NO. _____

IN THE
Supreme Court of the United States

JAMES M. MALONEY,

Petitioner,

V.

KATHLEEN A. RICE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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June 26, 2009

QUESTIONS PRESENTED

A New York statute makes the possession of a type of weapon known as nunchaku a criminal misdemeanor. Petitioner was arrested in his home and charged with possessing nunchaku. No other conduct, such as misusing the weapon or bearing it in public, was involved. The possession charge was ultimately dropped, though Petitioner was required to destroy the nunchaku.

Desiring to continue freely exercising his individual constitutional right to keep such arms in his home for self-defense, Petitioner brought this declaratory judgment action seeking to have the New York statute pronounced invalid insofar as it applies to criminalize the mere possession of nunchaku in one's home. The Second Circuit held that under this Court's precedent, it was constrained to rule that the Second Amendment does not apply against the States, and dismissed his complaint.

The questions presented are:

1. Whether the Second Amendment's individual right to keep and bear arms is incorporated against the States through the Due Process Clause of the Fourteenth Amendment.

2. Whether the Second Amendment's individual right to keep and bear arms is a privilege or immunity of citizens of the United States applicable to the States under the Privileges or Immunities Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioner, James M. Maloney, was plaintiff-appellant below. Respondent, Kathleen A. Rice (in her official capacity as District Attorney of Nassau County, New York) was defendant-appellee below.

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INTRODUCTION

"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. Writing in 1803, the esteemed editor of the "American Blackstone," William and Mary law professor St. George Tucker proclaimed that this constitutional guarantee "may be considered as the true palladium of liberty . . . . The right of self-defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible."[1] Such confinement was never to be imposed by a ruling class on the "compound republic of America,"[2] where the Founders sought to shelter the right of self-defense from degradation both by means of constitutional structure and the Bill of Rights, and where similar state constitutional or common law rights were and are legion. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEXAS REV. OF L. & POL. 191, 205 (2006) (44 States have constitutional guarantees similar to the Second Amendment).

Both the history of the 1866 Freedmen's Bureau Act and the 1868 Fourteenth Amendment to the

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[1] 1 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA, at App. 300 (1803), *quoted in District of Columbia v. Heller*, 128 S. Ct. 2783, 2805 (2008)).

[2] THE FEDERALIST No. 51 at 356, No. 62 at 422 (E.G. Bourne, ed. 1901).

Constitution reveal that the Reconstruction Congress still firmly believed, decades after the Founding, that the palladium[3] of the Second Amendment is most prominent in protecting the lawful possession of weapons kept for self-defense in the home. "[T]he founding generation 'were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense.'"[4] The citizen's "right to bear arms for the defense of himself and family and his homestead" was "indispensable."[5] "The great object of the first section of this [Fourteenth] amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees [among which are]," CONG. GLOBE, 39th Cong., 1st Sess., 2766 (1866) (Sen. Howard), "the right to keep and to bear arms," *id.* at 2765.

* * *

In this case, the Court should use its

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[3] Justice Story also likened the Second Amendment to the warding effect of the statue of Pallas Athena in classical Troy, calling the Second Amendment a "strong moral check against the usurpation and arbitrary power of rulers" — an attainable goal only if the right to keep and bear arms is an individual right that stands free of military service to the government. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1897, at 620 (4th ed. 1873), *quoted in Heller*, 128 S. Ct. at 2840 (Stevens, J., dissenting).

[4] *Heller*, 128 S. Ct. at 2810 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis)).

[5] *Heller*, 128 S. Ct. at 2811 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 1182 (1866) (Sen. Pomeroy)).

discretionary authority to settle a question that has divided the Courts of Appeals in the wake of *District of Columbia v. Heller* — whether the ratification of the Fourteenth Amendment in 1868 made clear that the Second Amendment liberty, first chartered in writing in 1791, thereby became fully applicable against the States. For, in this case, Petitioner James M. Maloney seeks a judicial declaration vindicating his constitutional right to self-defense and to the possession of weapons in his home against a modern incursion by the State of New York. Three decades ago New York criminalized the mere possession of an entire category of blunt weapons predominantly designed for defensive purposes. Consistent with the Fourteenth Amendment, state statutes that criminalize the simple ownership of a personal weapon of self-defense cannot stand. They are a foundational affront to the liberties of a free people. *Heller*, 128 S. Ct. at 2800 (equating the Second Amendment's phrase "security of a free State" to the "security of a free polity").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 554 F.3d 56 (2d Cir. 2009), and reprinted in the Appendix ("App.") at 1a-7a.

The United States District Court for the Eastern District of New York's unpublished order denying Petitioner's motion for summary judgment and granting Petitioner leave to file an amended complaint is reprinted at App. 34a-44a. The district court's second order dismissing Petitioner's amended complaint is reported at 470 F. Supp. 2d 205 (E.D.N.Y. 2007) and reprinted at App. 14a-33a. The

district court's unpublished order denying Petitioner's motion for reconsideration is reprinted at App. 8a-13a.

JURISDICTION

The Second Circuit entered judgment on January 28, 2009 in an appeal arising from a case premised on federal-question jurisdiction. On April 20, 2009, Justice Ginsburg granted Petitioner's request for an extension of time to file this petition for a writ of certiorari, up to and including June 26, 2009. This Court has jurisdiction under 28 U.S.C. § 1254.

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Second Amendment to the Constitution of the United States provides:

> 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.

The first section of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

> jurisdiction the equal protection of the laws.

The ban on possession of certain weapons in the New York Penal Law Section 265.01 provides in relevant part:

> A person is guilty of criminal possession of a weapon in the fourth degree when:
>
> (1) He or she possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or 'Kung Fu star.'
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> Criminal possession of a weapon in the fourth degree is a class A misdemeanor.

New York Penal Law Section 265.00(14) defines a "chuka stick" as follows:

> [A]ny device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking. . . .

New York Penal Law Section 265.20 sets out numerous exemptions to New York Penal Law

Section 265.01. Section 265.20 is reprinted in the Appendix at 84a. As described in *Bach v. Pataki*, 408 F.3d 75, 78-79 (2d Cir. 2005), New York Penal Law Article 400 provides for the licensing of firearm use, which is one of the exceptions to New York Penal Law Section 265.01. New York Penal Law § 265.20(3) (McKinney 2008). None of the defined exemptions apply to "chuka sticks," although New York Penal Law Section 265.20[a][1b] contains an exception that has been interpreted to allow police officers to possess such weapons. *See also* 1980 N.Y. Op. Atty. Gen. (Inf.) 247 (Dec. 8, 1980). Section 265.01 is not limited by a scienter requirement. *People v. Davis*, 446 N.Y.S. 2d 159, 161 (N.Y. Crim. Ct. 1981). The provision thus creates a strict-liability crime.

STATEMENT OF THE CASE

A. Background

1. Nunchaku are a martial-arts weapon consisting of two sticks connected together at one end by a short length of chain or rope. As the district court found, "the martial arts generally, and perhaps use of nunchaku in particular, have a rich history and are culturally significant to many people in many parts of the world." App. 30a. The use of nunchaku as a weapon appears to have originated in Okinawa in the early seventeenth century around the time of a Japanese invasion of that island. Stephen Halbrook, *Oriental Philosophy, Martial Arts and Class Struggle*, 2 SOCIAL PRAXIS, 139-40 (1974) [hereafter "*Martial Arts* at __"]; *see also* GEORGE KERR, OKINAWA: THE HISTORY OF AN ISLAND PEOPLE 156-160 (1958).

To suppress the possibility of internal dissent in a type of abuse of power familiar to the Founding Fathers from English history, the Japanese government prohibited the conquered from carrying or possessing weapons. *Id.*; *see also* PAUL CROMPTON, THE COMPLETE MARTIAL ARTS 63 (1989) [hereafter "CROMPTON at __"]. In response, martial arts systems were developed using non-prohibited items such as farm tools. *Martial Arts* at 140; CROMPTON at 63. Nunchaku were among those improvised weapons, evolving from a rice-threshing device or from a crude bridle for an agricultural beast of burden. *Martial Arts* at 140; *More Police are Using Nunchakus*, PHILA. INQUIRER, A05 (Feb. 5, 1989) [hereafter "*Police Nunchakus*, at __"].

2. Although nunchaku can be used offensively, it originated as and is utilized by modern martial artists primarily as a means of self-defense. *Martial Arts* at 140. Unsurprisingly, then, nunchaku are also currently used by over two-hundred police forces across the country for control of and/or self-defense against unarmed attackers.[6] As noted above, the

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[6] *See generally Police Nunchakus* ("Hundreds of police officers now swear by the weapon."). For instance, Sergeant Kevin Orcutt, a Colorado policeman, has developed a popular training system for nunchaku use by law enforcement officers as a non-lethal technique to control and subdue. Since 1985, nearly 200 law enforcement agencies across the country have employed his "Orcutt Police Nunchaku system." *See* <<http://www.orcuttopn.com/about.htm>> (last visited June 25, 2009). The Denver Police Department, *inter alia*, has touted the use of Orcutt's system. *See Denver Police Department 2000-2002 Accomplishments*, 15 (Jan. 1, 2003), *available at* <<http://www.denvergov.org/Portals/295/documents/Accompfinal.pdf>> (last visited June 25, 2009).

New York Attorney General has determined that state and municipal police in New York may possess and use nunchaku in the course of their duties. *Supra* at 6.

3. New York first proposed criminally banning the possession or use of nunchaku in 1973, but the ban did not pass until 1974. App. 76a. Contrary to the weapon's history as a device to subdue[7] and its later authorized use by New York police forces for the same purpose, state legislators concluded that a pair of nunchaku "is designed primarily as a weapon and has no purpose other than to maim, or in some instances, kill," App. 81a. *See also* App. 83a ("There is no conceivable innocent use[] for this device, and accordingly, there can be no possible invasion of anyone's right to use it innocently"). Oddly, a significant impetus for the prohibition on nunchaku possession appears to have been negative perceptions of the weapon formed from the 1973 martial-arts film, *Enter the Dragon*, starring Bruce Lee. *See, e.g.,* CROMPTON at 63; App 82 (excerpts from the New York Governor's "Bill Jacket").

There was an important minority view, however. Archibald Murray of the State of New York's Executive Department's Division of Criminal Justice Services questioned the proposed legislation. Mr. Murray noted that nunchaku have peaceable and non-criminal uses in martial-arts training. "In view

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[7] *See also* App. 66a ("The nunchaku, unlike most other weapons, including firearms, knives, swords and all other penetrating weapons, is capable of being used in a restrained manner such that an opponent may be subdued without resorting to the use of deadly physical force.").

of the current interest and participation in these activities by many members of the public, it appears unreasonable — and perhaps even unconstitutional — to prohibit those who have a legitimate reason for possessing chuka sticks from doing so." App. 77a-78a.

Mr. Murray also suggested various less-restrictive alternatives for regulating illegitimate nunchaku use, including the addition of a scienter requirement. App. 78a. The New York County Lawyers Association also recommended that the Governor veto the anti-nunchaku bill, noting that the bill would make "mere possession (even absent criminal intent) a criminal offense" and that "a more narrowly drawn statute can be fashioned" to achieve the legislature's desire "to prohibit the use of nunchakus in criminal conduct." App.74a.

Nevertheless, the New York State Assembly enacted (and Governor Malcolm Wilson signed) the anti-nunchaku legislation that is presently codified in New York Penal Law Section 265.01. 1974 N.Y. Laws 895 (chapter 179) (enacted Apr. 16, 1974) (effective Sept. 1, 1974).

In its present form, Section 265.01 makes any possession of a listed weapon, including nunchaku and all firearms, a misdemeanor (termed "criminal possession of a weapon in the fourth degree"). N.Y. Penal Law § 265.01(1) (McKinney 2008). The elements of Section 265.01(1) do not include proving the carrying or use of nunchaku. A violation occurs automatically under this section when an individual merely "possesses any . . . chuka stick." App. 36a-37a.

4. Petitioner James M. Maloney has practiced

various forms of martial arts involving nunchaku since he was a teenager. App. 64a. He also maintains a strong interest in continuing to do so, and cannot conveniently relocate from Nassau County, New York to a State that does not impose a *per se* ban on private nunchaku use. App. 65a.

As Mr. Maloney averred in his complaint, he "first became interested in the nunchaku, and began training with it in 1975, in part because the weapon is particularly effective in defense against an assailant armed with a knife or other sharp instrument, and in part because [his] father, John Maloney, had been fatally stabbed in 1964 . . . ." App. 64a-65a. As a trained New York City 911 Emergency Medical Services system paramedic, Mr. Maloney has also personally observed numerous stab wounds inflicted by knives or other sharp objects.

Currently, Mr. Maloney is an officer in the U.S. Naval Reserve, a member in good standing of the bar of New York and various federal bars, and a practicing maritime lawyer, holding a J.D. from Fordham University and an LL.M. from the New York University School of Law.

5. Following a dispute between Mr. Maloney and a telephone line worker who was working on a platform outside Mr. Maloney's home on August 23, 2000, the police were summoned and eventually admitted to his residence, whereupon they conducted a search and found the nunchaku that Mr. Maloney owned for purposes of self-defense and martial-arts training. *Maloney v. County of Nassau*, No. 03-CV-4178 (SLT)(MLO), 2007 U.S. Dist. Lexis 71162, at *2 (E.D.N.Y. Sept. 24, 2007).

Police had become involved after the telephone

worker claimed that Mr. Maloney had pointed a rifle at him from within the home. *Id.* at *2. When the police arrived at Mr. Maloney's home, they did not have a search warrant, so Mr. Maloney repeatedly refused them entry. *Id.* at *3. A team of police surrounded his dwelling and nonetheless persisted — for nearly twelve hours — in calling for Mr. Maloney to exit his home and surrender to them. After consulting with counsel and his rabbi, Mr. Maloney finally surrendered into the custody of police at approximately 2 a.m. on the morning of August 24, 2000. *Id.*

Nassau County and Mr. Maloney dispute the circumstances surrounding Mr. Maloney's wife's decision to later consent to the police entering their home. As the Eastern District of New York noted, "[i]t is readily apparent from the face of the documents and from the Declaration of [Mr. Maloney's wife] . . . that there are substantial issues concerning the scope, voluntariness and validity of [her] consent." *Id.* at *22.

Police searched the home, finding the nunchaku under a couch. Police also seized from Mr. Maloney's locked safe three revolvers, two inoperable and one operable, all purchased legally by Mr. Maloney in either Florida or New Jersey years before. Regarding Mr. Maloney's interaction with the telephone worker, the Supreme Court of New York for New York County concluded as follows: "It is undisputed . . . that petitioner did not have a rifle, and that he had not pointed any weapon at the telephone worker." *In re Maloney*, No. 101898/06, 2006 N.Y. Misc. LEXIS 2464, at *6 (N.Y. Sup. Ct. July 16, 2006).

6. "On August 24, 2000, the plaintiff was arrested and charged with six violations of the New York Penal Law, including one count of criminal possession of a weapon in the fourth degree for possessing a nunchaku in his home in violation of New York Penal Law § 265.01." App. 16a-17a. As the District Court below recognized, the criminal possession charge against Petitioner was "based solely on in-home possession, and not supported by any allegations that [he] had used the nunchaku in the commission of a crime; that he carried the nunchaku in public; or engaged in any other prohibited conduct in connection with said nunchaku. Thus, the only criminal activity alleged against [him] was his possession of the nunchaku in his home." App. 17a.

7. Seeking to call a halt to an unfortunate incident that had upended his life and exposed him to adverse media coverage for more than two years, on January 28, 2003 Mr. Maloney agreed to plead to a single disorderly conduct violation — an offense not amounting to a crime under New York law. App. 17a; New York Penal Law Sections 10.00(3), (6) & 240.20. Under the agreement, the criminal charges against Mr. Maloney were dismissed. App. 17a. Mr. Maloney did note at allocution on the violation charge that the resulting search of his home had uncovered a .38 caliber revolver. *Maloney v. Anton Community Newspapers, Inc.*, 16 A.D. 3d 465, 466 (N.Y. App. Div. 2005). But the New York Supreme Court later specifically concluded that the "'underlying facts and circumstances' [concerning the revolver also involved] no more than mere possession." *In re Maloney*, 2006 N.Y. Misc. LEXIS 2464, at *6. After receiving Mr. Maloney's plea, the

court ordered the "destruction of the nunchaku confiscated at the time of his August 24, 2000 arrest [and] a fine in the amount of $310." App. 18a.

B. Proceedings Below

1. To vindicate his constitutional rights, Petitioner filed a *pro se* complaint on February 18, 2003 in the United States District Court for the Eastern District of New York. Mr. Maloney sought a declaration "that N.Y. Penal Law §§ 265.00 through 265.02 are unconstitutional insofar as they punish possession of nunchakus in one's home." App. 2a-3a. From the outset of the case, Mr. Maloney has maintained that the provisions of New York law flatly banning nunchaku violate the Second Amendment as applicable against the States pursuant to the Due Process and/or Privileges or Immunities Clauses of the Fourteenth Amendment. App. 68a, 70a-71a (¶¶ 31-32, 39-40, 43-44).

On August 31, 2005, the District Court denied Petitioner's motion for summary judgment, reasoning that Petitioner lacked standing to pursue claims against the Attorney General. App. 43a The District Court, however, granted Petitioner leave to file an amended complaint. App. 43a-44a.

On September 3, 2005, Petitioner filed his amended complaint, this time adding as a defendant the District Attorney of Nassau County, who had undisputed authority to enforce the statutory bar on the possession of nunchaku by Mr. Maloney at his residence. App. 45a-60a.

2. The Eastern District of New York dismissed Petitioner's amended complaint on January 17, 2007. App. 32a. The district court found that the

nunchaku prohibition did not abridge Petitioner's rights to keep and bear arms under the United States Constitution because the Second Amendment "imposes no limitation on New York State's ability to ban the possession of certain weapons, including the nunchaku." App. 31a. The district court relied on controlling precedent in the Second Circuit, which in turn relied on this Court's decision in *Presser v. Illinois*, 116 U.S. 252, 265 (1886), to hold that "the Second Amendment's right to keep and bear arms imposes a limitation on federal, not state, legislative efforts." App. 31a (quoting *Bach v. Pataki*, 408 F.3d at 84). On May 14, 2007, the district court denied reconsideration. App. 13a.

3. On appeal, the Second Circuit affirmed the dismissal of Mr. Maloney's complaint in a brief *per curiam* opinion. App. 1a-7a. Like the district court, the Second Circuit relied on *Presser* to find "that the Second Amendment applies only to limitations the federal government seeks to impose on this right." App. 4a. The Second Circuit opined:

> [W]e must follow *Presser* . . . . [T]he Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.

App. 4a-5a (citing *Bach* 408 F.3d at 86) (internal citations omitted).

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED BY THE QUESTIONS OF WHETHER THE SECOND AMENDMENT IS INCORPORATED AGAINST THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND WHETHER THE COURTS OF APPEALS HAVE POWER EVEN TO REACH THAT ISSUE.

In the wake of this Court's decision in *Heller* that the Second Amendment confers an individual right to keep and bear arms, 128 S. Ct. at 2799, 2816, three Circuits have addressed the question of whether the Second Amendment applies against the States. Each has approached the question very differently.

1. In a challenge to an Alameda County, California ordinance prohibiting the possession of firearms or ammunition on county property, the Ninth Circuit concluded that it was free to reach the issue of whether the Second Amendment was selectively incorporated against the States by the Fourteenth Amendment's Due Process Clause because this Court had never resolved that question. Instead, the Ninth Circuit emphasized that this Court had explicitly rejected only arguments for the ***direct application*** of the Second Amendment to the States and incorporation through the Privileges or Immunities Clause. *Nordyke v. King,* 563 F.3d 439, 447-49 (9th Cir. 2009).

After an extensive historical and legal analysis, the Ninth Circuit held that the Second Amendment was incorporated against the States under the Due Process Clause's selective incorporation doctrine

because it was (i) a "fundamental right" (ii) "necessary to an Anglo-American regime of ordered liberty," as well as (iii) "deeply rooted in this Nation's history and tradition." *Id.* at 449-457. The Ninth Circuit nevertheless rejected the Second Amendment challenge on the merits to the Alameda County ordinance restricting gun possession on county property under the "sensitive places" exception referenced in *Heller*. *Nordyke*, 563 F.3d at 459-460 (quoting *Heller*, 128 S. Ct. at 2816-17) ("nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings").

Judge Gould concurred fully in the *Nordyke* majority opinion written by Judge O'Scannlain. But Judge Gould also emphasized his view that modern America in the international Age of Terrorism needs the Second Amendment every bit as much as it did in the Age of Enlightenment:

> The right to bear arms is a bulwark against external invasion. We should not be overconfident that oceans on our east and west coasts alone can preserve security. We recently saw in the case of the terrorist attack on Mumbai that terrorists may enter a country covertly by ocean routes, landing in small craft and then assembling to wreak havoc.
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>
> [T]he right to bear arms is also a protection against the possibility that even our own government could degenerate into tyranny, and though

> this may seem unlikely, this possibility should be guarded against with individual diligence.

Nordyke, 563 F.3d at 464 (Gould, J., concurring).

2. The Seventh Circuit disagreed with the Ninth Circuit, noting that it was bound by Supreme Court precedent to hold "that the Second Amendment applies only to the Federal Government." *National Rifle Ass'n of Am., Inc. v. City of Chicago*, --- F.3d ---, No. 08-4241, 2009 WL 1515443, at *2 (7th Cir. 2009) (quoting *Heller*, 128 S. Ct. at 2813, n.23). "The Supreme Court has rebuffed requests to apply the second amendment to the states. *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois* [and] *Miller v. Texas*, 153 U.S. 535 (1894)." *National Rifle Ass'n*, 2009 WL 1515443, at *1. The Seventh Circuit's case involved consolidated challenges to Chicago and Oak Park, Illinois ordinances outright prohibiting or placing registration limitations on firearm possession — effectively banning most handguns. *National Rifle Ass'n*, 2009 WL 1515443, at *1.

Specifically, the Seventh Circuit rejected the Ninth Circuit's view that because *Cruikshank*, *Presser*, and *Miller* were decided before the advent of twentieth-century selective incorporation doctrine, the lower federal courts were free to apply the Second Amendment to the States. Writing for the court, Judge Easterbrook argued: "If a court of appeals could disregard a decision of the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to

come up with a novel argument." *Id.* (citing *Rodriguez de Quijas v. Shearson/American Expr., Inc.*, 490 U.S. 477, 484 (1989)).

Immediately after extolling the virtues of judicial restraint at the circuit level, however, the Seventh Circuit ironically launched into four observations in *dicta*, each seriously questioning whether applying the Second Amendment to the States would be appropriate. Judge Easterbrook asserted:

> (1) selective incorporation cannot "be reduced to a formula" that resorts to historical analysis;[8]
>
> (2) reliance on Blackstone cannot make the historical case for incorporation because Blackstone held many legal opinions that American courts have never regarded as correct;[9]
>
> (3) this Court could perhaps conclude that (a)

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[8] "*Palko v. Connecticut*, 302 U.S. 319, 325 (1937) . . . was overruled in an opinion that paid little heed to history. *Benton v. Maryland*, 395 U.S. 784 (1969)." *National Rifle Ass'n*, 2009 WL 1515443, at *3.

[9] "Blackstone also thought determinate criminal sentences (e.g., 25 years, neither more nor less, for robbing a post office) a vital guarantee of liberty. That's not a plausible description of American constitutional law." *National Rifle Ass'n*, 2009 WL 1515443, at *3. Judge Easterbrook's disdain for historical analysis of American constitutionalism grounded on Blackstone should be contrasted with this Court's use of Blackstone in *Heller* and elsewhere. For instance, the *Heller* majority invoked Blackstone at least eight times. *See* 128 S. Ct. at 2792, 2798-2800, 2805, 2807, 2816-17. Justice Stevens's dissent in *Heller* also countered multiple times with its own invocations of Blackstone. *See* 128 S. Ct. at 2837-38, 2845 (Stevens, J., dissenting).

States should be able to decide that protecting long gun rights is more important to vibrant militias than handgun rights, or (b) States should be able to enact laws requiring "that people cornered in their homes must surrender rather than fight back,"[10] *National Rifle Ass'n*, 2009 WL 1515443 at *3-*4; and

(4) "[f]ederalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon." *Id.* at *4.[11]

3. Issued before either *Nordyke* or *National Rifle Association*, the Second Circuit's decision in this case represents the remaining constituent of the three-circuit split in post-*Heller* incorporation authority.[12] In its *per curiam* opinion, the Second Circuit neither attempted to apply selective

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[10] The Seventh Circuit's speculations should be compared to Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences,* 91 VA. L. REV. 999, 999 (2005) (noting that every State recognizes self-defense as a defense to crimes of personal violence).

[11] This position seems to have matters precisely backward — the Fourteenth Amendment is a constraint on the parameters of federalism; federalism does not confine the reach of the Fourteenth Amendment.

[12] If pre-*Heller* decisions are counted, three circuits holding that the Second Amendment does not apply against the States must be added to the split. *See Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 539 n.18 (6th Cir. 1998); *Love v. Pepersack,* 47 F.3d 120, 123-24 (4th Cir. 1995); *Thomas v. Members of the City Council of Portland,* 730 F.2d 41, 42 (1st Cir. 1984) (per curiam).

incorporation doctrine, nor venture its views on such matters in *dicta*. Instead, it invoked the *Rodriguez de Quijas* principle in a straightforward fashion to find that it was bound by this Court's trilogy of cases in *Cruikshank*, *Presser*, and *Miller*. "It is settled law, however, that the Second Amendment applies only to limitations the federal government seeks to impose on this right." App. 4a. This was because *Heller* "did not present the question of whether the Second Amendment applies to the states." *Id.* (citing *Heller*, 128 S. Ct. at 2813 n.23).

Judged against its sister circuits, the Second Circuit would seem to have taken the most defensible approach. Judicial restraint and the ready allegiance the lower courts must confess to the superintendence of this Court require that if *Cruikshank, Presser*, and *Miller* are to be pronounced overtaken by modern selective incorporation doctrine under *Duncan v. Louisiana*, 391 U.S. 145 (1968), or substantive due process doctrine under *Washington v. Glucksberg*, 521 U.S. 702 (1997) — the two strands of constitutional analysis on which *Nordyke* is grounded — only this Court may do so.[13]

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[13] Suggesting, however, that reasonable minds may differ as to how the *Rodriguez de Quijas* principle maps on to the issue of this Court's precedent regarding Second Amendment applicability against the States, it should be noted that the Fifth Circuit announced a similar analysis before the Ninth did (albeit in *dicta*, since the Fifth Circuit was dealing with the constitutionality of a federal gun statute). *See United States v. Emerson*, 270 F.3d 203, 221 n.13 (5th Cir. 2001) ("As these holdings [in *Cruikshank*, *Presser*, and *Miller*] all came well before the Supreme Court began the process of incorporating

But do so it must. In light of this circuit split following closely on the heels of *Heller*, the Court must now revisit — for the first time since the nineteenth century — the issue of whether Second Amendment rights apply against the States.

Deep confusion owing to what is, in effect, a three-way split in the Courts of Appeals presently reigns:

- The Second Circuit has held that the *Rodriguez de Quijas* principle of judicial hierarchy, together with *Cruikshank*, *Presser*, and *Miller*, precludes lower court incorporation of the Second Amendment.

- The Seventh Circuit agrees, but also appears to think, in significant tension with *Heller*, that the right of self-defense by force of arms is quaint and that to recognize it as applicable to the States would represent an assault on federalism.

- Finally, the Ninth Circuit believes that *Rodriguez de Quijas* is inapplicable and that the historical and legal case for Second Amendment incorporation under this Court's modern lines of due process cases is clear.

The question of applicability of *Rodriguez de*

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certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and as they ultimately rest on a rationale equally applicable to all those amendments, none of them establishes any principle governing any of the issues now before us.").

Quijas means that even if the Ninth Circuit vacates the *Nordyke* panel decision and grants rehearing *en banc*,[14] this Court should still take up the pressing constitutional issue of the Second Amendment's reach without delay. For if *Rodriguez de Quijas* applies here, then a circuit split would normally be impossible. Hence, this Court should not hold up resolution of the issue of incorporation to see if further conflict develops (or persists). The residents of the 50 States should not be forced to wait for one or more circuits to hazard disobedience to *Cruikshank*, *Presser*, and *Miller* (and to *Rodriguez de Quijas* in the process), before they can know if they are truly entitled to partake in the same precious Second Amendment liberties that District of Columbia residents now enjoy under *Heller*.

4. While the Court should grant certiorari in this case because of the conflicts between the circuits on the questions of (i) whether the Due Process Clause selectively incorporates the Second Amendment and (ii) how *Rodriguez de Quijas* applies to that issue, this case also readily meets the test of exceptional importance. "[W]hatever else [the Second Amendment] leaves to further evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 128 S. Ct. at 2821. Citizens of the 50 States have their own hearths and homes to defend that are every bit as worthy of protection as those of the District's residents.

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[14] *See* Order, in *Nordyke v. King*, No. 07-15763 (9th Cir. May 18, 2009) (calling for simultaneous briefing on whether to rehear the case *en banc*).

5. Laws in the South prohibiting "freedmen" from keeping any arm were typical during and following the Civil War era. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 345 n.176 (1991) (highlighting a Louisiana statute declaring that "[n]o Negro who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons . . ." were common).

As this Court recognized in *Heller*, an outcry over the routine disarmament of the freedmen ensued. As one newspaper declared, "[a]ll men, without distinction of color, have the right to keep arms to defend their homes, families or themselves." *Editorial*, THE LOYAL GEORGIAN (Augusta), at 3, col. 4 (Feb. 3, 1866). Statements such as these were prevalent in the debate surrounding the adoption of the Fourteenth Amendment and its statutory precursors. Senator Raymond, for example, noted that:

> [A freed slave and his descendants have] every right which you or I have as citizens of the United States under the laws and constitution of the United States . . . . He has defined status; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms.

CONG. GLOBE, 39th Cong., 1st Sess. 1266 (Mar. 8, 1866) (emphasis added).

Accordingly, it is beyond dispute that the Fourteenth Amendment was adopted to protect newly freed slaves from the depredations of the

formerly Confederate States, including specifically their disregard for the right to keep and bear arms. The proponents of the Fourteenth Amendment made clear their belief that "the right to keep and to bear arms" was to be protected under Section 1 of the Amendment. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Sen. Howard).

Just as "the 5th and 14th Amendments of the American Constitution are an echo of the Magna Carta,"[15] so the ratification history of the Fourteenth Amendment shows that it was intended to extend that echo of freedom to African-Americans (and all citizens in the several States), putting them behind the aegis of Second Amendment protection, whether the threat to such rights was posed by federal or state incursion.

6. *Heller*'s logic and its careful survey of history will not permit the Second Amendment to be shunted to the side and relegated to second-class status in an arbitrary pecking order of constitutional rights. *Compare Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth

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[15] The full quotation is from a speech by Winston Churchill to the American Bar Association: "Last week you visited Runnymede. There was the foundation, on which you have placed a monument. It has often been pointed out that the 5th and 14th Amendments of the American Constitution are an echo of the Magna Carta . . . ." Winston Churchill, *Liberty and the Law* (given July 31, 1957), *in* 8 ROBERT RHODES JAMES, ed., WINSTON CHURCHILL: HIS COMPLETE SPEECHES: 1897-1963, 8682 (1974).

Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

With limited exception,[16] every other individual right enumerated in the first eight amendments contained in the Bill of Rights has been deemed incorporated against the States through the Fourteenth Amendment. There is simply no basis to deny the Second Amendment the same status. At the very least, there is every reason for this Court to decide that question now, whatever the answer.

7. Either or both of the pending petitions for certiorari on the Second Amendment incorporation issues arising out of *National Rife Association* would be fitting for this Court to grant because those cases present the same Fourteenth Amendment issues concerning applicability of the Second Amendment to the States invoked in this petition. Indeed, consolidating those cases with this case and granting certiorari over all of them as a unit would put before the Court the fullest possible range of factual and legal settings in which to consider and resolve the burning issue of Second Amendment incorporation. *Compare, e.g.*, *Granholm v. Heald*, 544 U.S. 460, 465 (2005); *Employment Div., Dep't of Human Res. of Or. v. Smith*, 485 U.S. 660, 663 n.4 (1988).

If one case must be selected, however, this case should be the main vehicle. The statute at issue in

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[16] *See, e.g., Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916) (jury trials in civil cases); *Hurtado v. California*, 110 U.S. 516 (1884) (requirement of indictment by grand jury); *Murphy v. Hunt*, 455 U.S. 478 (1982) (protection against excessive bail and fines).

this case, N.Y. Penal Law Section 265.01, bans possession of the prohibited categories of weapons, and nothing more.[17] Moreover, the Petitioner here, Mr. Maloney, challenges the statute merely to the extent it prohibits possession in the home, consistent with the tempest-in-a-teapot incident police inflicted upon him in 2000, surrounding his home for twelve hours on a false suspicion, and then charging him after a warrantless search with nunchaku possession.

Finally, the Court will remember that it granted certiorari over quite a limited question presented in *Heller*:

> Petition for a writ of certiorari . . . granted limited to the following question: Whether the following provisions [of the] D.C. Code . . . violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish ***to keep*** handguns and other firearms for private use ***in their homes***?

District of Columbia v. Heller, 128 S. Ct. 645 (2007) (emphasis added). Hence, the question of the scope of the right to bear or carry weapons need not have

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[17] *Compare* Complaint, at ¶ 25 A, *in National Rifle Ass'n of Am., Inc. v. Village of Oak Park*, No. 08CV3696, (N.D. Ill. June 8, 2008) (assailing municipal code provision prohibiting carrying of handguns); Complaint, at ¶¶ 52-57, *in McDonald v. City of Chicago*, No. 1:08-cv-03645, (N.D. Ill. June 26, 2008) (challenging ordinance imposing registration requirements on certain firearms).

been addressed in that case (though the Court ultimately went on to analyze both parts of the double right to keep ***and*** bear arms). *Heller*, 128 S. Ct. at 2792-2797. Should the Court see the need to rewrite the question presented in a similar fashion again, the facts of this case are the best fit with the approach used in *Heller*, since the challenge in this case focused on incorporation of the Second Amendment right to ***keep arms, in the home***.

8. Finally, the fact that this case involves nunchaku and not firearms provides no reason to deny certiorari. First and foremost, none of the circuits involved in the split reached the question of whether the underlying arms were protected, so the issue is legally irrelevant. Mr. Maloney's amended complaint was dismissed before any such defense by Nassau County could be resolved. Second, *Heller* defined "arms" broadly as "any thing a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 128 S. Ct. at 2791. Nunchaku readily meet that definition. Nunchaku are simply a form of the articulated club/baton — with a name unfamiliar to English ears. IAIN HOGG, THE ENCYCLOPEDIA OF WEAPONRY, 11 (2006).[18] Most importantly, the destructive power of all forms of blunt club-like weapons is far less than that of the handguns rightly held protected in *Heller*.

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[18] Indeed, every rifle can serve as a club in a pinch. The Bunker Hill patriots used them in just that way after running out of gunpowder during the third British assault. ALAN AXELROD, THE REAL HISTORY OF THE AMERICAN REVOLUTION: A NEW LOOK AT THE PAST, 134 (2007).

Claims about nunchaku to the contrary in the 1974 legislative history of New York Penal Law Section 265.01 are an overblown reaction to a popular martial-arts fantasy film. As they do with nunchaku, many American law enforcement organizations train and permit officers to carry an elongated stick with a handle attached perpendicularly thereto, akin to the Japanese weapon known as a "tonfa." CROMPTON at 62. Had actor Bruce Lee appeared in the 1973 movie *Enter the Dragon* wielding twin "tonfa," New York, fearful of emulation among the youth, could well have added that weapon to Section 265.01 instead of nunchaku.

II. THE COURT SHOULD ALSO GRANT CERTIORARI OVER THE QUESTION OF WHETHER THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT APPLIES THE SECOND AMENDMENT AGAINST THE STATES.

1. Both the text and the original understanding of the Fourteenth Amendment strongly support the conclusion that incorporation of the individual provisions of the Bill of Rights should proceed, if at all, through the Privileges or Immunities Clause. Nevertheless, the Court's decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), opened up lines of reasoning that ultimately gutted the Clause. *Slaughter-House* must eventually be overruled, if it cannot be reinterpreted. The former course of action is not difficult to sketch, for many academics have savaged *Slaughter-House* and argued that the Court should instead simply adopt a forceful interpretation

of the Clause straightaway.[19] The remainder of this petition therefore focuses on how the decision could be reinterpreted, leaving later decisions expanding *Slaughter-House* as the ones to be overruled.

2. Indeed, the reinterpretation of *Slaughter-House* offered below would retain the logical, textual, and historical understanding of the Clause while providing determinate limitations on its scope, thus avoiding the potentially open-ended nature of "substantive due process" doctrine which some members of this Court have questioned. *See, e.g., United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) ("If I thought that 'substantive due process' were a constitutional right rather than an oxymoron . . . .").

In order to secure the application of the Second Amendment to state actors specifically intended by the Fourteenth Amendment, this Court should grant review of the second question presented in this petition along with the first — or simply take review of a generic question presented rooted in no specific clause of the Fourteenth Amendment.

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[19] *Slaughter-House* has been subjected to withering criticism time and again. *See, e.g.,* JOHN HART ELY, DEMOCRACY AND DISTRUST 22 (1980) ("Needless to say, there is not a bit of legislative history that supports the view that the Privileges or Immunities Clause was intended to be meaningless."); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1302 (3d ed. 2000) ("But within a matter of years of the Fourteenth Amendment's adoption, the Supreme Court [in *Slaughter-House*] would squelch its framers' quite unmistakeable intentions while twisting the evident import of the text itself and all but remove the Privileges or Immunities Clause from the landscape of American constitutional law.").

A. The Original Understanding of the Privileges or Immunities Clause Shows It Was Designed to Apply the Personal Rights in the Bill of Rights Against the States.

1. The commentary surrounding the adoption of the Fourteenth Amendment confirms the most logical textual reading of the Privileges or Immunities Clause. The author of the Privileges or Immunities Clause, Congressman John Bingham, argued repeatedly that it was intended to overrule this Court's decision in *Barron v. Baltimore*, 32 U.S. 243 (1833), which held that the Bill of Rights applied exclusively to restrict the actions of the federal government (and which was the basis for *Cruikshank*, *Presser*, and *Miller*). *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 811 (1867). Any conflict in the ratification era regarding the Privileges or Immunities Clause dealt not with whether the proposed Clause could be used to apply the ***Bill of Rights*** to the States, but instead concerned the extent to which the Clause's protections would cover ***unenumerated rights***.[20]

2. These observations are not new. Starting over

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[20] *Compare* CONG. GLOBE, 42nd Cong., 1st Sess. 84 app. (1871) (remarks by Rep. Bingham) ("[T]he privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.") *with* CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (remarks by Senator Howard) (arguing that unlisted fundamental rights, such as those described in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), were also "privileges and immunities").

one hundred years ago, dissenting Justices of this Court articulated them in resistance to the Court's refusal to incorporate the Bill of Rights through the Privileges or Immunities Clause. *See, e.g.*, *O'Neil v. Vermont*, 144 U.S. 323, 361-362 (1892) (Field, J., dissenting). What has changed since the last time this Court rejected an argument characterizing a freedom in the Bill as a "privilege or immunity" of United States citizenship is the Court's ultimate incorporation of nearly all the provisions of the first eight Amendments in the Bill of Rights through the Due Process Clause of the Fourteenth Amendment. Rejection of the Privileges or Immunities Clause as the basis for incorporation is no longer just a rejection of incorporation, it is a rejection of the most textually and historically accurate method of applying the Bill of Rights to the States.

B. *Slaughter-House* Itself Does Not Render the Privileges or Immunities Clause a Nullity.

1. The Court's main concern in *Slaughter-House* was situating within the existing structural constraints embodied in the Constitution a potentially capacious and judicially enforceable Privileges or Immunities provision (especially in its *Corfield v. Coryell* form). According to the Court, Congress could not have intended to "change the whole theory of the relations of the State and Federal governments," *Slaughter-House Cases,* 83 U.S. at 78, by putting in the federal government's control the protection of "nearly every civil right for the establishment and protection of which organized government is instituted." *Id.* at 76. To reconcile the Privileges or Immunities Clause with federalism, the Court thus declared two domains of individual

liberties — (i) those to be protected by the federal government as privileges or immunities of federal citizenship and (ii) those of state citizenship "which the State governments were created to establish and secure." *Id.* at 76. The challenge for the Court in *Slaughter-House* and subsequent decisions was to identify the line separating the two domains.

Defining the privileges of "citizens of the ***States***" was easy enough. According to the Court, these included all "fundamental" rights of individuals, including, for example, "the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." *Id.* at 76 (citing *Corfield*, 6 F. Cas. at 551 (Justice Bushrod Washington riding circuit, interpreting the "privileges and immunities" clause of Article IV of the Constitution)). These must be within state control, reasoned the Court, for otherwise the Fourteenth Amendment would present "so great a departure from the structure and spirit of our institutions" that it could not have been intended by the body that proposed the amendments or the States that ratified them. *Id.* at 78.

2. The Court's fear is perhaps best understood when considered in the context of the claimed right at issue in the *Slaughter-House Cases*. There, the plaintiffs were aggrieved butchers who argued that interference with their economic right to practice their trade as a result of a New Orleans slaughterhouse regulation was an abridgement of their privileges or immunities under the Fourteenth Amendment. In that *Lochner*-like context, it is understandable that the Court was concerned with its corresponding role as "a perpetual censor upon all legislation of the States, on the civil rights of their

own citizens, with authority to nullify such as it did not approve as consistent with those rights . . . ." *Id.* at 78. *Compare Lochner v. New York*, 198 U.S. 45 (1905) (striking down statute restricting the working hours of bakers as trenching on the "freedom of contract").

The Court did, however, offer an exemplary list of privileges of federal as opposed to state citizenship. Of the listed rights, one set, including an individual's privilege "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas," owed their very existence to the establishment of the federal government. *Id.* at 79. To these the *Slaughter-House* Court added a second set of rights, including "the right to peaceably assemble and petition for redress of grievances, [and] the privilege of the writ of habeas corpus." *Id.* at 79. Unlike the first group of rights, the second group existed long before establishment of the federal government. The second set of rights also share the characteristic of being explicitly codified in the Constitution or the Bill of Rights. Thus, under *Slaughter-House*, a right that was preexisting or fundamental could be a privilege or immunity of federal citizenship if it was also enumerated in the federal Constitution.

C. Subsequent Decisions Concerning Incorporation of the Bill of Rights Provisions Under the Privileges or Immunities Clause Should Be Overruled to the Extent They Are Inconsistent with *Slaughter-House* Itself.

1. In *Slaughter-House*, facing a *Lochner*-like claim, the Court had no reason to address whether every one of the provisions of the Bill of Rights qualified as a privilege or immunity of national citizenship. Indeed, two such rights — the First Amendment rights to peaceably assemble and to petition for redress of grievances — were articulated nearly word-for-word by the *Slaughter-House* Court as examples of privileges of ***federal*** citizenship that States could not abridge. *Slaughter-House Cases,* 83 U.S. at 79.

2. But, follow-on decisions of the Court consistently relied on the case to refuse to characterize provisions of the Bill of Rights as privileges or immunities of United States citizens. These later decisions completely ignored the examples *Slaughter-House* gave of certain fundamental, enumerated rights as falling within the coverage of the Privileges or Immunities Clause, opting instead to limit the Clause's applicability to rights that existed only by virtue of the creation of the federal government, not rights that predated that event or were codified at the Founding. *Maxwell v. Dow*, 176 U.S. 581, 596 (1900).

Under this reasoning, (i) the Fifth Amendment's grand jury right, *id.*, and (ii) right to be free from self-incrimination, *Twining v. New Jersey*, 211 U.S. 78 (1908), (iii) the Sixth and Seventh Amendment's

jury trial rights, *Maxwell*, 176 U.S. at 596, *Walker v. Sauvinet*, 92 U.S. 90 (1875), and (iv) the Eighth Amendment's freedom from cruel and unusual punishment, *In re Kemmler*, 136 U.S. 436 (1890), were held ***not*** to be privileges or immunities of United States citizens. According to the Court in these various cases, these explicitly mentioned rights did not apply to state actors.

This restated rule, of course, would also exclude the right to habeas corpus and the right to peaceably assemble — rights that were preexisting in 1789 and later present in the Bill of Rights. Thus, these subsequent cases, although superficially relying on *Slaughter-House*, fumble the logic of the case, and to this extent unjustifiably narrow the Privileges or Immunities Clause. And it goes without saying that the purported federalism foundation for these cases has also been completely eroded, given the rise of selective incorporation doctrine and its application to most provisions of the Bill of Rights in the twentieth century and beyond.

3. Furthermore, sight should not be lost of the fact that the Bill of Rights provisions these cases distorting *Slaughter-House* refused to apply against the States track fairly closely the same rights that the modern Court has so far declined or refused to incorporate selectively under its current Fourteenth Amendment Due Process Clause jurisprudence. The holdings of these cases narrowing *Slaughter-House* thus might be harmonized with incorporation precedent on a view that the un-incorporated rights were more structural than personal, such that they did not count as a true "***privilege or immunity***." AKHIL REED AMAR, THE BILL OF RIGHTS 221 (1998) (proposing a "private right" "filter" for determining

whether a particular Bill of Rights provision counts as a "privilege or immunity" of federal citizenship).

D. The Right Protected by the Second Amendment Should Be Considered a Privilege or Immunity of Citizens of the United States.

The Second Amendment, unlike the other freedoms of the Bill of Rights, satisfies both aspects of the definition of "privileges or immunities of citizens of the United States" carved out in *Slaughter-House*. First, like the right to habeas corpus or the Petition Clause right, it could properly be considered a privilege or immunity of federal citizenship since it is a preexisting right that is explicitly codified in the ***United States Constitution***. Moreover, unlike the jury trial or other procedural rights considered by the Court in early Fourteenth Amendment cases, the right to keep and bear arms is plainly a substantive, personal right. "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *Heller*, 128 S. Ct. at 2799.

Second, the right protected by the Second Amendment also springs from the essential character of the federal government. As this Court recognized in *Heller*, "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right — unlike some other English rights — was codified in a written Constitution." *Id.* at 2801. Without the right, the citizenry would have no power to protect itself against potential ***federal*** tyranny.

CONCLUSION

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

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