approach "had yet to be devised when" *Cruikshank*, *Presser*, and *Miller* were decided. Nonetheless, the Seventh Circuit went on to hold that, as an inferior court, it was bound by those precedents of this Court which it saw as holding that the Second Amendment applies only to the Federal government. See *id.* at 857 (citing *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). The court of appeals, however, acknowledged the truism that "*Cruikshank* is open to reexamination by the Justices themselves when the time comes." *Id.* at 858.

After announcing that its decision was based on adherence to precedent, the court of appeals then indulged in some *obiter dicta* on the interplay between principles of federalism and the right to keep and bear arms. See *id.* at 858–60. This discussion, however, played no role in the decision of

the court of appeals; as that court acknowledged, "[h]ow arguments of this kind will affect proposals to 'incorporate' the second amendment are for the Justices rather than a court of appeals." *Id*. at 860.

6. Although Petitioners' action and the NRA actions were consolidated on appeal before the Seventh Circuit and although Respondents in Support of Petitioners filed their own petition for writ of certiorari (No. 08-1497), this Court granted a writ of certiorari only in Petitioners' case. Thus, all parties to the case below other than Petitioners are Respondents before this Court. See Sup. Ct. R. 12.6. However, because Respondents NRA, Engler, Reisinger, Tyler, Welton and Benson support the Petitioners in this case, these Respondents are filing this brief in accordance with Petitioners' time schedule. See Sup. Ct. R. 12.6; 25.1.

SUMMARY OF THE ARGUMENT

The handgun bans of Chicago and Oak Park, Illinois, are not in any meaningful way different from the District of Columbia's ban that this Court held to be unconstitutional in *Heller*. The issue presented by this case is whether, notwithstanding the Fourteenth Amendment's Due Process and Privileges and Immunities Clauses, Chicago and Oak Park may abridge the right to keep and bear arms in ways that the District of Columbia may not, or whether the citizens of the States have federal constitutional protection of their right to keep and bear arms against overreaching State and local laws.

The history of the Fourteenth Amendment demonstrates that it was intended and publicly understood, *inter alia*, to protect the right of individuals to keep and bear arms. Confronting

efforts by Southern governments to oppress the freedmen by confiscating their firearms, the same Congress that proposed the Fourteenth Amendment also passed statutes protecting the right of all citizens to keep and bear arms. Statements from legislators, legal commentators, and the popular press, before, during, and after passage of the Fourteenth Amendment, demonstrate a consistent understanding that the Amendment would secure freedmen against efforts to strip them of their arms. The only real question is in which provision or provisions of the Fourteenth Amendment the right to keep and bear arms is located.

This Court has never addressed the question whether the Second Amendment should be incorporated against State and local governments through the Due Process Clause of the Fourteenth Amendment. Each of the decisions of this Court addressing whether the Second Amendment applies to the States was decided before the Court had even initiated its incorporation jurisprudence.

Incorporation into the Due Process Clause would be fully consistent both with the common understanding of the Fourteenth Amendment when it was adopted, and with this Court's selective incorporation precedent—indeed, not incorporating the Second Amendment would be a jarring and unjustifiable departure from that history and precedent. In deciding whether to incorporate a particular right enumerated in the Bill of Rights, this Court asks whether the right is a fundamental principle of liberty that is basic to a free society. The preamble of the Second Amendment and this Court's decision in *Heller* both confirm the fundamental importance of the right to keep and bear arms to

liberty and our free society. Given this Court's prior decisions, incorporation of the Second Amendment should be essentially automatic.

If the Court declines to selectively incorporate the Second Amendment into the Due Process Clause of the Fourteenth Amendment, then the Court should hold that the right to keep and bear arms is one of the privileges and immunities of national citizenship guaranteed by the Fourteenth Amendment. The Court has explained that the privileges and immunities of national citizenship are those that arise from the existence of the national government and bear on the relationship of a citizen to that government. Although the fundamental right to keep and bear arms preexists the Constitution, it also is related to the constitutional authority of the national government and the relationship of citizens to that government. This Court has previously stated that, for this very reason, the States cannot restrict the right of individuals to keep and bear arms.

Finally, if the Court does not incorporate the Second Amendment into the Due Process Clause of the Fourteenth Amendment or recognize the right to keep and bear arms as a privilege of national citizenship under the existing test for such rights, then the Court should overrule *The Slaughter-House Cases*, 83 U.S. 36 (1873), and hold that even rights preexisting the foundation of this country can be privileges or immunities of national citizenship. There has long been a scholarly consensus that *The Slaughter-House Cases* were wrongly decided. The fact that the fundamental right to keep and bear arms predates the founding of this country should

not be a barrier to its recognition as a privilege or immunity of U.S. citizens.

ARGUMENT

I. The Fourteenth Amendment Was Intended and Understood To Protect the Right To Keep and Bear Arms

More evidence exists that the right to keep and bear arms referenced in the Second Amendment was intended and commonly understood to be protected by the Fourteenth Amendment than exists for any other element of the Bill of Rights. The only real question, and the subject of the subsequent sections of this brief, is where within the Fourteenth Amendment that right is nestled.

1. "In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." *Heller*, 128 S. Ct. at 2809–10 (citing STEPHEN P HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 (1998)). When the 39th Congress convened in 1865, members were confronted with the recently-enacted Black Codes. The laws of Mississippi, for example, stated: "That no freedman, free negro or mulatto * * * not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind * * *." Laws of Miss., 1865, at 165. To invalidate such laws, Senator Henry Wilson introduced a civil rights bill, explaining that "[i]n Mississippi rebel State forces * * * are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages

on them * * *."[3] Cong. Globe, 39th Cong., 1st Sess., 40 (1865).

A similar South Carolina law led a convention of prominent blacks in that state to draft a petition stating: "We ask that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed * * * that the late efforts of the Legislature of this State to pass an act to deprive us of arms be forbidden, as a plain violation of the Constitution * * *." 2 *Proceedings of the Black State Conventions, 1840–1865*, at 302 (P. Foner & G. Walker eds. 1980). Senator Charles Sumner paraphrased the petition as seeking "constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press." Cong. Globe, 39th Cong., 1st Sess. 337 (1866).

In response to the mistreatment of freedmen in the South, Senator Lyman Trumbull introduced two pieces of legislation: S. 60, the Freedmen's Bureau Bill, and S. 61, the Civil Rights Bill, both of which protected, *inter alia*, the right "to full and equal benefit of all laws and proceedings for the security of person and property." Cong. Globe, 39th Cong., 1st Sess., at 129, 209, 211. He cited the prohibitions on possession of firearms by blacks and noted that it was "the intention of this [civil rights] bill to secure those rights" and other "privileges which are essential to freemen" from state deprivation. *Id.* at 474. Senator Willard Saulsbury opposed the bill on

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[3] *Harper's Weekly*, Jan. 13, 1866, at 3, reported: "The militia of this country have seized every gun and pistol found in the hands of the (so called) freedmen of this section of the country. They claim that the statute laws of Mississippi do not recognize the negro as having any right to carry arms."

the basis that: "In my State for many years * * * there has existed a law * * * which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power * * *." *Id*. at 478.

As passed, the Freedmen's Bureau Bill protected for blacks "the civil rights or immunities belonging to white persons, including the right * * * to have full and equal benefit of all laws and proceedings for the security of person and estate, *including the constitutional right of bearing arms* * * *." Cong. Globe, 39th Cong., 1st Sess., at 1292 (emphasis added). President Andrew Johnson, however, vetoed the Freedmen's Bureau Bill, prompting an outcry by Sen. Trumbull, who cited a report from Mississippi that the militia typically would "hang some freedman or search negro houses for arms." *Id*. at 941.

The right to keep and bear arms was repeatedly referenced in debate on the Civil Rights Bill as well. Senator Samuel Pomeroy specified the "safeguards of liberty under our form of Government" as including "*the right to bear arms for the defense of himself and family and his homestead*." Cong. Globe, 39th Cong., 1st Sess., 1182 (1866) (emphasis added). Rep. John Bingham explained that portions of the vetoed Freedmen's Bureau Bill, including the right to bear arms, "enumerate the same rights and all the rights and privileges that are enumerated in the first section of this [the Civil Rights] bill," which served to "arm Congress with the power to * * * punish all violations by State Officers of the bill of rights * * *." *Id*. at 1292. The Act was also understood by the public to prohibit "attempts to prevent their [blacks] holding public assemblies [and] keeping fire-arms * * *." *New York Evening Post*, Apr. 7, 1866, at 2.

The House then debated a second Freedmen's Bureau Bill, H.R. 613. Section 8 of that bill protected "the constitutional right to bear arms." Cong. Globe, 39th Cong., 1st Sess., 3412 (1866). Averring that Section 8 "simply embodies the provisions of the civil rights bill," Rep. Eliot quoted a report about freedmen in Kentucky: "Their arms are taken from them by the civil authorities * * *. Thus *the right of the people to keep and bear arms as provided in the Constitution is infringed * * *.*" *Id.* at 2773–74 (emphasis added). The report added that the freedmen "are defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders." *Id.* at 2775.

The second Freedmen's Bureau Bill ultimately was passed and vetoed, only to have the veto overridden by the same two-thirds-plus members who had (by this point) also voted for the Fourteenth Amendment.[4] Section 14 of that Freedmen's Bureau Act declared that in States or districts where ordinary judicial proceedings were not restored, and until such time as such States were restored to the Union and represented in Congress:

> the right * * * to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and

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[4] The same Senators who proposed the Fourteenth Amendment by a vote of 33-11, also overrode the veto of H.R. 613 by a vote of 33 to 12, or 73%. See Cong. Globe, 39th Cong., 2d Sess., 3042, 3842 (1866). The same Representatives who proposed the Fourteenth Amendment by a vote of 120–32, overrode the President's veto of H.R. 613 by a vote of 104–33, or 76%. *Id.* at 3149, 3850. On the roll call votes, see Halbrook, *Freedmen*, 41–43.

> personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery.

14 Stat. 173, 176–77 (1866) (emphasis added).

2. At the same time that Congress was debating bills with the purpose of protecting, *inter alia*, the right of freedmen to keep and bear arms, it was also considering amending the Constitution to the same end. On February 13, 1866, the Joint Committee of Fifteen on Reconstruction recommended a constitutional amendment empowering Congress to make laws "to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property." Cong. Globe, 39th Cong., 1st Sess., at 806, 813. The term "civil rights and immunities" was recognized as including "[t]he constitutional rights of all loyal and well disposed inhabitants to bear arms," in the words of General D. E. Sickles' General Order No. 1 for South Carolina. *Id.* at 908–09.

On May 23, Jacob Howard introduced the Fourteenth Amendment in the Senate, referring to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press [and] *the right to keep and bear arms* * * *." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (emphasis added). He averred that "[t]he great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766. He added that the amendment would "disable every one

of [the States] from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who happen to be within their jurisdiction."[5] *Id*. Howard's speech was widely reprinted.[6]

On June 13, 1866, the Fourteenth Amendment had passed both houses by the necessary two-thirds and was proposed to the States. While records are sparse, the Fourteenth Amendment was understood to guarantee broad rights in the State legislatures and conventions which considered it.[7]

In Massachusetts, the Committee on Federal Relations quoted the Second Amendment and three other Bill of Rights guarantees and stated: "Nearly

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[5] Howard's speech was cited as authority in *Jones* v. *Helms*, 452 U.S. 412, 424 n.23 (1981) (opinion by Stevens, J.); *Plyler* v. *Doe*, 457 U.S. 202, 214–15 (1982).

[6] See, *e.g.*, *New York Times*, May 24, 1866, at 1; *New York Herald*, May 24, 1866, at 1; *National Intelligencer*, May 24, 1866, at 3; *Philadelphia Inquirer*, May 24, 1866, at 8.

[7] Adoption of the Amendment by the States was critical because, as Rep. George W. Julian explained, the Civil Rights Act was declared void by Southern courts, which thereby upheld bans on firearm possession by freedmen. Cong. Globe, 39th Cong., 1st Sess., 3210 (1866). A Mississippi court did so in upholding the conviction of a freedman for possession of a firearm. *New York Times*, Oct. 26, 1866, at 2. Another court found the ban void: "Should not then, the freedmen have and enjoy the same constitutional right to bear arms in defence of themselves, that is enjoyed by the citizen? It is a natural and personal right—the right of self-preservation." *Id*. These decisions were taken notice of in a report from General U.S. Grant stating: "The statute prohibiting the colored people from bearing arms, without a special license, is unjust, oppressive, and unconstitutional." Cong. Globe, 39th Cong., 2d Sess., 33 (1866).

every one of the amendments to the constitution grew out of a jealousy for the rights of the people, and is in the direction, more or less direct, of a guarantee of human rights * * *. [T]hese provisions cover the whole ground of section first of the proposed amendments." Mass. H. R. Doc. No. 149, at 3 (1867).

Advocates in the Pennsylvania General Assembly averred that "the spirit of this section [1] is already in the Constitution, and that we are only reenacting it in plainer terms * * *." Pa. Leg., App., 59 (1867). Section one protected "the rights to life, liberty and property," which are "inalienable rights." *Id.* at 65. The proposed amendment was said to embody the Pennsylvania Declaration of Rights guarantee that all men "have certain inherent and indefeasible rights," including those of "*defending life and liberty*." *Id.* at 94 (emphasis added).

Even opponents of the Fourteenth Amendment understood it to protect the right to self defense. The Wisconsin Senate minority report averred that "[t]he absolute rights of *personal security*, personal liberty and the right to acquire and enjoy private property * * * form a part of the bill of rights" of the state and the federal constitutions, and it thus asked: "Why, then, is it necessary to engraft into the federal constitution that part of section one [of] the amendments which says: 'Nor shall any state deprive any person of life, liberty or property, without due process of law?'" Wisc. Sen. J. 106 (1867) (emphasis added).

Contemporaneous legal commentary was consistent with this view of the Fourteenth Amendment. Judge Timothy Farrar wrote that the people "do not create or confer on themselves any

new right, but they expressly reserve all the rights they then held," including "many natural and civil common-law rights" such as "[a] *right to keep and bear arms*." Farrar, *Manual of the Constitution of the United States* 58–59 (Boston 1867) (emphasis added). He would elsewhere in the same volume write "[t]he right of every person to 'life, liberty, and property,' to *'keep and bear arms'* * * * and divers other, are recognized by, and held under, the Constitution of the United States, and cannot be infringed by individuals *or States*, or even by the government itself." *Id*. at 145 (emphases added).

Likewise, George W. Paschal wrote that the Second Amendment "is based on the idea, that the people cannot be oppressed or enslaved, who are not first disarmed," and that "[t]he new feature declared [in the Fourteenth Amendment] is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States." Paschal, *The Constitution of the United States* 86, 256 (Washington, D.C., 1868).

Finally, John N. Pomeroy wrote that if a state statute provided that "certain classes of the inhabitants—say negroes—are required to surrender their arms," the federal Bill of Rights offered no relief. Pomeroy, *An Introduction to the Constitutional Law of the United States* 150-51 (1868). However, the Fourteenth Amendment "would give the nation complete power to protect its citizens against local injustice and oppression * * *." *Id*. at 151. The Second Amendment guaranteed that "government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms." *Id*. at 152.

3. Debate in Congress on related statutory issues in the years shortly after ratification of the Fourteenth Amendment provides further confirmation that the Amendment was commonly understood to guarantee the right to keep and bear arms against State action.

In 1868, addressing the disarming of freedmen, Thaddeaus Stevens referred to "those great rights, privileges, and immunities" of life, liberty, and the pursuit of happiness, adding:

> Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty* * *.
>
> The fourteenth amendment, now so happily adopted, settles the whole question * * *.

Cong. Globe, 40th Cong., 2d Sess., 1967 (1868).

The Enforcement Act of 1870 made it a felony to conspire to injure a citizen with intent to prevent exercise "of any right or privilege granted or secured to him by the Constitution or laws of the United States * * *." § 6, 16 Stat. 140, 141 (1870). In debate, Senator John Pool observed that Klansmen would "order the colored men to give up their arms; saying that everybody would be Kukluxed in whose house fire-arms were found * * *." Cong. Globe, 41st Cong., 2d Sess., 2719 (1870). Senator John Thayer added: "The rights of citizenship, *of self-defense*, of life itself were denied to the colored race * * *." *Id.*, App., 322 (emphasis added).

The Enforcement Act was followed by the Civil Rights Act of 1871. Introduced initially as H.R. No. 3011 by Rep. Benjamin Butler, a report noted that persons who oppressed the freedman "preceded their

outrages upon him by disarming him, *in violation of his right as a citizen to 'keep and bear arms,' which the Constitution expressly says shall never be infringed*." H. R. Rep. No. 37, 41st Cong., 3d Sess., 3 (1871) (emphasis added). The bill was based on the Second Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id.* at 4. The report explained:

> Section eight is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to "keep and bear arms," and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same * * *. Before these midnight marauders made attacks upon peaceful citizens, there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims.

Id. at 7–8.

After failing to pass in the 41st Congress, the bill was reintroduced in the next Congress as H.R. No. 189. While it provided remedies for violations of "any right guarantied" by the Constitution, *the only substantive right specifically mentioned* was that of a citizen to keep arms "in his house or possession for the defense of his person, family, or property," deprivation of which was punishable as a larceny. Cong. Globe, 42nd Cong., 1st Sess., 174 (1871).[8]

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[8] Senator Adelbert Ames noted how that right protected others: "Republicans were compelled to arm in self-defense * * *. In some counties it was impossible to advocate Republican

The full House ultimately considered a condensed bill, H. R. No. 320. 42nd CONG. GLOBE, 1st Sess. 317 (1871). Section 1 provided civil remedies against state agents who deprived a person of "any rights, privileges, or immunities" to which the person is "entitled under the Constitution or laws of the United States." *Id.*, App., at 68. Section 2 punished a conspiracy to violate such rights. *Id.* Section 3 provided that failure of a State to protect such rights would be a denial of equal protection of the laws. *Id.* at 70–71.

In support of the bill, Rep. John Coburn observed that "[a] State may by positive enactment cut off from some the right * * * to bear arms * * *. How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men?" *Id.* at 459 (April 4, 1871). Congress, he argued, must "enforce by appropriate legislation the rights secured by this clause of *the fourteenth amendment* of the Constitution." *Id.* (emphasis added). Likewise, Rep. Henry Dawes explained that the citizen "has secured to him *the right to keep and bear arms* in his defense. It is all these * * * which are comprehended in the words 'American citizen,' and it is to protect and secure to him in these rights, privileges, and immunities this bill is before the House." *Id.* at 475–76 (emphasis added).[9]

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principles, those attempting it being hunted like wild beasts; in others, the speakers had to be armed and supported by not a few friends." *Id.* at 196.

[9] *See Patsy*, 457 U.S. at 503 (quoting Dawes' explanation). *Patsy* further relied on the speeches of Butler, Coburn, and Thurman, all of whom agreed that the right to arms was protected. *Id.* at 504–06.

As passed, the Civil Rights Act provided that any person who, under color of State law, subjects a person "to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States" is civilly liable. 17 Stat. 13, § 1 (1871), today's Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. Subsequently, President Grant issued a report on enforcement of the Civil Rights Act which noted that parts of the South were under the sway of the Klan, which sought "to deprive colored citizens of the right to bear arms," and to reduce them "to a condition closely akin to that of slavery * * *." Ex. Doc. No. 268, 42nd Cong., 2d Sess., 2 (1872).

4. Summarizing this history, the status of the right to keep and bear arms during the drafting and ratification of the Fourteenth Amendment is unmistakable. It was viewed as a fundamental right in the most literal sense: The foundation necessary to secure all of the other rights of free citizens. The Reconstruction Congress that drafted the Due Process Clause condemned violation of that right by the Black Codes enacted by the Southern States as a gross injustice requiring a national remedy. That remedy came in the form of (1) federal legislation regulating state action (the Freedmen's Bureau Acts and the Civil Rights Act) and (2) protection of the right to keep and bear arms by the Fourteenth Amendment.

There can be, all told, no real debate that the right to keep and bear arms is guaranteed against infringement by the States somewhere in the Fourteenth Amendment. The only question, in light of the 140 years of jurisprudential development between ratification of the Amendment and this case, is where that right is found.

II. The Right To Keep and Bear Arms Should Be Incorporated Into the Due Process Clause of the Fourteenth Amendment

This Court need overrule *no* precedent in order to reverse the Seventh Circuit. As the Seventh Circuit recognized, 567 F.3d at 858–59, and the City of Chicago conceded, see Pet. Opp. at 6, this Court has *never* addressed the question whether the Second Amendment should be incorporated into the Due Process Clause of the Fourteenth Amendment under the Court's so-called selective incorporation jurisprudence. The Court had not yet begun selectively incorporating the Bill of Rights into the Due Process Clause when it last ruled on the constitutionality of a State or local restriction on the right to keep and bear arms. *See Miller* v. *Texas*, 153 U.S. 535 (1894).

Viewing the question of the Second Amendment's applicability to State and local regulations through the prism of the history discussed above and through this Court's selective incorporation precedent, it is clear that the Second Amendment must be incorporated. Indeed, not to incorporate the Second Amendment would mark a radical and unjustifiable departure from decades of this Court's incorporation precedents.

1. Over one century ago, but two years *after* the Court decided *Miller*—its last case considering the constitutionality of a State or local firearm law prior to the instant case—the Court began selectively incorporating provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. Throughout the century-long series of cases in which the Court has employed selective incorporation, the Court's consistent focus in determining which rights

to incorporate has been on the relationship between protection of that right and protection of liberty under our free government.

The earliest provision of the Bill of Rights to be incorporated into the Due Process Clause of the Fourteenth Amendment was the "just compensation clause" of the Fifth Amendment.[10] In *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226 (1896), the Court explained:

> *[I]n a free government almost all other rights would become worthless* if the government possessed an uncontrollable power over the private fortune of every citizen.

Id. at 236 (quoting 2 Story Const. § 1790) (emphasis added). Using the "just compensation clause" as an example, the Court expounded upon the types of liberties protected by the Due Process Clause of the Fourteenth Amendment: "There are limitations on [State] power which grow out of the essential nature of all *free governments*, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." *Id.* at 237 (quoting *Loan Assoc.* v. *Topeka*, 20 Wall. 655, 663 (1874)) (emphasis added).

The most natural place to find rights essential to free government has been within the list enumerated by the first eight Amendments of the Bill of Rights. Thus, in the seventy years following *Chicago B. & Q. R.R.,* this Court incrementally incorporated nearly all the protections contained therein. The general

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[10] "[N]or shall private property be taken for public use, without just compensation."

principle followed by this Court in deciding incorporation questions has been that "those guarantees of the Bill of Rights which are *fundamental safeguards of liberty* immune from federal abridgement are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment." *Gideon* v. *Wainwright*, 372 U.S. 335, 341 (1962) (emphasis added).

Incorporation of the First Amendment began with the speech and press clauses. In *Gitlow* v. *New York*, the Court stated, "[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the *fundamental personal rights and 'liberties'* protected by the due process clause of the Fourteenth Amendment from impairment by the States." 268 U.S. 652, 666 (1925) (emphasis added). Six years later, in *Near v. Minnesota*, the Court opined:

> It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. *It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property*.

283 U.S. 697, 707 (1931) (emphasis added).

In *Grosjean* v. *American Press Co., Inc.*, the Court explained that:

> The First Amendment to the Federal Constitution provides that 'Congress shall make no law * * * abridging the freedom of speech, or of the press.' While this provision is

> not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment.
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> * * *
>
> We [have] concluded that *certain fundamental rights*, safeguarded by the first eight amendments against federal action, were also safe-guarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.

297 U.S. 233, 243–44 (1936) (emphasis added).

The concept of First Amendment rights as "fundamental" was further explicated in *Schneider* v. *New Jersey*:

> This Court has characterized the freedom of speech and that of the press as *fundamental* personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights *lies at the foundation of free government by free men.*

308 U.S. 147, 161 (1939) (emphases added); see also *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940) ("The safeguarding of these [First Amendment] rights * * * is essential to *free government*" (emphasis added)).

By the time the Court reached incorporation of the religion clauses of the First Amendment, it was able to state in *Cantwell* v. *Connecticut*, without dissent or even much in the way of explanation, that:

> The *fundamental concept of liberty* embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

310 U.S. 296, 303 (1940) (emphasis added).

The protections of the Fourth Amendment were incorporated because they too were deemed fundamental to liberty: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a *free society*. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Wolf* v. *Colorado*, 338 U.S. 25, 27–28 (1949) (emphasis added).[11] The Fifth Amendment was incorporated piecemeal using similar language. The privilege against self-incrimination, for example, was deemed to be "one of the 'principles of a *free government*.'" *Malloy* v. *Hogan*, 378 U.S. 1, 9 (1963) (quoting *Boyd* v. *United States*, 116 U.S. 616, 632 (1886)) (emphasis added). In incorporating that privilege against the States, *Malloy* specifically "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective

[11] The exclusionary rule was not deemed to be "an essential ingredient of the Fourth Amendment," and therefore incorporated against the States, until a decade later. *Mapp* v. *Ohio*, 367 U.S. 643, 651 (1960).

version of the individual guarantees of the Bill of Rights.'" *Id.* at 10–11 (quoting *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting)).

The Sixth Amendment right to counsel was first considered for incorporation in *Powell* v. *Alabama*, 287 U.S. 45 (1932), in which the Court described the right as being "of such a character that it cannot be denied without violating those '*fundamental principles of liberty and justice which lie at the base of all our civil and political institutions*.'" *Id.* at 67 (quoting *Hebert* v. *Louisiana*, 272 U.S. 312, 316 (1926)) (emphasis added).[12] This sentiment was reiterated when *Gideon* fully incorporated the right to counsel 35 years later:

> [T]his Court in *Palko* v. *Connecticut*, 302 U.S. 319 (1937) * * * was careful to emphasize that "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of *ordered liberty*, and thus, through the Fourteenth Amendment, become valid as against the states" and that guarantees "in their origin * * * effective against the federal government alone" had by prior cases "been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption.

Id. at 342 (quoting 302 U.S., at 324–25, 326) (emphasis added).

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[12] *Powell* incorporated the Sixth Amendment right to counsel under the facts of the case, but declined to consider incorporation of the right more broadly.

Other provisions of the Sixth Amendment were incorporated in subsequent cases: *Pointer* v. *Texas*, 380 U.S. 400, 403 (1964), held that "the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right." The same analysis led to the incorporation of the right to a speedy trial: Upon examining Coke's Institutes and Framing-era documents such as the Virginia Declaration of Rights of 1776, the Court in *Klopfer* v. *North Carolina*, 386 U.S. 213, 225–26 (1966), concluded: "That [the right to a speedy trial] was considered fundamental at this early period in our history is evidenced by its guarantee in the constitutions of several of the States of the new nation, as well as by its prominent position in the Sixth Amendment."

Completing Sixth Amendment incorporation, *Washington* v. *Texas*, 388 U.S. 14 (1966), and *Duncan* v. *Louisiana*, 391 U.S. 145 (1967), recognized the fundamental nature of, respectively, the rights to compulsory process and criminal jury trials. In *Duncan*, as in prior cases, the Court pointed out:

> The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, *the Court has looked increasingly to the Bill of Rights for guidance*; many of the rights guaranteed by the first eights Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.

391 U.S. at 147–48 (emphasis added).

By the time the Court reached the Eighth Amendment's prohibition of cruel and unusual punishment, incorporation was simply assumed, *Francis* v. *Resweber*, 329 U.S. 459, 462 (1947), and then applied without analysis or dissent, *Robinson* v. *California*, 370 U.S. 660, 666 (1961).

The Court has declined to incorporate only two rights found in the Bill of Rights, both involving legal procedure rather than fundamental rights, and the rationale for not incorporating those two is wholly inapplicable here. First, the Court declined to incorporate the Fifth Amendment's Grand Jury Clause because, it reasoned, state courts are entitled to some procedural independence and "examination by a neutral magistrate provide[s] defendants with nearly the same protection as the abrogated common-law grand jury procedure." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 431 (1994). Likewise, the Court's refusal to incorporate the Seventh Amendment's requirement of civil jury trials rested on issues of procedure. *Minneapolis & St. Louis R.R. Co.* v. *Bombolis*, 241 U.S. 211, 221–22 (1916); *Howlett* v. *Rose*, 496 U.S. 356, 370 n.17 (1990).

In sum, while the Court has phrased the incorporation test in various ways over the years, the lynchpin has been the importance of the right in question to what has variously been described as "liberty," "a free society," "free government," the "liberty * * * at the base of all our civil and political institutions," or "ordered liberty." As well, the central, abiding, and indispensable element of every formulation is that rights be deemed fundamental in *our* system of government. See *Powell* v. *Alabama*,

287 U.S. 45, 67 (1932) (referring to "those fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions.") (emphasis added); *In re Oliver*, 333 U.S. 257, 273 (1948) (asking whether a right is "basic in *our* system of jurisprudence") (emphasis added); *Palko*, 302 U.S. at 325 (asking whether a right is "so rooted in the traditions and conscience of *our people* as to be ranked as fundamental") (emphasis added); *Washington* v. *Glucksberg*, 521 U.S. 702, 762 (1997) (asking whether denial of the right is something "*our polity* will not endure.") (emphasis added); see also *Duncan*, 391 U.S. at 148-49 (1968) ("*our* civil and political institutions"); *id.* at 153 ("fundamental to *our* system") (emphasis added); *id.* at 149 n. 14 (distinguishing this inquiry from the more abstract question whether any "civilized system could be imagined that would not accord the" right).

2. This Court's selective incorporation precedent compels the conclusion that the fundamental right to keep and bear arms must be incorporated into the Due Process Clause of the Fourteenth Amendment. As with the religion clauses and the protection against cruel and unusual punishment, incorporation of the Second Amendment should be a foregone conclusion in light of everything that has come before. Given the extensive history recited in Part I above the case for incorporation of the Second Amendment is stronger than for any other right in the Bill of Rights.

There can be no doubt that the right to keep and bear arms protected by the Second Amendment easily meets the test set forth in this Court's selective incorporation precedent: It is a right "fundamental" to "liberty," "a free society," "free

government," the "liberty * * * at the base of all our civil and political institutions," and "ordered liberty." The Second Amendment is the only provision of the Bill of Rights that declares its own essential link to liberty and a free society. As the Amendment itself states, "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." U.S. Const., amend. II (emphasis added); see *Heller*, 128 S. Ct. at 2800 (defining "security of a free State" to mean "security of a *free polity*, not security of each of the several States") (emphasis added).

The fundamental nature of the right to keep and bear arms was recognized even before the founding of this country. As the Court explained in *Heller*, "[b]y the time of the founding, the right to have arms had become *fundamental* for English subjects," and was cited by Blackstone "as one of the *fundamental* rights of Englishmen." *Id*. at 2798 (emphases added).[13] The attempted disarmaments of the pre-Revolutionary period, *Heller* explains, "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms * * * to defend themselves." *Id*. at 2799.

The Court in *Heller* repeatedly referenced the fundamental link between the right to keep and bear arms and individual liberty. It explained that "when

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[13] This Court has held that the Fourteenth Amendment protects from State infringement the "indefeasible right of personal security, personal liberty and private property." *Griswold* v. *Connecticut*, 381 U.S. 479, 484 n.* (1965) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). As was articulated from 1 Blackstone, Commentaries *143–44 to the Freedmen's Bureau Act, see *supra* at 11–14, these rights are in turn protected by the right to have arms.

the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." 128 S. Ct. at 2801; see also *id.* ("It was well understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down."). The Court then went on to quote St. George Tucker as stating, with respect to the Second Amendment:

> This may be considered as *the true palladium of liberty* * * *. The right to self-defense is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, *liberty*, if not already annihilated, is on the brink of destruction.

Id. at 2805 (emphases added; internal quotation marks and citations omitted).

The link between the right to keep and bear arms and the essential tenets of liberty remained front of mind at the time the Fourteenth Amendment was adopted. As the Court observed in *Heller*, the contemporaneous Freedmen's Bureau Act stated:

> [T]he right * * * to have full and equal benefit of all laws and proceedings concerning *personal liberty, personal security*, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens * * *.

128 S. Ct. at 2810 (emphasis added). Similarly, Thomas Cooley wrote in his constitutional treatise in 1868 that "among the other defenses to *personal liberty* should be mentioned the right of the people to keep and bear arms * * *." *Id.* at 2811 (emphasis added; internal quotation marks and citations omitted)).

The right to keep and bear arms also has long been guaranteed by many State constitutions, another factor this Court has often considered when determining whether other rights are fundamental for purposes of incorporation. See, *e.g., Duncan v. Louisiana*, 391 U.S. 145, 153 (1968); *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963); *Klopfer* v. *North Carolina*, 386 U.S. 213, 225–26 (1966). Currently, forty-four states have constitutional guarantees for the right to keep and bear arms, and no state constitution denies the right. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEXAS REV. OF LAW & POLITICS 191, 193–205 (2006). This enduring state consensus is strong evidence of the fundamental nature of the right to keep and bear arms. See *Duncan*, 391 U.S. at 154 (citing current state practice as evidence that the jury right is fundamental); see also *Benton* v. *Maryland*, 395 U.S. 784, 794 (citing current state practice as evidence that the prohibition on double jeopardy is fundamental).

Importantly, the liberty protected by the right to keep and bear arms is liberty not only from government tyranny, but the liberty to defend oneself and one's family from violent acts of private citizens as well. As the Court explained in *Heller*, the Framing generation:

> understood the right [to keep and bear arms] to enable individuals to defend themselves. * * * Americans understood the "right of self-preservation" as permitting a citizen to repel by force when the intervention of society in his behalf, may be too late to prevent an injury.

Id. at 2799 (internal quotation marks and citations omitted). As set forth in the history recited in Part I, *supra*, this aspect of the liberty secured by firearms was an essential basis behind the adoption of the Fourteenth Amendment.

In summary, the framework already established by this Court when it incorporated the First Amendment and other provisions of the Bill of Rights compels incorporation of the Second Amendment. No expansion or contradiction of existing jurisprudence is required. Quite the contrary, *not* incorporating the Second Amendment would be a stark and unjustifiable departure from the Court's treatment of the other "fundamental" rights enumerated in the first eight Amendments.

3. Putting aside the traditional test for selective incorporation, the Reconstruction-era history set forth above would still compel a conclusion that the right to keep and bear arms guaranteed by the Second Amendment is an aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment. Indeed, even if this Court had never incorporated another right, and even if one were to entertain doubts about the Court's selective incorporation jurisprudence with respect to the incorporation of any other elements of the Bill of Rights, the Second Amendment would still need to be incorporated because the Fourteenth Amendment was intended and commonly understood to secure

the federal right to keep and bear arms against deprivation by state governments.

In addition to the Reconstruction-era history, one cannot ignore that this case is before the Supreme Court *of the United States of America* precisely because Redcoats marched on Concord in April of 1775 to seize weapons and gunpowder, and were met by colonists jealous of their right to keep and bear arms who fired the first shots of the War of Independence. See *Heller*, 128 S. Ct. at 2798–99, 2801. When General Gage then ordered the confiscation of all of the arms of the people of Boston, the designs of the Crown became clear for all the colonists to see, and that order would be among the grievances detailed in the Declaration of Causes of Taking Up Arms of July 6, 1775. *See* S. Halbrook *The Founders' Second Amendment,* Ch. 4 (2008).

Moreover, through the end of the Nineteenth Century and beyond, a significant percentage of Americans depended upon private ownership of arms to provide food for their families and to defend themselves and their families from attack. Americans' personal right to possess such firearms for hunting or self-defense has long been an essential and fundamental component of Americans' view of themselves as a free people. To paraphrase this Court in *Near*, "[i]t [is] impossible to conclude that [the] essential personal liberty," not only of the freedman in the South, see *supra* at 10–21, but also of the frontiersman in his log cabin, or the city merchant living above his store, to keep arms for his livelihood and self-defense, "was left unprotected by the general guaranty of fundamental rights of person and property." 283 U.S. at 707; cf. *Heller*, 128 S. Ct. at 2807 (quoting Senator Sumner's "Bleeding

Kansas" speech with respect to the importance of arms on the American frontier).

In light of the "fundamental" nature of the right to keep and bear arms in our English legal heritage, the emphasis placed on this right by Revolutionary-era Americans, the post-bellum importance placed on self-defense rights of African-Americans during the framing of the Fourteenth Amendment, and the widespread use of firearms by Americans across the country throughout this nation's history, it is "impossible to conclude" that State and local governments were meant to have the capacity to infringe the right to keep and bear arms. In comparison to the right to keep and bear arms, no right has deeper roots in our history, no right is more essential to the preservation of all rights, and no right has a stronger claim to fundamental status. Even putting aside the traditional test for selective incorporation, the Second Amendment must be incorporated.

4. Even if the Second Amendment's original purpose may have been to cabin overreaching by the federal government, that is no bar to incorporation. After all, the First Amendment, unlike the Second Amendment, explicitly refers to Congress, and numerous Framing-era sources posited the First Amendment as guarding against the establishment of a national church,[14] leaving State establishments

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[14] "At the time that the first amendment was adopted, five states had established churches—Massachusetts, Connecticut, New Hampshire, Maryland, and South Carolina." William Van Alstyne, "Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on *Lynch* v. *Donnelly*," 1984 Duke L. J. 770, 773, fn 8 (1984); see also, *e.g.*, Thomas Jefferson ltr. to Samuel Miller, 1808. 11 The Writings of Thomas

of religion in place, yet it still was incorporated. Compare U.S. Const., amend. I ("*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.") with *id.*, amend. II ("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.").

This Court's pre-incorporation era precedent holding that the Second Amendment does not apply directly to the States also is no bar to incorporation today. As with the Second Amendment, this Court was unequivocal in the pre-incorporation era that the First Amendment does not apply against the states. See, *e.g.*, *United States* v. *Cruikshank*, 92 U.S. 542, 551–52 (1876). Yet inapplicability to the States in the pre-incorporation era proved to be no bar to later incorporation of the First Amendment, and is no barrier here either.

5. In summary, the case for incorporating the Second Amendment into the Due Process Clause of the Fourteenth Amendment is overwhelming. The right to keep and bear arms easily meets the test for incorporation set forth in a century of precedent. This history of this country, furthermore, demonstrates the vital importance of the right to keep and bear arm for the preservation of the liberty interest at the heart of the Due Process Clause. For

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Jefferson, Memorial Ed., 428 (Lipscomb and Bergh, ed. 1903–04) ("[N]o power to prescribe any religious exercise or to assume authority in religious discipline has been delegated to the General Government. It must then rest with the states, as far as it can be in any human authority.")

the reasons given above, the Second Amendment must be incorporated into the Due Process Clause.

III. In the Alternative, This Court's Precedent Requires Recognizing the Right To Keep and Bear Arms as a Privilege or Immunity of National Citizenship

If the Court does not decide this case in favor of Petitioners on selective incorporation grounds, then the Court should find that the right to keep and bear arms is one of the privileges and immunities of national citizenship protected by the Fourteenth Amendment. See U.S. Const., amend. XIV ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"). Respondents in Support of Petitioners do not believe it is necessary to revisit the entire analytical framework the Court has developed for the Privileges and Immunities Clause, under which that Clause protects only rights connected to national citizenship, in order to recognize that the right to keep and bear arms is protected.

1. The scope of the Privileges and Immunities Clause was examined by this Court in *The Slaughter-House Cases*, 83 U.S. 36 (1873). In particular, the Court considered, *inter alia*, whether that Clause made the entirety of the Bill of Rights applicable to State governments. *Id.* at 74–79. Holding in the negative, the Court explained that the Privileges and Immunities Clause only concerns those rights "which owe their existence to the Federal government, its national character, its Constitution, or its laws." *Id.* at 79. These include the right to travel to the seat of the national government, the right to petition the national

government, the right to demand protection of the national government when on the high seas or in foreign lands, and the right to use the navigable waters of the United States. *Id.* at 79–80.

After *The Slaughter-House Cases*, this Court at times has repeated that the privileges and immunities of citizens of the United States are those "which owe their existence to the Federal government, its national character, its Constitution, or its laws." See, *e.g.*, *Madden* v. *Kentucky*, 309 U.S. 83, 90–91 (1940) ("[T]he privileges and immunities clause protects all citizens against abridgement by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship"). The Court has also stated that if a "privilege claimed is one which arises in virtue of national citizenship," then "no state can abridge it." *Colgate* v. *Harvey*, 296 U.S. 404, 429 (1935).

2. Whether the Privileges and Immunities Clause places limits on a State's ability to prohibit or regulate the right to keep and bear arms has never squarely been decided by this Court. Although *The Slaughter-House Cases* held that the inclusion of a right in the Bill of Rights does not automatically mean such right is protected by the Privileges and Immunities Clause against State encroachment, it did not rule out the possibility. To the contrary, *The Slaughter-House Cases* explained that the right to petition the national government is a privilege of national citizenship protected by the Privileges and Immunities Clause, even though, of course, the right "to petition the government for a redress of grievances" is included within the First Amendment. 83 U.S. at 79; U.S. Const., amend. I.

Subsequently, in *United States* v. *Cruikshank*, 92 U.S. 542 (1875), the Court considered the case of individuals charged with violating the Enforcement Act of 1870, 16 Stat. 140, 141, by "'conspiring' together to injure, oppress, threaten, and intimidate * * * citizens of the United States, of African descent" by, *inter alia*, interfering with their "right to keep and bear arms for a lawful purpose." *Cruikshank*, in other words, did not involve State law or State action abridging the right to keep and bear arms, but private actors. The Enforcement Act required a finding that defendants acted to "prevent or hinder [another's] free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." *Id.* at 548. The Court, in that pre-incorporation case, held that the Second Amendment only prevents Congressional interference with the right to keep and bear arms, and thus that there was no violation of the statute. See *id.* at 553. It did not, however, directly address whether the Privileges and Immunities Clause of the Fourteenth Amendment places limits on the ability of State governments to regulate and restrict the keeping and bearing of arms, because no such regulations or restrictions were at issue.

In *Presser* v. *Illinois*, the Court considered criminal charges of parading and drilling as part of an unauthorized militia. 116 U.S. 252, 253 (1886). Among the arguments the criminal defendant asserted in challenging the constitutionality of his conviction was that it violated the Privileges and Immunities Clause. *See id.* at 261. In disposing of this argument, the Court wrote:

> The question is, therefore, had he a right as a citizen of the United States, in disobedience of state law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the state? * * *. The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of congress or law of the state authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of government of every country. They cannot be claimed as a right independent of law.

Id. at 266. The Court in *Presser* did *not* hold that the Privileges and Immunities Clause does not protect the right to keep and bear arms; it only addressed the supposed right to "drill and parade with arms in the towns and cities of the state." Indeed, *Presser* expressly recognized the limited scope of the issue before it, observing that "the sections" of Illinois law "under consideration do not have [the] effect" of "prohibit[ing] the people from keeping and bearing arms." *Id.* at 265–66. If the Court had previously concluded, in *The Slaughter-House Cases* or *Cruikshank*, that there was no constitutional restraint on the ability of State governments to restrict the right to keep and bear arms, this observation would have been a *non sequitur*.

Finally, in *Miller* v. *Texas*, the Court held that the Privileges and Immunities Clause challenge to the state firearms law at issue had been waived below:

> [I]f the Fourteenth Amendment limited the power of the states as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court.

153 U.S. 535, 538 (1894); see also *id.* at 539 ("a privilege or immunity under the Constitution of the United States cannot be set up here * * * when suggested for the first time in a petition for rehearing after judgment"). Any stray language in that decision concerning the status of the right to keep and bear arms under the Privileges and Immunities Clause is therefore *dicta*.

In the 115 years since *Miller*, this Court has never had occasion to consider whether the Privileges and Immunities Clause may be implicated by State or local firearms laws.

3. Considering the precise question whether a State or local firearm law violates the Privileges and Immunities Clause by infringing the right of a citizen to keep and bear arms, the answer must be yes.

In fact, this Court already provided the answer in *Presser*, albeit in *dicta*. Recall, as explained above, that *Presser* concerned only the question whether defendant's conviction for drilling and parading as part of an unauthorized militia could stand. The Court was not asked to, and did not need to, consider whether there are constitutional limits on a State's authority to prohibit the keeping and bearing of arms under the Privileges and Immunities Clause. Nonetheless, while addressing the criminal defendant's argument raised under the Second Amendment, the Court explained that:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, *the states cannot, even laying the constitutional provision in question* [*i.e.*, the Second Amendment] *out of view, prohibit the people from keeping and bearing arms*, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

116 U.S. at 584 (emphases added). In other words, the fundamental right of "keeping and bearing arms," which preexists the founding of the nation and therefore is not dependent upon it, see *supra* at 31–32, is *also independently* a right of national citizenship. See also *Heller*, 128 S. Ct. at 2809–11.

For the reasons given above, the fundamental right to keep and bear arms should be incorporated into the Due Process Clause of the Fourteenth Amendment. If it is not, however, then the logic of *Presser*, together with this Court's existing test for what constitutes a privilege or immunity of the United States, compel the conclusion that the preexisting right to keep and bear arms as guaranteed by the Second Amendment is also fully incorporated into the Privileges and Immunities Clause of the Fourteenth Amendment.

IV. In the Alternative, the Court Should Revisit the Scope of the Privileges and Immunities Clause

If the Court concludes that the right to keep and bear arms is not, based on current precedent, one of the privileges and immunities of national citizenship protected by the Fourteenth Amendment, then the Court should revisit that precedent.

1. It has long been the precedent of this Court that the Privileges and Immunities Clause does not incorporate the Bill of Rights against the States. See generally *Twining* v. *New Jersey*, 211 U.S. 78, 93–99 (1908) (describing *The Slaughter-House Cases* and its progeny as holding that "[the Privileges and Immunities] clause of the Fourteenth Amendment did not forbid the States to abridge the personal rights enumerated in the first eight Amendments."). *The Slaughter-House Cases*, however, was wrongly decided and is not worthy of deference. "Stare decisis is not, like the rule of res judicata, a universal inexorable command." *Lawrence* v. *Texas*, 539 U.S. 558, 577 (2003) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)). Generally speaking, this Court has expressed a willingness to depart from precedent when "governing decisions are unworkable or are badly reasoned," in which such cases "'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith* v. *Allwright*, 321 U.S. 649, 665 (1944)).

As early as 1908, this Court recognized the unworkable and badly reasoned logic of *The Slaughter-House Cases*:

> Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this court. Undoubtedly, it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others.

Twining, 211 U.S. at 96. One hundred years later, the decision continues to fare no better. "Virtually no serious modern scholar—left, right, and center—thinks that [*The Slaughter-House Cases*] is a plausible reading of the [Fourteenth] Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001). Indeed, as Justice Thomas has pointed out, "[l]egal scholars agree on little beyond the conclusion that the [Privileges and Immunities] Clause does not mean with the Court said it meant in 1873." *Saenz* v. *Roe*, 526 U.S. 489, 523 n.1 (1999) (Thomas, J., dissenting).

This case provides the perfect—and rare—opportunity to reevaluate the illogical holding of *The Slaughter-House Cases*, restoring the Privileges and Immunities Clause to the rightful importance that its framers, and the post-Civil War public, intended.

2. The historical record culminating in passage of the Fourteenth Amendment provides compelling support for the proposition that the Privileges and Immunities Clause was intended to incorporate much of the Bill of Rights, and certainly the Second Amendment, against the States.

The Amendment's principal drafter (Rep. Bingham), for example, declared that the Clause would "arm the Congress * * * with the power to

enforce the bill of rights as it stands in the Constitution today." CONG. GLOBE, 39th Cong., 1st Sess., 1088 (1866) (statement of Rep. John Bingham). He explained that he drafted the Fourteenth Amendment with *Barron* v. *Baltimore*, 32 U.S. 243 (1833), in mind. 42nd Cong., 1st Sess., App., at 84. He stated that "the privileges and immunities of citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States." *Id.* Reading each of the amendments, he added: "These eight articles * * * never were limitations upon the power of the States, until made so by the fourteenth amendment." *Id.*

Supporters and opponents of the Amendment each recognized the Amendment's purpose to incorporate the Bill of Rights against the States. See, *e.g.*, CONG. GLOBE, 39th Cong., 1st Sess., 2765–66 (1866)); Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 98 (1993). State ratification records confirmed this intent. See, *e.g.*, Mass. H. R. Doc. No. 149, at 3 (1867), quoted in Halbrook, *Freedmen*, 71–72. Legal scholars were also in agreement. See, *e.g.*, John N. Pomeroy, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 149, 151 (1868). And the general public understood incorporation to be the Amendment's design. See, *e.g.*, Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 78 OHIO ST. L.J. 1509, 1590 (2007).

For the reasons given at greater length in the brief of Petitioners, it is time for this Court to depart from the *The Slaughter-House Cases* and recognize the incorporation of the Bill of Rights, or at a

minimum the Second Amendment, into the Fourteenth Amendment's Privileges and Immunities Clause. Even if this Court finds it unnecessary to hold that the entire Bill of Rights is so incorporated, it would be faithful to the original understanding to hold that the Second Amendment is incorporated. As set forth in Part I, *supra*, those who explained that the entire Bill of Rights would be applicable to the States prominently mentioned the right to keep and bear arms in particular.

CONCLUSION

For the foregoing reasons, the decision of the Seventh Circuit below should be reversed.

Respectfully submitted,

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