Nos. 08-1497 and 08-1521

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,
Respondents.

OTIS MCDONALD, *ET AL.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should consider claims that the Second Amendment right to keep and bear arms in common use, including handguns, is a fundamental liberty interest applicable against state and local governments by the selective incorporation doctrine of the Due Process Clause of the Fourteenth Amendment.

2. Whether the Court should refuse to revisit its repeated holdings that the Privileges or Immunities Clause of the Fourteenth Amendment does not incorporate Bill of Rights provisions to apply against state and local governments.

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STATEMENT

In 1982, Chicago enacted a handgun ban, along with other firearms regulations, because "the convenient availability of firearms and ammunition has increased firearm related deaths and injuries" and handguns "play a major role in the commission of homicide, aggravated assaults and armed robbery."

Chicago City Council, Journal of Proceedings, Mar. 19, 1982, at 10049. Under Chicago's ordinance, "no person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm," and no person may possess "any firearm which is unregisterable." Municipal Code of Chicago, Ill. § 8-20-040(a) (2009). Unregisterable firearms include most handguns. *Id.* § 8-20-050(c). Rifles and shotguns are registerable. *Ibid.* Registerable firearms must be registered before being possessed in Chicago (*id.* § 8-20-090(a)), and registration must be renewed annually (*id.* § 8-20-200(a)). Failure to renew registration "shall cause the firearm to become unregisterable." *Id.* § 8-20-200(c).

Oak Park's firearms ordinance makes it "unlawful for any person to possess or carry, or for any person to permit another to possess or carry on his/her land or in his/her place of business any firearm." Municipal Code of Oak Park, Ill. § 27-2-1 (2008). The definition of firearms includes "pistols, revolvers, guns, and small arms of a size and character that may be concealed on or about the person, commonly known as handguns." *Id.* § 27-1-1.

The National Rifle Association and several individual plaintiffs (collectively "NRA petitioners") filed one lawsuit against Chicago, and another against Oak Park, challenging the handgun restrictions. The individual petitioners allege that they wish to possess handguns for purposes of self-defense at home. Count I of the NRA's complaint against Chicago alleges that Chicago's handgun ban violates the

Second Amendment, as allegedly incorporated into the Fourteenth Amendment.[1]

In its complaint against Oak Park, the NRA similarly alleges that Oak Park's handgun ban violates the Second Amendment, as allegedly incorporated into the Fourteenth Amendment.

Another lawsuit was filed by Otis McDonald and other individual plaintiffs, along with the Illinois State Rifle Association and the Second Amendment Foundation (collectively "McDonald petitioners"). The individual petitioners allege that they legally own handguns they wish to possess in their Chicago homes for self-defense; that they applied for permission to possess the handguns in Chicago; and that their applications were refused. McDonald petitioners allege in count I that Chicago's handgun ban violates the Second Amendment, as allegedly incorporated into the Fourteenth Amendment's Due Process Clause and Privileges or Immunities Clause.[2] Counts

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[1] Count II of both NRA complaints was an equal protection challenge to certain exceptions to the handgun bans. NRA petitioners do not mention the equal protection claims or make any argument concerning them but, to the contrary, have always conceded that the equal protection claims would fail without incorporation. See Dec. 9, 2008 Tr. 6, 10, 12, 14. Count III, which alleged that restrictions on transportation of firearms through Chicago and Oak Park violate 18 U.S.C. § 926A, was dismissed with prejudice by stipulation.

[2] McDonald petitioners incorrectly state that Chicago's ordinance is "identical to that struck down by this Court" in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). McDonald Pet. 2. The District's ordinance "require[d] residents to keep their lawfully owned firearms, such as registered long guns, 'unloaded and dissembled or bound by a trigger lock or similar device.'" 128 S. Ct. at 2788 (citation omitted). Chicago's ordinance does not contain this requirement for lawfully owned

II, III, and IV raise Second and Fourteenth Amendment claims against the requirements of annual registration of firearms, registration as a prerequisite to possession in Chicago, and the penalty of rendering firearms unregisterable for failure to comply with either requirement. Count V is an equal protection challenge to the unregisterability penalty.

All three cases were before the same district judge. McDonald petitioners moved for summary judgment, which the district court deferred for some discovery by Chicago. Subsequently, all petitioners filed motions to narrow the legal issues, asking the court to rule on the threshold question whether the Second Amendment is incorporated into the Fourteenth Amendment to apply to state and local governments. In response, the district court issued two opinions. In the first opinion, entered in the two NRA cases, the Court ruled that it was bound by *Presser v. Illinois*, 116 U.S. 252 (1886), and *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), which held that "[t]he Second Amendment declares that it shall not be infringed, but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government." NRA Pet. App. 20a (citations omitted). The second opinion, issued in *McDonald*, adopted the rationale in the *NRA* cases and denied the motions for summary judgment and to narrow the legal issues. McDonald Pet. App. 17-18.

At the next status hearing, Chicago and Oak Park made oral motions for judgment on the pleadings in

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firearms in the owner's residence or fixed place of business. See Municipal Code of Chicago, Ill. § 8-20-010.

all three cases, which the district court granted. Petitioners appealed, and the three appeals were consolidated.

The court of appeals affirmed, holding that "[t]he Supreme Court has rebuffed requests to apply the second amendment to the states" in three separate cases. NRA Pet. App. 2a (citing *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser*; *Miller v. Texas*, 153 U.S. 535 (1894)). The court of appeals further explained that it was bound by those decisions, and that it was not free to revisit the question based upon new arguments not considered in those cases, because that would "not only undermine[ ] the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision." *Id.* at 4a. The court further reasoned that the outcome of this case under the Court's more recent jurisprudence "is not as straightforward" as in other situations when the Court has overruled precedent. *Id.* at 5a. The court found it "hard to predict" how the Second Amendment would fare under the Court's "selective incorporation" doctrine, given that the Third and Seventh Amendments, and the Grand Jury Clause of the Fifth Amendment, have not been incorporated. *Id.* at 5a-6a. And the court observed that "the Court has not telegraphed any plan to overrule *Slaughter-House* and apply all of the amendments to the states through the privileges and immunities clause, despite scholarly arguments that it should do this." *Id.*

ARGUMENT

The Seventh Circuit properly affirmed judgment for Chicago and Oak Park. This Court held long ago in *Cruikshank* that the Second Amendment "has no other effect than to restrict the powers of the national

government." 92 U.S. at 553. Then, in *Presser*, the Court held that the amendment "is a limitation only upon the power of congress and the national government, and not upon that of the state." 116 U.S. at 265. Again, in *Miller*, the Court made clear that the restrictions of the amendment "have no reference whatever to proceedings in state courts." 153 U.S. at 538.

Cruikshank, *Presser*, and *Miller* remain good law today. Just last year, this Court noted in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), "that the Second Amendment applies only to the Federal Government." *Id.* at 2813 n.23. This Court's jurisprudence under the Due Process Clause and the Privileges or Immunities Clause provides no reason to depart from the Court's conclusion that the Second Amendment does not bind the States. We acknowledge, however, that the Court has not decided whether, under its modern selective incorporation cases, the Second Amendment right to keep and bear arms in common use, including handguns, is incorporated into the Due Process Clause so that it binds the States. If the Court believes the time is right to address whether the Second Amendment restrains state and local governments under the Due Process Clause, the petitions should be granted to address this issue only.

This Court should decline to address whether the Second Amendment is incorporated under the Privileges or Immunities Clause. The Court has long ago, and repeatedly, rejected the Privileges or Immunities Clause as a vehicle for incorporation of Bill of Rights provisions. Petitioners do not claim a circuit split on this issue, and have not even attempted an argument on how the usual factors this Court considers before breaking with precedent favor revisiting the issue now.

I. THIS CASE PRESENTS THE QUESTION WHETHER THE SECOND AMENDMENT IS INCORPORATED INTO THE DUE PROCESS CLAUSE.

Among the factors this Court considers when reviewing a petition for writ of *certiorari* are whether the courts of appeals are split on an important matter and whether the lower court has decided an important federal question that has not been, but should be, decided by the Court. Here, the circuit split identified by the petitioners is presently resolved and, in any event, is not a basis for granting *certiorari*. Nevertheless, the issue whether the Second Amendment binds the States under this Court's due process selective incorporation doctrine is one that has not been settled by this Court. If the Court wishes to address that issue, this case is a vehicle for doing so.

1. There is no conflict among the circuits for this court to resolve. As petitioners observe (see NRA Pet. 4; McDonald Pet. 3), since *Heller* was decided, three circuits have decided the continuing force of the holdings in *Cruikshank*, *Presser*, and *Miller* that the Second Amendment binds only the federal government.[3] In *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir.

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[3] Before *Heller*, too, the circuits consistently agreed that the Second Amendment did not restrain States. See, *e.g.*, *Thomas v. Members of City Council of Portland*, 730 F.2d 41 (1st Cir. 1984) (per curiam); *Cases v. United States*, 131 F.2d 916, 921-22 (1st Cir. 1942); *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005); *Edwards v. City of Goldsboro*, 178 F.3d 231, 232 (4th Cir. 1999); *Love v. Pepersack*, 47 F.3d 120, 123-24 (4th Cir. 1995); *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 539 n.18 (6th Cir. 1998); *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 730-31 (9th Cir. 1992).

2009) (per curiam), petition for writ of *cert.* filed (No. 08-1592), the Second Circuit, like the Seventh Circuit in this case, adhered to this Court's square holding that the Second Amendment binds only the federal government. See *id.* at 58-59. In *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), a panel of the Ninth Circuit ruled that it was free to address the issue whether, under the Court's selective incorporation doctrine, the Second Amendment binds the States (see *id.* at 447-49), but on July 29, 2009, the Ninth Circuit determined that the case should be reheard *en banc* and that argument will be heard the week of September 21, 2009 (see *Nordyke v. King*, No. 07-15763 (July 29, 2009 order) (available at http://www.ca9.uscourts.gov/datastore/opinions/2009/07/29/0715763ebo.pdf)). The order provides that the panel opinion shall not be cited as precedent. Thus, at the present time, there is no conflict on due process incorporation and it is premature for this court to grant *certiorari* based upon petitioners' claim of a circuit split.[4]

2. Even though the circuit split does not support petitioners' request for review, the petitions do present an issue the Court has not addressed, namely, whether under this Court's evolved due process jurisprudence, the Due Process Clause imposes Second Amendment restrictions on the States. Last year, in *Heller*, the Court determined for the first time that the Second Amendment confers an individual right to keep and bear arms that are in common use for purposes of self-defense in the home. See 128 S. Ct. at 2815-18; see also *United States v.*

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[4] In our view, there should never be a conflict in the lower courts on this issue. This Court's cases are clear and binding, and no court should feel free to reach the issue.

Tagg, No. 08-16860, 2009 WL 1856803, at *5 (11th Cir. June 30, 2009) (describing the right recognized in *Heller* as a right to weapons "in common use" and finding a pipe bomb not such a weapon). *Heller*, of course, did not rule on incorporation, since the law at issue was that of a federal district. And, although the Court has held the Second Amendment inapplicable to the States on three occasions, Fourteenth Amendment jurisprudence has evolved since *Cruikshank, Presser*, and *Miller* were decided. Thus, as this Court explained in *Heller*, the prior cases "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S. Ct. at 2813 n.23.

3. As the Court reviews whether to address that issue in this case, it may wish to consider our submission on incorporation. In our view, while *Heller* examined the meaning and intent of the Second Amendment in the founding era, that limited focus is not appropriate on the very different question whether Second Amendment rights are fundamental and therefore incorporated into the Due Process Clause. Thus, the precise Second Amendment right recognized in *Heller*—the right to a handgun as a weapon in common use—is not incorporated merely because it is protected under the Second Amendment. If there is a due process right to arms for self-defense, it is preserved with arms suitable for that purpose, and does not extend to any particular weapon merely because it is in common use. Moreover, the ordinances at issue here preserve any liberty interest that might exist under the Due Process Clause to some type of firearms for self-defense in the home, for they allow residents to possess long guns, such as rifles and shotguns, for self-defense in the home.

The most consistent theme in determining whether a right is a liberty interest protected under the Due Process Clause is whether it is implicit in the concept of ordered liberty. See, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (right to assisted suicide is not "deeply rooted in this Nation's history and tradition" so as to be fundamental and "implicit in the concept of ordered liberty") (internal citations omitted); *Mapp v. Ohio*, 367 U.S. 643, 650 (1961) ("security of one's privacy against arbitrary intrusion by the police is implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause") (internal quotation marks omitted); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (incorporation of First Amendment rights reflected that these rights are "implicit in the concept of ordered liberty"), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969). Thus, while there is no "tidy formula for the easy determination of what is a fundamental right" (*Wolf v. Colorado*, 338 U.S. 25, 27 (1949), overruled on other grounds, by *Mapp*, 367 U.S. at 655), it is quite settled that only a right that is itself an aspect of ordered liberty merits incorporation.

In assessing which rights are implicit in the concept of ordered liberty, the Court has flatly rejected "[t]he notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution." *Wolf*, 338 U.S. at 26. Nor has the Court ever held that an amendment that contains a "substantive" rather than a "procedural" right is automatically incorporated, as NRA maintains. NRA Pet. 11-12. Instead, the Court's selective incorporation test under the Due Process Clause examines numerous factors, such as the right's purpose, function, and

efficacy; its origins in English and American jurisprudence; and its prevalence in and treatment under state constitutions. See *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968). And, in stark contrast to *Heller*'s focus on original intent as of 1791 for purposes of interpreting the words in the Second Amendment, it is "our laws and traditions in the past half century" that "are of most relevance" in determining what liberty interests are protected by the Due Process Clause. *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003); accord *Hurtado v. California*, 110 U.S. 516, 528-29 (1884) (to hold that "settled usage both in England and this country" is "essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement"); see also *County of Sacramento v. Lewis*, 523 U.S. 833, 857-58 (1998) (Kennedy, J., concurring) ("history and tradition are the starting point," but "[t]here is room as well for an objective assessment of the necessities of law enforcement, in which the police must be given substantial latitude and discretion, acknowledging, of course, the primacy of the interest in life which the State, by the Fourteenth Amendment, is bound to respect").[5] When *Heller* referred to "the Fourteenth Amendment inquiry required by our later cases" (128 S. Ct. at 2813 n.23), this is what it meant.

The right recognized in *Heller* to keep and bear arms in common use is not implicit in the concept of ordered liberty. To begin, this is shown by the very purpose of codifying the Second Amendment. While

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[5] For this reason, the panel in *Nordyke* erred in limiting its examination of the historical treatment of the right to arms only up through the "post-Civil War period" (563 F.3d at 450), although the decision is non-precedential in any event.

the Second Amendment conferred an individual right, as against the federal government, to keep and bear weapons in common use, it stands in sharp contrast to other individual liberties in the Bill of Rights because the purpose of the common-use rule was to protect, not individual personal liberties, but the militia-related need for militiamen to possess and be familiar with weapons necessary for their militia service, a purpose that *Heller* recognized as the very reason for the right's codification, as well as determinative of its scope (see 128 S. Ct. at 2801, 2815-16).

Also unlike other enumerated rights—like free speech and religious exercise—the right to keep and bear arms carries an inherent risk of danger to the liberty and interests of others. "Homicides are most often committed with guns, especially handguns," and nearly 60% of those homicides take place in large cities. Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States* (available at https://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm). In 2008 alone, handguns were used in 402 homicides in Chicago. See Chicago Police Department, *2008 Murder Analysis in Chicago* 22 (available at www.cityofchicago.org, by following links to Police Department, News, Statistical Reports, and Homicide Reports). Thus, in urban environments, where handgun abuse is so rampant, the protection of a right to handguns simply because they are in common use undermines, rather than guarantees, ordered liberty. It is, instead, the very governmental power to protect residents that is critical to the concept of ordered liberty, since enforcing handgun control laws can make an enormous difference in curbing firearms violence. See, *e.g.*, Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-*

Regulated Militias, and Criminal Street Gangs, 41 Urb. Law. 1, 30-44 (2009) (discussing studies showing New York City crime reduction correlating to police tactics directed at handguns); Philip J. Cook, *et al., Underground Gun Markets*, 117 Economic J. F558, F581-82 (2007) (important contributing factor to the high transaction costs of underground gun markets is that handguns are illegal in Chicago, and "law enforcement efforts targeted at reducing gun availability at the street level seem promising"); Colin Loftin, *et al., Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991) (District's handgun ban coincided with abrupt decline in firearms-caused homicides with no comparable decline elsewhere in the region).

Indeed, during Reconstruction, the same federal government that adopted the Fourteenth Amendment demonstrated an understanding that the right to bear arms could be restricted to maintain order in a turbulent post-war environment, including prohibiting the "sale of pistols and knives" and even the carrying of "guns, pistols, or other weapons of War." Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 621 (2006). Thus, "[t]he disarming of freedmen was indeed troubling, but the federal government was not beyond disarming those whom it deemed a threat to public safety." *Ibid.* In short, while the federal government sought to expand the right to keep and bear arms for militia service to freedmen, whose assistance was needed to quell civil unrest during reconstruction, it was nevertheless willing to allow restrictions on civilian use. See *id.* at 622.

Moreover, the scope of arms rights under state constitutions confirms that the right to keep and bear arms in common use is not so firmly entrenched that it is implicit in the concept of ordered liberty. While, over time, most States have adopted constitutional provisions protecting a right to arms in one form or another, those constitutions, and state court interpretations of them, do not reflect a "uniform and continuing acceptance" of a right to weapons in common use as is required before the right "enjoys 'fundamental principle' status." *Montana v. Egelhoff*, 518 U.S. 37, 48 (1996).[6] State court decisions do not typically turn on whether a particular firearm is one that is in common use, but whether the regulation is reasonable, meaning that it is valid so long as it is not a "total prohibition against the use and possession of firearms" (*People v. Williams*, 377 N.E.2d 285, 286-87 (Ill. App. Ct. 1978)), or does not "functionally disallow the exercise of the rights" (*State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2003)); see also Adam Winkler, *The Reasonable Right to Bear Arms*, 17 Stan. L. & Pol'y Rev. 597, 599-612 (2006) (discussing reasona-

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[6] It is, at best, ironic that so many Attorneys General urge this Court to assist in their role "as guardians of their citizens' constitutional rights." *Amicus* Brief of Thirty-Three States 1; see also *Amicus* Brief of California 1. States, of course, remain free to adopt their own constitutional provisions; and all of the *amici* States, except Minnesota and California, have done so. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Politics 191, 194-200 (2006). And residents are equally able to seek greater gun rights under state law. If a State or its residents determine that it is appropriate, based on local conditions, to provide the same protection as the Second Amendment, then the state constitution can be amended or legislation passed to achieve that end, without stripping other States of their ability to craft arms protections appropriate to the public welfare in their localities.

ble regulation standard among state courts). Under tests such as these, state courts have routinely upheld bans on particular categories of weapons, including handguns. See *id.* at 604-05.

Thus, even if the protection of arms rights under state constitutions shows some level of protection of a right to arms for purposes of self-defense in the home, that protection does not automatically extend to particular categories of weapons simply because they are in common use; and so the Due Process Clause should not provide automatic protection, either.

The due process inquiry also entails a close examination of the purpose to be served by a particular right, and takes into account the existence of other means to the same ends. See *Hurtado*, 110 U.S. at 531-32, 537-38 (holding that "maxims of liberty and justice" "guaranty, not particular forms of procedure, but the very substance of individual rights," and determining that Fifth Amendment right to indictment by grand jury is not required of states where charging by information sufficiently "considers and guards the substantial interest of the prisoner"). This, too, supports at most a due process right only to some type of firearms for self-defense in the home, and Chicago and Oak Park preserve that right by allowing residents to possess rifles and shotguns. "[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992); accord *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (not all burdens on voting rights are constitutional infringements). Laws that do not make self-defense in the home impossible are valid, and the ordinances challenged here, which allow

possession of rifles and shotguns, do not make self-defense in the home with firearms impossible. Indeed, there is a wealth of authority that long guns are a better option than handguns when it comes to self-defense. See, e.g., Josh Sugarmann, *Every Handgun Is Aimed At You: The Case For Banning Handguns* 58-59 (2001); Violence Policy Center, *Unintended Consequences: Pro-Handgun Experts Prove that Handguns are a Dangerous Choice for Self-Defense* (2001) (available at www.vpc.org/studies/unincont.htm). Without even an allegation that handguns are necessary to protect a right to armed self-defense, petitioners have alleged nothing that would suggest a ban on that category of weapons infringes a general right to armed self-defense in the home. To the extent that the Second Amendment embraces a broader right to weapons in common use, whether or not they are necessary to self-defense, that broader right should not be incorporated.

The States thus have, and should continue to have, the greatest flexibility to create and enforce firearms policy, including the ban of particular types of weapons that have proven to be highly dangerous in a particular location. Indeed, the power to regulate according to the needs of varying local conditions is a hallmark of federalism that is as much a part of the constitutional design as the individual rights provisions of the Bill of Rights. See U.S. Const. Art. IV, § 4; U.S. Const. Amend. X. As the court of appeals observed, "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." NRA Pet. App. 9a. Firearms regulation is a quintessential issue on which state and local governments can "serve as a laboratory; and try novel social and

economic experiments without risk to the rest of the country." *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (internal citation omitted); see also *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (under "the theory and utility of our federalism . . . States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"). Restrictions that are appropriate in densely populated urban centers with severe gang problems, drug problems, and rampant armed violence may not be desirable or necessary in other parts of the country. So long as regulation does not render nugatory the right to arms for self-defense in the home, state and local governments should remain free to impose firearms regulations as they deem necessary for the safety and welfare of their citizens. The right to keep and bear arms in common use should not also, therefore, be imposed upon the States.

4. While the posture of this case would allow the Court to decide the issue of selective incorporation under the Due Process Clause, the record is not adequate for decision on the merits of the specific challenges petitioners make to Chicago's and Oak Park's ordinances. See NRA Pet. i; McDonald Pet. 28. Judgment was entered on the pleadings below; there has been no discovery; and Chicago and Oak Park do not accept all of petitioners' allegations as true. Moreover, the lower courts relied solely on stare decisis and did not reach any other legal issue. This Court normally refrains from deciding legal issues in the first instance, or on an undeveloped factual record. See, *e.g.*, *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988); *Community Communications Co. v. City of Boulder*, 455 U.S. 40,

59-60 (1982) (Stevens, J., concurring). Thus, if the Court determines to grant *certiorari* to decide the nature and extent of a liberty interest in armed self-defense under the Due Process Clause, it should not entertain petitioners' arguments on the invalidity of the ordinances. Those issues should be left to the lower courts on remand, if any.

II. THE COURT'S REPEATED HOLDINGS THAT THE PRIVILEGES OR IMMUNITIES CLAUSE DOES NOT INCORPORATE THE BILL OF RIGHTS SHOULD NOT BE REVISITED.

This Court has repeatedly held that Bill of Rights provisions are not imposed upon the States through the Privileges or Immunities Clause. The Court first construed the Fourteenth Amendment phrase "privileges or immunities of citizens of the United States" in the seminal *Slaughter-House Cases,* 83 U.S. 36 (1872). The Court ruled that this Clause includes only those rights that "are dependent upon citizenship of the United States, and not citizenship of a State." *Id.* at 80. These national citizenship rights include the right to "free access to its seaports," to "use the navigable waters," to "peaceably assemble and petition for redress of grievances," and to "become a citizen of any state." *Id.* at 79-80. In *Presser*, the Court held that a pre-existing right like the Second Amendment right "to keep and bear arms" is not a privilege or immunity of United States citizenship because it is not "in any manner dependent upon [the Constitution] for its existence." 116 U.S. at 265. Similarly, the right to peaceably assemble, when detached from the purpose of petitioning the government for redress of grievances, is not a privilege or immunity of "national citizenship," but of

state citizenship. *Id.* at 267 (citing *Cruikshank*, 92 U.S. at 551, 560). In *Maxwell v. Dow*, 176 U.S. 581 (1900), overruled on other grounds by *Williams v. Florida*, 399 U.S. 78 (1970), the Court applied the same rationale to reject imposing on the States the Fifth Amendment right to indictment by a grand jury and the Sixth Amendment right to jury trial in criminal cases. See *id.* at 602. The Court explained that under *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the protection of the privileges and immunities of state citizenship "still remains with the state," and the Privileges or Immunities Clause of the Fourteenth Amendment protects only those rights that "aris[e] out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States." *Maxwell*, 176 U.S. at 593. Similarly, in *Twining v. New Jersey*, 211 U.S. 78 (1908), overruled on other grounds by *Malloy v. Hogan*, 378 U.S. 1, 5-7 (1964), the Court again reaffirmed that civil rights "which, before the War Amendments, were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the [Fourteenth Amendment]" (*id.* at 96), and that the Privileges or Immunities Clause "did not forbid the states to abridge the personal rights enumerated in the first eight amendments" (*id.* at 100); see also *In re Kemmler*, 136 U.S. 436, 446-49 (1890) (Eighth Amendment prohibition against cruel and unusual punishment not a privilege or immunity of national citizenship); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (Seventh Amendment right to jury trial in civil cases not a privilege or immunity of national citizenship). Finally, in *Adamson v. California*, 332 U.S. 46 (1947), the Court reaffirmed this settled construction of the reach of a

"privilege or immunity of the citizens of the United States," again holding that the right against self-incrimination was a privilege or immunity of state, rather than national, citizenship. *Id.* at 52-53.

Given this unbroken chain of authority, it is no wonder that petitioners admit "this Court rejected incorporation under the Privileges or Immunities Clause" (NRA Pet. 21) and the Court would have to "undo an error . . . within *The Slaughter-House Cases*" (McDonald Pet. 29) and conclude it was "wrong the day it was decided" (*id.* at 22), in order to incorporate the Second Amendment under the Privileges or Immunities Clause.[7] Yet petitioners do not support their demand that the Court should revisit, much less overrule, this long line of cases. Despite claiming a (presently resolved) split in the circuits on incorporation into the Due Process Clause, petitioners can point to no split in the circuits on the issue of incorporation under the Privileges or Immunities Clause. Given the clarity and number of this Court's precedents on the issue, it is no wonder that no circuit has felt free to assess incorporation under this Clause.

Nor do petitioners build a case for reconsideration of this Court's privileges or immunities rulings under

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[7] Some *amici* disagree, arguing that incorporation into the Privileges or Immunities Clause would not require overruling *Slaughter-House Cases*. See, *e.g.*, *Amicus Curiae* Brief of the American Civil Rights Union in Support of Petitioners 19; Brief of *Amicus Curiae* Gun Owners of America, *et al.* in Support of Petitioners 23. But even they do not argue that the Court could reach such a holding without overruling the other cases—from *Presser* to *Adamson*—following the *Slaughter-House Cases* rationale and expanding upon it to reject incorporation under that clause.

the usual principles of *stare decisis* that guide the Court when deciding whether to overrule settled precedent. "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood*, 505 U.S. at 854. Adhering to precedent "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The disturbance of settled precedent is not taken lightly, and the Court first considers various factors to assess the costs and benefits of overruling or affirming prior cases. See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009). Those factors include whether the decision has proved unworkable; whether there has been individual or societal reliance on the rule; whether the evolution of the law or premises of fact have changed in a way that undermines the original rationale (see *Planned Parenthood*, 505 U.S. at 854-55), and "whether the decision was well reasoned" (*Montejo*, 129 S. Ct. at 2089); see also *Lawrence*, 539 U.S. at 576-77 (examining erosion of prior decisions and individual and societal reliance on former precedent in overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). Petitioners offer no explanation about how any of these factors favors overruling *Slaughter-House Cases*. That failure alone is a reason for the Court to refuse to consider the privileges or immunities question. And when these factors are analyzed, they counsel resoundingly against reconsideration.

1. While the rule of law developed in *Slaughter-House Cases* and its progeny has its critics, petition-

ers rightly make no claim that it has proven unworkable. The *Slaughter-House* rule is easy to apply; under it, no Bill of Rights provisions are incorporated. Nor does the Court need to overturn the rule in order to free its hand to find additional rights protected against state infringement—a test has developed under the Due Process Clause that has worked quite well as a means of incorporating Bill of Rights provisions when those rights are deemed "fundamental to the American scheme of justice" or "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 & n.14. Petitioners claim that the Second Amendment contains just such a fundamental right. See NRA Pet. 9-11; McDonald Pet. 15-16. We disagree, of course, that the Second Amendment right recognized in *Heller*—to keep and bear arms in common use, including handguns—is fundamental; but if that premise were correct, the Due Process Clause would impose that right upon the States. Incorporation into the Privileges or Immunities Clause would be unnecessary. In fact, the Court has already considered selective incorporation under the Due Process Clause of every individual right in the Bill of Rights except the Second Amendment, the Third Amendment, and the Eighth Amendment right against excessive fines (see Erwin Chemerinsky, *Constitutional Law* 545 (3d ed. 2009)), and has found all but two incorporated (see, *e.g.*, *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211 (1916) (Seventh Amendment civil jury trial); *Hurtado*, 110 U. S. at 534-38 (Fifth Amendment grand jury indictment)).[8] Thus, for fundamental rights, the

[8] The Court recently reaffirmed that these rights are not incorporated. See *Osborn v. Haley*, 549 U.S. 225, 252 n.17 (2007) (Seventh Amendment); *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (Fifth Amendment grand jury indictment).

Court's existing jurisprudence on selective incorporation has, for many decades, adequately served to protect individual constitutional rights against state intrusion. And there is certainly no reason to upset *Slaughter-House Cases* and its progeny to protect non-fundamental rights.

2. Petitioners also ignore the impact upon a society that has relied upon this Court's holdings that Bill of Rights protections are not automatically imposed upon the States by the Privileges or Immunities Clause, and will not be incorporated at all if they are not among the fundamental rights that are protected under the Due Process Clause. *Stare decisis* has added force when the rule of law was settled long ago and "eliminating it would . . . upset expectations." *Montejo*, 129 S. Ct. at 2089.

Petitioners identify no limiting principle under which the meaning of "privileges or immunities" could encompass the Second Amendment, but not the Fifth and Seventh Amendment grand jury and civil jury rights. To the contrary, McDonald petitioners readily admit that the first eight Amendments must be incorporated wholesale. McDonald Pet. 23. For more than a century, States have been free to adopt constitutional provisions and statutes regulating whether and when to indict by grand jury proceedings and the nature of their civil jury systems, all based on this Court's repeated holdings that these laws need not meet the same standards required in federal cases under the Fifth and Seventh Amendments. Petitioners make no effort to explain how *Slaughter-House Cases* can be overruled in favor of a regime of total incorporation without seriously upsetting the reliance interests of the States.

The deep impact of wholesale incorporation of the Bill of Rights is most obvious where the Fifth Amendment grand jury requirement is concerned. Since *Hurtado*, the Court has consistently held that the constitution does not prevent a State from doing away with grand jury indictments entirely (see *Beck v. Washington*, 369 U.S. 541, 545 (1962)), and the States have relied upon this. In *Beck*, for example, the State of Washington had eliminated mandatory grand jury practice in 1909, convening grand juries only on special occasions and instead instituting prosecutions by information. See *ibid.* Today, most other States also use procedures other than grand jury indictment to initiate prosecutions: only eighteen States require grand juries to return felony charges. See U.S. Department of Justice, Bureau of Justice Statistics, *State Court Organization 2004* at 215-17 tbl. 38. Incorporation of the Grand Jury Clause would be seriously destructive of the States' institutional frameworks for charging criminals.

3. Neither the evolution of the law nor any misperception of fact underlying *Slaughter-House Cases* supports revisiting its rationale, either. Petitioners do not, and cannot, point to any such changes to justify reconsideration. As for the law, petitioners identify no decision by this Court demonstrating an erosion of the legal theory underlying *Slaughter-House Cases* and its progeny of the kind that this Court has held justifies overruling precedent. There have not been, for example, any "more recent cases" that "have undermined the assumptions upon which [the Court] relied." *Agostini v. Felton*, 521 U.S. 203, 222 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985)). Nor has any "analytical underpinning" been "substantially weakened" by subse-

quent Court decisions. *State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997) (overruling *Albrecht v. Harold Co.*, 390 U.S. 145 (1968)).

While the Court's approach to selective incorporation under the Due Process Clause may have evolved, there has been no comparable departure from *Slaughter-House Cases*. From *Slaughter-House Cases* to *Adamson*, a majority of this Court has consistently rejected incorporation of Bill of Rights provisions under the Privileges or Immunities Clause because those rights pre-dated the Constitution; and, as pre-existing rights protected by state governments, they are not rights that flow from national citizenship. The Court has remained steadfast in this approach to the Privileges or Immunities Clause. Moreover, the legal development of selective incorporation under the Due Process Clause counsels against reconsideration of incorporation under the Privileges or Immunities Clause, precisely because that course is unnecessary to achieve incorporation of a fundamental right.

Unable to invoke any erosion of the *Slaughter-House Cases* rationale, petitioners instead emphasize a quote, taken out of context, from Justice Thomas's dissent in *Saenz v. Roe*, 526 U.S. 489 (1999). See NRA Pet. 24; McDonald Pet. 27-28. Justice Thomas stated that he "would be open to reevaluating [the] meaning" of the Privileges or Immunities Clause "in an appropriate case." *Saenz*, 526 U.S. at 528. But the dissent was responding to the majority's determination that the right to "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," is a privilege of national citizenship (*id.* at 503) (citation omitted) and that a California law capping welfare benefits to citizens who had resided in the State for

less than twelve months was unconstitutional under the Privileges or Immunities Clause (see *id.* at 504-11). Justice Thomas expressed the concern that, without consideration of original intent and the relationship between the Privileges or Immunities Clause and the Equal Protection Clause, "the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the predilections of those who happen at the time to be Members of this Court." *Id.* at 528 (internal quotation marks omitted).

Justice Thomas's dissent, which was concerned with an unintended expansion of individual rights, contains no hint of a view that the Court should again consider wholesale incorporation of the Bill of Rights. To the contrary, the dissent cited *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), as reflecting the meaning of "privileges" and "immunities," and the list of rights set forth in *Corfield* refers to neither the first eight amendments, nor to the Second Amendment in particular. See *Saenz*, 526 U.S. at 525 (citing *Corfield*, 6 F. Cas. at 551-52). Thus, petitioners' theories of incorporation do not fall in line with Justice Thomas's interest in defining the Clause according to *Corfield*.

Petitioners also fail to show any changes in the factual premises underlying *Slaughter-House Cases* and its progeny. Petitioners rely on the historical record, with a central focus on congressional debates surrounding enactment of the Fourteenth Amendment. See NRA Pet. 18-21; McDonald Pet. 24-25. But that record was scoured in *Adamson*, when Justice Black urged incorporation of the Bill of Rights through the Privileges or Immunities Clause. See 332 U.S. at 68 (Black, J., dissenting). Justice Black's dissenting

opinion relied heavily upon many of the same statements of Rep. Bingham and Sen. Howard that petitioners cite. See *id.* at 93-120. Justice Black also reviewed debates surrounding the Civil Rights Act of 1866 and the Freedmen's Bureau Act (see *ibid.*), which the NRA relies upon (see NRA Pet. 17-18). The majority rejected the argument for incorporation based on that record (see 322 U.S. at 52-53), as did Justice Frankfurter's concurrence (see *id.* at 61-64). Of course, the congressional record for the Fourteenth Amendment has not changed since then. Thus, instead of any great change in the premises of fact, petitioners simply urge another review of that same record. That is not the kind of changed circumstances that justifies upsetting settled precedent.

4. In lieu of discussing principles of *stare decisis*, McDonald petitioners stress that *Slaughter-House Cases* has been heavily criticized by scholars who, they claim, agree that, "at a minimum, [privileges or immunities] include the individual rights secured by the first eight amendments." McDonald Pet. 23. That is simply false. There is nothing approaching a consensus on this issue. Numerous scholars have found support lacking for the notion that the first eight Amendments were understood to have been incorporated *in toto* through the Privileges or Immunities Clause. See, *e.g.*, William Nelson, *The Fourteenth Amendment: From Political Principle To Judicial Doctrine* 123 (1988) ("[o]nly one historical conclusion can . . . be drawn: namely, that Congress and the state legislatures never specified whether section one was intended to be simply an equality provision or a provision protecting absolute rights as well"); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived*

Cat, 42 Ohio St. L. J. 435 (1981) (refuting arguments for incorporation of the entire Bill of Rights); David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 406 (2008) (finding support in the legislative history for "no fewer than four interpretations of the . . . Privileges [or] Immunities Clause"); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5, 139 (1949) (concluding that "the record of history is overwhelmingly against" the view that the Fourteenth Amendment "was intended and understood to impose Amendments I to VIII upon the states"); Rosenthal, *supra*, 41 Urb. Law. at 77 (finding historical evidence that the public understood "privileges or immunities" to include the Bill of Rights "sufficiently unreliable" for that to be "a satisfactory basis for adjudicat[ing incorporation]"); George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 Ohio St. L. J. 1627, 1628 (2007) (finding historical evidence of incorporationist meaning "sketchy, inconclusive, and subject to various plausible interpretations"). Indeed, five distinguished scholars filed an *amicus* brief in support of Chicago and Oak Park in the Seventh Circuit, arguing that "the historical record does not support appellants' argument about incorporation under the Privileges or Immunities Clause." *Amicus* Brief of Historians and Legal Scholars Saul Cornell, Jonathan Lurie, William Merkel, William Nelson, and George Thomas at 3, Nos. 08-4241, 08-4243, 08-4244 (consol.) (7th Cir.).

When the historical evidence is reviewed, it is easy to see why so many scholars reject the view that the Privileges or Immunities Clause was meant to impose the entire Bill of Rights on the States. *Heller* holds that the meaning of constitutional provisions

must be discerned from the "public understanding" of the words (128 S. Ct. at 2805), which entails accepting the "[n]ormal meaning" of words and not meanings that "would not have been known to ordinary citizens in the founding generation" (*id.* at 2788) (citations omitted). There is little evidence to support an understanding by "ordinary citizens" that the Fourteenth Amendment imposed the Bill of Rights on States.

In fact, even petitioners do not hew to this approach, instead focusing almost exclusively on the views of a few members of Congress. See NRA Pet. 18-19; McDonald Pet. 24-25. But as *Heller* warns, "[i]t is dubious to rely on [legislative] history to interpret a text" if it is "widely understood" to mean something else. 128 S. Ct. at 2804. And whether viewed through the lens of *Heller*'s public understanding approach or by focusing more narrowly on legislative intent, it is perilous to rely on a few expressions of an incorporationist intent, or the expressed desire to secure arms rights for freed slaves (see NRA Pet. 13-16), where the statements of other members of Congress suggest a lack of clarity and uniformity on what the Fourteenth Amendment meant. A few examples include the statement of one Senator who denied that there was any settled meaning of the words "privileges and immunities" (see Cong. Globe, 39th Cong., 1st Sess. 3039 (1866) (Sen. Hendricks)); a Representative who described the Amendment as "open to ambiguity and . . . conflicting constructions" (*id.* at 2467 (Rep. Boyer)); and a Senator who expressed an alternative view that the Amendment only "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all" (*id.* at 2459 (Rep. Stevens)).

And there is little evidence that the views of Rep. Bingham and Sen. Howard were "clearly, publicly, and candidly conveyed . . . to the country" (Thomas, *supra*, 68 Ohio St. L.J. at 1657), while there is a "mountain of evidence" that the Amendment was conveyed by the press to protect fundamental rights, natural rights, and equal protection, but without mentioning the Bill of Rights (George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1*, 18 J. Contemp. Leg. Issues (forthcoming 2009) (available at https://ssrn.com/abstract=1392961, at 4)). Nor do the Court's decisions decided in the wake of ratification—including *Slaughter-House Cases* and *Cruikshank*—hint at any such commonly understood incorporationist meaning. See Rosenthal, *supra*, 41 Urb. Law. at 69-72. As for the leading treatises of the day, some reflected an incorporationist understanding of the Amendment, and others did not. See Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73*, 18 J. Contemp. Leg. Issues (forthcoming 2009) (available at https://ssrn.com/abstract=1354404, at 19-99). Of course, an amendment that imposed the Bill of Rights upon the States would have radically altered the balance of power between the federal and state governments and surely would have been prominently featured in all of these sources if there had been a public understanding that such a monumental change was afoot. The evidence that the framers or the public attributed an incorporationist meaning to the Privileges or Immunities Clause is thin, or at best mixed, and should serve as no basis to upset longstanding precedent. For this reason, as well as the lack of any other valid justification for breaking

with prior cases, the Court should refuse to consider the privileges or immunities issue.

CONCLUSION

If the Court wishes to address whether the Second Amendment binds the States, the petitions should be granted, but limited to the issue whether the Second Amendment right to weapons in common use, including handguns, is incorporated into the Due Process Clause of the Fourteenth Amendment. The petitions should be denied with respect to whether the Privileges or Immunities Clause imposes the Second Amendment on the States.

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