No. 12-845

In the

Supreme Court of the United States

ALAN KACHALSKY, *et al.*,

Petitioners,

v.

SUSAN CACACE, *et al.*,

Respondents.

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

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

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QUESTION PRESENTED

Whether the state can restrict the Second Amendment Right to Bear Arms to individuals who prove, to the satisfaction of a government official, a special need to self defense that rises above the need for self defense of all other citizens.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence,[1] is dedicated to upholding and restoring the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that the intended to protect the right of a free people to armed self-defense. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *McDonald v. City of Chicago*, __ U.S. __, 130 S. Ct. 3020 (2010).

The Center believes the issue before this Court is one of significance to the individual liberties and rights protected by the Constitution. The Second Amendment enshrines the natural right of self-defense in our Constitution. The individual right of self-defense is not abandoned at the moment the citizen crosses the threshold of their front door and enters a public space.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief and copies of those consents have been lodged with the Clerk. All parties were given notice of this brief more than 10 days prior to filing.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The New York law purports to ration the right to self-defense, and the right to bear arms, to those few individuals able to obtain permission to exercise these rights from a government functionary. This restriction is consistent with neither the text of the Second Amendment ("the right of the people to keep and *bear* arms, shall not be infringed") nor with its purpose of enabling citizens to exercise their natural right of self-defense. The law does not purport to be either a place (restriction on bearing arms in sensitive places (*District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)) or manner (regulation of concealed versus open carry) restriction. Review by this Court is necessary to settle the conflict between Second and Seventh Circuits and to confirm the right of citizens to both keep and bear arms.

ARGUMENT

I. THE RIGHT TO BEAR ARMS PROTECTED BY THE SECOND AMENDMENT IS PART OF THE NATURAL RIGHT TO SELF-DEFENSE

This Court in *Heller* acknowledged that the Second Amendment's protection of the right to "bear arms" was a right to "carry" a weapon. *Heller*, 554 U.S. at 584. This right to "carry" a weapon is inextricably linked to the right of self-defense. *Id.* at 585 (*citing* 2 Collected Works of James Wilson 1142, and n. x (K. Hall & M. Hall eds.2007) (citing Pa. Const., Art. IX, § 21 (1790)). This purpose was expressed in the state constitutions of Pennsylvania, Vermont, Indiana, Mississippi, Connecticut, Alabama, Missouri, and Ohio. *Heller*, 554 U.S. at 585 and n.8.

This idea of a right to bear arms for self-defense was not a new idea of the Founders. History is replete with examples, from which the Framers took their lessons about human governance, that reveal the fundamental nature of the individual right of to keep and bear arms. For example, Aristotle tells the story of how the tyrant Pisistratus took over Athens in the sixth century B.C. by disarming the people through trickery. Aristotle, THE ATHENIAN CONSTITUTION ch. 15 (Sir Frederic G. Kenyon trans., 1901). Indeed, Aristotle stated that "arms bearing" was an essential aspect of each citizen's proper role. Stephen P. Halbrook, THAT EVERY MAN BE ARMED 11 (1994).

Similar events took place in Seventeenth Century England. This Court noted that "[b]etween the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents." *Heller*, 554 U.S. at 592-93. This Court also discussed the 1671 Game Act wherein "the Catholic James II had ordered general disarmaments of regions home to his Protestant enemies." *Id.*

Those thinkers who most influenced the Framers understood that the right to keep and bear arms is essential for the preservation of liberty. John Locke noted the "fundamental, sacred, and unalterable law of self-preservation." John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 149 (1690). Locke argued that the right to use force in self-defense is a necessity. *Id.* at § 207. This right to armed self-defense is also evident in the writings of Thomas Hobbes: [a] covenant not to defend my selfe from

force, by force, is always voyd." Thomas Hobbes, LEVIATHAN 98 (Richard Tuck ed., 1991).

Earlier works by Grotius and Cicero also note this basic human right. 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 Tullius Cicero, SELECTED SPEECHES OF CICERO 222, 234 (Michael Grant ed. & 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).

There is no doubt that the Founders also believed in a natural right to armed self-defense. The failure to recognize a right to keep and bear arms in the original Constitution was a point of contention at a number of state ratifying conventions. Samuel Adams proposed an amendment to the Massachusetts resolution to ratify the convention that included a command that "Congress should not infringe the ... right of peaceable citizens to bear arms." Letter from Jeremy Belknap to Ebenezer Hazard, reprinted in 7 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 4, at 1583 (John P. Kaminski, *et al.* eds. 2009).

A number of 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 Gazzette, Febru-

ary 22, 1788, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1, *supra* at 404. Notwithstanding these assurances, there were a number of proposals for amending the proposed Constitution to include an express recognition of the right to bear arms for defense. *E.g.*, Convention Debates, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Pennsylvania, *supra* at 597-98; The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Pennsylvania, *supra* at 623-24; Convention Debates, reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 3, *supra* at 1553; North Carolina Convention Amendments, reprinted in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Commentaries on the Constitution No. 6, *supra* at 316; Declaration of Rights and Form of Ratification Poughkeepsie Country Journal, reprinted in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Commentaries on the Constitution No. 6, *supra* at 298.

This general unease with how the new federal government would exercise power led to the adoption of the Bill of Rights, including the right to keep and bear arms. 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.

II. EARLY CASE LAW RECOGNIZES THE RIGHT TO BEAR ARMS BEYOND THE FRONT DOOR OF ONE'S HOME

This Court in *Heller* cited with approval several antebellum state court decisions, applying either the Second Amendment or parallel state constitutional provisions. Directly on point is *State v. Reid*, in which, during the course of upholding a ban on carrying a *concealed* weapon, the Supreme Court of Alabama noted: "A statute which, under the pretence of regulating, amounts 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 be clearly unconstitutional." *State v. Reid*, 1 Ala. 612, 616-17 (1840) (emphasis added). This sentence was quoted by this Court as an accurate expression of the right to bear arms. *Heller*, 554 U.S. at 629.

Also cited by this Court as an accurate reading of the Second Amendment was *Nunn v. State*, 1 Ga. 243 (1846). Applying the Second Amendment itself, the Georgia Supreme Court struck down a general ban on openly carrying handguns in public for protection, only holding 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.

State v. Chandler, 5 La. Ann. 489 (1850), was cited by this Court for correctly expressing that the Second Amendment guarantees *a right to carry*, but that the legislature may determine 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 con-

stitutional 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).

One other case deserves mention regarding the right to bear arms beyond the front door of one's home. In the infamous case of *Dred Scott v. Sandford*, this Court recognized that the right to keep and bear arms is a fundamental right enjoyed by all citizens. The Court relied on this recognition to justify its erroneous conclusion that African-Americans could not be considered citizens. Chief Justice Taney, writing the majority opinion, recognized that if African-Americans were "entitled to the privileges and immunities of citizens" they could rightfully claim fundamental rights such as "the right ... *to keep and carry arms* wherever they went." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1856) (emphasis added). Obviously, the Court could not have been expressing fear that freed slaves would hide inside their homes with arms. Indeed, the right to bear arms feared by the Court in *Dred Scott* was the right to "carry arms wherever they went."

The court below ignores this history and concludes that the Second Amendment right to bear arms is nothing more than a pale imitation of a right – one that can only be exercised behind the front door of one's own house. To be sure, the court below did identify some rights that are at their zenith in the privacy of a citizen's own home – specifically, the right to engage in private sexual conduct between consenting adults. *Kachalsky v. County of Winchester*, 701 F. 3d 81, 94 (2d Cir. 2012) (citing *Lawrence*

v. Texas, 539 U.S. 558, 562 (2003)). As the Seventh Circuit has noted, however,

> Well of course—the interest in having sex inside one's home is much greater than the interest in having sex on the sidewalk in front of one's home. But the interest in self-protection is as great outside as inside the home.

Moore v. Madigan, 702 F.3d 933, 941 (7th Cir. 2012). Indeed, the interest in self-defense may well be stronger outside the protection of the home.

CONCLUSION

The Framers recognized the right of self-defense as a natural right, and framed the Second Amendment as a recognition that government could not infringe on that right. Review by this Court is necessary to confirm that regulations, like that imposed by New York, infringe the peoples' right to keep and bear arms.

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Respectfully submitted,

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