Nos. 08-1497 and 08-1521 (Consolidated)

IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,
Petitioners,

v.

CITY OF CHICAGO AND VILLAGE OF OAK PARK,
Respondent.

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

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BRIEF OF ARMS KEEPERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus is a volunteer organization that supports reasonable regulation of handguns and rifles, instead of prohibition.[1] Formed in 2009, *Amicus* is an unincorporated association headquartered in Monroe, Connecticut and registered there with the town government. Membership is free, and *Amicus* communicates with its members, potential members, and the general public primarily via electronic means including the web site www.ArmsKeepers.org. *Amicus* believes that an individual's right to keep and bear arms is constitutionally protected not only by the Second Amendment but also by the Privileges or Immunities Clause of the Fourteenth Amendment. While the government can regulate in this area, it cannot legitimately disarm the American people. People have a right to use weapons to defend themselves, and also to keep weapons so as to be of service in the event of civil unrest. We support instant background checks, as well as a ban on weapons for indiscriminate killing. Arms Keepers is nonpartisan, and its business is conducted and transacted solely within the United States.

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[1]Pursuant to Supreme Court Rule 37.2, *amicus* provided timely notice of intent to file this brief to counsel of record for both petitioners and respondents. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. Letters reflecting the consent of the parties have been filed with the Clerk.

Amicus is filing this brief in support of the petitioners because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

Incorporation of the right to keep and bear arms is a constitutional issue touching upon matters of deep concern nationwide. Regardless of whether the court below was correct to forgo the analysis that the Supreme Court said is "required" in *District of Columbia v. Heller*, 128 S.Ct. 2783, 2813 n. 23 (2008), the fact is that the court below did forgo it. For that reason and others, a writ of certiorari is warranted

Instead of using a type of substantive due process inquiry developed in recent Supreme Court cases, the court below rejected incorporation of the right in question based upon several nineteenth century cases. However, a full analysis of those old cases shows that they do not preclude selective (rather than en bloc) incorporation under the Privileges or Immunities Clause, they correctly rejected the notion of substantive due process, and therefore they should not be overturned.

Those old cases said that the Second Amendment does not apply against the states, and

no one disputes that. As Justice Thurgood Marshall once explained: "By their terms, the provisions of the Bill of Rights curtail only activities by the Federal Government, but the Fourteenth Amendment subjects state and local governments to the most important of those restrictions." *Oliver v. United States,* 466 U.S. 170, 186 n. 3 (1984)(Marshall, J., dissenting, joined by Brennan and Stevens, JJ.)(citations omitted).

There is a key distinction between en bloc incorporation of the Bill of Rights, versus selective incorporation of Bill of Rights provisions, and the Supreme Court has never rejected selective (rather than en bloc) incorporation of the right to keep and bear arms under the Privileges or Immunities Clause. Revivification of this Clause would not allow courts to apply an unlimited range of restrictions against the states, because something cannot be a "privilege or immunity of citizens of the United States" unless it already restrains the federal government in federal jurisdictions such as the nation's capital. Even then, the Privileges or Immunities Clause cannot protect claimed rights beyond those that are fundamental.

The Court's due process jurisprudence is in disarray, and this case offers an opportunity to start setting it right. Virtually no one disputes that the phrase "due process of law" means process owed according to the "law of the land." The latter phrase

uses plain words, and was not meant to have any technical meaning. The Court may wish to review the advisability of inserting into that particular phrase the Court's own notions of fairness, or the Court's own balancing of various traditional values.

In contrast to unenumerated rights enforced using the judicially invented doctrine of substantive due process, the right to keep and bear arms is actually enumerated in the Constitution. This right is already enforceable in federal jurisdictions, it is a fundamental right, and it should therefore be construed as a privilege or immunity of citizens of the United States. This question is ripe for decision.

REASONS FOR GRANTING THE WRIT

A writ of certiorari would be warranted here even if there were no circuit split.[2] Handgun availability or unavailability is a matter of widespread concern in the United States. More importantly, the court below says that Supreme Court decisions on this subject are "obsolete," and therefore a fresh look by this Court would be most appropriate. Additionally, this case presents an

[2]Unlike the court below, a panel of the Ninth Circuit has held that the right to keep and bear arms applies to the states. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). As of this writing, it is unknown if the Ninth Circuit will review *en banc*.

opportunity for the Court to reevaluate its tangled Fourteenth Amendment jurisprudence.

I. The Court Below Declined To Use The Type Of Substantive Due Process Analysis That Recent Supreme Court Cases Have Required

The court below declined to do what the Supreme Court has said is necessary: "engage in the sort of Fourteenth Amendment inquiry required by our later cases." *District of Columbia v. Heller*, 128 S.Ct. at 2813 n. 23 (2008). Regardless of whether the court below was correct to not do what the Supreme Court "required," the undisputed truth is that the court below did not do so, and therefore issuance of the writ of certiorari is warranted.

The Ninth Circuit recently outlined the main issue here: "There are three doctrinal ways the Second Amendment might apply to the states: (1) direct application; (2) incorporation by the Privileges or Immunities Clause of the Fourteenth Amendment; or (3) incorporation by the Due Process Clause of the same amendment." *Nordyke v. King*, 563 F.3d 439, 446 (9th Cir. 2009). Direct application would be illegitimate under *Barron ex. rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and incorporation via a substantive reading of the Due Process Clause would transgress the original meaning of the Constitution. However, the Court

could very plausibly incorporate the right to keep and bear arms selectively via the Privileges or Immunities Clause.

A. The Court Below Followed *Presser* and *Miller* Which Correctly Rejected Substantive Due Process

The court below declined to use any of the various substantive due process inquiries that have been developed in modern cases such as *Washington v. Glucksberg,* 521 U.S. 702 (1997), and *Lawrence v. Texas*, 539 U.S. 558 (2003). The court below also correctly noted that the Court's modern approach is "hard to predict" and "subjective."

The court below followed *Presser v. Illinois*, 116 U.S. 252 (1886) and *Miller v. Texas,* 153 U.S. 353, 539 (1894), instead of pursuing the sort of inquiry required by *Glucksberg* or *Lawrence.* According to *Presser,* incorporation of the right to keep and bear arms into the Due Process Clause "is so clearly untenable as to require no discussion." *Presser*, 116 U.S. at 268. *Miller* correctly reached a similar conclusion, holding that, "[a]s the proceedings were conducted under the ordinary forms of criminal prosecutions there certainly was no denial of due process of law." *Miller,* 153 U.S. at 539.

The rejection by *Presser* and *Miller* of due process incorporation was correct and ought to be

reaffirmed, even though such reaffirmation would be against our interest as gun owners, and against the more recent type of due process inquiry in *Glucksberg* and *Lawrence*. Incorporation via the Privileges or Immunities Clause is another matter, and is addressed in a separate section herein.

Regarding due process, the court below said it was also following *United States v. Cruikshank*, 92 U.S. 542 (1875). However, that decision is not relevant to the present due process issue, because the *Cruikshank* Court correctly held that the Due Process Clause "adds nothing to the rights of one citizen as against another." *Cruikshank*, 92 U.S. at 554. In other words, there was no state action.

The *Cruikshank* Court also held, *id.* at 553, that the First and Second Amendments do not apply against the states, which of course is undisputed.[3] The *Cruikshank* Court "never specified whether the First Amendment contains 'fundamental rights' protected by the Fourteenth Amendment against state action." DAVID RABBAN, FREE SPEECH IN ITS

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[3]*See, e.g., Oliver v. United States,* 466 U.S. 170, 186 n. 3 (1984)(Marshall, J., dissenting, joined by Brennan and Stevens, JJ.)("the provisions of the Bill of Rights curtail only activities by the Federal Government...."). *See also Nordyke v. King*, 563 F.3d at 446 (9th Cir. 2009)("The Bill of Rights directly applies only to the federal government"). *See also Presser*, 116 U.S. at 265 (the right may apply against the states even laying the Second Amendment "out of view").

FORGOTTEN YEARS 148 (Cambridge University Press 1999). No one, including the court below, knows what the *Cruikshank* Court would have done on the due process issue if there had been state action.

James Madison originally introduced the right to keep and bear arms and the right to due process together in a single proposed amendment. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1789). Congress then split those rights into the Second and Fifth Amendments respectively. JOHN VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002 202 (ABC-CLIO 2003). The separateness of these simultaneous amendments is a structural feature of the Constitution that signifies that the two rights are "distinct" as Roger Sherman put it,[4] and "unconnected" as Madison put it.[5] The states were invited to ratify one right and reject the other at the same time, at their pleasure. The Court should not now join together what the framers split asunder, even if the Court has made similar errors in the past.

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[4]*Letter from Roger Sherman to Simeon Baldwin* (Aug. 22, 1789) reprinted in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1375 (Charlene Bickford et al., eds., 2004)("each may be passed upon distinctly by the states").

[5]*Letter from James Madison to Alexander White* (Aug. 24, 1789) reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 287-288 (Helen E. Veit, et al., eds., 1991)("The several propositions will...go forth as so many amendments, unconnected with one another").

Past errors do not require yet another error, especially where – as here – repetition of the error would require the Court to overturn venerable precedents such as *Miller* and *Presser*. The Due Process Clause in the Fourteenth Amendment has the same basic meaning as the same language in the Fifth Amendment,[6] and in neither instance does it include a right to keep and bear arms. That right can only apply against the states via the Privileges or Immunities Clause.

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[6]*Hurtado v. California*, 110 U.S. 516, 535 (1884) ("when the same phrase was employed... it was used in the same sense and with no greater extent"). *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 410 (1905) (same); *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 329 (1901) (assuming "that the legal import of the phrase 'due process of law' is the same in both Amendments" although different constructions may be proper); *Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("the same constitutional standards apply against both the State and Federal Governments"). The primary author of the Fourteenth Amendment's Due Process Clause was John Bingham, and he only wanted to enforce pre-existing federal rights against the states. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1088-1089 (1866). *See also* William J. Brennan, *The Bill of Rights and the States*, 61 N. Y. U. L. REV. 535, 545 (1986) ("[O]nce a provision of the Federal Bill was deemed incorporated, it applied identically in state and federal proceedings. To this day that remains the position of the Court").

B. The Court's Modern Due Process Jurisprudence Has Increasingly Gone Astray

The Due Process Clause is the centerpiece of Magna Carta.[7] One should not assume that the Court's fundamental transformation of due process jurisprudence during the past century has produced a Magna Carta Version 2.0 that is better than the original. Even if the new version were better, *Amicus* respectfully submits that the amendment process would be necessary to so fundamentally change the meaning of this Clause. The court below correctly turned back the clock on due process, and this Court should do so as well.

There are two primary alternative interpretations of due process that could conceivably replace the prevailing interpretation. First, there is a completely objective due process jurisprudence that simply requires compliance with the other laws that are in force. In recent times, the leading advocate on

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[7] *See Regina v. Paty*, 92 Eng. Rep. 232 (K. B. 1704):

> [L]ex terrae is not confined to the common law, but takes in all the other laws, which are in force in this realm; as the civil and canon law.... By the 28 Ed. 3, c. 3, there the words lex terrae, which are used in Mag. Char. are explained by the words, due process of law; and the meaning of the statute is, that all commitments must be by a legal authority.

Paty, 92 Eng. Rep. at 234.

the Court for this objective interpretation was Justice Black. *See In Re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting) quoted in *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004) (Thomas, J., dissenting). The second alternative interpretation is a purely procedural due process jurisprudence having subjective recourse to "fundamental fairness." *See generally Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring). The purely procedural interpretation is typified by *Miller v. Texas,* 153 U.S. 353 (1894), and the purely objective interpretation by *Walker v. Sauvinet*, 92 U.S. 90 (1875). The objective interpretation is the most credible, as a matter of original meaning, and other deeply rooted values.

The objective interpretation would still constrain legislators. For example, it would allow the federal courts to formulate the following remedy for deprivation of enumerated procedural rights: the government could then be stopped from taking life, liberty, or property.[8]

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[8]*See Chapman v. California*, 386 U.S. 18, 22 (1967)("we cannot leave to the States the formulation of ... remedies designed to protect people from infractions by the States of federally guaranteed rights"). *See also Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855)("We must examine the constitution itself, to see whether this process be in conflict with any of its provisions....") *See also* Andrew Hyman, "The Little Word Due", 38 *Akron Law Rev.* 1, 30 (2005)("Congress must either respect all of the accused persons' process rights, or let them have their liberty").

American colonists equated the phrases "due process of law" and "law of the land." *See Pacific Mutual v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment); *Twining v. New Jersey*, 211 U.S. 78, 100 (1908); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855). On its face, the phrase "law of the land" does not suggest any distinction between procedural law and substantive law, and indeed no one has ever suggested that Magna Carta allowed the king to define and prosecute whatever crimes and punishments he wanted so long as he followed certain procedures. These facts argue strongly against a purely procedural interpretation.

Neither the American colonists nor the highest legal authorities in England attributed any sort of technical meaning to the critical phrase "law of the land."[9] That phrase simply referred to the rules of the country or region. *See generally* SAMUEL

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[9]*Cf.* Alexander Hamilton, *Remarks on an Act for Regulating Elections* (1787), *reprinted in* 4 PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett ed., Columbia Univ. Press 1962). Hamilton saw technical meanings in the terms "law of the land" and "but by due process of law." His view was disputed. *See generally* James Ely, *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process* 16 CONST. COMMENTARY 315 (1999)("it is unlikely that a single statement, made in the course of a legislative debate, provides an adequate basis for broad generalizations").

JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768) (e.g., defining the word law as a "rule of action," defining the word land as a "country; a region," defining the word due as "exact; without deviation," defining the word process as "course," and defining the word course as "uncontrolled will" or "consequences" or "settled rule"). The ordinary meaning of the phrase "law of the land" was confirmed by the King's Bench in *Regina v. Paty*,[10] and also by legal luminaries such as Sir Edward Coke. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES 45 (Brooke 1797). Coke wrote that, "no man be taken or imprisoned, but per legem terrae, that is, by the common law, statute law, or custom of England" (notice the conjunction "or" used by Coke).

Lord Coke also wrote that the due process clause in a particular statute was "declaratory of the old law of England." *Id.* at 50. Consider very carefully what Coke meant. He was saying that the statute reiterated what was already contained in a clause of Magna Carta, rather than saying that the statute incorporated various other old rules aside from that particular clause in Magna Carta. *See id.* at Proeme ("the prudent reader may discern...whether the statute be introductory of a

[10]*See* note 7 *supra*.

new law, or declaratory of the old...."). *See also* GILES JACOB, LAW-DICTIONARY 117 (Riley 1811)("Statutes are ... either declaratory of the Common Law, or remedial of some defects therein; or to speak more strictly, they are either declaratory of the old law, or introductory of a new law").

The Court correctly explained in *Hurtado v. California,* 110 U.S. 516, 531 (1884), that "bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history were never regarded as inconsistent with the law of the land."[11] When Coke referred to a particular aspect of due process such as a right to a grand jury, he was not referring to an intrinsic aspect of due process, but rather was merely giving "an example and illustration of due process of law as it actually existed in cases in which it was customarily used." *Hurtado*, 110 U.S. at 523.

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[11]*Cf. Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)("As to the words from *Magna Charta,* incorporated into the constitution of Maryland...they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice"). This quote from *Okely* is a classic instance of accurately stating original intent rather than original meaning; by analogy, the original intent was also to promote wisdom and make people very happy, but that is no basis for using this clause of Magna Carta to overturn laws that merely lack wisdom or do not make people sufficiently happy.

Recent substantive due process cases have required that laws be fair, independently of what legislators may think about fairness, and independently of what later members of the Court may think about fairness. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 861, 870 (1992). However, the court below correctly observed that even a "deeply rooted" historical due process inquiry invites subjectivity, because principles like "privacy" and "justice" and "federalism" and "democracy" are all ancient rights that are often at odds with each other. *Cf. Washington v Glucksberg*, 521 U.S. 702 (1997)("we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'"). The right to keep arms might flourish under that sort of historical due process inquiry, but such an inquiry bears no relation to what the Constitution says.

It would be inconsistent with the constitutional text if the courts were to now say that state statutes infringing upon gun ownership are not sufficiently rooted in history to be "laws" within the meaning of the Due Process Clause.[12] The Constitution prescribes what "shall be a law." U.S.

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[12]*See generally* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768)("LAW...1. A rule of action. *Dryden* 2. A decree, edict, statute, or custom, publicly established. *Davies*").

Const. art. I, § 7, cl. 2. The Constitution also prescribes what "shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. The judiciary does not generally have carte blanche to counteract those prescriptions.

Blackstone defined municipal law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." WILLIAM BLACKSTONE. COMMENTARIES ON THE LAWS OF ENGLAND 44 (Bell 1771). Blackstone elaborated that the declaratory part of the law, which declares "the rights to be observed, and the wrongs to be eschewed....depends not so much upon the law of revelation or of nature as upon the wisdom and will of the legislator." *Id.* at 53-54. To the extent that our Constitution does not declare which laws are right and wrong, that is a job for legislators as Blackstone said; otherwise, there is no separation of powers except temporarily, in matters that the Court has not yet decided.

The Constitution belongs to the people.[13] Therefore, the people should be able to debate how we can use the republican and federal form of government that the Constitution painstakingly set

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[13]*See* testimony of Associate Justice Anthony M. Kennedy, *Judicial Security and Independence, Hearing Before the Committee on the Judiciary, United States Senate*, 110th Cong. 10 (2007)("The Constitution doesn't belong to a bunch of judges and lawyers. It belongs to the people").

up, in order to resolve even sensitive and fundamental matters. The present case is one of the relatively rare instances where the matter has already been resolved by specific applicable constitutional provisions.

Of course, it is painful for judges to allow minorities to be wronged by majorities, but there can be a greater good. In any event, the wronged minority has the advantage here in this case, because of the specific constitutional provisions protecting a right to keep and bear arms, quite apart from the Due Process Clause.

II. The Extent Of Protection Offered By The Privileges Or Immunities Clause For The Right To Keep And Bear Arms Is An Important Federal Question That Needs To Be Settled

As the court below correctly pointed out, *Slaughter-House*, 83 U.S. (16 Wall.) 36 (1873) has been interpreted as holding that the Privileges or Immunities Clause "does not apply the Bill of Rights, en bloc, to the states" (emphasis added). However, the Supreme Court has never rejected selective (rather than en bloc) incorporation under the Privileges or Immunities Clause. *See generally* Akhil Amar, *The Bill of Rights and the Fourteenth*

Amendment, 101 YALE LAW JOURNAL 1193 (1992) (proposing a "refined incorporation" of some but not all enumerated rights into the Privileges or Immunities Clause).

Revivification of this Clause would not allow the Court to apply an unlimited range of restrictions against the states, because the plain text of this Clause indicates that something cannot be a "privilege or immunity of citizens of the United States" unless it already restrains the federal government in federal jurisdictions such as the nation's capital.[14] Congress is likewise unable to expand the protected privileges or immunities. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

Moreover, the Privileges or Immunities Clause cannot protect any claimed constitutional right of a citizen beyond those that are "fundamental," and the Court would therefore be able to determine that some constitutional rights (e.g. the grand jury right) are not fundamental even though they restrain the

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[14]*See* ROBERT LEVY, SHAKEDOWN: HOW CORPORATIONS, GOVERNMENT, AND TRIAL LAWYERS ABUSE THE JUDICIAL PROCESS 145 (Cato Institute 2004). *See generally* speech by John Bingham, CONG. GLOBE, 39th Cong., 1st Sess., 1088, 1095 (Feb. 28, 1866) commenting on a draft of the Fourteenth Amendment ("The proposition pending before the House is simply a proposition to arm the Congress...with the power to enforce the bill of rights as it stands in the constitution today. It hath that extent—no more....If the State laws do not interfere, those immunities follow under the Constitution").

federal government in federal jurisdictions such as the nation's capital.[15] The "fundamental" rights inquiry under the Privileges or Immunities Clause would be somewhat subjective, but it would be closely cabined by the requirement that a proposed privilege or immunity must already be protected nationwide against federal infringement.

A. Selective Incorporation Of The Right To Keep And Bear Arms Under The Privileges Or Immunities Clause Is An Issue Of First Impression Despite *Cruikshank, Presser* and *Miller*

Neither *Cruikshank*, nor *Presser*, nor *Miller* rejected selective incorporation of the right to keep and bear arms via the Privileges or Immunities Clause. *Miller* merely said that, "we think it was fatal to this claim that it was not set up in the trial court." *Miller,* 153 U.S. at 538. And *Cruikshank* — which involved no state action — merely said that the counts in the indictment referencing the

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[15]*See Corfield v. Coryell*, 6 Fed. Cas. 546, 551 no. 3,230 (C.C.E.D.Pa. 1825)("We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental"); *Baldwin v. Montana Fish and Game Comm'n* 436 U.S. 371, 388 (1978)(same). These citations involve the Privileges *and* Immunities Clause. *See* U.S. Const., Art. IV, Sec. 2.

Privileges or Immunities Clause were "too vague and general." *Cruikshank*, 92 U.S. at 559.

As for *Presser*, although that opinion said that the Second Amendment only applies against the federal government, it also stated that there are other constitutional provisions protecting a right to keep and bear arms from state infringement: "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", in a manner inimical to the federal government. *Presser*, 116 U.S. at 265.

Presser did not involve home possession of weapons as in the present case, but rather involved formation of military organizations that train and parade in public. The *Presser* decision said that the state's ban on such military activities does "not infringe the right of the people to keep and bear arms" even if that right applies against the states, *id.* at 264, and would not infringe that right even if the ban were imposed by the federal government. *See id.* at 267. Thus, nothing in *Presser* rejected application of the right to keep and bear arms, via the Privileges or Immunities Clause.

B. Selective Incorporation Of The Right To Keep And Bear Arms Under the Privileges Or Immunities Clause Is An Issue Of First Impression Despite *Slaughter-House*

Slaughter-House did not directly involve any enumerated constitutional right.[16] If *Slaughter-House* had been dealing with fundamental enumerated rights that are constitutionally protected in federal jurisdictions, then the Court might or might not have applied those rights against the states via that Clause.

Professor John Hart Ely, for example, believed that the import of *Slaughter-House* "seems unmistakable: if it's a right guaranteed elsewhere in the Constitution — if, in particular, it's a right previously guaranteed only against the federal government — then it belongs on the list of privileges or immunities protected against state denial by the Fourteenth Amendment." JOHN HART ELY, DEMOCRACY AND DISTRUST, 196 n. 59 (Harvard

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[16]*See Adamson v. California,* 332 U.S. 46, 76 (1947)(Justice Black dissenting)("The state law under consideration in the Slaughter-House cases was only challenged as one which authorized a monopoly, and the brief for the challenger properly conceded that there was 'no direct constitutional provision against a monopoly'").

University Press 1980). Ely's reading of *Slaughter-House* is especially plausible if the rights at issue are not just enumerated in the Constitution but are also "rights which are fundamental," as the Court said in *Slaughter-House*, 83 U.S. at 76.

According to scholars such as Professor Nelson Lund, it may be that *Slaughter-House* "left open the possibility of incorporation under the Privileges or Immunities Clause." Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE LAW REV. 185, 190 (2008). This possibility becomes a probability if one considers selective incorporation of "fundamental" enumerated rights, instead of total (i.e. en bloc) incorporation of every enumerated right. After all, the Court in *Slaughter-House* specifically said that the Clause only protects "those rights which are fundamental." *Slaughter-House*, 83 U.S. at 76.

The right to keep and bear arms is one of those fundamental rights that is already protected within federal jurisdictions.[17] This right should therefore be selectively incorporated into the Privileges or Immunities Clause, and *Slaughter-House* is no obstacle. This in no way implies that the

[17]Even before the Civil War, the Court indicated that the right to arms is fundamental. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1856). Note that the dissent of Justice Curtis discussed due process at length, while declining to cite or follow any prior Supreme Court case on that topic. *Id.* at 626.

Fifth Amendment's grand jury right, or the Seventh Amendment's right to a jury in civil cases, need to be incorporated, if they are not "fundamental."

As of now, the Supreme Court does not use the Privileges or Immunities Clause to protect any right whatsoever. In the case of *Saenz v. Roe*, 526 U.S. 489 (1999), the Court did construe that clause as protecting an aspect of the right to travel:

> Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."

Saenz, 526 U.S. at 503 (emphasis added). However, this statement in *Saenz* was an inexact characterization of what the *Slaughter-House* opinion actually said: "One of these privileges is conferred by the very article under consideration." *Slaughter-House*, 83 U.S. at 80 (emphasis added). The *Saenz* Court acknowledged that its decision "rests on the fact that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence." *Saenz,* 526 U.S. at 506. The Privileges or Immunities Clause was

unnecessary to the result in *Saenz*, and thus that Clause continues to be treated by American jurisprudence as a nullity. That status quo can and should change, without overturning *Slaughter-House*.

The purported power to constitutionalize the most important substantive political issues under the Due Process Clause is clearly untenable, as the Court recognized in cases like *Presser*. That old decision should stand. However, the Privileges or Immunities Clause is a legitimate vehicle for selectively incorporating enumerated rights like the one in question.[18] The Constitution, as amended, does not allow the American people to be disarmed.

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[18]The Constitution guards some unenumerated rights. Madison called them the "great residuum" of rights that result from having a federal government of limited powers. *See* 1 ANNALS OF CONG. 455 (Joseph Gales ed., 1789). *See generally United Public Workers v. Mitchell*, 330 U.S. 75, 96 (1947). Those rights are not enforceable where federal power is plenary, and so they are not privileges or immunities of citizens of the United States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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