No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA and
ADRIAN M. FENTY, Mayor of the District of Columbia,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

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

BRIEF FOR THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case involves just such a fundamental clash between the individual right to bear arms – one of the fundamental rights essential to the protection of all other forms of liberty and security – and a theory of government power that renders such fundamental individual rights subservient to the whims of government authority. The case thus touches the very core of IJ's mission and ideals.

STATEMENT

Petitioners challenge the decision below on the various grounds that: (1) the Second Amendment only protects a collective right to keep and bear arms

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[1] This brief is filed pursuant to the written blanket consents on file with this Court. Per the terms of such consents, written notice was provided to the parties more than seven days prior to the filing of this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

in connection with militia service; (2) the Second Amendment does not apply to the District of Columbia because the District should be treated as the States are treated, and the States supposedly are not subject to the Second Amendment, but rather are protected by it; and (3) the District's restrictions on arms should be viewed as permissible and reasonable regulations even under an individual-rights view of the Second Amendment. Pet. Br. at 8-11 (summarizing arguments). And several of petitioners' *amici* seek to bolster such arguments by contending that the Second Amendment does not apply to the States, and thus should not apply to the District. Br. of *Amici Curiae* New York, *et al.*, in Support of Petitioners, at 1-2 (Second Amendment claimed to be a federalism provision n favor of the States); Br. of *Amici Curiae* Major American Cities, *et al.*, in Support of Petitioners, at 12-20 (same); Br. of *Amici Curiae* City of Chicago and Chicago Bd. Of Educ. in Support of Petitioners at 2, 5-31 (disputing incorporation of Second into Fourteenth Amendment).

In making such arguments, petitioners and their *amici* rely primarily on historical sources from and preceding the adoption of the Second Amendment to define the scope and meaning of the right to keep and bear arms. *See* Pet. Br. at 11-35 (looking to views of original Framers); Br. of *Amici Curiae* New York, *et al.*, at 2-4 (denying Fourteenth Amendment incorporation without any discussion of the views of the Framers of that Amendment); Br. of *Amici Curiae* Major American Cities, *et al.*, at 20-22 & n. 4 (denying incorporation with only a footnote misdescribing history of the Fourteenth Amendment); Br. of *Amici*

Curiae City of Chicago and Chicago Bd. of Educ., at 14-16 (denying incorporation with only a brief and misleading discussion of views of the Framers of the Fourteenth Amendment).

Largely overlooked in the briefs, however, is the understanding and intent of the Framers of the Fourteenth Amendment and the nature of the right to keep and bear arms as they understood it and addressed it in connection with their efforts to prevent freedmen from being disarmed and victimized by state governments and militias. The individual-rights view of the Second Amendment held by those subsequent Framers was incorporated into the Constitution as a whole via the Fourteenth Amendment, defines the rights secured to citizens as against the States, and adopts a construction of the privileges or immunities of national citizens that reflects back on the Second Amendment itself to either confirm or, if need be, expand, the construction of that earlier Amendment.

This brief will focus primarily on the history and relevance of the Fourteenth Amendment as it relates to the constitutional right to keep and bear arms. The earlier history and construction of the Second Amendment will be left to the capable arguments of respondent and its other *amici*.

SUMMARY OF ARGUMENT

1. Interpretation of the Constitution, as with interpretation of any instrument, requires this Court to consider the document as a whole. Subsequent amendments to the Constitution can have particular force even for interpreting earlier provisions, not only

because they may reflect an operational understanding of the meaning the pre-existing provisions, but because they can incorporate such understanding onto the existing provisions through the force and authority of the amendment itself. In such fashion, amendments can confirm or alter a particular construction of pre-existing provisions, and require that such provisions be read for their meaning as of the time of amendment, not merely from the time of original adoption.

2. The history and adoption of the Fourteenth Amendment demonstrates the Framer's specific and repeated concern that freedmen were being disarmed by state and local governments and militias, in violation of what those Framers understood to be an individual constitutional right to bear arms. In response to this Court's previous refusal to enforce parts of the Bill of Rights directly against the States, and its holding that blacks were not citizens of the United States entitled to the rights of such citizens, the Framers set out to remedy the inability to enforce numerous constitutional rights against the States by incorporating them into the Fourteenth Amendment.

Identification of the evils the 39th Congress sought to remedy – including the disarming of freedmen – the parallel legislative responses to that problem, and the specific explanations by the Framers of the purpose and function of the Fourteenth Amendment, all demonstrate that they viewed the existing constitutional right to bear arms as an individual right of personal security. And they understood and intended the language of the Fourteenth Amendment to secure such a right *against* the States and various militias,

not merely in the service of the very entities seeking to disarm and abuse the freedmen. And by accomplishing that goal through the identification and extension of the rights of national citizens, the Framers of the Fourteenth Amendment also clarified and defined the underlying rights in the Second Amendment as well.

Such clarification through incorporation demonstrates that the right to bear arms is an individual right, not merely a federalism provision. It also rebuts the notion that the phrase "to bear arms" was an exclusively military reference and confirms that personal security even, and especially, as against state actors is a primary function and purpose of the right to bear arms. Whatever level of scrutiny this Court applies in evaluating the infringement of the right to bear arms in this case must be protective of that central purpose of allowing for self-defense and personal security, and cannot allow government to, *ipse dixit*, declare such purposes unlawful or insignificant.

3. The history of the right to bear arms and the Fourteenth Amendment also reflects upon an error in this Court's incorporation doctrine that ought to be corrected. The Framers of the Fourteenth Amendment viewed the right to bear arms as a privilege or immunity of national citizenship. This Court, starting with the *Slaughter-House Cases*, has essentially abandoned the Privileges or Immunities Clause as a source of substantive restrictions on the States, contrary to the views of the Framers of that Clause. That decision should be overruled. While this Court subsequently shifted the work of incorporation to the

Due Process Clause, a proper textual and historical basis for incorporation would be far more legitimate.

Whatever the basis for incorporation, however, the history of the Fourteenth Amendment shows that the right to bear arms was intended to be incorporated, and thus should be read as it was understood at the time of such incorporation. This Court's decisions on the reach of the Second Amendment standing alone do not negate, and in fact support, incorporation of the right to bear arms as against the States.

ARGUMENT

I. The History and Adoption of the Fourteenth Amendment Is a Valuable and Proper Source for Construing the Right To Keep and Bear Arms Protected by the Second Amendment.

As everyone recognizes, constitutional provisions must be construed in context. *United States* v. *Balsys*, 524 U.S. 666, 673 (1998). The amendments to that document are, of course, part of the essential intrinsic context of such a document. The Constitution following an amendment is, in many ways, a substantially different document than it was just prior to amendment, and the internal context even for provisions not expressly altered by the amendment nonetheless changes, and changes the interpretation of such provisions. *Cf. United States* v. *La Franca*, 282 U.S. 568, 576 (1931) (Statutes after amendment "are to be read, as to all subsequent occurrences, as if they had originally been in the amended form"). And insofar as an amendment was made with reference to earlier provisions, the amendment will control over such ear-

lier provisions. *Cf. Rogers* v. *Palmer*, 102 U.S. (12 Otto) 263, 266 (1880) (amendment to statute controls original act to extent of conflict).

To understand the meaning of the Second Amendment today, one therefore must also understand the meaning of the Fourteenth Amendment and the ways in which it was understood and intended to incorporate the Second Amendment. An individual right to bear arms was a key component of what the Framers of the Fourteenth Amendment understood to be the privileges or immunities of citizens of the United States. By incorporating such an understanding into the Fourteenth Amendment, they necessarily have shaped the context of any present construction of the Second Amendment as well.

II. The History and Adoption of the Fourteenth Amendment Confirms and Establishes that the Right To Keep and Bear Arms Is an Individual Right.

During reconstruction following the Civil War, there was considerable discussion in Congress and throughout the Nation of the right to bear arms, and of the deprivation of that right by Southern States and militias seeking to oppress freedmen. In seeking to protect the right to bear arms and other rights from state infringement – first through interim legislation and then through the constitutional amendment – the Framers of the Fourteenth Amendment both defined the nature and scope of the right to bear arms in general, and then ensured that the right could be enforced against state abridgement.

In a comprehensive study of the relationship between the right to bear arms and the Fourteenth Amendment, Stephen P. Halbrook has reviewed the extensive history and discussion of the right to bear arms during reconstruction and concluded that the Framers of the Fourteenth Amendment understood the Second Amendment to protect against federal invasion an *individual* right of a citizen to keep and bear arms, and that protection for that underlying right was incorporated into the Fourteenth Amendment to protect it from abridgement by the States. Stephen P. Halbrook, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998) (hereinafter "FREEDMEN"). The history recounted in that study amply supports the individual-rights view of the Second Amendment and, to the extent any uncertainty remained, cemented such view into the Constitution through the act of incorporating it into the Fourteenth Amendment.

Understanding how such view was incorporated into the Fourteenth Amendment, like most other constitutional analysis, requires looking to the state of the law and the evils perceived by the Framers, the remedy chosen for such evils, and other evidence of contemporaneous understanding by the Congress that framed the Amendment. *See Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) (In construing Constitution, court looks to the history of the time and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy).

A. State Violation of Freedmen's Right To Keep and Bear Arms Was a Central Evil To Be Remedied by the Fourteenth Amendment.

A critical step in interpreting the Fourteenth Amendment's protection of the privileges and immunities of national citizens and of life, liberty, and property is to understand the evils its Framers sought to remedy. Among the many evils those Framers sought to cure, the systematic violation of the freedmen's constitutional right to keep and bear arms was prominent.

The evidence of such concern is extensive. While Congress was drafting and considering the proposed Fourteenth Amendment and two pieces of interim legislation – the Freedmen's Bureau Bill and the Civil Rights Bill – it received considerable testimony and evidence regarding the disarming of freedmen by state and local governments and militias.

For example, numerous witnesses testified before the Joint Committee on Reconstruction – which drafted the Fourteenth Amendment – and before other committees that many still-recalcitrant Southern States sought to disarm freed blacks and others, and then prey upon such newly vulnerable populations. *See, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. 78-79 (Dec. 19, 1865) (discussing report denouncing southern abuses, including local ordinances providing that that "no freedman who is not in the military service shall be allowed to carry firearms, or any kind of weapon" without special permission); House Ex. Doc. No. 70, 39th Cong., 1st Sess., at 236-39 (1866) (report that in Kentucky town the "marshall takes all arms from returned colored soldiers, and is very prompt in

shooting the blacks whenever an opportunity occurs"; outlaws in Kentucky "make brutal attacks and raids upon freedmen, who are defenseless, for the civil law-officers disarm the colored man and hand him over to armed marauders"); REPORT OF THE JOINT COMM. ON RECONSTRUCTION, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 3, at 32 (1866) (hereinafter "REPORT OF THE JOINT COMM.") (testimony from military officer that local militia in Mississippi "were ordered by the adjutant general of the State to disarm the negroes and turn their arms into the arsenals."); *id.* at 39 (report from the Freedmen's Bureau that the "Militia Organizations in * * * South Carolina (Edgefield) were engaged in disarming the negroes. This created great discontent among the latter, and in some instances they had offered resistance. [¶] In southwestern Georgia, I learned that the militia had done the same, sometimes pretending to act under orders from United States authorities."); *id.*, pt. 2, at 21 (testimony that Alexandria, Virginia sought "to enforce the old law against [negroes] in respect to whipping and carrying firearms, nearly or quite up to the time of the establishment of the Freedmen's Bureau in that city."); *id.*, pt. 4, at 49-50 (testimony that armed patrols in Texas, acting under supposed authority of the Governor, "passed about through the settlements where negroes were living, disarmed them – took everything in the shape of arms from them – and frequently robbed them" of other valuables); *id.*, pt. 2, at 272 (testimony that "[s]ome of the local police [in North Carolina] have been guilty of great abuses by pretending to have authority to disarm the colored people.").

Such testimony did not go unnoticed. Indeed, numerous members of Congress – and many of the key architects of the Fourteenth Amendment and related reconstruction-era legislation – specifically cited such mischief as needing a federal remedy. *See, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. 914 (Feb. 19, 1866) (Sen. Wilson) (quoting reports that Southern Militias "were engaged in disarming the negroes" as reasons to disband such militias); *id.* at 915 (Sen. Wilson) (noting that ex-Confederates went "up and down the country searching houses, disarming people, committing outrages of every kind and description"); *id.* at 941 (Feb. 20, 1866) (Sen. Trumbull) (discussing reports of oppression of freedmen and the "abusive conduct of [a Mississippi] militia" which would "hang some freedman or search negro houses for arms"); *see also id.* at 39, 40 (Dec. 13, 1865) (Sen. Wilson) (citing, as justification for a proposed bill, reports that in Mississippi "rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are done in other sections of the country").

And beyond merely *noticing* the oppressive conduct of the Southern States, federal officers and Congressmen alike considered it a violation of the freedmen's *constitutional right to bear arms* that demanded a federal remedy. *See* House Exec. Doc. No. 70, at 233, 236 (Report of the Commissioner of the Freedmen's Bureau) ("the civil law [in Kentucky] prohibits the colored man from bearing arms" and "their arms are taken from them by the civil authorities. * * * Thus, the right of the people to keep and

bear arms as provided in the Constitution is infringed."); *id.* at 236-39 (report that in Kentucky, colored people's "arms are taken from them by the civil authorities, and confiscated for the benefit of the commonwealth. * * * Thus, the right of the people to keep and bear arms as provided in the Constitution is infringed."); CONG. GLOBE, 39th Cong., 1st Sess. 908-09 (Feb. 17, 1866) (Rep. Lawrence) (during testimony regarding the proposed Fourteenth Amendment, discussing the need to protect freedmen, and quoting General Order No. 1 issued by the military providing, *inter alia*, that "'[t]o the end that civil rights and immunities may be enjoyed, * * * [t]he constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed * * *.'"); REPORT OF THE JOINT COMM., pt. 2, at 229 (discussing circular issued by General Saxton noting that "[i]t is reported that in some parts of [South Carolina], armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freedmen. Such conduct is in clear and direct violation of their *personal rights as guaranteed by the Constitution* of the United States, which declares that 'the right of the people to keep and bear arms shall not be infringed.'") (emphasis added); *id.*, pt. 3, at 140 (testimony that militias in Alabama "were ordered to disarm the freedmen," causing assistant commissioner of the Freedmen's Bureau to make "public [his] determination to maintain the right of the negro to keep and bear arms").

The view that States were violating the freedmen's right to bear arms, and the response to such violations, were widely reported. FREEDMEN at 7, 19, 31,

37 (discussing press coverage of state efforts to disarm freedmen and the military and congressional response to same). Such reporting confirmed a broader public understanding of an individual right to bear arms, and of the intention of the federal government to enforce that right against the States. *See, e.g.*, *Harper's Weekly*, Jan. 13, 1866, at 3 col. 2 (reporting that the "militia [in Mississippi] have seized every gun and pistol found in the hands of the (so called) freedmen," that the State refused to recognize "the negro as having any right to carry arms," and that it thus insists upon "infringing upon their liberties"); Editorial, *The Loyal Georgian (Augusta)*, Feb. 3, 1866, at 3, col. 4 (commenting that General Order No. 1 gave colored citizens "the same right to own and carry arms that other citizens have. You are not only free but citizens of the United States and as such entitled to the same privileges granted to other citizens by the Constitution. * * * All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves.").

As the above evidence and congressional discussion reflects, the disarming of freedmen by state and local governments and militias was considered a significant evil requiring a remedy and a violation of the individual rights of freedmen to keep and bear arms. In order to remedy such evils, the 39th Congress adopted a number of measures culminating in the Fourteenth Amendment.

B. Legislative Responses to Southern Recalcitrance and Violations of the Right To Keep and Bear Arms.

Two key pieces of legislation considered in parallel with the proposed Fourteenth Amendment, and that inform its meaning, were the Freedmen's Bureau Bill and the Civil Rights Bill.

1. The Freedmen's Bureau Bill.

The Freedmen's Bureau Bill, S. 60, enhanced and extended the authorization of the Freedmen's Bureau so that the federal military could protect the rights of freedmen in States still lacking a reconstructed or functioning civil government. The Bill was introduced by Sen. Lyman Trumbull, Chairman of the Senate Judiciary Committee, on January 5, 1866. CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866). The bill as introduced protected, *inter alia*, the "full and equal benefit of all laws and proceedings for the security of person and estate." *Id.* at 209 (Jan. 12, 1866). Between January and July 1866 the bill was debated, amended to include express protection for the "constitutional right to bear arms," passed, successfully vetoed, reintroduced, passed again, unsuccessfully vetoed, and ultimately became law on July 16, 1866.[2]

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[2] *See* CONG. GLOBE, 39th Cong., 1st Sess., at 421 (Jan. 24, 1866) (Senate passage); *id.* at 688 (Feb. 6, 1866) (House passage, with an amendment adding protection for the "constitutional right to bear arms"); *id.* at 748 (Feb. 8, 1866) (Senate concurrence with House amendments); *id.* at 775 (Feb. 9, 1866) (House concurrence with Senate amendments); *id.* at 916-17 (Feb. 19, 1866) (reporting President's veto message); *id.* at 943 (Feb. 20, 1866) (Senate override falling 2 votes short of the necessary two-thirds); *id.* at 1238 (Mar. 7, 1866) (reintroduction of bill as H.R. 613 by Rep. Eliot); *id.* at 2878 (May 29, 1866) (House passage);

As finally enacted, the Freedmen's Bureau Act continued and expanded federal military protection of the rights of persons in areas where ordinary judicial proceedings were not yet restored and in unreconstructed States. Section 14 of the Act (the former § 7 of the bill) provided, in relevant part, that:

> [T]he right * * * to have full and equal benefit of all laws and proceedings concerning *personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate*, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all citizens * * * without respect to race or color or any previous condition of slavery. * * * [T]he President shall * * * extend military protection and have military jurisdiction over all cases and questions concerning the *free enjoyment of such immunities and rights* * * *.

14 STAT. 173, 176 (1866) (emphasis added).

Congressional consideration and adoption of the Freedmen's Bureau Bill, overlapping Congress' consideration and approval of the Fourteenth Amendment, sheds considerable light on the then-contemporary understanding of essential concepts and language incorporated into the Fourteenth Amendment. Most obviously, the references to "personal liberty, personal security, and the acquisition,

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id. at 3412 (June 26, 1866) (Senate passage); *id*. at 3524 (July 2, 1866) (Senate concurrence in conference committee report); *id*. at 3562 (July 3, 1866) (House concurrence in same); *id*. at 3849 (July 16, 1866) (reporting President's veto message); *id*. at 3850 (House override); *id*. at 3842 (Senate override).

enjoyment, and disposition of estate," and to "such immunities and rights" plainly echo the "life, liberty, or property" and "privileges or immunities" language of the Fourteenth Amendment. Thus, it is highly instructive that the Act expressly includes "the constitutional right to bear arms" as encompassed by such language.

In fact, such language was added to the earlier language regarding the "security of person and estate," to emphasize the importance of the right to bear arms to the Framers of that era and one of the specific evils that were seeking to remedy. CONG. GLOBE, 39th Cong., 1st Sess. 654 (Feb. 5, 1866) (Rep. Eliot) (describing Committee substitute adding such language). Such right, however, was understood to be included within the broader general references in the act, even without such emphasis. *See, e.g.*, *id.* at 743 (Feb. 8, 1866) (Sen. Trumbull) (explaining that in "the section which declares that negroes and mulattoes shall have the same civil rights as white persons, and the same security of person and estate," the House has "inserted these words, 'including the constitutional right of bearing arms.' I think that does not alter their meaning.").

Congressional discussion of the bill also reflects upon the *nature* of the right to bear arms as being an individual right that would be made enforceable against the States and would trump state law. CONG. GLOBE, 39th Cong., 1st Sess. 512, 517 (Jan. 29, 1866) (Rep. Eliot) (bill would nullify the black codes in places like Louisiana barring freedmen from carrying weapons); *id.* at 657 (Feb. 5, 1866) (Rep. Eliot) (describing some of the evils to which the bill was di-

rected, citing report regarding Kentucky law prohibiting blacks from owning guns and disarming blacks). Even the bill's opponents did not dispute the *nature* of the rights at issue, only whether Congress could properly enforce them or should extend them to freedmen. *Id.* at 371 (Jan. 23, 1866) (Sen. Davis) (opposing bill but acknowledging that the Founding Fathers "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense"). Such discussion shows the right to bear arms, as then understood, was an individual right based in large part on personal security and defense, not merely collective service.

2. The Civil Rights Bill.

A further remedy adopted by Congress, and reflecting upon the right to bear arms, was the Civil Rights Bill also introduced by Sen. Trumbull on the same day as the Freedmen's Bureau Bill. CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866). As introduced, the bill provided complementary protection for the "full and equal benefit of all laws and proceedings *for the security of person and property*." *Id.* at 211 (Jan. 12, 1866) (emphasis added). That bill was to apply in all States, even after reconstruction had restored civil authority in the Southern States. Between January and April 1866, the bill was debated, passed, unsuccessfully vetoed, and thus became law.[3]

As enacted into law, Section 1 of the Civil Rights Act of 1866 provided, in relevant part:

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[3] CONG. GLOBE, 39th Cong., 1st Sess. 606 (Feb. 2, 1866) (Senate passage); *id.* at 1367 (Mar. 13, 1866) (House passage); *id.* at 1679 (Mar. 27, 1866) (reporting veto); *id.* at 1809 (Apr. 6, 1866) (Senate override); *id.* at 1861 (Apr. 9, 1866) (House override).

> *Citizens, of every race and color*, without regard to any previous condition of slavery or involuntary servitude, * * * *shall have the same right, in every State and Territory in the United States*, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and *to full and equal benefit of all laws and proceedings for the security of person and property*, as is enjoyed by white citizens.

14 STAT. 27 (1866) (emphasis added).

As with the Freedmen's Bureau Bill, the terms and discussion of the Civil Rights Bill reflect upon both the Fourteenth and the Second Amendments. As an initial matter, the protection for the "security of person and property" again echoes the Fourteenth Amendment's protections, and such language was again understood to encompass the Second Amendment's right to bear arms. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1291 (Mar. 9, 1866) (Rep. Bingham) (explaining that bill would "enforce in its letter and its spirit the bill of rights as embodied in that Constitution"); *id.* at 1291-92 (Rep. Bingham) (explaining that the relevant "sections of the Freedmen's Bureau bill enumerate the same rights and all the rights and privileges that are enumerated in the first section of this [the Civil Rights] bill"); *id.* at 1292 (Rep. Bingham) (quoting section of Freedmen's Bureau Bill providing for the "'full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms,'" and explaining purpose to "arm Congress with

the power to * * * punish all violations by State Officers of the bill of rights"). [4]

Congressional discussion of the bill also confirmed the personal nature of the right to bear arms and Congress' intent to make that right enforceable against the States. *See, e.g.*, *id*. at 474 (Jan. 29, 1866) (Sen. Trumbull) (bill needed to override "badges of slavery" such as the black codes in Mississippi and other states that "prohibit[ed] any negro or mulatto from having firearms," and noting the "intention of this bill to secure those rights" against state deprivation); *id*. at 1838 (Apr. 7, 1866) (Rep. Clark) (discussing veto override vote, criticizing seizure of arms from blacks in Alabama and Mississippi, and noting: "I find in the Constitution of the United States an article which declares that 'the right of the people to keep and bear arms shall not be infringed.' For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws.").

Also of interest in the discussion of the Civil Rights Bill was a proposal by Rep. Raymond of New York, also a member of the Joint Committee considering the Fourteenth Amendment, to add a clause declaring that all persons born in the United States are "citizens of the United States, and entitled to all rights and privileges as such." CONG. GLOBE, 39th

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[4] Opponents similarly understood the bill to have the same scope as the Freedmen's Bureau Bill, which was explicit in its protection of the right to bear arms. CONG. GLOBE, 39th Cong., 1st Sess. 1121 (Mar. 1, 1866) (Rep. Rogers) (Civil Rights Bill "is nothing but a relic of the Freedman's Bureau bill"); *cf. id.* at 1122 ("the rights of nature" included "the right of self-defense, the right to protect our lives from invasion by others").

Cong., 1st Sess. 1266 (Mar. 8, 1866). That language, of course, would eventually find its way into the Fourteenth Amendment itself. Explaining his proposed amendment to the Civil Rights Bill, Rep. Raymond explained:

> make the colored man a citizen of the United States and he has *every right which you or I have as citizens of the United States* under the laws and constitution of the United States. * * * He has defined status; he has a country and a home; a right to defend himself and his wife and children; *a right to bear arms*.

Id. (emphasis added). While such language did not make it into the Civil Rights Bill, it was added to the Fourteenth Amendment and Rep. Raymond's analysis again reflects on both the nature of the right to bear arms and its incorporation.

As with the Freedmen's Bureau Bill, Congress understood and intended that its protection for the "security of person and property" would encompass protection of an individual constitutional right to bear arms as a remedy for the abuses committed by the Southern States in disarming the freedmen. And that understanding would carry through to the Fourteenth Amendment.

C. The Fourteenth Amendment and Enforcement of the Second Amendment Against the States.

The Fourteenth Amendment was originally proposed via a House Resolution by Rep. Bingham on Dec. 6, 1865. CONG. GLOBE, 39th Cong., 1st Sess. 14 (Dec. 6, 1865) (calling for an amendment to the constitution "to empower Congress to pass all necessary and proper laws to secure to all persons in their

rights, life, liberty, and property"). Between December 1865 and July 1868, the proposed Fourteenth Amendment was referred to a Joint Committee of Congress and reported out therefrom, approved by Congress, and ultimately ratified by the States.[5]

Throughout the discussion and debate over the proposed amendment, there were repeated and undisputed statements of the intent of the Amendment to enhance protection for rights set out in the Constitution and Bill of Rights, and to make such rights enforceable against the States. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 566 (Feb. 1, 1866) (Senate resolution to consider an amendment to the Constitution "so as to declare with greater certainty the power of Congress to enforce and determine by appropriate legislation all the guarantees contained in that instrument"); *id.* at 586 (Rep. Donnelly) (proposed Amendment "provides in effect that Congress shall have power to enforce by appropriate legislation all the guarantees of the Constitution"); *id.* at 1088 (Feb. 28, 1866) (Rep. Bingham) (proposed amendment would "arm the Congress * * * with the power to enforce this bill of rights as it stands in the Constitution today"); *id.* (Rep. Woodbridge) (amendment would

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[5] *See* CONG. GLOBE, 39th Cong., 1st Sess. 566 (Feb. 1, 1866) (Senate resolution referring matter of potential amendment to Joint Committee); *id.* at 806, 813 (Feb. 13, 1866) (Joint Committee reporting draft language for Fourteenth Amendment); *id.* at 2286 (Apr. 30, 1866) (report to House of proposed amendment from Joint Committee); id. at 2545 (May 10, 1866) (House passage); *id.* at 3042 (June 8, 1866) (Senate passage with amendments); *id.* at 3149 (June 13, 1866) (House passage as amended by Senate); 15 STAT. 708, 709-11 (1868) (ratification by three-fourths of the States officially proclaimed on July 28, 1868).

empower Congress to protect "the natural rights which necessarily pertain to citizenship"); *id.* at 2465 (May 8, 1866) (Rep. Thayer) (amendment "is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law").

Beyond such a general intent to incorporate, however, the discussions reflect a more particular intent to incorporate the right to bear arms, as might be expected given the simultaneous consideration by Congress of abuses by the Southern States in disarming freedmen, and the passage of legislation directed at that and other abuses. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1182 (Mar. 5, 1866) (Sen. Pomeroy) (describing the "safeguards of liberty * * * under our Constitution" as being that every man should have "the right to acquire and hold [a homestead], and the right to be safe and protected in that citadel of his love[,] * * * the right to bear arms for the defense of himself and family and his homestead[, and] * * *[h]e should have the ballot."); *id.* at 1072 (Feb. 28, 1866) (Rep. Nye of Nevada) (opposing Amendment as unnecessary because of view that "[a]s citizens of the United States they [blacks] have equal right to protection, and to keep and bear arms for self-defense."); *id.* at 2765-66 (May 23, 1866) (Sen. Howard) (describing "personal rights" secured by earlier amendments, including the right to keep and bear arms, and explaining the object of the Fourteenth Amendment as being "to restrain the power of the States and compel

them at all times to respect these great fundamental guarantees).[6]

Indeed, among the express justifications for the Amendment was the desire to remedy the gap in protection created by this Court's decision in *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833), holding that the bill of rights did not apply of its own force to the States, and this Court's decision in *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857), holding that even freed blacks could not be citizens and hence were not entitled to the rights of citizens. CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (Feb. 26, 1866) (Rep. Bingham) (explaining problem as being that currently "this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States"); *id*. at 2459 (May 8, 1866) (Rep. Stevens) (provisions of the amendment "are all asserted, in some form or another, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This Amendment supplies that defect * * *."); FREEDMEN at 37-38 (discussing citizenship language designed to reverse effect of *Dred Scott* case).

Interestingly enough, this Court in *Dred Scott* had no difficulty identifying the privileges and immuni-

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[6] *Cf*. CONG. GLOBE, 39th Cong., 1st Sess. 1182 (Mar. 5, 1866) (Sen. Pomeroy) (discussing legislation "appropriate" for "securing the freedom of all men" under the Thirteenth Amendment: "It can be nothing less than throwing about all men the essential safeguards of the Constitution. The 'right to bear arms' is not plainer taught or more efficient than the right to carry ballots. And if appropriate legislation will secure the one so can it also the other.").

ties of citizens as including the right to bear arms, it simply refused to extend those rights to blacks. 60 U.S. (19 How.) at 416-17. The Fourteenth Amendment was intended to fill those gaps, and ensure federal authority and jurisdiction to protect such rights as against state deprivations. And an individual right to bear arms was front and center among the rights the Framers sought to protect.

D. Lessons from the Background, History, and Adoption of the Fourteenth Amendment.

Although the present case deals with the District of Columbia, an instrument of the federal government subject to the Second Amendment directly, rather than by incorporation, the significance of the above history is several-fold: First, by discussing the right to bear arms as one that must be protected against infringement by state and local governments and militias, the history of the Fourteenth Amendment confirms that it was viewed by the Framers of that era as an individual right, not merely a collective right of the States themselves in support of approved militias. Indeed, the fact that militias were among the primary culprits the Framers identified as *violating* the right to bear arms renders any continued suggestion of a purely collective right belonging to state governments impossible to square with the adoption of the Fourteenth Amendment.

Second, the repeated contextual uses of the phrase "to bear arms" in the context of carrying arms for personal security rebuts the claim that such phrase had an exclusively military meaning. Pet. Br. 18-19. Rather, it had the broader and general meaning of carrying arms for any purpose, including both mili-

tary and non-military uses. Indeed, that even soldiers serving the Freedmen's Bureau employed the phrase in plainly a non-military context shows that the language "to bear arms" has a broader meaning than suggested by petitioners.

Third, the history establishes a definition of the privileges or immunities of United States citizens which operates not only via the Fourteenth Amendment against the States, but also provides constructive guidance as to the underlying rights themselves even as they operate against the federal government. Although such guidance comes after the adoption of the original Second Amendment, because it was incorporated into the Fourteenth Amendment, it is also part of the Constitution as a whole and offers intrinsic evidence of how the earlier amendments must be construed in the context of the binding later amendments. Thus, even though the right to bear arms applies directly to the district via the Second Amendment itself, the subsequent constitutional construction of that right as among the privileges of national citizenship necessarily serves to define the underlying right in a more meaningful and authoritative manner than any mere after-the-fact opinion of a later Congress. Such a construction is no mere *post-hoc* opinion, it is part of the binding law incorporated into the document as a whole via the Fourteenth Amendment.

Fourth, the nature of the right as understood and incorporated by the Framers of the Fourteenth Amendment also affects the type of protection implied by that right. Being an individual right against all levels of government, the degree of scrutiny should

be heightened and governmental justifications viewed with skepticism. Furthermore, given the self-defense justifications of the right, any competing claim that seeks to deny the right of or need for self defense would be inconsistent with the embedded purpose and assumptions of the right to bear arms and hence invalid on its face. Finally, while there certainly are some restrictions on arms that even the Framers understood to be permissible – use only for lawful purpose, for example – any restrictions supposedly advancing permissible interests cannot be allowed to prevent ordinary citizens from exercising the core of the right and owning a weapon capable of protecting themselves, their families, and their communities if necessary, in the very circumstances where such protection would be necessary.

III. Incorporation and the Second Amendment in the Supreme Court.

The above material demonstrates that the Framers of the Fourteenth Amendment intended to incorporate the Bill of Rights generally, and the Second Amendment specifically, into the new amendment to make such rights enforceable against the States. The primary vehicle by which they understood themselves to accomplish that purpose was the Privileges or Immunities Clause, the content of which was so obvious to the Framers that it occasioned little, if any, dispute. This Court's Privileges or Immunities Clause jurisprudence, however, has largely neutered that provision and stripped it of its original intent and purpose. *See, e.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). This Court has instead shifted much of the work that naturally would have been

done by that clause instead to the Due Process Clause, creating the somewhat contradictory category of substantive due process, and struggling with what tests to apply to such an invented category.

At this point, however, the overwhelming weight of evidence and scholarly opinion makes clear that this Court should revisit its Privileges or Immunities Clause jurisprudence and ground the protection of individual rights as against the States in its historically and textually accurate source. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994) ("'everyone' agrees the Court [has] incorrectly interpreted the Privileges or Immunities Clause"); Thomas B. McAffee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282 (1986) ("this is one of the few important constitutional issues about which virtually every modern commentator is in agreement."); *see also* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1121, 1297 n. 247 (1995) ("[T]he *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause"); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1258-59 (1992) (noting that the *Slaughter-House* majority had "rendered the privileges or immunities clause unnecessary" and "strangl[ed] the privileges or immunities clause in its crib).

A more historically accurate approach to incorporation would plainly include the Second Amendment

right to bear arms as among the rights incorporated for protection against state infringement. As the previous discussion of the history of the Fourteenth Amendment demonstrated, the right to bear arms was among the essential protections the Framers sought to provide to freedmen threatened by their States, state militias, and others.

Any discussion of incorporation, of course, would be remiss in not at least briefly addressing this Court's key decisions regarding incorporation generally and the Second Amendment in particular. This Court's decisions in the *Slaughter-House Cases*, *Cruikshank*, *Presser*, and *Miller*, however, do not undermine the incorporation of an individual right to bear arms consistent with the intent of the Framers of the Fourteenth Amendment.

In the *Slaughter-House Cases*, this Court recognized that a "pervading purpose" among the reconstruction-era amendments was the "security and firm establishment of [the freedom of the slave race], and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." 83 U.S. (16 Wall.) at 71. Recognizing that understanding those amendments required looking to the "evil which they were designed to remedy, and the process of continued addition to the Constitution," this Court recounted the problem created by the *Dred Scott* and the solution adopted by the Fourteenth Amendment's citizenship clause, essentially overruling the *Dred Scott* decision. *Id*. at 73.

From there, however, the Court went astray, and opined that the Privileges or Immunities Clause only

protected rights that were unique to national citizenship, and did not cover rights that were also rights of *state* citizenship, including essentially all fundamental rights previously understood as the duty of *all* governments to protect. *Id*. at 74-80. The Court thus seemingly excluded all of the usual individual rights from the scope of the privileges or immunities of national citizenship, as distinct from the privileges or immunities of state citizenship or just citizenship in general. *Id*. at 78-79. While conceding that at least some rights protected by the Constitution would be encompassed within the Fourteenth Amendment's privileges and immunities clause, the Court found such rights not to be implicated by the case at hand and thus went no further in defining what rights would be included. *Id*. at 80-81.

The conventional reading of the *Slaughter-House Cases* understands the decision to render the Privileges or Immunities Clause largely meaningless in terms of incorporating the Bill of Rights as against the States. Although recognizing the general purpose of the Framers to protect the freedmen, the decision failed to acknowledge that the Fourteenth Amendment sought to remedy precisely the problem that the Bill of Rights did not apply directly to the States and hence the States were abusing the rights set forth therein.

The history of the Fourteenth Amendment with respect to the right to bear arms demonstrates that such a constricted reading of the Fourteenth Amendment's Privileges or Immunities Clause is simply wrong. It was the express intent of the Framers to protect constitutional rights which, while *previ-*

ously the responsibility of the States to secure for their citizens, were being ignored and abused by those very States. And, as for the right to bear arms in particular, there is ample evidence that it was among the very central privileges or immunities of national citizenship that the Framers sought to protect. Insofar as the *Slaughter-House Cases* is understood to reach a contrary conclusion, the decision should be overruled. *Cf. Saenz* v. *Roe*, 526 U.S. 489, 522-28 (1999) (Thomas, J., dissenting) (raising possibility of reviving the Privileges or Immunities Clause).

In any event, whether incorporation is based on the Privileges or Immunities Clause, or by having substantive due process pick up the work intended to be done by the earlier clause, this Court already has incorporated much of the Bill of Rights into the Fourteenth Amendment. Whatever theory of incorporation this Court selects, it should be mindful of the specific history and intent to incorporate the right to bear arms as an individual right necessary to protect freedmen against state and local governments and militias. That history and intent necessarily trump the theoretical speculation regarding whether any original federalism aspect of the Second Amendment should preclude subsequent incorporation. The views of the Framers of the Fourteenth Amendment were to the contrary and those views are of greater significance in this context.

While it would be better and more coherent to reclaim a proper understanding of the privileges and immunities clause as the basis for incorporation, any path respectful of the history of the Fourteenth

Amendment would incorporate the right to bear arms.[7]

Turning to this Court's cases directly mentioning the Second Amendment, those cases stand for far less than petitioners and their *amici* suggest.

This Court's decision in *United States* v. *Cruikshank*, 92 U.S. (2 Otto) 542 (1876), for example, does not conflict with incorporation, and in fact seems to support it. In *Cruikshank*, the question confronting this Court was whether private conduct by one group of citizens against another violated, *inter alia*, the First Amendment right to assemble and petition, the Second Amendment right to bear arms, and the Fourteenth Amendment rights to life and liberty and to the exercise of their rights, privileges, and immunities as citizens of the United States and the State of Louisianna. 92 U.S. (2 Otto) at 544-45.

Rather than disputing the existence of such individual rights, the Court affirmatively endorsed the

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[7] Even were incorporation based upon the Privileges or Immunities Clause, as suggested by the Framers of the Fourteenth Amendment, the debate over selective versus total incorporation would still remain. While the Fourteenth Amendment Framers frequently referred to providing protection for the bill of rights, their view of what *individual* rights were encompassed therein was somewhat uncertain. The evidence is quite strong as to the rights to speak, to assemble, and to petition the government and, as we have seen, is both strong and specific regarding the right to bear arms. However, incorporation of provisions such as the Establishment Clause, which some view as a prohibition of a national church and protection for potential state churches, rather than a protection for individuals, got little mention from the Framers, has little contemporaneous history bearing on the Fourteenth Amendment, and thus would pose different questions than incorporation of the Second Amendment.

view that such rights in fact pre-existed the Constitution and considered only the question whether the *federal government* was empowered by the Constitution to protect such rights as against *private* infringement.

In discussing the right of "bearing arms for a lawful purpose," this Court viewed that right, like the First Amendment right to assemble, as pre-existing the Constitution, neither "granted" by it nor "in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress[,] * * * leaving the people to look for their protection against any *violation by their fellow-citizens* of the rights it recognizes, to" the States. *Id.* at 553 (emphasis added). It was in that context of describing the limited jurisdiction of the First and Second Amendments standing alone that this Court commented that the Bill of Rights "was not intended to limit the powers of the State governments in respect of their own citizens, but to operate upon the national government alone." *Id.* at 552.

Far from undermining incorporation, such a judicial view of the Bill of Rights was recognized by the Framers of the Fourteenth Amendment and was the very reason for *adding* an amendment that would protect such rights against state infringement. Indeed, this Court seemed to recognize as much when it later distinguished the case before it as involving the conduct of *private parties*, not state actors, and thus observed that the Fourteenth Amendment "adds nothing to *the rights of one citizen as against another*.

It simply furnishes an additional *guarantee against any encroachment by the States* upon the fundamental rights which belong to every citizen as a member of society." *Id*. at 554 (emphasis added).

This Court's discussion thus seems to *endorse* such incorporation, treating the Fourteenth Amendment as a guarantee against *state* deprivation of the fundamental rights of citizens, which it had already described as including the pre-existing right to bear arms; a right not "dependent" upon the Constitution "for its existence," *id*. at 553, in precisely the same manner as the right to assemble was not dependent upon the Constitution, but rather inhered in the very notion of "citizenship under a free government," *id*. at 552.

Presser v. *Illinois*, 116 U.S. 252 (1886), likewise follows the same path as *Cruikshank*. Considering whether state restrictions on the claimed right of "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns" violated the right to keep and bear arms or the right to assemble, this Court found no violation. *Id*. at 264-65. Repeating *Cruikshank*'s analysis of the Second Amendment itself as being only a limit on the national government, *id*. at 265, this Court then turned to the Fourteenth Amendment. But instead of holding that First and Second Amendment rights were not attributes of national citizenship or otherwise excluded from the Fourteenth Amendment's protection, this Court held that the claimed right to military *association* and *drilling* with arms did not implicate the right to bear arms at all, only potentially the right to assemble. *Id*. at 266-67. As to

the right to assemble, this Court cited *Cruikshank* for the proposition that the First Amendment right to assemble and petition the government *was* indeed "an attribute of national citizenship," but then held that the claimed right to associate and drill as a military company lacked the expressive purpose of petitioning the government and hence was not within the scope of the protected right. *Id*. at 267.

In the end, therefore, the case simply decides that the particular right claimed – one of military organization and assembly – fell within neither the right to bear arms nor the right to assemble and petition the government. In the course of doing so, however, this Court actually confirmed that, within their proper scope, the rights protected by the First and Second Amendments are indeed attributes of national citizenship and part of the privileges or immunities of such citizenship, protected by the Fourteenth Amendment against state infringement. While the facts of the case did not involve any actual abridgement of those rights according to this Court, the reasoning in *Presser*, as in *Cruikshank*, supports incorporation of the Second Amendment.

Finally, in *Miller* v. *Texas*, 153 U.S. 535 (1894), this Court merely reiterated its earlier holdings that the Second Amendment did not operate *directly* upon the States, and disposed of a Fourteenth Amendment incorporation claim by noting the "fatal" failure to raise the issue in the trial court. *Id*. at 538.

In the end, regardless *how* the right to bear arms is incorporated into the Fourteenth Amendment, the history of that Amendment demonstrates that the Framers intended such incorporation, viewed the

right as a personal one, and thereby defined or redefined the right to bear arms even as against the federal government. Nothing in this Court's cases on the operation of the Second Amendment alone conflicts with the notion of incorporation via the Fourteenth Amendment, and this Court's reasoning in fact supports incorporation. Such incorporation, in turn, supports the decision below.

CONCLUSION

For the reasons above, this Court should affirm the judgment of the Court of Appeals for the District of Columbia Circuit.

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