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No. 82154-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SIEYES,

Appellant

FILED
SUPREME COURT
STATE OF WASHINGTON

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BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ("WACDL")

On Appeal from Kitsap County Superior Court, Juvenile Division

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ORIGINAL

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A. IDENTITY AMICUS CURIAE

The Washington Association of Criminal Defense Lawyers ("WACDL") submits this amicus curiae memorandum to assist the Court in deciding the case of *State of Washington v. Christopher William Sieyes*, No. 82154-2.

B. POSITION OF AMICUS CURIAE

WACDL takes no position on the issue of whether Mr. Sieyes' conviction should be reversed. However, this Court should hold that the Second Amendment is incorporated into the Fourteenth Amendment to the United States Constitution. The Court should also apply a strict scrutiny test to determine whether restrictions on firearm possession and ownership are constitutional.

C. ISSUES OF CONCERN TO AMICUS CURIAE

1. Whether the Second Amendment to the United States Constitution is incorporated into the Fourteenth Amendment, so that its prohibitions apply to the State of Washington?

2. Should this Court apply a "strict scrutiny" test when determining whether a particular regulation of the right to bear arms is constitutional?

D. STATEMENT OF THE CASE

Amicus accepts the statement of facts set out in the Brief of the Appellant and the Brief of the Respondent from the Court of Appeals, No. 36799-9-II

E. ARGUMENT

1. *Introduction*

In June 2008, the United States Supreme Court issued its decision in *District of Columbia v. Heller*, ___ U.S. ___, 128 S. Ct. 2783, 171 L.Ed.2d 638 (2008). In *Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and struck down a District of Columbia law which essentially banned handgun possession and required that other types of firearms (such as long guns) be rendered inoperable for immediate use within the home.

Heller was the Supreme Court's "first in-depth examination of the Second Amendment." 128 S. Ct. at 2822. Comparing the Second Amendment to other amendments in the Bill of Right which the Supreme Court did not begin to explain until recently, the Supreme Court noted that it was unsurprising that "that such a significant matter has been for so long

judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens." 128 S. Ct. at 2816. Because *Heller* was the first Supreme Court case addressing the Second Amendment in-depth, the Court explicitly did not decide numerous issues, preferring to wait until those issues presented themselves for review. *See* 128 S. Ct. at 2821 ("And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.").

Because *Heller* was a case challenging a firearms regulation from the District of Columbia, the Court did not have to address the issue of incorporation – whether the Second Amendment applies to the States through the Fourteenth Amendment. 128 S. Ct. at 2813 n.23. The Court also did not resolve the issue of the level of scrutiny used to evaluate the constitutionality of various regulations on firearm possession. 128 S. Ct. at 2817-18 & n. 27. While the Supreme Court did not explicitly address the incorporation and standard of review issues, a review of the analytical underpinnings of *Heller* should leave little doubt that the Second

Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment and that the level of scrutiny is "strict."

2. *The Second Amendment Applies to the States*

In *Heller*, the Supreme Court cast grave doubt on the continuing validity of the argument that the Second Amendment does not apply to the States. The Court explained, in some detail, that the very reason for the adoption of the Fourteenth Amendment was to secure for newly freed slaves the constitutional rights enshrined in the Bill of Rights, including the right to bear arms. 128 S. Ct. at 2809-2812.[1] Given this history and given the core value that the right to bear arms now has (after *Heller*), under the 14th Amendment, States can no more disarm citizens than Congress can.

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[1] In this portion of *Heller*, Justice Scalia relied on the amicus brief prepared by the Institute for Justice. 128 S.Ct. at 2810 This brief is available on-line at http://www.abanet.org/publiced/preview/briefs /pdfs/07-08/07-290_RespondentAmCuInstforJustice.pdf. The brief sets out in intricate detail the history of the 14th Amendment and how one of the main concerns of the drafters of that amendment was the fact that freed slaves were being denied the right to bear arms in self-defense. *See also District of Columbia v. Heller*, No. 07-290, *Brief of Amicus Curiae Congress of Racial Equality in Support of Respondent* (arguing how Southern states during Reconstruction attempted to pass laws which had the effect of disarming former slaves, and how 14th Amendment was intended to guarantee to the Freedman their right to keep and bear arms for self-defense). http://www.abanet.org/ publiced/preview/briefs/pdfs/07-08/07-290_RespondentAmCuCongrRacialEqualitynew.pdf.

Courts addressing this issue in the past have rotely cited to three cases -- *Presser v. Illinois*, 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615 (1886); *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1876) and *Miller v. Texas*, 153 U.S. 535, 14 S. Ct. 874, 38 L. Ed. 812 (1894) – for the proposition that the Second Amendment is not incorporated into the Fourteenth Amendment. *See, e.g. State v. Hunter*, 147 Wn. App. 177, 191, 185 P.3d 556 (2008), *petition pending* No. 82557-2;[2] *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269-70 (7th Cir. 1982); *NRA v. Oak Park*, __ F. Supp.2d ___, 2008 U.S. Dist. LEXIS 98134 (N.D. Ill. 2008); *Burton v. Sills*, 53 N. J. 86, 98, 248 A.2d 521 (1968), *appeal dismissed*, 394 U.S. 812 (1969); *Arnold v. City of Cleveland*, 67 Ohio.St.3d 35, 38-41, 616 N.E.2d 163 (1993). However, a review of all three of these 19th Century cases reveals that none of them are controlling and do not support the position that the Second Amendment does not apply to the States.

Cruikshank involved the prosecution of white members of an armed mob who attacked former slaves in Louisiana after the Civil War. The prosecution was brought under the Enforcement Act, 16 Stat. 140

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[2] One of the undersigned counsel is counsel of record in *Hunter*.

(1870)[3] and alleged the defendants conspired to deny the citizens of color the free exercise of their constitutional rights. The Supreme Court upheld the reversal of the convictions on the ground that no federal constitutional rights had been violated.

In *Cruikshank*, the Supreme Court did state that the right to bear arms under the Second Amendment "means no more than that it shall not be infringed by Congress." 92 U.S. at 553. However, this language cannot be read out of context. The language that immediately follows this sentence makes it clear that the Court held that the federal Constitution does not protect against private violations of rights:

> The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York* v. *Miln,* 11 Pet. 139 [36 U.S. 102, 139 (1837)], the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.

92 U.S. at 553.

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[3] The Enforcement Act is often referred to as the "Ku Klux Klan Act."

This conclusion does not undermine the doctrine of incorporation, since, as explained, the very reason for the adoption of the Fourteenth Amendment was to protect individuals who were being denied their right to bear arms, not by Congress, but by states in the South. The Supreme Court in *Cruikshank* did not dispute this conclusion and merely held in *Cruikshank* that the Fourteenth Amendment did not apply because the amendment did not control the actions of private parties, such as the white mob that attacked the freedman in Louisiana, rather than state actors:

> The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. . . .
>
> . . . .
>
> The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add any thing to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the

> States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

92 U.S. at 554-55. This language supports a theory of incorporation, rather than opposes it.

In any case, in *Heller*, Justice Scalia expressly limited *Cruikshank* by stating that it had a only a "limited discussion of the Second Amendment," 128 S. Ct. at 2813, and "also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." *Id.* at 2813 n.23. Thus, *Cruikshank* should not be cited for the broad proposition that the Supreme Court has already held that the Second Amendment does not apply to the states. The holding is only that the federal Constitution does not apply to the actions of private individuals.

As for *Presser*, the case involved whether the State of Illinois could restrict armed groups of men from parading in cities. The Court held that the Second Amendment did not bar such a law. The Court repeated *Cruikshank*'s analysis that the Second Amendment was only a limit on the national government. 116 U.S. at 265. However, when the Court turned to the Fourteenth Amendment, the Court did not hold that the

Second Amendment's right to bear arms was somehow excluded from the protection of the Fourteenth Amendment. Rather, the Court held that the claimed right of military association and drilling with arms did not implicate the right to bear arms at all, only potentially the right to assemble. Moreover, the right to assemble was not affected by state restrictions on military drills and parades. 116 U.S. at 266-67. Thus, the holding of *Presser* was not that the right to bear arms was not incorporated into the 14th Amendment, but only that the 14th Amendment was not offended by a state restriction on parading by armed bands. In *Heller*, the Court recognized the very limited holding of *Presser*: "*Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations." 128 S. Ct. at 2813.

Finally, *Miller v. Texas*, *supra*, involved review of a murder conviction which arose after the defendant shot and killed a police officer. He did not raise any federal constitutional issues regarding gun ownership either at the trial or appellate level, *see Miller v. State*, 20 S.W.1103 (Tex. Crim. App. 1893), *writ dismissed* 153 U.S. 535 (1894), and only raised a federal constitutional claim (that he had the right to walk on a public street

carrying a pistol) for the first time on a motion for rehearing after he lost his appeal. 153 U.S. at 535. As for the Court's discussion of the Second Amendment, the Court merely repeated its earlier holdings that the Second Amendment did not operate directly on the States. 153 U.S. at 538. As for a claim of incorporation under the 14th Amendment, the Court rejected this argument by simply by stating "it was fatal to this claim that it was not set up in the trial court." 153 U.S. at 538. Thus, *Miller* has no precedential value regarding issues about incorporation; its precedential value is limited to whether there is federal jurisdiction if a state criminal defendant fails to raise a federal issue properly in state court. *See Citizens' Savings Bank of Owensboro v. Owensboro*, 173 U.S. 636, 643, 19 S. Ct. 530, 43 L.Ed. 840 (1899) (citing *Miller* for this proposition: "But after a decision by the court of last resort of a State the attempt to raise a Federal question for the first time is too late.").

Thus, the holdings of *Cruikshank*, *Presser* and *Miller* do not require this Court to rule that the Second Amendment does not apply to the States through the Fourteenth Amendment. On the other hand, the history of the Fourteenth Amendment – primarily, its intent to protect the right to bear arms at the state level – and the primacy of the right to bear

arms which is ranked at the same cherished level as the rights protected by the First Amendment, should lead this Court to hold that the Second Amendment applies to the actions of the State of Washington.

The proper inquiry to determine if rights have been incorporated into the 14th Amendment's Due Process Clause is to see whether the right is among "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," or whether it is "basic in our system of jurisprudence." *Duncan v. Louisiana*, 391 U.S. 145, 148-49, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968). *See Palko v. Connecticut*, 302 U.S. 319, 326, 58 S. Ct. 149, 82 L.Ed. 288 (1937) ("If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed."), *overruled on other grounds Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969). Justice Scalia's thorough description of the core values protected by the Second Amendment, a right the majority in *Heller* constantly compares to the First Amendment's rights, should leave no doubt that the right to bear arms is so fundamental,

it applies to the states through the Fourteenth Amendment's Due Process Clause.[4]

3. *Strict Scrutiny is Required*

Previously, Washington courts have construed regulations of the right to bear arms under Wash. Const. art. 1, § 24, using a "reasonable regulation" standard and distinguished the right to bear arms from other constitutional rights such as voting, traveling and privacy. *See State v. Schmidt*, 143 Wn.2d 658, 676-77 & n. 76, 23 P.3d 462 (2001); *State v. Felix*, 125 Wn. App. 575, 581, 105 P.3d 427 (2005). *Heller* requires a change from this analysis because the Supreme Court not only rejected a "reasonable regulation" standard, but adopted an interpretation of the right to bear arms that places the right on an equivalent basis as other cherished rights in the Bill of Rights, such as the right to freedom of speech.

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[4] In addition to the Due Process Clause, the Second Amendment applies to the States through the 14th Amendment's "Privileges or Immunities" Clause (" No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."). The Supreme Court will hopefully one day overrule the decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394(1873), and adopt this position. *See Saenz v. Roe*, 526 U.S. 489, 522-28, 119 S. Ct. 518, 143 L.Ed.2d 689 (1999) (Thomas, J., dissenting) (raising possibility of reviving the Privileges or Immunities Clause).

The Supreme Court recognized that the law at issue in *Heller* would "pass rational basis scrutiny." 128 S. Ct. at 2817 n.27. Yet, the Court rejected this standard:

> But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. [Citation omitted]. In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) ("There may be narrower scope for operation of the presumption of constitutionality [*i.e.*, narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . "). If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

128 S. Ct. at 2817 n.27.

Similarly, the Supreme Court made it clear that the right to bear arms must be viewed at the same level of importance as other fundamental rights:

> 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. *See National Socialist Party of America v. Skokie*, 432 U.S. 43, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (1977) *(per curiam)*. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people--which JUSTICE BREYER would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

128 S. Ct. at 2821.

A reading of these sections of *Heller* should leave little doubt that a restriction of the right to bear arms can now be justified only under the same strict scrutiny test as is used in the First Amendment context – namely, whether there is a compelling government interest, with the restriction narrowly drawn to achieve that end. *See Rickert v. Public*

Disclosure Comm'n., 161 Wn.2d 843, 848, 168 P.3d 826 (2007) (setting out strict scrutiny test in First Amendment context).

In the instant case, the Court must decide whether the restriction at issue – RCW 9.41.040(2)(a)(iii) – satisfies the strict scrutiny test. To ban juveniles from possessing firearms, there must be a compelling government interest, and a restriction that is narrowly drawn to achieve that end. Amicus curiae does not have an opinion as to how that balance would come out in this case, although *Heller* requires this Court to engage in that balancing.

F. CONCLUSION

This Court should hold that the Second Amendment applies to the States through the Fourteenth Amendment's Due Process Clause. This

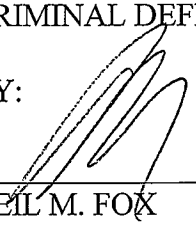
Court should then apply a "strict scrutiny" standard of review to state regulations of the right to bear arms.

DATED this 5 day of February 2009.

Respectfully submitted,

WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

BY:



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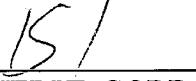

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