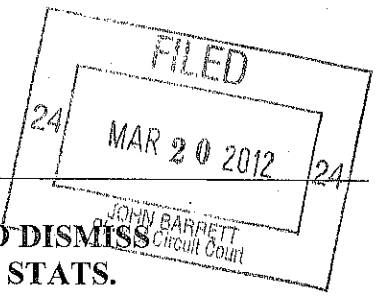
STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 24

STATE OF WISCONSIN,
Plaintiff,

-vs-

THOMAS M. BARRETT,
Defendant.

Case No. 11 CF 3855



DEFENDANT'S NOTICE AND MOTION TO DISMISS FOR FACIAL INVALIDITY OF s.941.298, STATS. AND MOTION TO FILE *INSTANTER*

The Defendant, Thomas M. Barrett, by and through his attorney, Allison Ritter, appearing specially, moves the Circuit Court, the Honorable Charles F. Kahn presiding, for a declaration of invalidity of s.941.298, Stats. because it is facially unconstitutional by impermissibly infringing upon the fundamental right to keep, use and bear arms under the Federal and Wisconsin Constitutions, and for dismissal of the subject Complaint herein for that reason and for other grounds as set forth in his Brief submitted in support hereof.

AND the Defendant further moves the court to file his Motion and Brief *instanter*, as counsel for the Defendant has had numerous challenges including the recent deployment of her children's father overseas for military service and the scheduled filing date slipped. To that end, no objection will be raised by Defendant for an extension of the same number of days for the state to file its response.

Dated this 20th day of March, 2012:

Allison M. Ritter, SBN 1024988

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STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 24

STATE OF WISCONSIN,
Plaintiff,

Case No. 11 CF 3855

-vs-

THOMAS M. BARRETT,
Defendant.

DEFENDANT'S BRIEF ON MOTION TO DISMISS FOR FACIAL INVALIDITY OF s.941.298, STATS.

BACKGROUND and INTRODUCTION

The Defendant, Thomas M. Barrett, by and through his attorney, Allison Ritter, appearing specially, mounts a facial challenge to the constitutionality of s.941.298, Stats., moving to dismiss the Complaint for the statute's violation of the Second and Fourteenth Amendments of the U.S. Constitution, and also, for its violation of Section 25 of Article I of the Wisconsin Constitution.

The Defendant has been charged by complaint with a single count of alleged possession of a "silencer" in violation of s.941.298, Stats.

Section 941.298, Stats. (the "silencer" statute) is an unconstitutional prohibition infringing upon the fundamental right to keep and bear arms, under the Second and Fourteenth Amendments of the U.S. Constitution, as well under the Wisconsin Constitution, Article I, Section 25.

This is a case of first impression, no other decision or opinion having been rendered on the validity of s.941.298, Stats.

FACTUAL PRELUDE TO A FACIAL CHALLENGE

Section 941.298, Stats., is a creature of an unreasoned Act of the 1991 Wisconsin Legislature, done almost exactly 20 years prior to the date of the underlying subject Complaint.[1] 1991 Wis. Act 39. It didn't receive much fanfare, finding its way into a 700-plus page enactment of a budget bill at page 676. The Legislature then acted *sans* consideration of the U.S. Supreme Court's upcoming decisions and opinions in ***McDonald v. City of Chicago***, 2010 US LEXIS 5523, 561 U.S. ____ (slip.op. 1), 177 L.Ed.2d 894, 130 S. Ct. 3020 (2010); and ***District of Columbia* v. *Heller***, 554 U. S. ___ (2008), not having had the benefit of the Court's reasoning to lay any sound foundation for s.941.298, Stats.

And since the time of the enactment of that section by 1991 Wis. Act 39, by Wisconsin State Constitutional Amendment, as expressed in Section 25 of Article I, the voting public of Wisconsin has recognized the right to bear arms for any lawful purpose:

> **Right to keep and bear arms.**
>
> ***The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.***

Wis. Const. Art. I, Section 25. [*As created Nov. 1998*] [By *1995 J.R. 27, 1997 J.R. 21, vote November 1998*]. (Emphasis supplied)[2].

As presently published, s.941.298, Stats. contains the following language:

> (1) In this section, "firearm silencer" means any device for silencing, muffling or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating such a device, and any part intended only for use in that assembly or fabrication.

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1 The effective date of 1991 Act 39 was August 15, 1991; the subject Complaint was dated August 16, 2011.

2 Over four decades ago, a state constitutional amendment was previously proposed recognizing the right of Wisconsin citizens to keep and bear arms, but that proposal was not passed. *See*, 59 Op. Wis. Atty. Gen. 3-8 (1970).

(2) Whoever sells, delivers or possesses a firearm silencer is guilty of a Class H felony.

(3) Subsection (2) does not apply to sales or deliveries of firearm silencers to or possession of firearm silencers by any of the following:

(a) Any peace officer who is acting in compliance with the written policies of the officer's department or agency. This paragraph does not apply to any officer whose department or agency does not have such a policy. Notwithstanding s. 939.22(2), this paragraph does not apply to a commission warden.

(b) Any armed forces or national guard personnel, while in the line of duty.

(c) Any person who has complied with the licensing and registration requirements under 26 USC 5801 to 5872.

A "silencer" does not actually silence a firearm, but merely muffles the sound.[3] A better word is sound-suppressor, as such a device may reduce the noise-emission of a firearm by 20 decibels (dB).[4] The "silencer" section is thus a complete ban on sound-suppression articles; it is a prohibition. Only about a third of the states completely ban suppressors.[5] In jurisdictions where suppressors are legal for pest control, target practice and hunting, owning a silencer simply requires a $200 federal permit and a criminal background check.[6] Tens of thousands of Americans each year use suppressors for perfectly harmless activities (such as target shooting) or

3 Clark, Criminal Use of Firearm Silencers, *Western Criminology Review 8(2), 44–57, at 46 (2007)*, citing Paulson, Adam C. 1996. *Silencers: History and Performance, volume 1*. Boulder, CO: Paladin Press; Reproduced herein at Appendix A.

4 Clark, Criminal Use of Firearm Silencers, *Western Criminology Review 8(2), 44–57, at 46 (2007)*, citing Paulson, Adam C. 1996. *Silencers: History and Performance, volume 1*. Boulder, CO: Paladin Press.

5 Clark, Criminal Use of Firearm Silencers, *Western Criminology Review 8(2), 44–57, at 45 (2007)*. "In some European countries, firearm silencers are legal and not regulated in any way--both in countries with widespread gun ownership, such as France, and countries where firearms themselves are strictly regulated, such as Sweden (Paulson, 1996:9). The approach of various jurisdictions to silencers runs the gamut from prohibition to regulation to complete legalization, and such laws follow no predictable pattern. Silencers are illegal in Texas, but legal in Sweden (Tex. Penal Code § 46.05(a)4 (2004))." *Id.*

6 Clark, Criminal Use of Firearm Silencers, *Western Criminology Review 8(2), 44–57, at 47 (2007)*. "The federal government issues about 2,000 silencer permits each year (*citing* U.S. Congress, 1984:121). It is estimated that more than 60,000 Americans legally possess and use silencers (*citing* Paulson, 1996:2)." *Id.*

even beneficial activities (such as shooting rats and rabid animals or simply to help prevent hearing loss resulting from recreational shooting).[7]

The prohibition, on its face, contains no *mens rea* element, not even whether or not the individual being charged with a violation is even aware of the presence of the offending article, except with respect to parts "intended" for making a "silencer" or using in a "silencer". Other state suppressor laws do contain *mens rea* requirements.[8] As such, Wisconsin's silencer prohibition s.941.298, Stats. is a strict liability offense as to mere physical possession.

The prohibition charges a violation by any individual as a felony.

The prohibition as written has a chilling effect of any meaningful exercise of the fundamental right to keep and bear arms. The prohibition would affect any individuals which include the young and new initiates in the field of arms and arms-training who desire to exercise their right to own and use firearms. The prohibition would affect those most vulnerable to the need to bear arms as "effective equalizers" against victimization—those affected most by crimes—those living in high-crime areas, those living in urban areas with noise-level prohibitions where few locations and facilities exist for training and practice with range work, and those who want and need training but are reluctant or unable to afford the training with more expensive, louder, full-power ammunition rounds for regular target practice.

The prohibition provides for no exclusion for persons inadvertently falling within its

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7 Clark, Criminal Use of Firearm Silencers, *Western Criminology Review 8(2), 44–57, at 47 (2007).*

8 *See, e.g.* Vermont Stat. § 4010. Gun silencers. Reproduced herein at Appendix B
A person who manufactures, sells, uses, or possesses ***with intent to sell or use an appliance known as or used for a gun silencer shall be fined $25.00***for each offense. The provisions of this section shall not prevent the use or possession of gun silencers by: (1) a certified, full-time law enforcement officer or department of fish and wildlife employee in connection with his or her duties and responsibilities and in accordance with the policies and procedures of that officer's or employee's agency or department; or (2) the Vermont National Guard in connection with its duties and responsibilities. Historical Citation Amended 2009, No. 154 (Adj. Sess.), § 238f, eff. June 3, 2010. (Emphasis supplied).

clutches, such as heirs to personal property in estates, personal representatives of estates, landlords performing evictions coming upon abandoned personal property left in the real estate the landlords own or control, vehicle dealers receiving trade-in and auction vehicles which contained abandoned or forgotten personal property, or even those acting under power-of-attorney instruments to take possession of incarcerated persons' property.

The prohibition would ensnare individuals based upon common items in their homes which are within the overbroad reach of s.941.298, Stats., all of which have been used to suppress the report of firearms, including oil filters, pillows, toilet paper, towels, and comforters.[9] The prohibition contains a vague reference to "silencer"; no other definition is to be found in the regulatory scheme of the Wisconsin Statutes.

Nor does the prohibition contain a definition of "report" or noise-emission of a firearm. Actually, there are five major categories of suppressible firearm noise-emissions: action, blast, sonic signature, impact, and operator perception.[10] Some of these are present in all instances, while others depend wholly on the specific mechanics of the weapon employed. In order of timing:

- Action noise required to ignite the round.
- Muzzle blast resulting from the discharge of excess propellant gas from the end of the barrel.
- Sonic or auditory signature of the projectile in flight (mainly supersonic-velocity rounds).
- Action noise in some firearm variants as the spent round is discharged and a fresh round reloaded (the ejection-rechambering cycle).
- Impact noise created as the projectile finds terminal impact. *Id.*

9 Clark, Criminal Use of Firearm Silencers, *Western Criminology Review 8(2), 44–57, at 46 (2007).*
10 See "Suppressors", Appendix C, for a general discussion of technical aspects of the components of firearms' reports or noise-emissions capable of being suppressed.

The two loudest sounds in a gunshot are typically the muzzle blast and the sonic signature. *Id.* Paired "reports" from the same shot may be observed when a distance observer/listener is first reached by the shock wave generated by the bullet flying past at supersonic speed, then subsequently reached by the muzzle blast moving at the normal speed of sound all the way from the muzzle. *Id.* Multiple techniques are used to address each of these sounds, but the suppressor itself is capable of addressing muzzle blast, sonic signature (through integral gas bleed, at the price of reducing projectile speed to subsonic) and the ability to cancel the mechanical action noise through Nielsen device manipulation, canceling the ejection cycle. *Id.*

Barrel length and bore-size, bullet velocity, size of powder or propellant charge, and burn-rate of propellant are the major factors contributing to unsuppressed muzzle-blast and sonic signature firearm noise-emissions.[11] *Id.* Projectile weight, composition and velocity are factors which make up projectile energy and in turn contribute to impact noise. *Id.* Smaller, lighter, slower projectiles have lesser impact sounds than faster, heavier projectiles, of course.

Wisconsin's prohibition contains no language describing sound-level criteria for classifying the noise-reduction characteristics of any devices or objects which are intended to fall within its reach, thus reaching almost anything which could reduce the noise emissions of a firearm.

Other provisions in Wisconsin law contain sound-level criterion, which are substantially related to the noise emissions sought to be regulated.[12] Current technology exists which enables

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11 *See also*, Kramer, Gunfire Noise and Hearing, Tinnitus Today (June 2002), reproduced herein at Appendix D.

12 *See, e.g.* s.350.095, Stats. Noise Level requirements. (1) NOISE LEVEL STANDARDS; TOTAL VEHICLE NOISE. (a) Every snowmobile that is manufactured on or after July 2, 1975, and that is offered for sale or sold in this state as a new snowmobile shall be manufactured so as to limit total vehicle noise to not more than 78 decibels of A sound pressure, as measured by the Society of Automotive Engineers standards. [* * *]; Wis. Admin. Code Sec. NR

both the classification of devices which reduce noise emissions, as well as the measuring of those emissions or reduction in sound levels to show compliance or prohibition of particular articles. Law enforcement agencies have readily available instrumentation which is used to measure noise emissions from vehicles, including boats and snowmobiles, as evident by the statutory and regulatory scheme here in Wisconsin for recreational vehicles.

The prohibition, being both over broad and vague, contains no exclusions of objects or devices which are not intended to fall within its reach, in order to allow for articles which are routinely marketed and commonly used. Other state suppressor laws do contain such exclusions, though.[13]

The prohibition is overbroad, by reaching "***any***" object or device which could result in reduced noise emission from firearms, by using the word "***any***" and by using its language, "***diminishing the report of***" a portable firearm. This reach could even include the very ammunition used in exercising the right to bear arms, as cartridges are by their very nature,

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6.08: Testing criteria. Testing criteria are as follows: (1) SOUND LEVEL LIMIT. (a) The total vehicle noise produced by every snowmobile manufactured after July 1, 1972 and offered for sale or sold in the state of Wisconsin shall not exceed 82dB on an A weighted network at 50 feet when measured in accordance with the procedures required herein. (b) The total vehicle noise produced by every snowmobile manufactured after July 1, 1975 and offered for sale or sold in the state of Wisconsin shall not exceed 78 dB on an A weighted network at 50 feet when measured in accordance with the procedures required herein. (c) The sound level requirements and testing criteria of the Society of Automotive Engineers Technical Report J192A, as amended 1975, shall be adhered to in certifying compliance with snowmobile sound level requirements. [* * *] ; Wis. Admin. Code Sec. NR 5.125 Noise level standards for motor boats. (1) TESTING STANDARDS. (a) The operator of any boat, when requested by a law enforcement officer who reasonably suspects a violation of s. 30.62(2), Stats., shall operate his or her boat in a manner prescribed by the officer, to determine compliance with s. 30.62(2), Stats. (b) An officer requesting a boat operator to submit to a noise test shall test the boat using testing methods J134a, J1970 or J2005. (c) When the J2005 testing method is used, the officer shall deduct 2 decibels from the decibel reading obtained in order for the test to be comparable to the J134a and J1970 tests. (d) When an officer requests a boat operator to conduct a boat noise test under the J1970 or J134a test method, the test shall be conducted at a minimum of 100 feet from the boat being tested. (e) When the J134a test is used at a distance of 100 feet, the officer will add 2 decibels (dB) to the test results. [* * *].

13 *See, e.g.*, N.H Rev. Stats. § 207:4, which excludes certain articles from the restrictions on "silencing devices"—I. No person shall possess a rifle, pistol, or other firearm fitted or contrived with any silencer or device for deadening the sound of explosion, for the purpose of taking wildlife. Nothing in this section shall prohibit the use of a ***muzzle brake, polychoke, or compensator***. II. Nothing in this section shall prohibit a person who has obtained a depredation permit issued by the executive director of fish and game from taking wildlife under such permit using a lawfully obtained silencing device. (Emphasis supplied) [reproduced herein at Appendix B]..

"explosive devices", containing an explosive charge and ignition primer, but reduced-power loads are designed to reduce the report and recoil of the firearm they are matched to. Reduced-power loads are used for close-quarters self-defense, firing-range work, target practice (especially with new and young shooters), and short-range hunting.[14]

Where Wis. Const. Art. I Sec. 25 refers to keeping and using "***arms***", "***for any lawful purpose***", the exercise of the right for the lawful purposes of training for defense with arms, target practicing with arms, and do either with reduced sound emissions made possible by the above commonly used articles, s.941.298, Stats. unduly burdens the meaningful exercise of those rights.

Other objects or accessories regularly sold for and commonly used with firearms which reduce their reports or sound/noise emissions include barrel extensions, bored target barrel weights, muzzle brakes, chokes & polychokes, compensators, sub-caliber conversion kits, sub-caliber interchangeable barrels, cartridge chamber inserts & reducers, gauge inserts & reducers, and barrel inserts & reducers.[15] Some semi-automatic firearms can even be placed on a setting which will prevent the arm from "ejection/rechambering cycling" thus limiting it to discharging one single round of ammunition at a time, keeping the bolt closed and reducing the overall noise-emission from the firearm.[16] Also included in the reach of the prohibition would be air-gun sound suppressors, which could be used as a dual-purpose appliance.[17]

I. UNDER ANY ANALYSIS, SECTION 941.298, STATS. FAILS REVIEW BECAUSE IT INFRINGES UPON THE FUNDAMENTAL SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS, INCORPORATED INTO THE FOURTEENTH AMENDMENT AND APPLICABLE TO THE INDIVIDUAL

14 See Appendix I, MCA Sports: [Chamber Adapters, Barrel Inserts and Cast Bullets] product circular, for an illustration of the use and applicability of using reduced-power loads.

15 See Appendices E, F, G, H & I for definitions and examples of these.

16 See Appendix C.

17 See Suppressor, n.1, Appendix C.

STATES UNDER THE LANDMARK PLACED BY *HELLER* AND THE WATERSHED OF *McDONALD V. CITY OF CHICAGO.*

A. Facial Challenges Generally.

Ab Initio, courts must consider the rights of citizens not before the court when examining regulations under facial challenges. ***Forsyth County v. Nationalist Movement,* 505 U.S. 123 (1992).** This exception from the rules of standing is grounded in "an appreciation that the very existence of some broadly written laws has the potential to ***chill*** the expressive activity of others not before the court." ***Id.*** (Emphasis supplied). Under the **Chilling Effect Doctrine,** therefore, any law discouraging the exercise of a constitutional right must be subject to a more searching judicial inquiry.

Thus, an examination of a statute based only upon the facts of the instant case is improper; an analysis under a facial challenge must refer to other citizens having constitutional interests that may be infringed by a regulation, given a particular governmental interest in relation to the burden on the infringed fundamental right.

B. Second Amendment Rights Are Fundamental.

U.S. Const., AMEND. II:

> ***A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.***

An individual's rights under the Second Amendment, which include firearm ownership, are fundamental rights. ***McDonald v. City of Chicago,*** 561 U.S. _____ (slip.op., 1) (2010). The Court in *McDonald* embraced a Substantive Due Process analysis in recognizing the fundamental rights of keeping and bearing arms when it incorporated Second Amendment rights into the Fourteenth Amendment, as against state governmental power, and implicitly rejected anything less

than strict scrutiny. McDonald, 561 U.S. _____ (slip.op., at 50) (2010).

The Court said in ***McDonald***, *citing* ***Heller***, 554 U. S., at ___ (slip op., at 26), 'On the contrary, we stressed that the right was also valued because the possession of firearms was thought to be essential for self-defense. As we put it, self-defense was "the *central component of the* right itself." *Ibid.*' (Emphasis in original). The conversation between the majority and the dissent in McDonald is very instructive as to the Court's ultimately opting to apply strict scrutiny to Second Amendment challenges.[18]

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18 JUSTICE BREYER's dissent makes several points to which we briefly respond. To begin, while there is certainly room for disagreement about *Heller*'s analysis of the history of the right to keep and bear arms, nothing written since *Heller* persuades us to reopen the question there decided. Few other questions of original meaning have been as thoroughly explored.***JUSTICE BREYER's conclusion that the Fourteenth Amendment does not incorporate the right to keep and bear arms appears to rest primarily on four factors: First, "there is no popular consensus" that the right is fundamental, *post*, at 9; second, the right does not protect minorities or persons neglected by those holding political power, *post*, at 10; third, incorporation of the Second Amendment right would "amount to a significant incursion on a traditional and important area of state concern, altering the constitutional relationship between the States and the Federal Government" and preventing local variations, *post*, at 11; and fourth, determining the scope of the Second Amendment right in cases involving state and local laws will force judges to answer difficult empirical questions regarding matters that are outside their area of expertise, *post*, at 11–16. Even if we believed that these factors were relevant to the incorporation inquiry, none of these factors undermines the case for incorporation of the right to keep and bear arms for self-defense.

First, we have never held that a provision of the Bill of Rights applies to the States only if there is a "popular consensus" that the right is fundamental, and we see no basis for such a rule. But in this case, as it turns out, there is evidence of such a consensus. An *amicus* brief submitted by 58 Members of the Senate and 251 Members of the House of Representatives urges us to hold that the right to keep and bear arms is fundamental. See Brief for Senator Kay Bailey Hutchison et al. as *Amici Curiae* 4.

Another brief submitted by 38 States takes the same position. Brief for State of Texas et al. as *Amici Curiae* 6. Second, petitioners and many others who live in high crime areas dispute the proposition that the Second Amendment right does not protect minorities and those lacking political clout. The plight of Chicagoans living in high-crime areas was recently highlighted when two Illinois legislators representing Chicago districts called on the Governor to deploy the Illinois National Guard to patrol the City's streets.[31] The legislators noted that the number of Chicago homicide victims during the current year equaled the number of American soldiers killed during that same period in Afghanistan and Iraq and that 80% of the Chicago victims were black.[32] *Amici* supporting incorporation of the right to keep and bear arms contend that the right is especially important for women and members of other groups that may be especially vulnerable to violent crime.[33] If, as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas

C. Section 941.298, Stats. Impermissibly Infringes Upon The Fundamental Right To Keep and Bear Arms For Defense As Recognized By The Second Amendment And Incorporated Into the Fourteenth Amendment.

§1 of the Fourteenth Amendment, provides, among other things, that a State may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of law." U.S. Const., XIV Amend., ***McDonald v. Chicago***, 2010 U.S. LEXIS 5523, 561 U.S. _____ (slip. op., 1), 130 S. Ct. 3020, 177 L.Ed.2d 894 (2010). Any law which burdens the ability of all persons to exercise a fundamental right is examined under substantive due process. *Id.* 561 U.S. _____ (slip. op., at 5 and 44).

Where fundamental rights are involved, strict scrutiny is normally applied to determine the constitutionality of legislation. ***See e.g., R.A.V. v. St. Paul***, 505 U.S. 377, 395-96, 112 S.Ct. 2538, 2549-50, 120 L.Ed.2d 305 (1992). A law which is overbroad cannot survive strict scrutiny—the standard by which all ***prohibitions*** of fundamental rights are reviewed. ***Id.*** A complaint which is based upon an unconstitutional law is infected with a structural defect. A defect which infringes on a fundamental right is a structural defect. ***Arizona v. Fulminante***, 499 U.S. 279, 309-310, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991).

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whose needs are not being met by elected public officials.***Third, JUSTICE BREYER is correct that incorporation of the Second Amendment right will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated. Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U. S., at __ (slip op., at 64). This conclusion is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution. * * * In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. See *Duncan*, 391 U. S., at 149, and n. 14. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.

Dismissal is thus warranted for any complaint based upon any overbroad law infringing upon the right to keep and bear arms.

1. STRICT SCRUTINY ANALYSIS.

Where a state statute infringes upon a fundamental right, review of that statute is subject to strict scrutiny, under the requirements of ***Due Process***. ***Rose v. Wade***, 410 U.S. 113, 155-56 (1973). Under strict scrutiny, any statute which affects fundamental rights, and which is not narrowly tailored to further a compelling state interest, is void for violating *Due Process*.

The Court in ***Roe v. Wade*** said:

> Where certain "fundamental rights" are involved, the Court has held that regulation limiting those rights may be justified only by a "compelling state interest," *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson* 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only legitimate state interests at stake. *Griswold v. Connecticut* 381 U.S., at 485; *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308 (1940); see *Eisenstadt v. Baird*, 405 U.S., at 460, 463-464 (White, J., Concurring in result).

Roe v. Wade at 155-56.

Strict scrutiny imposes the burden on the state to show how "compelling" its interest is when a fundamental right is infringed upon. ***Baird v. Lynch***, 390 F.Supp. 740, 749 (1974), *citing* ***Roe v. Wade*** *and other decisions of the Court.* The District Court in ***Baird*** struck down a Wisconsin statute infringing upon a woman's right to use contraceptives as ***unconstitutional because the state's reasons were insufficiently compelling.***

2. STRICT SCRUTINY AS APPLIED IN OTHER FUNDAMENTAL RIGHTS CASES.

Wisconsin v. Yoder, 406 U.S. 205 (1972), is the case in which the United States Supreme Court found that Amish children could not be placed under compulsory education past 8th grade.

The parents' First Amendment fundamental right to freedom of religion simply outweighed the state's interest in educating its children.

In ***Loving v. Virginia***, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (where right to marry was recognized as a fundamental right), the statutory racial classification involved was found to significantly interfere with the exercise of that right, so a "critical examination" of the state interests claimed to support the classification was required. The law in *Loving* was struck down because the state interest was not compelling and did not justify the means. In ***Zablocki v. Redhail***, 434 U.S. 374 (1986), prohibitions on the fundamental right to marry based upon unpaid child support were struck down under strict scrutiny analysis, as the regulation was not the least restrictive. In ***Zablocki***, while the state had a legitimate interest in pre-marital counseling, the interest was not compelling.

Parents have a ***fundamental liberty interest*** in matters of family life. ***Santosky v. Kramer***, 455 U.S. 745, 753 (1982); *See,* ***In re the Interest of Philip W.***, 189 Wis.2d 432, 436 (Ct. App. 1994) (holding that *Due Process* requires any TPR petition to be determined at a full evidentiary hearing).

Thus, to survive strict scrutiny, the law or policy under consideration must satisfy three tests:

1. It must be justified by a **compelling governmental interest**.
2. The law or policy must be **narrowly tailored** to achieve that goal or interest. If the government action encompasses too much (overbroad) or fails to address essential aspects of the compelling interest, then the rule is not considered narrowly tailored.
3. The law or policy must be the **least restrictive means** for achieving that interest, that is, there cannot be a less restrictive way to effectively achieve the compelling government interest. While some scholars consider this "least restrictive means"

requirement part of being narrowly tailored, though the Court generally evaluates it separately.

3. APPLICATION TO THE PRESENT SUPPRESSOR REGULATION, s. 941.298, STATS.

Because s.941.298, Stats. is a complete prohibition on certain firearms-related articles, it must be given the highest level of scrutiny because as a complete prohibition, it is the most restrictive of regulations.

Nor did the Court in ***McDonald*** expressly consider suppressor regulations to fall within the traditional areas of compelling state interests of regulating crime, dangerous weapons, etc. Those areas of traditional regulation do include, however, prohibiting felons in possession of firearms; prohibiting possession of firearms by the mentally ill; prohibiting carrying firearms into certain sensitive places such as schools; and law imposing conditions and qualifications on the commercial sale of arms:

> We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.*, at ___–___ (slip op., at 54–55).

McDonald, 561 U.S. at _____ (slip op. at 39-40) (J. ALITO, *citing Heller, and concurring in part*).

S.941.298 Stats. unduly burdens a meaningful exercise of the right to keep and bear arms for defense; defense and security require and include the right to prepare for self-defense—"arming oneself". Under the new CCW permit statute, s.175.60(4), Stats., training was expected for applicants to carry concealed weapons (although that rule may still be

under temporary suspension at this time). Thus the law expects and presumes training before using arms for defensive purposes.

Younger & newer shooters, minorities, those in high crime areas, urban citizens are most vulnerable to crime and need the most training with lower reduced power loads to effectively employ firearms as equalizers in self-defense or as an effective deterrent to crime. Urban dwellers wanting to meaningfully exercise their right to defense need legal devices such as sub-caliber adapters and smaller-caliber interchangeable barrels to practice more so, because of the scarcity of places to practice and train given the urban issues with noise emissions. Note that new shooters are often reluctant to get much practice, because of most pistols being loud enough to exceed the pain threshold and cause flinching.[19]

Conversion kits allow practice at reduced cost and noise emissions with reduced-power rounds.

Consider CCW permitees on city buses—permit holders need to be well trained & accurate to have the confidence necessary to employ rational thinking before mistakes are made—for in order for the responsible exercise of the right to keep, use and bear arms to be meaningful, it must be effective (i.e. under the language of the Second Amendment, "well regulated" means training and discipline, not "well infringed", according to *Heller and McDonald*).

Proper training with legal devices which allow the reduction of noise-emissions from firearms should be allowed, but would be prohibited under s.941.298, Stats.

4. THE BURDEN ON THE STATE WITH THE PRESENT STATUTORY SCHEME IS OTHERWISE *DE MINIMUS* TO NARROWLY DRAFT A CONSTITUTIONALLY PROPER SUPPRESSOR STATUTE.

No one in the present case is suggesting that the state has no interest whatsoever in

19 See *Kramer*, at Appendix D.

regulating suppressors and other weapons-related articles. But at a minimum, the statute regulating where a fundamental right is involved must be substantially related to the legislative goal.

The burden on the state is light, indeed *de minimus* to properly draft a sound-suppressor regulation substantially-related to the state's interest in regulating weapons and weapons-related articles—the state need only draft and add some meaning regarding dB reductions just like in snowmobile noise and vehicle sound regulations; draft some exclusions of certain articles used commonly used for training, hunting and practice; but exempt the mere possession of certain articles like oil filters and pillows where there is no intent to suppress noise emissions from firearms during criminal activity. Other states like New Hampshire have such exclusions. *See supra*, note 13.

There is no question that the burden is *de minimus*, because we have already seen that the state has the ability to regulate, meter and measure noise-emissions emanating from motor vehicles. Wisconsin regulates noise emissions of vehicle-products at both the manufacture stage and the sale stage. Wisconsin has gone further in its regulation of vehicle noise, by regulating at the operator stage as well, by giving law enforcement the tools needed to test and measure emissions from vehicles such as snowmobiles and boats.

We now have some 70 years of technological progress and societal advance since the introduction of suppressors for our legislature to sufficiently, narrowly tailor a suppressor statute that will meet the state's permitted interests, while not impermissibly and unduly burdening the recognized individual, fundamental right to keep, use and bear arms.

The present suppressor statute would get the little old grandmother for relying on

Wisconsin's new Castle Doctrine to protect herself and her home, when she is faced with an attacker intruding into her home, after she shoots through her comforter from her easy chair and puts a hole through her blanket, too, suppressing the noise from her trusted late-evening companion.

4. INTERMEDIATE SCRUTINY AT A MINIMUM

To survive intermediate scrutiny, the law or policy must satisfy the following two tests:

a) It must be justified by an **important governmental interest**.

b) The law or policy must bear a **substantial relationship** to achieve that important goal or interest.

If the fundamental right outweighs the governmental interest, or the law is not substantially related (more than mere rationally-related), then the law is invalid as unconstitutional.

As discussed below under the application of state constitutional law at Section II.C., even under intermediate scrutiny, s.941.298, Stats. would fail to meet constitutional muster.

5. RATIONAL BASIS INTEREST-BALANCING ANALYSIS WAS EXPLICITLY REJECTED BY *HELLER* AND *McDONALD* FOR RIGHTS RECOGNIZED BY THE SECOND AMENDMENT.

Rational basis testing requires only a legitimate governmental interest, and the law must be rationally or reasonably related to the governmental interest. Justice Alito, writing the opinion for the court, completely dismissed the notion of rational basis testing for Second Amendment rights, discussing Justice Breyer's dissent in that regard:

> Finally, JUSTICE BREYER is incorrect that incorporation will require judges to assess the costs and benefits of firearms prohibitions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion. See *supra*, at 38–39. "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." *Heller, supra*, at ___ (slip op., at 62–63), cited with approval in *McDonald,* Slip. Op. at _____.

II. WISCONSIN'S CONSTITUTIONAL ARMS AMENDMENT, ART. I, SECTION 25, ADDS ADDITIONAL STATE PROTECTION TO THE RIGHT OF KEEPING AND BEARING ARMS, WITH ITS LANGUAGE "*FOR SECURITY, DEFENSE, HUNTING, RECREATION OR ANY OTHER LAWFUL PURPOSE*", REQUIRING STRICT SCRUTINY OF s.941.298, STATS. WHICH IS FACIALLY INVALID AND FAILS ANY REVIEW.

A. CONSTRUCTION OF WISCONSIN'S RIGHT TO KEEP AND BEAR ARMS.

To begin with, the 20 words of Section 25 of Article I of the Wisconsin Constitution plainly read:

> ***The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.***

Id. (emphasis supplied).

ART. I, §8, WIS. CONSTITUTION [Prosecutions] plainly reads:

> SECTION 8. [*As amended Nov. 1870 and April 1981*]: **(1)** No person may be held to answer for a criminal offense without ***due process of law***, and no person for the same offense may be put twice in jeopardy of punishment, nor may be compelled in any criminal case to be a witness against himself or herself.

Id. (emphasis supplied).

"All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning." ***§ 990.01(1) Wis. Stats.*** In construing the meaning of a statute, a court must first determine whether the legislative intent is clear from the statute's plain language. ***Grosse v. Protective Life Ins. Co.***, 182 Wis2d 97, 105 (1994).

If the statutory language is clear, the court merely applies the statute to the facts of the case.

Carla B. v. Timothy N., 228 Wis.2d 695, 704 (Ct. App. 1999). Courts are also instructed to look at the "plain meaning" of the language used when construing the meaning of constitutional provisions. ***State v. Hamdan***, 2003 WI 113, 264 Wis.2d 433 n.29, (2006), *citing* ***Thompson v. Craney***, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996).

The language "recreation or any other lawful purpose" in Art. I, Section 25 clearly shows an intent to recognize and expanded right to keep and bear arms under the Wisconsin Constitution. *Due Process* under Art. I, Section 8 of the Wisconsin Constitution requires that courts construe any statutes which infringe upon expanded fundamental rights with strict scrutiny.

B. WISCONSIN COURTS ALSO APPLY STRICT SCRUTINY WHEN REVIEWING LAWS WHICH BURDEN FUNDAMENTAL RIGHTS.

Wisconsin also examines laws which burden a fundamental right under the state constitution under using a strict scrutiny analysis. ***State v. Post***, 197 Wis.2d 279, 302-03, 541 N.W.2d 115, 122-23 (1995) (acknowledging that freedom from restraint was a fundamental right, and applying strict scrutiny to provisions allowing commitment of sexually violent persons who have served their sentences because the statutes were "narrowly drawn" in relation to a compelling state interest, and the commitment process used was the "least restrictive"), *citing* ***Roe v. Wade,*** 410 U.S. 113, 155-156 (1973).

The challenged statute must further a compelling state interest and be narrowly tailored to serve that interest. ***Post*** at _____. Granted, when applying Wisconsin's Constitution, the challenger may bear the burden to prove a statute unconstitutional beyond a reasonable doubt. ***Id.*** However, that notion would really result in a conflict with federal constitutional principles in the nature of a *renvoi*, for federal fundamental rights analysis ***imposes the burden on the state*** to show

how compelling its interest is when a fundamental right is infringed upon. *See* ***Baird v. Lynch***, 390 F.Supp. 740, 749 (1974), *supra*.

Nevertheless, in a post-Section 25 Amendment case, ***State v. Hamdan***, 2003 WI 113, 264 Wis.2d 433 (2006), the Wisconsin Supreme Court conducted an "as-applied" challenge to the ban on carrying concealed firearms (CCW), and "read-in" an affirmative defense language to ***carve out*** an exception for shopkeepers carrying in their shops. The ***Hamdan*** court looked to other states that had "comprehensive" CCW provisions, which included affirmative defenses, in concluding that Wisconsin's CCW law as written was an unreasonable burden on the new Wisconsin-recognized right to keep and bear arms, since the Wisconsin CCW law was a complete prohibition and essentially a strict liability offense. ***Id.*** at 468-69.

It is important that ***Hamdan*** pre-dated both the ***Heller*** and ***McDonald*** decisions of the U.S. Supreme Court. The ***Hamdan*** court, in illumination by the new right-to-arms amendment, Section 25, employed scrutiny which was greater than mere rationality, but did not clearly articulate a standard—the review was more akin to intermediate scrutiny.

In a strongly worded concurrence/dissent, Justice Crooks agreed with the reversal of a conviction under the CCW, but admonished the majority for the court's straining to uphold the constitutionality of the CCW law, adding that,

> The majority in this case improperly reads exceptions into Wis. Stat. § 941.23 in order to hold that it is constitutional. Such exceptions to the statute should not be made by this court, but by the legislature. Looking at the statute itself, I conclude that Wis. Stat. § 941.23 ***has become unconstitutional with the passage of Article I, Section 25 of the Wisconsin Constitution.*** I agree with Chief Justice Abrahamson's dissent that the majority erroneously assigns to a court, rather than a jury, the task of determining factual issues involving whether a defense to a charge of carrying a concealed weapon is a available to a defendant. . . . If the statute does not conform to the Wisconsin Constitution, as amended, then the stature is unconstitutional. [*Citations omitted*]. I strongly disagree, however, with Chief

> Justice Abrahamson's conclusion that the statute survives the constitutional amendment and remains constitutional. In light of Article I, Section 25 of the Wisconsin Constitution, I conclude that Wis. Stat. § 941.23 ***is unconstitutional*** because it is ***unnecessarily broad and ridged now*** and provides no exceptions as it is written.

Id. at 494. Justice Crooks would refer the statute back to the legislature to revise the provision in order to make it constitutionally in accord with Art. I, Sec. 25.

The principle "*Maximus erroris populous magister*" is applicable here, for "the people is the greatest master of error." The error is plain when a 1991 state law is enacted as an unreasoned paragraph in a 700-plus page legislative budget Act for the people of a state, but which is later clearly shown to excessively regulate a fundamental individual right recognized by a 2010 U.S. Supreme Court decision. It is also clearly in contravention of the Wisconsin Constitutional Amendment recognizing an expanded right to keep, bear and use arms.

C. s.941.298, STATS. IS UNCONSTITUTIONAL BY UNREASONABLY BURDENING THE NEWLY RECOGNIZED RIGHT TO KEEP AND BEAR ARMS UNDER ART. I, SECTION 25 OF THE WISCONSIN CONSTITUION.

Now, with ***Heller*** as a new landmark, and ***McDonald*** as a watershed to direct our legislature when drafting provisions which affect the fundamental right to keep and bear arms, strict-liability prohibitions such as s. 941.298, Stats. have become unconstitutional not just under federal law, but even under state constitutional law.

Under ***Hamdan***, pre-***Heller/McDonald***, in an area of traditional of regulation considered important if not quite compelling, the concealment prohibition such as s. 941.23, Stats. was even given heightened review.

But now with the U.S Supreme Court having addressed the issue of individual rights to

arms and deciding they are to be recognized as fundamental, for those other statutes outside of the traditional areas of concern (traditionally such as machine-guns, felons-in-possession, no possession by mentally-ill, sawed-off shotguns, and school-zone bans), heightened scrutiny is appropriate. For non-traditional areas such as the provision in question, s.941.298, Stats., heightened review will certainly render the suppressor provision facially unconstitutional and therefore invalid.

D. OVERBREADTH

The *Overbreadth Doctrine* will strike down statutes that are so overbroad with the normal meaning of their language, that they reach conduct or speech that the state is not permitted to regulate. ***City of Milwaukee v. Wilson***, 96 Wis.2d 11, 19, 291 N.W.2d 452 (1980).

S.941.298, Stats. is so overbroad as to be unconstitutional—it reaches possession, ownership and control of common household articles, and commonly-used firearms articles, so as to prevent simple target practice and self-defense training.

E. s.941.298, STATS. IS EVEN VOID FOR VAGUENESS

While the statute in question, s.941.298, Stats. is unconstitutionally, vague, because the fundamental right to bear arms is infringed, *Substantive Due Process* requires heightened scrutiny; not just mere rationality under *Procedural Due Process* standards of analysis under Wisconsin state law. ***Art. I, § 8*** of the Wisconsin Constitution employs a procedural due process analysis, but as we have seen under ***Heller and McDonald***, the U.S. Supreme Court applied a *Substantive Due Process* determination that rights under the Second Amendment are fundamental ones.

The basis for a vagueness challenge to a statute is the procedural due process requirement of *fair notice*. ***State v. Ehlenfeldt***, 94 Wis.2d 347, 355, 288 N.W.2d 786 (1980). A statute is unconstitutionally vague if it either fails to afford proper notice of the prohibited conduct or fails to provide an objective standard for enforcement. ***State v. Smith***, 215 Wis.2d 84, 91, 572 N.W.2d 496 (Ct. App. 1997).

But even under the *Void for Vagueness Doctrine*, s.941.298, Stats. would fail review.

CONCLUSION

Because s.941.298, Stats. in its present version as enacted by 1991 Wis. Act 39 is facially unconstitutional and fails review under any applicable form of analysis by its over-breadth and by the undue burden it places upon the meaningful exercise of the right to keep and bear arms, any Complaint thereof is mis-founded and must be dismissed.

For the foregoing reasons, the subject statutory provision should be declared facially invalid and the instant Complaint in Milwaukee County Circuit Case No. 11 CF 3855 dismissed.

Respectfully submitted and dated this 20th day of March, 2012:

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