No. 09-930

In the

# Supreme Court of the United States

KENYON B. FITZGERALD, JR., PETER SCOVILLE WELLS, SIDNEY SILLER, DISABLED AMERICAN VETERANS DEPARTMENT OF NEW YORK, INC.,

*Petitioners,*

– v –

WADE F. B. THOMPSON, ELIHU ROSE, ARIE L. KOPELMAN, STEPHEN LASH, EDWARD KLEIN, REBECCA ROBERTSON, KIRSTEN REOCH, CHARLES GARGANO, WILLIAM SHERMAN, CAROL BERGENS, JOHN DOE, MARY ROE, SEVENTH REGIMENT ARMORY CONSERVANCY, INC.,

*Respondents.*

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

## BRIEF OF AN *AMICUS CURIAE* IN SUPPORT OF THE POSITION OF THE PETITIONERS BEFORE THE COURT'S CONSIDERATION OF A PETITION FOR A WRIT OF CERTIORARI

CHARLES G. MILLS, IV
*Counsel of Record*
56 School Street
Glen Cove, New York 11542
(516) 759-4300

*Attorney of Record for*
*The American Legion;*
*Department of New York*
*Proposed Amicus Curiae*

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**Motion for Leave to Submit a Brief of an *Amicus Curiae* in Support of the Position of the Petitioner before the Court's Consideration of a Petition for a Writ of Certiorari.**

Pursuant to Rule 37(2) of this Court, The American Legion, Department of New York, moves this Court for leave to file the annexed brief as an *amicus curiae* in this matter prior to consideration by this Court of the Petition for Certiorari.

The Petitioner and the Respondents Seventh Regiment Conservancy, Inc., Stephen Lash, Arie L. Kopelman, Edward Klein, Rebecca Robertson, Kirsten Reoch, and Wade F.B. Thompson have consented to the filing of the brief. No other respondent has.

The order of the court of appeals approves the termination of the rights of posts of veterans' organizations to meet in the Seventh Regiment of New York's armory. The *amicus curiae,* The American Legion, Department of New York is a department of The American Legion, the world's largest organization of war veterans. It consists of about 900 posts, more posts than those of any other veterans' organization in New York state. It, therefore, represents more veterans' posts adversely affected by the statute challenged in this case than anyone else.

The annexed brief will bring to the attention of this Court relevant matter not already brought to its attention by the parties and which bears directly on the question of whether *certiorari* should be granted.

This brief discuses the unsettling effect on previously settled law that the order of the court of appeals has in this case and the encroachment by the legislature on the power and precedents of the judiciary that are sanctioned by the order of the court of appeals. These issues have not been brought to the attention of this Court by the Petition.

Wherefore The American Legion, department of New York requests that the Court allow it to file the annexed brief as an *amicus curiae.*

May 24, 2010

Charles G. Mills, IV
*Counsel of Record*
56 School Street
Glen Cove, New York 11542
516-759-4300

Attorney of Record for
The American Legion;
Department of New York
*Proposed Amicus Curiae*

## Questions Presented for Review

1. Do organizations of war veterans have standing to challenge a statute that deprives them of their meeting place?

2. Do organizations of war veterans have a right to challenge a statute that "declares" that the state and not the trustees of a National Guard unit own the lease of an armory and the same statute has the effect of depriving these veterans of the same rights to meet that state law guarantees them in all other armories?

3. Do organizations of war veterans have a right to challenge a statute that changes the terms of their access to one armory so as to deprive them in effect of the use of that armory?

4. May a state constitutionally "declare" by legislation which party owns a specific leasehold?

5. May a state take without due process or compensation the property of a unit of the National Guard?

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## Corporate Disclosure Statement

The American Legion, Department of New York is one of 55 departments chartered by The American Legion, a corporation created by act of Congress. There are approximately 14,500 American Legion posts in the world. Some, but not all, posts are incorporated. Many of them have subsidiaries. The American Legion, Department of New York is the parent of Empire State American Legion Boys' State, Inc. The American Legion is the parent of many funds, foundations, and trusts created for charitable purposes and all of which have the words "American Legion" in their name.

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented for Review | i |
| Corporate Disclosure Statement | iii |
| Table of Contents | v |
| Table of Authorities | vii |
| The Interest of the *Amicus Curiae* | 1 |
| Statement of the Case | 2 |
| Summary of the Argument | 3 |
| Summary of the Statutory Scheme | 4 |
| I. *Certiorari* Should be Granted | 6 |
| II. The Injury-in-Fact to the Veterans' Organizations Was Very Real and Substantial | 8 |
| III. The Challenged Act is Unconstitutional | 10 |
| (a) The legislature may not determine the title to a piece of property by passing an act | 10 |
| (b) The legislature provided no compensation and no due process | 11 |
| (c) The court of last resort in New York has determined that the armory belongs to the Regiment | 13 |

(d) The legislation curtails the freedom of association and expression of a selected limited group of veterans for the benefit of a selected private corporation ..... 13

Conclusion ..... 15

## TABLE OF AUTHORITIES


| Cases: | Page(s) |
|---|---|
| *Buckley v. Valeo*, 424 U.S. 1 (1976) | 13-14 |
| *Dalva v. Pataki* NY Supreme Court, NY County (March 3, 2006) | 7 |
| *Kelo v. New London*, 545 U.S. 469 (2005) | 14 |
| *Kilbourn v. Thompson*, 103 US 168 (1880) | 7, 11 |
| *Kusper v. Pontikes*, 414 U.S. 51 (1973) | 14 |
| *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) | 6, 9 |
| *Marino v. Regan, Warden*, 332 U.S. 561 (1947) | 9 |
| *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) | 14 |
| *Tobin v. Laguardia*, 276 NY 34 (1937) | 7, 13 |
| *United States v. Miller*, 302 U.S. 174 (1939) | 12 |

**Statutes:**

26 USC 501(c)19, IRC 501(c)(19)..... 1

36 USC 21701-21708 ..... 1

36 USC 50301-50308 ..... 1

1 Stat 271 (1792)..... 12

New York Military Law 180-a..... 3, 4, 5, 8, 10, 12, 13

New York Military Law 183..... 4, 5, 13

New York Military Law 183(b) ..... 8

New York Military Law 240-a..... 5

Chapter 25 of the Laws of New York of 1786.... 12

## The Interest of the *Amicus Curiae*[1]

The *amicus curiae*, The American Legion, Department of New York is one of fifty-five departments of The American Legion. Approximately 900 of the approximately 14,500 American Legion posts make up The American Legion, Department of New York.

The American Legion was created by congressional act, 36 USC 21701-21708, and is the largest organization of war veterans in the world. The American Legion, its departments, and its posts are all exempt from taxation under IRC 501(c)(19). Its posts in New York are benevolent orders under the New York Benevolent Orders Law.

The American Legion, Department of New York has more posts adversely affected by the legislation challenged here than any other veterans' organization. The petitioner, Disabled American Veterans Department of New York is also a department of an organization created by act of Congress, 36 USC 50301-50308.

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[1] The printing and filing of this brief is being paid for entirely by The American Legion, Department of New York. Preparation of the brief was done entirely *pro bono publico* by Charles G. Mills IV, Judge Advocate of The American Legion, Department of New York.

## Statement of the Case

This amicus curiae adopts the list of parties, citations of the official and unofficial reports of opinions and orders entered in the case, statement of the basis for jurisdiction in the Supreme Court, statement of constitutional provisions and statutes involved in the case, statement of the case, and jurisdictional statement as set forth in the petition for *certiorari*.

## Summary of the Argument

War veterans' organizations have standing to challenge the constitutionality of New York Military Law 180-a. This act demilitarizes over 98 percent of the armory building of a single armory thereby depriving war veterans and their organizations of meeting places they are granted by law in every other armory in the state.

All this was done through a statute deigned to benefit a pre-selected private (even if not for profit) restaurant corporation and was done by legislative usurpation of judicial power and without due process or compensation to the National Guard unit that actually owns the expropriated property.

The legislature accomplished this by improperly nullifying a determination of the New York Court of Appeals that the armory belongs to the Regiment and "declaring" that it belongs to the state.

The court of appeals improperly held that only the property owner can be injured in fact by an unconstitutional taking of property.

The war veterans' organizations are not required to wait until the military character of the armory has been irreparably destroyed, the new restaurant equipped and opened, a restaurant manager appointed, and a procedure for application to meet there adopted and to then make a futile application to meet there which we know cannot be granted, before they can seek judicial vindication of their rights.

## Summary of the Statutory Scheme

With the single exception of the Seventh Regiment Armory, all armories in New York State are subject to New York Military Law 183 which establishes the following uses:

1. National Guard units;
2. Cadets;
3. Veterans' Organizations;
4. Civil Air Patrol units;
5. Military organizations;
6. Organizations of descendents of veterans;
7. Historic military commands;
8. Associations created under the Military Law;
9. Government bodies for official use;
10. Others approved by the National Guard officer in charge.

In 2004 Section 180-a was added to the Military Law which replaced Section 183 with respect to the Seventh Regiment Armory. This section "declared" the state to be the lawful successor of the lessee of the armory (by implication depriving the lessee of the benefits of the lease) and "declared": all fixtures in the armory to be the property of the state from the moment they were "deemed" to have been donated to the state as of the moment they were installed.

Section 180-a abolished military and similar use of the armory except for a small part of it (with an emergency exception) and replaced the subordination of use by veterans' associations to the needs of the

National Guard with a subordination to the needs of the lessee or manager of the armory.

The lessee or manager referred to in Section 180-a is a high priced restaurant for whom the legislation was specifically designed.

Former groups using the armory included cadets known as the Knickerbocker Greys (http://www.knickerbockergreys.org/), a number of organizations of descendents of veterans, and the Veteran Corps of Artillery, one of the Historic Military commands defined in Military Law 240-a and expressly authorized to use armories (http://www.allbusiness.com/personalservices/miscellaneous-personal-services/3813552-1.html) The Petitioner DAV and the *amicus curiae* are veterans' organizations authorized to use armories by Military Law 183.

In short the passage of Military Law 180-a demilitarized the Seventh Regiment Armory and placed it off limits to those unable to afford highly expensive restaurants.

## I. *Certiorari* Should be Granted.

The main issue in this case is standing to sue under Article III of the Constitution. This issue was addressed by this Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). One of the requirements set forth in that case is "injury in fact".

The court of appeals in this case has greatly narrowed in meaning of "injury in fact" and unsettled the law that was once settled by *Lujan*. The court of appeals required a legal interest in any property taken by the state in order for there to be an injury in fact. Appendix to Petition 4a-5a.

The injury to veterans and veterans' organizations and groups is quite real. They are deprived of the meeting places they have used for generations, one room of which was specifically built and dedicated for that purpose. This is contrary to New York law governing every other armory in New York State. Their injury is also a direct result of the taking of the leasehold of the regimental trustees by legislative action, without compensation or due process of any kind.

Adding a new requirement of legal title to the requirements of *Lujan* unsettles settled constitutional law.

Another basis on which the complaint was dismissed is that the veterans and veterans' groups lack standing because the lease between the City of New York and the field grade officers of the Regiment, in trust for the Regiment, is a contract between the state and one of its cities and therefore its obligations may be impaired. Appendix to the

Petition 18a. Whether a unit of the National Guard (the "organized militia") is an alter ego of the state, a joint venture of the state and federal; governments, or a person is an unsettled question that requires construction of the Second Amendment.

The district court in this case states, in effect, that the armory is state property because the legislature said so in its 2004 legislation. Appendix to the Petition 17a. This is improper deference by the district court to a clear encroachment by the legislature on the functions of the judiciary. The district court also cited an unpublished trial court opinion, *Dalva v. Pataki* (2006) but that opinion is directly contradicted by *Tobin v. Laguardia*, 276 NY 34, 43 (1937), which is the governing judicial authority on the subject of the ownership of the lease, and it was beyond legislative power to reverse it.

The right to have ones title to property determined by a court, not by a statute is a due process right under the Fourteenth Amendment. Legislative encroachment on the Judiciary was addressed by this Court in 1880. *Kilbourn v. Thompson*, 103 US 168, 198 (1880). This issue is ripe for further consideration.

In addition for all the reasons set forth in the Petition the Court should grant *certiorari*.

## II. The Injury-in-Fact to the Veterans' Organizations Was Very Real and Substantial.

The court of appeals below held that the only change in access to the armory by veterans' organization was that they now had to apply to a "different person". Appendix to Petition 5a.

This is a clear misreading of the statue. New York Military Law 183(b) conditions the use of armories by veterans' organizations only by a provision, "provided that such use does not interfere with the members and units of the organized militia stationed in such armory." The new Military Law 180-a(3)(c)(i) limits such use by the provision, "provided that such use does not interfere with the use by the lessee or the manager pursuant to the terms of the management agreement, including any use by third parties contracted for under paragraph (ii) of this paragraph.

Subordination of a veterans' organization's meetings to the weekly meetings of a militia unit and its monthly week-end meetings is insignificant. Subordinating them to the schedule of a restaurant (priced well above the means of most veterans) that serves at least two meals a day seven days a week amounts to a complete exclusion of the veterans' groups from the armory. This was overlooked by the court of appeals but it was crucial to its order.

In order to have standing under Article III the injury-in-fact to the veterans' organizations must be legally protected, concrete, particularized, actual or imminent, not conjectural or hypothetical, casually connected to legislation, and capable of judicial

correction. *Lujan v. Defenders of Wildlife, supra* at 504 US 560.

The legislative demilitarization of over 98 percent of the armory building concretely, particularly and imminently deprived the veterans' organization of their right to meet in the armory and this can be corrected by this action.

The court of appeals, however, held that this right is hypothetical because the organizations did not apply to the restaurant manager for meeting space and get turned down. What this amounts to is a holding that the veterans' organizations must wait until the demilitarization of the armory is complete, the restaurant is furnished and opened, and a manager appointed and then make an application to this new manager that everyone knows will be denied.

The law does not require clearly futile acts. This is particularly true when the requirement of such useless acts works to delay the vindication of constitutional rights. *Marino v. Regan, Warden,* 332 U.S. 561 (1947), concurring opinion.

The vindication of the constitutional rights of the petitioners and veterans' associations similarly situated should not be delayed until the military character of the rooms has been irreparably destroyed, expensive restaurants installed, and a procedure for scheduling private parties created, and a manager to whom the veterans' organizations can apply appointed.

## III. The Challenged Act is Unconstitutional.

New York Military Law 180-a:

(a) Makes a legislative determination that the state owns a specific leasehold;

(b) Does not compensate the true owners of the leasehold;

(c) Purports to overrule the New York Court of Appeals; and

(d) Singles out a single armory for the elimination of the right of association; and is deliberately designed to confer substantial benefits upon a single specific private corporation and exclude all others.

### (a) The legislature may not determine the title to a piece of property by passing an act.

New York Military Law 180-a(2)(a) provides, "The state, acting through the division, is and shall be recognized as and declared to be the lawful successor to the interest o0f the lessee under the city lease."

There is no claim that the either the Regiment or the field grade officers of the Regiment ever surrendered their leasehold.

In addition, New York Military Law 180-a(2)(b) provides

> "All improvements, betterments, fixtures, equipment, ornaments, decorative elements, and similar items affixed or attached to the armory building (i. e. all items other than moveable personal property which is not affixed to the walls or other parts of the building) are hereby

> recognized and declared to be an integral part of the armory and property of the state, and any and all persons who have heretofore installed or paid for the installation of any of the foregoing items are deemed to have donated such items to the state as of the time of installation of such items in the armory."

No claim has been made that the alleged donors of the items have been given any kind of due process or compensation.

This is a clear violation of the separation of powers. It purports to settle a claim of title to a leasehold and certain fixtures by legislation. It is a legislative encroachment on the judiciary in violation of *Kilbourn v. Thompson*, 103 US 168, 198 (1880). The only distinction between this and a bill of pains and penalties is that instead of legislative deprivation for a past offense, it is a legislative deprivation for not being the kind of upscale tenant the legislature wants.

**(b) The legislature provided no compensation and no due process.**

For the reasons set forth in the Petition this was a taking not for a public purpose at all but for a single pre-selected private corporation.

Furthermore the act makes no attempt to compensate anyone at all or to provide any means of seeking compensation.

The legislature seems to have simply assumed that everything a militia unit owns is property of the state. This is legally, actually, and historically untrue.

The origins of the militia go back to the time of King Alfred. *United States v. Miller*, 302 U.S. 174, 179 (1939). Relations between the King and the militia were controversial in the Seventeenth and Eighteenth Century and this was more true in America than in England. No one has ever claimed that the Minutemen in 1775 were alter egos of King George III.

The Militia is guaranteed by the Second Amendment to the Constitution, and by federal laws in continuous existence from 1 Stat 271 (1792). It is also provided for in various sections of the New York Military Law that go back to Chapter 25 of the Laws of New York of 1786.

Today most property of National Guard units is provided by the federal and state governments, but this was not always the case and is not the case of the property of the Seventh Regiment taken by New York Military Law 180-a.

The existence of the New York militia is guaranteed by the Second Amendment, and is regulated by both federal and state law. The property at issue in this case was dedicated for the use of the Regiment by members of it. Legal title to the property is in the hands of the senior officers of the Regiment for the benefit of the Regiment. The Regiment is not just a branch of the state government, nor just a branch of the federal government. It is an heir of the militias that predated 1776 by centuries, and whose rights are guaranteed by the Second amendment.

It is clear that the property in question was not state property.

**(c) The court of last resort in New York has determined that the armory belongs to the Regiment.**

In *Tobin v. Laguardia*, 276 NY 34, 43 (1937) the New York Court of Appeals held that the armory is owned by thy Regiment itself. An attempt by the legislature to declare ownership to no longer be in the Regiment but in the state for the civilian use of its urban development corporation by leasing it to an expensive restaurant is simply an attempt by the legislature to reverse a holding of the courts.

It is only by defying the prior determination of the court can the legislature seize the armory and its fixtures without any compensation and without any due process.

**(d) The legislation curtails the freedom of association and expression of a selected limited group of veterans for the benefit of a selected private corporation.**

New York Military Law 183 subordinates the right of meeting in an armory only to military need. New York Military Law 180-a, however, subordinates these rights of association and expression to the needs of a civilian restaurant operator in the case of one armory only. The only purpose for this curtailment of constitutional rights is the legislature's desire to accommodate one corporation set up specifically to take over the Regiment's property.

As more fully explained in the Petition, this legislation is subject to strict scrutiny because it has a severe impact on the right to associate. *Buckley v.*

*Valeo*, 424 U.S. 1, 25; *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973) A legislative determination that a favored restaurant is a more desirable tenant than the National Guard unit that has been there for over a century is simply not a sufficient reason to burden the rights of organizations to meet to such an extreme extent.

Also as more fully explained in the Petition, such discrimination both in the beneficiary of the discrimination and in limiting the veterans' organizations that lose rights of association to one neighborhood (as well as the veterans of the Regiment itself) violates the constitutional requirements of both *Kelo v. New London*, 545 U.S. 469 (2005) and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

## Conclusion

Certiorari should be granted so that the order of the court of appeals can be reversed and the case remanded for further remand by the court of appeals to the district court for further proceedings including trial.

May 24, 2010

Charles G. Mills, IV
*Counsel of Record*
56 School Street
Glen Cove, New York 11542
516-759-4300

Attorney of Record for
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Department of New York
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