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 *AMICI CURIAE* SENATOR KAY BAILEY HUTCHISON, SENATOR JON TESTER, REPRESENTATIVE MARK SOUDER, REPRESENTATIVE MIKE ROSS, AND X ADDITIONAL MEMBERS OF UNITED STATES SENATE AND Y ADDITIONAL MEMBERS OF UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are Senator Kay Bailey Hutchison, Senator Jon Tester, Representative Mark Souder, Representative Mike Ross, and X additional members of the United States Senate and Y additional members of the United States House of Representatives. *See* Appendix. As elected federal officials, *amici* have an interest in protecting the constitutional rights of their constituents and the American people in general. Moreover, Congress has a particular responsibility to enact legislation to protect and enforce constitutional rights guaranteed by the Fourteenth Amendment. Congress also has a more general responsibility to interpret the Constitution in deciding what laws to pass, and *amici* take that responsibility seriously. "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States v. Nixon*, 418 U.S. 683, 703 (1974).

Congress has a long history of protecting the right of the people to keep and bear arms. It was Congress, after all, that proposed the Second Amendment, and the rest of the Bill of Rights, to

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[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the States in 1789. Congress likewise proposed the Fourteenth Amendment in 1866, following and to further Congress' attempts in the Freedmen's Bureau Act and the Civil Rights Act to restore to freed slaves their right to keep and bear arms. In addition, Congress has enacted statutes such as 42 U.S.C. § 1983 that protect and enforce the Second Amendment against state action and other statutes that explicitly declare its understanding of the Second Amendment as guaranteeing fundamental, individual rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Heller v. District of Columbia*, 128 S. Ct. 2783 (2008), this Court recognized the individual right to keep and bear arms memorialized in the Second Amendment. This landmark decision ended years of debate over whether the right protected by the Second Amendment is individual or collective in nature. Having affirmed the original meaning of the right to keep and bear arms and definitively interpreted the Second Amendment to protect an individual right, this Court now should give full effect to that right by applying it to the States through the Fourteenth Amendment. Any other result would leave the rights of the citizens of the several States unprotected and undermine Congress' ability to enforce and protect this vital right through the Fourteenth Amendment's Enforcement Clause.

The history of the adoption of the Fourteenth Amendment is replete with references to protecting the right to keep and bear arms. Indeed, the pre-Fourteenth Amendment Freedmen's Bureau Act explicitly sought to end the systematic disarmament of freed slaves. The Fourteenth Amendment was the constitutional continuation of Congress' legislative efforts, and the Enforcement Clause provided a clear basis for these continuing efforts. It is clear that the Framers of the amendment intended to protect the right to keep and bear arms against state action.

It has long been recognized that the right to keep and bear arms pre-existed not only the

Fourteenth and Second Amendments, but the Constitution itself. The Second Amendment was adopted to ensure that the federal government could not interfere with this well-settled right. That the Founders did not expressly mandate respect for this right by the States simply reflects that the Constitution did not enhance the States' ability to infringe that right and the lack of concern at the time that the States, as opposed to the new national government, would seek to do so. In fact, even apart from the Second Amendment, the original Constitution restricted the States' ability to infringe the right to keep and bear arms to the extent that doing so would impair Congress' powers under the Militia Clauses. The Fourteenth Amendment simply restored and clarified the protection of a right that had always existed, after the potential for States' interference with the right had become manifest.

Under any theory of incorporation, the right to keep and bear arms should apply to the States. *Heller* fully captures the fundamental nature of the right at the Founding. As borne out by the history of the Fourteenth Amendment, the right to keep and bear arms was considered, if anything, even more fundamental after the Civil War. Because incorporation is now well established for fundamental substantive guarantees of the Bill of Rights, the question here is really whether there is some special reason to single out the Second Amendment for exclusion from incorporation. To the contrary, the fundamental nature of the right to keep and bear arms, its foundation in the unamended Constitution, its textual embodiment

in a separate amendment, and its prominence in the adoption of the Fourteenth Amendment make the case for its incorporation an easy one. In addition, incorporation has the virtue of applying the same body of law to both sovereigns and avoiding resort to substantive due process to fashion a shadow version of the Second Amendment for the States. That virtue is particularly compelling in light of the need for the courts to flesh out Second Amendment doctrine after *Heller*.

Congress has a unique interest in upholding the right to keep and bear arms. Congress, after all, proposed both the Second and Fourteenth Amendments. Moreover, Congress recognizes—and has stated explicitly in legislation—the importance of this right. Incorporation would also make clear that Congress has the authority to enforce Second Amendment rights pursuant to Section 5 of the Fourteenth Amendment and help preserve Congress' war powers.

ARGUMENT

I. The Right To Keep And Bear Arms Is Uniquely Suited To Incorporation Through The Fourteenth Amendment.

Section 1 of the Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV, § 1. Section 5 of

that same amendment provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." This Court has interpreted the Fourteenth Amendment's basic guarantee in Section 1 to prevent the individual States from infringing many of the guarantees of liberty found in the Bill of Rights. It is clear from the nature of the right to keep and bear arms and the history of the Fourteenth Amendment that this right likewise applies against the States.

A. The History Of The Fourteenth Amendment Requires The States To Respect Every Citizen's Right To Keep And Bear Arms.

1. Legal emancipation did not automatically translate into the full enjoyment of liberty. Freedmen were frequently deprived of constitutional rights by recalcitrant state and local authorities. This historical context, and the laws enacted by Congress to restore the rights of freedmen, must inform any interpretation of the Fourteenth Amendment.

The early Reconstruction period witnessed widespread disarmament of black citizens by state and local authorities. *See Heller*, 128 S. Ct. at 2810. Congress quickly took note. Senator Charles Sumner relayed to the Senate a memorial from a convention of black citizens of South Carolina, including a plea for "the constitutional protection in keeping arms." CONG. GLOBE, 39th Cong., 1st Sess. 337 (Jan. 22, 1866). Representative Sidney Clarke condemned a state law that prohibited blacks from

possessing and carrying firearms, as well as the practice of disarming "black Union soldiers." *Id.* at 1838. These deprivations were far from isolated incidents. Congress recorded numerous reports of firearms confiscation. *See*, *e.g.*, *id.* at 517; House Ex. Doc. No. 70, 39th Cong., 1st Sess., at 236-39 (1866); Report of the Joint Comm. on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 21; pt. 4, at 49-50; pt. 2, at 272.

Members of Congress urged the body to assure to black citizens the same rights held by whites. Representative Zachariah Chandler emphasized that "'[t]he right of the people to keep and bear arms' must be so understood as not to exclude the colored man from the term 'people.'" *Id.* at 217. As an initial response, Congress passed the Freedmen's Bureau Act in 1866. The Act expressly protected, *inter alia*, "the constitutional right to bear arms." 14 Stat. 173, 176. This language stemmed directly from the concerns about confiscation of arms by state and local authorities.

Congress also enacted the Civil Rights Act of 1866, 14 Stat. 27. Although not as textually explicit in its protection of firearms rights, the Act extended to freedmen the same right "to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ." *Id.* (codified at 42 U.S.C. § 1981). This language was understood by contemporaries in Congress to include the right to

keep and bear arms.[2] Representative James Wilson described the bill as "reducing to statute form the spirit of the Constitution." CONG. GLOBE, 39th Cong., 1st Sess. 1117. Representative John Bingham explained that the Freedmen's Bureau Act—which explicitly protected the constitutional right to bear arms—"enumerate[d] the same rights and all the rights and privileges that are enumerated in the first section of this bill . . . ." *Id.* at 1291-92 (Mar. 9, 1866). Representative Thomas Eliot similarly observed that the Freedmen's Bureau Act "simply embodies the provisions of the civil rights bill." *Id.* at 2773. With more specificity, Senator Lyman Trumbull, who introduced the bill, argued the bill was necessary to end laws that, among other things, forbade "any negro or mulatto from having firearms." *Id.* at 474 (Jan. 29, 1866).

It has long been recognized that the Fourteenth Amendment provided constitutional protection for the rights protected by the Civil Rights Act of 1866 and attempted to establish the constitutional authority of Congress to protect those rights. *See Saenz v. Roe*, 526 U.S. 489, 526-27 n.6 (1999) (Thomas, J., dissenting) ("The one point upon which historians of the Fourteenth Amendment agree, and, indeed, which the evidence places beyond cavil, is that the Fourteenth

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[2] The language "security of person" likely invoked the right of self-preservation and defense recorded by Blackstone. *See* Stephen P. Halbrook, *The Freedmen's Bureau Act and the Conundrum over Whether the Fourteenth Amendment Incorporates the Second Amendment*, 29 N. Ky. L. Rev. 683, 688-89 (2002).

Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills, particularly the latter, beyond doubt") (quotation omitted). Representative George Julian argued that the Fourteenth Amendment was needed to uphold the Civil Rights Act because it had been "pronounced void by the jurists and courts of the South." CONG. GLOBE, 39th Cong., 1st Sess. 3210. As a specific example, Representative Julian cited a state law making it "a misdemeanor for colored men to carry weapons" without a license. *Id.* Likewise, Representative Thayer argued that the Fourteenth Amendment "is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become law." *Id.* at 2465 (May 8, 1866).

2. Not surprisingly given the background just described, the Congress that passed the Fourteenth Amendment left no doubt that it considered the right to keep and bear arms a critical component of its work. The Enforcement Clause in particular reaffirmed Congress' authority to enact the Freedmen's Bureau and Civil Rights Acts, which clearly protected that right. Evidence from the debates regarding the Fourteenth Amendment pointedly identifies the right to keep and bear arms as one of the rights that Sections 1 and 5 allowed to be enforced against the States. For example, Senator Samuel Pomeroy remarked that every citizen should "have the right to bear arms for the defense of himself and family and his homestead." *Heller*, 128 S. Ct. at 2811 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1182). Senator Jacob Howard described Section 1 as prohibiting state

infringement of "the right to keep and bear arms." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). The inescapable conclusion is that Congress believed it had secured firearms rights against state invasion and reaffirmed its own authority to protect those rights.[3]

The ratification debates in the States reinforce this conclusion. For example, though divided into two camps, the Massachusetts legislature viewed it as common ground that the right to keep and bear arms would be binding on the States under Section 1. The majority committee report stated that Section 1 was unnecessary in this regard because the Bill of Rights already applied directly to the States; the minority urged ratification to eliminate doubt about that proposition. Halbrook, FREEDMEN, 71-72. In many States, objectors to the proposed amendment similarly based their opposition on the belief that Section 1 duplicated rights already held by the people—including the right to keep and bear arms. *Id.* at 73 (citing sources); *see also Heller*, 128 S. Ct. at 2811 (quoting Rep. Nye). Although these debates may show that not everyone was familiar with, correctly understood, or agreed with this Court's decisions holding that the Bill of Rights restricted only the national government, *see, e.g., Barron v. Baltimore*,

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[3] Numerous scholars have reached this conclusion. *See*, *e.g.*, Eric Foner, RECONSTRUCTION 258-59 (1988); Stephen P. Halbrook, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, 33-38 (1998); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359, 1451-53.

32 U.S. (7 Pet.) 243, 250 (1833), the important point is that it was widely understood and intended that the States would be, and should be, required to respect citizens' right to keep and bear arms.

This understanding was echoed by legislators shortly after the Fourteenth Amendment's ratification. Representative Henry Dawes, for example, described Section 1 as securing in part "the right to keep and bear arms in [one's] defense." CONG. GLOBE, 42d Cong., 1st Sess. 475 (1871). Other Representatives and Senators frequently invoked the Fourteenth Amendment as applying the Bill of Rights to the States. *See* Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 25-27 (2007). And there is evidence suggesting that the Fourteenth Amendment was popularly understood to incorporate the right to keep and bear arms. *See*, *e.g.*, Halbrook, FREEDMEN, at 36, 107-08 (citing newspaper reports and law school text).

In short, the intent to protect the right to keep and bear arms from state interference was unmistakable. After the Civil War, Congress sought through legislation to ensure that freedom for black citizens. The same desire was reflected in Congress' proposed Fourteenth Amendment, which was intended by its Framers to protect this right from invasion by the States. The intent to achieve this result was overwhelmingly shared, even if there was less of a consensus about the means to that end. Some may have misunderstood the case law and believed that the Second Amendment

already applied of its own force to the States. Some may have believed that the Privileges or Immunities Clause made the first eight amendments, as a body, applicable to the States. Some may have believed that the Due Process Clause had that effect. But any lack of clarity or unanimity about the technical doctrinal route to that end cannot obscure the shared intent and expectation that the States would be bound to respect all citizens' rights to keep and bear arms. And, of course, the most relevant intent is that of the Congress that proposed the Fourteenth Amendment and clearly intended Section 1 to protect the right to keep and bear arms and Section 5 to empower Congress to enforce that right.[4]

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[4] This Court has not accepted the argument that Section 1 made the first eight amendments, as a whole, applicable to the States. *See, e.g., Adamson v. California*, 332 U.S. 46, 53 (1947); *id.* at 68-123 (Black, J., dissenting). Nonetheless, it remains true that the historical record is replete with statements describing Section 1 as doing just that. *See*, *e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1088 (Feb. 28, 1866) (statement by Rep. Bingham that Fourteenth Amendment would "arm the Congress . . . with the power to enforce this bill of rights as it stands in the Constitution today"); *id.* at 2459 (May 8, 1866) (statement by Rep. Stevens that "the Constitution limits only the action of Congress, and is not a limitation on the States. This Amendment supplies [sic] that defect, and allows *Congress* to correct the unjust legislation of the States . . ."); *see also* Akhil Reed Amar, THE BILL OF RIGHTS 186 (1998) (counting at least thirty statements interpreting Section 1 to incorporate the Bill of Rights). In all events, the specific evidence of the Amendment's framers' intent to restore and preserve the right to keep and bear arms makes it unnecessary to revisit "total incorporation" question.

B. The Structure Of The Constitution And The Nature Of The Individual Right To Keep And Bear Arms Require The States To Respect That Right.

1. The right to keep and bear arms was not given to the people by the Second Amendment. Rather, "the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." *Heller*, 128 S. Ct. at 2797 (emphasis in original). As the Court declared in *United States v. Cruikshank*, the right to keep and bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." 92 U.S. 542, 553 (1875).

Precisely because the right to keep and bear arms was recognized as a fundamental right that pre-existed the Constitution, the Founders debated whether the Second Amendment was even necessary. Proponents of the federal Constitution argued that the national government's enumerated powers would not include the power to infringe the right to keep and bear arms and that, therefore, an amendment to protect that right would be superfluous at best and unintentionally restrictive of the right at worst. *See*, *e.g.*, THE FEDERALIST NO. 84 (Hamilton); *see also Heller*, 128 S. Ct. at 2801. Prominent Antifederalists were less sanguine about the likelihood that the general government would limit itself strictly to its enumerated powers: "During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist

rhetoric." *Heller*, 128 S. Ct. at 2801. Some state ratifying conventions proposed the addition of an amendment to the Constitution to protect the right to keep and bear arms. *See* David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 Harv. J. L. & Pub. Pol'y 559, 602-04 (1986). Ultimately, as with the pre-existing substantive freedoms protected by the First and Fourth Amendments, the Founders codified the right to keep and bear arms in the Second Amendment.

At the time the Constitution was designed and ratified, no similar fear was expressed that the governments of the several States would seek to disarm their citizens. The States' potential ability to infringe the pre-existing right to keep and bear arms was not enhanced by the federal Constitution, and States had generally respected that right. What is more, many state constitutions contained their own provisions expressly protecting this pre-existing right. *See Heller*, 128 S. Ct. at 2802-04. In short, the Framers of the federal Constitution did not codify the right to keep and bear arms as against the States, not because they intended to eliminate or jeopardize that right, but because they did not perceive a threat that the States would interfere with the right and certainly did not think the federal Constitution enhanced the States' ability to do so. Indeed, if anything, the Militia Clauses reduced the scope for state interference with the right.

What was unthinkable in 1789 became reality by 1868 at least for some citizens whose full citizenship was resisted by many. Reconstruction

made plain that at least some States could and would disarm some of their citizens. That Congress sought to restore the right to keep and bear arms—and other liberties previously codified only as against the federal government—therefore comes as no surprise. The Fourteenth Amendment simply gave full effect and protection to a right that had always existed but that the Founders had not thought needed positive-law protection against state infringement. *See Nordyke v. King*, 563 F.3d 439, 456 (9th Cir.), *reh'g en banc granted*, 575 F.3d 890 (2009).

2. The need for incorporation derives, at least in part, from this Court's opinion in *Barron*, 32 U.S. (7 Pet.) at 250, which held that the Bill of Rights did not apply directly to the States. The Court reaffirmed *Barron* in *Cruikshank* and explicitly held that the Second Amendment "means no more than that it shall not be infringed by Congress." 92 U.S. at 553.

There was an antebellum school of thought, however, that the Second Amendment originally applied to the States. William Rawle, an early and influential constitutional scholar, stated that "[n]o clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both." William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125-26 (1825).

Even after *Barron*, some state Supreme Courts held themselves bound by the Second Amendment. Georgia's Constitution, for example, did not codify the right to keep and bear arms. Yet the Georgia Supreme Court concluded that "[t]he language of the *second* amendment is broad enough to embrace both Federal and State governments . . . ." *Nunn v. State*, 1 Ga. 243, ___ (1846); *see also State v. Buzzard*, 4 Ark. 18 (1842) (construing Second Amendment); *State v. Chandler*, 5 La. Ann. 489 (1850) (same). And, of course, some of the same sentiments were reflected by those in the ratification debates who thought the Fourteenth Amendment was unnecessary to protect Second Amendment rights from state action.

The point is not that these scholars and jurists correctly interpreted the Second Amendment. Nor is it to revisit *Barron*. Rather, it is yet one more indication of the widespread belief that citizens' right to keep and bear arms was viewed as inviolable, even by States.

3. Even granting that the Second Amendment, independent of the Fourteenth, applies only to the federal government, the States have never had free rein to restrict firearms. *Heller* recognized that the right to keep and bear arms serves at least the purpose of ensuring "a well-regulated militia" for the common defense. 128 S. Ct. at 2801. The Constitution apportions authority over the militia between the States and Congress, and it gives Congress certain enumerated powers set forth in the Militia Clauses of Article I:

> "To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;
>
> To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress[.]"

U.S. CONST. art. I, § 8, cl. 15-16.

The Militia Clauses presume the existence of the militia and use "militia" as a term of art, essentially meaning all able-bodied males capable of military defense. *See Heller*, 128 S. Ct. at 2799-800. A disarmed populace, however, would be powerless to answer Congress' call and would frustrate Congress' ability to employ its power under the Militia Clauses. *See infra* at ___. Hence, the Militia Clauses presume the continued existence of an armed citizenry. Under this constitutional arrangement—irrespective of the Second and Fourteenth Amendments—the States could not and cannot restrict the right to keep and bear arms in a manner that undermines Congress' ability to exercise its enumerated militia powers.

This Court recognized as much in *Presser*, explaining that the Militia Clauses limit the States' ability to disarm their citizens:

> "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of

> the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, *the States cannot*, even laying the [Second Amendment] out of view, *prohibit the people from keeping and bearing arms*, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government."

116 U.S. at 265 (emphasis added). Even a cursory review of the Second Militia Act of 1792 confirms the correctness of *Presser*'s conclusion. The Second Militia Act prescribed in considerable detail the types of weapons that citizens then eligible for the militia were to bring with them when called to assemble. *See* 1 Stat. 271-72. If the States were free to ban possession of these same firearms, the congressional exercise of the militia power would be directly frustrated.

Although *Presser* reiterated *Cruikshank*'s holding that the Second Amendment does not apply directly to the States, the above passage plainly reasoned that the constitutional design imparts some limits on a State's ability to restrict the right to keep and bear arms. And it always has.

The Militia Clauses narrow considerably the issue before the Court today. It is unquestionably the case that the right to keep and bear arms limits the States in some fashion. The only remaining question is to what degree. Incorporation against the States of the right to keep and bear arms as

reflected in the Second Amendment would have the salutary effect of obviating the development of two different rights to keep and bear arms of different scope. The development of a unified Second Amendment jurisprudence is of particular practical benefit in light of the relatively nascent state of the jurisprudence due to the confusion sown by *United States v. Miller*, 307 U.S. 174 (1939). Moreover, incorporation would properly treat the Militia Clauses, the Second Amendment, and the Fourteenth Amendment as a unified whole, codifying the fundamental right to keep and bear arms that the Founders believed pre-dated the Constitution.

C. Under Any Theory Of Incorporation, The Right To Keep And Bear Arms Should Apply To The States.

The Court has chosen the Due Process Clause of the Fourteenth Amendment as the vehicle for incorporation. Even Members of the Court who may not have agreed with this approach as an original matter have accepted that it is by now well established. *See*, *e.g.*, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470 (1992) (Scalia, J., concurring in judgment). Given that nearly every other individual right guaranteed by the Bill of Rights has been held to apply against the States, the operative question in this case is whether there is a special reason *not* to incorporate the right to keep and bear arms. Not only is a special reason to reject incorporation lacking, but the case for incorporation is especially strong.

1. This Court has held that the Fourteenth Amendment incorporates many rights that are considered "fundamental." *See*, *e.g.*, *Benton v. Maryland*, 395 U.S. 784, 794-95 (1968); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). Under that standard, the Second Amendment has a powerful case for incorporation. To support this conclusion, the Court need look no further than its opinion in *Heller*. *See* 128 S. Ct. at 2798 ("By the time of the founding, the right to have arms had become fundamental for English subjects."); *see also Nordyke*, 563 F.3d at 451-53 (comparing *Heller*'s analysis of the fundamental nature of the right to keep and bear arms with the analysis in *Duncan v. Louisiana*, 391 U.S. 145 (1968), of the jury trial right in serious criminal cases).

Early constitutional scholars agreed. The right to keep and bear arms was frequently extolled as the "palladium" of liberty. William Blackstone, Commentaries, app. at 300 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803); 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1897; Rawle, at 125. A well-armed citizenry was considered a bulwark against tyrannies from without and within. *Heller*, 128 S. Ct. at 2800-01. The right to keep and bear arms was vital to personal security as well. *Id.* at 2805. In short, the right to keep and bear arms "was a right crucial to safeguarding all other rights." *Nordyke*, 563 F.3d at 452.

2. The Second Amendment also bears several objective characteristics that strongly favor incorporation. Most obviously, the first Congress dedicated an entire amendment to the protection of

the right to keep and bear arms. While other amendments protect a cluster of substantive rights or an admixture of procedural and substantive rights, the right to keep and bear arms stands alone. It would be odd to leave this substantive right completely unprotected against state action. In addition, as this Court noted in *Heller*, the Second Amendment employs the same key term, "the people," that the Framers used to protect fundamental, individual rights in the First and Fourth Amendments. 128 S. Ct. at 2790. Given that this Court has incorporated the fundamental substantive guarantees of the First and Fourth Amendments, *see*, *e.g.*, *De Jonge, supra*; *Mapp v. Ohio*, 367 U.S. 643 (1961), it would be odd indeed to single out the Second Amendment for exclusion.

Moreover, the text of the Amendment has no limiting language of the kind contained in the First Amendment. *Compare* U.S. CONST. amend. I ("Congress shall make no law . . ."). Incorporation of the Second Amendment, thus, does not face the same interpretive difficulties associated with the First Amendment's textual reference to Congress. *See Silveira v. Lockyer*, 328 F.3d 567, 576 n.46 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc).

The centrality of the right to keep and bear arms is underscored by the fact that even the unamended Constitution limited state regulation of the right. As noted above, the States may not restrict the right to keep and bear arms in a way that undermines Congress' ability to call forth the militia. *See Presser*, 116 U.S. at 265. The Constitution does not similarly restrict the States

with respect to any other right in the first eight amendments. It would be highly anomalous to reject incorporation of the one right that the original Constitution protected, at least to some degree, against state action. *Cf. Duncan*, 391 U.S. at 153 n.20 (incorporating Sixth Amendment jury trial right despite "relatively clear indication that the framers of the Sixth Amendment did not intend its jury trial requirement to bind the States").

Finally, the historical background of the Fourteenth Amendment uniquely exhibits its framers' efforts to protect the right to keep and bear arms. The Freedmen's Bureau Act and the Civil Rights Act evidenced a concerted effort by Congress to restore the right to keep and bear arms to freedmen. The Fourteenth Amendment provided constitutional protection for the same right and through the Enforcement Clause ensured that Congress had the power to protect and enforce it. If the Court were to find the Second Amendment not to be incorporated, it would likely frustrate Congress' intent by putting Second Amendment rights beyond the scope of the Enforcement Clause. *Cf. City of Boerne v. Flores*, 521 U.S. 507 (1997).

This history must matter lest the Court's incorporation doctrine become completely anti-historical. To be sure, this Court has incorporated other rights based solely on their fundamental nature, even without evidence that the Fourteenth Amendment was intended to restore or protect them. For example, the Court held in *Benton*, 395 U.S. at 794, that the right against double jeopardy applied to the States through the Fourteenth Amendment, without inquiring whether the States

were subjecting citizens to double jeopardy or whether such concerns motivated Congress to propose the Fourteenth Amendment, and we are aware of no evidence to that effect. In contrast, it is clear that States' disarming of freedmen was a principal concern of Congress. It is one thing for incorporation doctrine to be ahistorical in the sense of permitting incorporation of a right even without a showing that the Fourteenth Amendment was intended to protect that specific right. It would be quite another thing, and entirely unjustifiable, to make incorporation doctrine anti-historical by rejecting incorporation of a right that the Fourteenth Amendment was specifically intended to protect.

3. To decide this case, the Court does not need to revisit whether incorporation of individual rights through the Due Process Clause is the, or an, appropriate approach as an original matter. As Justice Scalia has observed, the doctrine that "explicit substantive protections of the Bill of Rights" can be "included within the Fourteenth Amendment" is "both long established and narrowly limited . . . ." *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring). That observation would be no less true following incorporation of the Second Amendment's "explicit substantive protections."

In addition, the Second Amendment does not suffer from concerns that may attend the incorporation of other Bill of Rights provisions. Some have read the Establishment Clause, for example, as a federalism provision as opposed to an individual right. *See Elk Grove Unified Sch. Dist.*

v. Newdow, 542 U.S. 1, 49-50 (2004) (Thomas, J., concurring in judgment).[5] Before *Heller*, some had interpreted the Second Amendment in similar fashion, but *Heller* definitively rejected that view.

Indeed, incorporation of the right to keep and bear arms as reflected in the Second Amendment would have significant virtues. First, incorporation would obviate reliance on vague notions of substantive due process. When the Court has not incorporated a right contained in the Bill of Rights, it has often crafted a substantive due process restriction on the States that mirrors but ultimately dilutes the right. For example, *Palko v. Connecticut*, 302 U.S. 319 (1937), held that the Fifth Amendment's prohibition against double jeopardy did not apply to the States. Instead of applying the Fifth Amendment, the Court fashioned a narrower prohibition capturing only a subset of the double jeopardy prohibited by the Fifth Amendment. The Court asked: "Is *that kind* of double jeopardy to which the [state] statute has subjected [Palko] a hardship so acute and shocking that our polity will not endure it?" *Id.* at 328 (emphasis added).

This bifurcation of a right into its full-bodied federal version and its conscience-shocking subset has little to recommend it. Justice Scalia, joined by Justice Thomas, has explained that incorporating

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[5] Of course, the Court has already held that the Establishment Clause applies to the States through the Fourteenth Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

enumerated Bill of Rights protections is far different from recognizing new rights through substantive due process:

> I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights . . . .

TXO Production Corp., 509 U.S. at 470 (Scalia, J., concurring in judgment); *see also Duncan*, 391 U.S. 171 (Black, J., concurring).

A related virtue of incorporation is that if the States are bound by the Court's Second Amendment jurisprudence, it is unnecessary to develop a separate body of law to identify state restrictions that impermissibly conflict with either less-adumbrated concepts of substantive due process or Congress' Militia Clauses authority. "Second Amendment law remains in its infancy," *Nordyke*, 563 F.3d at 459, and complex questions will be presented by the variety of restrictions placed on the right to keep and bear arms. The Court should not compound the problem by requiring courts to develop multiple bodies of law relating to this right.

4. The court of appeals rested its decision on stare decisis. Pet. App. 2-4. Putting aside questions about the proper role of a court of appeals, *see id.* at 3-5, the stare decisis principles applicable to this Court reinforce that this Court

should hold that the right to keep and bear arms is incorporated against the States through the Fourteenth Amendment. This Court has never addressed *that* precise question, and its precedents interpreting the Second Amendment and applying the selective incorporation doctrine bolster the arguments for incorporation.

Following *Barron*, this Court has twice held that the Second Amendment does not apply *directly* to the States. *See Cruikshank*, 92 U.S. at 553; *Presser*, 116 U.S. at 265. Critically, though, neither *Cruikshank* nor *Presser* addressed the Fourteenth Amendment. The concept of incorporation—particularly through the Due Process Clause—simply had not been developed at the time. This point is confirmed by *Miller v. Texas*, 153 U.S. 535 (1894), in which the petitioner attempted to argue that the Second Amendment applied to the States through the Fourteenth Amendment. This Court rejected that argument solely because it had not been preserved. *Id.* at 538-39. The Court did *not* suggest that *Cruikshank* and *Presser* foreclosed the argument.

Of course, in later decades, the Court increasingly applied Bill of Rights guarantees to the States through the Fourteenth Amendment's Due Process Clause. *De Jonge* illustrates that the incorporation question may be considered differently from the direct application question in cases like *Cruikshank*. *De Jonge* superseded one of the holdings in *Cruikshank* and held that the First Amendment's "right of peaceable assembly" does apply to the States, albeit via the Fourteenth Amendment. 299 U.S. at 364. It would be striking

if this Court were to find that the same reasoning does not apply to the right to keep and bear arms.

Incorporation through the Due Process Clause has been the accepted methodology for decades. Nearly all of the individual rights in the first eight amendments to the Constitution have been applied to the States through the Due Process Clause. In light of this precedent, there should be a heavy presumption that the individual right to keep and bear arms is also incorporated. The central question in this case thus reduces to whether there is a special reason to single out the right to keep and bear arms for *exclusion* from incorporation. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 653 (1990) ("The obvious question, given the modern legal reality of the incorporation of almost all of the rights protected by the First, Fourth, Fifth, Sixth, and Eighth Amendments, is what exactly justifies treating the Second Amendment as the great exception."). As shown, however, nothing justifies its exclusion; quite the opposite is true.[6]

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[6] As explained at length in Petitioners' opening brief, the Privileges or Immunities Clause also may provide a foundation for applying the right to keep and bear arms to the States. *See* Petitioner's Br. at 9-65. The critical fact is that the framers of the Fourteenth Amendment wanted to guarantee that the States would respect citizens' right to keep and bear arms. Any uncertainty about which clause of the Fourteenth Amendment was the primary vehicle for guaranteeing that respect should not obscure their intent to safeguard the right.

II. Congress Has A Strong Interest In Preserving The Right To Keep And Bear Arms That Would Be Undermined If The Second Amendment Does Not Apply To The States.

Congress has a unique interest in preserving the right to keep and bear arms. Throughout the Nation's history, Congress has consistently stated its view that the Second Amendment codifies an individual right. Congress' intent in proposing the Enforcement Clause of the Fourteenth Amendment was to ensure that it had an adequate constitutional basis to protect, *inter alia*, the right to keep and bear arms. More recently, Congress has enacted legislation designed to preserve this right and to encourage citizens to exercise it. Incorporation would clarify Congress' authority in this area, including by confirming Congress' power to enforce the right to keep and bear arms through Section 5. Moreover, incorporation would help to preserve Congress' enumerated war powers.

A. Congress Has Consistently Recognized The Importance Of The Right To Keep And Bear Arms In Numerous Contexts.

Congress has a long history of recognizing and protecting individuals' right to keep and bear arms. *See generally* Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 Tenn. L. Rev. 597, 618-31 (Spring 1995). Congress acknowledged the right to bear arms in the Nation's first century by protecting the right when threatened during

Reconstruction and by refraining from efforts to restrict it on the federal level. Congress did not enact its first comprehensive firearms law until 1932. 47 Stat. 650. The Senate Report made clear that "the right of an individual to possess a pistol in his home or on land belonging to him would not be disturbed by the bill." S. Rep. 72-575.

At the outset of World War II, Congress authorized the President to seize certain property for the national defense under the Property Requisition Act. The Act explicitly excluded "the requisitioning or . . . registration of any firearms possessed by any individual for his personal protection or sport" and further denied that the Act could be used "to impair or infringe in any manner the right of any individual to keep and bear arms . . . ." 55 Stat. 742. The exclusion is remarkable. Even during a time when private supplies of firearms would have been useful for national defense, Congress emphasized the importance of citizens' right to keep and bear arms.

Similar statements of congressional support for Second Amendment rights are found in numerous pieces of legislation. *See*, *e.g.*, Gun Control Act of 1968, Pub. L. 90-618, § 101 ("[T]his title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."); Firearms Owners' Protection Act of 1986, Pub. L. 99-308, § 1(b)(1)(A) (expressing support for citizens' right "to keep and bear arms under the second amendment to the United States Constitution").

In fact, for nearly a century, Congress has encouraged firearms safety and familiarity through the Civilian Marksmanship Program ("CMP"). 36 U.S.C. §§ 40701-33. The CMP promotes marksmanship among the citizenry and sells surplus army rifles and ammunition to the public. Programs like the CMP demonstrate that Congress does not merely support Second Amendment rights in words but with actions as well.

B. Incorporation Would Confirm Congress' Authority To Enforce The Second Amendment Through Section 5 Of The Fourteenth Amendment And Affirm Congress' Original Intent.

Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." If the Second Amendment applies to the States through the Fourteenth Amendment, then, consistent with Congress' initial intent in proposing the Fourteenth Amendment, Section 5 authorizes Congress to pass legislation that enforces the right to keep and bear arms.

In part because of the ineffectiveness of the Freedmen's Bureau and Civil Rights Acts, and in part to eliminate concerns that Congress lacked (or would lack after the exigencies of the immediate aftermath of the Civil War passed) adequate power to enact such laws, Section 5 of the Fourteenth Amendment was proposed and ratified to permit enforcement by Congress. Congress then enacted other laws designed to further protect the rights protected in the earlier Civil Rights Act, such as

the provisions now codified in 42 U.S.C. § 1983. *See* Civil Rights Act of 1871, 17 Stat. 13. Finding that the Second Amendment is not incorporated against the States would directly frustrate Congress' intent and leave Second Amendment rights unprotected by § 1983 contrary to the intent of the current Congress.

In recent years, Congress has sought to preserve Second Amendment rights through legislation specifically directed at lawful firearm use. After attempts to ban handguns through civil litigation, Congress responded in 2005 by enacting the Protection of Lawful Commerce in Arms Act, Pub. L. 109-92. The Act prohibits imposition of liability on manufacturers and distributors of firearms for the misuse or unlawful use of firearms by others. 15 U.S.C. § 7902. Congress specifically invoked its power under the Enforcement Clause, observing that the law was designed "[t]o guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment." 15 U.S.C. § 7901(b)(3).

Congress has also prohibited the seizure or forced registration of lawfully possessed firearms by any "officer or employee of the United States . . . or person . . . receiving Federal funds . . . while acting in support of relief from a major disaster or emergency." 42 U.S.C. § 5207. Originally part of the Disaster Recovery Personal Protection Act, the statute was passed by the House of Representatives with specific findings that "[i]n the wake of Hurricane Katrina, certain agencies confiscated the

firearms of [citizens] in contravention of the Second Amendment, depriving these citizens of the right to keep and bear arms and rendering them helpless against criminal activity." 152 Cong. Rec. H5755, H5814 (July 25, 2006).[7]

In other legislation, Congress eliminated some restrictions on interstate travel with lawfully owned firearms. *See* 18 U.S.C. § 926A. Individuals may transport a firearm from one State to another as long as possession is lawful at both the origin and destination. The legislation prevents States from restricting what would otherwise be lawful ownership and possession of the firearm and is yet another example of Congress' efforts to enforce the Second Amendment guarantee. Finding that the Second Amendment is not incorporated would allow the States to frustrate Congress' effort to protect interstate travel with firearms.

In each of these enactments, Congress has expressed its desire to enforce Second Amendment rights. Incorporation of the Second Amendment would ensure that Section 5 is an available tool to vindicate the right to keep and bear arms. *Cf. Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (reserving question whether Congress could make the then-unincorporated Fourth Amendment exclusionary rule "binding upon the States" under Section 5). Recent legislation aside, it would be profoundly ironic if Section 5 were construed not to permit

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[7] This legislation ultimately was enacted as part of a larger appropriations bill, and the findings were removed (as is customary) when it was added to the appropriations bill.

protection of the right to keep and bear arms that Congress attempted to achieve through the Freedmen's Bureau and Civil Rights Acts and in the Fourteenth Amendment itself.

C. State Restrictions On The Right To Keep And Bear Arms Would Threaten To Impede Congress' War Powers.

The Constitution vests Congress with authority to raise a standing army and to call forth and regulate the militia. U.S. CONST. art. I, § 8, cl. 12, 15-16. If many States and local governments followed respondents' example, Congress' ability to exercise its enumerated martial powers would be undermined. Soldiers with previous firearms experience require less training and make better marksmen. *See* Arthur D. Little, Inc., *A Study of the Activities and Missions of the National Board for the Promotion of Rifle Practice* 47, 58, 64 (1966), *reprinted in* James B. Whisker, THE CITIZEN SOLDIER AND UNITED STATES MILITARY POLICY (1979). And in time of war, the period for training is reduced and pre-existing familiarity with firearms becomes even more important. No less an authority than President Eisenhower made this point in advising that a prospective soldier "will do well to learn all he can about the American military rifle" because "he will find the time all too short to learn the many things he should know, for his own self-preservation, before he is called upon to meet the enemy." Stephen P. Halbrook, *Nazism, the Second Amendment, and the NRA: A Reply to Professor Harcourt*, 11 Tex. Rev. L. & Pol. 113, 129 (2006) (citation omitted). These considerations apply equally to the regular armed forces and the

National Guard. Strict state gun-control laws thus could impede Congress' exercise of its war powers, just as this Court recognized long ago in *Presser*. *See* 116 U.S. at 265.

Similar concerns attend Congress' militia powers. It remains the law of the land that the reserve or unorganized militia constitutes all able-bodied males between 17 and 45. 10 U.S.C. § 311; *see also Silveira*, 328 F.3d at 581 (Kleinfeld, J., dissenting from denial of rehearing en banc) ("Those of us who are male and able-bodied have almost all been militiamen for most of our lives whether we know it or not . . . ."). Congress now provides arms, ammunition, or uniforms for the reserve militia.[8] Implicit in the statute is an understanding that a substantial portion of the reserve militia will keep their own arms. The same understanding likely inheres in the Militia Clauses. State laws restricting firearm possession, by preventing the reserve militia from keeping firearms and thus being prepared, could seriously threaten the effectiveness of any attempt by Congress to call forth the militia.

Lest the suggestion that Congress might call forth the militia sound antiquated, it bears emphasis that the reserve militia has served nobly within living memory. During World War II, with the regular armed forces engaged in two far-flung theaters, citizen-soldiers performed important

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[8] From 1792 until 1903, every member of the reserve militia was required to possess his own firearm and ammunition. 1 Stat. 264 (1792).

duties on the homefront. Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okla. L. Rev. 65, 76-77 n.52, 91-92 (1983) (describing militia duties in Maryland, Virginia, and other States). These citizen-soldiers provided their own arms and ammunition, performing civil defense duties without pay and while keeping their regular jobs. *Id.* The Maryland Minute Men, for example, were tasked by the Governor with securing their local towns and coastlines from saboteurs. 3 *State Papers and Addresses of Governor Herbert R O'Conor* 616-20 (March 10, 1942). Similarly faded from the popular memory is the invasion and occupation of several Aleutian Islands in World War II. In the campaign to contain and evict Japanese forces, the Army drafted local citizens into a special, irregular unit. Murray Morgan, BRIDGE TO RUSSIA – THOSE AMAZING ALEUTIANS 153-54 (1947). Though not a militia action per se, the episode highlights two critical points. First, invasion of American territory, particularly remote areas, is not impossible. Second, a citizen population familiar with firearms remains relevant to our defense.

The argument that lightly-armed citizen-soldiers stand no chance against modern military technology is a common retort to invocation of Congress' militia powers. Yet it is a straw man. Even in the days of less technologically advanced warfare, the militia was never considered the first *and* last line of defense. Rawle, 125 ("[I]n the commencement of a war *before a regular force can be raised*, the militia form the palladium of the country." (emphasis added)).

The technology straw man also mistakes the nature of at least some modern enemies. Present-day security threats are markedly different from Nazi Germany and Imperial Japan (and the Cold-War Soviet Union, for that matter). Terrorist organizations pose unique defense problems. Their attacks are unlikely to come via T-72 tank or Typhoon-class submarine. Some have suggested that a reinvigorated constitutional militia would be an effective means to address such asymmetrical warfare. David A. Klinger & Lt. Col. Dave Grossman, *Who Should Deal with Foreign Terrorists on U.S. Soil?: Socio-Legal Consequences of September 11 and the Ongoing Threat of Terrorist Attacks in America*, 25 Harv. J. L. & Pub. Pol'y 815, 831-34 (2001); *see also Nordyke*, 563 F.3d at 464 (Gould, J., concurring) (noting recent terrorist attack on Mumbai and stating that "a lawfully armed populace adds a measure of security for all of us and makes it less likely that a band of terrorists could make headway in an attack on any community before more professional forces arrived.").

For purposes of this case, it should suffice that such options are constitutionally permissible, even if they are deemed unlikely. Congress' constitutional options should not be compromised by firearms restrictions imposed by the States. "However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once." *Silveira*, 328 F.3d at 570 (Kozinski, J., dissenting from denial of rehearing en banc).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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