No. 08-1521

IN THE
Supreme Court of the United States

OTIS MCDONALD, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

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

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

The NAACP Legal Defense & Educational Fund, Inc. (LDF), is a non-profit corporation established under the laws of the state of New York to assist African Americans in securing their civil and constitutional rights through litigation and advocacy challenging racial discrimination.[1] Since its founding in 1940 under the leadership of Thurgood Marshall, however, LDF has been committed to transforming this nation's promise of equality into reality for all Americans. In this case, Petitioners ask the Court to reconsider a key question concerning the proper interpretation of the Fourteenth Amendment, which, more than any other constitutional provision, embodies our nation's commitment to equal justice for all under the law.

The Fourteenth Amendment was enacted following the Civil War to correct *Dred Scott v. Sandford*, 60 U.S. 393, 406-07 (1857), which had relegated African Americans to the status of mere "persons" without citizenship. Unfortunately, the Court's late nineteenth-century decisions created obstacles to effective enforcement of the Fourteenth Amendment and its guarantee of equality under the law, regardless of race, national origin, or alienage. For more than six decades, LDF has been at the

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[1] Counsel of record for all parties received notice of the *amicus curiae*'s intention to file this brief. Letters of consent by the parties have been lodged with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

forefront of efforts to enforce the Fourteenth Amendment. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Loving v. Virginia*, 388 U.S. 1 (1967).

The Court's late nineteenth-century decisions concerning the scope of the Fourteenth Amendment had devastating consequences for African Americans and the country as a whole. But whether this case presents the appropriate vehicle for the Court to wipe their stain from the pages of the *United States Reports* is less clear. *Amicus* submits this brief on behalf of neither party with the limited goal of suggesting that the Court's well-established framework for the "incorporation" of rights under the Due Process Clause of the Fourteenth Amendment should form the starting point for the Court's analysis in this case.

The Court should turn to the largely unexplored Privileges or Immunities Clause of the Fourteenth Amendment only if it first determines that the Second Amendment right to keep and bear arms is *not* incorporated as against the states through the Due Process Clause. Many of the rights and individual freedoms that define and guard modern life in America have only been meaningfully expressed through decades of important cases decided under the Due Process Clause. Accordingly, if this Court looks anew to the Privileges or Immunities Clause, its decision should supplement, and not supplant, existing civil rights protections already safeguarded through the Due Process Clause. *Amicus* takes no position on the ultimate constitutional issues involved in this case.

SUMMARY OF ARGUMENT

Today in this country, there is general agreement that everyone is entitled to the fundamental protections of the Bill of Rights, that no one should be subject to racial, ethnic, national origin or other forms of discrimination, and that Congress has the power to enforce those rights and protections. But this has not always been the case. Decisions of the Court during and immediately after Reconstruction failed to accept these principles, and effectively limited the reach of the Fourteenth Amendment, and its Privileges or Immunities Clause, which guarantees that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV.

In the *Slaughter-House Cases*, 83 U.S. 36 (1873), the Court established that the Privileges or Immunities Clause provided no protection against state or local infringements on constitutional rights. Subsequent decisions relying on *Slaughter-House* prevented Congress from safeguarding the newly won freedoms of former slaves. For instance, in *United States v. Cruikshank*, 92 U.S. 542 (1875), the Court held that the federal government had no power to prosecute the perpetrators of the Colfax massacre;[2] and in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court struck down the Civil Rights Act of

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[2] On Easter Sunday, April 13, 1873, white insurgents committed a mass murder of over sixty African Americans who sought to defend the duly-elected government in Grant Parish, Louisiana against a coup. *See* Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (2008).

1875, which prohibited racial discrimination in public accommodations, as beyond Congress's enforcement power.

Thanks in large part to these Reconstruction-era decisions dramatically restricting the scope of the Privileges or Immunities Clause, the Due Process Clause of the Fourteenth Amendment came to serve as the primary vehicle to prevent state infringement of constitutional guarantees contained in the Bill of Rights. But despite this complex and contested past, the Due Process Clause has proven adequate to the task of ensuring the applicability of constitutional guarantees to the states. In this case, the Court has the option to continue to use its traditional Due Process Clause framework to analyze the issue presented: whether the Second Amendment "right to possess and carry weapons in case of confrontation," as articulated in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008), is "incorporated" as against the states through the Fourteenth Amendment.[3]

Petitioners urge the Court to consider incorporation of the Second Amendment primarily under the Privileges or Immunities Clause of the Fourteenth Amendment. *See* Pet'rs' Br. at 9-65. But history, prudence, and principles of judicial restraint

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[3] In *Heller*, *amicus* took the position that a departure from the Court's earlier pronouncements regarding the scope of the Second Amendment was unwarranted. *See* Brief for *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc. in Support of Petitioners, *District of Columbia v. Heller*, 128 S. Ct. 645 (2008) (No. 07-290), 2008 WL 157192. For purposes of this case, *amicus* recognizes this Court's constitutional interpretation in *Heller* that there is "an individual right to possess and carry weapons in case of confrontation" protected by the Second Amendment. *Id.* at 2797 (2008).

counsel that, before embarking on an exploration of this uncharted constitutional terrain, the Court should first look to its well-established framework under the Due Process Clause for determining whether a provision of the Bill of Rights applies to state and local governmental action. There is a danger that a shift to the Privileges or Immunities Clause as the primary source of incorporated rights could result in a rollback of constitutionally-protected freedoms—both in terms of the range of individuals covered by the Fourteenth Amendment, and the scope of rights that the Amendment protects. Thus, this Court should not begin its analysis with a reexamination of long dormant constitutional text, the meaning and scope of which is unclear.

This Court has another option: it can acknowledge expressly the mistakes of the Reconstruction-era Court and correct them. Should the Court choose to do so, it must preserve the Due Process Clause precedents that robustly safeguard constitutional protections for all persons, and that have been essential to the development of our democracy. It would be ironic, to say the least, if this Court decides to reexamine the Privileges or Immunities Clause in this case—which involves firearms regulations in a city where, each year, many times more African Americans are murdered by assailants wielding guns[4] than were killed during

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[4] In 2008, 74.8% of the 511 homicide victims in Chicago (or 369 individuals) were African Americans; 80.6% of all homicides were committed with firearms, and almost of all these murders were committed with handguns. *See* Chicago Police Department, *2008 Murder Analysis Report* 21, 30-32 (2009), a*vailable at* https://portal.chicagopolice.org/portal/page

the Colfax massacre by white insurgents who escaped federal prosecution in *Cruikshank*. *See supra* p. 3 n.3. But it would be a tragedy of the magnitude of *Slaughter-House* itself if, in the process of revitalizing the Privileges or Immunities Clause, the Court were to destabilize its existing Due Process jurisprudence and thereby undermine dozens of decisions that have played an essential role in bringing our nation's commitment to equality and democracy closer to reality.

ARGUMENT

I. In Determining Whether the Second Amendment Right to Keep and Bear Arms Is Incorporated as Against the States, the Court Should Look in the First Instance to Its Existing Due Process Framework

A. For Decades, the Court's Due Process Jurisprudence Has Provided a Workable Framework for Determining When a Provision of the Bill of Rights Applies to the States

The Due Process Clause of the Fourteenth Amendment "incorporates" certain constitutional rights so as to place limits on state and local governmental action. *See, e.g.*, *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("[I]t is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus, all fundamental rights comprised

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within the term liberty are protected by the Federal Constitution from invasion by the States."); *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (describing the "long line of cases" recognizing that "the Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.").

The familiar test to determine whether a particular right is protected under the Due Process Clause involves a two-step inquiry: (1) whether the right at issue is "necessary to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968); and (2) whether the right is "deeply rooted in this Nation's history and tradition," *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion).

This test for incorporation under the Due Process Clause has been applied to nearly every individual rights provision of the Bill of Rights and has proven workable. In a long line of cases, this Court has determined that the fundamental protections of the

First,[5] Fourth,[6] Fifth,[7] Sixth,[8] and Eighth Amendments[9] are incorporated as against the States through the Due Process Clause.[10] Apart from the Second Amendment question presented in this case, the Court has yet to analyze only two individual rights found in the Bill of Rights for the purposes of incorporation: the Third Amendment prohibition on

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[5] *See Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of the press); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (Establishment Clause); *NAACP v. Alabama*, 357 U.S. 449 (1958) (freedom of expressive association).

[6] *See Mapp v. Ohio*, 367 U.S. 643 (1961) (protection against unreasonable search and seizure); *Aguilar v. Texas*, 378 U.S. 108 (1964) (warrant requirement).

[7] *See Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (protection against taking with just compensation); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Benton v. Maryland*, 395 U.S. 784 (1969) (protection against double jeopardy).

[8] *See In re Oliver*, 333 U.S. 257 (1948) (right to a public trial, right to notice of accusations); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to assistance of counsel); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront adverse witnesses); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to a speedy trial); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to trial by impartial jury).

[9] *See Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishment).

[10] The Court has expressly found only two such rights unincorporated: the Fifth Amendment right to grand jury, *see Hurtado v. California*, 110 U.S. 516 (1884); and the Seventh Amendment right to a jury trial in civil cases, *see Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916).

the quartering of soldiers in private homes[11] and the Eighth Amendment right against excessive bails and fines.[12] *See* Erwin Chemerinksy, *Constitutional Law* 545 (3d ed. 2009).

Given the frequency with which the Court has applied the test for incorporation under the Due Process Clause, it is unsurprising that there has been no indication that this test has suddenly proven unworkable, or is ill-suited for the analysis necessary here. *See* Pet'rs' Br. at 66-72 (advocating incorporation of the Second Amendment through the Due Process Clause); Br. of Resp'ts Nat'l Rifle Ass'n of Am., *et al.* in Support of Pet'rs., at 24-30 (same).

Of course, the decision to incorporate the individual right to keep and bear arms recognized in *Heller* does not flow *a fortiori* from this Court's prior cases involving incorporation. There is substantial disagreement over whether the Fourteenth Amendment places limits on the ability of state and local governments to regulate firearms. *See* Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Law. 1, 57-72, 85-89 (2009) (examining the mixed historical evidence and concluding that the record does not strongly support incorporation).

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[11] The Second Circuit has addressed this issue. *See Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982).

[12] This Court has recently suggested that the prohibition on excessive bails and fines is in fact incorporated. *See Baze v. Rees*, 128 S. Ct. 1520, 1529 (2008).

Nevertheless, this Court should, in the first instance, attempt to resolve the question of incorporation as it has for decades: by asking whether the right asserted fits within the established framework for incorporation under the Due Process Clause—*i.e.*, whether the individual right to keep and bear arms recognized by *Heller* is implicit in the concept of ordered liberty, and whether it is deeply rooted in this nation's history and tradition.

In *Heller*, the Court expressly reserved the issue of incorporation, but the Justices began to grapple with precisely the questions central to Due Process analysis. *Compare Heller*, 128 S. Ct. at 2798 ("By the time of the founding, the right to have arms had become fundamental for English subjects."), *with id.* at 2844 (Stevens, J., dissenting) ("[F]or most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial."). The traditional Due Process framework for answering questions of incorporation is therefore applicable here, and by beginning its analysis with that framework, the Court may be able to resolve this case without deciding far more difficult constitutional questions concerning the meaning of the Privileges or Immunities Clause.

B. The Court Should Not Decide Constitutional Questions Unnecessary to the Resolution of This Case

Principles of judicial restraint counsel that the Court should generally refrain from ruling on a constitutional question unless it must do so to resolve the case at hand. *See Slack v. McDaniel*, 529

U.S. 473, 475 (2000) (The "Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of") (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 525-26 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("Where there is no need to decide a constitutional question, it is a venerable principle of this Court's adjudicatory processes not to do so, for '[t]he Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.'" (quoting *Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring) (internal quotation marks and citation omitted)); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring) ("Courts do not review issues, especially constitutional issues, until they have to.").

Although issues of judicial restraint frequently arise in contexts where a court must choose between resolving a statutory or a constitutional issue, *see, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009), the overarching principle is the same: under normal circumstances, a court should decide no more than is necessary to resolve the case at hand. *See PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) ("[T]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more."). Here, where the Court is presented with two competing constitutional grounds on which to resolve the question presented, the more prudent course

would be for the Court to begin its analysis with the more well-established constitutional framework, *i.e.*, the Due Process Clause, rather than reviving a long dormant provision, *i.e.,* the Privileges or Immunities Clause.

To be sure, in some instances it is both appropriate and necessary for the Court to revive debate over an important but long dormant constitutional question. *Cf. Brown*, 347 U.S. 483 (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)). But where a case can be resolved and constitutional interests appropriately vindicated, without considering a difficult and previously unexplored constitutional issue, it is often unwise for the Court to weigh in absent compelling reasons to do so. In this case, therefore, the Court's existing Due Process framework provides the clearest path for addressing the question presented, and should form the starting point of the Court's analysis.

C. The Court's Nineteenth Century Cases Concerning the Scope of the Fourteenth Amendment Present No Bar to Incorporation Under the Due Process Clause

Slaughter-House, and the other late nineteenth-century cases that effectively wrote the Privileges or Immunities Clause out of the Constitution, have been thoroughly discredited, and their continuing doctrinal significance has been substantially eroded by this Court's use of the Due Process Clause to incorporate key constitutional rights as against the states.

Slaughter-House initiated a post-Reconstruction line of decisions, such as *Cruikshank* and the *Civil Rights Cases*, that are rightly regarded as among the most misdirected in the history of the Court. In these cases, the Court enunciated principles far broader than were necessary to decide the matters at hand, and it too readily struck down Congressional legislation designed to combat discrimination against African Americans after the Civil War, including both the Ku Klux Klan's reign of terror and the establishment of a reconfigured caste system in the form of the Black Codes and Jim Crow.[13]

While it is undeniable that these cases are part of a dreadful chapter in the history of this nation, they present no bar to incorporation of constitutional rights as against the states under the Due Process

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[13] *See, e.g.*, Elizabeth Pryce-Foley, *Liberty for All* 36 (2006) ("If [the] *Slaughterhouse* Court had interpreted the Privileges or Immunities Clause of the Fourteenth Amendment as making the federal Bill of Rights applicable to the states, the southern states could not have continued to enact legislation that denied the Bill's liberties to African-Americans."), *quoted in* Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 39 (2007); Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* 93 (2009) ("In the wake of the Supreme Court ruling [in the *Civil Rights Cases*], the federal government adopted as policy that allegations of continuing slavery were matters whose prosecution should be left to local authorities only—a *de facto* acceptance that white southerners could do as they wished with the black people in their midst."); Lane, *supra*, at 249 (explaining that *Cruikshank* and its progeny granted southern states "control of their colored population—because the Supreme Court had decreed that the Negroes must look first to the states for protection against violence and fraud").

Clause. As Petitioners acknowledge, the "central rule" of these cases—namely, that the Bill of Rights has no application to the states—is "a doctrinal anachronism" in light of the development of incorporation doctrine under the Due Process Clause. Pet'rs' Br. at 64-65 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992)).

Indeed, the Court has already effectively rejected *Cruikshank*'s erroneous view that the Due Process Clause "adds nothing to the rights of one citizen as against another." 92 U.S. at 554. Last year, this Court recognized in *Heller* that *Cruikshank* held erroneously that the First Amendment was inapplicable to the States, and that the Court's reasoning in *Cruikshank* lacked "the sort of Fourteenth Amendment inquiry required by our later cases." *Heller*, 128 S. Ct. at 2813 n.23.[14]

The question of whether the right to keep and bear arms as recognized in *Heller* is incorporated remains for this Court to determine, but *Cruikshank* has been discredited as an historical relic, and should not be looked to for guidance.[15] As a case

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[14] *Cf. United States v. Emerson*, 270 F.3d 203, 222 n.13 (5th Cir. 2001) (noting that *Cruikshank* "came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment," and that it therefore does not "establish[] any principle governing" the question of incorporation); *Nordyke v. King*, 563 F.3d 439, 448 (9th Cir. 2009) (stating that *Cruikshank* did not address "incorporation through the Due Process Clause"), *rehearing en banc ordered*, 575 F.3d 890 (9th Cir. 2009).

[15] *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894), also pre-date the development of modern incorporation doctrine, and, to the extent that they

that allowed racially-motivated murderers who wantonly and tragically flouted the Constitution to escape the reach of federal power, it should not be relied on as valid precedent, particularly here.

II. Any Revival of the Privileges or Immunities Clause Should Supplement, and Not Supplant, Existing Due Process Protections

If, in this case, the Court determines that it must interpret the Privileges or Immunities Clause to correct the mistakes of the Reconstruction-era Court, it should make clear that its ruling does not open the door for a reevaluation of its existing Due Process Clause decisions and, thus, does not destabilize the textual source of other, already incorporated, rights. This case does not require a broad ruling of that kind, and principles of prudence and judicial restraint militate against it.

Restraint is particularly appropriate here, given the marked uncertainty regarding the full scope of the Privileges or Immunities Clause. *See Saenz v. Roe*, 526 U.S. 489, 523 n.1 (1999) (Thomas, J., dissenting) ("Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873").[16] In addition, there are substantial prudential considerations associated with any attempt to give new expression

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stand for the general proposition that the Bill of Rights has no application to the states, they should be deemed similarly anachronistic.

[16] Even under the Court's existing precedents, however, the Privileges or Immunities Clause is not a nullity, but rather protects certain limited rights. *See Saenz*, 526 U.S. at 502-03.

to a clause enacted to protect the citizenship of freed slaves after more than a century of having those rights, and many others, vindicated through an alternative doctrinal approach.

In light of that uncertainty and the potential risk to well-established safeguards for key constitutional rights, any venture by this Court into the largely uncharted terrain of the Privileges or Immunities Clause should supplement, and not supplant, clear and well-settled Due Process Clause case law. *See Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring) (noting that the Court should exercise caution when entering "un-chartered area[s], where the guideposts for responsible decisionmaking . . . are scarce and open-ended" (alterations in original, internal quotation marks and citations omitted)).

In order to present a full picture of the possible jurisprudential and practical consequences that such a reevaluation of the textual source of incorporation might entail, we highlight below some of the many complicated constitutional questions that might arise in the event that this Court reinterprets the Privileges or Immunities Clause.

A. The Range of Individuals and Entities Covered by the Privileges or Immunities Clause Is Unclear

The first question that would arise under a revitalized Privileges or Immunities Clause is what individuals and entities are entitled to the Clause's protections. Unlike the Due Process and Equal Protection Clauses of the Fourteenth Amendment, which speak in terms of "person[s]," the Privileges or Immunities Clause refers only to "citizens." It

therefore may be unclear whether the Privileges or Immunities Clause would apply to aliens (including lawful residents, visitors, undocumented immigrants, or even enemy combatants held within the jurisdiction of the United States).

It is well-settled under existing Due Process precedents that the protections of the Bill of Rights are applicable to non-citizens. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that the criminal procedure protections of the Fifth and Sixth Amendments are applicable to all individuals, regardless of formal citizenship status). Under the Due Process Clause, basic constitutional protections safeguard non-citizens against both state and federal action. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006).

As explained by the Court in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Constitution embodies ideals that are applicable universally to all persons within the jurisdiction of the United States:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "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." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws.

Id. at 369. The Constitution thus commands the protection of the rights and liberties of *persons as such*, and not only as citizens.

The universality embodied in our constitutional commitment to personhood is a core value of our nation's history and tradition. *See* Alexander Bickel, *Citizenship in the American Constitution*, 15 Ariz. L. Rev. 369, 370 (1973) ("[T]he original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizens."). Because of the robust protections for individual rights under existing Due Process and Equal Protection precedents, non-citizens in the United States are entitled to essentially the same protections under the Bill of Rights as are formal citizens.

The status of these constitutional safeguards, however, would be less clear if the Privileges or Immunities Clause were the exclusive source for incorporation. *See, e.g.*, Jamal Greene, *Heller High Water? The Future of Originalism*, 3 Harv. L. & Pol'y Rev. 325, 344 (2009) ("Reliance on the Privileges or Immunities Clause as the path of incorporation could have disturbing implications . . . for resident aliens and undocumented immigrants, whom the text of the Clause excludes from its protection.").

This is not to say that the Privileges or Immunities Clause necessarily excludes non-citizens from its scope. *See, e.g.*, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 25 (1980) (arguing that the Privileges or Immunities Clause's "reference to citizens may define the class of rights

[protected,] rather than limit the class of beneficiaries [covered]," and that the bundle of rights typically associated with citizenship is properly extended to all persons under the Fourteenth Amendment).

Moreover, even if non-citizens are excluded from the reach of the Privileges or Immunities Clause, the Equal Protection Clause serves as an independent check on deprivations against aliens. *See* Laurence H. Tribe, *American Constitutional Law* § 7-6, at 1325 (3d ed. 2000) ("[B]y prohibiting discrimination in legal rights among all persons—citizens and aliens alike—[the Equal Protection Clause could], in effect . . . secure the 'privileges or immunities of citizens of the United States' to all persons within the jurisdiction of a particular state."); *cf. Graham v. Richardson*, 403 U.S. 365, 371-72 (1973) ("[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."); *Plyler v. Doe*, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").

Petitioners are quite right that a decision invoking the Privileges or Immunities Clause as a source of incorporated rights should not "deprive non-citizens of any rights." Pet'rs' Br. at 62. But there are other views,[17] and the questions that might

[17] For instance, Professor Tribe contends that "there may be no convincing escape from the conclusion that the Privileges or Immunities Clause . . . protects only a limited group of persons—United States citizens." Tribe, *supra*, § 7-6, at 1325.

arise concerning the rights of non-citizens flowing from the Privileges or Immunities Clause should give the Court pause before issuing any ruling that might weaken the scope of existing Due Process protections.

The exclusion of non-citizens from the most basic constitutional safeguards has an ignominious history in the Court's decisions. For much of this nation's history, African Americans were considered "persons" but not "citizens," and therefore were deemed to have "no rights which the white man was bound to respect." *Dred Scott*, 60 U.S. at 407; *see also* Bickel, *supra*, at 387 ("It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a nonperson, which is the point of the *Dred Scott* case"). Any paring back of existing constitutional protections based on a reevaluation of the Privileges or Immunities Clause would thus be inconsistent with the Constitution's universal guarantee of fundamental rights to all persons, regardless of citizenship status.[18]

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[18] As with the aliens, the status of corporations may become unclear in the wake of a doctrinal shift away from the Due Process Clause as the source of incorporated rights. The Court has recognized corporations as "persons," thus entitling them to a broad array of constitutional protections against state governmental action under the Due Process Clause, *see S. Ry. Co. v. Greene*, 216 U.S. 400, 412 (1910), but not as "citizens" under the Privileges or Immunities Clause. *See Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907). As the Court explained in *NAACP v. Button*, 371 U.S. 415 (1963), for-profit and non-profit corporations, including *amicus*, currently enjoy a degree of First Amendment freedom of speech protection against state governmental regulations. *See id.* at 428-29; *see also Pac. Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475

B. The Range of Rights Covered By the Privileges or Immunities Clause Is Unclear

If the Privileges or Immunities Clause were to supplant the Due Process Clause as the principal basis for the incorporation of rights against state and local governmental action, a second serious question would arise concerning the range of rights that could be considered "Privileges or Immunities." The confusion that might arise in such a scenario militates against a sweeping ruling that would cast doubt upon the proper textual source of fundamental constitutionally-protected rights.

There is substantial disagreement as to what rights are included within the Privileges or Immunities Clause. On the one hand, the Privileges or Immunities Clause might be interpreted more narrowly than the Due Process Clause. The Court has held that the Due Process Clause includes many unenumerated rights, such as the right to marry, *Loving*, 388 U.S. 1; to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); to reproductive freedom, *Casey*, 505

U.S. 1, 8 (1986) (plurality opinion); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 (1978). Re-conceptualizing the Privileges or Immunities Clause as the source for incorporation could force the Court to revisit its precedents establishing the freedoms that corporations currently enjoy.

U.S. 833; and to intimate relations, *Lawrence v. Texas*, 539 U.S. 558 (2003).

The status of these unenumerated rights might suddenly become unclear in a new incorporation doctrine that relies exclusively on the Privileges or Immunities Clause. *See* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110, 195-96 (1999) ("Who can say with confidence which of the salutary traditions surrounding substantive due process would be preserved intact once the transplantation had occurred?").

Notably, some scholars have contended that the Privileges or Immunities Clause, as understood by its framers and ratifiers, might be relatively narrow, including only those rights that were understood as "civil" rights at the time of its ratification (*i.e.*, those rights associated with living in organized society generally), such as the right to free speech or to own property, as distinct from: (1) "political" rights (*i.e.*, those rights deriving from the particular arrangements of specific societies), such as the right to vote or to hold office, *see, e.g.*, Akhil Amar, *America's Constitution: A Biography* 391 (2005) (noting that the Privileges or Immunities Clause "applied only to civil rights and not to political rights such as voting, jury service, militia service, and officeholding"); and (2) "social" rights (*i.e.*, those rights exercised amongst private citizens) that would encompass full equality in all spheres of life, *see* Earl M. Maltz, *Reconstruction Without Revolution: Republican Rights Theory in the Era of the Fourteenth Amendment*, 24 Hous. L. Rev. 221, 224-26 (1987). A shift to the Privileges or Immunities

Clause as the principal source of incorporated rights could therefore dramatically narrow the range of constitutional protections against state and local governmental action.

On the other hand, however, the Privileges or Immunities Clause could be the source of expanded constitutional protections. As an initial matter, many of the historical sources relied on by petitioners suggest that the Privileges or Immunities Clause, at a minimum, was intended to incorporate the first eight amendments in their entirety. *See* Pet'rs' Br. at 29-32 (quoting assertions by Representative Bingham shortly after ratification of the Fourteenth Amendment in, *inter alia*, Cong. Globe 42d Cong., 1st Sess. 84 app. (1871)). By contrast, the Court has already explained that the Due Process Clause only "selectively incorporates provisions of the Bill of Rights." *Wolf v. Colorado*, 338 U.S. 25, 26 (1949), *overruled as to remedy*, *Mapp*, 367 U.S. 643 (1961).

Moreover, some commentators have urged a broad reading of the Privileges or Immunities Clause, pointing to the Court's expansive list of freedoms associated with Due Process, as stated in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), as a starting point for interpreting the scope of the Privileges or Immunities Clause. *See* David H. Gans & Douglas T. Kendall, *The Gem of the Constitution: The Text and History of the Privileges and Immunities Clause of the Fourteenth Amendment* ix, 31 (2008) *available at* http://www.theusconstitution.org/upload/filelists/241_Gem_of_the_Constitution.pdf. In *Meyer*, the Court held that Due Process includes

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. at 399.

Others have suggested that the Privileges or Immunities Clause might include other specific rights, such as natural rights and economic liberties protected under the now-discredited doctrine of *Lochner v. New York*, 198 U.S. 45 (1905). *See* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. Rev. 1, 2 (1996) ("Can we resurrect the Privileges or Immunities Clause and revive *Slaughter-House* without exhuming *Lochner*, a case that too often left the worker and the small business person to be regulated by massive combinations of corporate power?").

Still others have suggested that the Privileges or Immunities Clause could guarantee positive rights to life essentials such as government assistance, *see* Erwin Chemerinksy, *Making the Case for a Constitutional Right to Minimal Entitlements*, 44 Mercer L. Rev. 525, 538 (1993), and a basic education, *see* Goodwin Liu, *National Citizenship and the Promise of Equal Educational Opportunity*,

in *The Constitution in 2020* (Jack M. Balkin & Reva B. Siegel, eds. 2009); or a national right to vote, *see* John Benjamin Schrader, *Note*, *Reawakening "Privileges or Immunities": An Originalist Blueprint for Invalidating State Felon Disenfranchisement Laws*, 62 Vand. L. Rev. 1285, 1307-09 (2009) (observing that the majority of state legislatures to ratify the Fourteenth Amendment concluded that the right to vote was among the Privileges or Immunities protected by the Amendment).

Against this backdrop, it is likely that a decision by the Court altering the textual source of incorporated rights would bring less, rather than more clarity, to Fourteenth Amendment law. This is not to suggest that the Court should never tackle the meaning of the Privileges or Immunities Clause in the appropriate case. But the current wide disagreement about the scope of the Clause suggests that the Court should not confront this issue lightly. And given this uncertainty, should this Court ultimately decide to reexamine its Privileges or Immunities decisions, it should leave in place the full extent of the protections for rights that have been previously determined to fall within the scope of the Due Process Clause.

CONCLUSION

In resolving this case, principles of judicial restraint counsel that the Court should look to its well-established Due Process precedents in the first instance. But if the Court renders a ruling interpreting the Privileges or Immunities Clause, any such decision should supplement, and not supplant, existing Due Process protections. The civil rights protections against state and local action

established through Due Process incorporation are an essential bulwark in safeguarding fundamental liberties. The Court should act cautiously so that these protections, on which literally millions of Americans rely, are not disturbed by any decision concerning the scope of the Privileges or Immunities Clause.

Respectfully submitted,

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