Nos. 08-1497 & 08-1521

In The Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

OTIS MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AND CATO INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Founded in 1991, the Institute for Justice is a public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and restoring appropriate constitutional limits on the power of government. It seeks a rule of law under which individuals can control their destinies as free and responsible members of society. Through strategic litigation and outreach, the Institute works to promote economic liberty, private property rights, free speech, educational choice, and the principles of self-determination and limited government. This case presents a unique opportunity to revisit the Privileges or Immunities Clause and restore it as the primary embodiment of those principles in the Fourteenth Amendment.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of central concern to Cato because the issue of the Second Amendment's "incorporation" implicates not only the right to keep and bear arms – important enough by itself – but the larger debate over the origin, nature, and extent of *all* our natural rights and how the Constitution protects them.

SUMMARY OF ARGUMENT

Last summer this Court confirmed what the Framers of the Constitution, most scholars, and a substantial majority of Americans believe: that the Second Amendment protects an individual right to keep and bear arms. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Whether the Fourteenth Amendment protects that right against infringement by state and local governments is the question presented by the consolidated petitions for certiorari involving Chicago's handgun ban ("Chicago petitions").

This Court's initial encounters with the Fourteenth Amendment in the 1870s yielded a profound misreading of its Privileges or Immunities Clause that has haunted the Court's rights jurisprudence for more than a century. The Chicago petitions present

the Court with an unprecedented opportunity to reach back to the very source of that misreading, the 1873 *Slaughter-House Cases*, and correct it once and for all. There are three compelling reasons why the Court should seize that opportunity now.

First, the only disagreement among circuit courts so far in the wake of *Heller* is whether they are bound by this Court's pre-incorporation decisions refusing to apply the right to keep and bear arms against the states. More cases will not shed further light on that question. Second, case law and scholarly commentary together form a kind of constitutional conversation. After much give-and-take, that conversation has arrived at a clear consensus about *Slaughter-House* that merits the Court's consideration. Third and finally, the Constitution is not merely a blueprint for government, but a charter of liberty. Accurately placing the Fourteenth Amendment within that tradition – which this Court has yet to do – would be a virtue in itself and would sharpen the national dialogue regarding the source, nature, and limits of our constitutional rights.

ARGUMENT

The Fourteenth Amendment was enacted to cure a specific and well-documented evil: namely, the systematic violation of civil liberties by state and local governments determined to keep newly freed blacks in a state of constructive servitude while

marginalizing and terrorizing their white supporters. But that purpose was frustrated by the Court's initial failure to give the Amendment its intended effect. *E.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). As a result, states remained free to deprive people – black and white – of their basic civil rights, and many did.

Over time, and in the face of such outrages as Jim Crow, the fiction that state governments could be counted upon to adequately protect civil liberties became increasingly unsustainable. The Court thus reconsidered its understanding of the Fourteenth Amendment and began a process of identifying and enforcing specific rights through the Due Process Clause that came to be known as "selective incorporation." Today, nearly every substantive right listed in the first eight amendments has been held to apply against the states, with a particularly notable exception: the right to keep and bear arms. The Chicago petitions present the Court with the opportunity to correct that omission in a manner consistent with original understanding by using the Privileges or Immunities Clause instead of the Due Process Clause.

I. Further Consideration By Lower Courts Will Not Clarify Whether The Right To Keep And Bear Arms Should Apply Against The States.

Since *Heller*, three federal circuit courts have considered whether the right to keep and bear arms

should apply against state and local governments. *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, Nos. 08-4241, 08-4243, 08-4244, 2009 WL 1515443 (7th Cir. June 2, 2009); *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009); *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009). The Second and Seventh Circuits considered themselves bound by this Court's pre-incorporation precedents not to apply that right against the states. But the Ninth Circuit read those cases differently and conducted its own analysis, concluding that the Fourteenth Amendment's Due Process Clause incorporates the right to keep and bear arms against the states. *Compare Chicago*, 2009 WL 1515443, at *2, *and Maloney*, 554 F.3d at 58-59, *with Nordyke*, 563 F.3d at 447-58.

Given the profusion of state and local gun laws, the need for guidance from this Court to ensure a uniform understanding of the federal right to keep and bear arms is self-evident and urgent. Moreover, while some issues may benefit from "percolating" in the lower courts,[2] this is not one of them. The primary disagreement among lower courts is whether they are bound by this Court's pre-incorporation decisions concerning the right to keep and bear arms.[3] Since lower

[2] Or not – see *Comment: Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. Pitt. L. Rev. 861, 891 (1993) (empirical study concluding that "percolation does not lead to demonstrably better statutory decisions from the Supreme Court").

[3] Besides *Nordyke*, other courts directly considering the application of the right to keep and bear arms against the states in

(Continued on following page)

courts are unable to shed meaningful light on that question, it is difficult to see any point in waiting for more of them to weigh in.

II. There Is A National Consensus That *Slaughter-House* Misinterpreted The Privileges Or Immunities Clause Of The Fourteenth Amendment.

As noted above, case law and scholarly commentary together form a constitutional conversation in which this Court plays two roles, participant and arbiter. When that conversation produces a consensus at odds with precedent, it falls to this Court to determine both the validity of the consensus and whether to act upon it. The Court must decide, in other words, when the practical virtues of *stare decisis* should yield to the higher duty of fidelity to constitutional text.

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the wake of *Heller* have uniformly declared the issue foreclosed by this Court's precedents. *See, e.g., Young v. Hawaii*, No. 08-540, 2009 U.S. Dist. LEXIS 28387, at *13 (D. Haw. Apr. 1, 2009) ("Accordingly, *Heller* did not overrule the longstanding precedent that states are not bound by the Second Amendment."); *Livingston v. Francis*, 2009 U.S. Dist. LEXIS 24503 No. 09-10357, at *8-*9 (E.D. Mich. Mar. 26, 2009) ("[T]he State of Michigan is not constrained by the Second Amendment. . . ."); *United States v. Lewis*, 2008 U.S. Dist. LEXIS 103631, at *9-*10 (D.V.I. Dec. 24, 2008) (citing cases); *Crespo v. Crespo*, Nos. A-0202-08T2, A-0203-08T2, 2009 N.J. Super. LEXIS 138, at *20-*21 (N.J. Super. Ct. App. Div. June 18, 2009) (same); *State v. Turnbull*, No. A-08-0532, 2009 Minn. App. LEXIS 93, at *4-5 (Minn. Ct. App. June 2, 2009) (same); *State v. Hunter*, 147 Wn. App. 177, 191 (Wash. Ct. App. Oct. 20, 2008) (same).

Amici respectfully submit that for the Privileges or Immunities Clause of the Fourteenth Amendment, that time has come.

The doctrine of *stare decisis* is particularly inapt with respect to the *Slaughter-House Cases*, not only because of the extreme violence that opinion did to constitutional text and history, but because the purposes of the doctrine would not be served by refusing to revisit this particular mistake. The "principal purposes of *stare decisis* . . . are to protect reliance interests and to foster stability in the law." *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 79 (1993) (Scalia, J., concurring in part and concurring in the judgment). Those interests have no application here; individuals today have not altered their activities or expectations in reliance on a series of Supreme Court decisions that initially erased the Privileges or Immunities Clause from the Constitution but, shortly thereafter, enlisted the Due Process Clause to do much of what the erased clause had been designed to accomplish.

The Court's interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases* has inspired an extraordinary body of scholarship and commentary. Indeed, few if any questions of constitutional law have received more scholarly attention than the meaning of the Fourteenth Amendment, including specifically its command that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States." U.S. Const. amend. XIV, § 1. That scholarship may be briefly summarized as follows.

Congress declared the Fourteenth Amendment ratified on July 21, 1868.[4] On April 14, 1873, this Court handed down the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), involving the constitutionality of a Louisiana law that created a private monopoly on the sale and slaughter of livestock in New Orleans. Writing for a 5-4 majority, Justice Miller upheld the law as a valid public health measure that did not deprive New Orleans butchers "of the right to exercise their trade." *Id.* at 60. Undertaking the Court's first analysis of the Fourteenth Amendment's Privileges or Immunities Clause, Justice Miller concluded that it was meant to protect only rights of national – as opposed to state – citizenship, which did not include the right to earn a living in a marketplace free of state-chartered monopolies. *Id.* at 78-79. Nor, according to this Court's later gloss, did the Privileges or Immunities Clause protect other substantive provisions in the Bill of Rights.[5]

The decision was immediately controversial, and public opinion seems to have been decidedly with the

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[4] *E.g.*, Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 629 & n.10 (1994).

[5] *See United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876) (no federally protected right of assembly); *Presser v. Illinois*, 116 U.S. 252, 267 (1886) (same).

dissenting Justices.[6] Still, the issue lay relatively dormant[7] until Justice Black's famous dissent in *Adamson v. California*, 332 U.S. 46, 68 (1947), in which he argued that "one of the chief objects . . . of the [Fourteenth] Amendment's first section, *s*eparately and as a whole . . . was to make the Bill of Rights[ ] applicable to the states." *Id.* at 71-72. Justice Frankfurter rejected that conclusion in a concurring opinion, *id.* at 59-68, setting the stage for a vigorous academic debate that continues to this day.

Two of the leading figures in the early stages of the debate were Charles Fairman, a protégé of

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[6] *See, e.g.*, Akhil Reed Amar, THE BILL OF RIGHTS 209-10 (1998); (discussing contemporary legal opinion); Eric Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 503 (1988) (arguing that the *Slaughter-House* majority's conclusions "should have been seriously doubted by anyone who read the Congressional debates of the 1860s."); Michael Kent Curtis, NO STATE SHALL ABRIDGE 171-73 (1986) (noting widespread support among lower courts prior to *Slaughter-House* for "a libertarian reading of the amendment"); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 31-34 (2007) (arguing that, "[f]rom the beginning, Slaughter-House was intensely criticized," and providing examples); Aynes, *Constricting Freedom*, 70 Chi.-Kent L. Rev. at 679-81; Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol. 1, 33 (1998).

[7] The Privileges or Immunities Clause did enjoy a brief resurrection in *Colgate v. Harvey*, 296 U.S. 404 (1935), but that case was soon overruled by *Madden v. Kentucky*, 309 U.S. 83 (1940).

Justice Frankfurter and a leading proponent of his anti-incorporationist views,[8] and William Crosskey, an iconoclastic Chicago law professor who challenged Fairman's scholarship, particularly his handling of the Amendment's legislative history. Fairman's and Crosskey's seminal law review articles "were considered, as late as 1968, to be 'the only full-dress discussions of [the incorporation debate] in legal periodicals' and 'far more comprehensive than any of the United States Supreme Court cases on this point.'"[9] The next generation of scholarship was led by Professors Raoul Berger and Michael Kent Curtis, whose academic duel over the meaning of the Fourteenth Amendment and the Privileges or Immunities Clause spanned nearly two decades.[10] Many other respected

[8] *See, e.g.*, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 Stan. L. Rev. 5 (1949).

[9] Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 Chi.-Kent L. Rev. 1197, 1251 (1995) (quoting Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 Harv. J. on Legis. 1, 3 (1968)).

[10] *See, e.g.*, Raoul Berger, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (arguing that the Fourteenth Amendment was not intended to incorporate the Bill of Rights against the states); Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. Cin. L. Rev. 1 (1993); Michael Kent Curtis, NO STATE SHALL ABRIDGE (1986) (arguing that Framers of the Fourteenth Amendment intended to apply the Bill of Rights against the states and rebutting Fairman, Berger, and others); Michael Kent Curtis, *John A. Bingham and the Story of American Liberty*, 36 U. Akron L. Rev. 617 (2003); *see also* Michael Kent Curtis, *Still Further Adventures of the Nine-Lived Cat: A Rebuttal to Raoul*

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scholars, including Laurence Tribe[11] and Akhil Amar,[12] have expressed their views on the subject as well.

Somewhat surprisingly given the ideological diversity of its participants, the debate has yielded a clear consensus about the *Slaughter-House* majority's interpretation of the Privileges or Immunities Clause: It was wrong. Professor Aynes, for example, has observed that "'everyone' agrees the Court incorrectly interpreted the Privileges or Immunities Clause," and Professor McAffee considers this "one of the few important issues about which virtually every modern commentator is in agreement."[13] Professors Tribe and Amar have described *Slaughter-House* as "incorrectly

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Berger's Reply on Application of the Bill of Rights to the States, 62 N.C. L. Rev. 517, 518 n.5 (1984) (providing chronology of Berger-Curtis debate to that point).

[11] Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1320-31 (3d ed. 2000) ("The textual and historical case for treating the Privileges or Immunities Clause as the primary source of federal protection against state rights-infringement is very powerful indeed.").

[12] Akhil Reed Amar, THE BILL OF RIGHTS 213 (1998) (explaining "[t]he obvious inadequacy – on virtually any reading of the Fourteenth Amendment – of Miller's opinion" in *Slaughter-House*).

[13] Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 627 (1994); Thomas McAffee, *Constitutional Interpretation – the Uses and Limitations of Original Intent*, 12 U. Dayton L. Rev. 275, 282 (1986).

gutting" and "strangling the privileges or immunities clause in its crib."[14]

An error of such magnitude (or even just the widespread perception of such an error) must be addressed eventually. The Chicago petitions offer a unique opportunity to reconsider *Slaughter-House* from a fresh perspective and with the benefit of extensive scholarship that was not available when the Court developed the doctrine of incorporation through the Due Process Clause.

III. Interpreting The Privileges Or Immunities Clause According To Its Original Public Meaning Would Benefit The Court's Fourteenth Amendment Jurisprudence.

The *Slaughter-House* majority's failure to interpret the Privileges or Immunities Clause consistent with original understanding caused a dislocation in this Court's rights jurisprudence that has never been satisfactorily addressed, let alone corrected. Meanwhile, Justice Miller's analysis of the Privileges or Immunities Clause, never persuasive, has grown even less so over time, and it is no accident that his ultimate conclusion – that the Fourteenth Amendment provides

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[14] Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1121, 1297 n.247 (1995); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1258-59 (1992).

no meaningful protection against state and local governments – was so short-lived.

The fundamental tension is this: the term "privileges or immunities" was plainly understood by mid-19th-century Americans as synonymous with "rights." *See*, *e.g.*, Curtis, NO STATE SHALL ABRIDGE 64-65 (noting that the "words *rights*, *liberties*, *privileges*, and *immunities*, seem to have been used interchangeably"). In fact, that is how Article IV's Privileges and Immunities Clause was defined by Justice Bushrod Washington in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), the most authoritative pre-Civil War opinion defining that clause. *See*, *e.g.*, Bernard Siegan, THE SUPREME COURT'S CONSTITUTION at 55-65 (1987); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 Temple L. Rev. 361 (1993). But under the original Constitution, as amended by the Bill of Rights, the rights set forth in the Bill of Rights applied only against the federal government, which left the states free to disregard them. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). It was to rectify that problem, as they repeatedly said, and to fundamentally change the relationship between the federal and state governments, that the Framers of the Fourteenth Amendment drafted it the way they did.

Indeed, the Amendment's principal author, Rep. John Bingham, later publicly explained how he carefully chose the words of Section 1 in order to achieve that precise effect. Akhil Reed Amar, THE BILL OF RIGHTS 164-65 (1998) (quoting Cong. Globe, 42d

Cong., 1st Sess., 84 app. (1871)). Finally, the whole point of the Fourteenth Amendment was to enable the federal government to stamp out a culture of oppression whose very hallmark was the wholesale disregard of basic civil rights – including particularly free expression, armed self-defense, and economic self-sufficiency.

In short, the Privileges or Immunities Clause was meant to rectify what its Framers saw as a serious limitation with then-current constitutional doctrine by giving the *federal* government the power (and the duty) to protect individuals from *state* actions that violated their rights. The *Slaughter-House* majority, far from respecting that purpose, in fact repudiated it. The crux of the majority's argument is overtly consequentialist – Justice Miller expresses deep concern that reading the Clause to protect individual civil rights would "radically change[ ] the whole theory of the relations of the State and Federal governments to each other. . . ." *Slaughter-House Cases*, 83 U.S. 36, 78 (1873). Indeed, this reasoning – a judgment that the Fourteenth Amendment marked an improvident change in federal-state relations that was best ignored – is reflected in 19th-century legal scholar Christopher Tiedeman's praise of the majority opinion for having "dared to withstand the popular will as expressed in the letter of the amendment." David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 Mo. L. Rev. 93, 121 (1990) (quoting Christopher G. Tiedeman, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES:

A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 102-03 (1890)).

Of course, the "radical[ ] change[ ]" so feared by Justice Miller has in part come to pass by virtue of this Court's due process jurisprudence. But that approach has been the subject of substantial criticism, colorfully illustrated by John Hart Ely's characterization of "substantive due process" as reminiscent of "green pastel redness." John Hart Ely, DEMOCRACY AND DISTRUST 18 (1978).

Restoring the Privileges or Immunities Clause to its proper place in the constitutional structure would have the advantage of tethering this Court's rights-protecting jurisprudence much more closely to the Constitution's text and history.[15] *See*, *e.g.*, *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting); *Brennan v. Stewart*, 834 F.2d 1248, 1256 (5th Cir. 1988) ("[I]t would be more conceptually elegant to

[15] This is not to say that this Court must entirely reject the doctrine of substantive due process in order to give proper weight to the Privileges or Immunities Clause. Powerful arguments have, of course, been offered in favor of the substantive due process doctrine, if not the name. *See, e.g.,* Randy E. Barnett, RESTORING THE LOST CONSTITUTION 207-08 (2004); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Comment. 315 (1999). The virtue of properly interpreting the Privileges or Immunities Clause does not lie in purging substantive due process altogether – rather, it would more firmly ground substantive rights in the text, history, and original public meaning of the Constitution, and in doing so provide greater clarity and credibility to the Court's jurisprudence of rights.

think of these substantive rights as 'privileges or immunities of citizens of the United States'. . . ."). The debates over the framing and ratification of the Fourteenth Amendment make clear that the Privileges or Immunities Clause was meant to correct what John Bingham in another context called an "ellipsis" in the Constitution by providing for substantive federal protection of certain rights inherent in the Framers' understanding of what it meant to be a citizen and a free person.[16] Because the debates and contemporaneous public documents are replete with references to specific court cases that Congress and the ratifying states sought to overturn and specific evils they meant to prevent, the rights protected by the Clause can be rooted solidly in that history, as can their limits. *Cf. Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) ("In the construction of the constitution, we must . . . examine the state of things existing when it was framed and adopted . . . to ascertain the old law, the mischief and the remedy") (internal citation omitted).

This case presents a unique opportunity to begin to correct the mistake of *Slaughter-House* – a mistake that continues to distort both this Court's Fourteenth

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[16] Cong. Globe, 35th Cong., 2d Sess., 984 (1859) (statement of Rep. Bingham). *See also* Reinstein, *Completing the Constitution,* 66 Temple L. Rev. at 362-63 (1993) (describing the Framers' intention to "complete" the Constitution by applying the principles of the Declaration of Independence and the Bill of Rights to the states).

Amendment jurisprudence and the constitutional dialogue in general. A proper analysis of the Privileges or Immunities Clause is long overdue, not just in the interest of fidelity to popular will, but in the interest of establishing a solid foundation and clearly delimited framework for the Court's jurisprudence of rights.

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask the Court to grant the Chicago petitions and consider the proper meaning of "privileges or immunities" in the Fourteenth Amendment.

Respectfully submitted,

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