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 AMICUS CURIAE OF GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, GUN OWNERS OF CALIFORNIA, INC., MARYLAND SHALL ISSUE, INC., DOWNSIZEDC.ORG, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, U.S. BORDER CONTROL, AND U.S. BORDER CONTROL FOUNDATION, IN SUPPORT OF PETITIONERS

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MISCELLANEOUS

INTEREST OF AMICI CURIAE[1]

Gun Owners of America, Inc. ("GOA") (www.gunowners.org) was incorporated in California in 1976, and is exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). GOA is a citizens' lobby to protect and defend the Second Amendment.

Gun Owners Foundation ("GOF") (www.gunowners.com) was incorporated in Virginia in 1983, and is exempt from federal income tax under IRC section 501(c)(3). GOF is an educational and legal defense organization defending the Second Amendment.

Gun Owners of California, Inc. ("GOC") (www.gunownersca.com) was incorporated in California in 1982, and is exempt from federal income tax under IRC section 501(c)(4). Affiliated with GOA, GOC lobbies on firearms legislation in Sacramento and was active in the successful legal battle to overturn the San Francisco handgun ban referendum.

Maryland Shall Issue, Inc. ("MSI") (www.marylandshallissue.org) was incorporated in Maryland in 2005. It is an all-volunteer, non-partisan

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[1] The parties have consented to the filing of this *amicus curiae* brief subject to 10-day or 7-day notice, which was given. A copy of the letter confirming such consent upon prior notice of intent to file an amicus brief has been filed with the Supreme Court Clerk. No counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

organization dedicated to the preservation and advancement of all gun owners' rights in Maryland, with a primary goal of reform to allow all law-abiding citizens the right to carry a concealed weapon and to educate the community to the awareness that "shall issue" laws have, in all cases, resulted in decreased rates of violent crime.

DownsizeDC.org ("DDC") (www.downsizedc.org) was incorporated in Virginia in 2001, and is exempt from federal income tax under IRC section 501(c)(4). DDC is an educational organization primarily lobbying both citizens and legislatures in favor of legislation and legal reform.

Conservative Legal Defense and Education Fund, ("CLDEF") (www.cldef.org) was incorporated in the District of Columbia in 1982, and is exempt from federal income taxation under IRC section 501(c)(3). CLDEF is dedicated to the correct construction, interpretation, and application of the law.

The Lincoln Institute for Research and Education ("Lincoln") (www.lincolnreview.com) was incorporated in the District of Columbia in 1978, and is exempt from federal income tax under IRC section 501(c)(3). Lincoln focuses primarily on public policy issues that impact the lives of black middle Americans.

U.S. Border Control ("USBC") (www.usbc.org) was incorporated in Virginia in 1988, and is exempt from federal income tax under IRC section 501(c)(4). USBC is a social welfare organization focused primarily on

public policy issues such as national defense, immigration, and related matters.

U.S. Border Control Foundation ("USBCF") (www.usbcf.org) was incorporated in Virginia in 2006, and is exempt from federal income tax under IRC section 501(c)(3). USBCF is a public charity devoted to public education, particularly on public policy issues related to protecting the nation's borders and immigration.

Each of the amici curiae was established, *inter alia*, for education purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, the construction of state and federal constitutions and statutes related to the right of citizens to bear arms, and related issues. While supporting petitioners' argument that the right to keep and bear arms applies to the states, this brief attempts to demonstrate why application of the Privileges or Immunities Clause to the states, as construed in the Slaughter-House Cases, is the correct underpinning for guaranteeing the right to keep and bear arms to United States citizens.

In the past, each of the amici has conducted research on issues involving the U.S. Constitution, and each has filed amicus curiae briefs in other federal litigation involving such issues, including amicus curiae briefs to this Court. Of relevance here, GOA, GOF, GOC, MSI, Lincoln and CLDEF filed an amicus brief in District of Columbia v. Heller, No. 07-290 (Feb. 11, 2008). GOA and GOF filed an amicus brief in support of the

petition for certiorari in National Rifle Association of America, Inc., et al., v. City of Chicago, et al., and Otis McDonald, et al. v. City of Chicago, Nos. 08-1497 and 08-1521 (July 6, 2009).

It is hoped that the perspective of the amici curiae on the issues in the present case will be of assistance to the Court.

SUMMARY OF ARGUMENT

The ordinance challenged below banning handguns in Chicago is functionally identical to the District of Columbia handgun ban struck down last year in District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783 (2008). In Heller, this Court determined that the Second Amendment's right to keep and bear arms protected an individual, not a collective, right, held by "the people." Since the Second Amendment applied directly to the District of Columbia, it could not be infringed by that jurisdiction. Heller also determined that the right to keep and bear arms was owned by "the people" — Americans, members of the national political community, citizens of the United States.

In the instant case, this Court is asked to determine whether the right to keep and bear arms is among the privileges or immunities of citizens of the United States. If it is, the handgun ban imposed by Chicago, a subdivision of the State of Illinois, must also be struck down as a state abridgement of those individual rights.

After this Court's decision in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the Privileges or Immunities Clause has been rarely invoked, but it continues to protect important national rights of citizens of the United States from abridgement. The right to keep and bear arms is such a protected right of citizens of the United States.

Although petitioners have asked this Court to construe the Fourteenth Amendment as overturning Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), and have asked the Court to reverse Slaughter-House Cases and two other late nineteenth century cases, no such sweeping change would be required for this Court to find the right to keep and bear arms to be a protected privilege or immunity of U.S. citizenship which the City of Chicago cannot abridge.

Lastly, these amici urge the Court not to resolve this case by incorporating the right to keep and bear arms into the Due Process Clause of the Fourteenth Amendment. The incorporation doctrine is non-textual, and would require the Court to violate basic principles of construction. Further, the Due Process Clause applies to all "persons," while the Privileges or Immunities Clause protects only "citizens of the United States" — the Fourteenth Amendment's direct analog to "the people" protected by the Second Amendment. Moreover, due process incorporation would expose the right to keep and bear arms to erosion over time, as has already happened to the right to jury trial in criminal cases. And such an approach would temporize the right to keep and bear arms, making it vulnerable to reassessment based on

changing trends in state law, as well as national and even international developments.

ARGUMENT

I. The Chicago Handgun Ban Unconstitutionally Abridges Petitioners' Right to Keep and Bear Arms, a Privilege or Immunity belonging to Them as United States Citizens Protected by the Fourteenth Amendment.

In February 1866, Congressman John Bingham of Ohio introduced into the House of Representatives the initial version of what, only after significant modification, would become sections 1 and 5 of the Fourteenth Amendment. Bingham's proposal stated:

> The **Congress** shall have power to make **all laws** which shall be **necessary and proper** to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property. [*See* D. Bogen, Privileges and Immunities: A Reference Guide to the United States Constitution, 44 (Praeger: 2003) (hereinafter "Bogen"); CONG. GLOBE, 39th Cong., 1st Sess. 813, 1034 (1866) (emphasis added).]

In April 1866, due to strong objection to the proposed grant of broad legislative powers to

Congress,[2] the Joint Committee on Reconstruction reported a completely different type of proposal, one that would protect three specific rights from adverse State action. The first, the "privileges or immunities" guarantee, protects the rights of American citizens, whereas the other two — the "due process" and "equal protection" guarantees — apply to individual persons regardless of their citizenship, federal or state[3]:

> **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 **any person** within its jurisdiction the **equal protection of the laws**. [*Id.*, p. 47 (emphasis added).]

Further, in place of Bingham's proposed broad grant of legislative power, the Committee version limits Congress to have only the power **"to enforce"** the rights prescribed by the Amendment itself.[4]

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

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[2] *See* Bogen, pp. 46-47.

[3] *See also* A. Amar, The Bill of Rights: Creation and Reconstruction 182 (1998); R. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57, 68 (1993).

[4] *See* City of Boerne v. Flores, 521 U.S. 507, 524-29 (1997).

After being adopted by the House in this form, the Senate added two additional rights — one defining and securing citizenship of the United States[5] and the other, securing to a United States citizen citizenship in the state in which he chooses to reside.[6] These two guarantees constitute the first sentence of section 1 of the Amendment:

> 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 in which they reside.

In this amended form, sections 1 and 5 became a part of the Fourteenth Amendment which was ratified on July 28, 1868. *See* U.S. Constitution, Amendment XIV.

Five years later, in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the United States Supreme Court had occasion to address the meaning of each of the substantive provisions that appear in section 1 of the Fourteenth Amendment. Before turning to the constitutional text, the Court placed the Fourteenth Amendment into its historic context, mindful that it was but one of a trilogy of amendments, the "pervading purpose [of which], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and

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[5] *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 (1963).

[6] *See* Saenz v. Roe, 526 U.S. 489, 503-04 (1999).

the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.,* 83 U.S. at 71. While the Court acknowledged that "any fair and just construction of any section or phrase of these amendments, [would necessitate] look[ing] to [that] purpose" — not only of the Fourteenth, but also the Thirteenth and Fifteenth Amendments as well (*id.*, 83 U.S. at 72) — it did not succumb to the temptation to substitute that overarching purpose for the primacy of the text. Rather, it examined the butchers' claims that section 1 of the Fourteenth Amendment protected their right to engage in their trade free from a slaughter-house monopoly created by the Louisiana legislature, first under the "privileges or immunities" clause (*id.*, 83 U.S. at 74-80), next under the due process guarantee (*id.*, 83 U.S. at 80-81), and finally under the equal protection clause. *Id.,* 83 U.S. at 80.

Now, 206 years after Slaughter-House, this Court must re-examine the text of section 1 of the Fourteenth Amendment to determine if it affords constitutional protection of an individual right to keep and bear arms, free from a City of Chicago ordinance that would ban possession of a handgun for individual self-defense. These amici believe that it does. For the reasons set forth below, the individual right to keep and bear arms is secured to American citizens from any state law that "shall abridge" it because such right is a "privilege[] or immunit[y] of citizens of the United States," as stated in the Fourteenth Amendment for reasons explained by this Court in District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783 (2008). To reach this conclusion, this Court need not

overrule Slaughter-House, and need not even address the issue of wholesale incorporation of the first eight articles of the Constitution's Bill of Rights via the Fourteenth Amendment's Privileges or Immunities Clause, nor apply the Court's due process selective incorporation doctrine, as petitioners have contended. *See* Petitioners' Brief ("Pet. Br.") 9-72.[7]

Rather, application of the Slaughter-House textual analysis of the citizenship guarantee contained in the first sentence of section 1 of the Fourteenth Amendment, and the Privilege or Immunities guarantee of that section's second sentence, together with the substance of this Court's decision in Heller to the Chicago handgun ban leads inexorably to the conclusion that the Chicago ordinance unconstitutionally "abridges" a privilege or immunity of United States citizenship in violation of the Fourteenth Amendment.

A. Section 1 of the Fourteenth Amendment Defines and Secures Dual Citizenship for All Citizens of the United States.

Since America's founding, the people of the United States have enjoyed dual citizenship, "one state and one federal, each protected from incursion by the other." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). *See also* Saenz v. Roe, 526 U.S. 489, 504 (1999). While the distinction between the two citizenships had been

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[7] *See* discussion at sections II and III, *infra*.

"clearly recognized and established," the original United States Constitution neither defined United States citizenship, nor secured any right thereto. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72-73 (1873).

Some had contended that "no man was a citizen of the United States except as he was a citizen of one of the states" (*id.*, at 72), and thus argued that if a person were the citizen of a state, then he was a citizen of the United States. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 588 (1857). In Dred Scott, the Supreme Court rejected that contention, ruling instead that only those persons who constituted the People of the United States could be citizens of the United States. *See id.*, 60 U.S. at 406. In explanation, the Dred Scott Court stated that neither those persons who had been brought into the United States as slaves — nor their descendants — could be citizens of the United States, because at the time of the formation of that national community, slaves were "regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations." *Id.,* 60 U.S. at 407.

After the victory of Union forces in the Civil War — Dred Scott notwithstanding — Congress enacted over President Andrew Johnson's veto the Civil Rights Act of 1866 which, in part, purported to confer United States citizenship upon the newly-freed slave class. 14 Stat. 25, 39th Cong. 1st Sess. (1866). The President's veto had been based, in part, on doubts about Congressional power to confer citizenship on the newly-freed slave class. *See* President Johnson's Veto

of the Civil Rights Act, Messages and Papers, Vol. VI, p. 405 (1866 Richardson, ed.). *See also* K. Karst, Belonging to America: Equal Citizenship and the Constitution 51 (Yale Univ. Press: 1989). To allay these doubts, the Senate added what became the first sentence of section 1 of the Fourteenth Amendment: "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." *See* F. Van Dyne, Citizenship of the United States 9-10 (1908).

The citizenship provision limits both "the powers of the National Government as well as the States." Saenz, 526 U.S. at 507-08. With respect to the powers of the United States government, Congress may not deny citizenship to any person who meets the provision's birthright citizenship criteria. United States v. Wong Kim Ark, 169 U.S. 649 (1898). With respect to state power, the citizenship provision confers upon any person who is a citizen of the United States the right to establish residence in any state and, thereby, to become a citizen of that state. *See* Saenz, 526 U.S. at 510-11. And by "overturn[ing] the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States," the citizenship provision denies to the states any power over United States citizenship. *See* Slaughter-House Cases, 83 U.S. at 73. Although Section 5 of the Fourteenth Amendment conferred upon Congress the "power to enforce, by appropriate legislation, the provisions of" the Amendment, "Congress may not, itself violate, nor

authorize the States to violate the 14th Amendment." Saenz, 526 U.S. at 507.

As pointed out above, Section 5's enforcement language differed dramatically from Congressman Bingham's original proposal which would have granted to Congress "power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens of the several States." *See* Bogen, p. 44. As this Court has observed, Bingham's proposal "encountered immediate opposition ... from across the political spectrum": "[T]he proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution." Boerne, 521 U.S. at 520-21. And as this Court has further stated, "Section 1 of the new draft Amendment imposed self-executing limits on the States, ... Congress' power [being] no longer plenary but remedial." *Id.*, 521 U.S. at 522.

Nor is the power of the judiciary plenary. Rather, bound by the "self-executing limits on the States" appearing in the Fourteenth Amendment's text, the task of the Court is to examine the text to ascertain its meaning and application. In the instant case, the question is whether the ordinance banning possession of handguns enacted and enforced by the City of Chicago — a political subdivision of the State of Illinois — violates any of the "self-executing limits" placed upon the states by the Fourteenth Amendment's "privileges or immunities" guarantee.

B. The Second Amendment Right to Keep and Bear Arms, including its Self-Defense Component, Is a Privilege or Immunity of United States Citizenship.

Petitioners are both United States citizens and citizens of the State of Illinois, residing in the City of Chicago. *See* Complaint (N.D. Il., No. 08-cv-3645), p. 1. As dual citizens, petitioners have "two political capacities, one state and one federal, **each protected from incursion by the other.**" Term Limits, 514 U.S. at 838. As United States citizens, petitioners are entitled to possess handguns in the privacy of their homes for self-defense, in that such right of self-defense is encompassed by "the right ... to secure the ideal of a **citizen** militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." Heller, 128 S.Ct. at 2801 (emphasis added). Thus, the Heller Court pronounced:

> The first salient feature of the operative clause [of the Second Amendment] is that it codifies a "right of the people," [namely] all members of the **political** community [of the United States]. [*Id.*, 128 S.Ct. at 2790 (emphasis added).]

Indeed, as the Heller Court pointed out, the right to keep and bear arms, like the right to constitute the government and the privilege to vote, does not extend to "persons," as such, but to "'a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered a part of that community.'"

Id., 128 S.Ct. at 2791 (quoting from United States v. Verdugo-Urquidez, 494 U.S. 259, at 265 (1990)). Therefore, the Second Amendment does not extend the right to keep and bear arms — and hence, the **derivative** right to possess a handgun in one's home for self-defense[8] — to, for example, a foreign national who is in the United States on a tourist, student, or other temporary visa. Nor is that right secured to a documented alien or, much less, an undocumented, and therefore, illegal alien. Rather, it is a right secured to "all Americans." *Id.*

Tracing the Second Amendment right to keep and bear arms to its historic English roots, Heller observed that the right belonged to "**English subjects**" for their "self-preservation and defense" — not only against individual threats to their personal liberties and security, but domestic military threats by the "Stuart Kings Charles II and James II ... to suppress **political dissidents**, in part by disarming their opponents." *Id.*, 128 S.Ct. at 2798 (emphasis added). Heller further noticed that when King George III "began to disarm the inhabitants of the most rebellious areas" in the American colonies, that effort, like the one previously tried by the Stuarts, was rebuffed by the "Americans invoking their rights as **Englishmen** to keep arms" to defend their rights against a tyrannical

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[8] This does not mean that an alien does not have a common law or statutory right of self-defense, but, in contrast to an American citizen, he cannot claim a right derived from the constitutional guarantee that bars the "Federal Government [from] destroy[ing] the **citizen's** militia by taking away their arms...." Heller, 128 S.Ct. at 2801 (emphasis added).

parliament and king. *See id.*, 128 S.Ct. at 2799 (emphasis added).

Indeed, it was this pattern of British efforts to disarm the colonists, so as to prevent them from resisting an increasingly oppressive government, which coalesced colonists, leading directly to the American Revolution. *See* Brief Amicus Curiae of Gun Owners of America, Inc., *et al.*, District of Columbia v. Heller, No. 07-290 (Feb. 11, 2008), pp. 12-27. The colonists may have been willing to continue to suffer "a long train of abuses and usurpations," but once those abuses "evince[d] **a design** to reduce them under **absolute Despotism** ... all having in **direct object** the establishment of an **absolute Tyranny**," it was **then** that our forefathers resolved "to throw off such Government...."[9] Patrick Henry reacted to Governor Dunmore's seizure of the Williamsburg Magazine in a way that reveals that British "gun control" was the one intolerable abuse leading to war: "You may in vain mention to them the duties upon tea, etc. These things, they will say, do not affect them. But tell them of the robbery of the magazine, and that the next step will be to disarm them, and they will be ready to fly to arms to defend themselves."[10]

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[9] Declaration of Independence, The Founders' Constitution, Vol. 1, p. 10 (emphasis added).

[10] Henry, William Wirt, I Patrick Henry: Life, Correspondence, and Speeches (Sprinkle Publications, Harrisonburg, Va. 1993), p. 279 (emphasis added).

Relying in part on this colonial history, Heller "read the Second Amendment to protect the **right of citizens** to carry arms" for the preservation of their liberties, not to protect any such right of persons who willy-nilly happened to be on American soil. *See* Heller, 128 S.Ct. at 2799-2802. Heller reinforced this understanding by its examination of the overarching purposes of the Second Amendment, as expressed in its prefatory clause — "A well-organized militia, being necessary to the security of a free state" — concluding that "when the able-bodied **men of a nation** are trained in arms and organized, they are better able to resist tyranny." *Id.*, 128 S.Ct. at 2800-01 (emphasis added). In the past, Heller observed, "tyrants had eliminated a militia consisting of all the able-bodied men ... not by banning the militia but simply taking away the people's arms, enabling a select militia or standing army to suppress **political opponents**." *Id.*, 128 S.Ct. at 2801 (emphasis added). Heller further noted that, "[i]t was understood across the political spectrum [the Second Amendment] helped to secure the ideal of a **citizen** militia which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id.*, 128 S.Ct. at 2801 (emphasis added).

Although Heller concluded that "the threat that the new Federal government would destroy the **citizens'** militia by taking away their arms was **the reason** that right ... was **codified** in a written Constitution," Heller also found that "individual self-defense" against a lawless government and other law-breakers "was the *central component* of the right itself," not separate from it. *Id.*, 128 S.Ct. at 2801 (italics original;

emphasis added). Thus, the right of self-defense that Heller discovered to be embodied in the Second Amendment is part and parcel of a right secured to "all Americans," not to all persons regardless of whether they are members of the political community of the United States of America. Indeed, after reviewing "nine state constitutional protections for the right to bear arms immediately after 1789," Heller stated that, since "at least seven unequivocally protected an **individual citizen's** right to self-defense[,] [it] is strong evidence that is how the founding generation conceived of that right." *Id.*, 128 S.Ct. at 2803 (emphasis added). And, in its review of nineteenth century pre-Civil War constitutional authorities and cases, Heller repeatedly identified the self-defense component of the Second Amendment right as one belonging to a "citizen," not to just any person. *Id.*, 128 S.Ct. at 2806-09.

Heller noted that, after the Civil War, there was "a widespread effort to limit ownership by a large number of **citizens**," especially the "freedmen," the deprivations of which led directly to the enactment of the Freedman's Bureau Act of 1866, one provision of which specifically secured "the constitutional right to bear arms ... to ... all the **citizens** ... without respect to race or color, or previous condition of slavery...." *Id.*, 128 S.Ct. at 2810 (emphasis added). Indeed, as the Heller Court pointed out, one Congressman "thought the Fourteenth Amendment unnecessary because "[a]s **citizens of the United States** [blacks] have equal right ... to keep and bear arms for self-defense." *Id.*, 128 S.Ct. at 2811 (emphasis added).

Nevertheless, as the Slaughter-House Court pointed out, if the Dred Scott decision "was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution." Slaughter-House, 83 U.S. at 73. "To remove this difficulty," the Slaughter-House Court observed, Congress added "a clear and comprehensive definition" of both United States and state citizenship, the "main purpose [of which] was to establish the citizenship of the negro." *Id.* Consonant with that purpose, and respectful of the nation's federal structure, Slaughter-House ruled that the Fourteenth Amendment Privileges or Immunities Clause secured to all citizens of the United States, as defined in the Amendment's citizenship clause, those "privileges and immunities ... which owe their existence of the Federal government, its national character, its Constitution, or its laws." *Id.*, 83 U.S. at 79.

Among the privileges and immunities listed in Slaughter-House is the "right to peaceably assemble and petition for redress of grievances" (83 U.S. at 79), a right — like the right to keep and bear arms — specifically identified by Heller as a "right of the people" (*id.*, 128 S.Ct. at 2790), and, hence, a right that belongs to "all Americans" (*id.*, 128 S.Ct. at 2791), that is, all persons who are citizens of the United States. According to Slaughter-House, then, the right to keep and bear arms, as recognized in Heller, is one of those

privileges and immunities of United States citizenship secured by the Fourteenth Amendment.[11]

C. The Chicago Handgun Ban Ordinance Unconstitutionally Abridges Petitioners' Immunities and Privileges of United States Citizenship.

As previously noted, Justice Kennedy observed in the Term Limits case that "[American] citizens ... have two capacities, one state and one federal, each

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[11] It has been suggested that, because Heller found that "the Second Amendment, like the First ... Amendment, codified a *pre-existing* right," Slaughter-House would preclude the right to keep and bear arms from the category of United States citizen privileges or immunities, which are limited to "only [those] rights the Federal Constitution grants or the national government enables, but not those preexisting rights the Bill of Rights merely protects from federal invasion." *See* Nordyke v. King, Slip Op., pp. 4477-78 (No. 07-15763, 9th Cir., April 20, 2009) (opinion "vacated pending the Supreme Court's disposition of Maloney v. Rice, No. 08-1592, McDonald v. City of Chicago, No. 08-1521, and National Rifle Ass'n. Of Am., Inc. v. City of Chicago, No. 08-1497"). The Nordyke court was mistaken for two reasons. First, Slaughter-House included in its partial list of privileges and immunities of United States the right of the people to assemble and to petition the government for redress of grievances, rights that "preexisted" the formation of the federal government, not rights "enabled" by it. *See* Heller, 128 S.Ct. at 2797. *See also* Hague v. CIO, 307 U.S. 496, 512 (1939). Second, three years after Slaughter-House, this Court affirmed that the privileges or immunities of United States citizenship included "[t]he right of the people peaceably to assemble for lawful purposes [which] **long existed before the adoption of the Constitution of the United States.**" United States v. Cruikshank, 92 U.S. 542, 551 (1876) (emphasis added); *accord,* Hague, 307 U.S. at 513-14.

protected from **incursion** by the other." *Id.*, 514 U.S. at 838 (emphasis added). Having established that the Second Amendment right is a privilege or immunity of United States citizenship, the question now becomes whether the City of Chicago ordinance banning handgun possession in the home unconstitutionally "abridge[s]" that right.

According to Heller, a District of Columbia ordinance that "totally ban[ned] handgun possession in the home" unconstitutionally infringed the right to keep and bear arms secured by the Second Amendment, "the inherent right of self-defense [being] central to the Second Amendment right." Heller, 128 S.Ct. at 2817. If the identical ban by the city of Chicago is found not to "abridge" the right to keep and bear arms secured to an American citizen residing in that city, then it would turn the citizenship guarantee of the Fourteenth Amendment on its head, making United States citizenship, and its privileges and immunities, subordinate to state citizenship, and its privileges and immunities. Indeed, such a ruling would mean that an American citizen's privilege to become a citizen of any state in which he chooses to reside, as guaranteed by the Fourteenth Amendment (Saenz, 526 U.S. at 503-04), would be conditioned upon his giving up his Second Amendment right of self-defense. But that would defeat the very purpose of the privilege and immunities guarantee — to ensure that American citizens in whatever state they might choose to reside enjoy the same United States citizenship privileges and immunities. *See* Slaughter-House, 83 U.S. at 79-80. *See also* 526 U.S. at 503-04. *Accord,* Crandall v. Nevada, 73 U.S. (Wall.) 35, 48 (1868).

In short, the City of Chicago ordinance banning possession of handguns in one's home unconstitutionally "abridges" the individual American citizen's right of self-defense "inherent" in the Second Amendment because, if so applied, the ordinance would destroy "the *central component* of the right itself." *See* Heller, 128 S.Ct. at 2801 (italics original). The right to keep and bear arms cannot be bifurcated, for if the City of Chicago can prohibit all of its residents from possessing a handgun for self-defense, that ban would necessarily extend to all of its residents who are also citizens of the United States. Indeed, the right to keep and bear arms vis-a-vis the United States government cannot be preserved, unless the privileges or immunities guarantee applies to state laws and local ordinances.[12] *See* Paul B. Paskey, "The Right of the Individual to Keep and Bear Arms as a Federally Protected Right," Safeguarding Liberty, Gun Owners Foundation (Larry Pratt, ed., 1995), p. 127.

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[12] The Cruikshank ruling that the U.S. citizenship privilege of assembly and petition may be preserved by protecting that privilege, but only if the purpose of the assembly and petition was "connected with the powers or the duties of the National Government," is inapposite. *See* United States v. Cruikshank, 92 U.S. 542, 551-52 (1876). While it may be argued that people's assemblies and petitions may be divided into two categories — one related to state and local government business and another related to the national concerns — it is a practical impossibility to divide the right to keep and bear arms without destroying that right altogether.

II. No Wholesale Change in this Court's Fourteenth Amendment Jurisprudence Is Required to Rule that the Chicago Ordinance Unconstitutionally Abridges Petitioners' Right to Keep and Bear Arms.

Petitioners' four-page summary of argument contains only two references to the "right to keep and bear arms" — what these amici had understood to be the central issue in this case. Instead, petitioners have urged the Court to make a fundamental change in its jurisprudence with respect to the Privileges or Immunities Clause. Pet. Br. 42-65. Without making any effort to demonstrate that petitioners' right to keep and bear arms is protected by the Slaughter-House ruling, petitioners' brief urges an expansion of "individual liberty" against restrictions imposed under state law unrelated to the right to keep and bear arms.

Specifically, petitioners ask this Court to view this case as "a rare opportunity to correct a serious error" in cases which "fall short" and "fail[] to honor" and fail to "meaningfully secure[]" Fourteenth Amendment rights. Pet. Br. 8-9. Consistent with that broad agenda, petitioners urge the Court to read the Fourteenth Amendment as having overturned one of its most venerable decisions, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). Pet. Br. 31-32, 48. Petitioners also ask this Court to overturn The Slaughter-House Cases, 83 U.S. 36 (1873), United States v. Cruikshank , 92 U.S. 542 (1876), Presser v. Illinois, 116 U.S. 252 (1886), (*see* Pet. Br. 42-65), even though overturning these decisions should be

unnecessary to strike down the Chicago ordinance banning handguns.

These amici urge this Court to follow the more modest approach of respondent National Rifle Association ("NRA"), focusing on the essential legal issue at hand — the applicability of the Second Amendment right to keep and bear arms to the states. While these amici disagree with the NRA's preferred reliance on the selective incorporation of that right via the Due Process Clause (*see* section III, *infra*), the NRA has correctly asserted that, even under the Slaughter-House interpretation, "the right to keep and bear arms is one of the privileges and immunities of national citizenship protected by the Fourteenth Amendment," NRA Br. 38. Further, the NRA has correctly understood that Cruikshank "did not involve State law or State action abridging the right to keep and bear arms, but private actors." NRA Br. 40. And the NRA has also correctly explained that Presser "only addressed the supposed right to 'drill and parade with arms in the towns and cities of the state.'" NRA Br. 40. Only "in the alternative" — if the Court finds any current precedent to be a bar — has the NRA argued that Slaughter-House be revisited and, if necessary, overruled. NRA Br. 44.

In short, the instant case is one of great importance on its own merits, without this case being transformed into a vast expansion of federal judicial powers over the states which would alter severely the nation's federal structure in unrelated areas, such as business regulation and moral license.

III. Incorporation of the Right to Keep and Bear Arms into the Due Process Clause Would Result in Weak and Potentially Transitory Protection of that Right.

Petitioners devote the last seven pages of their brief to establish that petitioners are "also entitled to relief pursuant to the Fourteenth Amendment's due process clause." Pet. Br. 66-72. The NRA brief primarily urges that the Court apply the Due Process Clause, and only "[i]f the Court declines to selectively incorporate the Second Amendment into the Due Process Clause..., then the Court should hold that the right ... is one of the privileges and immunities of national citizenship...." NRA Br. 8-9. These amici believe that this case should **not** be decided under the Due Process Clause.

While a complete analysis of this Court's due process incorporation doctrine cannot be undertaken here, it is submitted that it violates the well-established rule that "[i]n expounding the Constitution, **every word must have its due force and meaning**." Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840) (emphasis added). Any reading of the Constitution that would "reject" any word as "superfluous or unmeaning" should be rejected. *Id.*, 39 U.S. 571. This "principle of construction applies with peculiar force" to the rights spelled out in section 1 of the Fourteenth Amendment, because they impose limits on the powers of the States. *See id.* Both the due process selective incorporation doctrine and the privileges and immunities wholesale incorporation claim fall short of this principle.

If the **Due Process Clause** of the Fourteenth Amendment is read in such a way as to **selectively "incorporate"** from the federal Bill of Rights the right to keep and bear arms, then such an interpretation would render "superfluous" the enumeration of that right in the Second Amendment, because the Bill of Rights, itself, includes in the Fifth Amendment an identical due process guarantee. As Justice Frankfurter observed in Adamson v. California, 332 U.S. 46 (1947): "Those reading the English language with the meaning which it ordinarily conveys [would] hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight amendments." *Id.,* 332 U.S. at 63 (Frankfurter, J., concurring). If, on the other hand, the Fourteenth Amendment **Privileges or Immunities Clause** is read so as to **"incorporate" wholesale** the federal Bill of Rights, including the right to keep and bear arms, then there would have been no need to insert a due process guarantee into the Fourteenth Amendment, because the Fifth Amendment due process guarantee was already included in the Privileges or Immunities Clause. *See* R. Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435, 462 (1981) ("If ... privileges and immunities comprehended the entire Bill of Rights, [the] due process provision [in the Fourteenth Amendment] was superfluous.")

In addition to the textual reasons for rejection of due process incorporation, incorporation of the right to keep and bear arms through the Due Process Clause

would provide, at best, only weak and potentially transitory protection for that right.

A. Due Process Selective Incorporation Would Threaten to Weaken the Right to Keep and Bear Arms.

The Second Amendment protects a right owned by "the people" to keep and bear arms. As such, the Second Amendment's protected class closely parallels the protected class of the Privileges or Immunities Clause — "citizens of the United States."[13] For this reason, the Second Amendment fits well with the Privileges or Immunities Clause. The Due Process Clause is quite different — broadly protecting the rights of "any person" who may be found within the state. If the Second Amendment's "right to keep and bear arms" were selectively incorporated into the Due Process Clause of the Second Amendment, it would create immediate confusion as to who is entitled to that right. If the right belonged to "any person," as specified in the Due Process Clause, then would the Second Amendment be construed to accord to an alien the right to keep and bear arms on the same terms as it must honor a citizen's claim of right? Current federal law, 18 U.S.C. section 922(g), makes it a felony for certain aliens to purchase a firearm. Would that law be found unconstitutional because, as a matter of

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[13] *See* Brief Amicus Curiae of Gun Owners of America, Inc. and Gun Owners Foundation In Support of Petitioners in National Rifle Association of America, Inc., et al., v. City of Chicago, et al., and Otis McDonald, et al. v. City of Chicago, Nos. 08-1497 and 08-1521 (July 6, 2009), pp. 11-16.

due process of law, the Second Amendment right belongs not just to American citizens, but also to aliens? The petitioners' brief appears to take that position. *See* Pet. Br. 63-64.

If the "right to keep and bear arms" were to be owned by "all persons," including aliens (even illegal aliens), it is reasonable to anticipate that, in the interest of public safety, great political (and legal) pressure would be applied to constrain the right of **all** persons, citizens and noncitizens alike. If the "right to keep and bear arms" protects the 9/11 hijackers, it is unlikely that it would be given robust interpretation. If, on the other hand, the right to keep and bear arms belongs only to citizens, then appeals to public safety would fall by the wayside, succumbing to the right's ultimate purpose — to protect the American people from being disarmed, and thereby deprived of their essential means to resist a tyrannical government. *See* Heller, 128 S.Ct. at 2801; *see also* Brief Amicus Curiae of Gun Owners of America, Inc., *et al.*, District of Columbia v. Heller, No. 07-290 (Feb. 11, 2008), pp. 12-27.

Understanding the fundamental difference between "citizens" and "persons," petitioners posit a range of judicial constructs under which the plain language of the Privileges or Immunities Clause's protection of the rights of citizens could be circumvented creatively. Pet. Br. 62-64. While petitioners may be correct that noncitizens could manipulate legal doctrine to gain the rights of citizens, it is probably more likely that the people's right to keep and bear arms would be watered down and weakened.

There is reason to believe that, when applied to the states, rights can be watered down. In their brief, petitioners have raised the selective incorporation banner of Duncan v. Louisiana, 391 U.S. 145 (1968), to support their argument that the right to keep and bear arms should apply to the states via the Due Process Clause because that right is "'fundamental to the American scheme of justice.'" Pet. Br. 67.

Duncan actually presents a good example of the risk seen here. In Duncan, the Court found that the Sixth Amendment right to a jury trial in criminal cases was "among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" (citing Powell v. Alabama, 287 U.S. 45 (1932)), and thus the Court incorporated the Sixth Amendment right via the Due Process Clause of the Fourteenth Amendment against the states. Prior to Duncan, it was well-settled Sixth Amendment law that a jury trial meant the right to a unanimous verdict by 12 of one's peers. *See* Thompson v. Utah, 170 U.S. 343 (1898). But in a series of cases after Duncan, the Court whittled away at the right, reducing the number of jurors required to six (Ballew v. Georgia, 435 U.S. 223 (1978)) and eliminating the unanimity requirement (Apodaca v. Oregon, 406 U.S. 404 (1972)). Guided by the Duncan selective incorporation doctrine of "fundamental principles of liberty and justice," the Court justified the watering-down of the venerable Sixth Amendment standards of unanimity and 12 persons with the observation that, in its view, a less-than-unanimous jury of less than 12 persons was sufficient to insure that the jury performed its role "to prevent oppression by the Government." *See* Williams

v. Florida, 399 U.S. 78, 100 (1970). In short, under the "selective incorporation" banner of "fundamental fairness," the 12-person, unanimous jury was dismissed as a "historic accident." 399 U.S. at 102. In Apodaca, to understand what the Sixth Amendment required (when ratified in 1791), Justice White stated that the Court's "inquiry must focus upon the function served by the jury in **contemporary** society." 406 U.S. at 410 (emphasis added).

If the Second Amendment right to keep and bear arms were applied as a matter of due process — that is, as a matter of "fundamental fairness" — there might be nothing to stand in the way of future rulings paring down that right according to the "function" of the Second Amendment in "contemporary society." If the scope of the right to keep and bear arms as applied to the states were allowed to evolve in a similar manner, one can imagine how weak and pathetic that right could become in only a matter of years.

In Heller, the Court importantly determined that the Second Amendment protected an individual, not a collective, right (128 S.Ct. 2797) and determined that a complete ban on handguns in the home violated that right (128 S.Ct. 2822). The Court favorably cited "post-Civil War 19th Century sources," including one which explained:

> [t]he purpose of the Second Amendment [to be] to secure a well-armed militia... But a militia would be useless unless the **citizens** were enabled to exercise themselves in the use of **warlike weapons**. To preserve this **privilege** and **to**

> **secure to the people** the ability to oppose themselves in **military force against the usurpations of government**, as well as against enemies from without, that **government is forbidden** by any law or proceeding to **invade or destroy the right to keep and bear arms**... [Heller, 128 S.Ct. 2812, citing J. Pomeroy, An Introduction to the Constitutional Law of the United States 152-153 (1868) (emphasis added).]

But the Court in Heller did not identify which categories of "arms" are protected against infringement (128 S.Ct. 2817).[14]

Under the selective incorporation doctrine, the right to keep and bear arms would be selected for a much more general purpose than this very specific historic one. Under the Duncan formulation, courts would be tempted to water-down the weaponry to conform to the judicially-perceived function that the right to keep and bear arms would serve in contemporary society, instead of the original purpose of resisting a tyrannical government. By basing its decision on original meaning of the Privileges or Immunities Clause, this Court could avoid the temptation to have the right to

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[14] For example, this Court may be called upon to determine whether semi-automatic so-called "assault rifles," or fully-automatic arms of the type currently used by the U.S. military easily could be found within the protective shield of the Second Amendment, either as "ordinary military equipment, or because its use could contribute to the common defense" (United States v. Miller, 307 U.S. 174, 178 (1939)), or as "a lineal descendant of ... founding-era weapon(s)" (Parker v. District of Columbia, 478 F.3d 370, 298 (2007)).

keep and bear arms devolve to the point where it only protected against state abridgement of the right to keep and bear only weapons needed for self-defense or hunting purposes.

B. Due Process Selective Incorporation Would Threaten to Temporize the Right to Keep and Bear Arms.

In their summary of argument, petitioners urge this Court not only to apply the Duncan "fundamental to the American scheme of justice," test, but to subscribe to the Duncan methodology of "look[ing] to the right's historical acceptance in our nation, its recognition by the States **(including any trend** regarding state recognition), and the nature of the interest secured by the right." Pet. Br. 9 (emphasis added). These amici believe that it would be dangerous for the "right to keep and bear arms" to be protected under a doctrine which would allow this Court to temporize rights based on the shifting sands of modern "trends." Indeed, a non-textual, ever-evolving, reading of the liberty protected by the Due Process Clause of the Fourteenth Amendment could allow this Court to amend the Constitution without adherence to the constitutional processes set out in Article V.[15]

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[15] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003), overruling the 17-year old decision of Bowers v. Hardwick, 478 U.S. 186 (1986), based in part upon (i) the changing count in the number of states with anti-sodomy laws, and (ii) trends beyond the nation's borders as evidenced by a report of a committee advising the British Parliament, and a case decided by the European Court of Human Rights. *Id.*, 539 U.S. at 572-573.

As Justice Hugo Black warned in Duncan, the fundamental rights doctrine is:

> on a par with that of shocking the conscience of the Court. Each of such tests **depends entirely on the particular judge's idea of ethics and morals** instead of requiring him to depend on the boundaries fixed by the written words of the Constitution. Nothing in the history of the phrase "due process of law" suggests that constitutional controls are to depend on any particular judge's sense of values. [Duncan, p. 168-169 (emphasis added).]

Justice Black expressed great concern about granting "unconfined power ... to judges" through the phrase "due process of law" if it is allowed to have "no permanent meaning" as its meaning is "found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country." Duncan, 391 U.S. at 168.

Justice Black was correct: modern selective incorporation doctrine is not based on a search for meaning in the text of the Due Process Clause — but predicated on near-unbridled and subjective judicial discretion, subject to change as rapidly as the composition of the Court.

Under such a standard, a decision deeming the right to keep and bear arms "fundamental" today could be undone tomorrow, particularly as other nations become ever more hostile to the ownership of firearms by their citizens, and seek to export their nation's

policies through on-going United Nations-sponsored talks on a treaty[16] to regulate small arms.[17]

Before addressing a state constitutional protection of the right to keep and bear arms, the Supreme Court of Oregon rejected the temptation to interpret a constitution based on current trends, with an astute and still relevant observation:

> We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is **to respect the principles given the status of constitutional guarantees and limitations by the drafters;** it is **not to abandon these principles** when this fits **the need of the moment**. [State v.

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[16] *See* Louis Charbonneau,"U.N. to launch global arms trade pact negotiations," Reuters (Oct. 29, 2009). http://www.reuters.com/article/newsMaps/idUSTRE59S57520091029?pageNumber=1&virtualBrandChannel=11604. *See generally* Wayne LaPierre, The Global War on Your Guns: Inside the UN Plan To Destroy the Bill of Rights, Thomas Nelson (2006), pp. vii-xxvi.

[17] Petitioners' brief favorably cites language in the Lawrence case that reveals the ephemeral qualify of due process analysis, as the Court rejected its own outdated 1986 view, and asserted its evolved modern 2003 view that 'liberty of the person both in its spatial and more transcendent dimensions' [now] supports right to consensual intimate relationships." 539 U.S. at 558 (2003), Pet. Br. 70.

> Kessler, 289 Ore. 359, 614 P.2d 94, 95 (1980) (emphasis added).]

Only when the people see that this Court has resolved the important issue now before it through a faithful search for the immutable textual meaning[18] of the words used by the framers of the Fourteenth Amendment, will Americans believe that they are truly protected by a robust federal constitution which effectively constrains the entire federal government — including the federal judiciary, not the shell of a constitution subject to evolutionary revision reflecting state, national, and even international trends.

CONCLUSION

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

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[18] *See generally* E.D. Hirsh, Validity in Interpretation, pp. 24-25, 124-26, 212-16 (Yale Univ. Press: 1967).