No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD, *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

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

BRIEF OF THE AMERICAN CIVIL RIGHTS UNION, LET FREEDOM RING, COMMITTEE FOR JUSTICE, AND THE FAMILY RESEARCH COUNCIL, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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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.

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INTEREST OF *AMICI CURIAE* [1]

The American Civil Rights Union (ACRU) is a nonpartisan legal policy organization dedicated to defending all constitutional rights, not just those conforming to a particular ideology. Founded in 1998 by longtime Reagan policy advisor Robert B. Carlson, the ACRU files briefs as *amicus curiae* on constitutional law issues in cases across the nation.

Those individuals setting the ACRU's policy as members of its Policy Board are: former U.S. Attorney General Edwin Meese, former Judge for the U.S. Court of Appeals for the D.C. Circuit Kenneth W. Starr, former Assistant Attorney General William Bradford Reynolds, John M. Olin Distinguished Professor of Economics at George Mason University Walter Williams, former Harvard University Professor Dr. James Q. Wilson, Ambassador Curtin Windsor, Jr., and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we seek to ensure that all constitutional rights are fully protected. This includes the right to keep and bear arms and a proper application of the Privileges or Immunities Clause.

Let Freedom Ring (LFR) is a non-profit organization, formed for the express purpose of mobilizing American citizens to engage on issues regarding the protection of fundamental American values. LFR

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[1] Peter J. Ferrara and Kenneth A. Klukowski authored this brief for *amici curiae*. No counsel for any other party authored this brief in whole or in part and no one apart from *amici curiae* made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

promotes constitutional government, economic freedom, and traditional values. LFR is interested in this case because the right to keep and bear arms is central to the American constitutional system. The right to bear arms is also a core American tradition, with a history stemming from the founding of America. Accordingly, LFR desires to see this right extended against the states in a fashion consistent with a traditional understanding of both the Second and Fourteenth Amendments.

Founded in 2002, the Committee for Justice (CFJ) is a non-profit organization incorporated in the District of Columbia that advocates against judicial activism, educates about the proper role of judges, and promotes judicial nominees who respect the rule of law. At the core of CFJ's mission is the need for objective judicial interpretation of the United States Constitution, based on the document's text and original meaning rather than on the political ideology, feelings, and life experiences of the judges. Accordingly, CFJ believes that the Second Amendment right to keep and bear arms must be afforded the same protection, at all levels of government, as the other fundamental rights in the Bill of Rights.

The Family Research Council (FRC) is a non-profit organization located in Washington, D.C., that exists to develop and analyze governmental policies that affect the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal. Accordingly, FRC has an interest in presenting a theory of the Fourteenth Amendment that allows for the extension of the right to bear arms to the states, but does not reinforce doctrines whereby courts recognize and enforce rights lacking a foun-

dation in the Constitution's text or the history and traditions of the American people, doctrines often resulting in outcomes detrimental to the rights of parents and families in the United States.

SUMMARY OF ARGUMENT

This Court held in *District of Columbia v. Heller* that the Second Amendment secured an individual right to keep and bear arms. 128 S. Ct. 2783, 2799 (2008). In so holding, this Court invalidated various sections of the District of Columbia's statutes establishing a virtually-categorical ban on handguns and other readily-usable firearms within the home. *Id.* at 2821–22. Yet despite the landmark nature of this case, its extreme facts properly led this Court to an appropriately narrow holding that the Constitution would not tolerate a complete ban on handguns in this nation's capital.

Of the remaining questions regarding the Second Amendment, perhaps none is more consequential than whether the Fourteenth Amendment protects the right to bear arms from infringement by the states. This Court expressly disclaimed that question in *Heller*, 128 S. Ct. at 2813 n.23, and is now presented with this issue.

Although most of the individual rights in the Bill of Rights have been "incorporated" through substantive due process, the right to keep and bear arms should instead be recognized as one of the "privileges or immunities" protected by the Fourteenth Amendment. This right is significantly different from the other rights in the Bill of Rights, and there are several advantages to this approach. There are, moreover, no serious disadvantages.

Significantly, and contrary to the assertions of Petitioner, this Court can and should decide this case under the Fourteenth Amendment Privileges or Immunities Clause without overruling the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). This Court in *Slaughter-House* held that rights inhering in federal citizenship are applicable to the states through the Privileges or Immunities Clause.

This holding was designed to preserve the federal system of government. Had this Court struck down a public health law passed pursuant to a state's police power as violating a right without any textual support in the Constitution, this Court would have read Privileges or Immunities in an extraordinary-broad manner with profound implications for federal-state relations.

The commonly-held view that *Slaughter-House* eviscerated the Privileges or Immunities Clause and precludes its extending federal rights to the states has never been adopted by this Court. That common view is incorrect, and is a *post-hoc* gloss created and promulgated by the legal academy, which this Court has not had occasion to consider. This anti-incorporation view is also unusual in that *Slaughter-House* did not involve any provision of the Bill of Rights and therefore was not an incorporation case. To the contrary, *Slaughter-House* listed several rights as being among the "privileges or immunities" of U.S. citizenship that could thus be applied to the states through the Privileges or Immunities Clause.

It is also possible for a right to be both a fundamental right within the purview of the states while also a federal right enforceable against the states. This list of rights inhering in federal citizenship includes two provisions of the First Amendment,

demonstrating that Privileges or Immunities can be used to apply federal rights to the states, so long as those rights are rooted in the constitutional text.

The political aspect of the Second Amendment confirms that the right to bear arms inheres in federal citizenship and thus can be applied to the states consistent with the *Slaughter-House Cases*. The Second Amendment entails two distinct, but related, interests. The first is a right to self-defense, recognized in *Heller*. The second is a political right to hold the government accountable by threat of arms as a deterrent against tyranny. Other courts have explored this right in detail, characterizing the Second Amendment as a "doomsday provision," assuring an armed citizenry that could quell "tyrannical leaders," and expressly acknowledging that this aspect of the Second Amendment is a "political component." This Court in *Heller* recognized the significance of this component, noting its role during the Framing.

This political distinction does not diminish the right to bear arms. The Constitution distinguishes citizens from noncitizens. Consequently certain fundamental rights, notably the right to vote, are restricted to only U.S. citizens because they are political rights. The right to vote is the means for expressing consent to be governed by certain leaders, and the Second Amendment is an intergenerational insurance policy to guarantee that such leaders cannot retain power in a tyrannical fashion after the American people have rescinded their consent. This concern regarding the federal government in 1791 when the Second Amendment was adopted became a prominent concern regarding state governments in 1868 when the Fourteenth Amendment was adopted,

and thus the right to bear arms was extended to the states through the Privileges or Immunities Clause.

There are three precedents that this Court must, and should, overrule to extend the right to bear arms to the states through the Privileges or Immunities Clause. These cases are *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). This Court has long since jettisoned the underlying rationales of *Cruikshank* and its progeny, all of which were decided before this Court began applying provisions of the Bill of Rights to the states. These cases must be overruled in that their clear language holds that the Second Amendment does not apply to the states through the Fourteenth Amendment, which would include both the Privileges or Immunities Clause and the Due Process Clause. These are prime examples of cases fit to be overruled, in that they meet this Court's criteria for overcoming *stare decisis*.

But the *Slaughter-House Cases* need not be overruled. By reaffirming that *Slaughter-House* stands for the proposition that rights applicable to the states through Privileges or Immunities are those inhering in federal citizenship, this Court could extend the right to bear arms—including a political component—through that clause with no adverse doctrinal consequences. Although there are several passages that appear problematic in *Slaughter-House*, all such passages are *dicta*, thus not protected by *stare decisis*, and the rejection of which therefore does not require overruling *Slaughter-House*.

Moreover, the *Slaughter-House Cases* should not be overruled. Doing so would render the Privileges or Immunities Clause a *tabula rasa*, which this Court in the future could interpret to mean anything this

Court chooses, making that clause a cornucopia of various rights devoid of any textual support in the Constitution, with profound implications for both social and economic policy issues in this country, as future Members of this Court could constitutionalize their personal preferences, foreclosing political solutions on these matters.

This is because the Privileges or Immunities Clause, unlike the Due Process and Equal Protection Clauses, has only one major precedent defining its meaning. Thus, removing that constraint renders Privileges or Immunities malleable, which, given that it provides for enforcing certain rights against the states, could profoundly alter the federalist system of governance if those rights were suddenly to be whatever this Court decides they should be, without condition or restraint. Such rights could be social matters or economic entitlements, and empower this Court to override every state and local government or any policy matter this Court chooses.

Stare decisis strongly counsels against overruling the *Slaughter-House Cases*. There is no special justification for overruling *Slaughter-House*. While *Cruikshank*, *Presser*, and *Miller* meet this Court's criteria for being overturned, none of those factors apply to *Slaughter-House*.

There are additional reasons to apply the right to bear arms through Privileges or Immunities instead of Due Process. Fourteenth Amendment jurisprudence has suffered from an overreliance on the Due Process Clause. The first two clauses of the Fourteenth Amendment's first section pertain to citizens, and the last two pertain to all persons. Redirecting rights properly considered under Privileges or Immunities to Due Process has resulted in judges

narrowing procedural protections out of concern for the consequently sweeping scope of the Due Process Clause.

Moreover, both the political aspect of the right to bear arms, and the inherent dangerousness of firearms, counsel for Privileges or Immunities over Due Process. This Court's precedent demonstrates that "the people" referenced in the Constitution, such as in the Second Amendment, refer to the U.S. citizenry. While states should enact statutory entitlements to enable law-abiding aliens access to firearms for self-defense, it is not xenophobic to recognize that political rights, whether the right to vote or the right to hold the government in check by an armed citizenry, only extend to American citizens.

Applying the Second Amendment to the states through Privileges or Immunities does not require reworking other aspects of incorporation doctrine. Settled precedents regarding which other provisions of the Bill of Rights are—or are not—incorporated need not be revisited, and this Court may possibly never again face an incorporation question for a provision of the Bill of Rights. Therefore, by preserving the *Slaughter-House Cases*, this case presents a rare opportunity to give effect to the original meaning of the Privileges or Immunities Clause while strictly limiting its implications for any right other than the right to bear arms.

ARGUMENT

The Second Amendment secures an individual right to keep and bear arms. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008). Likely the most significant remaining question involving the right to bear arms is whether that right is applicable to the

states through the Fourteenth Amendment. This Court is presented with the question of whether the right to bear arms applies to the states—or is "incorporated"[2]—through either the Privileges or Immunities Clause or the Due Process Clause of the Fourteenth Amendment. This Court should hold that the right to bear arms applies to the states through the Privileges or Immunities Clause, and should do so without overruling the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

I. THE RIGHT TO KEEP AND BEAR ARMS IS A FUNDAMENTAL RIGHT APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

We note at the outset that this Court's precedents strongly support incorporation through substantive due process. *See*, *e.g.*, Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse L. Rev. 185, 191–96 (2008). If the Court chooses not to rely on the Privileges or Immunities Clause, those precedents undoubtedly dictate incorporation because the right to arms is "fundamental" under any of the tests this Court has articulated. *Heller* itself thoroughly explored the historical evidence indicating that the right to arms is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325–36

[2] The term "incorporated" originally referred to whether the substantive federal right in question was applicable to the states through being incorporated into the Due Process Clause as an aspect of the doctrine of substantive due process. Klukowski, *Citizen Gun Rights*, *infra*, at 195 n.1. However, it has subsequently become the legal term of art for applying a federal right to the states through any provision of the Fourteenth Amendment, *id.*, and is used in that sense throughout this brief.

(1937), or "fundamental to the American scheme of justice," and "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 & n.14 (1968). The right to arms also meets the additional criterion of fundamentality under substantive due process later adopted by this Court, as it is "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation omitted).

The choice of incorporating the right to bear arms through Privileges or Immunities versus Due Process is partially a choice between first principles and past practice. Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. Rev. 195, 234 (forthcoming Dec. 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1290584 [hereinafter "Klukowski, *Citizen Gun Rights*"]. This Court's extensive history with incorporating rights into the Due Process Clause, *see id.* at 203 n.79, in many ways presents the path of least resistance.

But for the reasons explained in this brief, this Court should instead apply the Second Amendment right to bear arms to the states through the Privileges or Immunities Clause.

II. THE RIGHT TO BEAR ARMS CAN BE INCORPORATED THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE WITHOUT OVERRULING THE *SLAUGHTER-HOUSE CASES*.

The right to keep and bear arms found in the Second Amendment can be applied to the states through the Privileges or Immunities Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1, cl. 2. Contrary to Petitioner's arguments, this right

to keep and bear arms can be incorporated against the states consistent with the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). It presents this Court with a false choice to assert that the Privileges or Immunities Clause must either be a cornucopia of boundless rights or a dead letter that extends no federal rights to the states. Klukowski, *Citizen Gun Rights*, *supra*, at 228. This Court can extend the right to bear arms to the states without overruling *Slaughter-House* by holding that it is a right inhering in federal citizenship.

A. The *Slaughter-House Cases* Holds that Rights Inhering in Federal Citizenship are Applicable to the States Through the Privileges or Immunities Clause.

In the *Slaughter-House Cases*, this Court differentiated between federal rights and state rights, declaring that the rights incorporated to the states through the Privileges or Immunities Clause are those inhering in federal citizenship. Klukowski, *Citizen Gun Rights*, *supra*, at 230; *accord* William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 162–63 (1988); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 Akron L. Rev. 717, 746–49 (2003).[3] The foremost focus during the adoption of the Fourteenth Amendment was the rights that these newly-proclaimed U.S. citizens would be able to assert *as American citizens* against

[3] This was evidently also the position of the United States during the Reagan administration. *See* Off. Legal Policy, U.S. Dep't of Justice, Report to the Attorney General, *Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and Privileges or Immunities Clause* 28–31 (1987).

the states. *See* Klukowski, *Citizen Gun Rights*, *supra*, at 218 (citations omitted).

In promulgating the rule that the Privileges or Immunities Clause only extends rights inherent in federal citizenship to the states, this Court was acting to preserve the federal system of government created by the Constitution. For this Court to have decided *Slaughter-House* to the contrary would have interpreted the Privileges or Immunities Clause in an extremely broad fashion that would have imbued federal courts with boundless power over the states. Klukowski, *Citizen Gun Rights*, *supra*, at 228. Had this Court held that the Privileges or Immunities Clause invalidated the Louisiana statute, such a reading could have opened Pandora's Box, arrogating to this Court the role of being "a perpetual censor upon all the legislation of the States . . . with the authority to nullify [any laws] it did not approve." *Slaughter-House*, 83 U.S. (16 Wall.) at 78.

This is especially true given the police-power nature of the challenged Louisiana statute. Public health laws are part of the police power. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (citation omitted). While states wield police power, *id.*, the federal government does not outside federal enclaves and possessions. *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919). This Court in *Slaughter-House* expressly noted that the challenged statute was a public health measure entailing the police power. 83 U.S. (16 Wall.) at 61, 82. To nullify a state's public health law as violating a right that is not expressly referenced in the constitutional text would have read the Privileges or Immunities Clause so broadly as to effectuate an enormous expansion of

federal power. *See* Klukowski, *Citizen Gun Rights*, *supra*, at 226, 228, 229.

B. The Common View that *Slaughter-House* Precludes Incorporation Through the Privileges or Immunities Clause is Based On a Misunderstanding that Has Never Been Endorsed By This Court.

There is perhaps no precedent of this Court for which the gap between what this Court held versus how academic commentators later characterized the case is as great as for the *Slaughter-House Cases*. Many commentators assert that *Slaughter-House* eviscerated the Privileges or Immunities Clause, rendering it unable to incorporate rights against the states. *E.g.*, 1 Laurence H. Tribe, *American Constitutional Law* 1303 (3d ed. 2000). Such an argument claims that *Slaughter-House* "construed the Privileges or Immunities Clause so narrowly as to pave the way for its virtual elimination from the body of the Constitution." *Id.* While that may be what those seeking to advance an agenda of encouraging courts to create new unenumerated rights would like this Court to believe, it thoroughly misreads this Court's precedent. Fortunately, this Court is not bound by this *post-hoc* gloss imposed on *Slaughter-House* by various academics and advocates. Klukowski, *Citizen Gun Rights*, *supra*, at 230.

The anti-incorporation gloss imposed on the *Slaughter-House Cases* is especially odd given that *Slaughter-House* did not involve any enumerated right. *Slaughter-House* was not an incorporation case. *See, e.g.*, Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 Ohio St. L.J. 1051, 1064

(2000); *see also* Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the* Slaughter-House Cases, 109 Yale L.J. 643, 685 (2000).

The *Slaughter-House* Court enumerated some, but not all, of the rights that inhere in federal citizenship, and thus constitute the relevant "privileges or immunities." Moreover, this Court's precedents help define the characteristics of rights that inhere in federal citizenship. After listing certain federal rights, this Court stated that "with the exceptions of these and a few other restrictions, [the rights] of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal Government." *Id.* at 77. *Slaughter-House* then adds that "the right to peaceably assemble and petition for the redress of grievances . . . are rights of the citizen guaranteed by the Federal Constitution." *Id.* at 79. This is critical in that these are both express rights in the First Amendment. Klukowski, *Citizen Gun Rights*, *supra*, at 229 n.322.

This in turn suggests that the "privileges or immunities" incorporated by the Fourteenth Amendment are those rooted in the constitutional text. Rights such as assembly and petition are expressly secured by the text. *Slaughter-House* then noted that it also recognized a right to travel across the nation to Washington, D.C., *Crandall v. Nevada*, 73 U.S. (6 Wall.) 36, 44 (1868), and found such a right necessary to exercise the right to petition the government. 83 U.S. (16 Wall.) at 79. Thus rights such as the right to interstate travel that are not expressly granted in the Constitution are among "privileges or immunities" if they are essential to exercising the express rights. Either way, rights inhering in federal citizenship, applicable to the states through Privileges or

Immunities, must be derived from the constitutional text.

Whether a right inheres in federal citizenship is not dependent on whether the existence of the right antedates the Federal Constitution. The Ninth Circuit briefly held that rights of federal citizenship are those created by the Constitution, while fundamental rights that predated the Constitution are incorporated to the states through the Due Process Clause. *See Nordyke v. King*, 563 F.3d 439, 446–47, *vacated for reh'g en banc*, 575 F.3d 890 (9th Cir. 2009). But that is incompatible with this Court's precedent. Klukowski, *Citizen Gun Rights*, *supra*, at 229 n.322. First, this Court has found that the right of peaceable assembly preexisted the Constitution. *United States v. Cruikshank*, 92 U.S. 542, 551 (1876). Second, Members of this Court have said the same regarding the right to seek redress. *See Adderly v. Florida*, 385 U.S. 39, 49 & n.2 (1966) (Douglas, J., joined by Warren, C.J., and Brennan and Fortas, JJ., dissenting). And third, the writ of habeas corpus—which although it is not a provision of the Bill of Rights is nonetheless an enumerated right in the Constitution—also anteceded the Constitution's creation. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2244–51 (2008) (Scalia, J., dissenting). All three of these rights—assembly, petition, and the Great Writ—are referenced by *Slaughter-House* as being among the rights of federal citizenship. *See* 83 U.S. (16 Wall.) at 79.

The two types of rights contemplated in *Slaughter-House*—fundamental rights to be protected by the states and federal rights secured by the U.S. Constitution—are not mutually exclusive. Klukowski, *Citizen Gun Rights*, *supra*, at 230 (citing Robert C. Pal-

mer, *The Parameters of Constitutional Reconstruction:* Slaughter-House*,* Cruikshank*, and the Fourteenth Amendment*, 1984 U. Ill. L. Rev. 739, 744). Indeed, quite the contrary. Richard L. Aynes, *Freedom: Constitutional Law: Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the* Slaughter-House Cases, 70 Chi.-Kent L. Rev. 627, 648 (1994). For example, the writ of habeas corpus was referenced in the *Slaughter-House Cases* as a fundamental right. 83 U.S. (16 Wall.) at 117 (Bradley, J., dissenting) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230) (opinion of Washington, J.)). The section of *Corfield* cited therein was also referenced previously in *Slaughter-House* as describing those rights generally considered within the realm of state constitutions and legislation. *See* 83 U.S. (16 Wall.) at 75–77. Yet the *Slaughter-House* Court then expressly mentions habeas corpus as among the rights of federal citizenship, secured by the U.S. Constitution and thus entailed by the Privileges or Immunities Clause. *See id.* at 79. This establishes the principle that certain fundamental rights are also among the "privileges or immunities" of citizens of the United States, and therefore can be extended to the states through the Privileges or Immunities Clause consistent with *Slaughter-House*.

If a fundamental right within the purview of state governments is also manifestly a right against the federal government, then it could be a right of federal citizenship concurrently enforceable by both federal and state governments. Such a right would be one that the states are obligated to extend to out-of-staters under the Article IV Privileges and Immunities Clause, *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), but also independently would be federally

enforceable against the states through the Fourteenth Amendment Privileges or Immunities Clause, Klukowski, *Citizen Gun Rights*, *supra*, at 222.

C. The Political Aspect of the Second Amendment Confirms that the Right Inheres in Federal Citizenship, and is Thus Applicable to the States Under *Slaughter-House*.

The Second Amendment entails two distinct, though closely related, interests. The first is a right of self-defense, which this Court recognized in *Heller*. 128 S. Ct. at 2817. This Court recognized that this right was found in the English Bill of Rights of 1689. *Id.* at 2798. A great deal of scholarship has been written on this issue. *See, e.g.*, Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 97–114 (1994). Late medieval, baroque, and colonial authorities are often cited to demonstrate the pre-constitutional lineage of this right. *E.g.*, Montesquieu, *De L'Esprit des Lois* [*The Spirit of the Laws*] bk. X, ch. 2 (1748); John Locke, *The Second Treatise on Government* § 16 (1690); Thomas Hobbes, *Leviathan* 146 (Marshall Missner ed., 2008) (1651). Although less often cited, this literature can be traced to even earlier sources. *See* James Warner, *Disarming the Disabled*, 18 Geo. Mason U. Civ. Rts. L.J. 267, 269–74 (2008) (citing Hugo Grotius, *De Jure Belli ac Pacis* [*The Law of War and Peace*] (Louise R. Loomis trans., Walter J. Black, Inc. 1949) (1625); Plato, *The Laws*, *in The Collected Dialogues of Plato* 1429 (Edith Hamilton & Huntington Cairns eds., Bollingen Found. 1961) (360 B.C.)).

The second is a political right to hold government accountable by a latent deterrent of armed resistance. Two centuries of almost-unbroken domestic

tranquility juxtaposed with America possessing the most powerful military in the world make the importance of this interest difficult to adequately appreciate. Klukowski, *Citizen Gun Rights*, *supra*, at 240. It was very much a concern for the Founding Fathers in 1791, however, *id.* (citing 1 Annals of Cong. 778 (Joseph Gales ed., 1789); *The Federalist* Nos. 24, 46), and also a concern during Reconstruction, when African-Americans were often the victims of violence perpetrated by local authorities in former slave states, *id.* at 249–52 (citations omitted).

Although this Court has not had occasion to thoroughly explore this right, other courts and authorities have done so. As now-Chief Judge Kozinski explained, "the simple truth—born of experience—is that tyranny thrives best where government need not fear the wrath of an armed people." *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., *dissenting from denial of reh'g en banc*). Kozinski continues:

> The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies seem today, facing them unprepared is a mistake a free people get to make only once.

Id. at 570. This design was articulated by Judge Janice Rogers Brown, who while serving on the California Supreme Court found that, "[e]xtant political writings of the [founding] period repeatedly expressed a dual concern: facilitating the natural

right of self-defense and assuring an armed citizenry capable of repelling foreign invaders and quelling tyrannical leaders." *Kasler v. Lockyer*, 2 P.3d 581, 602 (Cal. 2000) (Brown, J., concurring). Judge O'Scannlain's opinion for the Ninth Circuit restates this by explaining the Second Amendment "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.

This Court recognized the significance of the Second Amendment's political aspect in *Heller*. Disarmament efforts by the British "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms." *Heller*, 128 S. Ct. at 2799. This Court noted that the Framers' concern was that government would disarm the citizenry to avoid being held accountable. *Id.* at 2801. This Court then concluded that the prefatory clause in the Second Amendment shows that the right was intended as a "safeguard against tyranny." *Id.* at 2802.

It in no way diminishes the right to bear arms to recognize that its *constitutional* status is tied to citizenship. Legitimate governments "derive[e] their just powers from the consent of the governed." The Declaration of Independence, para. 2 (U.S. 1776). Accordingly, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Yet the right to vote is restricted to citizens. *Cf. Burdick v. Takushi*, 504 U.S. 428, 433, 441 (1992) (citations omitted). Even the most important and productive noncitizens in this country cannot

cast a ballot. The Constitution differentiates between citizens and aliens in no fewer than eleven instances. *Sugarman v. Dougall*, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting). As a political right possessed only by citizens, therefore, the Second Amendment should be extended to the states through the Privileges or Immunities Clause.

The political right entailed by the Second Amendment is an enforcement provision to preserve constitutional government. "The Second Amendment secured to the people the right to alter or to abolish their government, if necessary." Klukowski, *Citizen Gun Rights*, *supra*, at 248 (citing The Declaration of Independence, para. 2 (U.S. 1776)). The right to hold government accountable and remove tyrannical leaders if absolutely necessary is a "transcendent sovereign right" of the American people. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1133 (1991) [hereinafter Amar, *Constitution*]. So just as voting is a political right to install government officials, the Second Amendment secures a means to remove them if they seek to retain power after the people have affirmatively rescinded their consent via the democratic process.

This anti-tyranny concern against the federal government in 1791 became a concern against state governments in the South in 1868. Klukowski, *Citizen Gun Rights*, *supra*, at 249–52. State governments can be as grave a threat to freedom as the federal government, and thus the safeguard against the latter is also necessary against the former. *See* Eugene Volokh, *Necessary to the Security of a Free State*, 83 Notre Dame L. Rev. 1, 3–6 (2007). Some among the Founding Fathers considered state governments a greater potential threat to liberty than the federal

government. *E.g.*, *The Federalist* No. 10 (Madison). Congressman John Bingham was the principal draftsman of the Fourteenth Amendment. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1233 (1992) [hereinafter Amar, *Fourteenth Amendment*]. During Reconstruction, Bingham stated that the amendment's purpose was to protect the former slaves from their own states' tyranny. *See* Cong. Globe, 39th Cong., 1st Sess. 1090 (1866) (statement of Rep. Bingham). Many slave states disallowed even free African-Americans from owning firearms, rendering them unable to withstand local oppression. Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States?*, 19 Harv. J.L. & Pub. Pol'y 443, 448 (1995). The Fourteenth Amendment was designed "to protect the citizens of a state against the state itself." 2 Andrew C. McLaughlin, *A Constitutional History of the United States* 656 (1935). This right to arms need not actually prevent tyranny, Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 3, 13–14 (1996); it need only provide a credible deterrent to tyranny. Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 115 (1987). Thus, a citizen's right to check the federal government in the Second Amendment became applicable against states through the Fourteenth Amendment Privileges or Immunities Clause. *See* Klukowski, *Citizen Gun Rights*, *supra*, at 241, 244.

D. Although Three Precedents Must be Overruled to Incorporate the Second Amendment, and Should Be Overruled, the *Slaughter-Houses Cases* Is Not Among Them.

There are three decisions of this Court that must be overruled to apply the Second Amendment right to bear arms to the states. This Court held that the Second Amendment right to bear arms does not apply to the states through the Fourteenth Amendment in *Cruikshank*, 92 U.S. at 551, and reaffirmed that holding in *Presser v. Illinois*, 116 U.S. 252, 264–66 (1886), and *Miller v. Texas*, 153 U.S. 535, 538 (1894).

This Court has held that "when governing decisions are unworkable or badly reasoned, this Court has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (internal quotation marks omitted). Specifically, "the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088–89 (2009). Additionally, *stare decisis* does not bar overruling precedent "where there has been a significant change in, or subsequent development of . . . constitutional law." *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997) (citations omitted). Beyond those factors, *stare decisis* affords less protection to a precedent involving a constitutional question. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2734 (2007) (citations omitted).

This Court has long since abandoned the assumptions underlying the *Cruikshank* line of cases. These cases were all decided before this Court began

applying the Bill of Rights to the states, a concept that now has over a century of precedent supporting it. This Court noted that *Cruikshank* also stated the First Amendment does not apply to the states, *Heller*, 128 S. Ct. at 2813 n.23, reflecting a rationale and reasoning that has long since been jettisoned by this Court. The instant case provides an opportunity for this Court to reexamine the *Cruikshank* line, an opportunity this Court suggested it welcomed. *See Heller*, 128 S. Ct. at 2809–11.

The alternative argument that *Cruikshank* and its progeny leave open the possibility of incorporating the right to bear arms into the Due Process Clause is plausible, but problematic. The Ninth Circuit briefly adopted such an approach, *Nordyke*, 563 F.3d at 448, 457 n.16, and it is advocated by a premiere Second Amendment scholar, *see* Lund, *Anticipating Second Amendment Incorporation*, *supra*, at 195. But for the reasons explained in Part II.C, *supra*, and Part IV.B, *infra*, the Second Amendment also secures a political right that is properly applied only to citizens. Therefore due-process incorporation, while simpler, is less suitable.

The Court should instead formally repudiate the relevant portions of *Cruikshank*, *Presser*, and *Miller*. They meet the criteria this Court has set forth for overruling constitutional precedents, and moreover are prime examples of cases that should be overturned for the reasons explained above. The underlying rationale has long since been rejected by this Court, the reasoning is flawed, and it is inconsistent with subsequent changes in this Court's constitutional law. In so doing this Court would also remove a possible impediment to incorporating the Second Amendment through the Privileges or Immunities

Clause, as one scholar argues that *Slaughter-House* did not strip Privileges or Immunities of the Clause's incorporation potential, but *Cruikshank* did. Palmer, *supra*, at 740–41, 762.

But this Court need not overrule the *Slaughter-House Cases* to extend the right to bear arms to the states. There is no special justification calling for such a holding, if this Court construes *Slaughter-House* as standing for the proposition that Privileges or Immunities extends to the states those rights inherent in federal citizenship. Such an interpretation restricts the scope of this clause to civil rights of a political character, regarding which there have been no adverse doctrinal developments.

There are passages in *Slaughter-House* that, at first glance, seem problematic to the interpretation set forth in this brief. Some such statements lend limited credence to critics' comments that the majority in *Slaughter-House* was attempting in minimize the Fourteenth Amendment's impact. *See, e.g.*, *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting). Admittedly, *Slaughter-House* did state that "rights which are fundamental . . . have always been held to be in the class of rights which the state governments were created to establish and secure." 83 U.S. (16 Wall.) at 76 (dictum). Such statements are potentially in tension with finding that a given right inhering in federal citizenship, such as the right to bear arms, is a fundamental right.

But these problematic statements share the common characteristic that they are all *dicta*. Klukowski, *Citizen Gun Rights*, *supra*, at 231–32. *Slaughter-House*'s holding was merely that, whatever the rights of federal citizenship are that apply to the states through Privileges or Immunities, an unenumerated

economic right to be free of monopolies is not among them. *Id.* at 229–30. These problematic statements were not essential reasoning to reach this Court's holding. Indeed, most of the *Slaughter-House* opinion is *dicta*. *Saenz*, 526 U.S. at 516 (Rehnquist, C.J., joined by Thomas, J., dissenting); 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, 1072–75 (2000). A proposition asserted in *dicta* but never elevated to a holding as the basis for judgment is not entitled to *stare decisis* protection. *Gonzales v. United States*, 128 S. Ct. 1765, 1774 (2008) (Scalia, J., concurring in judgment) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545-46 (2005)).

III. THE *SLAUGHTER-HOUSE CASES* SHOULD NOT BE OVERRULED.

Although, as explained above, this Court could apply the right to bear arms to the states through the Privileges or Immunities Clause while preserving the *Slaughter-House Cases*, it is also clear that this Court could extend the right to the states by overruling *Slaughter-House*. However, overturning the *Slaughter-House Cases* would essentially relegate the Privileges or Immunities Clause to the status of a *tabula rasa*, enabling this Court to redefine Privileges or Immunities in whatever fashion this Court chooses in the ensuing decades.

The consequences of such a tectonic shift in constitutional law are manifold. This Court should reject Petitioner's arguments to overrule the *Slaughter-House Cases*, and instead incorporate the right to bear arms through the Privileges or Immunities Clause while preserving *Slaughter-House*.

A. Without *Slaughter-House*'s Constraining Effect, Privileges or Immunities Could Fundamentally Change the Federal System of Government in the United States.

The Fourteenth Amendment profoundly altered the federal system of government in the United States. In its first section alone, it explicitly declared and conferred U.S. citizenship, extending citizens' rights to the states, and extending rights of due process and equal protection to all persons.

In the intervening years, the Due Process Clause and the Equal Protection Clause have been adjudicated in multitudinous lawsuits, creating voluminous case law governing those two provisions of the Fourteenth Amendment. These precedents limit the extent to which these provisions can be fundamentally reinterpreted.

The Privileges or Immunities Clause, by contrast, has barely been elucidated by this Court. Overruling its sole major precedent could allow a wholesale reordering of the constitutional system. Privileges or Immunities could become a cornucopia of myriad entitlements, such as a constitutional right to healthcare, higher education, a "living wage," "decent" housing, and a clean environment. Kenneth A. Klukowski, *Incorporating Gun Rights: A Second Round in the Chamber for the Second Amendment*, *Engage* Nov. 2009, at 14. This is not a commentary on whether such entitlements are desirable; it is instead an assertion that such policy questions are better decided by the people's elected representatives than the federal judiciary. By limiting the Privileges or Immunities Clause to rights that have a textual basis in the Constitution, either express rights such as

petitioning government, or implicit rights such as interstate travel to facilitate the express right of petition, *Slaughter-House* constrains this scenario of judicial activism run amok. Many authorities, including a sitting Member of this Court, have expressed such misgivings about the potential harm that could be brought about through a reinvigorated Privileges or Immunities Clause. *See, e.g.*, *Saenz*, 526 U.S. at 521–28 (Thomas, J., joined by Rehnquist, C.J., dissenting); J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or Immunities Clause,* 12 Harv. J.L. & Pub. Pol'y 43, 51 (1989).

This Court's precedent bears out the wisdom of such apprehensions. In earlier days, this Court suggested the possibility of such constitutional entitlements. *See, e.g.*, *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974) ("[G]overnmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements."). Although that case concerned welfare benefits provided by statute, the former Chief Justice of this Court expressed concern as to the constitutional principle that was emerging from that case and others of its era. *Id.* at 283–85 (Rehnquist, J., dissenting) (citing, *inter alia*, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969)). Such entitlements bear a resemblance to the economic right asserted by the unsuccessful petitioners in *Slaughter-House*, in that state laws and actions governing the allocation of economic resources, burdens on commerce, and employment issues were being drawn into a Fourteenth Amendment analysis despite the lack of constitutional text specifically supporting the existence

of such rights. The former Chief Justice warned that "the Court should observe its traditional respect for the State's allocation of its limited financial resources, rather than justifiably imposing its own preferences." *Id.* at 286.

But such risk can be vitiated by retaining the *Slaughter-House Cases*. This Court has held that there is no constitutional entitlement to welfare. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973); *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970). However, these opinions were handed down under a Fourteenth Amendment jurisprudence wherein *Slaughter-House* limited the Privileges or Immunities Clause to rights of federal citizenship rooted in the constitutional text. Even then, Members of this Court argued for the existence of such constitutional entitlements. *E.g.*, *Rodriguez*, 411 U.S. at 99–101, 111–15 (Marshall, J., joined by Douglas, J., dissenting); *see also, e.g.*, *Dandridge*, 397 U.S. at 508–09, 518–30 (Marshall, J., joined by Brennan, J., dissenting). If recognizing and applying such rights to economic entitlements garners some level of support even under *Slaughter-House*'s limiting effect on federal rights, then it follows *a fortiori* that such rights are far more likely to emerge if the *Slaughter-House Cases* were overturned.

Some have argued, consistent with the theory advanced by Petitioner, that "[t]he abandonment of any meaningful judicial protection for economic liberty has yielded predictable, and tragic, results." Clark M. Neilly III & Robert J. McNamara, *Getting Beyond Guns: Context for the Coming Debate over Privileges or Immunities*, *Engage* Nov. 2009, at 18, 22. However, it is not within the purview of this Court to address such matters beyond the enume-

rated provisions of the Constitution. For this Court to delve once again into questioning the wisdom of economic policies would be a form of "judicial supremacy" that this Court once resorted to in *Lochner v. New York*, 198 U.S. 45 (1905). *United Hauler's Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007) (plurality opinion of Roberts, C.J.). The fact that *Lochner* designated the locus of such judicial power to be the Due Process Clause instead of the Privileges or Immunities Clause is of no moment. The effects would be the same, as the judiciary would once again arrogate to itself the authority to override the economic policy judgments of public officials that are answerable to the electorate, to effectuate whatever five Members of this Court deem on any given day to be the best economic course of action for any given city, state, or the nation.

B. *Stare Decisis* Weighs Against Overruling the *Slaughter-House Cases*.

The doctrine of *stare decisis* also counsels against overruling the *Slaughter-House Cases*. *Stare decisis* is essential for stability in the rule of law in America's common-law system. *See John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 730, 757 (2008) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). This Court only overrules precedent where there is a special justification for doing so. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

This risk is only heightened in a case such as the instant case, in which this Court is being asked to overturn a longstanding precedent that shapes the entire scope of the extraordinarily-potent Fourteenth Amendment. Although this Court should regard extending the fundamental right to keep and bear

arms to the states as a constitutional imperative, this compelling need does not warrant overruling the *Slaughter-House Cases* absent a special justification, especially when there are alternative routes for extending the right to bear arms.

IV. INCORPORATING THE SECOND AMENDMENT THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE WOULD IMPROVE THIS COURT'S FOURTEENTH AMENDMENT JURISPRUDENCE.

There are additional reasons to apply the right to bear arms through the Privileges or Immunities Clause instead of the Due Process Clause. Privileges or Immunities can be considered "an empty and unused vessel which affords the Court the full opportunity to determine its contents without even the need for pouring out the precedents that already clog the due process and equal protection clauses." Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 Wash. U. L.Q. 405, 420.

A. Fourteenth Amendment Jurisprudence is in Disarray, Partially Traceable to Overreliance on the Due Process Clause.

This Court's Fourteenth Amendment jurisprudence has suffered as a result of the underdevelopment of the Privileges or Immunities Clause.

The Fourteenth Amendment clearly distinguishes citizens from noncitizens. Section One of the Fourteenth Amendment includes four clauses: (1) the Citizenship Clause, defining U.S. citizenship, (2) the Privileges or Immunities Clause, extending the rights of federal citizenship to be actionable against the states, (3) the Due Process Clause, securing proce-

dural rights where the deprivation of life, liberty or property is at issue, regardless of citizenship, and (4) the Equal Protection Clause, guaranteeing equal protection, also regardless of citizenship. Section One therefore neatly divides into two parts, with the first two clauses involving citizens, and the last two clauses involving all persons without respect to citizenship.

The Framers of the Fourteenth Amendment deliberated on the difference of citizens' rights versus the rights held by all persons, as reflected in various drafts of the Fourteenth Amendment. Amar, *Fourteenth Amendment*, *supra*, at 1225 & n.146 (citation omitted). The rights of citizens were consistently referenced in sharp contradistinction to the rights that all persons present in this country enjoy. Klukowski, *Citizen Gun Rights*, *supra*, at 218 (citations omitted). As Congress was debating the Fourteenth Amendment, Congressman Bingham reiterated this duality, stating:

> Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens? Is it not [also] essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?

Cong. Globe, 39th Cong., 1st Sess. 1090 (1959). This is consonant with the legal-rights distinction between citizens and noncitizens maintained throughout the nineteenth century. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1390 & n.15 (1992).

Rerouting substantive rights through the Due Process Clause has harmed that clause of the Fourteenth Amendment. Procedural protections in the Due Process Clause have been narrowed, as judges have found substantive due process "pretty scary" and sought to avoid giving too much effect to this one constitutional provision. John Hart Ely, *Democracy and Distrust* 20 (1980). This Court should consider the Framers' "deliberate choice of words" in the Constitution. *Wright v. United States*, 302 U.S. 583, 585 (1938). Those words extend procedural protections to persons regardless of citizenship through the Due Process Clause, and substantive rights to citizens through the Privileges or Immunities Clause. Privileges or Immunities was designed for that purpose, Klukowski, *Citizen Gun Rights*, *supra*, at 218–24, as briefs for Petitioner, Respondent NRA, and supporting *amici* demonstrate.

B. Both the Second Amendment's Political Aspect and the Inherent Dangerousness of Firearms Counsel in Favor of Incorporating Through Privileges or Immunities Rather Than Through Due Process.

In addition to general arguments for incorporating federal rights through the Privileges or Immunities Clause, there are distinctive reasons why the Second Amendment right to bear arms, in particular, should be extended through Privileges or Immunities rather than the Due Process Clause.

The Second Amendment entails a political right that is properly restricted to only citizens. In *Heller*, this Court acknowledged that the phrase "the right of the people" in the Second Amendment is often used to denote the U.S. citizenry. The First Amendment Peti-

tion Clause and Assembly Clause are both denoted as "the right of the people." 128 S. Ct. at 2790. This is significant in that this Court in *Slaughter-House* identified both the Petition and Assembly Clauses as rights of federal citizenship within the meaning of the Privileges or Immunities Clause. 83 U.S. (16 Wall.) at 79. This Court also noted that this term is also employed in "We the People" in the preamble of the Constitution, *Heller*, 128 S. Ct. at 2790, and that "the right of the people" carries a political connotation, *see id.* at 2791. None dispute that "We the People" referred to the citizenry of the United States in adopting the Constitution, not all persons present on American soil or even permanent resident aliens. Others have employed similar reasoning to conclude that the Second Amendment is a political right. *E.g.*, Amar, *Constitution*, *supra*, at 1163.

Second Amendment rights are unique in that they are inherently and unavoidably dangerous, with implications for extending such rights of "the people" to aliens coterminously with those of American citizens. "Among the enumerated rights in the Constitution, the right to bear arms is sui generis in that it carries the inherent power to take life; firearms are unavoidably dangerous; guns can kill." Klukowski, *Citizen Gun Rights*, *supra*, at 236–37; *but see United States v. Verdugo-Urquidez*, 494 U.S. 259, 263 (1990) (suggesting that "the people" should be read *in pari materia* throughout the Bill of Rights, including the Fourth Amendment, which has been applied to noncitizens).

This is not to suggest that aliens should be denied firearms. States should retain and enact statutes extending generous firearm rights to law-abiding aliens to enable them a means of self-defense. But

these decisions should be made as a matter of state policy, with the resulting rights being statutory in origin, not constitutional. It is not xenophobic to recognize that just as it is patently ridiculous to allow noncitizens to vote, it is likewise inapposite to afford them a right to check by armed force a government of which they are not a part.

C. Applying the Second Amendment To the States Through the Privileges or Immunities Clause Would Not Necessitate Reworking Any Other Parts of Modern Incorporation Doctrine.

Incorporating the right to bear arms through the Privileges or Immunities Clause would work no mischief regarding the precedents of this Court concerning the incorporation of other provisions of the Bill of Rights.

This Court reviews judgments, not opinions. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). Although this principle typically applies to considerations governing the granting of *certiorari* to review the actions of inferior courts, the same reasoning applies here regarding prior incorporation precedent from this Court. This Court has already determined for most of the provisions in the Bill of Rights whether a particular right in is applicable to the states. Moreover, after the instant case is decided, this Court may never again be confronted with deciding whether a particular provision from the Bill of Rights is incorporated. Therefore a decision by this Court to apply the right to bear arms to the states through the Privileges or Immunities Clause will have few, if any, precedential consequences beyond the Second Amendment.

This case therefore presents a valuable opportunity for this Court. This Court can explicate a provision of the Fourteenth Amendment and give effect to its original meaning, while—by preserving the *Slaughter-House Cases*—strictly limiting the implications for rights outside the Second Amendment right to bear arms.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

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