

No. 08-1521

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**

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

*Petitioners,*

v.

CITY OF CHICAGO,

*Respondent.*

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

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**REPLY BRIEF**

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## PRELIMINARY STATEMENT

Respondent concedes that this case presents a good vehicle for resolving the question of the Second Amendment's incorporation, a question it admits is one this Court has never addressed under the modern Due Process Clause analysis. Respondent's Br., 6-8. Critically, Respondent acknowledges that the court below did not address this question at all. *Id.*, 5. And Respondent correctly points out that the selective incorporation analysis has never turned on whether a right is "substantive" or "procedural," an argument not advanced by Petitioners. *Id.*, 10.

Other points raised by Respondent require response.

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## ARGUMENT

### **I. This Case Remains A Logical Vehicle For Resolving The Question Of The Second Amendment's Incorporation.**

Respondent observes that since the Petition's filing, the Ninth Circuit vacated the panel opinion in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009) and ordered the case be re-heard en banc, thus vitiating the circuit split. Respondent's Br., 8. Yet Respondent declares that "no [lower] court should feel free to reach the issue" of the Second Amendment's incorporation, *id.*, at 8 n.4, arguing that a circuit split on this question ought never arise again.

Petitioners do not agree that the question of the Second Amendment's incorporation is beyond the powers of the lower federal courts to determine. To the contrary, this Court relies upon the lower courts to develop the landscape of constitutional law, including questions of Fourteenth Amendment incorporation. Historically, this has been the role of the lower courts. *See, e.g. United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965) (incorporating Fifth Amendment Double-Jeopardy Clause); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3d Cir. 1969) (en banc) (incorporating Sixth Amendment public trial right).

But the time to insist on this point may have passed. Many lower federal court judges, including all four judges who passed on this case and at least two of the three circuits in which Second Amendment enforcement is most urgently needed, are of a different view, agreeing with Respondent that the very question of the Second Amendment's incorporation must be refused.<sup>1</sup> A true circuit split – one in which at least some courts address and develop the issue rather than avoid it entirely – might never re-appear.

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<sup>1</sup> It is unknown whether the Ninth Circuit voted to re-hear *Nordyke* en banc owing to the panel's decision on incorporation, or the panel's decision on one of the other significant issues raised in that case. Indeed, it is unclear whether the judges who will eventually re-hear *Nordyke* are the same ones who voted for taking the case en banc. *See* 9th Cir. R. 35-3.

Yet the incorporation question remains vitally important. A Second Amendment right valid only against the federal government is meaningless to Americans disarmed by state officials – the very circumstance that encouraged the Fourteenth Amendment’s ratification in the first instance.

Indeed, incorporating the Second Amendment as against state actors may be the only way to preserve its impact upon federal actors. For example, the District of Columbia, not yet reconciled to this Court’s opinion in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), argues “that the Second Amendment should not apply to the District if it is not incorporated as against the States, as the District argued in *Heller*.” Def. Mot. for Summary Judgment, *Heller v. District of Columbia*, U.S. Dist. Ct. D.C. No. 08-1289 at 16 n.14 (Aug. 5, 2009).<sup>2</sup> At least some federal actors are unimpressed by a constitutional right that state officials are free to ignore.

If the absence of a circuit split reflected uniformity on the question of whether the Second Amendment is incorporated against the States, such absence might be a factor counseling against the petition. However, the loss of a circuit split might instead reflect a uniformity of opinion that the question is, as Respondent and the court below assert, a question only this Court can answer. That fact would strongly favor the granting of certiorari,

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<sup>2</sup> The District advanced no such argument in *Heller*.

both because the lower court's position reflects a refusal to follow this Court's precedent in conducting the required due process analysis, and raises a profound question of federal law touching upon the fundamental enumerated rights of almost all Americans. Sup. Ct. R. 10(c).

Respondent is wrong in asserting that the record is inadequate for a decision on the merits. Respondent's Br., 17. In *Heller*, the D.C. Circuit granted Plaintiff's motion for summary judgment filed barely a month after the initiation of litigation, a decision affirmed by this Court, because there was no conceivable relevant factual dispute. Petitioners' motion should likewise be granted, as the handgun ban in this case is, contrary to Respondent's claims, identical to that struck down in *Heller*.<sup>3</sup> The other challenged provisions likewise require no factual development. Appellate courts routinely grant summary judgment motions in cases lacking meaningful factual disputes. See, e.g. *Jones v. Wilhelm*, 425 F.3d 455 (7th

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<sup>3</sup> That Chicago has no functional firearms ban, Respondent's Br., 3 n.2, is irrelevant. At issue in *Heller* were three distinct statutes: a functional firearms ban, a ban on unlicensed carrying of a handgun applied within the home, and a handgun ban that operated by forbidding the registration of handguns within a regime criminalizing the possession of unregistered guns. That handgun ban struck down by this Court, former D.C. Code § 7-2502.02(a)(4) was indeed identical to Chicago Mun. Code § 8-20-050(c) in forbidding the necessary registration of handguns. Respondent seeks discovery and trial on the question of whether handguns are unreasonably dangerous, but that is precisely the adventure foreclosed by *Heller*.

Cir. 2005); *KenAmerican Resources v. International Union, UMW*, 99 F.3d 1161 (D.C. Cir. 1996).

## **II. Respondent's Brief Contains Multiple Internal Contradictions.**

Respondent's first internal contradiction rests between its second Question Presented and its argument. Respondent opens its brief by asking this Court to consider "[w]hether the Court should refuse to revisit" its Privileges or Immunities Clause precedents. Respondent's Br., i. Yet by the end of the brief, Respondent argues that "[t]he petitions should be denied with respect to whether the Privileges or Immunities Clause imposes the Second Amendment on the States." *Id.*, 31.

Obviously, were the Court to accept the question of whether it "should refuse to revisit" its Privileges or Incorporation doctrine, it might determine that the topic should indeed be revisited, and thus decide the question of "whether the Privileges or Immunities Clause imposes the Second Amendment on the States." While Respondent's question would be more directly-stated in the positive, the concept embodied by this question – that the Court should revisit the Privileges or Immunities Clause – is one enjoying greater support in the Petition.

A more serious, substantive contradiction lies between Respondent's Due Process and Privileges or Immunities arguments with respect to the nature of the Second Amendment. Arguing against the Second

Amendment's incorporation under the Due Process Clause, Respondent asserts that the right to bear arms is not fundamental. Respondent's Br., 11. Yet the logic of this Court's Privileges or Immunities doctrine, which Respondent endorses, rests upon the fact that the Second Amendment is indeed an ancient, established right pre-dating the Constitution. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). The logical needle Respondent would thread treats the right to arms as natural and inherent in the Constitution's absence, yet somehow not "fundamental to the American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), or "necessary to an Anglo-American regime of ordered liberty," *id.*, 150 n.14. The tension between these two conditions cannot be resolved.

Although both of Respondent's claims cannot be true, assuredly, they are each false. In contrast, there is nothing inconsistent about Petitioners' arguments: the Second Amendment secures a fundamental right, as recognized in *Cruikshank*, and that right is therefore incorporated pursuant to the Due Process Clause just as it should be incorporated under a proper understanding of the Privileges or Immunities Clause.

Finally, Respondent echoes the lower court's argument that federalism interests somehow sanction the wanton violation of fundamental rights. Respondent's Br., 16-17. Petitioners have already addressed this error, Pet. 19-20, as have their amici. *See, e.g.* Br. of Texas, et al., at 22. But Respondent frames the

federalism theory in a new, self-defeating condition: states and localities should be left free to experiment with gun regulations “[s]o long as regulation does not render nugatory the right to arms for self-defense in the home.” Respondent’s Br., 17.

Leaving aside Respondent’s erroneous limitation of the right to arms to the home, *contra Heller*, 128 S. Ct. at 2793 (defining “bear arms”), and the suggestion that only laws wholly “nugatory” of an enumerated right are unconstitutional, *contra Heller*, 128 S. Ct. at 2818 & n.27, Petitioners have no quarrel with gun regulations that respect constitutional limitations. But if the Second Amendment is not incorporated as against the States and local governments, how are courts to enforce Respondent’s proposed condition regarding so-called “nugatory” laws?

Respondent argues it should be free to enact laws that do not violate the Constitution, and for this reason, it should not be bound by constitutional standards. But if some gun regulations might “render nugatory the right to arms,” this would be a reason to embrace, not reject, the Second Amendment’s incorporation.

### **III. The Privileges Or Immunities Clause Cannot Be Avoided.**

Respondent’s proposal to divorce the Fourteenth Amendment’s text from its history, by limiting consideration of incorporation to the ahistorical rubric of substantive due process, is neither practical

nor logical. Regardless of whether this Court ultimately accepts Petitioners' arguments, one can hardly engage in an historical analysis of the Fourteenth Amendment's original public meaning without considering the Privileges or Immunities Clause.

Contrary to Respondent's claims, the case for incorporation through the Privileges or Immunities Clause is overwhelming. Yet should the Court not invoke the Privileges or Immunities Clause to incorporate the Second Amendment, *Heller* nonetheless demonstrates that historical analysis is critical to the interpretation of constitutional text. If one point unified this Court in *Heller*, it was the maxim that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

Whether the Court would follow the approach of the *Heller* majority, and favor examining the Fourteenth Amendment's original public meaning, or instead follow the approach of the *Heller* dissenters, and look to discover the Fourteenth Amendment's original intent, the analysis would inexorably focus on the Privileges or Immunities Clause. That, after all, is the incorporating vehicle understood and intended by the Fourteenth Amendment's framers and their public. Respondent's proposal pre-judges the outcome of an historical analysis on the merits. It is simply not possible to examine the Fourteenth Amendment's history without confronting these words.

Indeed, Respondent dedicates a great portion of its brief responding to a Privileges or Immunities argument it wishes the Court not to consider. The argument is unavailing.

Respondent correctly notes there is no complete “consensus” on whether the Privileges or Immunities Clause incorporates the Bill of Rights. Respondent’s Br., 27. The nation’s faculty of over 200 law schools generates many interesting and provocative views, but the notion that *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) correctly decided this issue lies decidedly outside the mainstream of modern legal thought. See Pet., 22; Br. of Constitutional Scholars. This is one debate worthy of this Court’s engagement.

Several scholars have undertaken exhaustive study of just how publicly the debate over the Fourteenth Amendment was conducted. The results overwhelmingly refute Respondent’s claim that the public was unaware of the Amendment’s incorporation effect. The newspapers of the day were replete with Congressional speeches describing incorporation, and consequently, letters to the editor and editorial commentary on the topic, to say nothing of magazine expositions and the views of every single notable constitutional scholar writing from before ratification until the time of *Slaughter-House*. David Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. 695 (2009); Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the*

*Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio St. L.J. 1509 (2007); Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57 (1993). Again, this is the sort of evidence this Court would not ignore in reviewing the Fourteenth Amendment's meaning.

Finally, to the extent this Court may consider original intent, Respondent's dismissal of the "few members of Congress," at 29, cited by Petitioners, is unavailing. These "few" individuals were the leaders of the House and Senate who formed the Joint Committee on Reconstruction, and wrote and sponsored the Fourteenth Amendment. None of their statements were ever contradicted. If intent is a benchmark, theirs is the most relevant.

#### **IV. Overruling *Slaughter-House* Remains Imperative.**

Respondent oddly claims that overruling *Slaughter-House* is "unnecessary" because most enumerated rights have been incorporated under the Due Process Clause. Respondent's Br., 22. But incorporating the Second Amendment, the right at issue in this case, is, in fact, "necessary" – and in the manner intended and understood by the Fourteenth Amendment's framers.

The Second Amendment aside, it is also untrue that "the Court's existing jurisprudence on selective incorporation has, for many decades, adequately

[protected] individual constitutional rights.” *Id.*, 22-23. As the Fourteenth Amendment’s chief Senate sponsor famously declared, the Fourteenth Amendment’s Privileges or Immunities Clause reached the same rights described by Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. 1823). Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (Sen. Howard). Many such rights are today vigorously protected under Article IV, Section 2 from residence-based infringement, *see, e.g. Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), but enjoy no meaningful protection when otherwise violated.

Despite manifesting complete resistance to *Heller*’s common use test, *e.g.*, Respondent’s Br., 9, Respondent insists the Privileges or Immunities precedent must be preserved as a matter of *stare decisis*. But *stare decisis* is not a compelling consideration when plainly erroneous precedent deprives individuals of their fundamental civil rights. “The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role than that which was contemplated by its framers when they added the Amendment to our constitutional scheme.” *Malloy v. Hogan*, 378 U.S. 1, 5 (1964).

When “[m]embers of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding” of constitutional text, this Court has been open to doing so. *Crawford v. Washington*, 541 U.S. 36, 60 (2004). And in the process, this Court affords no weight to

deeply entrenched, yet wholly illegitimate regulatory frameworks. *See, e.g. Brown v. Board of Education*, 347 U.S. 483 (1954). That the Bill of Rights naturally burdens government officials is no reason for ignoring it. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009); *Gideon v. Wainwright*, 372 U.S. 335 (1963). True, it “is easy to apply” a rule under which people enjoy almost no rights under the Fourteenth Amendment’s opening directive to the States. Respondent’s Br., 22. But that is hardly a point in such a rule’s favor.

Simply put: States have no legally cognizable reliance interests in violating constitutional rights.

Unlike the obligations to provide counsel to indigents and to produce adverse witnesses for confrontation, respecting Second Amendment rights might reduce governmental burdens associated with enforcing unconstitutional laws and responding to criminal violence averted by the availability of self-defense. But the debate over whether the right to arms is a net boon or burden to government is irrelevant. The statutes at issue here are of more recent vintage than those struck down in *Heller* without regard to any improper reliance placed upon them by District of Columbia officials. And it makes no sense to deny an individual the means of self-defense to which she is otherwise constitutionally entitled, merely because others have historically been denied that right.

Nor would possible incorporation of the Grand Jury Clause or civil jury right prove problematic. When the Fourteenth Amendment was ratified, seventy-eight percent of the states guaranteed a grand jury right, and approximately eighty-nine percent of Americans lived in states that at least utilized the grand jury. Bryan Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73*, 18 J. Contemp. Leg. Issues \_\_, <http://ssrn.com/abstract=1354404> at 59-61 (forthcoming 2009). In contrast, at the time this Court applied the exclusionary rule to state courts pursuant to the Fourth Amendment, twenty-four to twenty-eight states had rejected it. *Id.*, n.181 (citation omitted).

The District of Columbia's courts operate under the Seventh Amendment without issue, and the federal courts are not lacking for criminal indictments.<sup>4</sup> If these constitutional requirements prove unduly burdensome, the people may remove them in the usual way. U.S. Const. art. V.

Finally, Petitioners are constrained to respond to the claim made by some that this Court can be simultaneously faithful to *Slaughter-House* and incorporate the Bill of Rights through the Privileges or Immunities Clause. Respondent's Br., 20 n.7. That is more of a policy than a legal argument, as neither the

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<sup>4</sup> The Grand Jury requirement is significantly limited to "capital, or otherwise infamous crime[s]," U.S. Const. amend. V.

plain words nor logic of *Slaughter-House* permit such a construction. Were it plausible, the theory might have been raised in *Cruikshank*, decided by eight of the nine *Slaughter-House* justices just three years after that opinion. But *Cruikshank* accurately followed *Slaughter-House* in excluding rights that pre-exist the Constitution from the Privileges or Immunities Clause, and this Court subsequently engaged in over a century of debate over substantive due process without re-imagining *Slaughter-House*. Nothing in the text or history of the Fourteenth Amendment points to selective incorporation of Privileges or Immunities.

Instead of adopting an ever-more tortured interpretation of the Privileges or Immunities Clause, this Court should apply the Fourteenth Amendment in accordance with its original meaning.



### CONCLUSION

For the reasons stated, the Court should grant the petition.

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