No. 08-1497

IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,
Petitioner,

v.

CITY OF CHICAGO AND VILLAGE OF OAK PARK,
Respondent.

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

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AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Second Amendment right to keep and bear arms is applicable to the states through the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution, regardless of whether such right is also incorporated into the Due Process Clause of the Fourteenth Amendment.

2. Whether the Second Amendment right to keep and bear arms can be applied to the states through the Fourteenth Amendment Privileges or Immunities Clause without overruling the *Slaughter-House* Cases.

3. What test should a court apply to determine whether an asserted liberty interest is a fundamental right?

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INTEREST OF *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or conform to a particular ideology. It was founded in 1998 by longtime Reagan policy advisor and architect of modern welfare reform Robert B. Carlson, and since that time has filed 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 III, former Circuit Judge for the U.S. Court of Appeals for the D.C. Circuit and Dean of Pepperdine Law School Kenneth W. Starr, former Assistant Attorney General for Civil Rights 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, not just those that may advance a particular ideology. This includes the right to keep and bear arms found in the Second Amendment and

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[1] Peter J. Ferrara and Kenneth A. Klukowski authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored this brief in whole or in part and no one apart from the ACRU 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.

a proper application of the Privileges or Immunities Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The instant case presents an exceptionally important question of constitutional law. This Court held in *District of Columbia v. Heller*, 128 S. Ct. 2753 (2008), that the Second Amendment secures an individual right to keep and bear arms. This Court's holding in *Heller* was appropriately narrow, considering the extreme nature of the facts involved in that case, situated in a purely-federal jurisdiction. The instant case presents the subsequent question of whether Second Amendment rights are incorporated to the states via the Fourteenth Amendment. This question will likely prove dispositive in resolving the constitutionality of a gun-control law essentially as restrictive as the one at issue in *Heller*, save that the law in question here was enacted by a political subdivision of the State of Illinois. For the reasons set forth in this brief, the American Civil Rights Union supports Petitioner National Rifle Association's petition for the writ of certiorari.

The question of whether the Second Amendment is applicable to the states through the Fourteenth Amendment is a significant question of constitutional law that should be resolved by this Court, regardless of whether such a right is applicable to the states through the Privileges or Immunities Clause, the Due Process Clause, or both. Questions of which federal rights constrain state and local governments are among the most consequential faced by this Court, with profound implications for individual liberty and also for this nation's system of federalism. This Court has not considered the question of incorporating the Second Amendment since before

the beginning of this Court's development of incorporation doctrine in 1897, and therefore has never subjected the right to keep and bear arms to the type of analysis required by that doctrine. Given the number of firearms possessed in this nation and the number of firearm laws currently in force, it would be prudent for this Court to consider whether this Court's precedent bars incorporation, and if so whether such precedent is anachronistic and should be reconsidered.

A circuit split now exists among the federal courts of appeals. The Seventh Circuit and Second Circuit have recently held the Second Amendment is not incorporated, while the Ninth Circuit held that it was incorporated. Moreover, both the Seventh Circuit and Second Circuit further held that they were constrained to arrive at their respective holdings by this Court's precedent, while the Ninth Circuit regarded the matter as a partially open question not foreclosed by this Court's precedent. A circuit split under these circumstances is an even more compelling reason to grant the writ, as it demonstrates that precedents from this Court impede exploration of this issue, and therefore only this Court can remedy the situation by reconsidering those precedents and deciding whether the inferior courts are bound on this question.

Overruling precedent is not something this Court should lightly consider, given the foundational role that *stare decisis* plays in America's common law system. The three precedents at bar in the current case, however, anteceded the entirety of this Court's incorporation case law. This Court did not even begin to develop a theory governing incorporation until 1947 (expanding on a 1937 decision). Those dates are

significant because the most recent of the Second Amendment incorporation precedents at issue here was decided in 1894. There have been such significant changes in constitutional law during the intervening years that *stare decisis* may no longer protect these precedents. Additionally, the constitutional nature of this issue further reduces this Court's reliance on *stare decisis*. In such a situation, it behooves this Court to examine whether these precedents should be considered good law, and either reaffirm or overrule them.

In doing so, this Court must consider two other constitutional issues that require clarification. The first is declaring what the proper test for courts to apply is in finding and recognizing fundamental rights in the U.S. Constitution. The circuits are split over whether the proper inquiry is (1) if the right is implicit in the concept of ordered liberty, (2) whether it is a two-pronged test both of the first test cited above and additionally whether the right is rooted in American history and tradition, or instead of these, (3) whether the right is essential to an Anglo-American scheme of ordered liberty. As only fundamental rights are encompassed by the Fourteenth Amendment, it will be necessary for this Court to articulate the proper test in evaluating the Second Amendment.

The second issue this Court will consider is the Privileges or Immunities Clause. The instant case is the first incorporation question to be offered to this Court since the Privileges or Immunities Clause was utilized as the basis for decision in a 1999 case. A great deal of scholarly commentary exists regarding the political character of the right to bear arms that suggests the Second Amendment may have a special

application for citizens, rather than all persons, and so this Court should examine whether this right is among the "privileges or immunities" of citizens of the United States.

As an aspect of this consideration, this Court should clarify the holding and the implications of the *Slaughter-House* Cases, 83 U.S. (16 Wall.) 36 (1873). Although there exists extensive scholarly literature and academic opinion arguing that *Slaughter-House* rendered the Privileges or Immunities Clause a nullity, this Court never issued such a proclamation. To the contrary, this Court's opinion in *Slaughter-House* allows for federal rights to be applied to the states through Privileges or Immunities if they are rights inhering in federal citizenship. This Court should examine the Second Amendment under this standard to determine whether it is such a right. If so, this Court could incorporate the Second Amendment through the Privileges or Immunities Clause without overruling the *Slaughter-House Cases.*

For all of these reasons, this Court should grant the petition for the writ of certiorari in the instant case.

ARGUMENT

On June 26, 2008, this Court held in its watershed case *District of Columbia v. Heller* that the Second Amendment protects an individual right. 128 S. Ct. 2753, 2799 (2008). Accordingly, this Court invalidated laws that essentially amounted to a categorical ban on handguns in the nation's capital. *Id*. at 2821–22. The facts in the *Heller* case were relatively extreme, and therefore despite the groundbreaking importance of the *Heller* decision, this Court's holding was

rightly narrow. K. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment through the Privileges or Immunities Clause*, 39 N.M. L. Rev. 195 (forthcoming Oct. 2009), (manuscript at 1, 7, *available at* http:// ssrn.com/abstract=1290584). The narrowness of this holding leaves a great many questions for future cases as to the nature, scope, and contours of the constitutional right to keep and bear arms.

Of the many questions left unanswered by *Heller,* perhaps the most significant question is whether the Second Amendment is applicable to the states through one or more provisions of the Fourteenth Amendment. *See id*. at 2, 9. This question of whether the Second Amendment is "incorporated"[2] is now working its way through the federal courts. More than just simply not addressing this incorporation issue in *Heller*, this Court expressly disclaimed the question for a case that properly presented it. *Heller*, 128 S. Ct. at 2813 n.23. One party to such a case is now petitioning this Court for a writ of certiorari. *National Rifle Ass'n of America, Inc. v. Chicago*, 567 F.3d 856, 2009 U.S. App. LEXIS 11721 (7th Cir. June 2, 2009), *petition for cert*. filed, 77 U.S.L.W. 3679 (U.S. June 3, 2009) (No. 08-1497). For the reasons set forth in this brief, this Court should grant the writ.

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[2] Strictly speaking, the term "incorporated" refers to whether the substantive right in question has been incorporated into the Due Process Clause of the Fourteenth Amendment. However, "incorporation" has become a legal term of art as to whether a particular provision of the Bill of Rights is applicable to state and local governments via any provision of Section One of the Fourteenth Amendment. It is therefore used in that sense in this brief, which focuses on whether the Second Amendment is "incorporated" against the states through the Privileges or Immunities Clause.

I. The Question of Whether the Second Amendment Is Applicable to the States Is A Constitutional Issue of Major Significance.

The issue of whether the Second Amendment is incorporated to the states is an exceptionally important question for the federal judiciary. Many of the most respected authorities in American law assert that the issue of which federal rights are applicable to the states is one of the most significant issues in constitutional law. *E.g., Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (opinion of Marshall, C.J.); W. Van Alstyne, *Forward to* M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights ix (1986); *see also*, *e.g*., O. Holmes, Collected Legal Papers 295–96 (1920); W. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 492–93 (1977).

This Court should consider the significance of the questions presented in cases requesting review by this Court. This Court held that the Second Amendment does not apply to the states in *United States v. Cruikshank*, 92 U.S. 542, 551 (1876), 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). However, those cases were decided before the first incorporation case from this Court, *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 243 (1897) (incorporating the Takings Clause), which began a century-long line of cases applying various provisions of the Bill of Rights against the states. *See* cases cited Klukowski, *supra*, at 9 n.79. Therefore the issue of whether the Second Amendment is incorporated is far from settled. This

Court suggests that it has surmised as much, both by expressly noting that it was unclear whether the *Cruikshank* line continues to be good law, *see Heller*, 128 S. Ct. at 2813 n.23, and also by noting that *Cruikshank* stated the First Amendment is inapplicable to the states, *id*., a proposition which this Court rejected long ago. *See, e.g*., *Everson v. Board of Educ*., 330 U.S. 1, 16 (1947) (establishment of religion); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (free exercise); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (free assembly); *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (free press); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (free speech).

Through these and subsequent cases, this Court developed a framework for assessing which federal rights also constrain state and local governments. However, because this Court has not revisited the Second Amendment since the development of that framework, the right to keep and bear arms has never been subjected by this Court to the inquiry derived from said framework. *Heller*, 128 S. Ct. at 2813 n.23. Given the widespread nature of firearm ownership in America, the numerous statutory and regulatory burdens on firearm ownership, and the public interests driving such laws, it is imperative that this Court analyze the Second Amendment under this framework.

The underlying facts regarding firearm possession in the United States bear out the need for this Court to consider the incorporation question at this time. According to estimates, there are currently approximately 200 million firearms in the hands of 90 million individuals in the United States. Klukowski, *supra*, at 1 n.5 (citing various sources). Even in the wake of the massive expansion of federal power in

the past century, the majority of gun-control laws continue to be state or local laws. N. Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 47 (1996). Thus there are multitudinous permutations of possible factual scenarios for Second Amendment-related suits, and so whether citizens can assert a Second Amendment claim against state or local action is a vitally-important threshold issue for the development of Second Amendment jurisprudence.

The instant case is therefore a textbook example of a case that epitomizes the impetus underlying Sup. Ct. Rule 10(c). As the foregoing authorities assert, the question of whether a specific provision of the Bill of Rights is applicable to the states is an exceedingly important federal question. The legal reasoning upon which the *Cruikshank* line of cases was predicated has long since been abandoned by this Court. No fewer than fifteen intervening Supreme Court cases have incorporated various Bill of Rights provisions since the last of the *Cruikshank* line of cases. Klukowski, *supra*, at 9 n.79. All of these subsequent cases are to some degree inconsistent with *Cruikshank*, and counsel in favor of addressing the question of Second Amendment incorporation anew.

For all of these reasons, this Court should grant certiorari in *NRA v. Chicago* to consider the important questions posed in this case.

II. The Circuit Courts Are Split on Whether the Second Amendment Applies to the States.

The federal courts of appeals are now split on the question of whether the Second Amendment applies to the states, insofar as these courts conclude that

they are free to even consider the question. Whereas the Seventh Circuit and Second Circuit held that the Second Amendment is not incorporated by the Fourteenth Amendment, the Ninth Circuit concluded that the Second Amendment is incorporated. Thus, it is fair to characterize the dispositive question in the instant case as one on which the circuits are split, insofar as they consider themselves able to address the question.

In the instant case, the Seventh Circuit held that the Second Amendment does not apply to the states. *NRA*, 2009 U.S. App. LEXIS 11721, at *6. Although noting arguments against incorporation such as the possibility that the Second Amendment is a federalism provision that would apply only at the federal level, *see id*. at *10, *13, in no way does the Seventh Circuit suggest that it finds the incorporation arguments asserted by Petitioner NRA unpersuasive. To the contrary, the circuit court makes clear that it considers itself unable to hold for incorporation because of this Court's precedents. *See id.* at *5 (quoting *Rodriguez de Quijas v. Shearson/ Am. Express, Inc*., 490 U.S. 477, 484 (1989). Indeed, Chief Judge Easterbrook's opinion for the Seventh Circuit panel concludes by declaring that whether the Second Amendment is incorporated is "for the Justices [of the Supreme Court] rather than a court of appeals." *Id*. at *13. In so doing, the Seventh Circuit proffers the instant case for this Court's consideration.

The Second Circuit reached the same conclusion that the Second Amendment is inapplicable to the states. *Maloney v. Cuomo*, 554 F.3d 56, 58–59 (2d Cir. 2009). Although this holding was announced in a brief *per curiam* opinion, the Second Circuit suggests that it reached its conclusion because it considered

binding the same authority cited by the Seventh Circuit in NRA. *See id*. at 59 (citing, *inter alia*, *Rodriguez,* 490 U.S. at 484).

The Ninth Circuit, however, held that the Second Amendment does apply to the states. *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009). The three-judge panel in *Nordyke* held that the *Cruikshank* line of cases only barred incorporating the Second Amendment through the Privileges or Immunities Clause. *Id*. at 446–47. Reasoning that there was no Second Amendment precedent involving the Due Process Clause, the *Nordyke* panel then went on to incorporate through the Due Process Clause. *Id*. at 457.

This decision is in direct conflict with the Second and Seventh Circuits, but not for lack of thorough analysis. To the contrary, it should be noted that the lengthy reasoning of Judge O'Scannlain's well-written *Nordyke* panel opinion makes clear that there are persuasive arguments in favor of incorporating the Second Amendment, and the *NRA* opinion suggests that the Seventh Circuit may not have reached a contrary conclusion, had it not considered the inferior courts bound by this Court's nineteenth-century precedents.

When courts of appeals have concluded that they were free to consider this incorporation question, circuit splits resulted. Indeed, this entails an additional circuit split on the question of whether the appellate courts are even at liberty to decide this issue. This Court therefore has multiple reasons to consider revisiting those precedents to determine whether they should be overruled.

Overturning precedent is something this Court should only do sparingly. Yet this Court has repeatedly held that "*stare decisis* is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). *Stare decisis* dictates that precedent must be adhered to unless there is some special justification for overruling it. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). This stems from the premise, foundational to the American legal system, that usually it is more important for a rule of law to be settled, than for it to be settled correctly. *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)). Therefore certain factors should be present for this Court to consider taking a case that would require overturning the *Cruikshank* line of cases.

This Court has set forth numerous rules and guideposts for when this Court's precedents should be overruled, two of which are relevant to the petition in the instant case. First, constitutional holdings are entitled to less *stare decisis* protection than statutory holdings. *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 127 S. Ct. 2705, 2734 (2007) (citations omitted); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996). The questions at bar are entirely constitutional in nature, concerning the Second Amendment and two provisions of the Fourteenth Amendment.

And second, there have been profound changes in Fourteenth Amendment jurisprudence since the *Cruikshank* cases were decided. *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). *Cruikshank*, *Presser*, and *Miller* were decided in 1876, 1886, and 1894, respectively, all before this Court began applying provisions of the Bill of Rights to the states through the Fourteenth Amendment. It was not until 1947 that this Court even began to accept or reject various theories regarding which provisions in the Bill of Rights applied to the states. *See Adamson v. California*, 332 U.S. 46, 59–68 (1947) (Frankfurter, J., concurring); *id*. at 68–123 (Black, J., concurring). Thus the entire century-long incorporation debate thus far occurred after the trio of precedents denying Second Amendment incorporation implicated in the instant case.

At a minimum, *Cruikshank* and its progeny clearly qualify for these two special justifications for overcoming *stare decisis*. These three cases are the products of an earlier era, the rationales for which have long since been jettisoned by this Court. The holdings of those cases are moreover irreconcilable with the entire body of subsequent incorporation case law that forms the bedrock of modern Fourteenth Amendment jurisprudence and is a cornerstone of the federalism framework currently utilized in American law. For these reasons, this Court should take the instant case to consider whether *United States v. Cruikshank*, *Presser v. Illinois*, and *Miller v. Texas* should be overruled.

III. This Case Presents an Opportunity to Clarify this Court's Fourteenth Amendment Jurisprudence.

The case *NRA v. Chicago* offers an opportunity for this Court to address two constitutional issues upon which the lower courts and other authorities continue to disagree. First, while most or all authorities agree

that this Court's case law holds that the Fourteenth Amendment extends only fundamental rights to be applied against the states, these authorities do not agree on which test promulgated by this Court is the proper test for fundamentality. Klukowski, *supra*, at 16–18. Second, this Court can revisit the Privileges or Immunities Clause, and in so doing can incorporate the Second Amendment through Privileges or Immunities in a manner that does not overrule the *Slaughter-House* Cases. *Id*. at 33–38, 53–55. The law would be well-served by this Court addressing both of these issues.

A. The Circuit Courts are Split Over the Test for Applying the Bill of Rights to the States.

There is a great deal of confusion among courts and scholars on how to determine whether a given right applies to the states. This Court has held that only rights that are fundamental are applicable to the states through the Fourteenth Amendment, *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (plurality opinion of Thomas, J.) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)), denying incorporation to rights that this Court finds are not fundamental, *e.g., Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) (holding that the Fifth Amendment Indictment Clause does not apply to the states because the right to a grand jury is not fundamental). Although there is little confusion over the proposition that only fundamental rights fall within the ambit of the Fourteenth Amendment, confusion abounds over what constitutes the test for fundamentality. Klukowski, *supra*, at 16–18. There are currently three tests that various courts cite as the solely appropriate test.

The first test is whether the right in question is "implicit in the concept of ordered liberty," from *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937). This test was repeatedly cited in subsequent incorporation cases. *E.g., Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). At least one circuit court recently cited the *Palko* test as still controlling. See *Doe v. Mich. Dept. of State Police*, 490 F.3d 491 (6th Cir. 2007). However, at least one other circuit held that *Palko* has subsequently been abandoned and replaced by this Court. *See Nordyke*, 563 F.3d at 449.

The second test is whether the right in question is both "implicit in the concept of ordered liberty" and also "deeply rooted in this Nation's history and tradition," from *Glucksberg*, 521 U.S. at 720–21 (quoting *Palko*, 302 U.S. at 325–26, and *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). Since *Glucksberg* was decided, many federal appeals courts continue to cite this two-prong test as the controlling test for finding fundamental rights. *See, e.g., Abigail Alliance v. Von Eschenbach*, 495 F.3d 695, 702 (D.C. Cir. 2007) (*en banc*); *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999) (*en banc*).

The third test is whether the right in question is "necessary to an Anglo-American regime of ordered liberty," from *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). At least one circuit has held that the *Duncan* test replaced the *Palko* test, *Nordyke*, 563 F.3d at 449, and indeed so held in a case specifically considering Second Amendment incorporation. *Id*. at 442–43. Although there are significant problems with the position that *Duncan* replaced *Palko*, *see* Klukowski, *supra*, at 17 nn.164–68 and accompanying text, others have made the same argument, including a law professor who is perhaps the nation's foremost

Second Amendment scholar. *See* N. Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse L. Rev. 185, 195 (2008). Therefore at a minimum this position must be seriously considered.

When the finding of a fundamental right carries such profound implications as whether that right is applicable to the states or what level of scrutiny should apply to burdens on that right, the fact that such a significant matter as to what test courts should apply to determine fundamentality is simply astonishing. It is possible that these varying tests may simply be alternate formulations of a single test. Klukowski, *supra*, at 18. It is also possible that the *Palko* test or *Glucksberg* test applies to substantive rights, while the *Duncan* test applies to procedural rights, *id*. at 17, although the Ninth Circuit has expressly rejected that argument. *See Nordyke*, 563 F.3d at 451 & n.9.

Even if any of these assertions is correct, however, only this Court could make such a pronouncement. This area of law is very much in need of clarification to guide both the courts and legal academia. The courts of appeals are clearly divided on this question. Therefore this Court should grant the petition in this case to resolve this circuit split.

B. The Second Amendment Is Incorporated by the Privileges or Immunities Clause.

There is a normative argument for applying all provisions of the Bill of Rights that entail substantive rights to the states through the Privileges or Immunities Clause. The literature is compelling that the facts surrounding the adoption of the Fourteenth Amendment demonstrate that Privileges or

Immunities was designed to apply substantive rights belonging to American citizens to the states, while the Due Process Clause was designed to confer procedural safeguards against the states to individuals irrespective of citizenship. Klukowski, *supra*, at 24–31 (citing, *inter alia*, A. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193 (1992); A. Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States?*, 19 Harv. J.L. & Pub. Pol'y 443 (1995); *Curtis, supra*; 1 L. Tribe, American Constitutional Law (3d ed. 2000). This Court should consider the meaning of Privileges or Immunities in the context of the instant case to explore this argument.

Regardless of whether that normative argument is persuasive, there is an even stronger argument for specifically incorporating the Second Amendment through Privileges or Immunities. The right to keep and bear arms was frequently mentioned by the Framers of the Fourteenth Amendment during its adoption as one of the privileges or immunities of citizenship. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard). This focus was a result of the concern of the Reconstruction Congress that racial minorities, as American citizens, required the means to defend themselves in a setting where state and local authorities failed to provide such protection from bodily harm, and at times were even the source of such danger. Klukowski, *supra*, at 55–58 (citing, *inter alia*, Cong. Globe, 39th Cong., 1st Sess. 1090 (1866) (statement of Rep. Bingham)).

Incorporating the Second Amendment through the Privileges or Immunities Clause would facilitate applying the right to bear arms to the states without

any reaffirmation of substantive due process doctrine. Applying substantive federal rights to the states through the Due Process Clause—holding that such rights are "incorporated" into the Due Process Clause—is an aspect of substantive due process. Klukowski, *supra*, at 13. Many aspects of this substantive due process jurisprudence and its results have been roundly criticized by legal academics and Members of this Court. *Id*. at 12–13, 65 (citing, *inter alia, Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 1001–02 (1992) (Scalia, J., dissenting); 1 Tribe, American Constitutional Law, *supra*, at 1318). One criticism is that substantive due process has been detrimental to the judiciary adequately enforcing the procedural protections of the Due Process Clause. J. Ely, Democracy and Distrust 20 (1980).

All this has led one sitting Justice of this Court to remark, "Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case." *Saenz v. Roe*, 526 U.S. 489, 528–29 (1999) (Thomas, J., dissenting). This remark was qualified by the caveat, however, that in reevaluating Privileges or Immunities this Court "should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant." *Id*. at 528. The instant case presents an ideal opportunity for this Court to conduct such a reevaluation of the Privileges or Immunities Clause, and in so doing apply the Second Amendment to the states without an unnecessary reaffirmation of substantive due process.

C. The Second Amendment Can Be Incorporated Under the Privileges or Immunities Clause Without Overruling Slaughter-House.

The instant case of *NRA v. Chicago* presents perhaps the best opportunity this Court has been presented with in decades to dispel a common misperception that has plagued Fourteenth Amendment jurisprudence for over a century. Judicial attention to the Fourteenth Amendment's substantive guarantees shifted away from the Privileges or Immunities Clause and toward the Due Process Clause after this Court's opinion in the *Slaughter-House* Cases, 83 U.S. (16 Wall.) 36 (1873). Klukowski, *supra*, at 32. The entire body of incorporation jurisprudence would benefit immensely from clarifying the holding from that precedent.

In *Slaughter-House*, this Court held that a state law granting a local monopoly over butchering animals within a specific city did not violate any substantive federal right within the ambit of the Privileges or Immunities Clause. 83 U.S. (16 Wall.) at 61, 66. Somehow, that narrow holding (accompanied by a lengthy opinion) became construed over the years to stand for the proposition that the Privileges or Immunities Clause cannot be effectively used to apply federal guarantees against the states. *E.g.*, 1 Tribe, American Constitutional Law, *supra,* at 1303, 1316. This has led many to argue that *Slaughter-House* would have to be overruled in order for Privileges or Immunities to have any meaningful potential. *E.g.*, L. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1298 n.247 (1995). Both of these assertions are false,

however, as this Court's narrow holding does not require overruling *Slaughter-House* for Privileges or Immunities to be effectively utilized.

Regarding the first proposition, rather than rendering the Privileges or Immunities Clause a nullity, the *Slaughter-House Cases* instead promulgates a test for whether an asserted right comes within the Clause's orbit. *Slaughter-House* holds that only rights inhering in federal citizenship are applicable to the states through the Privileges or Immunities Clause. Klukowski, *supra*, at 36 nn.325–26 and accompanying text (citing various sources). This Court's subsequent foray into substantive due process obviated the need to determine which federal rights may meet this criterion. *Id*. at 32. However, *dicta* in the *Slaughter-House* majority opinion list several such rights, *id*. at 32–33 & n.306 (citing *Slaughter-House*, 83 (16 Wall.) at 79); *see also* 35 n.322, and a dissenting opinion in *Slaughter-House* suggests that the Clause could incorporate numerous rights against the states, *id*. at 36 & n.327 (citing *Slaughter-House*, 83 (16 Wall.) at 112–19 (Bradley, J., dissenting)).

In rebuttal to the second proposition, *Slaughter-House* need not be overruled. This Court's holding in *Slaughter-House* was narrow, wherein this Court simply concluded that whatever rights were entailed by the Privileges or Immunities Clause, an unenumerated right to be free of state laws granting monopolies for the slaughtering of animals within a city is not among these federal rights. *Id*. at 36. Parts of Justice Miller's opinion for the Court in *Slaughter-House* are admittedly problematic for modern incorporation doctrine. However, much of the *Slaughter-House* opinion is *dicta*. *Saenz*, 526 U.S. at

516 (Rehnquist, C.J., dissenting); M. 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). Propositions contained in *dicta* but not as the basis for judgment are 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)). Nothing from this Court's holding in *Slaughter-House* need be repudiated for this Court to apply certain substantive rights to the states through the Privileges or Immunities Clause.

The Second Amendment is among the rights that can be incorporated through Privileges or Immunities consistent with this Court's opinion in *Slaughter-House*. Klukowski, *supra*, at 50–53. There is considerable scholarly and academic literature demonstrating that the Second Amendment entails a political right that is more properly regarded as being held by citizens than by every person, *id. passim*, and this Court as well suggested that it recognized a political element in the Second Amendment. *See Heller*, 128 S. Ct. at 2802.

This Court should revisit the Privileges or Immunities Clause and apply the Second Amendment to the states through the Clause. For the reasons set forth above, this can be accomplished without overruling the *Slaughter-House Cases*, and indeed this Court can clarify *Slaughter-House* in the process, to the benefit of the lower courts.

CONCLUSION

For the foregoing reasons, this Court should consider resolving the current circuit split regarding whether the Second Amendment is applicable to the states through the Privileges or Immunities Clause of the Fourteenth Amendment, whether the same can be accomplished without overruling the *Slaughter-House Cases*, and which test courts should apply in finding fundamental rights. Accordingly, in the instant case this Court should grant the petition for the writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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July 6, 2009