No. 18-280

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., *et al.*,

Petitioners,

v.

CITY OF NEW YORK, *et al.*,

Respondents.

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

AMICUS CURIAE BRIEF OF THE MADISON SOCIETY FOUNDATION, INC., IN SUPPORT OF PETITIONERS FOR REVERSAL

DONALD E. J. KILMER, JR.
Counsel of Record
LAW OFFICES OF DONALD KILMER, APC
1645 Willow Street, Suite 150
San Jose, CA 95125
(408) 264-8489
don@dklawoffice.com

Counsel for Amicus Curiae

288378

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The question presented is:

Whether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.

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I. INTEREST OF AMICUS[1]

The Madison Society Foundation, Inc., (MSF) is a not-for-profit 501(c)(3) corporation based in California. It seeks to promote and preserve the Constitution of the United States, in particular the right to keep and bear arms. MSF provides the general public and its members with education and training on this important right. MSF contends that this right includes the right of a law-abiding citizen to purchase firearms in all states and territories, subject to federal law.

II. ARGUMENT SUMMARY

The Second Amendment has two clauses, one affirming the importance of a well regulated militia, the other guaranteeing the right of the people to keep and bear arms. The relationship between these two clauses has engendered debate within the Court. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), for example, the dissent argued that the militia clause "confirms that the Framers' single-minded focus in crafting the constitutional guarantee 'to keep and bear

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation and submission of this brief. No person other than the amicus curiae, or its counsel made a monetary contribution to its preparation or submission. Counsel for Petitioners and Counsel for Respondents consented to this filing in accordance with this Court's Rules.

arms' was on military uses of firearms, which they viewed in the context of service in state militias." *Id*. at 643 (Stevens, J., dissenting). The majority treated the militia clause as a preamble to the arms clause, and discussed the role of preambles in construing operative clauses. *Id*. at 577-78.

We suggest that the relationship of the two clauses is best understood in light of their history and evolution.[2] Neither was meant to or understood as limiting the scope of the other. The militia clause and the right to arms clause had separate origins, philosophical underpinnings, and were demanded by separate constituencies. They were only joined together at the Virginia ratifying convention of 1788, the eleventh hour of the Framing. The phrasing of one as an apparent preamble to the other was more stylistic than substantive.

We further suggest that this bifurcated pedigree of the 1791 Second Amendment, along with a Fourteenth Amendment re-ratification in 1868, strongly implies that a personal, individual "right to keep and bear arms" is: (A) broader and more vigorous than any militia-based right; and (B) that neither of the two clauses is a limitation on the other; and (C) that both clauses support a liberal (not limiting) interpretation of the other.

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[2] Amicus Curiae are indebted to Dave Hardy of Tucson, Arizona, for a great deal of the research and scholarship in this brief.

III. STATEMENT OF FACTS

New York City prohibits its residents from possessing a handgun without a license, and the only license the City makes available to most residents allows its holder to possess her handgun only in her home or en route to one of seven shooting ranges within the city.

The City thus bans its residents from transporting a handgun to any place outside city limits, even if the handgun is unloaded and locked in a container separate from its ammunition, and even if the owner seeks to transport it only to a second home for the core constitutionally protected purpose of self- defense, or to a more convenient out-of-city shooting range to hone its safe and effective use.

The City asserts that its transport ban promotes public safety by limiting the presence of handguns on city streets. But the City put forth no empirical evidence that transporting an unloaded handgun, locked in a container separate from its ammunition, poses a meaningful risk to public safety.

Moreover, even if there were such a risk, the City's restriction poses greater safety risks by encouraging residents who are leaving town to leave their handguns behind in vacant homes, and it serves only to increase the frequency of handgun transport within city limits by forcing many residents to use an in city range rather than more convenient ranges elsewhere.

IV. ARGUMENT

A. A Militia-Centric View of the Right to Keep and Bear Arms is Ahistorical.

The core debate over the Second Amendment's meaning is whether the amendment's second clause, protecting the right to keep and bear arms, should be limited by its first clause, describing the importance of a well-regulated militia. That is, whether the individual right to arms exists only to the extent necessary to serve in such a militia.[3]

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[3] *See District of Columbia v. Heller*, 554 U.S. 570, 636 2008 (Stevens, J., dissenting) ("The question presented by this case is not whether the Second Amendment protects a "collective right" or an "individual right." Surely it protects a right that can be enforced by individuals."). This militia-centric construction is actually a recent development. Until the 1990s, the militia-centric theory of the Second Amendment rejected an individual rights interpretation in favor of a right of states to have some manner of militia organization. *See, e.g., Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *United States v. Warin*, 530 F.2d 103, 105 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *United States v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. (1981).

That position was always untenable. The Framers uniformly used "right of the people" to describe individual rights in the First and Fourth Amendment; and in the Ninth Amendment's reservation of rights to the people.

The militia-centric view assumes that the two clauses of the Second Amendment must have reflected a single purpose, so that one clause was implicitly meant to define the limits of the other. Reasoning by implication is essential, since no one of the Framing generation ever stated that the right to arms clause was restricted by the militia clause.

A careful look at the relevant history suggests, however, that the Second Amendment has two clauses because it has two purposes, and was meant to satisfy two different sets of critics of the original Constitution. In 1789-91 there were Americans who desired the guarantee of an individual right to arms, and there were Americans who desired to protect the militia as an institution. Only at the Virginia ratifying convention – in the eleventh hour of framing the Bill of Rights – did it occur to the Framers that both provisions could be embodied in a single amendment.

Nor was this drafting convention unusual. Each of the first eight entries in the Bill of Rights sets forth multiple rights in a single amendment. The Ninth Amendment reminds us that even that list is not exhaustive.

The common core of our First Amendment concerns matters of the intellect and spirit; the common denominators of the Fourth, Fifth, and Sixth Amendments preserve due process, protect the integrity of property rights, and promise fair criminal proceedings; the Seventh Amendment preserves a civil justice system based on juries, and the Eighth Amendment sets limits on pretrial detention and civil/criminal punishments.

The core of our multi-purpose Second Amendment is the acknowledgment of the individual's moral authority to use force in defense of self. It is with this foundation, that the Second Amendment's own militia clause, and the other militia clauses in the U.S. and State Constitutions, along with federal and state statutory authorities for militias, can be interpreted as a means for citizens to come to the defense of their community, state, and nation. This is accomplished through the allocation and decentralization of martial power between the national government and the states; but all of this is only made possible by the bedrock of a fundamental right to self defense held by individuals.

1. Historical Background: Classical Republicanism vs. The Jeffersonian Vision.

Late 18th century American political thought was dominated by two approaches, which differed in emphasis. The older of the two is today identified as the Classical Republican. This approach drew upon Niccolo Machiavelli's early, pro-republican writings, as imported into English political thought by James Harrington.

To Machiavelli, a republic (a "free state," in Second Amendment terms) could not safely be defended by a hired, full-time army. Any army strong enough to defend a republic would be strong enough to topple it, and take political power and wealth for its members. "Mercenary captains are either very capable men or not; if they are, you cannot rely upon them, for they will always aspire to their own greatness, either by oppressing you, their master, or by oppressing others

against your intentions; but if the captain is not an able man, he will generally ruin you." NICCOLO MACHIAVELLI, THE PRINCE AND THE DISCOURSES 45 (Mod. Library ed. 1950) (1513).

Harrington sought to escape Machiavelli's dilemma by envisioning a republic defended by a militia of freeholders, who also held the franchise. No matter how powerful such a militia, it could not seek to topple the government to seize political power – as voters, its member already had it – nor to seize wealth – as freeholders, its members had that as well.

> Harrington's innovation, however, lay in joining land ownership with the possession of arms as the twin bases of virtuous citizenship. Because he was both armed and landed, Harrington's virtuous citizen had the necessary independence to maintain his life, liberty, and property against all who would deprive him of them. From Harrington, libertarians came to conceptualize civic virtue in terms of the armed freeholder: upstanding, courageous, self-reliant, individually able to repulse outlaws and oppressive officials, and collectively able to overthrow domestic tyrants and defeat foreign invaders.
>
> Robert Shalhope, *The Armed Citizen in the Early Republic,* 49 LAW & CONTEMP. PROBS. 125, 128 (1986)

This Classical Republican approach thus saw property ownership, the franchise, and militia duty as

identical and coextensive; only this triple relationship could give a polity stability and independence. Individual rights were not its focus. Its goal was stability rather than individual rights.

Late 18th century America came to see the rise of a second political world-view, which was at the time identified as "Radical" thought, and which today is identified as Jeffersonian or proto-Jeffersonian.

> Between these two points [American independence and the drafting of the first state constitutions] was a continuous, unbroken line of intellectual development and political experience. It bridged two intellectual worlds: the mid-eighteenth century world, still vitally concerned with a set of ideas derived ultimately from classical antiquity – from Aristotelian, Polybian, Machiavellian, and seventeenth-century English sources, and the quite different world of Madison and Tocqueville.
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> Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, 285 (1977)

This new movement saw things differently than had the Classical Republicans. The electoral franchise was not to be limited to landowners: everyone who contributed to the state should have a voice in its affairs. The militia system was a tool, not the sole key to stability. Thomas Paine, a prominent leader of the Radical movement, did not hesitate to write in late 1776 that "a summer's experience" had sufficed to show

the militia's weakness, and that "I always considered militia as the best troops in the world for a sudden exertion, but they will not do for a long campaign." Thomas Paine, THE AMERICAN CRISIS, No. I (1776). Paine's language would have been rank political heresy to a Classical Republican.

2. The Right to Arms vs. The Militia in Early American Statecraft.

In 1776, with the colonies preparing to declare their independence, several colonies chose to replace their Royal charters with written constitutions, prefaced by a declaration of rights. It swiftly became apparent that the drafters, at this stage of history, saw something of a binary choice between praising the militia (a tenet of Classical Republicanism), and recognizing an individual right to arms (reflecting Radical/Jeffersonian values). The concept that, since the two provisions were not inconsistent, a state might adopt both, does not seem to have occurred to those framing these early constitutions.

a. Initial Contrast: Jefferson vs. Mason

Virginia's Constitution and Declaration of Rights were the first adopted after independence. Thomas Jefferson (then serving in the Continental Congress) drafted a constitution and submitted it for consideration; portions of his draft were incorporated into the final document. 1 PAPERS OF THOMAS JEFFERSON 337 (J. Boyd ed., 1950).

Jefferson: An Individual Right to Arms and Universal Manhood Suffrage.

Jefferson's draft was actually a reflection of a

proto-Jeffersonian vision of universal participation in government. He would have extended the franchise to any taxpayer, divided state lands among landless citizens, stopped importation of slaves, and ended Virginia's establishment of religion. His draft of a declaration of rights did not even mention the militia, but did include a clearly individual right to arms: "No freeman shall ever be debarred the use of arms." 1 PAPERS OF THOMAS JEFFERSON, *supra*, at 344.[4]

Virginia Convention: Praise for Militia and Freeholder-Only Suffrage.

Virginia's legislature chose instead a constitution and bill of rights drafted by committee, and taken predominantly from the proposals of the more conservative George Mason. (Edmund Randolph, a member of the legislature, wrote that Mason's plan "swallowed up all the rest." EDMUND RANDOLPH'S ESSAY ON THE REVOLUTIONARY HISTORY OF VIRGINIA, 44 VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY 35, 44 (1936)).

The resulting Declaration omitted any mention of individual arms rights and substituted a recognition that: "A well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and

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[4] In his second and third drafts, Jefferson added "[within his own lands or tenements]". *Id.* at 353, 363. Jefferson used brackets to denote language that was tentative or optional. 1 PAPERS OF THOMAS JEFFERSON, *supra*, at 347 n. 10. Jefferson, like other large landowners he may have worried about poaching.

safe defence of a free State." Virginia Declaration of Rights, §13 (1776). In accord with the tenets of Classical Republicanism, the constitution left undisturbed Virginia's longstanding requirement of property ownership for voting, 3 HENING'S LAWS OF VIRGINIA 173 (1699).

b. The Sequel: Virginia vs. Pennsylvania.

Two months later, Pennsylvania became the second state to adopt a declaration of rights. The drafters had Virginia's Declaration was a model, and John Adams wrote that Pennsylvania's "bill of rights is almost verbatim from that of Virginia." JOHN ADAMS, DIARY AND AUTOBIOGRAPHY 391 (L. H. Butterfield ed. 1964). Note the qualifier, "almost," when comparing Virginia's effort with the Pennsylvania effort:

Virginia:

> Section 1. That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.
>
> Section 12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.
>
> Section 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of

> peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

Pennsylvania:

> I. That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.
>
> XII. That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.
>
> XIII. That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

For the opening paragraph, the Pennsylvanians simply copied that of Virginia, editing it a bit. In the case of the second, they expanded the wording. But in the case of the third paragraph, did something more dramatic: they deleted the Virginia militia provision entirely and substituted a guarantee of a clearly individual right to arms. Indeed, the word "militia" is not to be found anywhere in the Pennsylvania

Declaration of Rights, and only once in its 1776 Constitution (§7: legislators may not hold office, other than in the militia).

We can also compare its extension of the franchise. Unlike Virginia, Pennsylvania enfranchised any taxpayer over the age of 21. Pa. Const. § 6 (1776).

Why the difference in outlook? Pennsylvania's politics had taken a dramatic turn. Independence had been opposed by Quakers and Pietists and the coastal merchant class, all of whom had long dominated the legislature. Patriot forces managed to purge them, and voted to have the constitution drafted by an elected convention. *See generally* Harding, PARTY STRUGGLES OVER THE FIRST PENNSYLVANIA CONSTITUTION, ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 371-72 (1895); J. Selsam, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY (1936).

The contrast between Jefferson's and Mason's proposals, and between those of Virginia and Pennsylvania, illustrate how in 1776 militia/arms provisions were seen as a binary choice: a constitution either recognized one or the other, but not both, and the choice reflected whether the drafters leaned toward Classical Republicanism (freehold-only suffrage) or a Jeffersonian vision (universal manhood suffrage).

The Virginia model was adopted by Maryland, Declaration of Rights §XXV (1776), and the Pennsylvania one by Vermont, Vt. Constitution, Ch. I, art. 16 (1777). At this point, no one seems to have sensed that a state could both praise the militia and guarantee an individual right to arms.

To be sure, there was a third model, which can fairly be called a militia-centric individual right. This approach was typified by Massachusetts, which protected a right to keep and bear arms "for the common defense." MA. Const., Pt. I, art. 17 (1780). We need not examine its history in detail, since "for the common defense" met with objection, Robert Shalhope, *supra*, at 134-35, and a proposal to add it to the Second Amendment was voted down in the First Senate: "On motion to amend article the fifth, by inserting the words "for the common defense next to the words 'bear arms:' it passed in the negative." JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820).

c. Federal Bill of Rights in State Conventions.

During the ratifying conventions in the states (1787-1788), there were three relevant calls for a bill of rights. The dominance of the individual right to arms model was here complete. All three called for an individual right to arms: the militia as an institution was mentioned only by way of criticism.

The Pennsylvania minority[5] report was drafted by delegates who were scarcely supporters of the militia as an institution. One of their complaints was that:

> [T]he personal liberty of every man, probably from sixteen to sixty years of age, may be destroyed by the power Congress have in organizing and governing of the militia. As militia they

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5 Minority, because Pennsylvania's traditional power bases had recovered power since being purged in 1776.

> may be subjected to fines of any amount, levied in a military manner; they may be subjected to corporal punishments of the most disgraceful and humiliating nature; and to death itself, by the sentence of a court-martial.
>
> J. McMaster & F. Stone, PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, 480 (1888)

The Pennsylvania minority called for an amendment to the proposed constitution, guaranteeing:

> That the people have a right to bear arms for the defense of themselves and their own State, or of the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.
>
> *Id., at* 462.

There is no mention of the militia, but there is a clearly articulated individual right to arms.

In the Massachusetts ratifying convention, Sam Adams called unsuccessfully for a guarantee that "the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms…" DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, at 86-87

(Boston 1856).

In New Hampshire's ratifying convention, proponents of a bill of rights for the first time won a majority vote, with the convention ratifying but calling for a guarantee that "Congress shall never disarm any Citizen except such as are or have been in Actual Rebellion." 1 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 761 (1971).

With New Hampshire's vote, the proposed constitution had the nine ratifications required for it to bind those states that had signed on. We are at the Eleventh Hour of the Constitution's history – *and no one had yet proposed a federal bill of rights that said anything about the militia as a system.*

The 1776 Pennsylvania guarantee, not its Virginia rival, was the exclusive model for those Americans calling for a federal bill of rights.

d. Virginia Proposes a Militia Clause.

The scene then shifted to Virginia, which twenty-two years before had adopted a constitution that called for a "well-regulated militia." George Mason, the probable source of that provision, told the ratifying convention that:

> Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British parliament was advised by an artful man, who was governor of Pennsylvania, to disarm the people--that was the best and most effectual way to enslave them--but that they should not do it openly; but to

> weaken them and let them sink gradually, by totally disusing and neglecting the militia.
>
> David Robertson, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 270 (2d ed. Richmond 1805)

Note how Mason's argument reflected a shift from the world-view of 1776. Mason's 1776 view had been that the militia as an institution was essential to a free state. Mason's 1788 argument was that individual disarmament was a precondition to the destruction of liberty, and neglecting the militia was just a preliminary step to that disarmament.

Perhaps as a result of this changed outlook, the Virginia delegates achieved an insight that had escaped those who had drafted all prior guarantees of rights. *The choice was not either-or: there was nothing inconsistent in both protecting an individual right to arms and also praising the militia as an institution.* In short, they could satisfy both the Classical Republicans and the Jeffersonians.

The Virginia proposal called for a guarantee "that the people have the right to keep and bear arms; that a well regulated militia, composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state ...." 1 Bernard Schwartz, *supra*, at 842. Before the Virginia proposals, all calls for a federal bill of rights had focused exclusively on an individual right to arms; the Virginians merely appended a clause praising the militia. The Virginia approach was subsequently adopted by New York, CHARLES TANSILL, ED., DOCUMENTS ILLUSTRATIVE OF

THE FORMATION OF THE UNION OF THE AMERICAN STATES 1035 (1927), and formed the basis of James Madison's draft of what become the Bill of Rights. 12 PAPERS OF JAMES MADISON 58 (Robert Rutland & Charles Hobson, eds., 1964)

Madison was willing to allow a phrase praising the militia, but not the parts of the Virginia proposals that would have given substantial guarantees to the militia as a system. The Virginia proposals also called for a state power to organize and arm its militia should Congress fail to do so. 3 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 660 (2d ed. 1836, reprinted 1966). This proviso Madison did *not* include in his draft of what became the Bill of Rights. The right to arms would receive a substantive guarantee. The nod to the militia concept would involve mere lip service.

3. The Right to Arms Clause vs. the Militia Clause and the Framing of the 14th Amendment.

The decades after the Framing saw the militia system known to the Framers (i.e., near-universal and mandatory) rapidly fade.

The 1792 Militia Act broadly empowered the states to exempt persons from militia duty. Act of May 8, 1792, 1 Stat. 271, 271 §2 (exempting "all persons who now are or may hereafter be exempted by the laws of the respective states"). Many states, particularly in the north, took advantage of the power given. Soon after the war of 1812, Ohio and Delaware abandoned mandatory militia service. Massachusetts, Maine, Ohio, Vermont, Connecticut, New York, and Missouri

followed suit in the 1840s, and New Hampshire in the 1850s. James K. Mahon, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 83 (1983). The universal militia was supplanted by smaller volunteer units with more training.

Following the Civil War, even voluntary militia units faded out in the North; their membership had largely served in the Union armies during the war, and after four years of fighting, had little interest in additional service. Michael D. Doubler, CIVILIAN IN PEACE, SOLDIER IN WAR 110 (2003). By 1866, the universal militia of the early republic was long gone. The Second Amendment came to be seen as focused exclusively upon an individual right.

The Reconstruction Congress demonstrated this view when, in 1867, it voted to order dissolution of the Southern militias, Act of March 2, 1867, §6, 14 Stat. 487, while refraining from disarming their members out of concern that individual disarmament would violate the Second Amendment.

The dissolution bill began as a proposal by Senator Wilson which would have commanded that the southern militias (which he denounced as bands of former rebels bent upon terrorizing the freedmen) "be forthwith disarmed and disbanded ...." CONG. GLOBE, 39th Cong., 2nd Sess. at 1848 (Feb. 26, 1867). On the floor, Senator Willey objected: "It strikes me also that there may be some constitutional objection against depriving men of the right to bear arms and the total disarming of men in time of peace." *Id.*

Senator Wilson responded that he was willing to "modify the amendment by striking out the word

'disarmed.' Then it will provide simply for disbanding these organizations." *Id.* at 1849. Senator Willey found the amended bill, which dissolved militia units but preserved the individual right to arms for these former enemies, "much more acceptable to me than it was previously," *Id.*, and in that form it was enacted. Act of March 2, 1867, *supra*. See generally Stephen P. Halbrook, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 135-42 (1984).

Thus, to the Framing generation of 1866-68, the Second Amendment was entirely about an individual right to arms. Any belief that it was meant to protect the militia as an institution – an institution then dead for decades – had entirely vanished.

In sum, in 1789-91 there were Americans who wanted to protect the militia as an institution, and those who wanted to protect an individual right to arms; the first clause of the Second Amendment was meant to reassure the first, and its second clause to satisfy the second. Neither clause should be taken to restrict or limit the other. If we were to rank the importance of the two clauses in 1789-91, the right to arms clause would be first among equals.

By 1866-68, the predominance of the right to arms was total: the Second Amendment was seen as protecting individual rights to arms, and not as protecting the militia as an institution.

Viewed through the eyes of either (or both) Framing generations (1789 or 1866), a militia-centric view of the right to arms (a view which was actually rejected by the First Senate) is completely ahistoric.

B. The Recognition of A Multi-Purpose Second Amendment Undermines the Validity of New York's Premises-Only Arms License.

So, cognizant of the principle that all constitutional clauses must be given meaning, what role can we assign to the Second Amendment's vestigial militia clause? At its core, the clause refers not to a right, but to a social duty, a citizen's duty to be ready to help "execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONSTITUTION, ART. I, SEC. 8, CL. 15. Viewed in this light, the militia clause is a touchstone for liberalizing[6] the individual's right to keep and bear arms.

The Second Circuit's opinion is long on judicially empowering balancing tests, but short on consistent application of constitutional principles, or even ordinary logic. The opinion accurately recounts how the "Supreme Court announced that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008)." [Pet. App. 9]

The analysis of the Second Amendment actually employed by the *Heller* majority, would have ended the inquiry there, with judgment for the Plaintiffs.

Even a tiered scrutiny approach can not validate the premises-only license. Later in the opinion, the

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[6] The term "liberalizing" is used here, not in its modern political vernacular, but in its original meaning as a gerund of the word "liberty."

circuit court recounts (in rational basis terms, *i.e.*, with much deference to) the State's justification for a premises-only license. Most people, the Second Circuit claims, should be limited to a premises-only license, because the licensee might have a weapon (albeit locked, unloaded, and with ammunition carried in a separate container) during an actual confrontation like "road rage, crowd situations, demonstrations, family disputes and other situations where it would be better to not have the presence of a firearm." [Pet. App. 26, internal quotations omitted.]

First off, "family disputes" are *most* likely to take place at a licensee's premises where the gun is authorized and the challenged ordinance is irrelevant. Therefore any policy designed to keep "family disputes" from turning deadly based on excluding the presence of a gun, is contradicted by the issuance of a premises license for the one place where families are most likely to reside – the "dwelling [of] a householder." N.Y. Penal Law § 400.00 (a).

That leaves us with: road rage, crowd situations, and demonstrations.[7] Road rage has to be the quintessential "confrontation" contemplated by the *Heller* decision, 554 U.S. at 592. Why is it even rational to insist that a victim of this kind of thuggery be disarmed?

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[7] The catch-all of "other situations where it would be better to not have the presence of a firearm" is a null concept. It adds nothing to the definitions, especially since the right to carry weapons upheld in *Heller*, 554 U.S. at 592, was possession for confrontation.

Alternatively, Defendants could be counting on a court to accept, without evidence, that law-abiding gun owners who have been investigated, fingerprinted, and licensed to possess a firearm in their home, are somehow pre-disposed to instigate road rage incidents that escalate into deadly violence. This would be rank prejudice and cannot, as a matter of law, form the basis for a legal opinion. (Such a court would also have to assume, again without evidence, that premises-only licensed gun owners would not succumb to road rage when driving to or from their homes and gun ranges within city limits, or that they are only prone to road rage when transporting their guns outside of city limits.)

Next, the circuit court expects the reader to ignore the exceptions in New York State's enabling statute that make all manner of exceptions to the premises-only license by allowing for off-premises licences to be issued to: messengers for banks, various justices and judges in the New York court system, and the usual list of state employees. N.Y. Penal Law § 400.00 (c), (d), (e). Apparently bank messengers, judges and state employees will never be involved in road rage, crowd situations, or demonstrations.

The terms "crowd situations" and "demonstrations" are indistinguishable in the context of having a weapon for confrontation, and thus collapse into the term "demonstrations." This remains the only situation where firearms outside the "dwelling of a householder" are anathema to New York's policy-makers. But one man's demonstration might become another man's insurrection.

It is here that the (now) dormant militia clause lends its only historical meaning to the core self-defense purpose of the Second Amendment. And it is a liberalizing construction, because it reminds us that an ancillary benefit of an armed civilian population in a republic, is the utility of a home guard. The militia clause is thus (now) merely a bonus or additional feature of an individual's right to keep and bear arms. It can be used to expand, but not contract the core right of self-defense set forth in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

At the time of the founding, and critical for an "original public meaning" understanding of the Second Amendment, is that membership in the unorganized militia was near universal under Federal Law. See Militia Act of May 8, 1792, 1 Stat. 271, 271 §1.

New York Law was in accord when it was a colony. See Militia Act of April 1, 1775, (Laws of the Colony Of New York, - Passed in the Years 1774 and 1775. Kept [&] Published under Direction of Frederick Cook, Secretary Of State, Pursuant To Chapter One Hundred And Seventy-one, Laws or Eighteen Hundred And Eighty-eight. Chapter 10, Laws of 1775, [Chapter LXII]).

Post-revolution New York continued the tradition of near universal membership with the Militia Act of April 3, 1778 and its amendments, (Laws of the State of New York Passed at the Sessions Of The Legislature, Held in the Years 1777, 1778, 1779, 1780, 1781, 1782, 1783 and 1784, inclusive. Albany: James B. Lyon, State Printer, 1894. Volume 1. Session 1, Chapter 33).

Furthermore, when mustered to answer the hue and cry, members were expected to appear with their own small arms and sufficient ammunition as defined by the relevant statutes.

As noted above, among the few duties specifically assigned to a militia in the Constitution is the suppression of insurrections and the repelling of invasions. U.S. CONSTITUTION, ART. I, SEC. 8, CL. 15.

The likelihood that any such insurrection or invasion will be conveniently engaged only within "the dwelling [of] a householder" diminishes to zero.

V. CONCLUSION

It is inconceivable that a stand-alone right to keep and bear arms "in case of confrontation" *Heller*, 554 U.S. at 592, does not include the right to carry a weapon outside of your home, regardless of the manner in which a state might regulate, but not ban, the manner of carry. This conclusion follows regardless of the methodology of interpretation employed by any court.

It is nonsensical and ahistorical to read the prefatory militia clause as anything other than a liberalizing touchstone to a fundamental right to keep and bear arms for defense of self, and by appropriate extension, the community, state and nation.

Respectfully Submitted on May 10, 2019,

/s/ Donald Kilmer
Counsel of Record for Amicus Curiae