Nos. 08-1497 and 08-1521

IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *ET AL.*, *Petitioners*,
v.
CITY OF CHICAGO, ILLINOIS, *ET AL.*, *Respondents*.

OTIS MCDONALD, *ET AL.*, *Petitioners*
v.
CITY OF CHICAGO, ILLINOIS, *Respondent*.

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

BRIEF AMICUS CURIAE OF GUN OWNERS OF AMERICA, INC. AND GUN OWNERS FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

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

Gun Owners Foundation ("GOF") (www.gunowners.com) was incorporated in Virginia in 1983, and is exempt from federal income tax as an educational organization under IRC section 501(c)(3). GOF is involved in a number of educational and victim-assistance projects relative to federal and state constitutional, statutory, and other legal matters, particularly as they relate to the Second Amendment to the U.S. Constitution.

Each of the *amici curiae* was established, *inter alia*, for education purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, the construction of state and federal constitutions and statutes related to the right of citizens to bear arms, and questions related to human and civil rights

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[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice at least 10 days prior to the filing date of the intention to file this *amicus curiae* brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. In the past, each of the *amici* has conducted research on issues involving the U.S. Constitution, and each has filed *amicus curiae* briefs in other federal litigation involving such issues, including *amicus curiae* briefs to this Court in cases such as District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008).

It is hoped that the perspective of the *amici curiae* on the issues in the present case will be of assistance to the Court in deciding whether to grant the petitions for a writ certiorari.

SUMMARY OF ARGUMENT

The petitioners have presented an important question of federal law that has not been, but should be, settled by this Court. By its decision in District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008), this Court settled a long-standing controversy by confirming that the Second Amendment protects an individual right to keep and bear arms. Having settled that question, Heller has spawned numerous constitutional challenges to State and local laws banning handguns. At issue is whether the Fourteenth Amendment applies the Second Amendment right to keep and bear arms against the States. As noted in Heller, previous decisions where the Supreme Court touched on this question ruled that the Second Amendment did not apply to the States. But Heller also acknowledged that the Court "did not engage in the sort of Fourteenth Amendment inquiry

required by [this Court's] later cases." Heller, 171 L.Ed.2d at 674 n.23. This Court should grant the petitions to resolve this important federal question in the interests of the orderly administration of justice and to provide authoritative resolution of these issues regarding the American people's federal constitutional rights of self defense.

The right to keep and bear arms as secured by the Second Amendment is among the privileges and immunities of United States citizenship. First, as this Court stated in Heller, the right to keep and bear arms is an individual right that belongs to "all Americans." Thus, Heller determined that the Second Amendment right to keep and bear arms belongs to those individual persons who are part of the national polity. If a person is a member of that political community, then he has the constitutional right to keep and bear arms under the Second Amendment. According to Heller, it is a right that belongs to all Americans, not just those who reside in the nation's capital. Because the constitutional right to keep and bear arms inheres in a person by virtue of his American citizenship, the right to keep and bear arms is one of the privileges and immunities of citizens of the United States.

The City of Chicago and Village of Oak Park bans on handguns challenged by petitioners are comparable to the D.C. firearms ban struck down in Heller. Just as the D.C. law was held to infringe upon the right to keep and bear arms, in violation of the Second Amendment, the making and enforcing of an almost identical ban on handguns by the municipalities of Chicago and Oak Park abridge the privilege and

immunity of keeping and bearing arms, in violation of the Fourteenth Amendment. The Second Amendment confers upon the citizen parties the right to possess a handgun for self-defense, which Heller determined is central to the Second Amendment right. In contrast, the municipalities of Chicago and Oak Park have taken away that right of self-defense. Those two positions are incompatible and, constitutionally, cannot co-exist.

Each American citizen must enjoy the same privileges and immunities of U.S. citizenship. If the lower courts' rulings were upheld, the Second Amendment's protection of an individual right to keep and bear arms could be effectively nullified by State law or local ordinance. If, as determined in Heller, the right of self-defense is central to the individual's right to keep and bear arms under the Second Amendment, and a total handgun ban limits that right of self-defense, that right as one of the national privileges or immunities of U.S. citizenship is unconstitutionally abridged if a State or one of its political subdivisions, in which an American citizen resides, bans the possession and use of handguns for lawful self-defense. In short, a law made or enforced by a State or political subdivision that would infringe upon the right to keep and bear arms under the Second Amendment — and the laws challenged by petitioners herein would so infringe — abridges that right under the Fourteenth Amendment.

ARGUMENT

I. THE PETITIONS PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

On June 26, 2008, this Court handed down its decision in District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008), that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.*, at 683. By so ruling, this Court settled a decades-long controversy as to whether the Second Amendment protects an "individual right" or only a "collective" one. *See* United States v. Emerson, 270 F.3d 203, 218-20 (5th Cir. 2001). As Justice Breyer's dissent forecasted, the Heller decision sparked a flurry of Second Amendment litigation challenging "the constitutionality of gun laws throughout the United States."[2] *See* Heller, 171 L.Ed.2d at 736 (Breyer, dissenting).

Paramount among these many challenges is the question presented by petitioners: whether the Fourteenth Amendment Due Process Clause or Privileges or Immunities Clause "incorporates" the Second Amendment right to keep and bear arms and applies that right against the States. If the Fourteenth Amendment applies to the States the right to keep and bear arms, as stated in the Second

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[2] *See* Adam Winkler, "The New Second Amendment: A Bark Worse Than Its Right," The Huffington Post, January 2, 2009.

Amendment, it would constrict the firearm laws of every State, county, city, and town in the United States. If it does not, then the Second Amendment limits only the power of Congress to enact firearm laws and regulations.

Petitioners' question was anticipated specifically by this Court last year in its discussion of the statement in United States v. Cruikshank, 92 U.S. 542 (1876), that "[s]tates ... were free to restrict or protect the [Second Amendment] right under their police powers." Heller, 171 L.Ed.2d at 674. While Heller found Cruikshank supportive of "the individual-rights interpretation," it raised doubts about "Cruikshank's continuing validity on incorporation, a question not presented by this case...." Heller, 171 L.Ed.2d at 674 n.23.

Without question, then, the petitioners present to this Court "an important question of federal law," under Rule 10(c) of the Rules of this Court. And, as Judge Easterbrook's opinion for the Seventh Circuit below demonstrates, it is a question that has not been, but should be, settled by this Court. *Id*. Referring to footnote 23 of the Heller majority opinion — which acknowledged that on three previous occasions the Supreme Court had affirmed "that the Second Amendment applies only to the Federal Government"[3] — the Seventh Circuit panel refused to address the

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[3] McDonald v. City of Chicago, Pet. App. 4. (Citations to the lower court's decision are to the opinion as reproduced in pages App. 1 – App. 10 of the petitioners' appendix ("Pet. App.") in No. 08-1521.

"incorporation" question, because, as the district court had previously ruled, "only the Supreme Court may change course"[4]:

> Repeatedly ... the Justices have directed trial and appellate courts to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale. [Pet. App. 3.]

Indeed, as Heller stated of Cruikshank,[5] on which the Seventh Circuit relied, the Supreme Court had "not engage[d] in the sort of Fourteenth Amendment inquiry required by our later cases." Heller, 171 L.Ed.2d at 674 n.23.

These are reasons enough for this Court to grant the petitions. Otherwise, the lower federal courts may very well follow the Seventh Circuit's lead and decline to address the question presented by these petitioners for no other reason than outworn "precedent,"[6] or for lack of authoritative guidance from this Court.

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[4] *Id.*, Pet. App. 2.

[5] 92 U.S. 542 (1876).

[6] As Sam Walter Foss parodied in "The Calf-Path":

A hundred thousand men were led,
By one calf near three centuries dead.
They followed still his crooked way,
And lost one hundred years a day;
For thus such reverence is lent,
To well-established precedent.

There is, however, more at stake than just the orderly administration of justice. In compliance with Heller, the District of Columbia, however reluctantly, took steps to modify its handgun ban to appear to conform to the Second Amendment principles articulated by this Court.[7] Thus, the District of Columbia has apparently taken some steps to restore to its "law-abiding, responsible citizens" to their constitutional right of self-defense of "hearth and home" — "and, [hence, to] the *core component* of the right" to keep and bear arms. *See* Heller, 171 L.Ed.2d at 683. In Heller's aftermath, some Illinois towns, in response to threatened litigation, have repealed their handgun bans so that citizens residing in those municipalities apparently have been restored to their constitutional right of self-defense.[8] But Chicago and Oak Park, the municipal defendants-respondents in these consolidated cases, have chosen not to respond to Heller, and thus have not agreed to make any effort to restore that right of self-defense to the law-abiding, responsible citizens who reside there.

Although the issue in Heller, and here, involves the "individual citizen's right to self-defense" (171 L.Ed.2d.

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[7] Brian Westley, "D.C. Votes New Gun Restrictions Into Law," Associated Press (July 15, 2008); Michael Neibauer, "Council eases D.C. gun laws," Washington Examiner (Sept. 17, 2008); Jacob Sullum, "Back to Court: Heller v. D.C. II," Reason (Nov. 2008).

[8] *See, e.g.*, Robert Channick, "Morton Grove repeals 27-year-old gun ban," Chicago Tribune, July 28, 2008; Deborah Horan, "Evanston latest suburb to repeal handgun ban in wake of high court ruling," Chicago Tribune, Aug. 12, 2008.

at 664), it must be remembered that the Second Amendment's preservation of that right is also necessary to ensure that the people would be "better able to resist tyranny" and thus, in the language of the Second Amendment, to "secur[e] a free state." *Id*., at 661. As Heller observed, "history [has] show[n] that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms...." *Id*.

The Seventh Circuit suggests, however, that the disparity between the right to keep and bear arms in Washington, D.C. versus that in Chicago and Oak Park exists because the United States "Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule."[9] But if the Second Amendment applies to the States under the Fourteenth Amendment, this is not true. Currently, recognition of that right appears to depend upon the risks and costs of litigation. Whether the Second Amendment applies to the States and their local subdivisions ought not be subject to such vagaries of litigation and settlement. Rather, this Court should grant the petitions, and render an authoritative decision that the Second Amendment right to keep and bear arms applies to the States via the Fourteenth Amendment.

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[9] Pet. App. 9.

II. THE CHICAGO AND OAK PARK HANDGUN BANS ABRIDGE ONE OF THE PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES — THE RIGHT TO KEEP AND BEAR ARMS — IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

In Heller, this Court ruled that a District of Columbia ordinance, which "totally bans handgun possession in the home," violated the Second Amendment. *Id.*, 171 L.Ed.2d at 679. Like the D.C. ordinance, the City of Chicago and Village of Oak Park ordinances constitute an absolute ban on possession of handguns within their respective city limits. *See* Petition for a Writ of Certiorari, National Rifle Association, *et al.* v. City of Chicago, *et al.*, pp. 2-3, and Petition for a Writ of Certiorari, McDonald, *et al.* v. City of Chicago, pp. 5-6.[10] Had the courts below found that the Second Amendment applies to the States and their political subdivisions, there would be no doubt that the total gun bans in Chicago and Oak Park would have been found unconstitutional under Heller. Because the Second Amendment right recognized in Heller is one of the "privileges or immunities of citizens of the United States," and because the Chicago and Oak Park ordinances "abridge" that right by imposing an absolute ban on handgun possession, the two ordinances are unconstitutional.

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[10] The McDonald Petition also concerns Chicago's gun regulations as they relate to "long arms" (*see* McDonald Petition, p. 6).

A. The Right to Keep and Bear Arms Is a Right Belonging to American Citizens.

Because the Second Amendment text specifies that the right to keep and bear arms belongs to "**the people**," Heller concluded that the right to keep and bear arms was not only an individual right, but one that belonged to "**all Americans**." Heller, 171 L.Ed.2d at 651 (emphasis added). In explanation, the Court found "the people" — as employed in the First, Second, Fourth, Ninth, and Tenth Amendments, as well as in the Constitution's Preamble and Article I, Section 2 — to be a "term [that] unambiguously refers to all members of the **political** community...." *Id.* at 650 (emphasis added). Recalling its analysis of the meaning of "the people" in an earlier case, the Court repeated that "'[T]he people' seems to have been a term of art employed in select parts of the Constitution," as a reference "to a **class of persons** who are part of a **national community** or who have otherwise developed sufficient connection with **this country** to be considered part of that community." *Id.* at 650 (emphasis added), citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

Accordingly, Heller found that the Second Amendment right to keep and bear arms belonged to those individual persons who were part of the **national polity**. Thus, it may be inferred that only **Americans** have the constitutional right to keep and bear arms. It is not a right that can be claimed by an

alien, even an alien on American soil,[11] because an alien is not among the "class of persons who are part of [the American] national community."[12] On the other hand, if a person is a member of that political community, then he has the constitutional right to keep and bear arms under the Second Amendment because, according to Heller, it is a right that belongs to "all Americans."[13]

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[11] While such an alien may claim a right to self-defense under an applicable statute or the common law, the Second Amendment does not protect that right as it would if the person were a citizen. After all, an alien has no political standing to claim any right to resist a tyrannical government of which he is not a constituent. Thus, his right of self-defense — unlike a citizen's right — is not a "central component" of a right, the ultimate purpose of which is, as the Second Amendment states, "the security of a free state." *See* Heller, 171 L.Ed.2d at p. 661-62.

[12] Throughout the majority opinion, Heller repeatedly stressed that the right to keep and bear arms, whether it appeared in a State constitution, or in the Second Amendment, or in related documents and materials, secured a "right of citizens." *See id.*, 171 L.Ed.2d at 653, 659, 664, 667-68, and 670-72. It may be inferred, therefore, that a person who claims a right to keep and bear arms, whether under the Second Amendment or under a comparable State constitutional provision, must be a citizen. With respect to the Second Amendment, the person must be a U.S. citizen.

[13] In Heller, the Court repeatedly emphasized the universality of the citizen's right to keep and bear arms. Thus, in recounting the English history of the "suppress[ion] [of] political dissidents in part by disarming their opponents," the Court concluded that "[b]y the time of the founding [of America], the right to have arms had become fundamental for **English subjects**," without discrimination among classes of citizens. Heller, 171 L.Ed.2d at 657-59 (emphasis added). The right to keep and bear arms,

B. The Second Amendment Individual Right to Keep and Bear Arms Is One of the "Privileges or Immunities of Citizens of the United States," as Provided for in the Fourteenth Amendment.

Because the constitutional right to keep and bear arms does not inhere in a person simply by virtue of his existence as a human being dwelling in the United States, but by virtue of his American citizenship[14] —

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therefore, was found to be "a right 'of **all** free citizens," including those newly-endowed Fourteenth Amendment citizens who, as slaves, had been denied that right. *Id.*, 171 L.Ed.2d at 670-72 (emphasis added). To be sure, the Court cautioned that it had "not undertak[en] an exhaustive historical analysis ... of the **full scope** of the Second Amendment," and thus, its "opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.*, 171 L.Ed.2d at 678 (emphasis added). It should be noted, however, that the Court did not provide any Second Amendment rationale for such prohibitions. As pointed out by these *amici* in their amicus brief in Heller, such limits as may be placed on convicted felons and the mentally ill must relate to their status as citizens, not to their "perceived danger to community safety or general unfitness," as had been the rationale supporting the "black codes" enacted, in part, by some states to prohibit blacks from possessing firearms. *See* Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, pp. 33-34 in District of Columbia v. Heller, No. 07-290.

[14] In contrast with the Second Amendment right, which belongs only to members of the American political community, the Fifth Amendment rights with respect to grand jury indictment, double jeopardy, self-incrimination, due process and government taking may be asserted by any person regardless of citizenship. United States v. Verdugo-Urquidez, 494 U.S. at 264. Such is not the case here, where the claimants have alleged in their complaints that they are United States Citizens, and as such citizens are entitled

his being a part of the national political community — the right to keep and bear arms is one of the "privileges or immunities of citizens of the United States." Prior to the ratification of the Fourteenth Amendment, the United States Constitution contained no specific reference to the privileges and immunities of citizens of the United States, but that did not mean that none existed. In the Slaughterhouse Cases, 83 U.S. 36, 79-80 (1873), this Court pointed to a number of such privileges and immunities "dependent upon citizenship of the United States," that would not be available to a noncitizen.

Further, in reference to the citizenship clause of the Fourteenth Amendment,[15] the Court noted that, unless a person is a citizen of the United States, he cannot "of his own volition, become a citizen of any state of the Union by a *bona fide* residence therein...." *Id.*, 83 U.S. at 80. One does not have the right to become a citizen of a State just because he is a person. He may do so only "'by virtue of [his already] being [a U.S.] citizen." *Id.*, 83 U.S. at 77. Thus, the right to become a citizen of a State is a privilege and immunity of United States citizenship.

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to the right to keep and bear arms. McDonald v. Chicago, Complaint (N. Dist. of Ill., No. 08-cv-3645), p. 1; NRA v. Chicago, Complaint (N. Dist. of Ill., No. 08-cv-3697), p. 2.

[15] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Fourteenth Amendment, Section 1, Clause 1.

In like manner, a person who is not a member of the polity of the United States may not, merely by his own volition, lay claim to the individual right to keep and bear arms, as provided in the Second Amendment. For, as the Heller Court has established, the constitutional right to keep and bear arms belongs to Americans, *i.e.,* to "members of the political community" of the United States of America. *See* Heller, 171 L.Ed.2d at 650-51. This ruling, in turn, was based upon the Second Amendment pronouncement that the right to keep and bear arms is a "right of the people," not a right belonging to a person *qua* person. Thus, the right to keep and bear arms is one of the "privileges or immunities of a citizen of the United States;" that is, it is an individual right accruing by virtue of one being a member of the American polity,[16] not by virtue of one being a member of the human race.

In United States v. Cruikshank, Chief Justice Waite explained that "[t]he right ... of 'bearing arms for a lawful purpose' ... is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." 92 U.S. at

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[16] As a right of citizenship, however, it is no less an individual right than a right based upon personhood. As Justice Scalia carefully explained, the rights of citizenship are not "'collective' rights, or rights that may be exercised only through participation in some corporate body." *Id.*, 171 L.Ed.2d at 650. Therefore, Heller concluded that the Second Amendment protected an individual right, having identified its subject, as "the right of the people to keep and bear arms not to [be] infringed," not as the collective power of the people, acting through a "well-regulated militia" to "secur[e] a free state." *Id.*, 171 L.Ed.2d at 650-51.

553. Similarly, he explained that the "right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States [and] was not, therefore, a right granted to the people by the Constitution of the United States. In fact, it is, and has always been, one of the **attributes of citizenship** under a free government." 92 U.S. at 551 (emphasis added). Just as with the right to assemble, the lawful bearing of arms was a right of the people recognized by, not created by, the United States Constitution. As the people's right of assembly is one of the Privileges and Immunities of U.S. citizenship, so is the people's right to keep and bear arms. *See generally* Paul B. Paskey, "The Right of the Individual to Keep and Bear Arms as a Federally Protected Right," p. 127 (Safeguarding Liberty, Gun Owners Foundation (Larry Pratt, ed., 1995)).

C. The Chicago and Oak Park Handgun Bans Unconstitutionally Abridge the Privileges and Immunities of Petitioners as United States Citizens.

As noted above, the Chicago and Oak Park bans on handguns are comparable to the D.C. ban struck down in Heller. The Heller Court eschewed the invitation to employ a balancing test to determine whether the D.C. handgun ban unconstitutionally "infringed" the plaintiff D.C. resident's right to keep and bear arms. This Court should likewise decline to employ any such balancing test to determine whether the Chicago and Oak Park bans unconstitutionally abridge that right as a privilege and immunity of U.S. citizenship. If the

D.C. law **infringes** the right to keep and bear arms in violation of the Second Amendment, then the making and enforcing of an almost identical ban on handguns **abridges** the privilege and immunity of keeping and bearing arms in violation of the Fourteenth Amendment. There is no middle ground.

As Justice Kennedy observed in his concurring opinion in U.S. Term Limits v. Thornton, 514 U.S. 779 (1995), American citizens "have two political capacities, one state and one federal, each protected from incursion by the other":

> The resulting Constitution created a legal system ... establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. [*See id.,* at 838 (1995) (Kennedy, J., concurring).]

As a consequence of this dual citizenship, the American people enjoy privileges and immunities of both State and United States citizenship. From time to time, however, the powers granted by the people of a State to the government of that State may interfere with "rights that stem from sources other than the State." *Id.*, at 843 (Kennedy, J., concurring). Such is the case here. The Second Amendment confers upon the citizen parties the right to possess a handgun for self-defense, "a right [that] has been central to the Second Amendment right." *See* Heller, 171 L.Ed.2d at 679. In contrast, the municipalities of Chicago and Oak Park have taken away that right of self-defense,

relegating the occupants of those cities to other, less effective, means for the defense of their hearth and home. Those two positions are incompatible and, constitutionally, cannot co-exist.

Because the Second Amendment's codification of the right to keep and bear arms "owes its existence to the act of the whole people who created" the national government, "'each individual [American] citizen **everywhere** [must] enjoy[] the same national rights, privileges, and protection'... The Federalist No. 2...." Thornton, 514 U.S. at 839 (Kennedy, J., concurring) (emphasis added). Thus, "national citizenship has privileges and immunities protected from state abridgment by the force of the Constitution itself." *Id.*, at 842. While "[f]ederal privileges and immunities may seem limited in their formulation by comparison with the expansive definition given to the privileges and immunities attributed to state citizenship,"[17] there is no way to limit the national privilege and immunity to keep and bear arms in this case without obliterating it.

To be sure, since the Slaughterhouse Cases, it has been assumed that there would be no State abridgement of a privilege or immunity of U.S. citizenship unless the U.S. citizen is engaged in an activity specifically related to his national citizenship.

For example, prior to adoption of the Fourteenth Amendment, the privileges and immunities of United

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[17] *See* Thornton, 514 U.S. 779 at 844 (Kennedy, J., concurring).

States citizenship set forth in the First Amendment did not constrain the states. *See* United States v. Cruikshank, 92 U.S. 542, 552 (1876). Following the Fourteen Amendment's ratification, however, the Court stated in the Slaughterhouse Cases that "[t]he right to peaceably assemble and petition for redress of grievances ... are rights of the **citizen** guaranteed by the Federal Constitution." *Id.,* 83 U.S. at 79 (emphasis added). Thus, Justice Owen J. Roberts (writing also for Chief Justice Hughes and Justice Black) concluded that the action of the Jersey City mayor to prevent a peaceable assembly from taking place "to disseminate information concerning the provisions of the National Labor Relations Act" was an unconstitutional abridgment of First Amendment rights:

> [I]t is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them ... is a **privilege inherent in citizenship of the United States** which the Amendment protects. [Hague v. CIO, 307 U.S. 496 (1939) at 512 (emphasis added).]

In explanation, Justice Roberts stated that "[c]itizenship of the United States would be little better than a name if it did not carry with it the right to discuss **national** legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom." *Id.*, 307 U.S. at 513. According to this line of precedent, however, the privilege and immunity extended by the Fourteenth Amendment to citizens of the United States would **not** include an assembly for just any "peaceful and lawful purpose"; rather, it

would be limited only to assemblies and petitions having to do with the business of the national government. *See* United States v. Cruikshank, 92 U.S. at 552-53.

While one might be able to slice and dice the right to assemble and petition in this fashion, there is no way to bifurcate the Second Amendment. If, as Heller has held, the right of self-defense is "central to the Second Amendment right," and a total handgun ban "infringes" upon that right of self-defense, that right cannot be preserved as a national privilege and immunity of U.S. citizenship if a state or political subdivision, in which an American citizen resides, may ban the possession and use of handguns for lawful self-defense. One either has the constitutional right of access to handguns for the purpose of self-defense or he does not. In short, any law made or enforced by a state or political subdivision that would **infringe** upon the right to keep and bear arms under the Second Amendment necessarily would **abridge** that right under the Fourteenth Amendment.

III. COURT REVIEW IS ALSO SUPPORTED BY A CONFLICT AMONG THE CIRCUITS.

One of the bases for review set out by petitioners was a conflict between the Seventh Circuit's decision below and the Ninth Circuit's decision in Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).[18] These *amici* agree that review is supported due to this conflict, as

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[18] *See* NRA Pet., pp. 4-7, 15-16; McDonald Pet., pp. 10, 15-16.

provided in Rule 10(b) of the Rules of the Supreme Court. But, even though affirmation of the decision in Nordyke would favor the petitioners, these *amici* do not believe that it was properly decided.

A. Nordyke Rests upon a Misreading of the Slaughterhouse Cases.

Nordyke ruled that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments." Nordyke, 563 F.3d at 457. Before reaching that conclusion, however, the Nordyke court decided that it was:

> barred from considering incorporation through the Privileges or Immunities Clause.... Under the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), [the Clause] protects only those rights that derive from United States citizenship, but not those general civil rights independent of the Republic's existence, *see id.* at 74-75. The former include only those rights the Federal Constitution grants or the national government enables, but not those preexisting rights the Bill of Rights merely protects from federal invasion. *Id.* at 76-80. The Second Amendment protects a right that predates the Constitution; therefore, the Constitution did not grant it. [*Id.*, 563 F.3d at 446-47 (footnote omitted).]

This is a misreading of the Slaughterhouse Cases. That opinion contains no requirement that the "rights that derive from United States citizenship ..." are limited to "rights the Federal Constitution grants ... but not those preexisting rights the Bill of Rights merely protects," as the Nordyke court concluded. Rather, in an effort to demonstrate that the Court's reading of "privileges or immunities of citizens of the United States" would not render the clause a nullity, Justice Miller gave numerous examples of those "which owe their existence to the Federal government, its National character, its Constitution, or its laws." Slaughterhouse Cases, 83 U.S. at 79. One of those examples was "[t]he right to peaceably assemble and petition for redress of grievances" (*id.*), a right that three years later the Court identified to have "existed long before the adoption of the Constitution of the United States ... as one of the attributes of citizenship under a free government." *See* United States v. Cruikshank, 92 U.S. at 551.

As Cruikshank explained, "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.*, 92 U.S. at 552. It had no difficulty finding that "the right of the people peaceably to assemble for the purpose of petitioning Congress ... is an **attribute of national citizenship** and, as such, under the protection of and guaranteed by, the United States." *Id.*, (emphasis added). In short, because the "Federal government" was constituted by the people as a "free government," then its "national character" embraced the preexisting right of the people to

assemble and to petition the government for redress of grievances as a privilege and immunity of a citizen of the United States.

Thus, properly understood, the Slaughterhouse Cases presents no bar to considering the right to keep and bear arms, which antedated the federal constitution, and then expressly was recognized and protected by the Second Amendment, among the "privileges or immunities of citizens of the United States."

B. The Slaughterhouse Cases Need Not Be Overruled.

Also misreading Slaughterhouse Cases, the McDonald Petition criticizes the case as "wrong the day it was decided and today stands indefensible" (McDonald Pet., p. 22), erroneously believing it is an impediment to recognition of the Second Amendment as among the "privileges or immunities of citizens of the United States." The McDonald Petition presents this case as a "logical starting point" for the "[c]omplete restoration of the Privileges or Immunities Clause" by "incorporating" the first eight amendments of the federal Bill of Rights and applying them to the States. McDonald Pet., p. 28. As discussed in Section II, *supra*, however, granting review under the Privileges or Immunities Clause of the Fourteenth Amendment does not require reversing Slaughterhouse Cases, or adopting the McDonald Petition's expansive view of that Clause; nor does granting this Petition require application of the Due Process "incorporation" doctrine.

CONCLUSION

For the foregoing reasons, the Petitions for a Writ of Certiorari should be granted.

Respectfully submitted,

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