No. 08-

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

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the right of the people to keep and bear arms guaranteed by the Second Amendment to the United States Constitution is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting possession of handguns in the home.

PARTIES TO PROCEEDING

Petitioner National Rifle Association of America, Inc. ("NRA"), is a corporation which has no parent corporation. No publicly held company owns 10% or more of the corporation's stock. Petitioners in *NRA v. City of Chicago*, No. 08-4241, also include the natural persons Dr. Kathryn Tyler, Van F. Welton, and Brett Benson. Petitioners in *NRA v. Village of Oak Park*, No. 08-4243, also include the natural persons Robert Klein Engler and Dr. Gene A. Reisinger.

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OPINIONS BELOW

The opinion of the court of appeals is not reported at the time of this writing and is printed in the Appendix ("App.") at 1a. The unreported order denying the petition for initial hearing *en banc* is at App. 11a. The district court's unreported memorandum opinion, App. 17a, is available at 2008 WL 5111163.

JURISDICTION

On June 2, 2009, the court of appeals rendered judgment affirming the district court's order dismissing the complaint. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTION AND ORDINANCES

The texts of the following are in the Appendix: U.S. Const., Amends. II and XIV, § 1; Municipal Code of Chicago, §§ 8-20-030(k), 8-20-040, 8-20-050(c), 8-20-250; Oak Park Municipal Code, §§ 27-1-1 (excerpts), 27-2-1, 27-4-1, 27-4-3, 27-4-4.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Petitioners National Rifle Association of America, Inc. ("NRA") *et al.*, filed a complaint against

the City of Chicago and a complaint against the Village of Oak Park on June 27, 2008, the day after this Court rendered its seminal decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). The complaints alleged that the ordinances of said municipalities prohibiting possession of any handgun, including in the home, violated the Second and Fourteenth Amendments of the United States Constitution.

The district court had jurisdiction under 28 U.S.C. § 1331. In a memorandum opinion and order dated December 4, 2008, the district court held that the Second Amendment is not applicable to the States through the Fourteenth Amendment and granted judgment on the pleadings in favor of the City of Chicago and Village of Oak Park. Final judgments were rendered on December 18, 2008. Timely notices of appeal were filed.

On May 6, 2009, the court of appeals denied a petition for an initial *en banc* hearing. On June 2, 2009, the court of appeals issued an opinion that it was bound by certain nineteenth-century precedents of this Court, and that only this Court could decide whether the Second Amendment applies to the States through the Fourteenth Amendment. The court of appeals affirmed the judgments of dismissal by the court below.

(ii) Statement of Facts

The City of Chicago prohibits possession of a

firearm unless it is registered, but provides that no handgun may be registered. Municipal Code of Chicago, §§ 8-20-040(a), 8-20-050(c). The Village of Oak Park makes it unlawful to possess any "firearm," which it defines as a handgun. Oak Park Municipal Code, §§ 27-2-1, 27-1-1.

But for the ordinances, the individual plaintiffs would forthwith keep handguns in their homes for self protection and other lawful purposes. Some plaintiffs own handguns which they must store outside these jurisdictions, and other plaintiffs would acquire handguns if lawful to keep at home. In addition to having numerous members in the same predicament who reside in Chicago and Oak Park, the National Rifle Association has numerous members who lawfully transport firearms but may not do so through those municipalities.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT AND TO DECIDE WHETHER THE FOURTEENTH AMENDMENT INCORPORATES THE SECOND AMENDMENT SO AS TO MAKE IT APPLICABLE TO THE STATES

The court of appeals decided an important question of federal law that has not been, but should be, settled by this Court, and did so in a way that conflicts with relevant decisions of this Court. Holding that a prohibition on possession of handguns violates

the Second Amendment, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008), stated that this Court's nineteenth century cases "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." The court of appeals here did not engage in that inquiry and instead opined that only this Court may decide whether the Second Amendment is incorporated into the Fourteenth Amendment. App. 2a-4a.

In addition, the decision at bar conflicts with decision of another United States court of appeals on the same important matter. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), held that the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment so as to be applicable to the States. The court of appeals here joins other courts of appeal in holding that it does not.[1]

1. This Court has never ruled on whether the Second Amendment applies to the States through the

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[1] *See also Bach v. Pataki*, 408 F.3d 75, 85 (2nd Cir. 2005) (rejecting incorporation); *accord, Maloney v. Cuomo*, 554 F.3d 56, 58-59 (2nd Cir. 2009). Other courts of appeal have also rejected incorporation, but they also held that the Second Amendment only protects a "collective" militia right, which *Heller* rejected in favor of an individual-rights approach. *See Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) ("second amendment grants right to the state, not the individual"); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) ("the Second Amendment preserves a collective, rather than individual, right"); *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 539 n.18 (6th Cir. 1998).

Fourteenth Amendment. It held that the First, Second, and Fourth Amendments do not apply directly to the States. *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *Miller v. Texas*, 153 U.S. 535, 538 (1894). Each of these decisions relied on the pre-Fourteenth Amendment decision in *Barron v. Mayor of Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (1833).[2]

Miller refused to consider whether the Second and Fourth Amendments apply to the States through the Privileges or Immunities Clause of the Fourteenth Amendment because it was not raised in the trial court.[3]

This Court noted in *Heller*: "With respect to *Cruikshank*'s continuing validity on incorporation, . . . we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment

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[2]"Representative [John] Bingham . . . explained that he had drafted §1 of the Fourteenth Amendment with the case of *Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833), especially in mind." *Monell v. Dep't of Social Services*, 436 U.S. 658, 686-87 (1978). On the same page of that speech, Bingham characterized "the right of the people to keep and bear arms" as one of the "limitations upon the power of the States . . . made so by the Fourteenth Amendment." Cong. Globe, 42nd Cong., 1st Sess., App. 84 (Mar. 31, 1871).

[3]"[I]f the fourteenth amendment limited the power of the states as to such rights [to bear arms and against warrantless search and seizure], as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court." *Miller*, 153 U.S. at 538.

inquiry required by our later cases." 128 S. Ct. at 2813 n.23. The court of appeals in the instant case considered itself bound by *Cruikshank, Presser*, and *Miller*, and opined that only this Court may decide whether the right is incorporated.[4] App. 2a-4a. Since it failed to engage in the required inquiry, it offered no opinion on whether incorporation should be recognized.

By contrast, the Ninth Circuit in *Nordyke* found *Cruikshank* and its progeny inapplicable because they addressed only the direct application of the Second Amendment to the States. 563 F.3d at 446-47. It found that incorporation through the Privileges or Immunities Clause was precluded by the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *Id.* However, applying this Court's later cases,

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[4]In doing so, it reaffirmed its decision in *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983). App. 3a. Judge Coffey, dissenting, wrote, *id.* at 278:

> The majority cavalierly dismisses the argument that the right to possess commonly owned arms for self-defense and the protection of loved ones is a fundamental right protected by the Constitution. Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 151, 82 L. Ed. 288 (1937), defined fundamental rights as those rights "implicit in the concept of ordered liberty." Surely nothing could be more fundamental to the "concept of ordered liberty" than the basic right of an individual, within the confines of the criminal law, to protect his home and family from unlawful and dangerous intrusions.

Nordyke recognized the Second Amendment to be selectively incorporated into the Due Process Clause of the Fourteenth Amendment. *Id.* at 457.[5]

2. This Court should grant the writ and determine whether the right at issue is incorporated. "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1, 5 (1964). As *Heller*, 128 S. Ct. at 2816, states:

> [N]othing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States . . . . Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods.

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[5] *Cruikshank*, *Presser*, and *Miller* "came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and . . . they ultimately rest on a rationale equally applicable to all those amendments . . . ." *United States v. Emerson*, 270 F.3d 203, 221 n.13 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (holding that the Second Amendment protects individual rights).

The First, Second, and Fourth Amendments all refer to "the right of the people" to do certain things or be free from certain governmental restraints. The Second Amendment has a purpose clause clarifying that exercise of the right makes possible a well regulated militia, which is "necessary to the security of a free state."

There is a strong presumption that an explicitly-guaranteed substantive right is fundamental.[6] "The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights." *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) (referring to "the specific guarantees elsewhere provided in the Constitution. . . . the right to keep and bear arms"). This Court's decisions incorporating substantive rights appear to have done so virtually on an *a priori* basis.[7]

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[6]This Court has stated as much regarding a procedural right: "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right . . . ." *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

[7]*Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 237 (1897) (Just Compensation; "implied reservations of individual rights . . . which are respected by all governments entitled to the name"); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (speech and press "are among the fundamental personal rights and 'liberties' protected by the due process clause"); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (assembly is among "those fundamental principles of liberty and justice which lie at the base of all civil and political institutions"); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (religious freedom a "fundamental concept of liberty");

"[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right . . . ." *Heller*, 128 S. Ct. at 2797. *Heller* explains:

> The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. Like the First, it [the Second Amendment] is the very *product* of an interest-balancing by the people . . . . And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

128 S. Ct. at 2821.

Heller held as a matter of law that "the inherent right of self-defense has been central to the Second Amendment right." 128 S. Ct. at 2817. The right to have arms allows one to protect life itself, and the Second Amendment declares its purpose to be "the security of a free state."

Blackstone "cited the arms provision of the [English] Bill of Rights as one of the fundamental rights of Englishmen." *Heller*, 128 S. Ct. at 2798.

Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (the "security of one's privacy against arbitrary intrusion by the police"), *rev'd. on other grounds, Mapp v. Ohio*, 367 U.S. 643 (1961).

"By the time of the founding, the right to have arms had become fundamental for English subjects." *Id.*

"In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment." *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

"A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan*, 391 U.S. at 155-56. The Second Amendment also prevents oppression: "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Heller*, 128 S. Ct. at 2801.

Benton v. Maryland, 395 U.S. 784, 794 (1969), held "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage" and is thus incorporated. "[T]his Court has increasingly looked to the specific guarantees of the (Bill of Rights)" as to incorporation and "has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights . . . .'" *Id.* at 794 (citations omitted).[8] The guarantee against double

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[8] *Benton* (*id.*) overruled the more narrow, subjective test in *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937), which asked

jeopardy was fundamental because it could "be traced to Greek and Roman times," it was "established in the common law of England," and "was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his *Commentaries*." *Id.* at 795. The same is true of the Second Amendment.[9]

While most procedural guarantees of the Bill of Rights have been incorporated, the grand jury indictment clause has not. That is because, as *Hurtado v. California*, 110 U.S. 516, 532 (1884), explained, general maxims such as due process "must be held to guaranty, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."[10]

Nor has the Seventh Amendment right to jury trial in civil cases where the value in controversy exceeds $20. "The Court has not held that the right to

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if "the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty . . . ."

[9] *See Heller*, 128 S. Ct. at 2792, 2798-99, 2805 (discussion of Blackstone and the common law); S. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 9-20 (1984) (recognition of right to have arms in Greek and Roman law and philosophy); S. Halbrook, *The Founders' Second Amendment* 25-26, 114, 293 (2008) (Founders' reliance on right to arms in writings of Aristotle and Cicero).

[10] "Although the Due Process Clause guarantees petitioner a fair trial, it does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury." *Alexander v. State of Louisiana*, 405 U.S. 625, 633 (1972).

jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment." *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974).

Substantive guarantees in the Bill of Rights are not subject to the question of whether a particular procedure is necessary for due process. In recognizing substantive Bill of Rights guarantees to be incorporated, the Court has relied on their status as such rather on subjective values to determine if a constitutional right is really important.

The Second Amendment does not represent an inferior right which a court may subjectively relegate as beneath the usual rules of incorporation. "To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution." *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956). No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).

This Court has held that the Fourteenth Amendment guarantees various activities that are non-textual. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (same-sex sodomy).[11] It would be incongruous

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[11] *Lawrence* has a lesson for this case: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home." *Id.* at 562.

to hold that an explicitly-guaranteed substantive right is not protected by that Amendment.

The right to have arms was considered fundamental in every State at the founding. Stephen P. Halbrook, *The Founders' Second Amendment* 126-69 (2008) (hereafter "*Founders*") (State-by-State analysis). Chicago argued below that 8 of the original 13 State constitutions had no arms guarantee. Yet none of those 8 States explicitly protected free speech either – two had no written constitution at all,[12] three had no bill of rights,[13] and three had bills of rights with no mention of free speech.

During Reconstruction, ten of the Southern States were required to amend their constitutions to be consistent with the Fourteenth Amendment to be readmitted to the Union.[14] Of these, six had antebellum arms guarantees, three of which limited the right to "the free white men." Of the four that had no arms guarantee, two had court rulings that the Second Amendment applied to the States,[15] and the

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[12]Connecticut and Rhode Island. Halbrook, *Founders*, 164-66.

[13]New Jersey, New York, and South Carolina. Halbrook, *Founders*, 133, 151, 127.

[14]Ala., La., Va., Ga., Ark., Miss., S.C., N.C., Fla., and Tex. *See* 14 Stat. 428 (1867).

[15]*Nunn v. State*, 1 Ga. 243 (1846); *State v. Chandler*, 5 La. Ann. 489, 490 (1850).

other two had legal traditions consistent therewith.[16] Revision of their constitutions in 1867-68 left eight of the ten states with arms guarantees, three of which expanded the guarantee from "the free white men" to "the people" or "the citizens"; the two States that did not had court decisions or legal traditions consistent therewith.[17] Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876*, at 90-98 (1998).

Currently, forty-four states have constitutional guarantees for the right to arms, and no state constitution denies the right.[18] Eugene Volokh, "State Constitutional Rights to Keep and Bear Arms," 11 Texas Rev. of Law & Politics 191, 193-205 (2006). In the *Heller* case, 31 states formally declared that "the right to keep and bear arms is fundamental and so is properly subject to incorporation." Brief Amici Curiae of the States of Texas, *et al.*, Supreme Court No. 07-

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[16]Henry St. George Tucker, *Commentaries on the Laws of Virginia* 43 (1831) ("the right of bearing arms . . . is practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation"); *Public Laws of the State of South Carolina* (1790), App., 13 ("Subjects Arms" in English Bill of Rights).

[17]They included Virginia and Louisiana.

[18]*Cf. Bartkus v. Illinois*, 359 U.S. 121, 124-25 (1959) (expressing reluctance to incorporate procedural guarantees where a significant number of states had conflicting procedures), *overrruled on other grounds, Benton v. Maryland*, 395 U.S. 784 (1969).

290, at 23 n.6. "In the judgment of amici States, the right to keep and bear arms is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (citation omitted).

Heller's "common use" test is firmly grounded in State tradition. *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972), held protected arms to be those that "are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles."[19]

Nordyke, the only case to apply this Court's modern Fourteenth Amendment jurisprudence to the Second Amendment, held:

> We therefore conclude that the right to keep and bear arms is "deeply rooted in this Nation's history and tradition." Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. . . . Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a

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[19] *See also State v. Duke*, 42 Tex. 455, 458-59 (1875) ("such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense"); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921) ("all 'arms' as were in common use"; "'pistol' *ex vi termini* is properly included within the word 'arms'").

> recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.

563 F.3d at 457.

3. "In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." *Heller*, 128 S. Ct. at 2809-10, citing Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876* (Praeger 1998). The Black Codes passed by the Southern States prohibited possession of firearms by African Americans, and a primary purpose of the Fourteenth Amendment was to prevent such State deprivation of Second Amendment rights. *Id.* at 2809-11.[20]

More evidence exists that the Second

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[20] *See also Bell v. Maryland*, 378 U.S. 226, 247-48 & n.3 (1964) (Douglas, J., concurring) (Fourteenth Amendment intended to eradicate the black codes, under which "Negroes were not allowed to bear arms.").

Amendment was intended to be incorporated than exists for any other right. The same two-thirds of Congress that passed the Fourteenth Amendment enacted the Freedmen's Bureau Act,[21] and both sought to guarantee the same rights.[22] The Act provided that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . ." § 14, 14 Stat. 176-177 (1866). The rights to "personal liberty" and "personal security" are protected by the Fourteenth Amendment.[23]

Similarly, the Civil Rights Act of 1866, 14 Stat. 27 (1866) (today's 42 U.S.C. § 1981) also protected the "full and equal benefit of all laws and proceedings for the security of person and property . . . ."[24] The

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[21]Halbrook, *Freedmen*, 41-42. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3842, 3850 (July 16, 1866).

[22]*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423-24, 436 (1968); *Regents of University of California v. Bakke*, 438 U.S. 265, 397-98 (1978) (Marshall, J.).

[23]*See Washington v. Glucksberg*, 521 U.S. 702, 714 (1997) ("The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable") (citation omitted); *Griswold v. Connecticut*, 381 U.S. 479, 484 n.* (1965) (the "indefeasible right of personal security, personal liberty and private property").

[24]"§14 of the amendatory Freedmen's Bureau Act . . . re-enacted, in virtually identical terms for the unreconstructed

Fourteenth Amendment was needed because, as Rep. George W. Julian explained, the Civil Rights Act

> is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.

CONG. GLOBE, 39th Cong., 1st Sess. 3210 (1866).

Introducing the Fourteenth Amendment in the Senate, Jacob Howard distinguished the "privileges and immunities of citizens" in Article IV of the Constitution from "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). However, this "mass of privileges, immunities, and rights" did not restrain the States. *Id.* "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766.

Howard's speech is weighty authority for the meaning of the Fourteenth Amendment. *Plyler v. Doe*, 457 U.S. 202, 214-15 (1982) (Howard was "explicit about the broad objectives of the Amendment");

Southern States, the rights granted in §1 of the Civil Rights Act of 1866." *Georgia v. Rachel*, 384 U.S. 780, 797 n.26 (1966).

Reynolds v. Sims, 377 U.S. 533, 600 (1964) (quoting Howard on "those fundamental rights lying at the basis of all society"). Howard's explanation of the Enforcement Clause "was not questioned by anyone in the course of the debate." *Katzenbach v. Morgan*, 384 U.S. 641, 648 n.8 (1966). Nor did anyone question his statement that the Amendment would protect the Bill of Rights guarantees that he mentioned, including the right to keep and bear arms.

The Fourteenth Amendment's framers reflected the Nation's views. The fundamental character of the right to keep and bear arms was evident nationwide in view of the plight of the freedmen who were deprived of this right. It was expressed in debates, hearings, reports, proclamations, trials, letters, State conventions, and newspapers.[25] Halbrook, *Freedmen*, chapters 1-4.

African Americans were advised that "you have the *same* right to own and carry arms that other citizens have." *The Loyal Georgian*, Feb. 3, 1866, at 1, quoted in Halbrook, *Freedmen*, 19. The Freedmen's Bureau proclaimed: "All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves." *Id.* *See also* 2 *Proceedings of the Black State Conventions, 1840-1865*, at 302 (1980) (petition to Congress in 1866 that Second Amendment rights be protected from

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[25]See David T. Hardy, "Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68," 30 Whittier L. Rev. __ (2009), http://works.bepress.com/david_hardy/5/.

deprivation by State of South Carolina).

State ratification records express the understanding of the Second Amendment as protecting fundamental rights. The Committee on Federal Relations in the Massachusetts General Court quoted the Second Amendment and other guarantees and stated: "Nearly every one of the amendments to the constitution grew out of a jealousy for the rights of the people, and is in the direction, more or less direct, of a guarantee of human rights . . . . [T]hese provisions cover the whole ground of section first of the proposed amendments." Mass. H. R. Doc. No. 149, at 3 (1867), quoted in Halbrook, *Freedmen*, 71-72.

"This clause [the Second Amendment] . . . is based on the idea, that the people cannot be oppressed or enslaved, who are not first disarmed." George W. Paschal, *The Constitution of the United States* 256 (1868). "The new feature declared [by the Fourteenth Amendment] is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States." *Id.* at 86.

The Framers broadly referred to the right to have arms as being among the rights, privileges, and immunities protected by the Fourteenth Amendment. *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982), quoted Rep. Dawes on the judicial protection of "these rights, privileges, and immunities" codified in the Civil Rights Act of 1871, today's 42 U.S.C. § 1983. Dawes identified them in part as follows:

He has secured to him the right to keep

> and bear arms in his defense. . . . It is all these, Mr. Speaker, which are comprehended in the words, "American citizen," and it is to protect and to secure him in these rights, privileges and immunities this bill is before the House.

CONG. GLOBE, 42nd Cong., 1st Sess., 475-76 (Apr. 5, 1871).[26]

4. In their complaints, Petitioners rely on both the Due Process Clause and the Privileges or Immunities Clause as protecting the arms right. Historically, this Court rejected incorporation under the Privileges or Immunities Clause, and selectively incorporated rights through the Due Process Clause. Petitioners claim that the arms right is protected under either or both clauses.

Application of this Court's jurisprudence under

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[26] *Patsy*, 457 U.S. at 504-06, further relied on the speeches of Rep. Butler, Rep. Coburn, and Senator Thurman. In related statements each of them held the right to arms to be among the "rights, immunities, and privileges" guaranteed in the Constitution. H.R. Rep. No. 37, 41st Cong., 3d Sess., 3 (1871) (Butler); CONG. GLOBE, 42d Cong., 1st Sess., 459 (1871) (Coburn); *id.*, 2d Sess., App. 25-26 (1872) (Thurman).

"Opponents of the bill also recognized this purpose and complained that the bill would usurp the State's power." *Patsy*, 457 U.S. at 504 n.6 (citing Rep. Whitthorne). On the page cited by the Court, Whitthorne stated that under the civil rights bill, if a police officer seized a pistol from a "drunken negro," then "the officer may be sued, because the right to bear arms is secured by the Constitution." CONG. GLOBE, 42d Cong., 1st Sess. 337 (1871).

the Due Process Clause easily brings the Second Amendment into the incorporation tent. Should this Court wish to reevaluate its jurisprudence under the Privileges or Immunities Clause, this would be an appropriate case in which to do so.

Saenz v. Roe, 526 U.S. 489, 502 n.15 (1999), explained about the Privileges or Immunities Clause:

> The Framers of the Fourteenth Amendment modeled this Clause upon the "Privileges and Immunities" Clause found in Article IV. Cong. Globe, 39th Cong., 1st Sess., 1033-1034 (1866) (statement of Rep. Bingham).

On the same pages of that speech, Bingham noted that previously "this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States," but that some States "have violated in every sense of the word those provisions of the Constitution . . . ." *Id.* at 1033-34. The next day, Robert Hale argued that the first ten amendments were "a bill of rights for the protection of the citizen," which already "limit[ed] the power of Federal and State legislation." *Id.* at 1064. Bingham responded that the proposed amendment would "arm the Congress . . . with the power to enforce this bill of rights as it stands in the Constitution today." *Id.* at 1088.

Saenz, 526 U.S. at 502 n.15, continued in its discussion about the Clause's background:

> In *Dred Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691 (1856), this Court had

> limited the protection of Article IV to rights under state law and concluded that free blacks could not claim citizenship. The Fourteenth Amendment overruled this decision. The Amendment's Privileges or Immunities Clause and Citizenship Clause guaranteed the rights of newly freed black citizens by ensuring that they could claim the state citizenship of any State in which they resided and by precluding that State from abridging their rights of national citizenship.

Indeed, *Dred Scott* stated, 19 How. at 416-17, that if African Americans were citizens, they would enjoy First and Second Amendment rights:

> For if they [blacks] were . . . entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race . . . the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.

By thus overruling the *Dred Scott* decision, the Fourteenth Amendment invalidated the "special laws" and "police regulations" passed by the States which

violated the rights to speech, assembly, and arms.[27]

Dissenting in *Saenz*, 526 U.S. at 527-28, Justice Thomas wrote:

> Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant.

In the context of this case, the Framers intended the Privileges or Immunities Clause to protect the right to keep and bear arms and other rights from State infringement. This case presents a ready vehicle for this Court to reevaluate the Clause.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

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[27]Senator Reverdy Johnson opposed the privileges-or-immunities clause "because I do not understand what will be the effect of that." CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866). Yet he was counsel for the slave owner in *Dred Scott* and was thus fully aware of such passages as the above.

Respectfully submitted,

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