No. 08-1592 JUL 16 2009

In The Supreme Court of the United States

JAMES M. MALONEY,

Petitioner,

v.

KATHLEEN A. RICE,

Respondent.

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

BRIEF FOR THE NRA CIVIL RIGHTS DEFENSE FUND AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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The NRA Civil Rights Defense Fund (the "Fund"), by and through the undersigned counsel, by consent of the parties, submits its brief amicus curiae respectfully praying the Court to grant the Petitioner a writ of certiorari. In support of the petition, the Fund states as follows:

I. Interest of the Amicus[1]

The issue presented by this case – whether the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment or otherwise applies via the Privileges or Immunities Clause – implicates rights that are fundamental to the concept of ordered liberty as understood by the Framers of the Constitution and the drafters of the Fourteenth Amendment. Although there are post-Reconstruction decisions[2] holding that the Second Amendment is not applicable against the states, no one believes that the analysis in these decisions accurately reflects current doctrine. Furthermore, conflicts have now arisen among the circuits

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[1] Pursuant to Sup. Ct. R. 37.6, your amicus certifies that no counsel for either party authored any part of this brief and that no person, other than the amicus and its counsel, made a monetary contribution intended to fund the preparation of the brief. In accord with Sup Ct. R. 37.2 the amicus certifies that counsel of record for both parties have been notified more than ten days before filing of the amicus' intention to file the brief and have given their consent.

[2] *See* Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542, 553 (1875).

concerning the continued vitality of those cases necessitating, guidance from this Court.

The National Rifle Association (the "NRA") is America's oldest civil rights organization and is widely recognized as America's foremost defender of the Second Amendment. The NRA was founded in 1871 by Union generals who, based on their experiences in the Civil War, desired to promote marksmanship and expertise with firearms among the citizenry. Today, the NRA has over four million members and its programs reach millions more. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement.

Amicus curiae the NRA Civil Rights Defense Fund was established by the NRA in 1978 for purposes that include assisting in the assertion and defense of the natural, civil, and constitutional rights of the individual to keep and bear arms in a free society. To accomplish this, the Fund provides legal and financial assistance to individuals and organizations defending their right to keep and bear arms. The Fund has a significant interest in the issues at stake in this case because the arguments made by the Respondents, if accepted by this Court, would limit the very rights the Fund was created to protect.

II. Why a Writ Should be Granted

A. There is a Split Between the Circuits on an Issue of National Importance at a Time When Lower Courts are in Need of Definitive Guidance.

In June 2008 this Court issued its historic opinion in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). *Heller* found that the Second Amendment to the United States Constitution guarantees an individual right to keep and bear arms and invalidated a District of Columbia law broadly banning possession of a handgun in the home. *Id.* at 2821-22. What the Court did not resolve in *Heller*, however, is the question whether, and to what extent, the right to keep and bear arms secured by the Second Amendment restricts the police power of state governments. That issue is squarely presented by Petitioner Maloney.

For most of the history of the United States, the regulation of weapons has been a matter addressed, when it was addressed at all, by state and local governments. The first substantial foray into gun control by the federal government occurred with the National Firearms Act of 1934. 26 U.S.C. § 5801 *et seq.* (2006) (original version at ch. 757, 48 Stat. 1236 (1934)). In 1968, Congress passed the Gun Control Act, 18 U.S.C. § 921 *et seq.* (2006), which incorporated the National Firearms Act and expanded the scope of federal regulation. 18 U.S.C. § 921 *et seq.* (2006). Despite the more comprehensive nature of that enhanced regulatory scheme,

enforcement activity by Federal authorities is dwarfed in comparison to the vast number of prosecutions for violation of state and local weapons laws each year[3]. Countless cases are disposed of each year by courts not of record, and the number of citizens whose exercise of their right to keep and bear arms is restricted by state and local statutes is indeterminate.

In the wake of the *Heller* decision, state courts as well as lower federal courts have been confronted with Second Amendment challenges to state and local statutes.[4] While some courts considering these challenges have correctly held that the Second Amendment acts as a restriction on the states as well as on the federal government, other courts, including the Second Circuit panel below, have adhered to doctrinally-superseded precedent and concluded that the Second Amendment is not implicated in challenges to state and local laws.

In the decision below, the Second Circuit panel relied on this Court's opinion in *Presser v. Illinois*, 116 U.S. 252 (1886). The Court in *Presser*

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[3] The FBI reports that in 2007, there were 188,891 arrests nationwide for the category of offenses it describes as "Weapons; carrying, possessing, etc." Federal Bureau of Investigation, Table 29 – Crime in the United States 2007, http://www.fbi.gov/ucr/cius2007/data/table_29.html (Last Visited June 11, 2009)

[4] *See, e.g.*, Nat'l Rifle Ass'n v. City of Chicago, 567 F.3d 856 (7th Cir. 2009); Nordyke v. King, 563 F.3d 439 (9th Cir. 2009); State v. Turnbull, No. A08-0532, 2009 Minn. App. LEXIS 93 (Minn. June 2, 2009); People v. Perkins, 2009 NY Slip Op 3962 (N.Y.A.D. 3 Dept. 2009); Commonwealth v. Bolduc, No. 0825 CR 2026, Barnstable District Court (Mass. Feb. 19, 2009).

held only that the Second Amendment did not, of its own accord, limit the power of the State of Illinois. *Id.* at 265. This holding merely restated the well-established antebellum principle from *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833), in which this Court held that the Bill of Rights only acted as a restriction upon the power of the Federal Government. *Presser* failed to undertake even a cursory incorporation analysis, instead relying upon a decision handed down decades before the ratification of the Fourteenth Amendment.

The ruling below is part of a split between the Courts of Appeals on the question whether, in light of *Heller*, the Second Amendment limits the ability of state and local governments to enact and enforce restrictions on arms. In the case presented here, the Second Circuit declined to enforce the individual right to keep and bear arms protected by the Second Amendment, holding that "[i]t is settled law, however, that the Second Amendment applies only to limitations the federal government seeks to impose." *Maloney v. Cuomo*, 554 F.3d 56, 58 (2d Cir. 2009). Further, the court below held that

> to the extent that Heller might be read to question the continuing validity of this principle, we 'must follow *Presser*' because '[w]here, as here, a Supreme Court precedent has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the

> case which directly controls, leaving the Supreme Court the prerogative of overruling its own decisions.'

Id. at 59 (*quoting Bach v. Pataki*, 408 F.3d 75, 86 (2d Cir. 2005)).

In *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), however, the Ninth Circuit issued a contrary ruling. There, the court held: "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 government." *Id.* at 457. The Ninth Circuit correctly held that it was not constrained by *Presser* or by *United States v. Cruikshank,* 92 U.S. 542, 553 (1875), in considering the question of whether the Second Amendment is incorporated by the Fourteenth Amendment Due Process Clause: "*Cruikshank* and *Presser* involved direct application and incorporation through the Privileges or Immunities Clause, but not incorporation through the Due Process Clause." 563 F.3d at 448.

In *National Rifle Ass'n v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), the Seventh Circuit, confronted with numerous challenges to local laws nearly identical to the ordinance struck down in *Heller*, held that the Second Amendment does not restrict the power of the State of Illinois and its political subdivisions. Relying on *Presser*, *Cruikshank*, and *Miller v. Texas,*[5] the court rejected arguments that the Second Amendment restricts

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[5] 153 U.S. 535 (1894).

state power via either the Fourteenth Amendment Privileges or Immunities Clause or the Due Process Clause. *Id.* at 857. The court wrote: "[r]epeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale." *Id.* at 857.

This clear split of authority leaves the law in disarray and invites review by the Court. Furthermore, it is likely that lower courts will continue to be divided on this important question until this Court provides a definitive answer. In *Heller*, the Court specifically reserved the question: "With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, 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. Now, however, the important question whether the Second Amendment restricts state power via the Fourteenth Amendment is fully ripe for consideration by the Court.

B. Additional Reasons to Grant a Writ: the Right to Keep and Bear Arms was a Core Interest of the Fourteenth Amendment and That Interest Should be Clearly Established in a Time of Uncertainty.

1. The Drafters of the Fourteenth Amendment Sought to Overrule *Barron* and *Dred Scott.*

In the antebellum period, this Court's doctrine was that the states were not bound by the Bill of Rights. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Further, in 1857, the Court held that people of African descent were not citizens in a constitutional sense. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). The Fourteenth Amendment was squarely aimed at overturning these two cases. It was a bedrock doctrine of Republican constitutional theory that the Constitution should be interpreted in light of the Declaration of Independence. *See* Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* 76, 133, 290 (Oxford University Press 1970).

In *Barron*, Chief Justice Marshall stated that, "[h]ad the framers of these amendments [the Bill of Rights] 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." *Barron*, 32 U.S. at

250. John Bingham, one of the key drafters of the Fourteenth Amendment, set out to do precisely that.

> [I]t is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

Noting that it had been the "want of the Republic that there was not an express grant of power [enabling] the whole people, of every State ... to enforce obedience to ... the Constitution," Rep. Bingham appealed to the Constitutional theories of his party when he said:

> [T]he amendment proposed stands in the very words of the Constitution of the United States as it came to us from

> the hands of its illustrious framers. Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). Thus, the Fourteenth Amendment must be deemed a self-conscious attempt to reverse *Barron*. The incorporationist impulse underlying the Fourteenth Amendment may also be seen in the statement of Senator Howard: "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. 2766 (1866).

The Republican drafters of the Fourteenth Amendment recognized that, without a mechanism by which they could restrain the power of the states to infringe upon the civil liberties of the freedmen, slavery could continue indefinitely as a *de facto* regime. As Rep. Woodbridge noted, "if Congress does not do something to provide for these people, if they do not prove equal to their duty, and come up to their work like men, the condition of those people will be worse than it was before." Cong. Globe, 39th Cong., 1st Sess. 1088 (1866). The proposed Fourteenth Amendment therefore provided Congress with the power "to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship." *Id.* The

"condition of the freedmen," he concluded, "demands the adoption of this resolution." *Id.*

2. The 39th Congress Explicitly Targeted the Black Codes Passed by Southern States.

The drafters of the Fourteenth Amendment were plainly concerned that the southern states were attempting to continue the antebellum system of slavery through the enactment or perpetuation of Black Codes. These laws substantially restricted the civil rights of the Freedmen, including their rights of free speech, to assemble, to keep and bear arms, and to pursue a trade. For example, a Florida statute, first enacted in 1825 and reauthorized in 1847 and 1861, provided that militia patrols "shall enter into all negroes houses and suspected places, and search for arms and other offensive or improper weapons, and may lawfully seize and take away all such arms, weapons, and ammunition." An Act to Govern Patrols, § 8, 1825 Acts of Fla. 52, 55; Act of Jan. 6, 1847, ch. 87, § 11, 1846 Fla. Laws 42, 44; ch. 1291, § 11, 1861 Fla. Laws 38, 40.

In Tennessee, a state constitutional amendment stated that "the free *white men* of this State have a right to keep and bear arms for their common defence." Tenn. Const. of 1796, art. I, §26. A Mississippi statute declared that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any

ammunition." Act of Nov. 29, 1865, ch. 23, § 1, 1865 Laws of Miss. 165.

When recalcitrant southern states sought to continue slavery *de facto*, "almost universally the first thing done was to disarm the negroes and leave them defenceless." Albion Tourgée, *The Invisible Empire* 54-55 (Louisiana State Univ. Press 1989) (1880). Because northern Republicans were fully aware that the occupation of the South by the Army could not continue indefinitely, they viewed limitations on the right of freedmen to defend themselves as a challenge to Reconstruction. The ultimate effect of these laws, as Representative Eliot noted in debate over the second Freedmen's Bureau Bill, was to leave blacks "defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders." Cong. Globe, 39th Cong., 1st Sess. 2775 (1866).[6] Something had to be done about it.

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[6] Laws limiting the right to keep and bear arms were ubiquitous before the war and remained on the books. *See, e.g.*, Ark. Const. of 1836, art. II, §21; Fla. Const. of 1838, art. I, §21 (both declaring "[t]hat the free white men of this State shall have a right to keep and to bear arms for their common defence"); Tenn. Const. of 1796, art. I, §26 (providing that only "free white men" had the right to bear arms); "An Act to prevent the use of fire arms by free negroes," ch. 176, §1, 1832 Laws of Del. 180 (imposing a five dollar fine on free blacks carrying guns); Act of Dec. 17, 1861, ch. 1291, § 11, 1861 Fla. Laws 38, 40 (reauthorizing patrols to enter homes of blacks to seize weapons); Act of Jan. 6, 1847, ch. 87, § 11, 1846 Fla. Laws 42, 44 (reauthorizing patrols); Act of Dec. 10, 1825, § 9, 1825 Acts of Fla. 52, 55 (allowing slaves to carry guns outside the presence of whites only if they possessed a one-week renewable license); An Act to Govern Patrols, § 8, 1825 Acts of Fla. 52, 55 (stating that white patrols "shall

3. The Drafters of the Fourteenth Amendment were Particularly Interested in Second Amendment rights.

"In the aftermath of the Civil War, there was an outpouring of discussion of the Second

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enter into all negro houses . . . and search for arms . . . and may lawfully seize and take away all such arms, weapons, and ammunition"); Act of Dec. 23, 1833, § 7, 1833 Ga. Laws 226, 228 (declaring that "it shall not be lawful for any free person of colour in this state, to own, use, or carry fire arms of any description whatever"); Black Code, ch. 33, §§ 19-20, Laws of La. 150, 160 (1806); (allowing slaves to carry firearms, but only for the very limited purpose of hunting on his owner's property); Act of Mar. 14, 1832, ch. 323, §6, 1832 Laws of Md. 448 (prohibiting free blacks from carrying firearms); Act of Nov. 29, 1865, ch. 23, § 1, 1865 Laws of Miss. 165 (declaring that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition"); Act of Mar. 15, 1852, ch. 206, 1852 Miss. Laws 328 (repealing Act of June 18, 1822, ch. 73, §§ 10, 12, 1822 Miss. Laws 179, 181-83, which allowed slaves and free blacks to obtain licenses to carry firearms); Act of Dec. 18, 1819, 1819 Acts of S.C. 31 (requiring that slaves carrying firearms be in the presence of whites or have the permission of their owners, unless the slave was hunting or guarding his owner's property); "An Act Concerning Slaves," § 6, 1840 Laws of Tex. 171, 172 (prohibited slaves from using firearms at all); Act of Dec. 3, 1850, ch. 58, §1, 1850 Laws of Tex. 42-44 (imposing a penalty of between 39 and 50 lashes on slaves caught carrying firearms); Act of Mar. 15, 1832, ch. 22, § 4, 1832 Acts of Va. 21 (providing that "[n]o free negro or mulatto shall be suffered to keep or carry any firelock of any kind, any military weapon, or any powder or lead; and any free negro or mulatto who shall so offend shall . . . be punished with stripes . . . not exceeding thirty-nine lashes").

Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly freed slaves." *Heller*, 128 S.Ct. at 2809-10 (*citing* Stephen Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*, (Praeger 1998)). Indeed, those opposing the disarmament of blacks after the Civil War "frequently stated that they [laws disarming blacks] infringed blacks' constitutional right to keep and bear arms." *Id.* at 2810.

Statesmen of the period endorsed the view that ensuring that the freedmen retained the right to keep and bear arms was critical to their overall freedom. Senator Pomeroy, in debate before the Senate, stated:

> And what are the safeguards of liberty under our form of Government? There are at least, under our Constitution, three which are indispensable – 1. Every man should have a homestead ... 2. He should have the right to bear arms for the defense of himself and family and his homestead ... 3. He should have the ballot.

Cong. Globe, 39th Cong., 1st Sess. 1182.

When Senator Jacob Howard introduced the Fourteenth Amendment in the Senate, he explained that the Privileges or Immunities Clause secured all the privileges and immunities guaranteed in Article IV §2 as well as the rights secured by the Bill of Rights:

> To these privileges and immunities . . . should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances. . . [and] the right to keep and to bear arms.

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). The framers of the Fourteenth Amendment could hardly have expressed a clearer intent that the Amendment should secure the Second Amendment right to keep and bear arms against state infringement, and the Court should grant review to settle this issue.

4. Congressional Debate During the Passage of the Civil Rights Act and the First and Second Freedmen's Bureau Bills Further Confirms that the Congress Considered the Right to Keep and Bear Arms Fundamental to the Liberty of Freedmen.

As the Court noted in *Heller*, the second Freedmen's Bureau Bill secured constitutional liberties for all freedmen, "including the constitutional right to bear arms...". *Heller*, 128 S. Ct. at 2810 (*quoting* 14 Stat. 176-177 (1866)). During debate over the Freedmen's Bureau Bill and the 1866 Civil Rights Bill, Representative Zachariah Chanler stated that "[t]he right of the people to keep

and bear arms must be so understood as not to exclude the colored man from the term people." Cong. Globe, 39th Cong., 1st Sess. 217 (1871). Senator Charles Sumner also stated that the freedmen "should have the constitutional protection in keeping arms." Cong. Globe, 39th Cong., 1st Sess. 337 (1866). Ultimately, the Freedmen's Bureau Bill was passed by both houses of Congress in a form which protected

> any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms
> . . .

Cong. Globe, 39th Cong., 1st Sess. 1292 (1866).

5. The Court's Precedent Dealing with the Application of the Second Amendment to the States is Doctrinally Unsound and of Limited Relevance.

In 1876, relying upon the *Slaughter-House Cases*, the Court refused to find that the right to keep and bear arms was covered by the Privileges or Immunities Clause because it "is not in any manner dependent upon [the Constitution] for its existence."

U.S. v. Cruikshank, 92 U.S. 542, 553 (1876). Nevertheless, the Court, "in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms," *Heller*, 128 S. Ct. at 2812, held that the Second Amendment "is one of the amendments that has no effect other than to restrict the power of the national government...." *Cruikshank*, 92 U.S. at 553. The Court's pronouncement on the Second Amendment comprised only one paragraph and failed to undertake *any* incorporation analysis.

In *Cruikshank,* the Court held that freedmen had to "look [to the state through its exercise of the police power] for their protection against any violation by their fellow-citizens." *Id.* at 553. This reasoning completely ignored the realities that prompted the passage of the Fourteenth Amendment, the 1866 Civil Rights Act, and both of the Freedmen's Bureau Bills: that the freedmen in the South (as well as free blacks in the North) were being systematically disarmed and subjugated by the very state governments to which the *Cruikshank* court required them look to for protection. *See* Charles Lane, *The Day that Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (Henry Holt & Co. 2008).

In 1886, the Court, citing the *Slaughter-House Cases*, *Cruikshank*, and even *Barron* (which, as noted above, the drafters of the Fourteenth Amendment explicitly intended to overturn), repeated the conclusory holding in *Cruikshank* that the Second Amendment applied only to limit the national government. *Presser v. Illinois*, 116 U.S.

252, 265 (1886). Once again the Court did not engage in incorporation analysis. Moreover, the *Presser* Court suggested that the First, Fifth, and Sixth Amendments also had no effect upon the states. *Id.* "*Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited." *Silveira v. Lockyer*, 312 F.3d 1052, 1067 (9th Cir. 2003).

Miller v. Texas is even less to the point. There, the Court, citing *Barron*, did state that "it is well settled that the restrictions of [the Second Amendment] operate only upon the Federal power, and have no reference whatever to proceedings in state courts." 153 U.S. 535, 538 (1894). However, the Court did not reach incorporation, holding that the issue could not be raised "for the first time in a petition for rehearing after judgment." *Id.* at 539.

6. This Case Provides a Vehicle for Determining that the Second Amendment also Operates Against the States Under the Privileges or Immunities Clause.

In 1873, the Court first ruled on the meaning of the Fourteenth Amendment in *The Slaughter-House Cases*. There, the majority held, in the face of overwhelming contrary legislative history, that the Privileges or Immunities Clause guaranteed only rights of national as opposed to state citizenship. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). In order to be faithful to the textual distinctions in the amendment between the two

levels of citizenship, and supposing a lack of intent to radically alter the federal architecture of the original Constitution, the majority concluded that privileges and immunities of state citizenship included all the natural and fundamental rights for which government in general is created to protect.

The privileges and immunities of national citizenship on the other hand were found to be limited to rights historically dependent on the existence of a national government. These include the right to "the care and protection of the federal government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government;" the right to habeas corpus in federal court; and the right to use the navigable waters of the United States. *Id.* at 79. In so holding, the Court limited the Privileges or Immunities Clause, originally intended to include, at a minimum, "the personal rights guarantied and secured by the first eight amendments of the Constitution," Cong. Globe, 39th Cong., 1st Sess. 2765 (1866), to but a few rights whose exercise were usually noncontroversial.

Though considerable debate remains over the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, it has been forcefully observed that, "legal scholars agree ... 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).

For this there is considerable historical support. As Rep. Bingham stated during the House debate on the Fourteenth Amendment:

> The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.

Cong. Globe, 39th Cong., 1st Sess. 2542 (1866).

It would not be necessary to reverse the holding in *The Slaughter-House Cases* for the

Privileges or Immunities Clause to provide an additional basis for finding that the Second Amendment right to keep and bear arms is a restriction on state power. Accepting as established the argument that federal privileges and immunities do not include rights that were antecedently protected by the states, the right to keep and bear arms, *as applied to the freedmen*, was not such a right. *Heller* makes it clear that a right to keep and bear arms was such a right for the majority of the population. However, this right was recognized in a discriminatory regime. In England, the Bill of Rights protected only the right of protestant Christians to keep and bear arms. 128 S.Ct. at 2798 (quoting 1 W. & M., c.2 §7, in 3 Eng. Stat. at Large 441 (1689)). In America, both before and after the revolution, the right was widely limited by race. For example, in 1680, an act of the Virginia General Assembly declared it illegal for slaves to carry offensive or defensive weapons—even so much as a staff—without prior written permission. 2 Hennings Va. Stat. at Large at 481.

There are numerous other antebellum and postbellum laws disarming blacks, but the most telling authority is found in *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). A key syllogism in *Dred Scott* was that the founders could not have intended those of African descent to be citizens in the constitutional sense because that would give them the privileges and immunities of citizenship including the right "to keep and carry arms wherever they went." *Id.* at 416-17. For Chief Justice Taney, it was "impossible. . . to believe that the great men of the slaveholding

states, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them. *Id.* at 417.

It was in light of the limited nature of the antebellum right to keep and bear arms that the framers of the Fourteenth Amendment drafted and debated its text. As shown above they intended to extend the right to the freedmen. This created a new right of United States citizens—a right to keep and bear arms that applied to all citizens, regardless of race or creed. This right, which in its full scope had never been a right of the citizens of the several states, can be found to reside in the Privileges or Immunities Clause even as interpreted by *the Slaughter House Cases*. If it is accepted that a core purpose of the Fourteenth Amendment was to reverse *Dred Scott*, it should also be accepted that one of its particular purposes was to overturn Chief Justice Taney's syllogism.

7. The Court's Due Process Jurisprudence Compels the Conclusion that the Second Amendment is Incorporated by the Fourteenth Amendment Due Process Clause.

The idea that the no provision of the Bill of Rights applied to the States – the fundamental premise upon which *Cruikshank* and *Presser* were

based – is "a position long since repudiated." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). As previously noted, *Cruikshank* and *Presser* expressly relied upon a constitutional theory that has been wholly discredited by over 100 years of decisional law. Heller strongly suggests that an incorporation analysis of the Second Amendment is required to determine if it restricts state power: "*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.

In *Nordyke*, the Ninth Circuit performed an incorporation analysis and relied upon this Court's substantive due process jurisprudence, reasoning that "incorporation is logically a part of substantive due process." *Nordyke*, 563 F.3d at 450. The *Nordyke* Court thus asked whether the Second Amendment right to keep and bear arms was "deeply rooted in this Nation's history and tradition." 563 F.3d at 450, (*quoting Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). The court answered this question in the affirmative.

Heller explained that the phrase "necessary to the security of a free State," as found in the prefatory clause of the Second Amendment, means "necessary to the security of a free polity." *Heller*, 128 S. Ct. at 2800 (internal quotation marks omitted). Thus, as the Ninth Circuit held in *Nordyke*, "the text of the Second Amendment already suggests that the right it protects relates to an institution ... which is 'necessary to an Anglo-

American regime of ordered liberty'" *Nordyke*, 563 F.3d at 451 (*quoting Duncan*, 391 U.S. at 149 n.14).

Heller also set forth numerous grounds for regarding the right to keep and bear arms as one of the fundamental rights deeply rooted in our history and tradition. The same historical underpinnings that support the individual character of the right also demonstrate that it is fundamental. First, the right is "useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary .... Third, 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 2800-01.

Heller also explicitly relied upon the fundamental human right to self-defense: "[T]he inherent right of self-defense has been central to the Second Amendment right." *Id.* at 2817. The Court in *Heller* invalidated the District of Columbia's ordinance that required all firearms to be rendered and kept inoperable at all times, noting that the requirement made "the core lawful purpose of self-defense" impossible and was therefore unconstitutional. *Id.* at 2818. This language forecloses any assertion, as argued in dicta by the Seventh Circuit in *National Rifle Ass'n v. City of Chicago*, that the inherent right to self-defense is subject to modification – and even elimination—by the impulses of local legislative majorities.[7]

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[7] Cf. Nat'l Rifle Ass'n v. City of Chicago, 567 F.3d 856, 859 (7th Cir. 2009) (arguing in dicta that a state could effectively

The Court should not delay in granting a writ. This is an appropriate case that will serve as a vehicle to ensure that an important purpose of the Fourteenth Amendment—to secure the fundamental right to keep and bear arms—is not frustrated by allowing that right to be reevaluated or eliminated by state or local legislative majorities.

CONCLUSION

Therefore, because the question of whether the Second Amendment restricts the power of the states is one of national importance, because there is a clear split of authority, and because a core purpose of the Fourteenth Amendment is in need of clarification, *amicus curiae* NRA Civil Rights Defense Fund respectfully requests that this Court grant Petitioner's petition for a *writ of certiorari*.

RESPECTFULLY SUBMITTED,

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achieve the same ends sought by the District of Columbia in *Heller* by enacting policies designed to ensure that "burglars were deterred by the criminal law rather than self-help.")