No. 08-1521

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

BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Each of the *amici curiae* is a law professor who has published a book or law review article on the Fourteenth Amendment and the Bill of Rights. Certain of *amici*'s relevant publications are cited in this brief. *Amici* are:

Prof. Richard L. Aynes
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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Amici submit this brief to bring to the foreground of this case a remarkable scholarly consensus and well-documented history that shows that the Privileges or Immunities Clause of the Fourteenth Amendment was intended to protect substantive, fundamental rights, including the individual right to keep and bear arms at issue in this case.

Amici do not, in this brief, take a position on whether the particular regulation challenged in this case is constitutional in light of the individual privilege to bear arms, which, as the Court noted in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008), may be regulated to a certain extent.

SUMMARY OF ARGUMENT

The *McDonald* petitioners have asked this Court to grant *certiorari* to review the United States Court of Appeals for the Seventh Circuit's ruling that the Second Amendment's individual right to keep and bear arms is not incorporated against the States. Both the court below and the Second Circuit have explained that, while the reasoning of 19th century anti-incorporation precedent has been undermined, it is the prerogative of this Court to authoritatively proclaim the current irrelevance of this line of precedent. *Amici* urge the Court to grant review in this case to clarify its incorporation jurisprudence, and, in particular, precedent that has inappropriately turned the Fourteenth Amendment's Privileges or Immunities Clause—a Clause that was written to be the centerpiece of the

14th Amendment—into a constitutional afterthought.

The textually and historically accurate approach to determining whether the Fourteenth Amendment protects an individual right to keep and bear arms is to look to the Amendment's Privileges or Immunities Clause. However, the *Slaughter-House Cases*, 83 U.S. 36 (1873), read the Privileges or Immunities Clause so narrowly as to render it practically meaningless—completely ignoring the contrary text, history and purpose of the Fourteenth Amendment. Moreover, *Slaughter-House* and its progeny stand for the proposition that the Fourteenth Amendment does not apply the Bill of Rights to the States. *See, e.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1876) (holding that the First and Second Amendments do not apply to the States). While this line of precedent has been so completely undermined by subsequent Supreme Court incorporation decisions that there no longer remains any justification for its continued application, the lower courts will continue to hew to these precedents, as the Seventh Circuit did below, absent clarification from this Court.

This case presents the Court with a unique opportunity to re-examine *Slaughter-House* and *Cruikshank* and properly cabin the reach of those cases. The history here is clear. The framers of the Fourteenth Amendment sought to constitutionally protect an individual right to keep and bear arms against state infringement, in large part because they wanted the newly freed slaves and unionists to have the means to protect themselves, their

families and their property against well-armed former rebels. The history also shows that the Privileges or Immunities Clause was intended to—and understood to—protect this right.

Reviving the Privileges or Immunities Clause and limiting *Slaughter-House* and its progeny would bring this Court's jurisprudence in line with constitutional text and a near-unanimous scholarly consensus on the history and meaning of the Clause. *Slaughter-House* read the Privileges or Immunities Clause so narrowly as to essentially read it out of the Amendment, but "[v]irtually no serious modern scholar—left, right, and center—thinks that this 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). *Certiorari* is necessary here because the Seventh Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10(c).

ARGUMENT

THE COURT SHOULD CLARIFY ITS PRIVILEGES OR IMMUNITIES CLAUSE JURISPRUDENCE TO AVOID FURTHER CONFUSION AMONG THE LOWER COURTS.

In declining to hold that the States must respect an individual right to keep and bear arms, the Seventh Circuit followed this Court's rulings in *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller*

v. Texas, 153 U.S. 535 (1894), which "rejected arguments that depended on the privileges and immunities clause of the fourteenth amendment." Pet. App. 2. Similarly, the Ninth Circuit, while recently finding incorporation of such a right under the Due Process Clause, explained that the court was "barred from considering incorporation through the Privileges or Immunities Clause," *Nordyke v. King*, 563 F.3d 439, 446 (9th Cir. 2009) (citing *Slaughter-House Cases*, 83 U.S. 36 (1873)).

The courts of appeals followed these precedents despite acknowledging that the decisions' anti-incorporation reasoning appears to be outdated and that "judges and academics have criticized *Slaughter-House*'s reading of the Privileges or Immunities Clause." *Id.* at 447 n.5. The confusion of the lower courts is evident: as the Seventh Circuit explained, "[a]lthough the rationale of *Cruikshank*, *Presser*, and *Miller* is defunct, the Court has not telegraphed any plan to overrule *Slaughter-House*" and "[h]ow the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict." Pet. App. 6.

Amici urge the Court to grant *certiorari* to clarify the reach of *Slaughter-House*, *Cruikshank*, *Presser*, and *Miller* and bring Privileges or Immunities Clause jurisprudence up to date with modern understandings of incorporation under the Fourteenth Amendment and back in line with constitutional text and history.

A. The Court Should Grant Review To Harmonize Incorporation Precedent.

The primary source of the lower courts' confusion as to whether *Slaughter-House*, *Cruikshank*, *Presser*, and *Miller* remain binding law on the question of incorporation is the outdated reasoning of those decisions.

After *Heller*, there can be no further doubt that the Constitution protects an individual right to keep and bear arms in self-defense, subject to certain limitations, against federal infringement. The question is now whether such a right may be recognized to protect against *state* infringement. The Seventh Circuit and the Second Circuit understood *Slaughter-House*, *Cruikshank*, *Presser*, and *Miller* to preclude incorporation of such a right, and considered these cases binding law absent clarification from the Court.

The Court has already acknowledged that there is a tension between these precedents and modern incorporation doctrine. In *Heller*, the Court noted that:

> 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. Our later decisions in *Presser v. Illinois* and *Miller v. Texas*

> reaffirmed that the Second Amendment applies only to the Federal Government.

District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008).

Modern incorporation doctrine similarly conflicts with *Slaughter-House*. In overruling earlier cases such as *Maxwell v. Dow*, 176 U.S. 581 (1900), *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947),[2] the Court has already rejected the foundation upon which *Slaughter-House* was built—the idea that the Fourteenth Amendment did not fundamentally change the balance of federal/state power and that Americans should look to state governments for the protection of their rights, save only those few rights connected to the workings of the federal government or the Union. In cases incorporating and applying against the States nearly all of the protections in the Bill of Rights, the Court repudiated *Slaughter-House*'s conception of federalism and encouraged citizens to look to the federal government for the protection of a long list of fundamental rights.[3] The reasoning of

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[2] *E.g.*, *Malloy v. Hogan*, 378 U.S. 1, 5-7 (1964) (overruling *Twining* and *Adamson* and applying Fifth Amendment right against self-incrimination to the States); *Duncan v. Louisiana*, 391 U.S. 145, 154-55 (1968) (rejecting dicta in *Maxwell*, which refused to apply the Sixth Amendment jury right to the States).

[3] *E.g.*, *Chicago, B. & Q. Ry. Co. v. City of Chicago*, 166 U.S. 226 (1897) (applying to the States the Fifth Amendment right against uncompensated takings); *Gitlow v. New York*, 268 U.S. 652 (1925) (First Amendment free speech); *Mapp v. Ohio*,

Slaughter-House simply cannot be squared with this long line of incorporation precedent.

Even if the Court does not expressly overrule *Slaughter-House*, as urged by the Petitioner, *e.g.*, Pet. at 4, 22, the Court should clarify that *Slaughter-House*'s general interpretation of the Privileges or Immunities Clause is mere dicta. This dicta, rooted in an ahistoric and now discarded interpretation of the Fourteenth Amendment, does not preclude incorporation of an individual right to keep and bear arms under the Clause. After all, the *Slaughter-House* majority expressly "excused" itself from "defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so." 83 U.S. at 78-79.[4]

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367 U.S. 643 (1961) (Fourth Amendment guarantee against unreasonable search and seizure); *Benton v. Maryland*, 395 U.S. 784 (1969) (Fifth Amendment right against double jeopardy); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment right to speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right to confront witnesses); *Washington v. Texas*, 388 U.S. 14 (1967) (Sixth Amendment right to compulsory process to obtain witnesses); *Robinson v. California*, 370 U.S. 660 (1962) (Eight Amendment ban on cruel and unusual punishment).

[4] The actual decision in *Slaughter-House* is noncontroversial: the Court rejected petitioners' claim that the Louisiana legislature had violated their fundamental rights of citizenship by granting to a single slaughtering company a monopoly on the location where animals could be butchered within the city of New Orleans. But in the process of finding the challenged restrictions justified by the health risks of butchering, the *Slaughter-House* five-Justice majority

In *Heller*, the Court identified the outmoded reasoning of *Cruikshank*. *Amici* urge the Court to take the next logical step and grant review in this case to provide definitive guidance to the lower courts regarding the continuing validity of *Slaughter-House*, *Cruikshank*, *Presser*, and *Miller*.

B. The Court Should Grant Review To Harmonize Its Interpretation Of The Fourteenth Amendment's Privileges Or Immunities Clause With The Clause's Text, History, And Public Meaning.

While the primary source of the lower courts' confusion is the clash between outdated cases like *Slaughter-House* and *Cruikshank* and modern incorporation precedent, there is also a deep conflict between the Court's interpretation of the Fourteenth Amendment in *Slaughter-House* and *Cruikshank* and the Constitution's text and history.

"The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role than that which was contemplated by its framers when they added the

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questioned how much the Fourteenth Amendment changed the federal/state balance and suggested that the Privileges or Immunities Clause could be read so narrowly as to protect only rights attendant to national citizenship, such as the right to access navigable waters, with most fundamental rights protected at the discretion of the States. *Id.* at 74-75.

Amendment to our constitutional scheme." *Malloy*, 378 U.S. at 5. Should the Court grant *certiorari*, it is the intent of *amici* to place before the Court the work of a host of leading constitutional scholars who agree that *Slaughter-House*'s interpretation of the Fourteenth Amendment's Privileges or Immunities Clause is wrong as a matter of text and history. [5] The *McDonald* petition presents an ideal opportunity for the Court to grant review and re-examine the Privileges or Immunities Clause and its promise of protection for substantive, fundamental rights because it is clear that one of the privileges covered by the Clause is the individual right to keep and bear arms at issue in this case.

1. Slaughter-House *and* Cruikshank *Conflict with the Text of the Fourteenth Amendment.*

Proposed in 1866 and ratified in 1868, the Fourteenth Amendment was designed to make former slaves into equal citizens in the new republic, securing for the nation the "new birth of freedom" President Lincoln promised at Gettysburg. In two short sentences, Section One of the Fourteenth Amendment wrote equal citizenship

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[5] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22-30 (1980); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 163-230 (1998); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 7-6, at 1320-31 (2000); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 191-203 (2004); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 313-15, 317-18 (2007).

into our constitutional design, mandating that the States abide by fundamental constitutional principles of liberty, equality, and fairness. Its words provide:

> 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.

U.S. CONST. amend. XIV, section 1.

The opening words of the Fourteenth Amendment announce a new relationship between federal and state governments and between the people and their Constitution. By affirming U.S. citizenship as a birthright and declaring federal citizenship "paramount and dominant instead of being subordinate and derivative," *Arver v. United States*, 245 U.S. 366, 389 (1918), the Amendment marked a dramatic shift from pre-war conceptions of federalism and overruled *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), which held that a former slave was not a U.S. citizen under the Constitution because of his race.

The framers of the Fourteenth Amendment made sure that the full and equal citizenship they established in the first words of Section One was no empty promise. In the Privileges or Immunities Clause, they explicitly guaranteed that citizens would enjoy all fundamental rights and liberties: "the privileges or immunities of citizens of the United States."[6]

As crafted, the Privileges or Immunities Clause was meant to secure the substantive liberties protected by the Bill of Rights, as well as unwritten fundamental rights. Leading proponents and opponents alike of the Fourteenth Amendment understood the words of the Clause to protect substantive fundamental rights—including the rights enumerated in the Constitution and Bill of Rights.

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[6] This focus on full and equal citizenship did not mean that the Reconstruction framers were unconcerned with the rights of non-citizens. John Bingham, principal author of the Fourteenth Amendment, believed that no state could violate the Constitution's "wise and beneficent guarantees of political rights to the citizens of the United States, as such, and of natural rights to all persons, whether citizens or strangers." Cong. Globe, 35th Cong., 2d Sess. 983 (1859). As explained by Professor Akhil Amar, the "privileges-or-immunities clause would protect citizen rights, and the due-process and equal-protection principles (which Bingham saw as paired if not synonymous) would protect the wider category of persons." AMAR, at 182. *See also* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 68 (1993) ("An examination of the language of the proposed Amendment shows that its 'privileges and immunities' clause would apply only to citizens, whereas its 'life, liberty, and property' clause would apply more expansively to 'all persons.'").

The framers of the Fourteenth Amendment acted against a historical backdrop that required them to protect at least the liberties of the Bill of Rights: they were keenly aware that southern states had been suppressing some of the most precious constitutional rights of both freed slaves and unionists. *See* AMAR, BILL OF RIGHTS, at 160. Starting around 1830, southern states had begun enacting laws restricting freedom of speech and press to suppress anti-slavery speech, even criminalizing such expression; in at least one state, writing or publishing abolitionist literature was punishable by death. *Id.* at 161; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 30, 40 (1986). Political speech was repressed as well, and Republicans could not campaign for their candidates in the South. *Id.* at 31. To prevent states from continuing to violate some of the core rights of our original Constitution, the Fourteenth Amendment framers added the Privileges or Immunities Clause to the Constitution.

In addition to providing the textual basis for protection of the liberties in the Bill of Rights, the Clause is "the natural textual home for . . . unenumerated fundamental rights." Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 449 (1990). It mimics the Ninth Amendment, which provides that there are rights protected by the Constitution not spelled out in the text. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX.

L. REV. 1 (2006). As one member of the Reconstruction Congress observed during the debates on the Fourteenth Amendment:

> In the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of – "life," "liberty," "property," "freedom of speech," "freedom of the press," "freedom in the exercise of religion," "security of person," &c; and then lest something essential in the specifications should have been overlooked, it was provided in the ninth amendment that "the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated." This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law.

Cong. Globe, 39th Cong., 1st Sess. 1072 (1866) (Sen. Nye). [7]

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[7] One preeminent constitutional scholar has suggested that the individual right to keep and bear arms, unconnected to militia service, at issue in both *Heller* and this case may have more to do with the Ninth and Fourteenth Amendments than the words of the Second Amendment. *See* Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 174-77 (2008). Regardless of whether the individual right to bear arms is protected against state infringement by incorporating the Second Amendment through the Fourteenth

Accordingly, the Privileges or Immunities Clause is the textual hook in the Fourteenth Amendment for protection of unenumerated fundamental rights, as well those substantive fundamental rights articulated in the Bill of Rights, including the Second Amendment right to keep and bear arms.

2. Slaughter-House *and* Cruikshank *Conflict with the History of the Privileges or Immunities Clause.*

The debates in Congress confirm what the text of the Fourteenth Amendment provides: the Privileges or Immunities Clause secures substantive fundamental constitutional rights. In particular, the Clause secures against state infringement an individual, substantive right to keep and bear arms for defense of hearth and home.

Senator Jacob Howard, speaking on behalf of the Joint Committee on Reconstruction, offered the most comprehensive analysis of the Privileges or Immunities Clause in the Senate debates on the Amendment. Relying heavily on *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), an influential

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Amendment or by looking to an unenumerated right to defend person and property protected by the Ninth and Fourteenth Amendments, the textual home for the guaranteed protection of that substantive right is the Privileges or Immunities Clause.

1823 decision interpreting the Privileges and Immunities Clause contained in Article IV, Section Two of the Constitution,[8] Sen. Howard made clear that the Privileges or Immunities Clause of the Fourteenth Amendment would afford broad protections to substantive liberty, encompassing all "fundamental" rights enjoyed by "citizens of all free Governments": "protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (quoting *Corfield*, 6 F. Cas. at 551).

Sen. Howard also made clear that these substantive "privileges or immunities" included those liberties protected by the Bill of Rights. *See* Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509, 1562-63 (2007). He noted the "privileges and immunities" of citizens "are not and cannot be fully defined in their entire extent and precise nature," but to these unenumerated rights

> should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press;

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[8] Article IV, Section Two provides: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

> the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right pertaining to each and all of the people; *the right to keep and bear arms*; the right to be exempted from the quartering of soldiers in a house without consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.
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> . . . [T]hese guarantees...stand simply as a bill of rights in the Constitution...[and] States are not restrained from violating the principles embraced in them....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).

Representative John Bingham, the principal author of Section One of the Fourteenth Amendment, also made it abundantly clear that the

substantive privileges and immunities of citizens encompassed the liberties set forth in the Bill of Rights. In explaining why the Fourteenth Amendment was necessary, Bingham cited the Supreme Court's opinions in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and *Livingston v. Moore*, 32 U.S. 469 (1833), both of which held that the Bill of Rights did not apply to the states. Cong. Globe, 39th Cong., 1st Sess. 1089-90 (1866). Bingham retained this understanding of what the Privileges or Immunities Clause protected. In 1871, after the ratification of the Fourteenth Amendment, he explained:

> [T]he privileges or 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. Those eight amendments are as follows. [Bingham read the first eight amendments word for word.] These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment.

Cong. Globe, 42d Cong., 1st Sess. 84 app. (1871). *See generally* Aynes, 103 YALE. L.J. at 74.

Other prominent members of the Reconstruction Congress shared the same view of the privileges and immunities of national citizenship held by Sen. Howard and Rep. Bingham. For example, prior to the drafting of the

Fourteenth Amendment, Representative James Wilson, chairman of the House Judiciary Committee, stated that "[t]he people of the free States should insist on ample protection to their rights, privileges and immunities, which are none other than those which the Constitution was designed to secure to all citizens alike." Cong. Globe, 38th Cong., 1st Sess. 1202-03 (1864). *See* CURTIS, at 37-38.

Accordingly, the most influential and knowledgeable members of the Reconstruction Congress went on record with their express belief that the Privileges or Immunities Clause of the Fourteenth Amendment protected against state infringement substantive, fundamental rights, including the liberties secured by the first eight articles of the Bill of Rights. Not a single Senator or Representative disputed this understanding of the privileges and immunities of citizenship or Section One. *See, e.g.*, AMAR, BILL OF RIGHTS, at 187; CURTIS, at 91; Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 932 (1986). To the contrary, whether in debates over the Fourteenth Amendment or its statutory analogue, the Civil Rights Act of 1866, speaker after speaker affirmed two central points: the Privileges or Immunities Clause would safeguard the substantive liberties set out in the Bill of Rights, and that, in line with *Corfield*, the Clause would give broad protection to substantive liberty, safeguarding all the fundamental rights of citizenship.

Particularly relevant to the *McDonald* petition is the history of the Clause that shows that an individual right to keep and bear arms was among the privileges and immunities of citizens protected against state infringement under the Fourteenth Amendment.

The framers of the Fourteenth Amendment were particularly concerned with the right of freedmen to bear arms. *See* Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 346 (1991). The efforts to disarm freed slaves "played an important part in convincing the 39th Congress that traditional notions concerning federalism and individual rights needed to change." *Id.* As constitutional historians have noted, "Reconstruction Republicans recast arms bearing as a core *civil* right. . . . Arms were needed not as part of political and politicized militia service but to protect one's individual homestead." AMAR, BILL OF RIGHTS, 258-59. In fact, far from fulfilling the Founders' vision of state militias as bulwarks of liberty, various southern militias perpetrated rights deprivations in the South: "Confederate veterans still wearing their gray uniforms, . . . frequently terrorized the black population, ransacking their homes to seize shotguns and other property and abusing those who refused to sign plantation labor contracts." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 203 (1988). *See also* Cong. Globe, 39th Cong., 1st Sess. 40 (1866) (Sen. Wilson) ("In Mississippi rebel State forces, men who were in the rebel armies, are traversing

the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them"); *id.* at 914, 941 (Letter from Colonel Samuel Thomas to Major General O.O. Howard, quoted by Sens. Wilson and Trumbull) ("Nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of [the state] militia.").

Central in the minds of the framers were the Black Codes, the South's post-war attempt to re-institutionalize slavery in a different guise.[9] The Black Codes systematically violated the constitutional rights of the newly freed slaves in myriad ways, including by prohibiting the former slaves from having their own firearms. *See* FONER, at 199-201; CURTIS, NO STATE SHALL ABRIDGE, at

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[9] The Reconstruction Congress first acted to explicitly protect the right of the freedmen to keep and bear arms in the re-enacted Freedman's Bureau Bill. Seeking to prevent the Black Codes from perpetuating the wrongs of slavery, the bill provided that African Americans should have "the full and equal benefit of all laws and proceedings for the security of person and property, *including the constitutional right of bearing arms*." Cong. Globe, 39th Cong, 1st Sess. at 654, 743, 1292 (Rep. Bingham) (emphasis added). *See also id.* at 654 (Rep. Eliot) (proposing the addition of the words "including the constitutional right to bear arms"); *id.* at 585 (Rep. Banks) (stating his intent to modify the bill so that it explicitly protected "the constitutional right to bear arms"). Because there was some question over whether Congress had the power to enforce against the states the protections of the Bill of Rights and the fundamental rights articulated in Reconstruction civil rights legislation, the 39th Congress proposed the Fourteenth Amendment, which made explicit the constitutional guarantee of fundamental rights against state infringement.

35.[10] *See also Heller*, 128 S. Ct. at 2841 (noting that "[b]lacks were routinely disarmed by Southern States after the Civil War" and that opponents of "these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms"). These abuses were investigated and reported to Congress by the Joint Committee on Reconstruction, composed of members of both the House and Senate (including Sen. Howard and Rep. Bingham). The Joint Committee drafted the Fourteenth Amendment in Congress, and thus their findings bear directly on the Amendment they constructed. The Committee's conclusions, issued in a June 1866 report, were also distributed widely throughout the country—150,000 copies were issued. *See* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 265 (1914). The Joint Committee's report confirmed through an exhaustive fact-finding effort the systematic violation of constitutional rights in the South and the need for guaranteeing basic human and civil rights.

On the issue of the right to bear arms the Joint Committee reported testimony that, in the South, "[a]ll of the people...are extremely reluctant to grant to the negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property," and noted that "[t]he

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[10] For discussions of the Black Codes in Congress, *see* Cong. Globe, 39th Cong., 1st Sess. 93-94 (1865); *id.* at 340 (1866); *id.* at 474-75; *id.* at 516-17; *id.* at 588-89; *id.* at 632; *id.* at 651; *id.* at 783; *id.* at 1123-24; *id.* at 1160; *id.* at 1617; *id.* at 1621; *id.* at 1838.

planters are disposed...to insert into their contracts tyrannical provisions...to prevent the negroes from leaving the plantation...or to have fire-arms in their possession." REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION Pt. II, 4 and Pt. II, 240 (1866). Members of the Reconstruction Congress echoed these concerns. Senator Pomeroy explained that the newly freed slaves should be guaranteed the "essential safeguards of the Constitution," including the right of bearing arms, and noted that southern states had denied African Americans the right to keep and bear arms. 39th Cong. Globe, 1st Sess. at 1183, 1837-38. Sen. Pomeroy expressly listed as one of the constitutional "safeguards of liberty" the "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess. 1182 (1866). Representative Eliot decried a Louisiana ordinance that prevented freedmen not in the military from possessing firearms within town limits without special written permission from an employer. *Id.* at 517. Finally, Sen. Howard defined the privileges or immunities of citizenship protected by the Amendment to include "the personal rights guaranteed and secured by the first eight amendments of the constitution....such as....the right to keep and bear arms." *Id.* at 2765. *See also id.* at 1073 (Sen. Nye) ("As citizens of the United States, [the freedmen] have equal right to protection, and to keep and bear arms for self defense.")

In short, Reconstruction legislative history unequivocally demonstrates that an individual right to keep and bear arms was one of the rights to

be protected by the Privileges or Immunities Clause.

3. Slaughter-House *and* Cruikshank *Conflict with the Original Public Meaning of the Fourteenth Amendment.*

There is substantial historical support for reading the words "privileges" and "immunities" to include the liberties in the Bill of Rights. The words privileges and immunities had been extensively used to describe basic Bill of Rights liberties (and their English predecessors) in the years before the framing and ratification of the Fourteenth Amendment, and that meaning appears to have been widely understood. *See, e.g.*, Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000).

From our very beginnings, Americans used the words "privileges" and "immunities" interchangeably with words like "rights" or "liberties." *See* AMAR, BILL OF RIGHTS, at 166-69; Curtis, *Historical Linguistics*, 78 N.C. L. REV. at 1094-1136. As Professor Curtis has noted, "Blackstone's *Commentaries on the Laws of England*, published in the colonies on the eve of the Revolution, had divided the rights and liberties of Englishmen into those 'immunities' that were the residuum of natural liberties and those 'privileges' that society had provided in lieu of natural rights." CURTIS, NO STATE SHALL ABRIDGE, at 64. In Blackstone's *Commentaries*, "the words *privileges*

and *immunities* [were] used to describe various entitlements embodied in the landmark English charters of liberty of Magna Charta, the Petition of Right, the Habeas Corpus Act, the English Bill of Rights of 1689, and the Act of Settlement of 1701." AMAR, BILL OF RIGHTS, at 169. Most of these liberties of Englishmen would later be enshrined in the American Bill of Rights, and they continued to be thought of as the privileges or immunities of citizens. CURTIS, NO STATE SHALL ABRIDGE, at 64.

For example, when James Madison proposed the Bill of Rights in Congress, he spoke of the "freedom of the press" and "rights of conscience" as the "choicest privileges of the people," and included in his proposed Bill a provision restraining the States from violating freedom of expression and the right to jury trial because "State governments are as liable to attack these invaluable privileges as the General Government is...." 1 Annals of Congress 453, 458 (1789); *see also id.* at 766 (discussing the proposed Bill of Rights as "securing the rights and privileges of the people of America").

This long-standing understanding of privileges and immunities appears to have held sway at the time of our Second Founding, as well. Certainly, as described above, the drafters of the Fourteenth Amendment "used the words *privileges* and *immunities* as a shorthand description of fundamental or constitutional rights." CURTIS, NO STATE SHALL ABRIDGE, at 64. In the ratification debates in the States, several governors "seem to have treated the words *rights* as equivalent to the words *privileges* or *immunities*." *Id.* at 146.

The general public was well aware that the Fourteenth Amendment was intended to protect the liberties of the Bill of Rights and other fundamental rights against state infringement. Sen. Howard's speech explaining that the Privileges or Immunities Clause included at least the rights guaranteed by the first eight amendments in the Bill of Rights "was reprinted as front page news the next day in the New York Times." Wildenthal, *Nationalizing the Bill of Rights*, 68 OHIO ST. L.J. at 1564. In addition, "[a]t least four other major papers apparently covered the relevant parts of Howard's speech: the Philadelphia Inquirer, the Washington, D.C. National Intelligencer, the front page of the New York Herald, and, with slight ambiguity, the front page of the Boston Daily Advertiser." *Id.* In short, "[t]he 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." *Id.* at 1590.

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The lower courts have applied precedent to preclude incorporation of an individual right to bear arms under the Privileges or Immunities Clause. While acknowledging that this precedent runs counter to scholarly consensus and modern views of incorporation, the courts have considered themselves bound to follow these outdated cases until this Court declares otherwise. Because cases like *Slaughter-House* and *Cruikshank* are contrary

to modern lines of precedent and established constitutional text and history, the Court should grant review to re-align Privileges or Immunities Clause jurisprudence and settle the question for the lower courts.

CONCLUSION

Amici urge the Court to grant *certiorari* and restore the Privileges or Immunities Clause of the Fourteenth Amendment to its intended place in our constitutional order.

Respectfully submitted,

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