

STATE OF WISCONSIN

IN SUPREME COURT

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No. 2004AP2989-CR

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STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOTT K. FISHER,

Defendant-Respondent

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ON CERTIFICATION FROM THE COURT OF APPEALS  
ON APPEAL FROM A JUDGMENT OF DISMISSAL ENTERED  
IN THE JACKSON COUNTY CIRCUIT COURT, THE HONORABLE  
JOHN A. DAMON, PRESIDING

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*AMICUS CURIAE* BRIEF OF  
NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.  
IN SUPPORT OF DEFENDANT-RESPONDENT

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

The National Rifle Association of America, Inc. (“NRA”) is a not-for-profit membership corporation with 4.2 million individual members and 10,700 affiliated clubs and associations nationwide. Its purposes include protection of the right to possess, transport, and carry arms for self defense; to promote public safety; to train police, soldiers, and citizens in marksmanship and gun safety; to promote the shooting sports; and to promote hunter safety.

The NRA has a strong interest in upholding the rights of its members and all citizens to keep and bear arms as protected in the constitutions of each State. In addition to the Wisconsin Rifle and Pistol Association and numerous affiliated clubs in Wisconsin, the NRA has thousands of members who reside in Wisconsin or who travel to Wisconsin for hunting, competitions, training, and other lawful activity involving firearms. The NRA

has a keen interest in protecting the rights of its members and ensuring that they are in compliance of the law, including in the context of the carrying and transportation of firearms in motor vehicles. Since in our highly mobile society firearms are carried and transported in vehicles countless times every day, NRA members have a stake in how this case is resolved.

This interest is extraordinarily significant at this time in that the NRA will hold its annual convention in Milwaukee, Wisconsin, during May 17-23, 2006. In 2005, the NRA convention in Houston drew nearly 60,000 attendees. The NRA regularly litigates and files *amicus curiae* briefs in firearms law cases nationwide. This brief seeks to assist the Court by providing analysis of precedents not set forth in the briefs of the parties, and is desirable in order to apprise the Court of the views of America's leading organization representing law-abiding firearm owners.

## **ARGUMENT**

### **Introduction**

Wis. Const., Art. I, § 25, enacted in 1998, provides: “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” However, W.S.A. § 941.23 states: “Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor.” The issue is “whether the concealed weapon statute can be enforced against a tavern owner who keeps a loaded gun in the glove compartment of his car for protection because he routinely makes large cash deposits in a high-crime neighborhood.” *State v. Fisher*, 2005 WL 1300725, \*1 (Wis. App. 2005).

The above should be answered in the negative. First, the right to bear arms for security is a fundamental right which must be construed broadly. Second, where the right to bear arms for

security is exercised in a motor vehicle, no alternative to concealment exists.

**I. THE RIGHT TO BEAR ARMS MUST BE CONSTRUED BROADLY.**

The Court of Appeals posed the following jurisprudential question:

“Security” is a broad concept that could arise in a myriad of situations. . . . If an individual may cite security as the basis for carrying a loaded firearm in a vehicle, is there any further guidance the Supreme Court could give on how to analyze such claims? For instance, should the constitutional right be interpreted liberally or narrowly?

*Fisher*, 2005 WL 1300725, \*4.

The answer is clear. “Such a constitutional expression of the will of the people is to be liberally construed.” *State v. Legrand*, 77 Wis.2d 520, 526, 253 N.W.2d 505 (1977). Terminology “couched as it necessarily must or ought to be, in a document such as a constitution, in broad and general terms, should have a liberal construction looking toward virility rather

than impotency.” *Id.* n.5, quoting *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 638, 209 N.W. 860, 861 (1926). “[I]t is clearly judicial duty to liberally construe . . . such an expression of the will of the people, whatever might be our opinion as individuals of the wisdom or value . . . of such an amendment.” *State ex rel. Ekern, id.*

“[O]rdinarily words in the constitution ‘do not receive a narrow, contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all contingencies.’” *State ex rel. Graves v. Williams*, 99 Wis.2d 65, 298 N.W.2d 392 (1980). Unwritten exceptions to a right must be narrowly construed, for “Courts cannot supply what they deem to be unwise omissions from the Constitution.”<sup>1</sup> *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N.W. 961, 966 (1910).

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<sup>1</sup>See *State v. Hamdan*, 264 Wis.2d 433, 492, 665 N.W.2d 785 (2003) (Bablitch, J., concurring) (avoiding interpretation that “renders the constitutional amendment a sham by reading into it the words ‘unless concealed’”).

These principles apply above all to constitutional rights. “This constitutional protection must not be interpreted in a hostile or niggardly spirit.” *Ullmann v. United States*, 350 U.S. 422, 426 (1956). “As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it.” *Id.* at 428-29.

Some constitutional rights are not “in some way less ‘fundamental’ than” others, but “each establishes a norm of conduct” which must be honored “to no greater or lesser extent than any other inscribed in the Constitution.” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). “[W]e know of no principled basis on which to create a hierarchy of constitutional values . . . .” *Id.*

The Wisconsin Bill of Rights recognizes no such hierarchy when it characterizes fundamental liberties as “the right” of “the people.” *Compare* “The people have the right to keep and bear arms for security,” Wis. Const., Art. I, § 25, *with* “The right of the people peaceably to assemble,” *id.*, § 4, and “The right of the people to be secure . . . against unreasonable searches and seizures,” *id.*, § 11.

“Fundamental rights are those which are either explicitly or implicitly based in the Constitution.” *State v. Martin*, 191 Wis.2d 646, 652, 530 N.W.2d 420 (1995). “If a statute affects a ‘fundamental right’ . . ., we review the statute with ‘strict scrutiny.’” *Id.* at 651-52. “Under strict scrutiny, we require the statute to be narrowly drawn to further a compelling government interest.” *Matter of Guardianship of Ruth E.J.*, 196 Wis.2d 794, 802, 540 N.W.2d 213 (1995).

This Court should expand its analysis of fundamental

rights consistent with the above. *State v. Cole*, 264 Wis.2d 520, 537, 665 N.W.2d 328 (2003), found that “the state constitutional right to bear arms is fundamental,” but rejected strict scrutiny or intermediate scrutiny. *Cole* found the test to be whether “the restriction upon the carrying of concealed weapons is a reasonable exercise of the State’s inherent police powers,” but added: “Such a test should not be mistaken for a rational basis test. The explicit grant of a fundamental right to bear arms clearly requires something more, because the right must not be allowed to become illusory.”<sup>2</sup> *Id.* at 540.

As a constitutional right, bearing arms must be accorded heightened scrutiny. *City of Lakewood v. Pillow*, 180 Colo. 20, 23, 501 P.2d 744 (1972), invalidated an ordinance, under that

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<sup>2</sup>“The reasonableness test focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare.” *Id.* at 541. *But see id.* at 558 (Abrahamson, C.J., concurring) (“I am not persuaded that there is any difference between rational basis test and the majority opinion’s ‘reasonable exercise of police power’ test.”).

State's arms guarantee, which made it "unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense." "Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.*

*State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988), held regarding a concealed pistol in a vehicle that "a total proscription" of carrying a weapon without a license "operates to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes."<sup>3</sup> *Id.* at 462. Even activities subject to the police power "may not be achieved by means which sweep unnecessarily broadly and thereby invade the realm of protected

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<sup>3</sup>*See also id.* at 461 (precedent implied "that a constitutional guarantee or right to keep and bear arms would subject laws regulating protected arms to the same standard of scrutiny given laws regulating first amendment freedoms.").

freedoms, such as the right to keep and bear arms . . . .” *Id.* at 467.

While the above decisions suggest the “least restrictive alternative” test of strict scrutiny, this Court in *Hamdan* crafted an “any reasonable alternative” test, which is readily applicable to this case:

First, under the circumstances, did the defendant’s interest in concealing the weapon to facilitate exercise of his or her right to keep and bear arms substantially outweigh the State’s interest in enforcing the concealed weapons statute? . . . Second, did the defendant conceal his or her weapon because concealment was the only reasonable means under the circumstances to exercise his or her right to bear arms? Put differently, did the defendant lack a reasonable alternative to concealment, under the circumstances, to exercise his or her constitutional right to bear arms?

264 Wis.2d at 489-90.

Here, Scott Fisher had a clear interest in carrying the weapon in his motor vehicle which substantially outweighed the State’s interest. The firearm was to provide security for making bank deposits for a lawful business in an area in which serious

crimes had been committed, and Mr. Scott posed no threat to the police or other citizens. As the following demonstrates, no alternative to concealment existed if he was to exercise his right to bear arms for security in a vehicle, the only realistic method of regularly transporting cash deposits to the bank.<sup>4</sup>

**II. NO ALTERNATIVE TO CONCEALMENT EXISTS WHERE THE RIGHT TO BEAR ARMS FOR SECURITY IS EXERCISED IN A MOTOR VEHICLE.**

The right to bear arms for security is not forfeited when one enters a motor vehicle. However, under Wisconsin precedent, a firearm in a vehicle is inherently concealed, even when visible to persons looking inside. The prohibition on going armed with a concealed weapon is unconstitutional as

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<sup>4</sup>*Kellogg v. City of Gary*, 562 N.E.2d 685, 694 (Ind. 1990), held about the right to bear arms for self-defense:

This interest is one of liberty to the extent that it enables law-abiding citizens to be free from the threat and danger of violent crime. There is also a property interest at stake, for example, in protecting one's valuables when transporting them, as in the case of a businessman who brings a sum of cash to deposit in his bank across town.

applied to a person who is genuinely bearing arms for security in a vehicle.

“The driver of an automobile goes armed . . . when he has a dangerous weapon within reach on a shelf in back of his seat.” *Mularkey v. State*, 201 Wis. 429, 230 N.W. 76, 77 (1930). “Absolute invisibility to other persons is not indispensable to concealment.” *Id.* See *State v. Asfoor*, 75 Wis.2d 411, 435, 249 N.W.2d 529 (1977) (pistol on floorboard).

However, *State v. Walls*, 190 Wis.2d 65, 72-73, 526 N.W.2d 765, 767-68 (Ct. App. 1994), held that a handgun was “indiscernible to ordinary observation” even though “the police officers did observe the gun lying on the front seat.” The police reported that “‘upon checking the auto the gun was lying on the seat’ clearly in plain view.” *Id.* at 70. Even though “the handgun was observable to anyone looking into the automobile,” *Walls* held it to be concealed. *Id.* Yet if the test

requires observation by people outside of a vehicle traveling at night, it could only be met by mounting the gun on the front hood like a classic Cadillac figurine and shining a light on it.

A person may transport an unloaded, encased firearm in a vehicle. *Id.* at 69 n.2, citing W.S.A. § 167.31(2)(b). But that precludes bearing arms for security.

While *Walls* was decided before adoption of Art. I, § 25, after adoption this Court agreed that “a person who carries a weapon in a car with the weapon in plain view on the front seat may have nonetheless unlawfully concealed the weapon.” *State v. Dundon*, 226 Wis.2d 654, 661 n.7, 594 N.W.2d 780 (1999).

“The adoption of Article I, Section 25 did not affect prior judicial interpretations of the CCW statute . . . , but it did create an obligation to protect rights guaranteed by the amendment.” *Hamdan*, 264 Wis.2d at 458-59. “The State may not apply these regulations in situations that functionally disallow the exercise

of the rights conferred under Article I, Section 25. . . . The prohibition of conduct that is indispensable to the right to keep (possess) or bear (carry) arms for lawful purposes will not be sustained.”<sup>5</sup> *Id.* at 461.

The term “security” connotes “a persistent state of peace” rather than “an imminent threat,” and “the domain most closely associated with a persistent state of peace is one’s home or residence, *followed by other places in which a person has a possessory interest.* . . . In fact, a person who takes no initiative to provide security in these private places is essentially leaving security to chance.” *Hamdan, id.* at 477-78 (emphasis added). One such important place in modern life is in a motor vehicle. The prohibition here bans bearing arms for security in a motor

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<sup>5</sup>The term “bear arms” applies to carrying a firearm on the person or in a vehicle. *Muscarello v. United States*, 524 U.S. 125, 126, 130 (1998). “Surely a most familiar meaning is [in] the Constitution’s Second Amendment (‘keep and *bear* Arms’) . . . .” *Id.* at 143 (Ginsburg, J., dissenting).

vehicle, in violation of the rule that “regulations limiting a constitutional right to keep and bear arms must leave some realistic alternative means to exercise the right.” *Id.* at 480.

*Hamdan* found keeping the weapon in the open, such as in a visible holster or on the wall, not to be a *realistic* alternative. *Id.* at 480. Because carrying a firearm in a vehicle is considered concealed per se, there is no alternative method, realistic or unrealistic, of bearing arms for security in a vehicle.

*Cole* involved a defendant with marijuana in his pocket and loaded pistols in the glove box and under the driver’s seat. 264 Wis.2d at 526. “We see no need to examine the assortment of restrictions that may apply to transporting a weapon in a vehicle, because under the facts of this case, the constitutional right to bear arms has clearly not been infringed.” *Id.* at 556. It was noted that “Cole has presented no evidence of any threat at or near the time he was arrested.” *Id.* at 557. Yet this relates

more to bearing arms for “defense” than “security,” which connotes “a persistent state of peace” rather than “an imminent threat.” *Hamdan*, 264 Wis.2d at 477.

*Cole* foregoes creation of a broad rule: “Whatever the outer reaches of application of the CCW statute might be in light of the new constitutional amendment, this fact scenario does not fall within them.” 264 Wis.2d at 557. It also notes that the firearms at issue were loaded, creating a danger of accidents,<sup>6</sup> and reiterates that the right to bear arms was not violated “under these specific circumstances.” *Id.* at 558. Yet the pistol in *Hamdan* must have been loaded, suggesting tension between the two decisions. That tension is reduced by limiting *Cole* to its facts – the defendant was carrying a illegal drug, use of which

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<sup>6</sup>*Cole* cited *State ex rel. West Virginia Division of Natural Resources v. Cline*, 200 W.Va. 101, 106-07, 488 S.E.2d 376 (1997), but that case only upheld a law regulating transport of loaded firearms by hunters, “since transportation of a loaded firearm is not a lawful method of hunting with firearms.”

could have resulted in an accidental discharge of the firearm, and he was in a neighborhood he considered to be dangerous, without asserting any need to be there.

By contrast, Scott Fisher was bearing arms for security, and was acting lawfully as a responsible citizen. Far from being a threat to law enforcement officials, he openly volunteered that he was carrying a firearm. He possessed his firearm in his vehicle to protect bank deposits from a lawful business, and in no way was a danger to the public.

### **CONCLUSION**

This Court should hold that W.S.A. § 941.23 is unconstitutional as applied to a person who is bearing arms for security in a vehicle and is otherwise acting lawfully, and should affirm the judgment of the circuit court.

Dated this \_\_\_\_\_ day of December, 2005.

Respectfully submitted,

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## CERTIFICATION

I certify that this brief conforms to the rules contained in WI Stat §§809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2796 words.

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