No. 20-843

IN THE
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL., *Petitioners,*

v.

KEVIN P. BRUEN, ET AL., *Respondents.*

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS AND URGING REVERSAL

EDWARD L. WHITE III
CHRISTINA A. COMPAGNONE
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

JAY ALAN SEKULOW
Counsel of Record
JORDAN SEKULOW
STUART J. ROTH
ANDREW J. EKONOMOU
COLBY M. MAY
MATTHEW R. CLARK
BENJAMIN P. SISNEY
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Counsel for Amicus

July 20, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF AMICUS[1]

Amicus curiae, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before this Court in numerous cases involving constitutional issues. *See, e.g., Pleasant Grove City v. Summum,* 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993). The ACLJ has also participated as *amicus curiae* in several cases before this Court, including those involving the Second Amendment, which this Court will be considering in the instant case. *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

The proper resolution of this case is a matter of concern to the ACLJ because it involves the proper application of the Bill of Rights, including the Second Amendment, to the conduct of government. The ACLJ and more than 65,000 of its members support the position of the Petitioners and urges this Court to reverse the decision of the Second Circuit.

---

[1] No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock. The parties in this case have consented to the filing of this brief.

SUMMARY OF ARGUMENT

According to the text and history of the Second Amendment, along with this Court's decisions in *Heller* and *McDonald*, the right of individuals to carry a weapon for self-defense pre-exists government and applies both inside and outside of the home.

The Founders drafted the Bill of Rights to protect the rights of the individual from governmental intrusion. Like the Constitution and Declaration of Independence, the Bill of Rights presupposed certain inalienable rights that the government could not infringe upon. In particular, the Founders included the right to keep *and carry* arms in the Bill of Rights for the express purpose of preserving liberty and preventing government overreach. The Second Amendment would be incomplete if the right to carry arms outside of the home were neglected.

In *Heller*, this Court recognized that the Second Amendment protects an individual's pre-existing right to carry arms and defend oneself. *Heller* also recognized that the text of the Second Amendment clearly identified an inherent personal right to carry a weapon for the purpose of self-defense; this inherent right was applied to the states in *McDonald*.

To ensure the preservation of the right to carry weapons to defend oneself, this Court adopted a textual and historical approach for lower courts to utilize when reviewing government weapon restrictions. Despite this Court's clear enunciation of

Second Amendment principles in *Heller* and *McDonald*, several lower courts, however, have eroded the inherent right to self-defense, while other courts have stayed true to this Court's Second Amendment jurisprudence and protected that right.

This case presents this Court with the vehicle to reestablish the individual's right to keep and carry arms. The text and history of the Second Amendment clearly indicate that the right to defend oneself is not limited to the four walls of one's own home. New York's law requiring private citizens to demonstrate "proper cause" before they can obtain a permit for carrying firearms violates the Second Amendment.

ARGUMENT

I. THE SECOND AMENDMENT SECURES THE INHERENT, INDIVIDUAL AND PRIVATE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS FOR SELF-DEFENSE.

The Second Amendment states that "[a] well regulated Militia, being necessary to the security of a free State, *the right of the people* to keep and *bear Arms*, shall *not* be infringed." U.S. Const. amend. II (emphasis added). The substantive effect of the Second Amendment is to codify and secure a pre-existing right of the American people to keep and bear arms for self-defense. *See District of Columbia v. Heller*, 554 U.S. 570 (2008). Both the text and the

history of the Second Amendment demonstrate that its drafters expressly intended to preserve the right of the American citizenry to keep and bear arms for self-defense including outside the home.

A. The Bill of Rights Secures Pre-Existing Individual Rights of the American People.

The cornerstone of American political philosophy is that every individual possesses certain inalienable rights. Even a cursory glance at the text of the Founding documents elicits a recurrent intention to secure these "endowed" human rights. *See* Decl. of Independence paras. 1-3 (U.S. 1776); U.S. Const. pmbl. As demonstrated by the Founding documents, the Framers rejected the notion that retention of these endowed rights was conditioned on arbitrary qualifications such as age, social status, or government authorization. *See* Decl. of Independence; U.S. Const. pmbl. The Framers recognized, however, that the enjoyment of these rights depended on the establishment of good government. Decl. of Independence paras. 2-3. Indeed, in the face of human nature, the pre-existing rights of the citizenry could not fully be enjoyed except in the presence of a governing institution dedicated to ensuring their security.

The Framers' intent to establish government for the purpose of codifying and securing the pre-existent rights of the people is further evidenced in the Preamble to the United States Constitution:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and *secure the Blessings of Liberty to ourselves and our Posterity*, do ordain and establish this Constitution for the United States of America.

U.S. Const. pmbl.

Just as the Constitution was a substantive outgrowth of the Declaration of Independence, the Bill of Rights was a substantive outgrowth of the Constitution; and, just as the Constitution sought to achieve the purpose for establishing government as articulated in the Declaration of Independence, the Bill of Rights sought to achieve the same purpose as both the Declaration of Independence and the Constitution. The Bill of Rights was added to the Constitution to more effectively achieve its underlying purpose of securing the endowed rights of the people.

As Justice Harlan explained it, the "Bill of Rights, *designed to protect personal liberties*, was directed at rights against governmental authority." *United States v. Guest*, 383 U.S. 745, 771 (1966) (Harlan, J., concurring in part and dissenting in part) (emphasis added). In *Arnett*, this Court recognized two significant aspects of the Bill of Rights, which clearly attest to that document's direct correlation to the

purpose for which American government was founded. First, the Bill of Rights was designed to *secure* rights, and as such, was intended to protect rights that pre-dated the Founding. *Arnett v. Kennedy*, 416 U.S. 134, 157 (1974). Second, the rights secured by the Bill of Rights were both personal and individual to the American people. *Id.*

A textual analysis of the Bill of Rights further demonstrates that its underlying purpose is to secure pre-existing individual liberties. Each of the first nine amendments appearing in the Bill of Rights specifically secures rights retained by the individual. It would be illogical to construe one of these provisions namely, the Second Amendment as not similarly codifying and securing an individual right.

In addition to recognizing the Second Amendment as securing individual rights based on its inclusion in the Bill of Rights as a whole, it is important to note that such interpretation is bolstered by the fact that it specifically appears "within a subset of the Bill of Rights amendments, the First through Fourth, that relates most directly to personal freedoms (as opposed to judicial procedure regulating deprivation by the government of one's life, liberty, or property) . . . ." U.S. Dep't of Justice, *Whether the Second Amendment Secures an Individual Right*, 28 Ops. of the Off. of Legal Couns. 126, 161 (2004)[2] (hereinafter, "DOJ Memo").

[2] Available at https://www.justice.gov/file/18831/download.

In short, the Bill of Rights was designed to protect individual liberties. A uniform interpretation of the Bill of Rights thus requires the Second Amendment to be properly construed as similarly protecting an individual right of the people: the right to keep and *bear arms* for self-defense.

B. The Text of the Second Amendment Protects and Secures the Individual Right to Keep and Bear Arms for Self-Defense.

The main purpose of the Second Amendment is to ensure the security of a "free State." To understand the scope of what the drafters contemplated in formulating the Second Amendment, one must first understand what the drafters meant by the phrase "free State." "'[A] free State' was not understood as having to do with states' rights as such. Rather, it referred to preserving the liberty of the new country that the Constitution was establishing." Eugene Volokh, *Necessary to the Security of a Free State*, 83 Notre Dame L. Rev. 1, 6 (2007). Upon considering the writings of Blackstone, Montesquieu, James Madison and John Adams, one can conclude that, at the time of the Founding,

> "State" simply meant country; and "free" almost always meant free from despotism, rather than from some other country, and never from some larger entity in a federal structure. That is how the phrase was used in the sources that

> the Framers read. And there is no reason to think that the Framers departed from this well-established meaning, and used the phrase to mean something different from what it meant to Blackstone, Montesquieu, the Continental Congress, Madison, Adams, or others.

Id. In light of the Framers' understanding of a "free State," it is evident that they specifically intended for the Second Amendment to "preserv[e] the liberty of the new country that the Constitution was establishing." *Id.* As such, the purpose of the Second Amendment is a direct outgrowth of the very purpose for which the United States government itself was established: to preserve the rights and liberties of the people.

As highlighted by the text of the Second Amendment, the people's ability to arm themselves depends entirely on the protection of their inherent right to do so. Importantly, the Second Amendment expressly provides that the people's right to keep and bear arms "shall not be *infringed*." U.S. Const. amend. II (emphasis added). In light of the American philosophy that all individuals are born with certain inalienable rights and that government is necessary to preserve those rights, it is clear from the text of the Second Amendment and its inclusion in the Bill of Rights that the Framers believed that one of these inalienable rights was the right to arm oneself.

The Framers' use of the Second Amendment to enumerate a "right of the people" clearly intimates that the right to keep and bear arms is both private and individual. Indeed, the Constitution never uses the word "right" to enumerate a liberty interest belonging to entities, whether public or private, and a careful examination of the Constitution reveals that individuals possess "rights," whereas governmental entities possess "powers" or "authorities." DOJ Memo, at 137 (citing U.S. Const. art. I, § 1; *id.* art. I, § 8; *id.* art. II, § 1; *id.* art. III, § 1; *id.* amend. X).

Furthermore, "the people," as used in the Second Amendment, functions as a term of art in light of its use throughout the Founding documents. For instance, the Declaration of Independence states that "whenever any Form of Government becomes destructive of these ends [securing the people's inalienable rights] it is the Right of the People to alter or abolish it, and to institute new Government" to achieve such ends. Decl. of Independence para. 3. Among its many purposes, the Declaration of Independence specifically served as an indictment against King George III for "his invasions on the rights *of the people*." Decl. of Independence para. 8. The Preamble to the Constitution states that "We *the People* of the United States . . . do ordain and establish this Constitution for the United States of America." U.S. Const. pmbl.

As such, the Second Amendment's use of "the people" signifies that the right to keep and bear arms

belongs to those who instituted and established the new government and its accompanying Constitution for the United States of America. Simply stated, the right to keep and bear arms belongs to the people of the United States. Additionally, because government was established *by* "the people" (and for "the people"), it is illogical to interpret "the people" to mean "the government" or "the State." In light of its preservation of a right belonging to "the people," it is clear that the Second Amendment secures an individual's private and inherent right to keep and bear arms.

During the Founding era, it was understood that individuals possessed the inherent right to arm themselves for purposes of self-defense, defense of country, hunting and fowling. *See United States v. Emerson*, 270 F.3d 203, 231 (5th Cir. 2001). Joseph Story explained that the right to keep and bear arms is essential to the people's right to overthrow an abusive government. 3 Joseph Story, Commentaries of the Constitution of the United States, § 1890 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833). Interestingly, it was the exercise of this latter right which specifically precipitated the drafting of the Declaration of Independence:

> The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary

> power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Id.

Indeed, this understanding was confirmed in *District of Columbia v. Heller*, when this Court held that the main purpose of the Second Amendment is to protect an individual's pre-existent right to carry arms and defend oneself. 554 U.S. 570, 592 (2008). *Heller* established that the Second Amendment "guarantee[s] the individual right to possess and *carry* weapons in case of confrontation." *Id.* (emphasis added). Specifying that the Second Amendment simply "codified a *pre-existing* right," the Court stressed that "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed." *Id.* (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)). Unambiguously, this Court noted that the Second Amendment "refer[s] to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body." *Id.* at 579. Therefore, the Second Amendment was not drafted with the intention of limiting arms usage to militias. Rather, the Second Amendment "is exercised individually and belongs to all Americans." *Id.* at 581.

Moreover, through the lens of a textual analysis, *Heller* recognized that the plain wording of the Second Amendment demonstrated that "'bear' meant to 'carry,'" in that it protects an individual's pre-existent right to carry a weapon to be "armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584 (quoting Black's Law Dictionary 214 (6th ed. 1990)). Accordingly, the Framers drafted the Second Amendment because there is an "inherent right of self-defense" that is "central to the Second Amendment right." *Id.* at 628.

The Second Amendment preserves the individual rights belonging to all United States citizens. The *McDonald* Court affirmed that "the Second Amendment protects the right to keep and bear arms for the purpose of self-defense," and applies to state actors through the Due Process Clause of the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 749-50, 791 (2010). Therefore, a true understanding of the political ideologies upon which this nation was built eliminates any possibility that the drafters haphazardly included in the Bill of Rights a clause intended to do anything but protect and secure individual human rights. The Second Amendment expressly secures the right of individual citizens of the United States to keep and bear arms for self-defense.

II. THE SECOND AMENDMENT PROTECTS THE RIGHT OF INDIVIDUALS TO CARRY ARMS FOR SELF-DEFENSE OUTSIDE OF THE HOME

It was established in *Heller* that the primary purpose of the Second Amendment is to protect a pre-existent right of individuals to keep and bear arms for self-defense. Consequently, this Court has invalidated laws that ban the usage and possession of firearms within an individual's home. *Heller*, 554 U.S. at 636. *Heller* gave clear and proper instruction on how to analyze and interpret Second Amendment questions through a textual and historical approach. Under this approach, the Second Amendment protects the right of individuals to carry arms outside of the home.

Of particular importance, the *Heller* Court declined to introduce a level of scrutiny for analyzing Second Amendment restrictions, stating:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government--even the Third Branch of Government--the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its

> usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie.

Id. at 634-35 (internal citation omitted). Moreover, Justice Kavanaugh previously extrapolated on the proper evaluation of the Second Amendment, arguing that "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Heller v. District Of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). As a result of Justice Kavanaugh's candid evaluation, members of the Fifth Circuit have expressed interest in retiring an interest-balancing approach for the textual and historical analysis in future cases. *See United States v. McGinnis*, 956 F.3d 747, 761-62 (5th Cir. 2020) (Duncan, J., joined by Jones, J., concurring); *Houston v. City of New Orleans*, 675 F.3d 441, 451-52 (5th Cir. 2012) (Elrod, J., dissenting).

The First, Second, Third, and Fourth Circuits, however, wrongly declined to undertake a meaningful analysis of the history surrounding the right to bear arms as required by this Court. Instead, they choose

to utilize an interest-balancing approach to effectively eliminate the right under the Second Amendment to bear arms outside of the home. *See Gould v. Morgan*, 907 F.3d 659, 672 (1st Cir. 2018); *Kachalsky v. City of Westchester,* 701 F.3d 81, 91 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 877-78 (4th Cir. 2013). In fact, the Third Circuit specifically rejected the idea of "engaging in a round of full-blown historical analysis," *Drake*, 724 F.3d at 431, while the Second Circuit declared that history and tradition is "highly ambiguous," *Kachalsky,* 701 F.3d at 91. These courts used an improper analysis, rather than, as required by *Heller* and *McDonald*, using a textual and historical examination.

In contrast, other circuit courts have found that *Heller*'s analysis of the history and tradition of the Second Amendment is dispositive of whether there is a right to carry arms outside of the home. Specifically, courts have affirmed that the "core" of the Second Amendment right to bear arms is "individual self-defense." *Wrenn v. District of Columbia*, 864 F.3d 650, 657 (D.C. Cir. 2017). Because the text of the Second Amendment distinguishes between the right to "keep" and "bear" arms, courts have determined that "it's more natural to view the Amendment's core as including a law-abiding citizen's right to carry common firearms for self-defense beyond the home." *Id*; *see also Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) ("The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home

as inside."). "[T]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Moore*, 702 F.3d at 937. Thus, these courts conclusively found that *Heller*'s analysis of the Second Amendment's history and tradition established that the right to bear arms for self-defense also applies outside the home. *Wrenn*, 864 F.3d at 660-61; *Moore*, 702 F.3d at 942.

Initially, panels of the Ninth Circuit twice analyzed the Second Amendment correctly by using the required textual and historical analysis and found the right to carry firearms outside of the home. *See Peruta v. City of San Diego*, 742 F.3d 1144, 1167 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016); *Young v. Hawaii*, 896 F.3d 1044, 1070 (9th Cir. 2018), *rev'd en banc*, 992 F.3d 765 (9th Cir. 2021). However, the *en banc* court reversed these decisions by employing a flawed historical and interest-balancing approach rejected by this Court in *Heller*. *Peruta v. City of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016); *Young v. Hawaii*, 992 F.3d 765, 826 (9th Cir. 2021).

Judge O'Scannlain, the author of the original Ninth Circuit panel opinions, criticized the majority for their misapplication of the Second Amendment arguing "its text, its historical interpretations by the commentators and courts most proximate to the Founding, and its treatment by early legislatures unequivocally demonstrate that the Amendment does indeed protect the right to carry a gun outside the home for self-defense." *Young*, 992 F.3d at 831

(O'Scannlain, J., joined by Callahan, J. and Nelson, J., dissenting). Through these flawed decisions, the Ninth Circuit has "undermine[d] not only the Constitution's text, but also half a millennium of Anglo-American legal history, the Supreme Court's decisions in [*Heller* and *McDonald*], and the foundational principles of American popular sovereignty itself." *Id.* at 829.

Based on *Heller* and *McDonald*, courts have invalidated laws that effectively prevent individuals from carrying a firearm outside the home without a "good reason." *Wrenn*, 864 F.3d at 667-68; *Moore*, 702 F.3d at 942. The New York law at issue is identical to the laws rejected in *Wrenn* and *Moore* because it functionally operates as a blanket ban on arms-carrying outside of the home. N.Y. Penal Law §400.00(2). As the New York law is written, a citizen does not have "proper cause" to obtain a permit for carrying firearms in public for the purpose of self-defense. *Id.* As held in *Wrenn* and *Moore* based on this Court's precedents New York has violated the Second Amendment rights of its citizens by rendering it impossible for a normal citizen to carry a firearm for the core purpose of self-defense. Consequently, the New York law is unconstitutional and irreconcilable with this Court's holding in *Heller*.

In sum, no other right enumerated in the Bill of Rights has ever been, nor could logically ever be,

constrained to one's home.[3] The rights of free speech, religion, and against unreasonable searches, etc., naturally go beyond the boundaries of the home. To constrain the right to bear or carry arms to the confines of the home would be contrary to the plain meaning of the Constitution and would treat the Second Amendment different from every other right protected by the Constitution, with no foundation in the text and history. *Heller* made clear that the Second Amendment should not be treated differently from any "other enumerated constitutional right." *Heller*, 554 U.S. at 634. Like the freedoms of speech, religion, assembly, etc., the right to bear arms must naturally flow beyond the four walls of one's home or its meaning and purpose for inclusion within the Bill of Rights would be eviscerated. For these reasons, the Court should hold that the right to bear arms is not only personal but is held by that person wherever that person may go.

[3] The obvious exception is that right protected by the Third Amendment, which expressly limits its application to the quartering of soldiers "in any house."

CONCLUSION

The New York law infringes the Second Amendment right of individuals to keep and bear arms outside of the home. This Court should reverse the decision below.

Respectfully submitted,

EDWARD L. WHITE III
CHRISTINA A. COMPAGNONE
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

JAY ALAN SEKULOW
Counsel of Record
JORDAN SEKULOW
STUART J. ROTH
ANDREW J. EKONOMOU
COLBY M. MAY
MATTHEW R. CLARK
BENJAMIN P. SISNEY
AMERICAN CENTER FOR LAW& JUSTICE
[redacted]

July 20, 2021

Counsel for Amicus