No. 18-280

In the

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASS'N, INC, et al.,
Petitioners,

v.

CITY OF NEW YORK, NEW YORK, et al.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment protects the right to bear arms for self-defense.

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. These principles include the recognition that many of the liberties enshrined in the Bill of Rights are fundamental natural rights held by the people. As such, these are rights held by the people long before their listing in the United States Constitution. The natural right to self-defense protected by the Second Amendment is just such a natural right. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing Second Amendment issues, including *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

SUMMARY OF ARGUMENT

The city law at issue in this case prohibits transporting an *unloaded* licensed firearm in a *locked box* to a shooting range outside the state or even to the owner's second home in a different part of the state. The court below upheld this restriction because it viewed the Second Amendment as protecting the right to bear arms only inside the home. However, the Second Amendment does not *grant* a right. It recognizes

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[1] Pursuant to this Court's Rule 37.3(a), all parties have filed blanket consents to amicus participation. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than Amicus Curiae, its members, or its counsel made a monetary contribution to fund the preparation and submission of this brief.

a preexisting fundamental natural right to self-defense. There is no basis in the history of this natural right to limit its exercise to the inside of one's home.

The right to bear arms is a right to carry – even outside the home. The New York City law cannot repeal this fundamental natural right.

ARGUMENT

I. The Right to Bear Arms Protected by The Second Amendment Is A Codification of The Natural Right to Self-Defense

This Court has held, twice, that Second Amendment protects an "individual right to keep and bear arms for the purpose of self-defense." *McDonald v. City of Chicago*, 561 U.S. 742, 748; *District of Columbia v. Heller*, 554 U.S. 570, 599 (2010) (determining that the Second Amendment protects an individual right with the "central component" of self-defense).

This Court's decision in *Heller* explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense. 554 U.S. at 593. In fact, by 1765, Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen." *Id*. at 594. These principles were not unique to England as "Blackstone's assessment was shared by the American colonists." *Id*.; *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2013).

This Court in *Heller* acknowledged that the Second Amendment's protection of the right to "bear arms" was a right to "carry" a weapon. 554 U.S. at 584. This right to "carry" a weapon is inextricably linked to the

right of self-defense. *Id*. at 585 and n.10. (citing 2 COLLECTED WORKS OF JAMES WILSON at 1142 (K. Hall M. Hall ed. 2007) (citing Pa. Const., Art. IX § 21 (1790)). The early state constitutions of Pennsylvania, Vermont, Indiana, Mississippi, Connecticut, Alabama Missouri, and Ohio explicitly protected the right to bear arms for this purpose.

The founders of the American Republic did not originate the concept of a right to bear arms in self-defense. The fundamental right of self-defense has long been recognized. Even Aristotle stated that "arms bearing" was an essential aspect of each citizen's proper role. Stephen P. Halbrook, THAT EVERY MAN BE ARMED (Univ. of New Mexico Press 2013) at 9.

The right to self-defense is a basic human right recognized throughout history. Hugo Grotius, THE RIGHTS OF WAR AND PEACE 76-77, 83 (A.C. Campbell trans., 1901) ("When our lives are threatened with immediate danger, it is lawful to kill the aggressor"); Marcus Tullis Cicero, SELECTED SPEECHES OF CICERO 222, 234 (Michael Grant ed. and trans., 1969) ("[Natural law lays] down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right"); *see also* David Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self Defense*, 22 BYU J. Pub. Law 43, 58-92 (2007-2008) (detailing writings of early philosophers regarding the right and duty of self-defense). The Second Amendment reflects these philosophies in the right to bear arms.

John Locke identified it as the "fundamental, sacred, and unalterable law of self-preservation." John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 149

(1690). Locke understood, and subsequently argued, that the right to use force in self-defense is a necessity. *Id*. at § 207. The writings of Thomas Hobbes also recognize the right to self-defense as a self-evident proposition: "[a] covenant not to defend my selfe from force, by force, is always voyd." Thomas Hobbes, LEVIATHAN 98 (Richard Tuck ed., 1991). Nothing in this history limits the right to self-defense to actions inside the home.

II. The Right to Self Defense Extends Beyond the Threshold of the Home.

The failure to recognize the right to bear arms in the original text of the Constitution was a point of contention at state ratifying conditions and was vigorously debated by the American Founders. Samuel Adams proposed an amendment to the Massachusetts resolution to ratify the constitutional convention which included a command that "Congress should not infringe the … right of peaceable citizens to bear arms." Letter from Jeremy Belknap to Ebenezer Hazar, reprinted in 7 John P. Kaminski, *et al*. eds., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1583.

Advocates for the Constitution argued that Congress would have no power to interfere with the "rights of bearing arms for defence." Alexander White, Winchester Virginia Gazette, February 22, 1788, reprinted in 8 John P. Kaminski, *et al.* eds., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 404. Notwithstanding the assurances of those who argued that an express provision was not required, there were many proposals for amending the proposed Constitution to include explicit recognition of the natural right to bear arms in self-defense. *E.g*.,

Convention Debates, reprinted in 2 John P. Kaminski, *et al.* eds., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 597-598; The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, reprinted in 2 John P. Kaminski, *et al.* eds., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623-24; Convention Debates, reprinted in 10 John P. Kaminski, *et al.* eds., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1553; North Carolina Convention Amendments, reprinted in 18 John P. Kaminski, *et al.* eds., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 316; Declaration of Rights and Form of Ratification Poughkeepsie Country Journal, reprinted in 18 John P. Kaminski, *et al.* eds., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 298.

These proposals led to the ratification of the Second Amendment, the purpose of which was to limit the ability of the new government to impede the ability of citizens to keep and bear arms, particularly for use in self-defense. State constitutions of the time echo this purpose. Of the nine state constitutional protections for the right to bear arms enacted immediately after 1789, at least seven unequivocally protected an individual citizen's right to self-defense. This is strong evidence that the founding generation understood the right to bear arms as part of the fundamental right of self-defense. *Heller*, 554 U.S. at 603

Nothing in this history limits the right to bear arms or the right to self-defense to actions inside the home. There is no basis on which to argue that the Framers meant only to preserve a mere shadow of the

recognized natural right of self-defense. The Framers understood that codifying the right to keep arms would be meaningless in preserving the natural right of self-defense in the absence of the corollary right to bear arms. Citizens do not waive their right to self-defense merely by crossing through a doorway to the outside.

In *McDonald*, this Court reiterated that many state constitutions guaranteed the right to bear arms as an individual right to self-defense, as did later state constitutions adopted during the Reconstruction era. *McDonald*, 561 U.S. at 777. "A clear majority of the States in 1868, therefore, recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government." *Id.*

The need to exercise the right to self-defense arguably becomes more acute once people expose themselves to the dangers of the world, and this remains as true today as it has been throughout the history of the United States. *Heller*, 554 U.S. at 659 (2008). The drafters of the Constitution were not ignorant of this fact, which is why understanding the basic distinction between the words keep and bear is so important.

The court below ignored this history. Instead, the Second Circuit upheld a state scheme that prohibits transporting even unloaded firearms in locked containers to the owner's other home. *New York State Rifle & Pistol Association, Inc. v. City of New York*, 883 F.3d 45, 57 (2d Cir. 2018). This view departs from this Court's rulings in *Heller* and *McDonald* and further conflicts with ruling of the Seventh Circuit in *Moore v. Madigan*, *supra*. There, the court noted that "one doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the

eighteenth century could not rationally have been limited to the home." *Id.* at 936.

III. Early Case Law Also Recognizes the Right to Bear Arms beyond the Threshold of the Home

This court in *Heller* cited with approval several antebellum state court decisions, applying either the Second Amendment or parallel state constitutional provisions. In *State v. Reid*, the Supreme Court of Alabama noted: "A statute which, under the pretence of regulating, amount to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would clearly be unconstitutional." *State v. Reid*, 1 Ala. 612, 616-17 (1840) (emphasis added). This Court cited *Reid* as an accurate expression of the right to bear arms. *Heller*, 554 U.S. at 629.

In the first published appellate decision on the right to arms, *Bliss v. Commonwealth*, an 1822 opinion of the Kentucky Court of Appeals (then the state's highest court), the court struck down a state statute that prohibited the concealed carrying of weapons. The court held that the prohibition violated the "right of the citizens to bear arms in defense of themselves and the state" as recognized in the Kentucky Constitution. 12 Ky. (2 Litt.) 90, 91, 93 (1822), cited in *Heller*, 554 U.S. at 585 n.9. The Kentucky court viewed the right to bear arms as a categorical right to carry personal weapons in any manner the owner deemed appropriate, whether concealed or openly. Subsequently, Kentucky amended its constitution to give the legislature the authority to ban concealed carry, while still allowing citizens to carry firearms openly for self-defense.

In *Nunn v. State*, 1 Ga. 243 (1846), the Georgia Supreme Court struck down a general ban on openly carrying handguns in public for protection. The court held that the provisions of the statute banning "carrying certain weapons secretly" was valid because it did not "deprive the citizen of his natural right of self-defense, or of his constitutional right to keep and bear arms." *Id*. at 251. This Court cited *State v. Chandler*, 5 La. Ann. 489 (1850) for the proposition that the Second Amendment guarantees a right to carry, subject to the legislature's determination of whether the carry is to be open or concealed. *Heller*, 554 U.S. at 629. To the exact same effect is *Andrews v. State*, where the Tennessee Supreme Court equated the state constitutional provision to the Second Amendment and struck down a law against carrying handguns "publicly or privately, without regard to time or place, or circumstances." 50 Tenn. 165, 187 (1871).

Early twentieth century cases carry this theme forward. The Supreme Court of Vermont declared an ordinance prohibiting the carrying of concealed weapons without a permit to be contrary to Vermont's Constitution, which states: "The people of the state have a right to bear arms for the defense of them-selves and the state." *State v. Rosenthal*, 75 Vt. 295, 297 (1903). The Idaho Supreme Court issued a similar ruling, holding that a state law that prohibited the carrying of handguns in cities, towns, or villages violated the Idaho Constitution and the Second Amendment. *In re Brickey*, 8 Idaho 597, 599 (1902). The legislature could regulate the exercise of the right by requiring that defensive handguns be carried openly, but it had "no power to prohibit a citizen from bearing arms in any portion of the state of Idaho," whether inside a city or not. *Id*. See also Steven G. Calabresi and Sarah E.

Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868*, 87 Tex. L. Rev. 7, 50 (2008).

In the midst of these decisions, this Court specifically recognized the fundamental right of citizens "to keep and carry arms wherever they went." *Dredd Scott v. Sandford*, 60 U.S. 393, 417 (1856) (emphasis added). Of course, the irony of this Court's reasoning in *Dredd Scott* was that it relied on the recognition of this right to justify its erroneous conclusion that African-Americans are not worthy of citizenship. The recognition of citizenship inevitably leads to the recognition of the right to keep and bear arms for self-defense. As the Supreme Court of Rhode Island recently noted: "One does not need to be an expert in American history to understand the fault inherent in a gun-permitting system that would allow a licensing body carte blanche authority to decide who is worthy of carrying a concealed weapon." *Mosby v. Devine*, 851 A.2d 1031, 1047 (R.I. 2004).

All these cases stand for the proposition that bearing arms outside the home for the purpose of self-defense is a right protected by the Second Amendment. The Court below, however, rejected the notion that the core of Second Amendment protects the right to bear arms outside the home.

CONCLUSION

The Second Amendment recognizes a natural right to self-defense that extends beyond the threshold of the home. Restrictions on this fundamental right should be analyzed the same as restrictions on other fundamental rights – under strict scrutiny. The New York law at issue here cannot survive such scrutiny.

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