No. 23-329

In the Supreme Court of the United States

CHONG AND MARILYN YIM, KELLY LYLES, EILEEN, LLC, AND RENTAL HOUSING ASSOCIATION OF WASHINGTON,
Petitioners,

v.

THE CITY OF SEATTLE,
Respondent.

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

BRIEF AMICUS CURIAE 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

1. Does Seattle's restriction on private owners' right to exclude potentially dangerous tenants from their property violate the Fourteenth Amendment?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, The Buckeye Institute, was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

Through its Legal Center, The Buckeye Institute works to protect property rights, preserve the structure and provisions of the Constitution, and ensure that the judiciary fulfills its responsibility to follow the Constitution. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs. In this case, The Buckeye Institute asserts that the right to property—which includes the right to exclude others from one's real property—is a fundamental right protected by the Privileges or Immunities Clause of the Fourteenth Amendment.

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[1] Pursuant to 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. Pursuant to Rules 37.2(a) and 37.3(a), The Buckeye Institute states that it has provided timely notice of its intent to file this amicus brief to all parties in the case.

SUMMARY OF ARGUMENT

Petitioners ask the Court to protect citizens' real property rights against state intrusion. Every owner of real property possesses a vast bundle of ownership "sticks," each one of which is valuable and integral to that ownership interest. In this case, the stick implicated is the right to exclude others from one's property. The Court is presented with a city government trying to force property owners to allow others to live in their property, regardless of the others' criminal history, even if it is a violent criminal history. The city may think this is good public policy, but the city's perception of good public policy does not trump the civil right of property ownership guaranteed by the Constitution.

This case presents an opportunity for the Court to examine whether the Privileges or Immunities Clause protects the Petitioners' property rights. Although the "question presented" argues that these property rights are preserved via the Due Process Clause, Petitioners have preserved the Privileges or Immunities argument in footnote 15, recognizing that the Court has not applied that clause for some time.

While the analysis of property rights under the substantive due process doctrine and the constitutional text of the Privileges or Immunities Clause may be similar and may lead to the same result, the Privileges or Immunities Clause provides a strong constitutional foundation for the analysis, stemming from the text and original meaning of the Constitution. Declaring that the Constitution guarantees the individual right to exclude others from one's property using an atextual analysis undermines

the legitimacy of the opinion and 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.

And the results may *not* be the same. There is extensive historical evidence of what constituted the privileges or immunities of citizens at the time the Constitution and the Fourteenth Amendment were ratified. Those privileges or immunities included property rights. 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.

And, the Court need not decide the applicability of the substantive due process doctrine 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 those rights as the law develops as it should have prior to the *Slaughter-House Cases.*

ARGUMENT

I. The Restoration of Things Lost.

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. Yet the Court has functionally written it out of the Constitution. 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). But the only thing lost that cannot be restored is time. 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, whether because of fear of failure or fear of the unintended consequences of our actions. But fear of giving the original public meaning to the Constitution should never be an excuse to disregard the text. We are governed by laws and not man—and certainly not by fear. Yet, fear of poor interpretation and concomitant unintended consequences is what fueled the summary dismissal of the Privileges or Immunities Clause. The reluctance to fully explore the 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 substantive rights are well known. Justice Thomas recognized this 20 years ago, writing, 'The expression of unenumerated rights today makes conservatives nervous, while at the same time gladdening the hearts of liberals.' As Professor [John] Ely noted, '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.'"

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) (quoting Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol'y 63 (1989)). While it is appropriate to be cautious in determining what rights are encompassed by the Privileges or Immunities Clause, that caution should not cause the judiciary to shun its duty to follow the Constitution.

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

Words have meaning. And words in our governing documents 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 responded, "because it's there." *"Because it's there"*, Forbes (Oct. 29, 2001).[3] And when asked why we should pay attention to the Privileges or

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[2] See also *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.

Immunities Clause after all these years, the answer is the same: because it's there.

Once a court makes a mistake, is it stuck with it? No. The Court has an obligation to correct it—especially when the mistake was in constitutional interpretation, which only it can correct without resorting to the extraordinary remedy of constitutional amendment. See generally Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1 (2001). Indeed, "[i]n recent years, [the] Court has begun to correct its mistake[s] [on constitutional interpretation]. Increasingly, it has emphasized original meaning in constitutional interpretation." *Haaland v. Brackeen*, 143 S. Ct. 1609, 1659 (2023). Judges should never ignore, delete, or disregard constitutional provisions—especially those added via constitutional amendments. Doing so denies the people's will implemented through an extensive and difficult process and for the purpose of correcting past errors. The Fourteenth Amendment was no fluke, its verbiage was not accidental, and its purpose not illusory. Every clause was debated and submitted to the American people. And the American people ratified it as written.

"[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 continued blindness. When faced with the text of the

Constitution, pretending the words do not exist undermines the rule of law. "[T]he same judicial humility that requires [the Court] to refrain from adding to [the Constitution] requires [it] to refrain from diminishing [it]." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1753 (2020).

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

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, "[i]t is also worth noting that the Justices who decided the case in 1873 had not exactly been cheerleaders for the Amendment in 1867 . . . ." *Id.*

Following the Court's evisceration of the Privileges or Immunities Clause in the *Slaughter–House Cases*, 16 Wall. 36 (1873), and *United States v. Cruikshank*, 92 U.S. 542 (1875), individual liberties became unprotected against state intrusion. 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, 759–767 (2010).

The Court's incorporation of the first eight amendments against the states predictably started with procedural rights. As the Due Process Clause speaks to "process," it makes sense that the Court viewed procedures guaranteed in the Bill of Rights as

being fundamental liberties protected by the Due Process Clause. However, without the Privileges or Immunities Clause, the Court needed a way to protect liberties that were being deprived through legitimate processes. Thus, the Court created the substantive due processes doctrine. But this doctrinal legerdemain simply piled one mistake upon another.

III. The Privileges or Immunities Clause: What does it mean?

The functional erasure of the Privileges or Immunities Clause via the *Slaughter-House Cases* makes discerning its meaning more difficult. But one thing is sure: The Privileges or Immunities Clause means something. See *Marbury v. Madison*, 1 Cranch 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect."). And even a cursory exploration of the Privileges or Immunities Clause reveals that it included protection of property.

A. Privileges or immunities include protection of property.

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. 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).

The Court provided a roadmap for interpreting long-dormant rights contained in the Constitution in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The Court looks to history 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, 634–635 (2008). See also *Bruen*, 142 S. Ct. at 2130 ("If a litigant asserts the right in court to 'be confronted with the witnesses against him,' U.S. Const., Amdt. 6, we require courts to consult history to determine the scope of that right. See, *e.g., Giles v. California*, 554 U.S. 353, 358, 128 S.Ct. 2678, 171 L.Ed.2d 488.").

Looking to the history of privileges and immunities, Blackstone's commentaries expound on the scope and limitations of these privileges of citizenship, 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*. See also Curtis, *supra*, at 1094 ("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 naturall [sic] born subject of England,' as articulated in the Maryland Act for the Liberties of the People in 1639."). 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), an early circuit court decision widely regarded as the most important case interpreting the original meaning of the Privileges and Immunities Clause, and thus relevant to interpreting the Privileges or Immunities Clause of the Fourteenth Amendment.

In *Corfield,* Justice Bushrod Washington, expounding on the meaning of privileges and immunities, 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 this 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 possess 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.

Corfield, 6 F. Cas. at 551–52 (emphasis added).

Similarly, recent scholars have argued that a substantive approach to the Privileges or Immunities Clause mandates that citizens enjoy certain legal advantages, like the right to contract, or to enjoy property rights. Akhil Reed Amar & John C. Harrison, *Common Interpretation*.[4]

Another recent scholar, Professor Barnett, has argued that the 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.

He further argues that privileges or immunities include the right to acquire and possess property of every kind and positive law (i.e., laws which protect specific rights—which includes common law rights,

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[4] https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/704 (last visited Nov. 6, 2023).

the right to make and enforce contracts, to inherit, purchase, lease, sell, hold, and convey real and personal property, and the guarantees contained in the first eight amendments. Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 Harvard J. L. Pub. Pol. 1, 9–10 (2020). 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 to "protect the fundamental rights of all United States citizens from being abridged by state governments," the Fourteenth Amendment. *Id.* at 6.

While there are some key differences in the definitions and approaches offered by scholars, on one point, there is widespread agreement: Privileges or immunities include the right to property.

B. To succeed, the government must demonstrate that regulating away a property owner's right to exclude dangerous individuals is consistent with the Nation's historical tradition.

Once a privilege or immunity has been established, it must be determined whether the State is abridging that privilege or immunity. Under *Bruen,* "the government must [ ] justify its regulation by demonstrating that it is consistent with the Nation's historical tradition" of regulation. *Bruen*, 142 S. Ct. at 2130.

Applying *Bruen*'s second step to determine if a law abridges those privileges or immunities comports

with how the Court has interpreted other parts of the Constitution. Just as the Court has done with other constitutional rights, to determine whether those privileges or immunities have been abridged, the government must point to "historic and traditional categories" of "permitted restrictions" "long familiar to the bar." *U.S. v. Stevens*, 559 U.S. 460, 468 (2010). That is because "a defense against a Privileges or Immunities Clause claim could be that the state was not 'abridging' such privileges or immunities but was rather acting pursuant to its proper police powers." Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. Chi. L. Rev. 816, 823 (2020). See also William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 Stan. L. Rev. ___, 24–25 (forthcoming 2024).[5]

"An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some 'exception' within the 'Court's . . . jurisprudence.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (quoting *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 575 (2014)).

IV. The Court should take this case to examine how the Privileges or Immunities Clause protects property rights.

This case presents the Court with the opportunity to reinvigorate the Privileges or Immunities Clause as it relates to protecting property rights—in particular, the right to exclude. This case is

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[5] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4604902 (last visited Oct. 24, 2023).

a good vehicle for this task. The Court has not yet weighed in on the question of whether the Fourteenth Amendment protects the right to exclude. However, the Court has found such right to be a long-established privilege under the Fifth Amendment. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) ("The right to exclude is 'one of the most treasured' rights of property ownership." (citation omitted)); *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (preventing landlords from evicting nonpaying tenants "intrudes on one of the most fundamental elements of property ownership—the right to exclude"); see also Pet'rs' Br. at 15–16.

But shoehorning those rights into the substantive due process analysis is not the preferred methodology. The Court has become increasingly skeptical of recognizing "new" rights via the substantive due process doctrine. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022). But simply because the vehicle of substantive due process is flawed is not a good reason to deny fundamental property rights. Because an extension of the right to exclude—which the Court has recognized under the Fifth Amendment—against the states is the natural consequence of the Fourteenth Amendment, the Court should decide this case under the Privileges or Immunities Clause rather than continuing the erroneous substantive due process charade.

Here, the Court can do what it did not in other cases where it could have turned to the Privileges or Immunities Clause. *E.g., McDonald*, 561 U.S. at 758. The Court did—at least briefly—"breathe new life into the previously dormant Privileges or Immunities

Clause of the Fourteenth Amendment." *Saenz v. Roe*, 526 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 of the Fourteenth Amendment, . . . 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 property rights are 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 is not a license to create new rights or new governmental obligations. Rather, it is a recognition that our history provides the key to discerning our constitutional rights. *Bruen*, 142 S. Ct. at 2130 ("[R]eliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments.'" (quoting *McDonald*, 561 U.S. at 790–791)); *Dobbs*, 142 S. Ct. at 2247 ("Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the 'liberty' protected by the Due Process Clause because the term 'liberty' alone provides little guidance.").

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, there is little question that privileges or immunities include the right to property. However, until the Court opens the door, the Privileges or Immunities Clause will remain an academic exercise with no precedential authority.

V. Why it Matters.

Using the correct tool always matters. While one can pound a nail with the side of a wrench, a hammer is made for the task. And although one can turn a bolt with pliers, the wrench is the proper—and better—tool. The pliers can turn the bolt, but they are likely to damage the bolt in the process. So it is in the law. While protecting the rights of United States citizens might be accomplished by gratuitously adding the word "substantive" to the clause "due process," and then struggling to simultaneously divine which rights are substantive and which are not, the proper tool is to use the words of the Constitution—the Privileges or Immunities Clause. Just because we have been using

pliers instead of a wrench to confirm the existence of some rights, it does not diminish the need to resort to the wrench when faced with a different bolt, i.e., the right to exclude others from his or her property.

And how could the Court divine if the right to exclude others is covered by the substantive due process doctrine? 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). More expansively, 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*, 142 S. Ct. at 2302 (Thomas, J., concurring).

By contrast, "[b]y restoring the Privileges or Immunities Clause to its original public meaning, no longer will [courts] have to shoehorn rights and liberties into the Due Process Clause." Blackman & Shapiro, *supra*, at 27. "[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). And, as stated above, there is

extensive history and scholarship regarding what rights were considered privileges or immunities at the time of the Amendment's ratification. The same cannot be said for rights protected by—as Justice Scalia termed it—spinach.

This case is well suited to an analysis under the Privileges or Immunities Clause. The court has not yet analyzed the right to exclude under the Fourteenth Amendment. It is an important right. This is the perfect opportunity to compare the analysis of this right 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.* at 812 (Thomas, J., concurring in part and concurring in the judgment). The latter can easily recognize that the right to exclude was a right—a privilege—recognized by the founders at the founding and at the passage of the Fourteenth Amendment. The opportunity to address this right explicitly for the first time provides the Court with an opportunity to correct "an error that cannot be allowed to stand." *Dobbs*, 142 S. Ct. at 2265.

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 discernable guiding principle, for most litigants—and certainly most Americans—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.[6] Sooner or later, the Court will need to—or at least should—make the break with substantive due process and follow the more cogent, more textually accurate, and—as luck would have it—simpler analysis of the Privileges or Immunities Clause.

As Justice Kagan observed, "we are all originalists."[7] And so the Court should "not engage in [ ] halfway originalism." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2470 (2018) (criticizing litigants for "apply[ing] the Constitution's supposed original meaning only when it suits them"); *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment) ("[I]t would be freakish to single out the provision at issue here for special treatment."). By attempting to determine what rights are longstanding in this Nation's history but then protecting them under an un-originalist doctrine, the Court engages in "halfway originalism."

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—based on the text and historical tradition.

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

[7] *Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Justice Elena Kagan).

CONCLUSION

The Court should grant the petition for writ of certiorari and declare that the traditional right to exclude 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