

No. 07-290

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**In the  
Supreme Court of the United States**

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DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,  
MAYOR OF THE DISTRICT OF COLUMBIA,  
*Petitioners,*  
v.  
DICK ANTHONY HELLER,  
*Respondent.*

————— ◆ —————  
ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

————— ◆ —————  
**MOTION FOR LEAVE TO FILE OUT OF TIME A  
BRIEF OF THE STATE OF WISCONSIN AS  
AMICUS CURIAE IN SUPPORT OF RESPONDENT  
AND BRIEF OF THE STATE OF WISCONSIN AS  
AMICUS CURIAE IN SUPPORT OF RESPONDENT**

————— ◆ —————  
J.B. VAN HOLLEN  
Attorney General  
of Wisconsin

CHRISTOPHER G. WREN\*  
Assistant Attorney General  
*\*Counsel of Record*

STEVEN P. MEANS  
Assistant Attorney General

Counsel for the State of  
Wisconsin as *Amicus Curiae*

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-7081

**MOTION FOR LEAVE TO FILE OUT OF TIME A BRIEF  
OF THE STATE OF WISCONSIN AS *AMICUS CURIAE*  
IN SUPPORT OF RESPONDENT**

Pursuant to Rule 30.2 and 37.4 of the Rules of this Court, the State of Wisconsin, by its Attorney General, respectfully seeks leave to file the attached brief as *amicus curiae* in support of respondent Dick Anthony Heller. The State of Wisconsin further respectfully requests, for the reasons that follow, that this motion be construed as timely filed and that the motion be granted.

On February 8, 2008 (three days before the due date for filing the *amicus* brief), the State of Wisconsin submitted to the Clerk a request under Rule 30.4 for permission to extend the time to file its *amicus* brief to not later than February 28, 2008. The State of Wisconsin proceeded under Rule 30.4 because the rule states that “[a]n application to extend the time to file any document or paper other than those specified in paragraph 3 of this Rule may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified.” Rule 30.3 does not specify an *amicus* brief. Having not heard a response from the Clerk, counsel for the State of Wisconsin inquired about the status of the extension request and was advised that the Clerk does not have authority under Rule 30.4 to extend the filing deadline for an *amicus* brief.

The State of Wisconsin sought the extension because, in accord with Wisconsin law, the Attorney General awaited approval from the Wisconsin Assembly to file the brief. *See* Wis. Stat. § 165.25(1). The Assembly was not in session at that point but

was scheduled to reconvene the week of February 18, 2008. Because the Wisconsin statutory requirement of prior approval extends to Wisconsin's participation in briefs filed by other *amici*, the State of Wisconsin could not join other *amicus* briefs due by February 11.

The Assembly postponed reconvening until February 26, 2008. The leadership of the Assembly had been apprised of the Attorney General's interest in filing an *amicus* brief and of the time-sensitivity of the Attorney General's request for approval. On February 26, 2008, shortly before 8:00 p.m. Central Time, the Assembly overwhelmingly approved the Attorney General's request.<sup>1</sup> The Attorney General has filed, as promptly as possible, this motion for permission to extend the time to file the *amicus* brief.

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<sup>1</sup> The Assembly voted 78-18 to approve the request. The tally sheet for the Assembly's vote is available online at <http://www.legis.state.wi.us/2007/data/votes/av0179.pdf>.

Respectfully submitted,

J.B. VAN HOLLEN  
Attorney General of Wisconsin

CHRISTOPHER G. WREN\*  
Assistant Attorney General  
*\*Counsel of Record*

STEVEN P. MEANS  
Assistant Attorney General  
Counsel for the State of  
Wisconsin as *Amicus Curiae*

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-7081  
wrencg@doj.state.wi.us

February 2008.



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**BRIEF OF THE STATE OF WISCONSIN AS  
AMICUS CURIAE IN SUPPORT OF RESPONDENT**

**INTEREST OF THE STATE OF WISCONSIN**

If the Circuit Court decision is reversed, and Second Amendment's rights are limited to those who are affiliated with a state-regulated militia, the federal government may gain expanded power to preempt state constitutional rights. Through their constitution's Declaration of Rights, the citizens of the State of Wisconsin have the "right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." WIS. CONST. art. I, § 25; *see also* WIS. CONST. art. I, § 26 ("The people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law."). So far, judicial interpretations of the Second Amendment have not significantly endangered this right under the Wisconsin Constitution. The State offers this brief, on behalf of its citizens, to urge the Court to decide this case in a way that preserves Wisconsin constitutional rights and does not transform the Second Amendment into a wide-ranging grant of authority through which the federal government could eventually infringe those rights.

**SUMMARY OF THE ARGUMENT**

The Court should affirm the circuit court's holding that the Second Amendment embraces an individual right "to keep and bear Arms." Affirming that holding will protect Wisconsin citizens against possible federal infringement of this right valued by Wis-

consin citizens and protected by the Wisconsin Constitution.

The Court should leave intact its precedents holding that the Second Amendment applies only to the federal government, not to state governments.

### ARGUMENT

This Court should affirm the circuit court’s holding that the Second Amendment protects an individual’s right “to keep and bear Arms” for purposes unrelated to participation in “[a] well regulated Militia.” *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007) (“[W]e conclude that the Second Amendment protects an individual right to keep and bear arms. . . . [T]he activities [the Amendment] protects are not limited to militia service, nor is an individual’s enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.”), *cert. granted in part sub nom. District of Columbia v. Heller*, 128 S. Ct. 645 (2007). The circuit court’s opinion sets out a compelling explanation for that conclusion. *Id.* at 378-95.<sup>1</sup>

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<sup>1</sup> See also AKHIL REED AMAR, *THE BILL OF RIGHTS* 258-59 (1998) (distinguishing the Creation-era understanding of the Second Amendment from the post-Civil War understanding; observing that “Reconstruction Republicans recast arms bearing as a core *civil* right, utterly divorced from the militia and other political rights and responsibilities. Arms were needed . . . to protect one’s individual homestead. Everyone — even nonvoting, nonmilitia-serving women — had a right to a gun for self-protection” (emphasis in original)); *id.* at 259 (“Creation-era arms bearing was collective . . . Reconstruction gun-toting was individualistic . . . The Creation vision was public . . . The Re-

(footnote continues on next page)

The circuit court’s conclusion fully protects the interests of Wisconsin citizens against unwarranted intrusion by the federal government on their state-protected “right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” WIS. CONST. art. I, § 25.<sup>2</sup> As the *Parker* court noted, this Court has held “that the Second Amendment constrain[s] only federal government action and [does] not apply to the actions of state governments.” *Parker*, 478 F.3d at 391 n.13 (citing *Presser v. Illinois*, 116 U.S. 252 (1886), and *United States v. Cruikshank*, 92 U.S. 542 (1876)); *id.* (citing *Twining*

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construction vision was private . . . .”); *id.* at 257-66 (explaining the Reconstruction-transformed understanding of the Second Amendment). Professor Laurence H. Tribe has described Professor Amar’s treatment of the Second Amendment as “making a powerful case for the proposition that the right to keep and bear arms *as of 1789* meant something very different from what the right meant *as of 1866-68*.” 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-11, at 901 n.221 (3d ed. 2000) (emphases in original).

<sup>2</sup> In a referendum held in November 1998, Wisconsin voters approved this amendment to the Wisconsin Constitution by an overwhelming vote of 1,205,873 in favor to 425,052 against. STATE OF WISCONSIN, 2007-2008 BLUE BOOK at 246, *available at* <http://www.legis.wisconsin.gov/lrb/bb/07bb/pdf/197-248.pdf>. In a referendum held in April 2003, Wisconsin voters approved a complementary amendment to protect “the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law.” WIS. CONST. art. I, § 26. The voters approved this amendment overwhelmingly as well, with 668,459 voting in favor and 146,182 against. 2007-2008 BLUE BOOK, *supra*, at 246.

*v. New Jersey*, 211 U.S. 78, 98 (1908), and *Maxwell v. Dow*, 176 U.S. 581, 597 (1900), as reiterating the *Presser* and *Cruikshank* holding). Accord ANTONIN SCALIA, A MATTER OF INTERPRETATION 136 n.13 (1997) (“Of course, properly understood, [the Second Amendment] is no limitation upon arms control by the states.”). By holding that the Second Amendment embraces an individual’s right “to keep and bear Arms,” this Court will ensure that the federal government cannot infringe that right.

The *Parker* court specifically declared that whether the Second Amendment applies to the states through incorporation “is an issue that we need not decide.” *Parker*, 478 F.3d at 391 n.13. This Court need not decide that issue, either. As the *Parker* court wrote, “the District is directly constrained by the entire Bill of Rights, without need for the intermediary of incorporation.” *Id. Cf. SCALIA, supra*, at 136 n.13 (“Of course, properly understood, [the Second Amendment] is no limitation upon arms control by the states.”).

Moreover, by leaving *Presser v. Illinois*, 116 U.S. 252, 265 (1886), and *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), intact, this Court will forestall federal infringement on state-created rights of individuals to keep and bear arms for nonmilitia purposes and simultaneously preserve the right of each state to decide for itself the scope of that right (as Wisconsin has done by constitutional amendment) and to regulate or punish, without federal interference, the negligent or intentional misuse or abuse of firearms, *see, e.g.*, Wis. Stat. § 51.20(13)(cv) (2005-06 ed.) (permitting court to restrict possession of firearms by a person involuntarily committed for treat-

ment); Wis. Stat. § 939.63 (2005-06 ed.) (penalty enhancement for “using or threatening to use” a dangerous weapon when committing a crime); Wis. Stat. § 948.605 (2005-06 ed.) (creating gun-free school zones and punishing intentional violation as a felony).

### CONCLUSION

For the reasons offered in this *amicus* brief, the State of Wisconsin respectfully requests that the Court affirm the circuit court’s holding that the Second Amendment protects an individual’s right “to keep and bear Arms” for purposes unrelated to membership in a militia or other military organization. The State of Wisconsin also respectfully requests that the Court leave intact its holdings that the Second Amendment constrains federal action only, not action by the states.

Respectfully submitted,

J.B. VAN HOLLEN  
Attorney General of Wisconsin

CHRISTOPHER G. WREN\*  
Assistant Attorney General  
*\*Counsel of Record*

STEVEN P. MEANS  
Assistant Attorney General

Counsel for the State of  
Wisconsin as *Amicus Curiae*

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
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wrencg@doj.state.wi.us

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