No. 24-1180

In the Supreme Court of the United States

CORRINE MORGAN THOMAS, ET AL.,
Petitioners,
v.
HUMBOLDT COUNTY, CALIFORNIA, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

David C. Tryon
Counsel of Record for Amicus Curiae
Alex M. Certo
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

QUESTION PRESENTED

Whether the Seventh Amendment right to a jury trial in suits at common law is incorporated against the States by the Fourteenth Amendment.

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INTEREST OF AMICUS CURIAE[1]

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SUMMARY OF THE ARGUMENT

This case presents an opportunity for the Court to examine whether the Privileges or Immunities Clause protects the right to a state civil jury. Although Petitioners argue that this right is incorporated via the Due Process Clause, Petitioners have preserved the privileges or immunities argument in footnote 3.

The Privileges or Immunities Clause provides a stronger constitutional foundation than the substantive due process doctrine because the former relies on the text and original meaning of the Constitution. Declaring that the Constitution

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[1] As required by Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

guarantees the right to a jury in a state civil trial using the substantive due process doctrine's atextual analysis undermines the legitimacy of any incorporation of the Seventh Amendment and diminishes respect for the law in general. The reasoning in constitutional law decisions is, in some ways, more important than the ultimate decision. If the reasoning is deficient, it is not a legal decision—it is a policy choice.

There is extensive historical evidence of what constituted privileges or immunities of citizens at the time the Constitution and the Fourteenth Amendment were ratified. Those privileges or immunities included the right to a civil jury. Here, the Court has an opportunity to revitalize the Privileges or Immunities Clause. In doing so, the Court can begin to correct a long-recognized misstep without opening the floodgates of new "substantive" due process rights.

The Court need not decide the applicability of the Privileges or Immunities Clause in other contexts; that broad question is not before the Court. Leaving past substantive due process decisions in place as the Privileges or Immunities Clause develops will provide a lifeboat for previously recognized rights as the law progresses.

ARGUMENT

I. The Restoration of the Lost Privileges or Immunities Clause

The Privileges or Immunities Clause is simple: "No 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, § 1, cl. 2. Yet the Court has largely ignored it. It is even known as "the lost clause." Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071, 1075 (2000). While lost or ignored for a time, the Privileges or Immunities Clause can and should be found and restored to its respected place in American jurisprudence.

A. The Privileges or Immunities Clause was lost out of fear: Fear not—bring it back.

Fear of the unknown impedes us from doing many things. But fear of giving the original meaning to the Constitution should never be an excuse to disregard the text. The reluctance to fully explore the Privileges or Immunities Clause "has been due to a fear of creating constitutional refuges for a host of rights historically subject to regulation." *Bell* v. *State of Md.*, 378 U.S. 226, 250 (1964) (Douglas, J., concurring in part).

Fears of expanding the scope of unenumerated rights are nothing new. Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 Geo. J.L. & Pub. Pol'y 1, 67 (2010). Over

thirty years ago, Justice Thomas recognized that "[t]he expression of unenumerated rights today makes conservatives nervous, while at the same time gladdening the hearts of liberals." Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol'y 63, 63 (1989). Professor John Ely has recognized this fear, noting, "The Court hasn't moved an inch on privileges or immunities. The reason has to be that the invitation extended by the language of the clause is so frightening." John Hart Ely, *Democracy and Distrust* 23 (1980).

While it is appropriate to be cautious in determining what rights are encompassed by the Privileges or Immunities Clause, that caution does not permit the Court to pretend it is not there.

B. The Privileges or Immunities Clause exists—it is not an inkblot.[2]

Words in our governing documents have meaning and are meant to bind and direct those who govern us. When George Leigh Mallory was asked why he wanted to climb Mount Everest, he famously replied, "because it's there." "*Because it's there"*, Forbes (Oct. 29, 2001).[3] And when asked why the Court should pay attention

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[2] See *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 224 (1987) (statement of Judge Robert H. Bork) (noting that he could not interpret the Ninth Amendment any more than if the words of the Constitution were obscured by an inkblot).

[3] https://www.forbes.com/global/2001/1029/060.html?sh=28b98af20802.

to the Privileges or Immunities Clause after all these years, the answer is the same—because it's there.

The Court has an obligation to correct mistaken interpretations of the Constitution. *Gamble* v. *United States*, 587 U.S. 678, 718 (2019) (Thomas, J., concurring) ("When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it."); see generally Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents,* 87 Va. L. Rev. 1 (2001). Indeed, in recent years, the Court has begun to correct its mistakes on constitutional interpretation. "Increasingly, it has emphasized original meaning in constitutional interpretation." *Haaland* v. *Brackeen*, 599 U.S. 255, 330 (2023) (Gorsuch, J., concurring).

Judges should never ignore, delete, or disregard constitutional provisions—especially those added via constitutional amendments for the purpose of correcting past errors. Judicially changing constitutional provisions denies the People's will implemented through an extensive and difficult process. The Fourteenth Amendment was no fluke, its verbiage was not accidental, and its purpose was not illusory. Every clause was debated and ratified by the People's representatives.

"[I]t is not to be forgotten, that ours is a government of laws, and not of men; and that the judicial department has imposed upon it by the constitution the solemn duty to interpret the laws . . . ." *United States* v. *Dickson*, 40 U.S. 141, 162 (1841). The Constitution is the supreme law of the land. U.S. Const. art. VI, cl. 2. While prior rulings have ignored clauses or provisions, that is no excuse

for the Court to continue to turn a blind eye. When faced with the text of the Constitution, pretending the words do not exist undermines the rule of law. The "same judicial humility that requires [the Court] to refrain from adding to [the Constitution] requires [it] to refrain from diminishing" the Constitution. *Bostock* v. *Clayton Cnty. Georgia*, 590 U.S. 644, 681 (2020).

II. The Court's replacement of the Privileges or Immunities Clause with the atextual substantive due process doctrine compounded the erroneous displacement of the Privileges or Immunities Clause.

No serious scholar contends that the Court's dismissal of the Privileges or Immunities Clause was correct. Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepperdine L.Rev. 601, 631 n. 178 (2001). Indeed, it is worth noting that the *Slaughter-House Cases* were "decided on a set a facts and at a time not especially conducive to a generous reading of the Amendment." *Id.* (citing Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 Chi.-Kent L. Rev. 627, 655–78 (1994)).

Following the Court's diminution of the Privileges or Immunities Clause in the *Slaughter–House Cases*, 83 U.S. (16 Wall.) 36 (1873), and *United States* v. *Cruikshank*, 92 U.S. 542 (1875), individual liberties became largely unprotected against state erosion. Without the Privileges or Immunities Clause, the Court needed a way to protect liberties that were being deprived through legitimate processes. To begin correcting this error, the Court turned to the Fourteenth Amendment's Due Process Clause.

McDonald v. *City of Chicago, Ill.*, 561 U.S. 742, 759–67 (2010).

But this doctrinal legerdemain simply piled one mistake upon another. " '[S]ubstantive due process' is an oxymoron that 'lack[s] any basis in the Constitution. *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215, 331 (2022) (Thomas, J., concurring) (citation omitted). The text and history of the Constitution "provide little support for modern substantive due process doctrine." *Id.* (Thomas, J., concurring) (citation omitted). "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual users of words." *Id.* (Thomas, J., concurring) (citation omitted).

Justice Scalia explained the difficulty in using the doctrine most succinctly: "It's spinach." David M. Wagner, *Thomas v. Scalia on the Constitutional Rights of Parents: Privileges and Immunities, or "Just Spinach"?*, 24 Regent U. L. Rev. 49 (2012). See also *McDonald*, 561 U.S. at 812 (Thomas, J., concurring in part and concurring in the judgment) (noting that the substantive due process doctrine leads to a complex analysis "devoid of a guiding principle"). Petitioners will "need to contend with all of [the Court's] messy precedents [on substantive due process] and the accompanying balancing tests considering undue burdens and other nebulous factors." Blackman & Shapiro, *supra*, at 26. Substantive due process improperly "exalts judges at the expense of the People from whom they derive their authority." *Dobbs*, 597 at 333 (Thomas, J., concurring).

"[T]he original meaning of the Fourteenth Amendment offers a superior alternative, and [ ] a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed." *McDonald*, 561 U.S. at 812 (Thomas, J., concurring in part and concurring in the judgment).

This is the perfect opportunity to compare the analysis of incorporation under the substantive due process doctrine and the Privileges or Immunities Clause. The former leads to a complex analysis "devoid of a guiding principle." *Id.* (Thomas, J., concurring in part and concurring in the judgment). The latter can easily recognize that the right to a civil jury was a right—a privilege—recognized by the constitutional Founders and the Framers of the Fourteenth Amendment. The opportunity to address this right's applicability to the states provides the Court with an opportunity to correct "an error that cannot be allowed to stand." See *Dobbs*, 597 U.S. at 569.

This is certainly not the last time the Court will have to sort through its substantive due process jurisprudence if it is retained as the primary tool to discern what rights the Fourteenth Amendment encompasses. Without a discernible guiding principle, substantive due process is little more than Godric Gryffindor's magic hat, sorting rights into categories by some mystical process. J.K. Rowling, *The Sorting*

Hat, Wizarding World.[4] Sooner or later, the Court will need to—or at least should—make the break with substantive due process and follow the more cogent, and more textually accurate.

III. What does the Privileges or Immunities Clause mean for the right to a jury trial?

The diminution of the Privileges or Immunities Clause in the *Slaughter–House Cases* makes discerning the Clause's meaning more difficult. However, one thing is sure: The Privileges or Immunities Clause means something. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect.").[5] And an exploration of the Privileges or Immunities Clause reveals that it included the right to a trial by jury in civil suits.

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[4] https://www.wizardingworld.com/writing-by-jk-rowling/the-sorting-hat (last visited Oct. 11, 2023).

[5] While the *Slaughter-House Cases* did greatly diminish the Privilege or Immunities Clause, some commentators have pointed out that the *Slaughter-House Cases* did not eviscerate it. See, *e.g.*, Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 Yale L.J. 643, 646 (2000). (noting the view of many scholars and courts, but also noting that even the *Slaughter-House* Court recognized that the clause imposed some restrictions on the states.) That Court's narrow holding, which did not address the full scope of the Privilege or Immunities Clause, should not restrict this Court's examination of this issue.

A. The Fourteenth Amendment was intended to incorporate the first eight amendments against the states.

When interpreting a clause in the Constitution, the Court begins with the text: "No 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, § 1, cl. 2. The words "privileges" and "immunities" as applied to citizens "had a long historical acceptance and would not have sounded odd to U.S. citizens in the 1860s, as it does to our modern ears." Anthony B. Sanders, "*Privileges and/or Immunities" in State Constitutions Before the Fourteenth Amendment*, 26 Geo. Mason L. Rev. 1059, 1060 (2019).

In *New York State Rifle & Pistol Ass'n. Inc.* v. *Bruen*, 597 U.S. 1 (2022), the Court pointed to the roadmap of history to examine dormant rights contained in the Constitution. History informs interpretation because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." *District of Columbia* v. *Heller*, 554 U.S. 570, 634–35 (2008). See also *Bruen*, 597 U.S. at 25 (citing *Giles* v. *California*, 554 U.S. 353, 358 (2008)) ("If a litigant asserts the right in court to 'be confronted with the witnesses against him, U.S. Const., amend. 6, we require courts to consult history to determine that scope of that right.").

Looking to the history of privileges, Blackstone's commentaries expounded on the scope and limitations of these privileges, starting with Magna Carta. See generally William Blackstone, *Commentaries on the*

Laws of England (W.S. Hein & Co. 1992) (1766). Blackstone explained that "Englishmen enjoy natural rights under natural law." Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 San Diego L. Rev. 777, 790 (2008). "In principle, these foundational statutes do not give English subjects new rights; they merely 'declare' that the subjects have in civil law rights they already enjoy as a matter of natural law." *Id*. Similarly, "American colonial laws quite early claimed that the colonists were entitled to all the 'rights liberties immunities priviledges [sic] and free customs' enjoyed by 'any natural [sic] born subject of England,' as articulated in the Maryland Act for the Liberties of the People in 1639." Curtis, *supra*, at 1094; see also *Heller*, 554 U.S. at 592 ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right."). Professor Claeys summarized that "privileges and immunities relate to both natural and civil law. They are creations of positive law, but with the purpose of carrying the natural law into effect." Claeys, *supra*, at 785.

Blackstone's understanding aligns with the subsequent decision in *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (Washington, Circuit J.), an early circuit court decision widely regarded as the most important case interpreting the original meaning of the Privileges and Immunities Clause in Article IV, and thus, relevant to interpreting the Privileges or Immunities Clause of the Fourteenth Amendment.

In *Corfield*, Justice Bushrod Washington declared:

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and posses property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Id. at 551–52.

More recently, Professor Randy Barnett has argued that the Privileges or Immunities Clause protects privileges or immunities:

> (1) which are, in their nature, fundamental;
>
> (2) which belong, of right, to the citizens of all free governments; and
>
> (3) which have been enjoyed by the citizens of the several states which

> compose this Union, from the time of their becoming free, independent, and sovereign.

Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 Harvard J. L. Pub. Pol'y 1, 9–10 (2020). He further argues that privileges or immunities include various rights, including common law rights regarding real property, and the guarantees contained within the first eight amendments. *Id.* See also *Adamson* v. *People of State of California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) (noting that the original intent of the Fourteenth Amendment included incorporating the first eight amendments against the states), *overruled by Malloy* v. *Hogan*, 378 U.S. 1 (1964). In addition to *Corfield*, Professor Barnett also points to the Civil Rights Act of 1866. Because many in Congress were afraid that the southern Democrats would repeal the Civil Rights Act, they supported a constitutional amendment—the Fourteenth Amendment—to "protect the fundamental rights of all United States citizens from being abridged by state governments." Barnett, *supra*, at 6.

Professor Barnett's interpretation of the Privileges or Immunities Clause is supported by the sponsor of that Clause. Michigan Senator Jacob Howard introduced the Fourteenth Amendment in the Senate as its designated sponsor and provided an explanation of the Amendment. After quoting Justice Washington's *Corfield* opinion, Howard noted that "the personal rights guaranteed and secured by the first eight amendments of the Constitution" should be added to the list of privileges and immunities. Cong.

Globe, 39th Cong., 1st Sess. 2765 (1866). Howard listed some of these rights, including the "right of an accused person . . . to be tried by an impartial jury of the vicinage." *Id.* Howard further explained that the "great object" of the Privileges or Immunities Clause is to "restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766.

Similarly, Professor Akhil Amar concluded—after reviewing numerous scholars and other early sources, and conducting his own analysis—that the Privileges or Immunities Clause protects and presupposes "such fundamental rights [as] are catalogued elsewhere in documents that the American people have broadly ratified, formally or informally." See, *e.g.*, Akhil R. Amar, *Forward: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 123 (2000). Of course, the first eight amendments were formally ratified. Accordingly, it is time for the Court to finally fulfill the Fourteenth Amendment's promise.

B. Privileges or Immunities includes the right to trial by jury in civil suits.

Besides the explicit intent to incorporate the Bill of Rights against the states through the Privileges or Immunities Clause, Professor Barnett asserts that rights protected under the Privileges or Immunities Clause include those which (1) "are, in their nature, fundamental;" (2) "belong, of right to the citizens of all free governments;" and (3) have, at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign . . . ." Barnett, *supra* at 9–10.

Before the ratification of the Fourteenth Amendment in 1868, every state except Louisiana had enshrined in their constitutions the right to a jury trial in civil suits, some dating back to the colonial period. See Del. Declaration of Rights of 1776, § 13 ("[T]rial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people."); Pa. Const. of 1776, art. XI ("[I]n controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred."); N.J. Const. of 1776, art. XXII ("[T]he inestimable Right of Trial by Jury shall remain confirmed, as a Part of the Law of this Colony without Repeal for ever [sic]."); Md. Const. of 1776, art. III ("[T]he inhabitant of Maryland are entitled to the common law of England, and the trial by Jury . . . used and practiced by the courts of law or equity."); Mass. Const. of 1780, art. XV ("In all controversies concerning property, and in suits between two or more persons . . . the parties have a right to trial by jury; and this method of procedure shall be held sacred.").

By 1868, thirty-six of the recognized thirty-seven states included some form of the right in their state constitution. See Steven Calabresi & Sarah Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 77 (2008). Although only eighteen of the thirty-six state constitutions explicitly mentioned the right to a jury in civil suits, the others include the right more generally. See, *e.g.*, R.I. Const. of 1842, art. I, § 15 ("The right of trial by jury shall remain inviolate."). "The original public meaning of a

clause generally protecting the right to a jury trial"—like the one contained in the Rhode Island Constitution— would "most likely have been understood in 1868 as applying to civil as well as criminal juries." Calabresi & Agudo, *supra,* at 78.

The consensus among states before the ratification of the Fourteenth Amendment was clear—the right to a trial by jury in civil suits was a revered fundamental principle. It is a right that has "been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." Barnett, *supra* at 9–10.

This Court recently confirmed that " '[t]he right to trial by jury is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right has always been and should be scrutinized with the utmost care.' " *Perttu* v. *Richards*, 145 S. Ct. 1793, 1800 (2025) (quoting *SEC* v. *Jarkesy*, 603 U.S. 109, 121 (2024)) (internal quotation marks omitted).

Thus, regardless of the Seventh Amendment, the right to a jury in civil suits is—and ought to be—protected by the Privileges or Immunities Clause.

IV. This case is an excellent vehicle to narrowly reinvigorate the Privileges or Immunities Clause without opening Pandora's box.

Shoehorning rights into the substantive due process analysis should not be the Court's preferred methodology. The Court has become increasingly skeptical of recognizing "new" rights through the substantive due process doctrine. See *Dobbs*, 587 U.S. at 237. Simply because the vehicle of substantive due process is flawed is not a good reason to deny other fundamental rights, namely the right to a jury trial. Because incorporating the right to a jury trial in civil suits against the states is a natural consequence of the Fourteenth Amendment, the Court should decide this case under the Privileges or Immunities Clause rather than continuing down the erroneous substantive due process path.

Here, the Court has the opportunity to do what it did not accomplish in other cases where it could have utilized the Privileges or Immunities Clause. See *McDonald*, 561 U.S. at 806 (Thomas, J., concurring in part and concurring in the judgment) ("[H]istory confirms what the text of the Privileges or Immunities Clause most naturally suggests . . . the Clause establishes a minimum baseline of federal rights, and the constitutional right to keep and bear arms plainly was among them."). See also *Timbs* v. *Indiana*, 586 U.S. 146, 157 (2019) (Gorsuch, J., concurring) ("[T]he appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clase, rather than, as this Court has long assumed, the Due Process Clause."). In *Saenz*, the Court did—at least briefly—"breathe new life into the previously

dormant Privileges or Immunities Clause of the Fourteenth Amendment." *Saenz* v. *Roe*, 536 U.S. 489, 511 (1999) (Rehnquist, C.J., dissenting). The Court explained, "Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause . . . it has always been common ground that this Clause protects [certain rights]." *Id.* at 503. And because "the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of [the Court's] Fourteenth Amendment jurisprudence," *id.* at 527–528 (Thomas, J., dissenting), the Court should take this opportunity to recognize that the right to a civil jury is a privilege or immunity of all citizens of the United States.

While this case will not result in a full exposition of the scope of the Clause, it will allow future litigants and courts to finally recognize a fully functional constitutional clause. Turning to the Privileges or Immunities Clause in this case does not grant a license to create new rights or new governmental obligations. Rather, it is a recognition that history provides the key to discerning constitutional rights. "[R]eliance on history to inform the meaning of constitutional text—especially text meant to codify a pre-existing right—is . . . more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments.' " *Bruen*, 597 U.S. at 25 (quoting *McDonald*, 561 U.S. at 790–91).

The Court need not decide in this case the full scope of the Privileges or Immunities Clause. "The question presented in this case is not whether [the Court's] entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what

extent, a particular clause in the Constitution protects the particular right at issue here." *McDonald*, 561 U.S. at 813 (Thomas, J., concurring in part and concurring in the judgment). The Court passed on the opportunity to re-evaluate the Privileges or Immunities Clause in *McDonald*, partially because scholars who agreed that the interpretation in the *Slaughter-House Cases* was wrong could not agree on the full scope of the clause. *Id*. at 758. Here, the right to a civil jury trial, guaranteed by the Seventh Amendment, is as close to a privilege or immunity as one can imagine. However, until the Court opens the door, the Privileges or Immunities Clause will remain an academic exercise.

This case provides a clean vehicle to decide this issue. The only question presented to the Court is whether the right to a civil jury trial is incorporated against the states through the Fourteenth Amendment. All other issues were resolved below and have not been appealed to this Court. As Petitioners noted, "No factual disputes or ancillary issues cloud the record. There are no jurisdictional or procedural complications that would prevent this Court from deciding only the incorporation question." Pet. at 27.

The Court is rarely presented with a spotless case to decide a narrow issue. This case is as clean a vehicle as the Court could ask for.

CONCLUSION

Because the Privileges or Immunities Clause "is there," the Court must one day interpret the Clause based on its original public meaning. This case presents an opportunity for the court to climb the

mountain and declare that a constitutional guarantee is just that—a constitutional guarantee.

The Court should grant the petition for writ of certiorari and declare that the right to a civil jury enumerated in the Seventh Amendment is protected under the Fourteenth Amendment's Privileges or Immunities Clause from state action.

Respectfully submitted,

David C. Tryon
Counsel of Record for Amicus Curiae
Alex M. Certo
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

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