No. 13-827

In the

Supreme Court of the United States

JOHN M. DRAKE, *et al.*,

Petitioners,

v.

EDWARD A. JEREJIAN, SUPERIOR COURT OF NEW JERSEY, BERGEN COUNTY, *et al.*,

Respondents.

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

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

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QUESTIONS PRESENTED

1. Does the Second Amendment right to "bear arms" for self-defense include the right to bear arms outside the home?

2. May a Court simply presume that a state legislature had a constitutionally sufficient basis for enacting a restriction on a textually explicit fundamental individual right?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae Center for Constitutional Jurisprudence[1] was established in 1999 as the public interest law firm of the Claremont Institute, the stated mission of which is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the proposition that the Second Amendment protects the right of a free people to armed self-defense. The Center advances that mission through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance. 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, a right this Court has rightly labeled as "fundamental." Some of the lower courts, however, seem to be erecting barriers to the

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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 a copy of those consent 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.

protection of this fundamental right. They treat the right to bear arms as a "poor relation" (*Cf. Dolan v. City of Tigard*, 512 U.S. 372, 393 (1994)) in status to other fundamental rights enshrined in the Bill of Rights. The Center believes that it is critical for this Court to intervene now to resolve the deepening conflicts between the lower courts on the issue of where the Second Amendment applies and what standard to use to review state regulation of the individual right enshrined in the Amendment.

SUMMARY OF ARGUMENT

The court below asserted that it would assume, for sake of argument, that the Second Amendment might apply to conduct outside the home. It then ruled, however, that a state law enacted in the first half of the twentieth century was a sufficiently longstanding restriction as to remove the right to bear arms outside the home from the protection of the Second Amendment. Applying what it termed "intermediate scrutiny," the court then simply presumed that the state legislature had some legitimate reason for enacting the restriction at issue.

Review by this Court is necessary to settle the conflict between the court below and the Seventh Circuit and decisions of this Court regarding the right of citizens to both keep and bear arms for the purpose of self defense outside the confines of the home. The ruling of the Third Circuit in this case conflicts with the decision of the Seventh Circuit in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). It also conflicts with this Court's rulings in *Heller* and *McDonald*, which cited early state court rulings upholding the right to bear arms outside the house as indicative of the reach of the Second Amendment.

Review is also necessary to resolve the conflict between the court below and this Court and other Circuit Courts of Appeals on the standard of scrutiny for reviewing restrictions on textually explicit fundamental constitutional rights. The court below applied a deferential standard that merely assumed the legislature had a basis for enacting the restriction rather than strict or heightened scrutiny.

ARGUMENT

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

Within the last ten years this Court has held, twice, that Second Amendment protects an "individual right to keep and bear arms for the purpose of self-defense" *McDonald*, 130 S. Ct., at 3026; *Heller*, 554 U.S. 372, 599 (1994) (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, at 935.

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 protect the right to bear arms for this purpose.[2]

The founders of the American Republic did not originate the concept of a right to bear arms for 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. New Mexico Press 1994) at 11.

The right to bear arms is a basic human right recognized throughout history. Hugo Grotius, THE RIGHTS OF WAR AND PEACE 76-77, 83 (A.C. Campbell

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[2] *Heller*, 554 U.S., at 585 and n.8., 602 (citing Pa. Declaration of Rights § 13 (1776) ("That the people have a right to bear arms for the defence of themselves and the state."); Vt. Declaration of Rights § 15 ("That the people have a right to bear arms for the defence of themselves and the State."); Ky. Const. of 1792, art. XII, § 23 ("That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned."); Ohio Const. of 1802, art. VIII, § 20 ("That the people have a right to bear arms for the defence of themselves and the State."); Ind. Const. of 1816, art. I, § 20 ("That the people have a right to bear arms for the defense of themselves and the State."); Miss. Const. of 1817, art. I, § 23 ("Every citizen has a right to bear arms, in defence of himself and the State."); Conn. Const. of 1818, art. I, § 17 ("Every citizen has a right to bear arms in defence of himself and the state."); Ala. Const. of 1819, art. I, § 23 ("Every citizen has a right to bear arms in defence of himself and the State."); Mo. Const. of 1820, art. XIII, § 3 ("That [the people's] right to bear arms in defence of themselves and of the State cannot be questioned.")).

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 self-defense 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 a number of 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 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 4 at 1583 (John P. Kaminski, et. al. eds. 2009).

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 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1, *supra* at 404. Notwithstanding the assurances of those who argued that an express provision was not required, there were a number of 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 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Pennsylvania, *supra* at 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 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.

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,[3] as did later

[3] *See* Ala. Const., Art. I, § 28 (1868) reprinted in Francis Newton Thorpe, THE STATE AND FEDERAL CONSTITUTIONS, (William S. Hein 1993) vol. 1 at 134; Conn. Const., Art. I, § 17 (1818) reprinted in Thorpe, *supra*, vol. 1 at 538; Ky. Const., Art. XIII, § 25 (1850) reprinted in Thorpe, *supra*, vol. 3 at 1314; Mich.

state constitutions adopted during the Reconstruction era.[4] *McDonald*, 130 S. Ct., at 3042. "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). *McDonald*, 130 S. Ct., at 3138. 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 court ruled that bearing arms outside the home was outside the "core" of the Second Amendment. *Drake v. Filco*, 724 F.3d 426, 431 (3rd Cir. 2013) ("We reject Appellants' contention that a historical analysis leads *inevitably* to the conclusion that the

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Const., Art. XVIII, § 7 (1850) reprinted in Thorpe, *supra*, vol. 4 at 1967; Miss. Const., Art. I, § 15 (1868) reprinted in Thorpe, *supra*, vol. 4 at 2070; Mo. Const., Art. I, § 8 (1865) reprinted in Thorpe, *supra*, vol. 4 at 2192; Tex. Const., Art. I, § 13 (1869) reprinted in Thorpe, *supra*, vol. 6 at 3593; *see also* Mont. Const., Art. III, § 13 (1889) reprinted in Thorpe, *supra*, vol. 4 at 2302; Wash. Const., Art. I, § 24 (1889) reprinted in Thorpe, *supra*, vol. 7 at 3975; Wyo. Const., Art. I, § 24 (1889) reprinted in Thorpe, *supra*, vol. 7 at 4119; *State v. McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986).

[4] *See*, *e.g.*, Ark. Const., Art. I, § 5 (1868) reprinted in Thorpe, *supra*, vol. 1 at 307; Miss. Const., Art. I, § 15 (1868) reprinted in Thorpe, *supra*, vol. 4 at 2070; Tex. Const., Art. I, § 13 (1869) reprinted in Thorpe, *supra*, vol. 6 at 3593.

Second Amendment confers upon individuals a right to carry handguns in public for self-defense."). 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. The Court below went even further, however, and ruled that a state law enacted more than a century after adoption of the Second Amendment constituted a longstanding regulation sufficient to exclude the restricted conduct from the protection of the Second Amendment. *Drake*, 724 F.3d, at 431-32. Review by this Court is necessary to resolve the conflict.

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 opin-

ion of what was then Kentucky'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.[5] 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.[6]

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*,

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[5] *See* Ky. Const. of 1799, art. X, § 23 reprinted in Thorpe, *supra*, vol. 3 at 1290 ("The rights of the citizens to bear arms in defense of themselves and the State shall not be questioned.")

[6] Ky. Const. of 1850, art. XIII, § 25 reprinted in Thorpe, *supra*, vol. 3 at 1314 ("The rights of the citizens to bear arms in defense of themselves and the State shall not be questioned; but the General Assembly may pass laws to prevent persons from carrying concealed arms.")

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 themselves 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.*

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 self-defense.

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. 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). The court below, however, rejected the notion that the core of Second Amendment protects the right to bear arms outside the home. This Court should grant review to resolve the conflict between this decision and the decisions of the Seventh Circuit and this Court.

IV. The Decision of the Third Circuit Conflicts With Decisions of this Court and Other Circuit Courts of Appeals on the Proper Level of Scrutiny for State Law Restrictions of a Textually Explicit Fundamental Right

This Court recognized in *McDonald* that the Second Amendment protects an individual right "that is fundamental from an American perspective." *McDonald*, 130 S.Ct. at 2030. The Court below ruled that state restrictions on this textually explicit fundamental right should be judged under a standard of scrutiny that largely defers to state legislative policy judgments – and assumes a basis for those judgments even when none is stated. *Drake*, 724 F.3d, at 438. This approach for review of restrictions on fundamental rights conflicts with the

prior rulings of this Court and other Circuit Courts of Appeals.

This Court has applied strict scrutiny or a compelling interest test when laws trench on fundamental rights. *See*, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 627-35 (1969); *NAACP v. Alabama ex rel. Patterson*, 357 US 449, 461 (1958). Other Circuit Courts of Appeals follow approach. *See*, *e.g.*, *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 746 (9th Cir. 2012); *Duke v. Cleland*, 954 F.2d 1526, 1529 (11th Cir. 1992).

The court below and some Circuit Courts of Appeals reviewing Second Amendment challenges, however, seem oddly reluctant to apply strict or heightened scrutiny. Instead, these courts apply what they term "intermediate scrutiny" which in practice is the "interest balancing" approach rejected by this Court in *Heller*, 554 U.S., at 634. As this Court noted: "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." *Id*. (emphasis in original).

Nonetheless, some circuit courts, including the Fourth Circuit, have sought to preserve this type of deferential review for regulations that they label as outside the "core" of the Second Amendment. *See*, *e.g.*, *National Rifle Association v. Bureau of Alcohol, Tobacco, and Firearms*, 700 F.3d 185, 195 (5th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1261-62 (D.C. Cir. 2011); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010); *Woollard v. Gallagher*, 712 F.3d at 876; *Kachalsky v. County of*

Westchester, 701 F.3d 81, 100-101 (2d Cir. N.Y. 2012); *Drake*, 724 F.3d, at 436-38. These courts accept, grudgingly, this Court's ruling that the District of Columbia ordinance at issue in *Heller* is unconstitutional. They insist, however, that *Heller* is limited to its unique facts and that the Second Amendment incorporates the fundamental right of self-defense only for actions inside the home.

The court below went so far as to assume, in the absence of any evidence whatsoever, that there was a sufficient fit between New Jersey's restriction of this fundamental right and the presumed state interest in "protecting its citizens' safety." Any standard of scrutiny above the lowest level of rational basis review would at least consider contrary evidence showing that this type of law does *not* protect citizen safety. Recent studies undertaken at the direction of the President Obama have found: "Defensive use of guns by crime victims is a common occurrence" and that studies have found "found consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies." National Research Council, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE, (The National Academies Press, 2013) at 15-16.

Other studies confirm that restrictions on carrying weapons by citizens has little or no effect on the level of crime. John R. Lott, Jr., MORE GUNS, LESS CRIME, (University of Chicago Press 1998) at 160. By contrast, an increase in concealed carry of firearms has a dramatic effect, especially for women, in reducing violent crime. *Id*., at 159. As the author noted, "Preventing law-abiding citizens from

carrying handguns does not end violence; it merely makes victims more vulnerable to attack." *Id.* at 165. The deference to what the New Jersey Legislature might have thought or what evidence it might have put forward is completely inconsistent with the level of scrutiny generally used to examine restrictions on textually explicit fundamental constitutional rights.

"The Framers counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald*, 130 S.Ct., at 3042. Because of the nature of this fundamental right, this Court in *Heller* rejected both rational basis and interest-balancing as appropriate standards of review. The decision below conflicts with this ruling by adopting a deferential form of intermediate scrutiny. This Court should grant review to resolve that conflict and the conflict regarding the level of scrutiny afforded to review of restrictions on textually explicit fundamental constitutional rights.

CONCLUSION

This Court should grant the petition for writ of certiorari to resolve the conflicts between the court below and the other Courts of Appeals as well as the conflicts between the decision below and the decisions of this Court.

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