No. 08-

In The

Supreme Court of the United States

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

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID G. SIGALE
LAW FIRM OF
DAVID G. SIGALE, P.C.
4300 Commerce Court,
Suite 300-3
Lisle, Illinois 60532
630.452.4547

ALAN GURA*
GURA & POSSESSKY, PLLC
101 N. Columbus Street,
Suite 405
Alexandria, Virginia 22314
703.835.9085

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

PARTIES TO THE PROCEEDINGS

Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc. and Illinois State Rifle Association initiated the proceedings below by filing a complaint against Respondent City of Chicago and its Mayor, Richard M. Daley, in the United States District Court for the Northern District of Illinois. Mayor Daley was dismissed at an early stage of the proceedings and is no longer a party in the matter.

No parent or publicly owned corporation owns 10% or more of the stock in either Second Amendment Foundation, Inc. or the Illinois State Rifle Association.

The day after Petitioners filed their complaint in the District Court, similar cases were brought against Respondent City of Chicago and Mayor Daley; and the Village of Oak Park, Illinois and its President, David Pope, by other parties. The plaintiffs in the related Chicago case were the National Rifle Association of America, Inc., Kathryn Tyler, Anthony Burton, Van F. Welton, and Brett Benson. The plaintiffs in the related Oak Park case were the National Rifle Association of America, Inc., Robert Klein Engler, and Gene A. Reisinger.

The three cases were related, but not consolidated, in the District Court. Petitioners and the

PARTIES TO THE PROCEEDINGS – Continued

related case plaintiffs appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit, which consolidated the appeals. The plaintiffs in the related cases, other than Anthony Burton, have separately petitioned for certiorari. Sup. Ct. Rule 12.4.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc., and Illinois State Rifle Association, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, 2009 U.S. App. LEXIS 11721, is reprinted in the Appendix (App.) at 1. The decision of the United States District Court for the Northern District of Illinois in this case, reprinted at App. 17, 2008 U.S. Dist. LEXIS 98133, is unpublished. The District Court's decision in the related cases, reprinted at App. 11, 2008 U.S. Dist. LEXIS 98134, is unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the United States Constitution provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

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

Relevant provisions of the laws of the City of Chicago are reprinted in the Appendix.

STATEMENT OF THE CASE

1. The City of Chicago enforces a handgun ban identical to that struck down by this Court as a violation of Washington, D.C. residents' Second Amendment rights. The Fourteenth Amendment guarantees that fundamental individual rights may not be violated by any form of government throughout the

United States. Accordingly, Chicago's handgun ban must meet the same fate as that which befell the District of Columbia's former law.

The federal appellate courts, and state courts of last resort, are split on the question of the Second Amendment's applicability to the states. The Ninth Circuit, applying this Court's test for selective incorporation of enumerated rights, held the states bound by the Second Amendment through the Fourteenth Amendment's Due Process Clause. *Nordyke* v. *King*, 563 F.3d 439 (9th Cir. 2009). But in this case, the Seventh Circuit declined to perform the required incorporation analysis, following inapposite pre-incorporation era precedent barring direct application of the Bill of Rights to the states. App. 3-4.[1]

This split of authority warrants speedy resolution, as it perpetuates the deprivation of fundamental constitutional rights among a large portion of the population. The split itself is not over whether the right to bear arms should be binding upon state actors, but rather, over which line of this Court's cases controls the question. Perpetuation of that dispute among the lower courts will serve no purpose. Moreover, the scholarly landscape concerning the core

---

[1] The Second Circuit followed the same logic in declining to perform an incorporation analysis for the right to keep and bear arms. *Maloney* v. *Cuomo*, 554 F.3d 56 (2d Cir. 2009).

constitutional issues in the case is exceptionally well-developed, enabling a just and comprehensive treatment by this Court.

The court below also declined to incorporate the Second Amendment under the Fourteenth Amendment's Privileges or Immunities Clause, following this Court's decisions which held that the provision incorporates only so-called rights of national citizenship. App. 2.

Application of this Court's selective incorporation doctrine is "required" to resolve the question of the Second Amendment's incorporation through the Fourteenth Amendment. *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2813 n.23 (2008). Doing so for the first time in this case, this Court should reverse the judgment below.

More critically, owing to the Fourteenth Amendment's plain text, original purpose, and original public meaning, this Court should also hold the Second Amendment is incorporated through the Fourteenth Amendment's Privileges or Immunities Clause. Although consensus regarding this provision's full meaning will likely remain elusive, there is now near-uniform agreement that this Court's decision in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), which all but eviscerated the Privileges or Immunities Clause, was wrongly decided. Given the profound scope of *Slaughter-House*'s error, and the confusion

it has spawned in Fourteenth Amendment jurisprudence, overruling *Slaughter-House* remains imperative. The unique interplay between the Second and Fourteenth Amendments makes this the ideal case in which to do so.

2. Immediately upon announcement of this Court's decision in *Heller*, Petitioners brought this action in the United States District Court for the Northern District of Illinois, challenging various Chicago ordinances as violating their Second and Fourteenth Amendment rights. At issue are Chicago's laws (1) banning the registration of handguns, thus effecting a broad handgun ban;[2] (2) requiring that guns be registered prior to their acquisition by Chicago residents, which is not always feasible;[3] (3) mandating that guns be re-registered on an annual basis, including the payment of what amounts to an annual tax on the exercise of Second Amendment rights;[4] and (4) rendering any gun permanently non-registerable if its registration lapses.[5] The district court had jurisdiction over the subject matter of the case under 28 U.S.C. § 1331 and § 1343.

Respondent City of Chicago had denied each individual Petitioner's attempt to register a handgun on account of the handgun registration ban. App. 34-45.

---

[2] Chicago Mun. Code § 8-20-050(c).

[3] Chicago Mun. Code § 8-20-090.

[4] Chicago Mun. Code § 8-20-200.

[5] Chicago Mun. Code § 8-20-200(c).

Petitioners Orlov and David Lawson were also denied handgun registrations on account of the city's pre-acquisition registration requirement. App. 37, 40.

Petitioners McDonald and David Lawson are the registered owners of long arms, and are thus subjected to the city's re-registration requirements. The registration for one of Petitioner David Lawson's rifles lapsed, thus rendering the rifle unregisterable. Petitioner David Lawson had also acquired a rifle through the federal Civilian Marksmanship Program ("CMP"), which sent the rifle directly to his Chicago home, rendering it automatically unregisterable as it was acquired prior to its possible registration. Respondent denied Lawson's administrative appeal of its refusal to register the CMP rifle. App. 47-48.

The day after Petitioners filed their complaint, the National Rifle Association ("NRA") and various individuals brought a separate challenge to the Chicago handgun ban, albeit not to the other provisions challenged by Petitioners. NRA also led a lawsuit challenging a similar handgun ban implemented by the Village of Oak Park, Illinois. It does not appear that the challenged provisions had been enforced against the NRA plaintiffs. This case, and the two NRA cases, were related in the District Court.

Petitioners moved for summary judgment on July 31, 2008. Subsequently, the District Court advised that the case should be resolved on a motion to narrow the legal issues under Fed. R. Civ. Proc. 16.

Heeding this advice, Petitioners filed such a motion, seeking to establish the Second Amendment's incorporation through the Privileges or Immunities and Due Process Clauses. The next day, NRA Plaintiffs sought leave to brief the incorporation issue, which was granted.

The parties advanced different arguments for incorporation. Petitioners have consistently argued that the Second Amendment is incorporated through both the Privileges or Immunities Clause and, pursuant to this Court's selective incorporation doctrine, the Due Process Clause of the Fourteenth Amendment. In contrast, NRA Plaintiffs initially posited that all rights are "fundamental" if "explicitly or implicitly protected by the Constitution," NRA Br., Dist. Ct. Nos. 08-3696, 08-3697, Dec. 4, 2008, at 12 (citation omitted), and that "[a]s such, the Second Amendment should be recognized as incorporated." *Id.* "An explicitly protected right, keeping and bearing arms is thus a fundamental right and is incorporated into the Fourteenth Amendment." NRA Br., Ct. App. Nos. 08-4241, 08-4243, Jan. 28, 2009 at 35; *cf.* Pet. for Cert., No. 08-1497 at 12 ("In recognizing substantive Bill of Rights guarantees to be incorporated, the Court has relied on their status as such rather on [sic] subjective values to determine if a constitutional right is really important.").

3. On December 4, 2008, the District Court entered orders denying both Rule 16 motions, as well as Petitioners' motion for summary judgment. Turning first to NRA Plaintiffs, the District Court termed their argument as a "simple syllogism," App. 12, that because most of the Bill of Rights has been incorporated under the Fourteenth Amendment, "[e]rgo, the Second Amendment's guaranty of the right of the people to keep and bear arms, as construed in *Heller*, also extends to Oak Park and Chicago via the Fourteenth Amendment. QED." App. 12-13. But the District Court held itself "duty bound . . . to adhere to the holding in *Quilici* [v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982)] rather than accepting [NRA] plaintiffs' invitation to 'overrule' it(!)," App. 16, referring to circuit precedent following this Court's decision in *Presser* v. *Illinois*, 116 U.S. 252 (1886) declining to apply the Second Amendment to the states.

Petitioners acknowledged that it is for this Court to grant them relief under the Privileges or Immunities Clause, but maintained that neither *Quilici* nor *Presser* addressed their Due Process selective incorporation argument. Indeed, *Quilici* had refused consideration of "historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments," *Quilici*, 695 F.2d at 270 n.8, key aspects of the selective incorporation analysis. Nonetheless, the District

Court referred to its decision in the related cases, reiterating its belief that *Quilici* controlled the outcome of Petitioners' selective incorporation claim. App. 18.

Notably, the District Court declined to opine whether the Second Amendment should be incorporated in the absence of what it considered to be binding precedent to the contrary. App. 16. Because it found the Second Amendment not to be incorporated, the District Court subsequently granted motions for judgment on the pleadings in all three cases.

On appeal, the Seventh Circuit held that this Court's opinions in *United States* v. *Cruikshank*, 92 U.S. 542 (1876), *Presser*, *supra*, and *Miller* v. *Texas*, 153 U.S. 535 (1894) "have direct application in [this] case" and are thus controlling. App. 3. The lower court reached this conclusion despite acknowledging that these three cases "did not consider [the] possibility, which had yet to be devised when those decisions were rendered," that the Second Amendment is selectively incorporated. App. 2.

The Seventh Circuit found support for its position in *Heller*'s footnote 23, observing "that *Presser* and *Miller* 'reaffirmed [*Cruikshank*'s holding] that the Second Amendment applies only to the Federal Government.'" App. 4 (quoting *Heller*, 128 S. Ct. at 2813 n.23. Notably, the Seventh Circuit did not

address the other portion of that same footnote, which Petitioners repeatedly emphasized indicate a contrary approach: "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 inquiry *required by our later cases*." *Heller*, 128 S. Ct. at 2813 n.23 (emphasis added).

REASONS FOR GRANTING THE PETITION

I. The Federal Courts Of Appeals And The Highest Courts Of Numerous States Are Divided Over Whether The Second Amendment Is Incorporated As Against The States By The Fourteenth Amendment.

The decision below is consistent with the Second Circuit's opinion in *Maloney* v. *Cuomo*, 554 F.3d 56 (2d Cir. 2009), but it directly contradicts the Ninth Circuit's opinion incorporating the Second Amendment through the Due Process Clause in *Nordyke* v. *King*, 563 F.3d 439 (9th Cir. 2009). The court below acknowledged this conflict. App. 2.

State high courts are also divided on the question of whether they are bound by the Second Amendment. Several state courts consider themselves bound

to respect the Second Amendment,[6] a view advanced before this Court by the Attorneys General of thirty-two states.[7] Yet other state high courts take the opposite view, usually by cursory reference to this Court's nineteenth century direct application precedent.[8]

This split of authority is ripe for resolution at this time. At the federal level, the split encompasses the nation's three largest population centers, depriving millions of Americans of what is for others a life-saving fundamental constitutional right. Moreover, as discussed *infra*, the Fourteenth Amendment's incorporating effect has recently enjoyed significant academic attention, fully developing the historical record in a manner that would empower the Court to reach a comprehensive and just resolution of this important question.

---

[6] *Brewer* v. *Commonwealth*, 206 S.W.3d 343, 347 & n.5 (Ky. 2006); *State* v. *Blanchard*, 776 So. 2d 1165, 1168 (La. 2001); *Rohrbaugh* v. *State*, 607 S.E.2d 404, 412-14 (W. Va. 2004); *Stillwell* v. *Stillwell*, 2001 Tenn. App. LEXIS 562 (Tenn. Ct. App. July 30, 2001); *State* v. *Anderson*, 2000 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Jan. 26, 2000); *State* v. *Nickerson*, 247 P.2d 188, 192 (Mont. 1952); *In re Brickey*, 70 P. 609 (Idaho 1902).

[7] The Second Amendment "is properly subject to incorporation." Br. of Amici States Texas, et al., No. 07-290, at 23 n.6. North Carolina joined the brief's thirty-one original signatories by letter.

[8] *See, e.g. State* v. *Keet*, 190 S.W. 573 (Mo. 1916); *State* v. *Mendoza*, 920 P.2d 357 (Haw. 1996); *In re Ramirez*, 226 P. 914 (Cal. 1924); *Strickland* v. *State*, 72 S.E. 260 (Ga. 1911); *Harris* v. *State*, 432 P.2d 929 (Nev. 1967); *State* v. *Kerner*, 107 S.E. 222 (N.C. 1921); *Ex parte Thomas*, 97 P. 260 (Okla. 1908).

The two circuits and various state high courts holding against Second Amendment incorporation have done so not on the grounds that incorporation would be wrong, but that it is foreclosed by a line of this Court's precedent. The question of which precedential line controls is ultimately one for this Court to decide, and would not benefit from further disagreement among the lower federal courts.

II. The Court Below Decided An Important Question Of Law In A Manner Contrary To This Court's Precedent.

Precedent barring direct application of the Bill of Rights remains undisturbed by the Fourteenth Amendment. But contrary to the Seventh Circuit's assertion, pre-incorporation relics such as *Cruikshank*, *Presser*, and *Miller* have no direct application to the question of selective incorporation under the Due Process Clause. "[C]ases cannot be read as foreclosing an argument that they never dealt with." *Waters* v. *Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) (citation omitted). By the time this Court first incorporated the Fourth Amendment in *Wolf* v. *Colorado*, 338 U.S. 25 (1949), *overruled on other grounds*, *Mapp* v. *Ohio*, 367 U.S. 643 (1961), *Miller*'s reasoning that the Second and Fourth Amendments "operate only upon the federal power, and have no reference whatever to proceedings in state courts," *Miller*, 153 U.S. at 538, was irrelevant with respect to both amendments it addressed.

The lower court's commendable respect for this Court's precedent and prerogatives was misapplied in that the lower court followed the wrong line of cases. Thus, the lower court decided an important constitutional issue in a manner contrary to the instructions of this Court. "[W]hen a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it." *Perkins* v. *Endicott Johnson Corp.*, 128 F.2d 208, 217-18 (2nd Cir. 1942), *aff'd*, 317 U.S. 501 (1943) (footnotes omitted). "A court need not blindly follow decisions that have been undercut by subsequent cases. . . ." *United States* v. *Burke*, 781 F.2d 1234, 1239 n.2 (7th Cir. 1985) (citations omitted).

> [S]ometimes later decisions, though not explicitly overruling or even mentioning an earlier decision, indicate that the Court very probably will not decide the issue the same way the next time. In such a case, to continue to follow the earlier case blindly until it is formally overruled is to apply the dead, not the living, law.

Norris v. *United States*, 687 F.2d 899, 904 (7th Cir. 1982).

The lower court erred in failing to heed *Heller*'s cautionary statement that the pre-incorporation relics lack "the sort of Fourteenth Amendment inquiry required by our later cases." *Heller*, 128 S. Ct. at 2813 n.23. The lower court's decision, while faithful to *Cruikshank*, failed to follow the approach laid down by this Court in cases describing selective due process

incorporation, such as *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

Responding to Petitioners' argument that in our legal system, it is the reasoning of precedent, not its result, which is controlling, the court below offered that if this were so, "the Court's decisions could be circumvented with ease" by any judge not "too dim-witted to come up with a novel argument." App. 3.

Respectfully, this is not correct. Time and again, this Court has rejected a result under one theory, only to adopt the same result under another. For example, this Court rejected a challenge to the mandatory federal Sentencing Guidelines under separation of powers and non-delegation theories, *Mistretta* v. *United States*, 488 U.S. 361 (1989), but sustained a similar challenge under the Sixth Amendment jury trial right. *United States* v. *Booker*, 543 U.S. 220 (2005). This is essentially the history of the selective incorporation doctrine. Most selectively-incorporated rights were earlier the subject of direct application bars. *Compare*, *e.g.*, *Cruikshank* (First Amendment not directly applicable to the states) with *Gitlow* v. *New York*, 268 U.S. 652 (1925) (First Amendment incorporated), and *Fox* v. *Ohio*, 46 U.S. (5 How.) 410 (1847) (Fifth Amendment Double Jeopardy Clause not directly applicable to the states) with *Benton* v. *Maryland*, 395 U.S. 784 (1969) (Double Jeopardy Clause incorporated).

Yet in this case, unless the Court grants the petition, Americans residing in the Seventh Circuit

will not only be deprived of their Second Amendment rights, they will also be denied consideration of whether those rights must be respected by state officials under this Court's established selective incorporation doctrine. It falls to this Court to perform the incorporation analysis that the lower court would not.

The modern incorporation test asks whether a right is "fundamental to the American scheme of justice," *Duncan*, 391 U.S. at 149, or "necessary to an Anglo-American regime of ordered liberty," *id.* at 149 n.14. *Duncan*'s analysis suggests looking to the right's historical acceptance in our nation, its recognition by the states (including any trend regarding state recognition), and the nature of the interest secured by the right.

As demonstrated by the only post-*Heller* opinion applying this Court's "required" selective incorporation analysis to the Second Amendment right, the court below erred in declining to apply the Second Amendment to the states. The Ninth Circuit began its analysis by observing that "the text of the Second Amendment already suggests that the right it protects relates to an institution, the militia, which is 'necessary to an Anglo-American regime of ordered liberty.'" *Nordyke*, 563 F.3d at 450 (quoting *Duncan*, 391 U.S. at 149 n.14). Noting *Heller*'s instruction that the right to arms codified in the Second Amendment was considered "fundamental," *Nordyke* observed that "the right contains both a political component – it is a means to protect the public from tyranny – and a personal component – it is a means to protect the

individual from threats to life or limb." *Nordyke*, 563 F.3d at 451 (citing Akhil Reed Amar, THE BILL OF RIGHTS 46-59, 257-66 (1998)).

Surveying the founding era, with respect to the Second Amendment, *Nordyke* concluded that our nation's history "reveals a right indeed 'deeply rooted in this Nation's history and tradition.'" *Nordyke*, 563 F.3d at 454, a conclusion re-enforced by the history of the Post-Revolutionary period, *id.*, and the history surrounding Reconstruction and the adoption of the Fourteenth Amendment. *Id.,* at 455-56. And surveying the protection afforded the right to arms in state constitutions over the years, as also described in *Heller*, *Nordyke* found that history "compelling." *Nordyke*, 563 F.3d at 455.

Most importantly, instead of formulating its own ideas about the nature of the right secured by the Second Amendment, the Ninth Circuit took its guidance from this Court's definition of the right to arms. "[L]anguage throughout *Heller* suggests that the right is fundamental by characterizing it the same way other opinions described enumerated rights found to be incorporated." *Nordyke*, 563 F.3d at 456-57.

In reversing the judgment below, this Court should follow the Ninth Circuit's reasoning as more faithful to precedent. Yet this Court should also re-emphasize aspects of *Heller* which the Seventh Circuit appears to have not considered. In a remarkable passage, the court below suggested that the right of self-defense is a mere construct of positive law that, if rescinded, can obviate the Second Amendment right

to keep and bear arms. App. 7-9. In other words, the Second Amendment secures a right that can be revoked by mere legislation. The court below thus suggested that the right of self-defense could be legislatively modified to deprive people of the Second Amendment right to possess a handgun. App. 7.

This dicta contradicts *Heller*'s teaching that "the *inherent right* of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2817 (emphasis added). Self-defense "was the *central component* of the right itself." *Heller*, 128 S. Ct. at 2801 (emphasis original).

In a similar vein, the court below offered that reliance on the works of William Blackstone for the proposition that "the right to keep and bear arms is 'deeply rooted' not only slights the fact that Blackstone was discussing the law of another nation but also overlooks the reality that Blackstone discussed arms-bearing as a *political* rather than a *constitutional* right." App. 6 (emphasis original). The "other nation" was England in the centuries before the American Revolution, the relevance of its law established by *Duncan*'s inquiry into whether rights are "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14.

Heller reiterated that Blackstone "constituted the preeminent authority on English law for the founding generation," *Heller*, 128 S. Ct. at 2798 (quoting *Alden* v. *Maine*, 527 U.S. 706, 715 (1999)), and quoted with approval his description of the right to arms as "the

natural right of resistance and self-preservation" and "the right of having and using arms for self-preservation and defence." *Heller*, 128 S. Ct. at 2798 (citation omitted). On this authority, *Heller* concluded that the right to arms "was by the time of the founding understood to be an individual right protecting against both public and private violence." *Heller*, 128 S. Ct. at 2798-99. Indeed, St. George Tucker, the earliest prominent commentator on the Constitution, regarded the Second Amendment right as equivalent to Blackstone's "right of the subject," protecting "[t]he right of self defence [which] is the first law of nature." 1 St. George Tucker, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, 143, 300 (1803). This is no mere "political" right.

The lower court's refusal to recognize the right of self-defense as inherent also contradicts a multitude of this Court's decisions affirming rights under the Due Process Clause arising from recognition of the individual interest in personal autonomy and bodily integrity.

> [N]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Cruzan v. *Dir., Mo. Dept. of Health*, 497 U.S. 261, 269 (1990) (citation omitted). "[T]he right to personal

security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Youngberg* v. *Romeo*, 457 U.S. 307, 315 (1982) (citation omitted); *cf. White* v. *Rockford*, 592 F.2d 381, 383 (7th Cir. 1979) ("the right to some degree of bodily integrity" is "chief among" the interests protected by the Due Process Clause).

"[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 851 (1992). If abortion is protected because "[a]t the heart of liberty is the right to define one's own concept of existence," *id.*, and states may not restrict contraception owing to the "indefeasible right of personal security," *Griswold* v. *Connecticut*, 381 U.S. 479, 484 n.* (1965) (citation omitted), it is unfathomable that states may abolish the right of self-defense against violent crime and thus moot its auxiliary, codified right to arms.

Also warranting this Court's attention is the suggestion that the court below would elevate an alleged state interest in federalism over the fundamental individual rights secured by our Constitution. Federalism is a venerable political institution, but since ratification of the Fourteenth Amendment, it no longer sanctions violation by state actors of Americans' civil rights.

States and localities are not laboratories of democracy when it comes to the establishment of religion, *Engel* v. *Vitale*, 370 U.S. 471 (1962); suppression

of the press, *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931); racial segregation, *Brown* v. *Bd. of Education*, 347 U.S. 483 (1954); interference with family planning, *Casey, Griswold*; intrusion into personal relationships, *Lawrence* v. *Texas*, 539 U.S. 558 (2003) – or disarmament. *Cf. Heller*, 128 S. Ct. at 2818 n.27. The Second Amendment "surely elevates above all other interests" – including federalism – "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 128 S. Ct. at 2821.

To claim that of all rights, the Second Amendment must yield to local majoritarian impulses is especially wrong considering that the rampant violation of the right to keep and bear arms was understood to be among the chief evils vitiated by adoption of the Fourteenth Amendment. At the time, the Congress was beset by horrific reports of disarmament and its aftermath. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 39, 40 (Dec. 13, 1865) (statement of Sen. Wilson) ("rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are being done in other sections of the country."); House Ex. Doc. No. 70, 39th Cong., 1st Sess., at 236-39 (1866) (Kentucky "marshal takes all arms from returned colored soldiers, and is very prompt in shooting the blacks whenever an opportunity occurs," while outlaws "make brutal attacks and raids upon freedmen, who are defenseless, for the civil law-officers disarm

the colored man and hand him over to armed marauders").

Not surprisingly,

> With respect to the proposed [Fourteenth] Amendment, Senator Pomeroy described as one of the three "indispensable" "safeguards of liberty . . . under the Constitution" a man's "right to bear arms for the defense of himself and family and his homestead."

Heller, 128 S. Ct. at 2811 (citing Cong. Globe, 39th Cong., 1st Sess., 1182 (1866)).

The lower court expressed lack of confidence in conducting the required incorporation analysis. "How the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict." App. 6. The lower court's observations with respect to the inherent right of self-defense, Blackstone, and federalism suggest that it would not have correctly decided the question even had it been considered. In any event, with several state and lower federal courts deferring to this Court for an authoritative answer on the critically important question of Second Amendment incorporation, this Court should provide the necessary guidance by considering this case.

III. This Case Presents A Unique Opportunity To Correct This Court's Privileges Or Immunities Doctrine.

If reversal on substantive due process grounds is all but foretold by precedent, reversal is also commanded by adherence to the text, purpose, and original public meaning of the Fourteenth Amendment's Privileges or Immunities Clause.

The almost meaningless construction given this provision in *Slaughter-House* was wrong the day it was decided and today stands indefensible. "Virtually no serious modern scholar – left, right, and center – thinks that [*Slaughter-House*] is a plausible reading of the Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 n.178 (2001). "'[E]veryone' agrees the Court [has] incorrectly interpreted the Privileges or Immunities Clause." Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627 (1994); Thomas B. McAffee, *Constitutional Interpretation – The Uses and Limitations of Original Intent*, 12 U. Dayton L. Rev. 275, 282 (1986) ("this is one of the few important constitutional issues about which virtually every modern commentator is in agreement"); *see also* 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) ("*[T]he Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause.").

"Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873." *Saenz* v. *Roe*, 526 U.S. 489, 523 n.1 (1999) (Thomas, J., dissenting) (citations omitted). But within that "little" agreement is the realization that however one defines the unenumerated Privileges or Immunities, at a minimum, these include the individual rights secured by the first eight amendments.

Consideration of the Privileges or Immunities Clause must start with its textual command: "No state shall." U.S. Const. amend. XIV, sec. 1. The words are identical to those introducing the prohibitions against state conduct set forth in Article I, Section 10. This is no accident. Fourteenth Amendment author Rep. John Bingham made no secret that he intended for the amendment to effectively overrule *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), barring direct application of the Bill of Rights as against the states. In doing so, Bingham

> looked to *Barron* itself for guidance. Within the words of Chief Justice John Marshall he found clear instructions: "Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention."

Michael Anthony Lawrence, *Second Amendment Incorporation Through the Privileges or Immunities and*

Due Process Clauses, 72 Mo. L. Rev. 1, 18 (2007) (hereafter "Lawrence") (citing Cong. Globe, 42d Cong., 1st Sess. app. at 84 (1871); *Barron*, 32 U.S. at 250).

As for the "privileges or immunities" the states were not to abridge, "'[o]ver and over [John Bingham] described the privileges-or-immunities clause as encompassing 'the bill of rights' – a phrase he used more than a dozen times in a key speech. . . . '" Lawrence, 72 Mo. L. Rev. at 19 (quoting Akhil Reed Amar, THE BILL OF RIGHTS 182 (1998)). "[T]he privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States." Cong. Globe, 42d Cong., 1st Sess. app. at 84 (Mar. 31, 1871) (Rep. Bingham).

The Fourteenth Amendment's Senate sponsor, Senator Jacob Howard, explained the Privileges or Immunities Clause's incorporating scope:

> To these privileges and immunities, whatever they may be – for they are not and cannot be fully defined in their entire extent and precise nature – to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech, . . . *and the right to keep and to bear arms*. . . . 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.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (emphasis added).

"The newspaper coverage of the Bingham and Howard speeches provides substantial evidence that the national body politic, during 1866-68, was placed on fair notice about the incorporationist design of the Amendment." Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio St. L.J. 1509, 1590 (2007); David Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. 695 (forthcoming 2009), available at SSRN: http://ssrn.com/abstract=1322323.

This understanding was not limited to the Fourteenth Amendment's supporters. "Fourteenth Amendment opponent Senator Reverdy Johnson . . . agreed that the privileges and immunities protected by the Fourteenth Amendment included the right to keep and bear arms." Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57, 98 (1993) (citations omitted). Interior Secretary Orville Browning

> published widely, in the fall of 1866, a letter denouncing the proposed Amendment. The Browning letter predicted the Amendment, especially the Due Process Clause, would "subordinate the State judiciaries to Federal supervision and control" and "annihilate

> the[ir] independence . . . in the administration of State laws." Indeed, he said, "all State laws . . . will be equally open to criticism, interpretation and adjudication by the Federal tribunals, whose judgments and decrees will be supreme and will override the decisions of the State Courts. . . . " Browning specifically noted that the Amendment would authorize federal court claims by state criminal defendants.

Wildenthal, 68 Ohio St. L.J. at 1604.[9]

And until the *Slaughter-House* surprise, leading legal scholars of the day understood the incorporationist effect of this language. Describing *Barron* as "unfortunate," Dean Pomeroy added that "a remedy is easy, and the question of its adoption is now pending before the people," referring to the Fourteenth Amendment. John N. Pomeroy, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 149, 151 (1868). Judge Farrar, referring to precedent holding the Bill of Rights inapplicable to the states, wrote: "All these decisions . . . are entirely swept away by the 14th amendment." Timothy Farrar, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 546 (3d ed. 1872). Writing during the Fourteenth Amendment's ratification period, Judge Paschal offered that "[t]he

---

[9] "The letter was published in numerous papers. The quotations in the text are taken from the *Cincinnati Commercial* of October 26, 1866." Wildenthal, at 1604 n.313 (other citations omitted).

new feature declared is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States." George W. Paschal, THE CONSTITUTION OF THE UNITED STATES 290 (1868).

It bears emphasizing that while the original public meaning of the Fourteenth Amendment with respect to incorporation is consistent with the Court's incorporation precedent under the Due Process Clause, the original understanding relates directly to the Privileges or Immunities Clause. The original error of eviscerating the Privileges or Immunities Clause has led to increased reliance on substantive due process, a concept which, whatever its merits, rests on shakier textual and originalist roots and is thus more prone to controversy.

This Court need not abandon substantive due process, which does not in and of itself conflict with faithful adherence to the original public meaning of the Privileges or Immunities Clause. However, when as here, substantive due process incorporation would lead to the same result as under a more straightforward, correct reading of the Privileges or Immunities Clause, the latter approach is preferable.

Justice Thomas, joined by Chief Justice Rehnquist, declared that he "would be open to reevaluating [the Privileges or Immunities Clause's] meaning in an appropriate case." *Saenz*, 526 U.S. at 528 (Thomas,

J., dissenting).[10] Complete restoration of the Privileges or Immunities Clause may not occur overnight, but as the Second Amendment is among the last provisions of the Bill of Rights whose incorporation has not been considered in the modern era, this case presents a logical starting point.

IV. This Case Is An Excellent Vehicle For Elucidating The Protections Of The Right To Keep And Bear Arms In Relation To State And Local Governments.

Several factors render this the ideal case in which to settle the question of the Second Amendment's incorporation. First, Petitioners have clearly and consistently advanced the two traditional incorporation doctrines – selective incorporation under the Due Process Clause, and textual incorporation under the Privileges or Immunities Clause – each of which was turned away by the lower court.

Second, the laws at issue unambiguously violate the Second Amendment right, and would be unconstitutional if the Second Amendment bound Respondent.

---

[10] "Since the adoption of [the Fourteenth] Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights. . . . Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open." *Gideon* v. *Wainright*, 372 U.S. 335, 345-46 (1963) (Douglas, J., concurring) (citation omitted).

Finally, Respondent has already enforced these laws against Petitioners, and Petitioners have moved for summary judgment. A definitive resolution in Petitioners' favor is therefore available.

CONCLUSION

The Seventh Circuit's deference to the precedent and prerogatives of this Court is admirable, but misplaced. The court below should have heeded *Heller*'s instruction to "engage in the sort of Fourteenth Amendment inquiry required by our later cases," *Heller*, 128 S. Ct. at 2813 n.23. *Duncan*, not *Cruikshank*, today controls incorporation questions under the Fourteenth Amendment's Due Process Clause. Moreover, *Heller* flatly precludes the concepts relating to the right to arms explored by the lower court's dicta.

As the Ninth Circuit correctly held, the modern analysis mandates incorporation of the Second Amendment right as against the states. It is vitally important that this split be resolved quickly, so that all Americans may enjoy the full measure of protection in their exercise of fundamental rights.

More critically, it is never too late to undo an error as grievous as that contained within *The Slaughter-House Cases*. Opportunities to correct such mistakes should be seized when they present themselves.

Petitioners respectfully pray that the Court grant the petition.

Respectfully submitted,

DAVID G. SIGALE
LAW FIRM OF
DAVID G. SIGALE, P.C.
4300 Commerce Court,
Suite 300-3
Lisle, Illinois 60532
630.452.4547

ALAN GURA*
GURA & POSSESSKY, PLLC
101 N. Columbus Street,
Suite 405
Alexandria, Virginia 22314
703.835.9085

Counsel of Record