No. 08-1521

In the
Supreme Court of the United States

OTIS MCDONALD, ET AL.,
PETITIONERS,
v.
CITY OF CHICAGO, ILLINOIS, ET AL.,
RESPONDENTS.

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

BRIEF FOR THE STATES OF ILLINOIS, MARYLAND, AND NEW JERSEY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated against the States by the Fourteenth Amendment's Due Process or Privileges or Immunities Clause.

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INTEREST OF THE *AMICI CURIAE*

For more than two hundred years, the States have used their police powers to enact and enforce laws governing firearms. These laws, and more local ordinances, often differ from one State to the next, reflecting conscientious democratic responses to a spectrum of diverging local conditions and challenges. Until now, it was well-settled that the Second Amendment did not interfere with state and local efforts to balance competing interests and formulate proper limits on the possession and use of firearms. The question before the Court is whether States should continue to define these limits in tune with local conditions, as they have since the Founding, or whether federal courts should expound and enforce a national standard with which every State and locality must comply, regardless of popular will or circumstance. If petitioners prevail, nearly every firearms law will become the subject of a constitutional challenge, and even in cases where the law ultimately survives, its defense will be costly and time-consuming. In addition, incorporation via the Privileges or Immunities Clause, as petitioners primarily urge, would have the further effect of applying a host of new rights, both enumerated and unenumerated, against the States.

For these reasons, *amici* States urge the Court to affirm the decision below and confirm their ability to protect the health and safety of their residents by regulating firearms within their borders.

STATEMENT

1. In Illinois, a political subdivision with home rule authority (including the City of Chicago and the Village

of Oak Park) is empowered, within its borders, "to regulate for the protection of the public health, safety, morals and welfare." Ill. Const. art. VII, § 6(a). Home rule units may exercise this power "concurrently with the State" unless the Illinois General Assembly has "specifically" limited this concurrent exercise or declared that the State has exclusive regulatory authority in a given area. *Id.* at § 6(i). The General Assembly has not preempted local firearms laws and has left firearms regulation "open to local solution and reasonable experimentation to meet local needs." *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 274 (Ill. 1984).

2. In the absence of preemption, Chicago and Oak Park enacted laws prohibiting most handguns (but not most rifles and shotguns). Chicago's ordinance provides that "[n]o person shall within the City of Chicago * * * possess * * * any firearm unless such person is the holder of a valid registration certificate for such firearm." Municipal Code of Chicago, Ill. § 8-20-040(a) (2008). Although the ordinance makes most handguns unregisterable (and thus unlawful), see *id.* § 8-20-050(c), there are exceptions. Chicago residents may register a handgun if it was "validly registered to [the] current owner * * * prior to the [ordinance's] effective date," or if it is owned by a peace officer, security officer, or private detective agency. *Ibid*. In addition, the registration requirement does not apply to certain nonresidents, including those participating in or traveling to "any lawful recreational firearm-related activity" if the firearm is lawfully possessed in another jurisdiction and kept "unloaded and securely wrapped." *Id.* § 8-20-040(b). Oak Park's ordinance makes it "unlawful for any person to possess

or carry, or for a person to permit another to possess or carry on his/her land or in his/her place of business any" handguns. Municipal Code of Oak Park, Ill. §§ 27-1-1, 27-2-1 (1995).

3. After *District of Columbia v. Heller*, 128 U.S. 2783 (2008), held that the Second Amendment required invalidation of a handgun ban enacted by the District, a federal enclave, petitioners filed suit to enjoin Chicago's ordinance. Pet. App. 1. Petitioners argued that the ordinance violates the Second Amendment, allegedly incorporated against the States by either the Due Process or Privilege or Immunities Clause of the Fourteenth Amendment. J.A. 26-27. Respondent National Rifle Association filed a similar lawsuit and a second suit challenging Oak Park's handgun ban. Pet. App. 11-13.

4. The three cases were before the same district court judge, who, after rejecting plaintiffs' invitation to depart from this Court's cases refusing to incorporate the Second Amendment, *id.* at 13-16, granted defendants judgment on the pleadings, J.A. 4.

5. The Seventh Circuit, affirming, also adhered to this Court's prior decisions. Pet. App. 1-3. The court noted that the question of Second Amendment incorporation is hardly "straightforward," even after *Heller*. *Id.* at 5. Because the Second Amendment "creat[es] individual rights" "to prevent the national government from interfering with state militias," "those rights may take a different shape when asserted against a state than against the national government." *Id.* at 7. Moreover, any argument for incorporation must consider principles of "[f]ederalism"—specifically, the view that "local differences are to be cherished as

elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." *Id.* at 9. This "is an older and more deeply rooted tradition than is [the] right to carry any particular kind of weapon" recognized in *Heller*. *Ibid.*

SUMMARY OF ARGUMENT

Pursuing a variety of approaches to gun-control legislation, the individual States have balanced the legitimate interests of gun owners against the need, which varies with locale, to protect their residents from the devastating effects of gun violence. In this manner, the States capably have performed their role as "'laboratories for experimentation'" in an arena "'where the best solution is far from clear.'" *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, *J.*, concurring)).

Incorporating the Second Amendment would undermine these efforts, and neither that provision nor the Fourteenth Amendment was understood to demand such interference with state prerogatives. The Second Amendment was codified to protect the militia from elimination by the federal government, not from overreaching by the States. And the Fourteenth Amendment was designed to prevent discriminatory disarmament of Southern blacks, not restrict the States' traditional authority to pass generally applicable gun laws.

The Second Amendment resists incorporation for the additional reason that—as the only Bill of Rights provision conferring a right to possess an item designed to kill—the right to bear arms uniquely requires

government oversight, and the democratic process in the States is far better suited than the federal courts to set limits on firearm possession and use.

Finally, because the States have long regulated firearms without federal interference, they have a considerable reliance interest in this Court's decisions refusing to incorporate the Second Amendment. This interest is especially acute here, where petitioners urge the Court to incorporate the Amendment via the Privileges or Immunities Clause, a holding that would apply myriad new rights against the States. The States would need to modify their practices dramatically to address the requirements of the grand jury and civil jury trial rights, and they would be inundated with new claims to economic rights and rights to life "essentials" not currently recognized.

ARGUMENT

This Court consistently has approved the view that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the county." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, *J.*, dissenting); accord, *e.g.*, *Oregon v. Ice*, 129 S. Ct. 711, 718-719 (2009); *Chandler v. Florida*, 449 U.S. 560, 579-580 (1981); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973). But the States may perform their role as laboratories only if given "'great latitude under their police powers to legislate as to the protection of the lives, limbs, heath, comfort, and quiet of all persons,'" *Gonzalez v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)) (internal punctuation omitted), and left free

to engage in regulation "that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be," *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 546 (1985).

"[I]n keeping with * * * [its] status as a court in a federal system," the Court accordingly has sought "to avoid imposing a single solution on the States from the top down." *Smith v. Robbins*, 528 U.S. 259, 275 (2000); accord *United States v. Virginia*, 518 U.S. 515, 601 (1996) (Scalia, *J.*, dissenting). The Court similarly has articulated a "'special concern * * * with the autonomy of the individual States within their respective spheres,'" and precluded individual States from imposing their policy choices on others. *BMW of N. Amer., Inc. v. Gore*, 517 U.S. 559, 571-572 (1996) (quoting *Healy v. Beer Institute*, 491 U.S. 324, 335-336 (1989)).

This reluctance to interfere with state prerogatives—always "[t]he essence of our federal system," *Garcia*, 469 U.S. at 546—must weigh heavily in this case, for incorporation of the Second Amendment would reverse more than a century of precedent holding that the Amendment "applies only to the Federal Government," *Heller*, 128 S. Ct. at 2812-2813 & n.23 (citing *United States v. Cruikshank*, 92 U.S. 542, 553 (1876); *Presser v. Illinois*, 116 U.S. 252, 265 (1886), and *Miller v. Texas*, 153 U.S. 535, 538 (1894)), and more than two centuries of unfettered firearms regulation by the States, see, *e.g.*, Br. for *Amici Curiae* Brady Center to Prevent Gun Violence, et al. in Support of Neither Party ("Brady Br.") 19-22 (describing long tradition of firearms regulation by States). While "any departure

from the doctrine of stare decisis demands special justification," *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), this is never more true than when a reversal of course undermines "practices and assumptions followed * * * in many States," *Jones v. United States*, 526 U.S. 227, 254 (1999) (Kennedy, *J.*, dissenting); accord *Arizona v. Gant*, 129 S. Ct. 1710, 1728-1729 (2009) (Alito, *J.*, dissenting); see also *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 785 (1992). This "intrudes upon legitimate and vital state interests, upsetting the proper federal balance." *Jones*, 526 U.S. at 254 (Kennedy, *J.*, dissenting).

For three additional reasons, it would be especially problematic to change course here. First, the history of the Second and Fourteenth Amendments shows that the framers viewed the right to bear arms as a check on federal, not state, power. Second, incorporation would strip decision-making from state legislatures and courts and place it in the hands of federal courts, which would have to address a host of new challenges with little guidance from constitutional text or history. Finally, if the Court were to incorporate the Second Amendment via the Privileges or Immunities Clause, as petitioners seek, it would open the door to incorporation of still more rights, contrary to longstanding practice and the States' well-founded reliance to the contrary.

I. UNLIKE PURELY PRIVATE RIGHTS THAT HAVE BEEN INCORPORATED, THE RIGHT TO BEAR ARMS ANTICIPATES A CONTINUED ROLE FOR STATE SOVEREIGNTY.

1. The framers understood the Second Amendment to preserve a role for state sovereignty, as the Seventh Circuit explained, see Pet. App. 7 ("One function of the

second amendment is to prevent the national government from interfering with state militias."), and the passage of the Fourteenth Amendment did nothing to upset this understanding. The Second Amendment therefore stands apart from provisions in the Bill of Rights that were motivated primarily by the protection of private rights. It is a "federalism provision" and, as such, "resists incorporation." Cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45-46 (2004) (Thomas, *J.*, concurring in judgment); see also *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, *J.*, concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 727-728 (2005) (Thomas, *J.*, concurring). Thus, respect for the Second Amendment's origins requires the Court, not to apply a "heavy presumption" favoring incorporation, Brief for *Amici Curiae* Senator Kay Bailey Hutchison, et al. ("Hutchison Br.") 27, but to assume the opposite and ultimately to reject incorporation.

In *Perpich v. Department of Defense*, 496 U.S. 334 (1990), a unanimous Court held that "the text of the Constitution" resulted from "a compromise" between the opponents and proponents of a national standing army (the former reflecting the "widespread fear" that such an institution would "pose[] an intolerable threat to individual liberty and to the sovereignty of the separate States"). *Id.* at 340. Likewise, the individual right recognized in *Heller* "was codified" out of concern that "the new Federal Government would destroy the citizens' militia by taking away their arms." 128 S. Ct. at 2801. This was "*the* reason" for the right. *Ibid.* (emphasis added). In short, while it codifies an individual right, the Second Amendment exists to protect the militia from elimination by the federal government.

The history of the Second Amendment confirms that its framers aimed to prevent overreaching by federal authority, not the States. The Amendment "codified a right inherited from our English ancestors," specifically, the right to bear arms contained in the English Bill of Rights. *Id.* at 2801-2802 (internal quotations omitted); see also *id.* at 2798. Following the removal of King James II—a Catholic, who alienated mostly-Protestant England by ignoring Parliament's laws and packing the courts, ministries, and army with Catholic royalists, as well as disarming Protestant gentlemen—the English Bill of Rights sought to restore Parliament's place as the supreme source of lawful authority. See, *e.g.*, George Macaulay Trevelyan, Illustrated History of England 466-476 (1956); Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 44 (2000). Thus, the Bill included a right to bear arms assertable only against the authority that posed the greatest threat of tyranny—the King. See *Heller*, 128 S. Ct. at 2798 ("[L]ike all written English rights [the right to bear arms] was held only against the Crown, not Parliament.") (citing Schwoerer, *To Hold and Bear Arms: The English Perspective*, in The Second Amendment in Law and History (C. Bogus, ed. 2000)). Parliament's authority to regulate firearms for the good of the people was unfettered. Indeed, Parliament exercised this power to such a degree that as little as three percent of the English population could possess firearms after the Bill was passed. See Schwoerer, *supra*, 76 Chi.-Kent L. Rev. at 48. In short, the English common law recognized a need to regulate firearms only as a check against royal power. The people, acting through Parliament, retained plenary authority over firearm use and possession.

The early American understanding of the right to bear arms reflects its British origins. Americans were outraged when King George III attempted to disarm state militias, see *Heller*, 128 S. Ct. at 2799, as the English had objected when James II endeavored to disarm Protestants. But just as the English saw little threat from parliamentary regulation, Americans did not fear oppression by regulation from the States. To the contrary, both Federalists and Antifederalists agreed that the way to avoid tyranny was to empower the States. Compare Richard Henry Lee, Letters from The Federal Farmer III (Oct. 10, 1787), reprinted in The Antifederalists 227-228 (Cecelia M. Kenyon ed., N.E. Univ. Press 1985) (criticizing concentration of military power in federal hands because it is "[i]n the state governments [that] the great body of the people, the yeomanry, etc. of the country, are represented"), with Federalist No. 46 (James Madison), reprinted in The Federalist Papers 296 (Clinton Rossiter ed., Signet 2003) (arguing that federal government's power to call out the militia would not endanger liberty because any tyrannical federal authority "would be opposed by a militia amounting to near half a million of citizens with arms in their hands, . . . united and conducted by [state] governments possessing their affections and confidence"). For the framing generation, it was the federal government, not the States, that threatened liberty through a monopoly on firepower.

That this was the framers' perspective is confirmed by the Second Amendment's use of the phrase "well regulated militia." Article I, § 8 of the Constitution entrusts Congress with the power of "organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of

the United States[.]" Article II, § 2 similarly grants the president the power to act as commander in chief "of the militia of the several states, when called into the actual service of the United States[.]" Nowhere, however, does the Constitution grant Congress or the president the power to "regulate" the militia.[1] And with good reason, for the power to "regulate" elsewhere in the Constitution always indicates broad, discretionary, and even plenary governmental powers. See U.S. Const. art. I, § 8 (Congress empowered to "regulate" commerce and the value of currency, and to "make rules for the government and regulation of the land and naval forces"); art. III, § 2 (Congress may make "regulations" regarding Supreme Court's appellate jurisdiction); art. IV, § 3 (Congress empowered to "make all needful rules and regulations" regarding U.S. territories and property). Thus, the term "well regulated" in the Second Amendment denotes a broad degree of governmental control.[2] And the fact that the right to

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[1] This omission is particularly striking given that Article I, § 8 also grants Congress the power "[t]o make rules for the government *and regulation* of the land and naval forces." U.S. Const. art I, § 8 (emphasis added).

[2] In *Heller*, the Court stated in passing that "the adjective 'well regulated' implies nothing more than the imposition of proper discipline and training." 128 S. Ct. at 2800. But the definition of "well regulated" was not before the Court in *Heller*, and thus the Court did not engage in the same searching analysis that it used to determine the meaning of other words in the Second Amendment. Now that the question is more squarely presented, the Court should look to the meaning of "regulate" in other portions of the Constitution to determine its meaning in the Second Amendment. See *Heller*, 128 S. Ct. at 2790-91, 2799-2800 (analyzing the use of "right," "people,"

"regulate" the militia is not within the federal government's enumerated powers demonstrates that the Constitution leaves this right to the States. See U.S. Const. amend. X.

In fact, at the time of the Second Amendment's ratification, the States robustly exercised their police power to regulate firearms. Thus, in the 1770s and 1780s, after independence, Connecticut, Maryland, Massachusetts, North Carolina, Pennsylvania, and Virginia all passed "test acts" that disarmed any white male who would not swear a loyalty oath to the State. See Robert H. Churchill, *Gun Regulation, The Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 158-160 (2007). Pennsylvania's law is particularly instructive. That State was one of only a handful to recognize any right to bear arms. See *Heller*, 128 S. Ct. at 2802-2803. Yet even there, legislative practice demonstrates that the right did not limit the State's police power. In 1777, the same Pennsylvania legislature that had declared that "the people have a right to bear arms for the defence of themselves and the state," 1776 Pa. Const., Decl. of Rights, § XIII, passed a law disarming men who would not swear their allegiance to the State, see An Act Obliging the Male

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"militia," and "state" in other parts of Constitution to determine their meaning in Second Amendment). Moreover, had the framers wanted to refer only to "discipline and training," they could have so specified, as they did elsewhere in the Constitution. See U.S. Const. art. 1, § 8 (Congress has powers for "organizing, arming, and disciplining, the militia"). The framers therefore must have intended the phrase "well regulated" to mean something more than mere discipline and training.

White Inhabitants of this State to Give Assurances of Allegiance to the Same and for Other Purposes Therein Mentioned, ch. 756, 9 The Statutes at Large of Pennsylvania 110-114 (James T. Mitchell & Henry Flanders, eds., 1903). And while the act stripped recusants of other civic rights as well, see *id.* at 112-113, it did *not* deny any of the rights enumerated in the Bill of Rights that are now incorporated against the States, including the rights to speech, conscience, and trial by jury, see *ibid.*; see also Saul Cornell, *"Don't Know Much About History": The Current Crisis in Second Amendment Scholarship*, 29 N. Ky. L. Rev. 657, 670-673 (2002). Pennsylvania's practice thus confirms that the right to bear arms is different from those enumerated rights that the framers codified chiefly to protect individual freedoms.

To be sure, *Heller* instructs that the Second Amendment "did nothing to assuage Antifederalists' concerns about federal control of the militia," and ultimately concluded that the "concern that the Federal Government would abolish the institution of the state militia" "found expression" in structural provisions of the Constitution but not in the Second Amendment. 128 S. Ct. at 2804; see also Brief of the States of Texas, et al. in Support of Petitioners ("Texas Br.") 21-22. But *Heller* also rejected "'[t]he claim that the best or most representative reading of the language of the amendments would conform to the understanding and concerns of the Antifederalists'" as "'highly problematic.'" 128 S. Ct. at 2796 n.12 (quoting Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, in Bogus 74, 81) (internal punctuation omitted). "Federalists did not cave in to their opponents' demands"; rather, they sought to "conciliate

those moderate Antifederalists who sincerely if misguidedly believed that a constitution lacking a bill of rights was defective." Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi-Kent L. Rev. 103, 116 (2000).

It is therefore unsurprising that the Second Amendment did not assuage hard-line Antifederalist concerns. That would have required the Constitution's defeat. See Joseph Story, A Familiar Exposition of the Constitution of the United States § 439 (1847) ("Doubtless the want of a formal Bill of Rights in the Constitution was a matter of very exaggerated declamation and party zeal, for the mere purpose of defeating the Constitution."). The Second Amendment instead appealed to those in the middle—the moderate Antifederalists who did not reject the Constitution outright but were concerned that structural provisions alone were inadequate to protect state sovereignty. See Rakove, *supra*, 76 Chi-Kent L. Rev. at 116. It provided them a clear textual guarantee that the federal government would not undercut the "inherent right" of the States to regulate the militia. Joseph Story, Commentaries on the Constitution of the United States § 1202 (1833); see also *ibid.* ("the amendments proposed to the constitution (some of which have been since adopted)" were written to reassure the Constitution's critics that the federal government would not usurp state militia powers).

2. The Fourteenth Amendment did not upset this understanding that the right to bear arms was assertable only against the federal government. Petitioners and their *amici* devote considerable attention to the uncontroversial proposition that the nineteenth century Congress was deeply concerned

about the selective disarmament of freed Southern blacks. See, *e.g.*, Pet. Br. 10-14; NRA Br. 10-21; Hutchison Br. 6-9; Tex. Br. 17-20. But the framers of the Fourteenth Amendment did not think that stripping States of their traditional power to regulate firearms was the solution to that problem. Rather, they thought the proper remedy was to force Southern States to treat all of their citizens with equal dignity. They understood that "[t]he way to stop discrimination on the basis of race" is simply "to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality op.).

"[T]he Fourteenth Amendment was designed to place the constitutionality of the Freedman's Bureau and the civil rights bills, particularly the latter, beyond doubt." *Saenz v. Roe*, 526 U.S. 489, 526 n.6 (1999) (Thomas, *J.*, dissenting); see also Hutchison Br. 8 ("It has long been recognized that the Fourteenth Amendment provided constitutional protection for the rights protected by the Civil Rights Act of 1866[.]"). But the Second Freedman's Bureau Act and the Civil Rights Act focused not on new, substantive gun rights but on equality. The Bureau Act provided that "the constitutional right to bear arms, shall be secured and enjoyed by all citizens of such State or district *without respect to race or color, or previous condition of slavery*." An Act to continue in force and to amend "An Act to establish a Bureau for the Relief of Freedmen and Refugees" and for other Purposes (Second Freedmen's Bureau Act), ch. 200, § 14, 14 Stat. 173, 176-17777 (1866) (emphasis added). As its text makes clear, the Act granted no new right to bear arms. Rather, it provided that any right to bear arms must extend equally to all citizens. The Civil Rights Act of 1866 did

the same. See An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication, ch. 31, § 1, 14 Stat. 27 (1866) (citizens "of every race and color, without regard to any previous condition of slavery or involuntary servitude * * *shall have the same right [to various legal activities] and to full and equal benefit of all laws * * * as is enjoyed by white citizens").[3] Equality, not arms, was the idea of the day, and this need for equality did not translate into a restriction on the States' traditional authority to pass universally applicable gun laws.

The scope of the Bureau Act further confirms this understanding. The Act did not apply to every State in the Union; it applied only to States "where the ordinary course of judicial proceedings [had] been interrupted by the rebellion, and until the same shall be fully restored," and "whose constitutional relations to the government [had] been practically discontinued by the rebellion, and until such State shall have been restored in such relations[.]" 14 Stat. at 176. In other words, the Bureau Act continued the same Anglo-American tradition that gave rise to the Second Amendment. The framers of the Fourteenth Amendment expressed deep concerns about non-republican governments implementing unfair arms restrictions. But they also trusted still-functioning state governments to use their traditional police powers responsibly.

Indeed, the post-Civil War generation would never have granted a blanket right to firearms to Southerners

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[3] Unlike the Second Freedmen's Bureau Act, the Civil Rights Act did not specifically mention the right to bear arms as a protected right.

who had so recently waged war against the Union, and who continued to oppress free blacks. See An Act making Appropriations for the Support of the Army for the Year ending June thirtieth, eighteen hundred and sixty-eight, and for other Purposes, ch. 170, § 6, 14 Stat. 485, 487 (1867) (disbanding militia in former Confederate states). Throughout the South, Reconstruction state governments used newly organized black militias to combat and disarm white racist mobs and paramilitary groups. See Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 622-624 (2006). Such efforts would have been difficult, if not impossible, if the Fourteenth Amendment were popularly construed to create new gun rights rather than to bar discrimination.

Thus, the States retained—and exercised—their traditional discretion to regulate firearms after ratification of the Fourteenth Amendment. Throughout the remainder of the nineteenth century, state legislatures passed a series of firearms laws, each tailored to local needs and circumstances. See*, e.g.*, An Act to Prevent the Carrying of Fire Arms and Other Deadly Weapons, ch. 52, § 1, 1876 Wyo. Comp. Laws 352 (banning "concealed or open[]" bearing of "any fire arm or other deadly weapon" within cities and towns); An Act to Preserve the Public Peace and Prevent Crime, ch. 96, § 1, 1881 Ark. Acts. 191 (banning "wear[ing] or carry[ing]" pistols other than army and navy pistols); An Act to regulate the keeping and beariing [sic] of deadly weapons, ch. 34, § 1, 6 The Laws of Texas 1822-1897, 927 (H.P.N. Gammel, ed. 1898) (banning carrying pistols except for militia service or where bearer had "immediate and pressing" reasonable

grounds to fear attack); see also Francis Wharton, 2 A Treatise on Criminal Law § 1557 (1880) (collecting state laws banning concealed weapons).

Thus, the historical, common law right to bear arms was a limited one, and the Second Amendment was uniquely interested in maintaining state prerogatives. Nothing in the Fourteenth Amendment changed this underlying structure. Accordingly, the Second Amendment should not be incorporated against the States.

II. THE STATES ARE BETTER POSITIONED THAN THE FEDERAL COURTS TO SET LIMITS ON THE RIGHT TO BEAR ARMS.

The decision whether to incorporate the federal right to bear arms must consider not only its origins but also its uniquely dangerous character. The Second Amendment is different from other enumerated rights because it protects conduct that by its nature may injure or kill others. And the States have proven themselves capable at addressing the dangers inherent in the right to bear arms while protecting legitimate interests of gun owners. Holding that the Second Amendment is incorporated would "interfere significantly" with each "State's ability to structure relations exclusively with its own citizens," and "threaten the future fashioning of effective and creative programs for solving local problems." *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980). "A healthy regard for federalism and good government" favors "reluctan[ce] to risk these results." *Ibid.* And the suggestion, see Texas Br. 21-24, that incorporation of the Second Amendment raises no federalism concerns is absurd.

A. The States Have Proven Themselves Capable Of Adopting Appropriate Gun-Control Regulations.

Public health and safety regulation presents "'primarily, and historically, matters of local concern,'" *Medtronic*, 518 U.S. at 475 (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985)) (elipses and brackets omitted), and such concern is at its apex where firearms are involved. The States have adopted a variety of approaches to gun regulation, each reflecting the particular needs and concerns of their residents. For example, while federal law does not specifically address assault weapons, which have been used in many well-known shooting incidents (including the massacre at Colorado's Columbine High School) and pose a particular threat to law enforcement, several States have determined these guns warrant more stringent regulation. See *Regulating Guns in America*, 2008 ed. (Legal Community Against Violence) ("*Regulating Guns*"), at 19-20, available at http://www.lcav.org/library/reports_analyses/RegGuns.entire.report.pdf (last visited Dec. 30, 2009). Five States (California, Connecticut, Massachusetts, New Jersey, and New York) ban assault weapons, two (Hawaii and Maryland) ban assault pistols, and three (Maryland, Minnesota, and Virginia) regulate assault weapons. See *id.* at 20-23.

Similarly, most States have laws regulating the sale of firearms and ammunition that are more stringent than federal law. Unlike the federal government, 23 States prohibit persons convicted of certain misdemeanor offenses from purchasing or possessing some or all firearms, 18 limit access to firearms by alcohol abusers, 27 prohibit juvenile offenders from

purchasing firearms, 12 have waiting periods for firearm purchases, and three restrict multiple firearm purchases. See *id.* at vii-ix, 72, 74-76, 134-135, 139-141. In addition, 37 States impose a stricter minimum age for purchase or possession of firearms than federal law, 30 make it more difficult for domestic abusers to purchase or possess firearms, and 31 have laws regulating the sale of ammunition—including certain highly dangerous types—that are stricter than federal law. See *id.* at viii, 52-60, 81-85, 93-103.

At the same time, States have given due weight to the legitimate interests of gun owners. Indeed, many States recognize robust gun rights. Forty-four States have a right-to-arms provision in their state constitutions. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 192 (2006). Some were enacted more than a century ago, others within the past few decades. See *ibid.* Nine of the original 13 state constitutions had no arms provision, see *id.* at 208; 22 of 37 state constitutions had arms provisions when the Fourteenth Amendment was ratified, see Steven Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition*, 87 Tex. L. Rev. 7, 50 (2008); and the remaining state gun-rights provisions were enacted subsequent to 1868. Even prior to *Heller*, 40 state constitutions had been read to protect an individual right to possess a firearm. See Volokh, *supra*, at 205. Thus, while "state courts have routinely upheld reasonable regulations on the possession of firearms" under state constitutions, the States also, as their particular circumstances permit, have readily

recognized "the central importance of their citizens' right to arms." Texas Br. 28.[4]

In addition, although many States with substantial urban centers provide their local governments with broad authority to regulate firearms, 43 States have preempted all, or substantially all, local gun regulation. See *Regulating Guns*, *supra*, at 15. Five States (Connecticut, Hawaii, Illinois, Massachusetts, and New York) have declined to preempt local regulation expressly; another two (California and Nebraska) have only limited preemption, permitting substantial regulation at the local level. See *id.* at 11-15. Thus, although petitioners' *amici* raise the specter that, absent incorporation, "millions of Americans will be deprived of their Second Amendment right to keep and bear arms as a result of actions by *local* governments," Texas Br. 1 (emphasis added), there is no reason to believe that incorporation is necessary to police municipal gun regulations. The States are already doing this themselves.

And as for *amici*'s claim that in this case political "factionalism" gave rise to "gun control that would not

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[4] Because the States have exercised and continue to exercise judiciously their authority to regulate firearms, there is no cause for *amici*'s concern that a non-incorporation holding could impair an attempt by Congress to "call forth the militia" "by preventing the reserve militia from * * * being prepared." Hutchison Br. 34. Moreover, in the unlikely event that a State were to enact a law that actually interfered with Congress' plans for the militia, Congress has ample constitutional authority "[t]o provide for * * * arming * * * the militia," U.S. Const. art. 1, § 8, and thus to preempt such a law, see *Presser*, 116 U.S. at 268-269.

be adopted by a larger political unit (the State of Illinois)," Br. of *Amicus Curiae* Eagle Forum Education & Legal Defense in Support of Petitioners 9, if the Illinois General Assembly wished to preclude Chicago's ordinance, it need only enact a preemptive statute, see *supra* p. 2. That the General Assembly has not done so demonstrates that the legislature approves rather than disapproves of the law.

In short, there is no reason to fear that the democratic processes at work in the States will not strike the proper balance between the legitimate interests of gun owners and public safety. Gun owners are not a "discrete and insular minorit[y]" unable to employ the "political processes ordinarily to be relied upon to protect" their interests. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). To the contrary, gun owners long have been treated in the legislative arenas with full concern and respect. Absent any "'reason to infer antipathy'" against gun owners, the Court should "presume[] that 'even improvident decisions will eventually be rectified by the democratic process,'" *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)), and decline to incorporate the Second Amendment. In this way, "our tradition of political pluralism"—"predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare"—will continue to thrive. *Brown v. Hartlage*, 456 U.S. 45, 56 (1982).

B. Incorporation Of The Second Amendment Will Require Federal Courts To Engage In Difficult Line-Drawing.

Application of the Second Amendment to the States will subject firearm regulations duly enacted by state legislatures to federal court review. See Resp. Br. 17-20 (collecting examples). We explain above that the States are adept at balancing the legitimate interests of gun owners against the need for reasonable regulation of firearms. Interjecting a federal standard into this calculus will "inevitably invit[e] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia*, 469 U.S. at 546.

And the path for judicial involvement is poorly marked. The origins of the individual right recognized in *Heller* are historical, yet this history provides few hints as to its scope. A right that protects "those weapons * * * typically possessed by law-abiding citizens for lawful purposes" will evolve as circumstances change, 128 S. Ct. at 2816, as *Heller* recognized, see *id.* at 2791 (Amendment not limited to "those arms in existence in the 18th century"). Accordingly, although *Heller* indicated that many firearms regulations would survive Second Amendment scrutiny, see *id.* at 2799, 2816-2817, divining which laws pass muster will thrust federal courts into a morass of standardless line-drawing, see Hutchison Br. 19 (conceding "nascent state" of federal jurisprudence); Brady Br. 3 (within eighteen months after *Heller*, 190 challenges to state and local firearms regulations were filed in federal court).

To make matters worse, the dangers that a gun law seeks to combat—presumably a critical consideration in any constitutional analysis—are highly location-specific. For example, handguns present their most serious threat to law enforcement and the community in urban areas plagued by criminal street gangs. See Resp. Br. 13-17. And as this Court has repeatedly recognized, such local conditions are better evaluated by state courts and legislators. See *Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (noting "great respect that we owe to state legislatures and state courts in discerning local public needs"); *Niemotko v. Maryland*, 340 U.S. 268, 287 (1952) (Frankfurter, *J.*, concurring in the result) (similarly urging deference to "State courts in light of their knowledge of local conditions").

Indeed, state *legislatures* are best qualified to assess the need for regulation in this context, as the Seventh Circuit noted below. See Pet. App. 8 ("The way to evaluate the relation between guns and crime is in scholarly journals and the political process[.]"); see also *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545 (2005) ("The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established."); *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (legislatures "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions with a flexibility of approach that is not applicable to the courts'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)). And when state statutes are challenged, state courts are uniquely well placed to review these legislative determinations. Many States recognized an individual right to arms long before *Heller* held that the Second Amendment protected this

right. See *supra* p. 20. Consequently, state courts have experience addressing state constitutional challenges to state and local firearms regulations. See Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 687 (2007) ("Since World War II, state courts have authored hundreds of opinions" in cases challenging gun-control laws).

Moreover, when it comes to gun rights, many state constitutions are more specific than the Second Amendment. Among the States, only Hawaii uses identical language to the Second Amendment. See Haw. Const. art. 1, § 17. Other state constitutions are more detailed. Some expressly guarantee an individual right to own a gun for specified purposes, such as "for the defense of self, family, home and State, and for hunting and recreational use." Del. Const. art. 1, § 20; see also Nev. Const. art. 1, § 11(1) ("for security and defense, for lawful hunting and recreational use and for other lawful purposes"); N.M. Const. art. II, § 6 (same); N.D. Const. art. 1, § 1 ("for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes"); W. Va. Const. art. III, § 22 ("for the defense of self, family, home and state, and for lawful hunting and recreational use"); Wis. Const. art. 1, § 25 ("for security, defense, hunting, recreation or any other lawful purpose").

Others permit some state regulation, such as limits enacted "with a view to prevent crime." Tex. Const. art. 1, § 23; see also Fla. Const. art. 1, § 8(a) ("except that the manner of bearing arms may be regulated by law"); Ga. Const. art. 1, § 1, ¶ VIII ("General Assembly shall have power to prescribe the manner in which arms may be borne"); Okla. Const. art. II, § 26 ("nothing herein contained shall prevent the Legislature from regulating

the carrying of weapons"); Tenn. Const. art. I, § 26 ("Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime").

In fact, many States have amended their constitutions to address specific questions that may arise in response to gun laws. For example, since 1978, the Idaho Constitution has specified that its arms right

> shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm.

Idaho Const. art. 1, § 11. Similarly, as of 1990, the Florida Constitution requires a mandatory waiting period between the purchase and delivery of most guns. See Fla. Const. art. 1, § 8(b). And in 1986, New Mexico amended its constitution to provide that "[n]o municipality or county shall regulate, in any way, an incident of the right to keep and bear arms." N.M. Const. art. II, § 6.

In short, thanks to the precision of state constitutions and hundreds of opportunities to interpret the rights to arms contained therein, the state courts are experienced, capable adjudicators of gun-rights challenges.

III. THE STATES HAVE A SUBSTANTIAL RELIANCE INTEREST IN AVOIDING INCORPORATION OF OTHER RIGHTS NOT CURRENTLY APPLICABLE TO THE STATES.

Petitioners' "primar[y]" argument is that the Court should overrule *The SlaughterHouse Cases*, 83 U.S. (16 Wall.) 36 (1873), and incorporate the Second Amendment via the Privileges or Immunities Clause. Pet. Br. 66. But this would mark a dramatic break from this Court's jurisprudence limiting that Clause to rights associated with federal citizenship. Petitioners' theory would open the door to the incorporation of myriad other rights, contrary to the States' well-entrenched and reasonable reliance.

A. The States Have Relied On This Court's Holdings Declining To Incorporate The Fifth Amendment's Grand Jury Right And The Seventh Amendment's Civil Jury Trial Right.

It is black letter law that neither the Fifth Amendment right to a grand jury nor the Seventh Amendment right to a jury trial in civil cases applies to the States. Were the Court to hold that the Second Amendment is incorporated via the Privileges or Immunities Clause, however, the grand jury and jury trial rights would have to be incorporated as well. Such a holding would likely upset long-standing practices in the state courts.

1. Most States Do Not Provide A Right To Indictment By Grand Jury.

The Fifth Amendment to the U.S. Constitution guarantees that, in non-military cases, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. More than a century ago, this Court held that the Grand Jury Clause was not incorporated through the Fourteenth Amendment's Due Process Clause, approving California's procedure of initiating criminal proceedings via information. See *Hurtado v. California*, 110 U.S. 516, 517-518, 538 (1884). The Court subsequently declined to incorporate the grand jury right via the Privileges or Immunities Clause. See *Maxwell v. Dow*, 176 U.S. 581, 594 (1900). Since then, it "consistently" has "held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions." *Beck v. Washington*, 369 U.S. 541, 545 (1962); accord, *e.g.*, *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998); *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972).

States have relied heavily on this rule. Only 15 States (Alabama, Alaska, Delaware, Maine, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia) require a grand jury indictment to initiate any felony charge. See U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *State Court Organization 2004*, at Table 38, available at http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf (last visited Dec. 30, 2009). One State (Rhode Island) requires a grand jury indictment to initiate charges that could result in a capital sentence or life

imprisonment, and another (Florida) requires a grand jury indictment to initiate charges in capital cases only. See *id.* at nn. 6, 11. Thus, 33 States have no grand jury requirement. Even in States that require a grand jury, its function may not be identical to that of its federal counterpart. In Connecticut and Pennsylvania, for example, the grand jury is purely an investigative body, without power to issue indictments. See *id.* at Note. In short, while many States retain the option of indicting by grand jury, few use it and instead initiate criminal proceedings by information, which is less costly and more efficient.

Indeed, the number of States requiring indictment by grand jury has declined steadily. Although at the Founding each original State adopted the grand jury as the principal method of initiating criminal prosecutions, see Sara Sun Beale, et al., 1 *Grand Jury Law & Practice*, 2d, § 1:4 at 15-16 (West 1997), by the middle of the nineteenth century the practice was criticized as expensive and inefficient, see *id.* § 1:5 at 21. In 1868, when the Fourteenth Amendment was ratified, only 19 of 37 States had constitutionalized a grand jury guarantee for felony defendants. See Calabresi, *supra*, at 78. Several States already had abolished their grand jury right, and others (including Illinois) adopted constitutional provisions authorizing their legislatures to do away with grand jury review. See Beale, *supra*, § 1:5 at 21-23. After grand juries briefly returned to favor, the movement against them accelerated in the 1970s, leading to a new round of eliminations. Thus, although in 1972 there were 32 States with a grand jury requirement, see *Branzburg*, 408 U.S. at 688 n.25, only 22 remained as of 1998, see *Campbell*, 523 U.S. at 398-399, and there are 15 today, see *supra* p. 28.

The use of grand juries has long been controversial, with its detractors arguing that the practice is inefficient, slow, and costly, especially in less populated areas. See Beale, *supra*, § 1:5 at 21. But whatever the merit of the competing arguments, the States have long relied on their authority to experiment with different solutions to this problem. And most States have concluded that a grand jury requirement does not suit their needs. Requiring the States to use grand juries now, contrary to more than one hundred years of precedent to the contrary, would upset this long-established practice.

2. The States Protect The Civil Jury Right In A Variety Of Forms.

As with the grand jury guarantee, this Court has long held that the Seventh Amendment's civil jury right is not incorporated under either the Due Process or Privileges or Immunities Clause. See *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875); see also *Osborn v. Haley*, 549 U.S. 225, 252 n.17 (2007); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974); *Minneapolis & St. Louis Ry. Co. v. Bombolis*, 241 U.S. 211, 217 (1916). The States have relied on these holdings in structuring their court systems. Although every State protects some form of the civil jury right, the scope of that right rarely coincides precisely with the Seventh Amendment. Thus, incorporating the Seventh Amendment would require "a major restructuring of a large amount of litigation in the courts of the several states." Akhil Reed Amar, *Continuing the Conversation*, 33 U. Rich. L. Rev. 579, 597 (1999).

First, and most important, the Seventh Amendment requires juries to reach a unanimous verdict. See *Johnson v. Louisiana*, 406 U.S. 366, 369-370 n.5 (1972) (Powell, *J.*, concurring in the judgment); *Andres v. United States*, 333 U.S. 740, 748 (1948); *Am. Pub. Co. v. Fisher*, 166 U.S. 464, 467-468 (1897). But many States have not adopted this rule. Twenty-five States permit verdicts by super-majorities. See *State Court Organization 2004*, *supra*, Table 42. Of the remaining 25, four permit non-unanimous verdicts under certain circumstances. See *ibid*.[5]

Like the grand jury requirement, the desirability of a unanimity rule is debatable. In the criminal context, the Court has observed that "[r]equiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit." *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972). Thus, a unanimity rule may subject the jury to an unreasonable holdout juror, which in turn may undermine the quality of jury decisionmaking and increase the costs associated with retrials. See *Johnson*, 406 U.S. at 377 (Powell, *J.*, concurring) (unanimity requirement "often leads . . . to agreement by none and compromise by all, despite the

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[5] Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maryland, Minnesota, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wyoming require a unanimous verdict in civil cases. See *State Court Organization, supra*, Table 42. Among these, Iowa applies a seven-eighths rule after six hours of deliberation, Kansas applies a five-sixths rule for 12-member juries, and Minnesota and Nebraska apply a five-sixths rule after six hours of deliberation. See *id.* at nn. 16, 18, 23, 25.

frequent absence of a rational basis for such compromise"); but see *id.* at 397-399 (Stewart, *J.*, dissenting) (urging unanimity requirement). Thus, this Court has left it to the state "laboratories" to experiment with their own approaches to jury unanimity. And the divergent responses demonstrate that there is no "one size fits all" solution. Incorporating the civil jury right thus would interfere with the States' reliance interests and undermine state sovereignty.

In some States, the civil jury right also is qualified by a subject matter or amount in controversy requirement that federal law does not impose. Many States guarantee a jury trial in any action in which a jury would have been available under existing law when that State's constitution was adopted. Thus, New Jersey citizens are entitled to a jury trial if their claim (or an analogous one) would have warranted a jury when the New Jersey Constitution was adopted in 1776, see *State v. Anderson*, 603 A.2d 928, 936 (N.J. 1992); 1784 is the relevant date in New Hampshire, see *Gilman v. Lake Sunappe Props. LLC*, 977 A.2d 483, 487 (N.H. 2009); 1820 in Maine and Missouri, see *Thermos Co. v. Spence*, 735 A.2d 484, 486-487 (Me. 1999); *Hammons v. Ehney*, 924 S.W.2d 843, 848-849 (Mo. 1996); and 1912 in New Mexico, see *Las Campanas Ltd. P'ship v. Pribble*, 943 P.2d 554, 557 (N.M. 1997). Similarly, while most States reject an amount in controversy requirement, at least six have requirements that exceed the U.S. Constitution's twenty dollars. See Alaska Const. art. I, § 16 ($250); Haw. Const. art. 1, § 13 ($5000); La. Code Civ. Proc. Ann. art. 1732(1) (2009) ($50,000); Md. Const., Decl. of Rights, art. 23 ($10,000); N.H. Const. pt. 1, art. 20 ($1,500); Okla. Const. art. II,

§ 19 ($1,500). Here again, incorporating the Seventh Amendment would work a dramatic change in the States' civil jury systems.

B. The States Have Relied On This Court's Holdings Declining To Incorporate "Non-Fundamental" Rights.

If the Court were to overrule its prior decisions and hold that the Privileges or Immunities Clause incorporates the Second Amendment, the States would face substantial uncertainty over what other rights are protected by that Clause. Even petitioners' *amici* diverge on this point. Compare Brief for the Goldwater Institute, et al. as *Amici Curiae* Supporting Petitioners ("Goldwater Br.") 24-25 (Privileges or Immunities Clause incorporates all personal rights protected by federal law on July 9, 1866, both fundamental and non-fundamental), with Brief of *Amici Curiae* State Legislators in Support of Petitioners 24-25 (Clause incorporates only rights enumerated in Bill of Rights). Petitioners press the expansive view. See Pet. Br. 21-22 (Clause "intended to constitutionalize" "preexistent natural rights" recognized in Civil Rights Act and "personal guarantees enumerated in the Bill of Rights").

A broader Privileges or Immunities Clause would threaten to "unleash[] a second source of constitutional protections against the states," Lawrence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110, 197 (1999), and "become a font for new federal common law," J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or*

Immunities Clause, 12 Harv. J. L. & Pub. Pol'y 43, 51 (1989). Some have argued that the Clause should guarantee economic rights protected under the now-discredited doctrine of *Lochner v. New York*, 198 U.S. 45 (1905). See Goldwater Br. 23 n.9 (Clause would provide "protection of economic liberties," including "free labor, freedom of enterprise, private property rights and freedom of contract").[6] Others contend that it should guarantee rights to welfare services, health services, police protection, and a certain quality of education. See Erwin Chemerinsky, *Making the Right Case for a Constitutional Right to Minimal Entitlements*, 44 Mercer L. Rev. 525, 538 (1993); Philip Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 Wash. U. L. Q. 405, 419-420.

These are areas in which the States have long had freedom to regulate for the public good. But Second Amendment incorporation via the Privileges or Immunities Clause would open the door to a seemingly endless line of arguments, threatening the States' "'broad authority under their police powers to regulate the employment relationship to protect workers,'" *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976)), and to "legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *Gonzales*, 546 U.S. at 270 (internal quotations omitted). In short, myriad state and local laws would be at risk.

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[6] Given this view, the claim that such an expansive reading of the Clause "does not mean that there would be wholesale invalidation of state and local laws," Goldwater Br. 25, cannot be taken seriously.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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