No. 20-

In the
Supreme Court of the United States

LEEVAN ROUNDTREE,
Petitioner,
v.

STATE OF WISCONSIN,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a non-violent felon may bring an as-applied challenge to a state law that permanently denies Second Amendment rights to anyone convicted of a crime denominated as a felony.

2. Whether, in adjudicating a non-violent felon's as-applied challenge to a state dispossession law, the reviewing court may uphold the law without analyzing the particular non-violent felony of which the challenger was convicted.

PARTIES TO THE PROCEEDING

Petitioner Leevan Roundtree was the defendant–appellant–petitioner below. Respondent State of Wisconsin was the plaintiff–respondent below.

RELATED PROCEEDINGS

Supreme Court of Wisconsin: *Wisconsin v. Roundtree*, No. 2018AP594–CR (Jan. 7, 2021) (reported at 952 N.W.2d 765, 395 Wis. 2d 94, 2021 WI 1).

Wisconsin Court of Appeals: *Wisconsin v. Roundtree*, No. 2018AP594-CR (Apr. 4, 2019) (reported at 928 N.W.2d 806, 387 Wis. 2d 685, 2019 WI App 26).

Circuit Court of Wisconsin, Milwaukee County: *Wisconsin v. Roundtree*, No. 2015CF004729 (not reported).

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PETITION FOR WRIT OF CERTIORARI

Leevan Roundtree respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Supreme Court in this case.

OPINIONS BELOW

The Wisconsin Supreme Court's opinion is published and reported at 952 N.W.2d 765 and 2021 WI 1. Pet. App. 1a–90a. The Wisconsin Court of Appeals' opinion is unpublished but is reported at 387 Wis. 2d 685. *Id.* at 91a–96a. The order of the Circuit Court of Wisconsin for Milwaukee County is unreported. *Id.* at 97a–101a.

JURISDICTION

On March 19, 2020, the Court extended the deadline to file all petitions for writs of certiorari to 150 days. The Wisconsin Supreme Court entered judgment on January 7, 2021. Pet. App. 1a. This Petition was filed on June 4, 2021, within 150 days of that judgment. The Court therefore has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Second Amendment to the United States Constitution provides:

> 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.

WIS. STAT. § 941.29(1m)[1] provides:

> A person who possesses a firearm is guilty of a Class G felony if any of the following applies:
>
> (a) The person has been convicted of a felony in this state.
>
> (b) The person has been convicted of a crime elsewhere that would be a felony if committed in this state.

[1] Petitioner pleaded guilty to violations of WIS. STAT. § 941.29(2) (2013–14). That subsection has since been relocated, and the substance of the former § 941.29(2) now resides at WIS. STAT. § 941.29(1m) (2017–18). *See* 2015 WIS. ACT 109 §§ 6, 8.

INTRODUCTION

This petition asks the Court to address one of the most vexing issues that has arisen since *District of Columbia v. Heller*—whether, and under what standards, a non-violent felon seeking to keep a firearm in his home for self-defense may bring an as-applied challenge to a law that permanently strips all felons of their Second Amendment rights. In dozens of decisions, lower courts have come to diametrically opposed conclusions on the two questions presented by this petition, causing severe and entrenched splits across and within jurisdictions. *E.g.*, *Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016) (en banc) (striking down an application of the federal dispossession law in a splintered decision with no majority opinion).

This case is an ideal vehicle to bring order to the judicial chaos without disrupting the status quo. If this petition is granted and the Court rules for Petitioner, that ruling will not suddenly invalidate state and federal dispossession laws across the country in any particular circumstances, or even call those laws into question. Instead, a favorable decision will result only in a remand for the Wisconsin Supreme Court to reconsider Petitioner's as-applied challenge, with the assurance that any conclusion reached during that remand will be based on constitutionally sound legal standards articulated by this Court.[2]

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[2] Because this petition does not ask the Court to strike down any particular application of a felon dispossession law, and does not call into question the federal dispossession statute, it is

More than 18 years ago, Petitioner Leevan Roundtree pleaded guilty to two counts of failure to pay child support, a non-violent crime the Wisconsin legislature has denominated a felony. He "was never incarcerated for [these] offense[s]," he "made full restitution by paying what he owed," and he "did not reoffend." Pet. App. 54a, 55a (Grassl Bradley, J., dissenting). Nearly 12 years after Petitioner entered those pleas, police found that he kept a revolver and ammunition in his home for self-defense. Consequently, the State charged him with, and he pleaded guilty to, a single count under Wisconsin's firearm dispossession statute, WIS STAT. § 941.29(1m).

This statute is among the most severe dispossession laws in the country. Although some dispossession laws are limited to certain enumerated crimes or categories of crimes, and although some are temporary or create procedures through which Second Amendment rights can be restored, the Wisconsin law is categorical, permanent, and unyielding. Pet. App. 40a. Justice Barrett, while a judge on the Seventh Circuit, examined this very statute, reasoning that § 941.29(1m) could not be constitutionally applied to a

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fundamentally different from—and presents narrower legal questions than—petitions this Court has recently denied. *E.g.*, Pet. at i, *Folajtar v. Garland*, No. 20-812 (Dec. 11, 2020) (asking the Court to determine that a particular application of the federal felon dispossession law "violates the Second Amendment"); Pet. at i, *Holloway v. Garland*, No. 20-782 (Dec. 3, 2020) (asking the Court to determine that "a lifetime firearms prohibition based on a nonviolent misdemeanor conviction violate[s] the Second Amendment"); Pet. at i, *Flick v. Garland*, No. 20-902 (Dec. 29, 2020) (asking the Court to address the merits of a particular as-applied challenge to the federal felon dispossession law).

non-violent mail-fraud offender because the statute permanently disqualified him from exercising his "core" right to "mere[ly] possess[ ] ... a firearm in the home for the purpose of self-defense." *Kanter v. Barr*, 919 F.3d 437, 451, 465 (7th Circ. 2019) (Barrett, J., dissenting).

Below, Petitioner brought an as-applied challenge to his § 941.29(1m) conviction, asserting that application of the statute to someone in his circumstances violates the Second Amendment. The Wisconsin Supreme Court, over two separate dissents, not only denied him relief, it also denied him any meaningful as-applied ***review***.

First, the majority held that because "the legislature did not ... create a hierarchy of felonies, ... neither will this court." Pet. App. 20a. Thus, it did not matter what felony Petitioner was convicted of, or whether his particular felony conviction demonstrated a propensity for violence or dangerousness. The mere fact that "the legislature denominated [Petitioner's crime] a felony" was dispositive. *Id*. This simplistic analysis is fundamentally at odds with as-applied review, which requires examination of "the circumstances of the particular case." *United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 565 (1972). The majority below therefore functionally foreclosed as-applied review for nonviolent felons who seek to challenge their convictions under § 941.29(1m). In doing so, the majority departed from the many decisions holding that the Second Amendment has, in fact, "left room for as-applied challenges" to felon dispossession statutes, instead aligning itself with decisions that foreclose as-applied

review altogether. *Kanter*, 919 F.3d at 442–43 (detailing the acknowledged circuit split on this issue and citing over a dozen cases from ten different jurisdictions on both sides of the split).

Second, and relatedly, in adjudicating Petitioner's as-applied challenge the majority did not evaluate Petitioner's specific underlying felony. Instead, it relied on generalized statistical reports that did "not even purport to argue that those who have failed to pay child support or committed other analogous crimes pose any risk of committing gun-related violence." Pet. App. 89a (Hagedorn, J., dissenting). Those reports lumped Petitioner in with felons who committed far more dangerous "nonviolent" felonies "like operating [a car] while intoxicated, bail jumping, and operating a vehicle to elude an officer." *Id*. at 85a. The majority's failure to analyze Petitioner's own non-violent felony once again placed it squarely on one side of an entrenched jurisdictional split. *Contrast Kanter*, 919 F.3d at 449 & n.11 (relying on statistics regarding all "nonviolent offenders" as a group) *with id*. at 467 (Barrett, J., dissenting) (rejecting statistical studies that merely "lump[ed] all nonviolent felons together"); *see also Holloway v. Attorney General*, 948 F.3d 164, 172–77 & n.10 (3d Cir. 2020) (explaining that Third Circuit law requires analyzing the particular "crime of conviction," and proceeding to analyze the challenger's particular crime of driving under the influence, rather than a generalized class of offenses, in upholding application of the federal dispossession law).

Cases like this one continue to proliferate, and yet the two basic questions presented by this petition remain unresolved. Consequently, nonviolent felons

seeking to raise identical as-applied challenges to a felon dispossession statute receive radically different judicial review, if any, depending on jurisdiction. The Court should grant the petition to resolve the split among the lower courts and bring uniformity to the two important and recurring questions of federal constitutional law presented here.

STATEMENT

A. Wisconsin's Permanent and Categorical Dispossession Law

Wisconsin has one of the most restrictive and sweeping felon dispossession laws in the country. Under § 941.29(1m), a person is permanently prohibited from possessing a firearm—even in the home for self-defense—if the person was previously "convicted of a felony in [Wisconsin]" or was previously "convicted of a crime elsewhere that would be a felony if committed in [Wisconsin]." Section 941.29(1m) thus permanently deprives all "felons" of their core Second Amendment right of self-defense in the home. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (explaining that "the inherent right of self-defense" is "central to the Second Amendment" and "the need for defense of self, family, and property is most acute" in the home).

Section 941.29(1m) is "wildly overinclusive." *Kanter*, 919 F.3d at 451 n.1, 466 (Barrett, J., dissenting) (analyzing the Wisconsin and federal dispossession laws together) (citation omitted). It does not distinguish between types of felonies, it contains no time limit, and it provides no avenue to restore

Second Amendment rights under any circumstances. As the Wisconsin Supreme Court explained below:

> This statute ... bars a person convicted of any felony from firearm possession after that conviction without exception, with no time limitation, and with no mechanism for restoration of the right to possess a firearm. The statute does not draw any distinctions among felonies. Those convicted of less serious felonies are banned from possessing firearms just as are those convicted of the most serious felonies.

Pet. App. 8a. Thus, under § 941.29(1m), someone like Petitioner who fails to pay child support, or a "hapless possessor of fish who runs afoul of [Wisconsin's] record-keeping requirements," is treated the same as a murderer or rapist. *Id.* at 56a (Grassl Bradley, J., dissenting); *id.* at 58a (Hagedorn, J., dissenting) (explaining that, under § 941.29(1m), "[i]t matters not whether the felony was for making unlawful political contributions, legislative logrolling, armed robbery, or here, delinquent child support" (citations omitted)).

Not all State dispossession statutes are as harsh as Wisconsin's; many of them more carefully balance constitutional rights with concerns of public safety. For example, some State dispossession statutes provide for restoration of a felon's Second Amendment rights after a period of time. *E.g.*, OR. REV. STAT. § 166.270(4)(a); WASH. REV. CODE § 9.41.040(4)(a)(ii). Other States, meanwhile, provide an administrative avenue for felons to restore their Second Amendment rights. *E.g.*, FLA. STAT. § 790.23(2)(a); MONT. CODE ANN. § 45-8-314(2)(a); VA. CODE § 18.2-308.2(C). Still

other States tailor their laws to dispossess only particular categories of felons, typically those whose convictions demonstrate a propensity for violence or dangerousness. LA. STAT. § 14:95.1(A); MONT. CODE ANN. § 45-8-314(1); N.J. STAT. § 2C:39-7(a); 18 PA. CONS. STAT. § 6105(b); WYO. STAT. § 6-8-102(a).

B. Factual Background

In 2003, Petitioner pleaded guilty to two counts of failure to pay child support for more than 120 days, a felony in the State of Wisconsin. WIS. STAT. § 948.22(2) (2003–04). Because the sentencing court determined that Petitioner did not present a danger to the public, he served no prison time. Pet. App. 54a (Grassl Bradley, J., dissenting). He was instead sentenced to four years of probation, which he satisfied, and was required to make restitution for his past due child support, which he paid in full. *Id*. Subsequently, Petitioner "did not reoffend" and he "has never been convicted of a violent crime." *Id*. Indeed, there is no "evidence otherwise suggesting that he poses a danger to society," *id*., and "nothing [Petitioner] has done since [his guilty pleas] suggests he poses any heightened risk of using a gun violently." *Id.* at 83a–84a (Hagedorn, J., dissenting).

In 2015, nearly 12 years after Petitioner's guilty pleas for failure to pay child support, police found a revolver and ammunition under Petitioner's mattress. Pet. App. 5a. The revolver apparently had been stolen sometime in the past, but Petitioner was not aware of that fact when he bought it, *id*., and of course Petitioner could not have simply purchased a handgun for self-defense at his local sporting goods store. WIS. STAT. § 175.35(2)(d) (prohibiting sale of a handgun

without "an approval number" from the Wisconsin Department of Justice after a criminal background check). In any event, Petitioner was not charged with any offense related to the transfer or provenance of the revolver. Instead, Petitioner was charged with a single violation of § 941.29(1m), based only on the fact that he, a non-violent felon who failed to pay child support more than a decade prior, was in possession of the revolver. Petitioner pleaded guilty to the § 941.29(1m) charge and was sentenced to 18 months of incarceration and 18 months of extended supervision. Pet. App. 5a.

After his plea, Petitioner filed a motion for post-conviction relief, raising an as-applied challenge to his § 941.29(1m) conviction based on the Second Amendment. Petitioner argued that his permanent dispossession was unconstitutional because his prior convictions were for non-violent felonies, he never spent time in prison for those convictions, and his permanent dispossession therefore would not advance public safety.

The trial court rejected these arguments. It held that Petitioner waived his constitutional challenge because he entered a guilty plea. Pet. App. 100a. The court went on to hold that "convicted individuals (felons in particular) do not enjoy the same constitutional guarantees as citizens who have not violated the law." *Id.* For that reason, the court refused to conduct an as-applied analysis of Petitioner's Second Amendment claim. *Id.*

Unlike the trial court, the Wisconsin Court of Appeals did not rely on waiver. It instead held that Petitioner's argument "fail[ed] on its merits." Pet.

App. 93a. But the court's truncated reasoning "disregard[ed] the very nature of as-applied challenges," as Petitioner himself argued. *Id.* at 95a. Specifically, the appeals court flatly rejected the "notion that [Petitioner's] particular nonviolent felony matters." *Id.* at 94a. The court's analysis thus took only two sentences to explain: "it is undisputed that [Petitioner] is a felon"; "[t]he ban on felons possessing firearms is therefore constitutional as to him." *Id.* at 96a.

C. The Decision Below

The Wisconsin Supreme Court granted discretionary review, affirming the court of appeals over two separate dissents. A majority of the court—the two dissenters plus three concurring justices—agreed that, as a matter of state law, Petitioner did not waive his constitutional challenge. Pet. App. 27a (Dallet, J., concurring) ("[A] guilty plea does not waive a defendant's right to challenge the statute of conviction's constitutionality, facially or as applied ...."); *id.* at 53a (Grassl Bradley, J., dissenting) ("[T]his statute is unconstitutional as applied to [Petitioner]."); *id.* at 90a (Hagedorn, J., dissenting) ("[Petitioner's] conviction violates the Second Amendment."). On the merits, however, the court was fractured on two fundamental questions of federal constitutional law: first, whether a non-violent felon can raise an as-applied challenge to a felon dispossession law and, second, whether the challenger's underlying felony is relevant to the Second Amendment analysis.

The majority, despite purportedly addressing Petitioner's as-applied claim, functionally foreclosed

any avenue for a non-violent felon to challenge a § 941.29(1m) conviction. The majority refused to "create a hierarchy of felonies" and reasoned that the State has power to dispossess anyone who "commit[s] a crime serious enough that the legislature has denominated it a felony." Pet. App. 20a. Thus, in the majority's view, the Second Amendment is a rubber stamp for the legislature: "even if a felon has not exhibited signs of physical violence," the simple fact that he committed a crime "denominated ... a felony" is sufficient. *Id*. Other Wisconsin courts have used this same circular logic to foreclose meaningful as-applied review of other § 941.29(1m) convictions. *E.g., State v. Pocian*, 814 N.W.2d 894, 897 (Wis. Ct. App. 2012) (holding that because "[t]he legislature has determined that Pocian's crimes are felonies," "Pocian has legislatively lost his right to possess a firearm").

Indeed, in the majority's view, an analysis of Petitioner's own felony was unnecessary. The majority claimed that "an abundance of research" supported its holding, but that research was based on generalized data about recidivism rates for an undifferentiated universe of supposedly "nonviolent felons." Pet. App. 20a. The generalized data was therefore irrelevant to Petitioner and his own circumstances. For example, the majority, citing a 2016 Wisconsin Department of Corrections report, claimed that 21.4% of felons who committed a "public order offense" (including failure to pay child support) "recidivated with a violent offense." *Id*. at 21a–22a (citing Joseph R. Tatar II & Megan Jones, *Recidivism After Release from Prison*, Wisconsin Dep't of Corrections (Aug. 2016)).

But that report lumped failure to pay child support in with dangerous offenses such as drunk driving, bail jumping, and fleeing from the police in a motor vehicle. Pet. App. 85a (Hagedorn, J., dissenting). It provided no information at all regarding Petitioner's particular felony conviction. Additionally, the "decade-old data" on which the report was based involved offenders who "***spent time in prison***," even though Petitioner "was never incarcerated." Pet. App. 55a (Grassl Bradley, J., dissenting) (emphasis in original). And the majority did not even read the report correctly. The report does not show that 21.4% of "public order" offenders who spent time in prison went on to commit violence; instead, it shows only that ***of those who recidivated***, 21.4% committed a violent crime. "[T]his 21.4 percent figure has nothing to do with, and makes no reference to, those who [like Petitioner] never recidivate[d]." *Id.* at 86a (Hagedorn, J., dissenting). Thus, the majority's conclusion that the State had, by citing the report, provided sufficient justification to "keep[ ] firearms out of the hands of those convicted of nonviolent felonies" was based on a misinterpretation of irrelevant data that has nothing to do with Petitioner or his underlying felony. *Id.* at 22a.

The two dissenting justices rejected the majority's analysis. While they applied different constitutional standards (strict scrutiny or intermediate scrutiny), both agreed that the Second Amendment demands meaningful as-applied review when a non-violent felon challenges a categorical dispossession law like § 941.29(1m). Both also agreed that, in conducting the as-applied review mandated by the Second

Amendment, an analysis of the challenger's particular underlying felony is required.

Justice Rebecca Grassl Bradley analyzed the history of the Second Amendment, concluding that "[w]hile legislatures have always had the power to prohibit people ***who are dangerous*** from possessing firearms, the Second Amendment does not countenance collectively depriving ***all*** felons of their ***individual*** Second Amendment rights." Pet. App. 33a (Grassl Bradley, J., dissenting) (first emphasis added). While, in her view, strict scrutiny must be applied to determine the constitutionality of felon dispossession laws, she concluded that § 941.29(1m) was unconstitutional as applied to Petitioner regardless of the level of scrutiny because he "committed a non-violent felony," he was "not deemed dangerous to the public," he was not incarcerated, he "pa[id] what he owed," and "he did not reoffend." *Id*. at 54a.

Justice Hagedorn also emphasized the Second Amendment's history, and he also concluded that the State may dispossess only "those who pose[ ] a danger of engaging in arms-related violence." Pet. App. 72a (Hagedorn, J., dissenting). He determined, however, that intermediate rather than strict scrutiny "best capture[s] and secure[s] the right in accordance with its original public meaning." *Id*. at 82a–83a. Applying intermediate scrutiny, Justice Hagedorn concluded that because the State could not show that "those who have failed to pay child support or committed other analogous crimes pose any risk of committing gun-related violence," it "fail[ed] to meet its burden of proof" to demonstrate the constitutionality of Petitioner's conviction. *Id*. at 89a.

In addition to agreeing on the outcome, both dissents also agreed that the majority's use of generalized and irrelevant data—and its refusal to analyze Petitioner's actual underlying felony—was improper. As Justice Hagedorn observed, it was an "egregious error" to misread the generalized data on "public order offenses" to justify dispossessing Petitioner of his Second Amendment rights. Pet. App. 86a (Hagedorn, J., dissenting). "Playing this logic out further," Justice Hagedorn explained, would mean that the State could disarm other broad classes of people simply because their generalized attributes might correlate in some way with future criminal behavior—for example, the State could dispossess "those who previously declared bankruptcy," "those who do not have a bachelor's degree," "those who were born out of wedlock," and those "who fall below the poverty line." *Id.* at 87a–88a. Indeed, as Justice Rebecca Grassl Bradley explained, the majority "abandon[ed] any pretense of conducting an individualized inquiry" because it failed to analyze "the crime committed or the offender's personal characteristics." *Id.* at 54a–55a (Grassl Bradley, J., dissenting).

REASONS FOR GRANTING THE PETITION

I. The lower courts are intractably split on the two questions presented.

The questions presented by this petition, if answered, would define the basic contours of as-applied challenges to dispossession statutes. As the law currently stands, even those basic contours are uncertain, although *Heller*—which summarily

deemed felon dispossession laws "presumptively lawful" without further analysis—was decided over a decade ago. Without this Court's guidance, lower courts have adopted radically different approaches to adjudicating cases like this one. This Court's intervention is desperately needed to bring some measure of uniformity, and therefore some measure of fairness, to this frequently litigated area.

A. Some lower courts permit as-applied challenges to firearm dispossession laws, while others—like the majority below—foreclose as-applied review entirely.

The first question presented, and the most fundamental, is whether as-applied challenges are available to non-violent felons subjected to categorical dispossession laws. The lower courts cannot agree on even this threshold question.

1. At least three federal courts of appeals have explicitly concluded that the Second Amendment permits non-violent offenders to raise as-applied challenges to firearm dispossession laws. The Seventh Circuit, for example, has explained that *Heller* does not give dispossession laws a "free pass simply because [a legislature] has established a 'categorical ban.'" *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010). To the contrary, the fact that dispossession laws are "***presumptively*** lawful" under *Heller* implies "there must exist the possibility that [a] ban could be unconstitutional in the face of an as-applied challenge." *Id.* (emphasis added).

The Seventh Circuit reaffirmed this position in *Kanter*, 919 F.3d at 448, in an as-applied challenge to both the federal dispossession law and § 941.29(1m). But like the majority's opinion below, the *Kanter* majority's analysis casts doubt on whether an as-applied challenge could ever succeed. The *Kanter* majority acknowledged that the plaintiff in that case was "a first-time, non-violent offender with no history of violence, firearm misuses, or subsequent convictions," and that he was "employed, married, and [did] not use illicit drugs, all of which correspond with lower rates of recidivism." *See id.* at 449 (quotation marks omitted). Yet the majority still held that the plaintiff could be permanently deprived of his right to keep and bear arms. *Id.* at 451. In the majority's view, because the plaintiff committed a "serious federal felony for conduct broadly understood to be criminal" (mail fraud) and "did not face a minor sentence" (one year plus one day in prison, two years of supervised release, and a penalty of $50,000), his as-applied challenge failed. *Id.* at 450–451. The majority acknowledged that "[t]here may be a case in the future that requires addressing whether an individual may successfully bring an as-applied challenge" to a dispossession law, but "Kanter's is not that case." *Id.* at 450 n.12.

Then-judge Barrett, in dissent, adopted a more nuanced approach. After conducting an exhaustive historical analysis, she reasoned that the Second Amendment does not permit the government to categorically dispossess felons on the theory that only "virtuous" citizens may exercise the right to keep and bear arms. To the contrary, "[t]he Second Amendment confers an individual right … of self-defense," which is

"not limited to civic participation." *Id.* at 464 (Barrett, J., dissenting). Although the government can disarm individuals on a "class-wide basis," Judge Barrett observed, it must "do so based on present-day judgments about categories of people whose possession of guns would endanger the public safety." *Id.* The plaintiff in *Kanter* was convicted of a single count of mail fraud, and neither the federal government nor the State of Wisconsin was able to demonstrate that his conviction for that crime, or his own personal attributes, made it likely that he would "pose a risk to the public safety if he possessed a gun." *Id.* at 468–69 (Barrett, J., dissenting). For that reason, Judge Barrett concluded that "the [federal government and the State of Wisconsin] cannot permanently deprive him of his right to keep and bear arms." *Id.* at 469 (Barrett, J., dissenting).

The D.C. Circuit has also held that dispossession laws are susceptible to as-applied challenges. *Medina v. Whitaker*, 913 F.3d 152 (D.C. Cir. 2019). Again, however, the opinion does not suggest that any such challenge could succeed. The court adopted the theory that only "virtuous members of the community" may exercise Second Amendment rights, holding as a general matter that most people "convicted of felonies are not among those entitled to possess arms." *Id.* at 159–60. The court acknowledged the possibility that "a felon [could] show that his crime was so minor or regulatory that he did not forfeit his right to bear arms." *Id.* at 160. But because the court deemed the plaintiff's offense to be "serious" (making a false statement on a mortgage application decades prior), his "prohibition on firearm ownership" was "a reasonable consequence of [his] felony conviction." *Id.*

Finally, the Third Circuit explicitly "permit[s] Second Amendment challenges" to dispossession laws. *Folajtar v. Att'y Gen. of the United States*, 980 F.3d 897, 901 (3d Cir. 2020). Indeed, the en banc Third Circuit has ruled in favor of individuals who brought one such challenge. *Binderup*, 836 F.3d 336 (en banc). That en banc decision, however, was deeply fractured and produced no majority opinion, underscoring the need for this Court's review.

The seven dissenting judges in *Binderup* lamented the "almost complete absence of guidance from the Supreme Court about the scope of the Second Amendment right," ultimately opining that no as-applied challenge may be brought against a felon dispossession law. *Id.* at 387. In the dissenters' view, all felonies, as well as all misdemeanors "punishable by more than two years in prison," are "serious by definition" and disqualify all offenders from ever exercising Second Amendment rights, "full stop." *Id.* at 388 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments).

The eight-judge majority, meanwhile, was split 3–5. Three judges reasoned that "persons who have committed ***serious crimes*** forfeit the right to possess firearms." *Id.* at 349 (opinion of Ambro, J.) (emphasis added). Those judges concluded that the challengers' misdemeanor convictions (corrupting a minor or carrying a handgun without a permit) were "not serious enough to strip them of their Second Amendment rights" and that the government failed to carry its burden under intermediate scrutiny to justify application of the federal dispossession law. *Id.* at 351, 356 (decision of Ambro, J.). According to those three

judges, "[t]he [c]hallengers' isolated, decades-old, non-violent misdemeanors do not permit the inference that disarming people like them will promote the responsible use of firearms." *Id*. at 356.

Five other judges concurred with the result but adopted an analysis more in line with then-Judge Barrett's dissent in *Kanter*. Those five judges reasoned that "the as-applied constitutionality of [dispossession laws] is tied to [their] historical justification: people who have demonstrated that they are ***likely to commit violent crimes*** have no constitutional right to keep and bear arms." *Binderup*, 836 F.3d at 370 (opinion of Hardiman, J.) (emphasis added). For those five judges, because the challengers "presented unrebutted evidence that their offenses were nonviolent and now decades old" and "present[ed] no threat to society," this "place[d] them within the class [of] persons who have a right to keep and bear arms." *Id*. at 379.[3]

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[3] Some circuits have acknowledged the possibility that felon dispossession laws are susceptible to as-applied challenges but have not explicitly resolved the question. The First Circuit has observed that "some felonies do not indicate potential violence" and, for that reason, it may be that those crimes cannot justify "a categorical ban." *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011). The Eighth Circuit, meanwhile, has adjudicated at least two as-applied challenges to the federal dispossession statute, rejecting both because the challengers could not demonstrate that their convictions were for "non-violent crimes" or that they were "no more dangerous than a typical law-abiding citizen." *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014); *United States v. Brown*, 436 F. App'x 725, 726 (8th Cir. 2011); *see also United States v. Adams*, 914 F.3d 602, 605 (8th Cir. 2019) (explaining that the circuit has "yet

2. Three other circuits—like the majority below—have definitively foreclosed as-applied challenges to felon dispossession laws.

The Tenth Circuit "rejected the notion that *Heller* mandates an individualized inquiry" when a court reviews a challenge to a felon dispossession law. *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (citing *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009)); *see also United States v. Gieswein*, 887 F.3d 1054, 1064 n.6 (10th Cir. 2018). That holding, however, came after Judge Tymkovich questioned the "*deus ex machina* dicta" in *Heller* that deems felon dispossession statutes "presumptively lawful." *McCane*, 573 F.3d at 1049 (Tymkovich, J., concurring). As Judge Tymkovich explained, a broad dispossession law that "***permanently*** disqualifies ***all*** felons from possessing firearms ... would conflict with the 'core' self-defense right embodied in the Second Amendment" because "[n]on-violent felons ... certainly have the same right to self-defense in their homes as non-felons." *Id.* at 1048–49 (emphasis in original).

Similarly, the Eleventh Circuit has held that felons are not "qualified" to possess firearms and thus, "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *United States v. Rozier*, 598 F.3d 768, 770–71 (11th Cir. 2010); *see also Flick v. Att'y Gen., Dep't of Justice*, 812 F. App'x 974, 975 (11th

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to address squarely whether [a dispossession law] is susceptible to as-applied challenges"). In the Ninth Circuit, it is "far from settled" whether a non-violent felon "can mount an as-applied Second Amendment challenge." *United States v. Torres*, 789 F. App'x 655, 658 (9th Cir. 2020) (Lee, J., concurring).

Cir. 2020) (confirming that *Rozier*'s holding precludes any as-applied challenge to a dispossession law).

Finally, the Fourth Circuit has concluded that "conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment." *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017). Thus, a legislature's decision to classify a crime as a felony categorically forecloses any Second Amendment challenge to a dispossession law, and "evidence of rehabilitation, likelihood of recidivism, and passage of time" are irrelevant, even when the felon has had his Second Amendment rights restored both by the State in which he was convicted of a felony and by the federal government. *Id.*[4]

The majority opinion below fits this mold. In refusing to create a "hierarchy of felonies" and holding that it is "reasonable" to dispossess anyone who "commit[s] a crime serious enough that the legislature has denominated it a felony," Pet. App. 20a, the majority effectively foreclosed all future as-applied challenges to § 941.29(1m), treating the "felony" label

[4] Other circuits have suggested, without explicitly holding, that a non-violent felon cannot challenge a dispossession law. *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009) (summarily rejecting an as-applied challenge to the federal dispossession law based on pre-*Heller* precedent); *see also Stimmel v. Sessions*, 879 F.3d 198, 203 & n.1 (6th Cir. 2018) (declining to decide whether an as-applied challenge to the federal felon dispossession law is available); *but see id.* at 213 (Boggs, J., dissenting) (expressing the view that "strict scrutiny should apply to Second Amendment restrictions" and rejecting the majority's conclusion that a permanent ban on firearm possession for a person convicted of misdemeanor domestic violence survived intermediate scrutiny).

as a rubber stamp of constitutionality, regardless of any particular set of facts.

B. Lower courts also disagree on whether as-applied challenges require consideration of the specific underlying offense that led to dispossession.

Among courts that entertain as-applied challenges to felon dispossession laws, an additional jurisdictional split continues to deepen: whether a reviewing court must consider the underlying felony itself or may instead lump the challenger in with all other "non-violent" felons. This split likewise exists across and within jurisdictions.

1. In the Third Circuit, the law is clear that an as-applied challenge requires an analysis of the particular "crime of conviction" that led to dispossession. *Holloway*, 948 F.3d at 172 & n.10. In *Holloway*, which applied the narrowest opinion from the en banc *Binderup*, the court carefully analyzed "whether ***Holloway's crime***," was ... serious enough to strip [him] of [his] Second Amendment Rights." *Id.* at 172 (quoting *Binderup*, 836 F.3d at 351) (emphasis added; quotation marks omitted). The court examined whether that crime, misdemeanor driving under the influence, "presents a potential for danger and risk of harm," how it is classified across jurisdictions, and the severity of its potential maximum criminal penalty. *Id.* at 173–77. Based on that careful and targeted analysis, the majority concluded that "[t]ogether, these considerations demonstrate that Holloway's DUI conviction constitutes a serious crime, placing him within the class of 'persons historically excluded

from Second Amendment protections.'" *Id.* at 177 (citation omitted).

In *Binderup*, both majority opinions likewise required a "close examination" of the "apparently disqualifying convictions." *Binderup*, 836 F.3d at 351 (opinion of Ambro, J.); *id.* at 374–77 (opinion of Hardiman, J.) (reviewing the challengers' "offenses [and] the circumstances surrounding them," as well as "their subsequent behavior," and finding that there was "compelling evidence that they are responsible citizens"). Additionally, both majority opinions explicitly rejected reliance on "off-point" and "obviously distinguishable" statistical reports about "felons generally." *Id.* at 354–55 (opinion of Ambro, J.). As Judge Ambro explained, while relevant "statistics [might] show that people who commit ***certain crimes*** have a high (or low) likelihood of recidivism that warrants (or does not warrant) disarmament," permanently stripping a nonviolent offender of Second Amendment rights cannot be based on data that "sweeps so broadly" it is irrelevant to the actual facts. *Id.* at 355 & n.8 (opinion of Ambro, J.); *see also id.* at 378 (opinion of Hardiman, J.) (rejecting the use of "generalized studies" that shed no light on the challengers' particular offenses). Thus, in the Third Circuit, a court cannot dismiss an as-applied challenge to a felon dispossession law without reviewing "specific evidence about [the challenger] ... and empirical evidence about people like [the challenger]." *United States v. Brooks*, No. CR 17-250, 2018 WL 2388817, at *9 (W.D. Pa. May 24, 2018). An analysis of the "challenger's specific characteristics" is necessary because, otherwise, "the challengers' efforts to distinguish themselves from the overall class are

rendered futile," "effectively foreclose[ing] all as-applied challenges." *Keyes v. Sessions*, 282 F. Supp. 3d 858, 876 (M.D. Pa. 2017).

2. That is precisely the problem in other jurisdictions, including Wisconsin. The majority below refused to "create a hierarchy of felonies" and relied on generalized reports concerning broad classes of "nonviolent offenders" and "public order offenses" to reject Petitioner's arguments and effectively foreclose all future as-applied challenges to § 941.29(1m). Pet. App. 20a. As the dissents pointed out, those generalized reports show only "a correlation between past crime ***of any sort*** and future violent crime." *Id.* at 87a (Hagedorn, J., dissenting) (emphasis added). The reports are irrelevant to Petitioner himself and his underlying felony convictions, and reliance on them "[a]bandon[s] any pretense of conducting an individualized inquiry." *Id.* at 55a (Grassl Bradley, J., dissenting).

This same problem exists in the Seventh Circuit. The majority in *Kanter* relied on "studies" regarding broad classes of "nonviolent offenders" and "nonviolent property offenders." 919 F.3d at 449. As then-Judge Barrett explained in dissent, "[t]hese statistics are entirely unhelpful ... because they lump all nonviolent felons together." *Id.* at 467 (Barrett, J., dissenting). "[W]hile some nonviolent felons may be likely to misuse firearms, the characteristics that make them risky cannot be generalized to the whole class." *Id.* at 467–68. "For example, the characteristics of an individual convicted of a drug-related offense tell us little if anything about the tendency of an individual convicted of perjury—or, for that matter,

mail fraud—to commit gun violence." *Id.* at 468. Given the "sheer diversity of crimes encompassed by" statutes like § 941.29(1m), a more targeted analysis is required to determine the constitutionality of those statutes "as applied to [a challenger] in particular." *Id.*

II. This case is an ideal vehicle to bring order to the increasingly fractured case law governing the as-applied constitutionality of firearm dispossession laws.

Since *Heller*, the constitutionality of felon dispossession laws has been the most frequently litigated Second Amendment issue. *See, e.g.*, Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 286 n.16 (2020) (explaining that "[s]ince *Heller*, the federal statute prohibiting felons from possessing firearms ... has been the most challenged law under the Second Amendment"). Federal courts are "inundated with challenges to these presumptively lawful measures," *id.* at 250, and have been called upon to adjudicate their constitutionality in a growing number of cases, leading to dozens of reported decisions (over 50 at last count). Similar cases continue to proliferate.

The constitutionality of these laws is far from settled. *See, e.g.*, Greenlee, *supra*; Alexander C. Barrett, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163 (2013); C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 HARV. J.L. & PUB. POL'Y 695 (2009). Indeed, as explained above, the lower courts cannot even agree on whether, or how, to adjudicate their constitutionality as applied. As one Fourth Circuit Judge observed, "*Heller* has left in its

wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations." *United States v. Chester*, 628 F.3d 673, 688–89 (4th Cir. 2010) (Davis, J., concurring in the judgment). That observation was made only two years after *Heller*. In the decade since, the "morass of conflicting lower courts opinions" has only deepened.

At the heart of the two questions presented by this case is a dispute about the basic theory on which felon disarmament may (or may not) rest. Lower courts and scholars are divided as to whether the historical scope of the Second Amendment excluded anyone who could be deemed an "unvirtuous citizen" or instead excluded only those who are potentially dangerous or violent.

If the government may "disarm unvirtuous citizens," *Binderup*, 836 F.3d at 348 (opinion of Ambro, J.), a potentially "wide variety of non-violent" offenders may possibly be subject to dispossession. *See Medina*, 913 F.3d at 301–02; *see also Kanter*, 919 at 445–46. The majority below, for example, focused on the whether Petitioner's offense—like other felonies—is in some way "serious." *Id.* at 19a (concluding that "failure to pay child support is every bit as serious as uttering a forgery").

On the other hand, if the government may restrict the Second Amendment rights of only those individuals with a violent or dangerous propensity, dispossession laws must be tailored accordingly. Below, the dissenting justices concluded that felons cannot be dispossessed of their Second Amendment rights "irrespective of whether they pose a danger to the public." Pet. App. 37a (Grassl Bradley, J., dissenting); *id.* at 82a–83a (Hagedorn, J., dissenting).

Other judges have reached similar conclusions. *See, e.g.*, *Kanter*, 919 F.3d at 458 (Barrett, J., dissenting) (concluding that historical evidence supports disarming those who could "be a threat to the public safety," but does not "support[ ] a legislative power to categorically disarm felons because of their status as felons"); *Binderup*, 836 F.3d at 357 (opinion of Hardiman, J.) ("The most cogent principle that can be drawn ... is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment.").

This case presents an ideal vehicle to decide the two questions presented and to begin to clarify the Second Amendment principles that govern as-applied challenges to dispossession statutes. Petitioner was convicted of a non-violent felony over 18 years ago, satisfied his probation, paid his debts, and did not reoffend. He seeks only to keep a firearm in his home for self-defense, and his as-applied challenge is limited to Wisconsin's dispossession statute, which is among the harshest in the country, and which Justice Barrett has already had occasion to review. The majority below not only rejected Petitioner's claim, but effectively foreclosed as-applied review for every non-violent felon who may seek to bring a similar claim in the future. Even if this Court rules in Petitioner's favor, that ruling will not suddenly invalidate § 941.29(1m) or any other dispossession law in this or any future case. Instead, the result will be a remand for the Wisconsin Supreme Court to more carefully consider Petitioner's as-applied challenge, with the assurance than whatever the outcome, the remand proceedings will be consistent with this Court's authoritative interpretation of the Second

Amendment and in line with *Heller*'s dicta that dispossession laws like § 941.29(1m) are "presumptively lawful."

III. Alternatively, the petition should be held pending the outcome of *New York State Rifle & Pistol Ass'n v. Bruen*, No. 20-483

Next term, this Court will hear argument in *New York State Rifle & Pistol Association v. Bruen*, No. 20-843. At issue in that case is another law that allegedly dispossesses classes of citizens from exercising Second Amendment rights. There, the law under challenge forecloses "ordinary law-abiding citizens from carrying handguns outside the home for self-defense." Reply Br. at 1, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-483 (Mar. 10, 2021).

At minimum, the Court should hold this petition until it decides *New York State Rifle & Pistol Association*. That case presents another opportunity for the Court to analyze the scope of Second Amendment rights and to assess the extent to which a State (there, New York) can restrict the fundamental right to keep and bear arms for self-defense. For that reason, it may provide guidance relevant to Petitioner's own challenge to his own Second Amendment disability. After that case is decided, the Court may then determine whether the petition in this case should be granted and set for argument; granted, vacated, and remanded; or denied.

CONCLUSION

The petition should be granted. Alternatively, the petition should be held and disposed of as appropriate—for example, granted and set for argument, or granted, vacated, and remanded—in light of the Court's upcoming decision in *New York State Rifle & Pistol Association*.

Respectfully submitted,

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