No. 20-1706

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 Wisconsin Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Wisconsin Supreme Court correctly rejected Petitioner Leevan Roundtree's as-applied Second Amendment challenge to Wis. Stat. § 941.29(1m), which bars convicted, unpardoned felons from possessing firearms.

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INTRODUCTION

Leevan Roundtree's petition, on its surface, seeks clarification on how to assess as-applied challenges to felon-dispossession statutes, which in his view will bring order to the "diametrically opposed conclusions" and "judicial chaos" governing these cases. Yet the law in this area looks much more like consensus than chaos. Every court to have considered an as-applied challenge from purportedly nonviolent felons has held that statutes dispossessing them of firearms do not violate the Second Amendment. The Wisconsin Supreme Court broke neither new nor controversial ground in this well-litigated area of Second Amendment law. It applied intermediate scrutiny to Roundtree's as-applied claim, and it reached the same conclusion as every other court in the country to have considered a similar claim. Nothing here warrants this Court's granting review.

Roundtree first asks this Court to grant review so that it can ultimately hold that nonviolent felons may bring as-applied challenges to felon-dispossession statutes. But the Wisconsin Supreme Court did not preclude Roundtree or felons like him from bringing as-applied challenges. Accordingly, this question does not provide a basis for review.

Roundtree nevertheless urges that this case implicates a federal circuit split regarding whether felons can bring as-applied challenges to the federal felon-dispossession statute, 18 U.S.C. § 922(g)(1). This case doesn't involve that statute or that conflict. Even if it did, this Court has consistently denied

petitions advancing virtually identical questions directly addressing § 922(g)(1) and that split.[1] The same result is warranted here, especially since nothing about Wisconsin's felon-dispossession law, Roundtree's personal characteristics, or his disqualifying felonies is distinguishable from those cases. Moreover, the Wisconsin Supreme Court's decision denying Roundtree's as-applied challenge to the state felon-dispossession statute is correct. This Court should deny Roundtree's petition.

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[1] *See, e.g.*, *Flick v. Attorney Gen.*, 812 F. App'x 974 (11th Cir. 2020), *cert. denied,* 209 L. Ed. 2d. 573 (U.S. 2021); *Folajtar v. Attorney Gen.*, 980 F.3d 897 (3rd Cir. 2020), *cert. denied,* 209 L. Ed. 2d 546 (U.S. 2021); *United States v. Torres*, 789 F. App'x 655 (9th Cir.), *cert. denied,* 141 S. Ct. 960 (2020); *Medina v. Whitaker*, 913 F.3d 152 (D.C. Cir.), *cert. denied,* 140 S. Ct. 645 (2019); *Michaels v. Sessions*, 700 F. App'x 757 (9th Cir. 2017), *cert. denied,* 139 S. Ct. 936 (2019); *Rogers v. United States*, *cert. denied*, 138 S. Ct. 502 (2017) (No. 17-69); *Hamilton v. Pallozzi*, 848 F.3d 614 (4th Cir.), *cert. denied,* 138 S. Ct. 500 (2017); *United States v. Massey*, 849 F.3d 262 (5th Cir.), *cert. denied*, 138 S. Ct. 500 (2017); *United States v. Phillips*, 827 F.3d 1171 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 56 (2017).

Roundtree attempts to distinguish his petition from some of these recently rejected petitions. (Pet. 3–4 n.2.) Yet the questions he presents are based on the same alleged federal circuit split invoked in those petitions and on similar applications of the federal felon-dispossession statute, which applies to all felons the same way that Wisconsin's felon-dispossession statute does. Far from advancing a narrow legal question, Roundtree is essentially asking this court to clarify standards on how all courts should consider as-applied challenges to all felon-dispossession statutes. All said, Roundtree is attempting to have this Court indirectly address issues that it has numerous times declined to address directly.

STATEMENT

In two 2003 Milwaukee County criminal felony cases, Roundtree pleaded guilty to four counts of failure to support a child for over 120 days; two additional counts of that crime were dismissed and read in. Since 1985, failure to support a child for over 120 days has been a Class E felony in Wisconsin, with each count punishable by up to 15 years' incarceration and $50,000 in fines. Wis. Stat. §§ 939.50, 948.22(2). Roundtree was sentenced to five months in jail followed by four years of probation with imposed and stayed prison sentences. The court also ordered Roundtree to pay arrears totaling $7,300.[2]

In 2015, the State of Wisconsin charged Roundtree with possession of a firearm by a felon after police found a revolver and bullets in his home pursuant to a valid search warrant. (App. 5a.) Wisconsin and federal law prohibit persons who have committed unpardoned felonies from possessing firearms.[3] See 18 U.S.C. § 922(g)(1); Wis. Stat.

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[2] This information, to the extent it does not appear in decisions provided in the appendix, is accessible online. *See* Wisconsin Court System Circuit Court Access, *State of Wisconsin v. Leevan Roundtree*, Milwaukee County Case Nos. 2003CF2243 & 2003CF2244, https://wcca.wicourts.gov (last visited July 26, 2021).

[3] Roundtree was charged under the applicable law at the time, Wis. Stat. § 941.29(2) (2013–14). The state legislature has since renumbered the applicable section to Wis. Stat. § 941.29(1m)(a), with no substantive changes relevant here. Respondent refers to the current version of Wisconsin's felon-dispossession statute in this brief.

§ 941.29(1m)(a). Roundtree never sought a pardon for his 2003 felony convictions.

After police found the weapon, Roundtree admitted that he knew that his felony convictions barred him from possessing it. Roundtree told police that he purchased the gun—which had been stolen in Texas—"from a kid on the street" a year earlier but denied knowing that it had been stolen. (App. 5a.)

Roundtree pleaded guilty to the felon-in-possession count and was sentenced to 18 months' initial confinement and 18 months' extended supervision. (App. 92a.)

Roundtree filed a postconviction motion in circuit court, arguing that Wisconsin's felon-dispossession statute violated the Second Amendment as applied to him, since his disqualifying felony convictions were nonviolent and over ten years old. The postconviction court denied Roundtree's motion, applying the state's guilty-plea waiver rule. (App. 97a–99a.) The court alternatively concluded that the claim appeared to be meritless based on state case law holding that the state felon-dispossession statute is constitutional as applied to nonviolent felons. (App. 99a–100a.)

Roundtree appealed, again raising his as-applied challenge. The Wisconsin Court of Appeals affirmed, applying "settled [Wisconsin case] law that the firearm ban applies regardless of the defendant's particular felony." (App. 94a (referencing *State v. Pocian*, 814 N.W.2d 894 (Wis. Ct. App. 2012), and *State v. Culver*, 918 N.W.2d 103 (Wis. Ct. App. 2018).)

The Wisconsin Supreme Court granted Roundtree's petition for review and affirmed. (App. 1a.) It considered the merits of Roundtree's as-applied challenge, first concluding that intermediate scrutiny was appropriate and rejecting Roundtree's request to apply strict scrutiny. (App. 11a–17a.) It based that decision in part on persuasive authority in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), which involved an as-applied challenge to Wis. Stat. § 941.29(1m) and 18 U.S.C. § 922(g)(1). In that case, the Seventh Circuit focused its analysis on the federal felon-dispossession statute, holding that it did not violate the Second Amendment as applied to Kanter, whose disqualifying felony was mail fraud. 919 F.3d at 451.

Applying the intermediate scrutiny analysis set forth in *Kanter* and other federal court of appeals cases, the Wisconsin Supreme Court held that the state's application of Wis. Stat. § 941.29(1m) was constitutional as applied to Roundtree. (App. 18a–23a.) It recognized the State's important objective in promoting public safety and curbing gun violence, and it concluded that the statute's bar on gun possession was substantially related to the State's interest. (App. 18a.) That was so, in part, because Roundtree's felonies demonstrated sufficient seriousness to justify the firearms prohibition. In the court's view, Roundtree deprived his children of basic necessities for a significant time period, which was at least as serious as other purportedly nonviolent felonies that Wisconsin courts had held did not support similar as-applied challenges, including uttering a forgery or property theft. (App. 19a–22a.)

The Wisconsin Supreme Court explained that "[s]imply because [Roundtree's disqualifying felonies were] not physically violent in nature" was not dispositive, given the abundance of empirical national and state-level evidence that persons with a felony (or even a misdemeanor) conviction were statistically more likely to misuse a firearm or reoffend with a violent crime than non-felons. (App. 19a–21a.) The court rejected Roundtree's assertion that he poses no danger to the public, which was contradicted by Roundtree's reoffending in this case by intentionally violating the felon-dispossession law and by supporting street-level gun sales, which in turn fueled gun violence. (App. 22a.)

Five justices joined that majority decision; two justices dissented. One dissenter disagreed that the State satisfied its burden in the means-end test. (App. 58a–59a (Hagedorn, J., dissenting).) The other dissenter believed that strict scrutiny was appropriate and that Wisconsin's felon dispossession statute is "void" as applied "to felons who pose no danger to society." (App. 57a (Grassl Bradley, J., dissenting).)

REASONS TO DENY THE PETITION

I. The state court resolved Roundtree's first question presented in his favor; that decision does not implicate the alleged federal circuit split.

A. Roundtree's first question presented asks "[w]hether 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." (Pet. i.)

This question does not support a grant of certiorari because the Wisconsin Supreme Court ruled in Roundtree's favor, i.e., it entertained Roundtree's as-applied challenge to the state felon-dispossession law. Roundtree simply does not agree with how the court evaluated his claim.

Roundtree admits that the Wisconsin Supreme Court addressed his as-applied claim, but he insists that its analysis "functionally foreclosed any avenue for a non-violent felon to challenge a [Wis. Stat.] § 941.29(1m) conviction." (Pet. 11–12.) He homes in on language in its decision in which it declined to create a "hierarchy of felonies," it noted that the legislature may reasonably dispossess anyone "who commit[s] a crime serious enough" to be called a felony, and it observed that a felon need not have "exhibited signs of physical violence" to justify the legislature's prohibition on firearm possession. (Pet. 5, 12–13, 22, 25.)

To start, Roundtree disregards the portions of the Wisconsin Supreme Court's decision evaluating his disqualifying felony convictions and his personal characteristics. The Court rejected Roundtree's efforts to downplay the seriousness of his disqualifying felonies, it consulted data regarding recidivism among offenders who commit similar public order crimes, and it factored the circumstances of Roundtree's subsequent violation of the felon-dispossession statute. (*See* App. 19a–22a.) Had the

court intended to foreclose Roundtree or other felons from bringing as-applied challenges to the dispossession statute, it would have said so and ended its analysis there rather than proceeding through the intermediate-scrutiny test.

Moreover, Roundtree seems to suggest that the Wisconsin Supreme Court should have either: (1) attempted to rank felonies by their dangerousness, or (2) accepted a general notion that lack of violence in the disqualifying felony is dispositive, or (3) adopted a theory that the legislature cannot dispossess felons as a category. None of those propositions has any support in this Court's decisions or those of any other court majority.

At most, the Wisconsin court's declining (quite reasonably) to rank felonies or grant as-applied relief based on an amorphous dangerousness standard simply reflects an accurate recognition that felons are unlikely to prevail on as-applied challenges based on the claimed nonviolent nature of their disqualifying felonies. The court's recognizing that fact is hardly a basis for this Court's review. It does not foreclose felons from advancing such claims. And it is not inconsistent with any holding of this Court or federal court of appeals. Indeed, numerous courts have recognized that successful as-applied claims by felons would be rare.[4]

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[4] *See, e.g.*, *Folajtar*, 980 F.3d at 904 ("[W]hile those convicted of felonies may bring as-applied challenges to § 922(g)(1), they are unlikely to succeed in all but the exceptional case."); *Kanter v. Barr*, 919 F.3d 437, 443 (7th Cir. 2019) (noting that no court entertaining a felon's as-applied challenge to § 922(g)(1) has

B. Likewise, this case does not implicate the circuit split between federal courts of appeals on whether state-law felons can bring as-applied challenges to federal (or analogous state) felon-dispossession laws. To that end, at least five federal courts of appeals reject outright as-applied challenges to felon-dispossession laws. *See Kanter*, 919 F.3d at 442 ("On the one hand, the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have suggested that § 922(g)(1) is always constitutional as applied to felons as a class, regardless of their individual circumstances or the nature of their offenses."). Those courts, relying on the "presumptively lawful" language in *Heller* and *McDonald*, hold that "felons are categorically different from the individuals who have a fundamental right to bear arms." *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010). Thus, under this view, as-applied challenges based on the disqualifying felon's lack of violence or age are not

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granted relief); *Medina*, 913 F.3d at 160 ("We need not decide today if it is ever possible for a convicted felon to show that he may still count as a 'law-abiding, responsible citizen.'"); *Binderup v. Attorney Gen.* 836 F.3d 336, 353 n.6 (3d Cir. 2016) (noting a state-law felon's burden in succeeding on an as-applied a claim "would be extraordinarily high—and perhaps even insurmountable"); *United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) (allowing that a nonviolent felon's as-applied challenge "might" succeed "in theory"); *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011) (expressing that "highly fact-specific" as-applied challenges "obviously present serious problems of administration, consistency, and fair warning").

viable because felons are excluded from the Second Amendment's protections.[5]

Other federal courts of appeals since *Heller* have left open the possibility that felons may successfully raise as-applied challenges to a dispossession statute. *See Kanter*, 919 F.3d at 443 (explaining that the Third, Fourth, Seventh, Eighth, and D.C. Circuits "have left room for as-applied challenges to the statute" and listing cases). This was the approach taken by the Wisconsin Supreme Court and the approach that Roundtree is seemingly asking this Court to decide in his favor. This portion of the Wisconsin Supreme Court's decision, which was not adverse to Roundtree, doesn't implicate any concerns that might arise from the approach taken by that former group rejecting such claims outright.

Even if the approach taken by the former group of courts could justify a grant of certiorari in a case

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[5] *See, e.g.*, *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010) (stating that based on *Heller*, felons as a category lack Second Amendment protections); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir.), *cert. denied*, 562 U.S. 867 (2010) (stating that *Heller* did not affect its precedent holding that "criminal prohibitions on felons (violent or nonviolent) possessing firearms did not violate" the individual right to bear arms); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir.), *cert. denied*, 560 U.S. 958 (2010) (explaining that *Heller* suggested "that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment"); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) ("We have already rejected the notion that *Heller* mandates an individualized inquiry concerning felons pursuant to § 922(g)(1).").

arising from that group,[6] this Court should wait for a case from that group to squarely address the issue.

C. To that end, Roundtree does not identify any meaningful split in the approach or results reached by courts like the Seventh Circuit and others that consider the merits of as-applied challenges to 18 U.S.C. § 922(g)(1). (Pet. 15–26.) Nor can he point to any controlling or persuasive law with which the Wisconsin Supreme Court's reasoning and outcome conflict. As discussed below, there is no split in federal courts' adjudication of challenges to the federal dispossession statute, given that each one has held that § 922(g)(1) is constitutional as applied to state-law felons. The Third Circuit case Roundtree relies upon as creating a conflict involved a state-law misdemeanant, not a felon.

1. Before discussing the intermediate-scrutiny approach taken by the Seventh Circuit and others to these as-applied challenges, a brief review of the federal felon-dispossession statute and this Court's relevant law is helpful. Along with the states, the federal government has long barred convicted, unpardoned felons from possessing firearms. *See* 18 U.S.C. § 922(g)(1). The law prohibits firearms

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[6] It shouldn't, given that this Court has declined to grant certiorari in those cases establishing the former group's approach, *see, e.g.*, *Vongxay v. United States*, 562 U.S. 921 (2010) (No. 10-5423); *Scroggins v. United States*, 562 U.S. 867 (2010) (No. 09-11204); *Rozier v. United States*, 560 U.S. 958 (2010) (No. 09-10590); and likewise declined to grant review in more recent cases in which courts applied that approach. *See, e.g.*, *Flick*, 209 L. Ed. 2d 573 (No. 20-902); *Torres*, 141 S. Ct. 960 (No. 20-5579); *Massey*, 138 S. Ct. 500 (No. 16-9376).

possession by any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." *Id.* While the statute does not use the word *felon*, its scope reaches state-law felons—provided that the state adheres to the traditional practice that felonies are punishable by more than one year in prison. *See, e.g.*, *Burgess v. United States*, 553 U.S. 124, 130 (2008) (recognizing common definition of a felony).

This Court has signaled that such laws barring convicted felons from possessing firearms are constitutionally sound. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court struck down a municipal handgun ban. In doing so, it discussed well-recognized regulations on the right to present arms, and it cautioned that "nothing in our opinion [striking down the municipal handgun ban] should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons," describing such regulations as "presumptively lawful." *Id.* at 626, 627 n.26. This Court explained that those "permissible" measures fall within "exceptions" to the Second Amendment right to keep and bear arms. *Id.* at 635. And it implicitly incorporated its recognition of those "exceptions" in holding that the plaintiff in *Heller* had a right to keep a handgun in his home "[a]ssuming that [he] is not disqualified from the exercise of Second Amendment rights," *id.*, that is, assuming "he is not a felon and is not insane." *Id.* at 631.

A few years later, a plurality of the Court reiterated those points. *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). In striking down a municipal handgun ban similar to the challenged

regulation in *Heller*, the Court "repeat[ed its] assurances" that its decisions there and in *Heller* did not cast doubt on the constitutionality of longstanding felon-dispossession laws. *Id.*

Given that language in *Heller* and *McDonald*, federal courts like the Fourth, Seventh, Eighth, and D.C. circuits (and as relevant here, the Wisconsin Supreme Court) apply intermediate scrutiny to as-applied challenges.[7] That means-end test requires courts to consider whether nonviolent felons historically enjoyed Second Amendment rights; if they did, courts turn to whether the statute survives intermediate scrutiny, i.e., whether the government can show a substantial relation in the prohibition to an important government objective. *Kanter*, 919 F.3d at 447–48. The substantial relation between the objective and challenge need only be reasonable, not perfect. *Id.* at 448.

2. Roundtree does not identify any case in which a court applying means-end scrutiny has held that a felon-dispossession law violates the Second Amendment as applied to a person with Roundtree's criminal history. Nor can he. The courts—which are almost exclusively federal courts considering challenges by state-law felons and misdemeanants to § 922(g)(1)—have reached resoundingly uniform outcomes in considering these challenges.

To start, every federal court of appeals has recognized that § 922(g)(1)'s bar on felons from

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[7] *See Medina*, 913 F.3d at 160–61; *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014); *Pruess*, 703 F.3d at 247.

possessing firearms facially comports with the Second Amendment.[8] And while courts are split whether a felon can bring an as-applied challenge based on the purportedly nonviolent nature of his disqualifying felony, any disagreement over that question has been academic. The outcomes in these cases have been resoundingly uniform: every federal court to have reached the merits of an as-applied challenge from a purportedly nonviolent felon has held that § 922(g)(1) is constitutional.[9] Accordingly, there is no legitimate "split" demanding this Court's review on how to weigh or decide these claims.

3. Contrary to Roundtree's suggestion (Pet. 23–24), the Third Circuit in *Binderup v. Attorney*

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[8] *See, e.g.*, *United States v. Bogle*, 717 F.3d 281, 281–82 (2d Cir. 2013) (per curiam); *United States v. Moore*, 666 F.3d 313, 318–19 (4th Cir. 2012); *United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011), *overruled on other grounds by Binderup*, 836 F.3d 336; *Schrader v. Holder*, 704 F.3d 980, 989–91 (D.C. Cir.), *cert. denied*, 571 U.S. 989 (2013); *United States v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011); *United States v. Davis*, 406 F. App'x 52, 53–54 (7th Cir. 2010); *United States v. Khami*, 362 F. App'x 501, 508 (6th Cir.), *cert. denied*, 560 U.S. 934 (2010); *United States v. Battle*, 347 F. App'x 478, 480 (11th Cir. 2009) (per curiam); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009), *cert. denied*, 559 U.S. 970 (2010); *United States v. Smith*, 329 F. App'x 109, 110–11 (9th Cir. 2009); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009).

[9] *See, e.g.*, *Folajtar*, 980 F.3d at 910–11 (disqualifying felony was tax fraud); *Medina*, 913 F.3d at 160 (uttering false statement); *Kanter*, 919 F.3d at 451 (mail fraud); *United States v. Hughley,* 691 Fed. App'x 278, 279–80 (8th Cir. 2017) (per curiam), *cert. denied*, 138 S. Ct. 983 (2018) (drug possession and unlawful use of weapon); *Hamilton*, 848 F.3d at 627 (property crimes); *Pruess*, 703 F.3d at 247 (violations of firearms laws); *Torres-Rosario*, 658 F.3d at 113 (drug dealing).

Gen., 836 F.3d 336, 350–53 (3d Cir. 2016), did not create a split in approaches by courts entertaining as-applied challenges by felons. To start, the *Binderup* petitioners were not felons, but rather state-law misdemeanants who were disqualified from possessing firearms based on § 922(g)(1)'s language barring persons convicted of crimes punishable by more than one year. *Id.* at 340.

Moreover, the court's reasoning in *Binderup* does not reflect disagreement between circuits. In upholding the misdemeanants' as-applied challenges to § 922(g)(1), the *Binderup* majority (eight of 15 judges sitting en banc) applied largely the same two-step intermediate scrutiny analysis as the Seventh Circuit and other federal courts of appeals, first assessing whether each challenger presented "facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class." *Id.* at 347–49. If the challenger satisfied that step, the court then applied the means-end test. *Id.* at 354.

In considering the first step, the *Binderup* court concluded that the scope of that historically barred class was limited to whether the offense at issue was "serious." *Id.* at 349. The court placed the most significance on the state's characterization of the offenses as misdemeanors, calling it "a powerful expression of [the legislature's] belief that the offense is not serious enough to be disqualifying." 836 F.3d at 351–52. Other relevant, non-dispositive factors were that the offenses did not involve physical force or threats, *id.* at 352; the misdemeanants received probation "[w]ith not a single day of jail time," *id.* at

352; and the "vast majority" of other states treated the conduct underlying the offenses as either not serious or not even criminal, *id.* at 352–53.

Content that the misdemeanant challengers satisfied the first step, the court then concluded that the government did not meet its burden under intermediate scrutiny. *Id.* at 354–56. That was so primarily because their disqualifying crimes were not felonies. *Id.* at 355–56. In fact, the court emphasized that its holding was limited to state-law misdemeanants; it expressly reserved judgment as to "whether an as-applied Second Amendment challenge can succeed where the purportedly disqualifying offense is considered a felony by the authority that created the crime." 836 F.3d at 353 n.6. Even if such a challenge could be made, the court observed, the "burden would be extraordinarily high—and perhaps even insurmountable." *Id.*

Thus, Roundtree's best case for demonstrating a federal circuit split in how to adjudicate as-applied challenges to felon-dispossession laws involves a court that (1) expressly limited its reasoning to claims by state-law misdemeanants; (2) openly questioned whether a claim by a state-law felon "could be made" at all; and (3) recognized that even if a state-law felon can bring such a claim, their burden may be "insurmountable." *Binderup,* 836 F.3d at 353 n.6.

And even if the Third Circuit's holding in *Binderup* applied to a felon like Roundtree, Roundtree's claim would not prevail. Here, the Wisconsin legislature has classified long-term refusal to support a child as a felony, which is "a powerful

expression of its belief that the offense is . . . serious enough to be disqualifying." 836 F.3d at 351–52. What's more, the misdemeanants in *Binderup* were sentenced to no confinement for their disqualifying offenses, *id.* at 352, whereas Roundtree was sentenced to five months in jail.[10] In addition, Roundtree committed not just one but four felony counts. Finally, there is "cross-jurisdictional consensus" that Roundtree's felonies were serious. *See Binderup*, 836 F.3d at 352. Every state imposes some form of criminal sanction for failure to pay child support, with over two-thirds of states imposing felony liability for egregious violations like Roundtree's.[11]

4. The only real "conflict" or "fracture" in these as-applied challenges occurs between individual jurists. Roundtree highlights dissents in *Kanter*, *Binderup*, and in his case that would either require

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[10] *See* Wisconsin Court System Circuit Court Access, *State of Wisconsin v. Leevan Roundtree*, Milwaukee County Case No. 2003CF2244, https://wcca.wicourts.gov (last visited July 26, 2021). The notes from the sentencing hearing reflect that Roundtree was sentenced to five months in jail with work release privileges. That said, based on subsequent filings reflecting that Roundtree received a child-care release, it is unclear how much jail time Roundtree actually served.

[11] *See* Nat'l Conf. of State Legislatures, *Criminal Nonsupport and Child Support*, December 11, 2020, https://www.ncsl.org/research/human-services/criminal-nonsupport-and-child-support.aspx#50-State%20Table (last visited July 26, 2021). By Respondent's count, Wisconsin is one of 35 states that designates long-term or egregious failure to pay child support either as a felony or as a crime punishable by more than one year of imprisonment.

strict scrutiny of these claims or would require more of an individualized analysis of the underlying felony and the person's characteristics in as-applied challenges. (Pet. 18, 19–20, 25–26, 27–28.) That a few individual jurists would assess as-applied challenges by purportedly nonviolent felons differently than every court majority to consider the issue is not a circuit split either implicated by this case or warranting this Court's review. To the contrary, endorsing the approach in *Binderup* or those offered in the dissents that Roundtree cites is much more likely to cement genuine splits between courts, create confusion, and foster divergent outcomes.

In sum, Roundtree's case does not implicate the circuit split regarding whether a felon may bring an as-applied challenge. Among courts that reach the merits of such as-applied challenges, there is no legitimate split or even disagreement in resolving these cases. Roundtree simply does not like how the Wisconsin Supreme Court resolved his case. As discussed below, the court was correct.

II. The Wisconsin Supreme Court's decision was correct.

A. At bottom, Roundtree disagrees with how the Wisconsin Supreme Court adjudicated the merits of his as-applied claim. But the Wisconsin Supreme Court applied a sound standard and reached a correct result.

To start, Roundtree's primary argument to the Wisconsin Supreme Court was that it should apply strict scrutiny to his claim, an argument wholly

unsupported in controlling or persuasive precedent. (App. 4a.) The Wisconsin Supreme Court rejected that contention based on the "presumptively lawful" language in *Heller* and *McDonald*, and the holdings in *Kanter* and *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010), concluding that intermediate scrutiny is appropriate. (App. 10a–14a.)

Roundtree does not seem to disagree with that portion of the court's decision. Rather, he takes issue with the court's as-applied analysis, asserting that the court did not adequately consider Roundtree's specific characteristics and more targeted data reflecting the risk posed by Roundtree's particular felony convictions. (Pet. 24–26, 27–28.)

But the Wisconsin Supreme Court correctly resolved Roundtree's claim. It first assumed without deciding that the felon-dispossession statute burdened conduct falling within the Second Amendment's scope. (App. 17a–18a.) It then applied the intermediate-scrutiny means-end test, which weighs whether the law is substantially related to an important governmental objective. (App. 18a.)

It considered Roundtree's offense and personal characteristics, noting that failure to support a child for over 120 days is an extreme violation and no less serious than other "nonviolent" felonies such as uttering a forgery, which Wisconsin courts had deemed—and Roundtree did not dispute—justified disqualification under the firearms ban. (App. 19a–20a.) It also rejected Roundtree's insistence that he did not pose a danger to the public, given his choice to

commit a new felony by purchasing a gun "off the street." (App. 22a.)

The court also found persuasive the "abundance of research" reflecting that nonviolent offenders have a higher recidivism rate than the general population, and showing that some categories of nonviolent offenders have a higher rate of recidivism (with a large percentage of those reoffenses being violent) compared to that of violent offenders. (App. 20a.) It cited national research and state-level data reflecting that a person's committing a crime greatly heightens the likelihood of reoffense and that public-order offenders who later recidivated did so with a violent crime at rates higher than that of other groups of offenders, and not substantially lower than that of violent offenders who later recidivated. (App. 21a–22a.)

Nothing in this Court's jurisprudence reflects that the Wisconsin Supreme Court's analysis was wrong. The analysis is consistent with this Court's language in *Heller* and *McDonald* recognizing that felon-dispossession statutes are presumptively constitutional. The Wisconsin Supreme Court's approach was consistent with federal courts that allow defendants to bring as-applied challenges to felon-dispossession statutes. *See, e.g.*, *Kanter*, 919 F.3d at 445–52. And Roundtree does not, and cannot, suggest that the Wisconsin court's analysis was an outlier among state courts deciding similar issues.

B. Roundtree's critiques of the Wisconsin Supreme Court's decision do not provide grounds to grant his petition. Roundtree faults the Wisconsin

Supreme Court for declining to create a "hierarchy of felonies" and to engage in a more in-depth inquiry into his personal characteristics and risk of violent re-offense. (Pet. 23–26.) But to require courts to rank felonies by amorphous dangerousness standards would seemingly usurp the legislature's authority to define and categorize crimes. *Cf. Solem v. Helm*, 463 U.S. 277, 290 (1983) (recognizing "broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes"). In addition, nothing in the Second Amendment or this Court's decisions require courts to engage in such a fact-specific case-by-case investigation whether a specific felon should be relieved from the effects of a felon-dispossession law. Nor is such an approach or investigation reasonable to place on individual courts or likely to result in fair, uniform results.

Indeed, this Court has recognized that the sort of fact-specific inquiry into a felon's suitability to have their firearm rights restored is "a function best performed by the Executive, which, unlike courts, is institutionally equipped for conducting a neutral, wide-ranging investigation." *United States v. Bean*, 537 U.S. 71, 77 (2002); *see also Kanter*, 919 F.3d at 450 (noting the "serious institutional and administrative concerns" with highly fact-specific as-applied analyses); *Medina v. Whitaker*, 913 F.3d 152, 159–60 (D.C. Cir.) (expressing concerns with courts applying "amorphous 'dangerousness' standard" to as-applied challenges), *cert. denied*, 140 S. Ct. 645 (2019). Besides, there's nothing in this Court's law or any other precedent reflecting that the Second Amendment requires courts to engage in such a fact-

intensive, case-by-case inquiry. In short, Roundtree's approach would require courts to determine on an ad hoc basis whether a particular felon "deserves" to have his Second Amendment rights restored.

As for Roundtree's complaint that the Wisconsin Supreme Court relied too heavily on general statistics and not heavily enough on Roundtree's personal characteristics or more targeted data (Pet. 24–26), Roundtree identifies nothing about his personal characteristics that the court did not consider. Moreover, the court's consideration of national or categorized data in weighing the state's justification for its law was reasonable, sound, and not inconsistent with this Court's or any other's jurisprudence. *Cf., e.g.*, *Ewing v. California*, 538 U.S. 11, 26 (2003) (weighing categorical recidivism data against the state's interest in protecting public safety in Eighth Amendment challenge to three-strikes law).

Finally, Roundtree wrongly claims that the supreme court's majority misread the statistics and considered "irrelevant" data. (Pet. 12–13, 15, 25.) He misrepresents that the majority stated that "21.4% of felons who committed a 'public order offense' (including failure to pay child support) 'recidivated with a violent offense,'" when actually that percentage of public order recidivists reoffended with a violent crime. (Pet. 12–13.) But the majority correctly conveyed the statistic, writing that "among recidivists who committed public order offenses, such as failure to pay child support . . . 21.4 percent

recidivated with a violent offense." (App. 21a–22a.) The majority accurately stated the statistic.[12]

And, contrary to Roundtree's claim that statistics involving recidivists are irrelevant to him (Pet. 13, App. 86a), a statistic involving public order offenders who recidivated is relevant to Roundtree; he was a public order offender who recidivated by violating the felon-dispossession statute.

Roundtree further criticizes the use of data grouping his offense of failure to pay child support "with dangerous offenses such as drunk driving, bail jumping, and fleeing from the police in a motor vehicle." (Pet. 13.) It is not clear why Roundtree considers those offenses—but not his disqualifying felony—indisputably "dangerous." Bail jumping, like failure to support a child, involves at its core contempt of a court order. In all events, Roundtree does not explain why grouping his particular felony in a category with other public order offenses renders that data irrelevant or inapplicable.

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[12] Roundtree's suggestion that Justice Hagedorn faulted the majority with making an "egregious error" in this respect (Pet. 15) is also incorrect. Justice Hagedorn disagreed with the State's wording in its brief; he accused *the State*, not the majority, of erring. (App. 86a (Hagedorn, J., dissenting).) Regardless how Justice Hagedorn interpreted the State's brief, the majority correctly understood the data, which appears on page 14 of the relevant report, and accurately conveyed it. *See* Joseph R. Tatar & Megan Jones, *Recidivism after Release from Prison*, Wis. Dep't of Corrections, at 14 (August 2016), https://doc.wi.gov/DataResearch/InteractiveDashboards/RecidivismAfterReleaseFromPrison_2.pdf.

In short, the Wisconsin Supreme Court reached a correct decision. Roundtree is advocating an approach toward as-applied challenges by state-law felons that has no support by any court majority in the country, and is not congruent with this Court's Second-Amendment jurisprudence in *Heller* and *McDonald*. And, as discussed below, this case is a poor vehicle to resolve any alleged circuit split.

III. Nothing about Wisconsin's statute, the state court's decision, Roundtree's felony, or the circumstances in this case make it a sound vehicle to resolve the alleged circuit split.

Roundtree insists that because individual jurists and commentators have disagreed on whether or how a felon may bring an as-applied challenge to a particular case, his case offers an ideal vehicle to bridge those conflicts. (Pet. 26–28.) Again, there is no true disagreement between federal courts in the outcomes they reach in these cases. Roundtree cannot identify a court that has held that 18 U.S.C. § 922(g)(1)—or any other felon-dispossession statue—violates the Second Amendment as applied to nonviolent felons.

Further, that this is a frequently litigated area (Pet. 26) counsels against granting the petition in this case. As noted, this Court has consistently rejected petitions that raise virtually the same questions (with the only differences being that those cases involve § 922(g)(1)). Nothing about this case—including the scope of Wisconsin felon-dispossession law or

Roundtree's individual circumstances—presents a better vehicle to address Roundtree's proposed questions than any of the many similar cases in which this Court has denied certiorari.

Roundtree disagrees, insisting that Wisconsin's felon-dispossession law is particularly draconian, calling it "unyielding," and "among the harshest . . . the most severe . . . the most restrictive and sweeping . . . dispossession laws in the country." (Pet. 4, 7–8, 28.) It is unclear how the statute's sweep relates to how courts should review as-applied challenges. In all events, Wis. Stat. § 941.29(1m) is less wide-reaching than § 922(g)(1), which is enforceable in every state and which bans possession by a larger category of individuals (based on its designation of crimes punishable by more than one year) than Wisconsin's law. And the scope of Wisconsin's law is hardly an outlier among states. Many others bar felons as a category from possessing firearms just as § 922(g)(1) and Wis. Stat. § 941.29(1m) do.[13]

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[13] *See, e.g.*, Alaska Stat. Ann. § 11.61.200; Fla. Stat. § 790.23(1)(a); Iowa Code Ann. § 724.26(1); 720 Ill. Comp. Stat. Ann. 5/24-1.1(a); Ky. Rev. Stat. Ann. § 527.040(1); Mo. Rev. Stat. § 571.070; N.M. Stat. Ann. § 30-7-16; Or. Rev. Stat. § 166.270. These are just a few laws that bar felons as a category. See Collateral Consequences Resource Center, Restoration of Rights Project, 50-State Comparison: Loss & Restoration of Civil/Firearms Rights, 3. Firearms Rights Under Federal Law, https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/ (last visited July 26, 2021), which includes a table compiling state dispossession laws and summarizing their respective scopes.

As for Roundtree's complaint that Wisconsin does not provide an administrative means to restore the right or set a time period for restoration (Pet. 8–9), whether the state law provides such a means has no bearing on whether a petitioner may advance an as-applied challenge. And Wisconsin's regime is hardly different from § 922(g)(1) in this regard. Felons who have had their rights restored under state law in ways short of a pardon or expungement generally are still disabled from possessing firearms under § 922(g)(1). To that end, Wisconsin felons may restore their possession rights through a pardon, an avenue that Roundtree has not pursued.

Roundtree also claims that he is an ideal petitioner because he "was convicted of a non-violent felony over 18 years ago, satisfied his probation, paid his debts, and did not reoffend." (Pet. 28.) To be clear, Roundtree was convicted of *four* felony counts of failure to support a child for more than 120 days across two separate criminal cases, all of which exposed him to significant confinement and fines. Roundtree's assertion that he served no prison time for those crimes (Pet. 9) is correct, though it leaves out that the court sentenced him to five months in jail consecutive to his probation time. While it is not clear how much of that jail time Roundtree served, his sentences reflected that his 2003 sentencing court concluded that some confinement was warranted.

Nor does the passage of time between Roundtree's 2003 conviction and his 2013 violation of the felon-dispossession statute persuade that Roundtree's as-applied claim has merit. An offender's "present contributions to his community, the passage

of time, or evidence of . . . rehabilitation" does not "un-ring the bell" of the disqualifying conviction or factor into an as-applied claim. *See Medina*, 913 F.3d at 160; *see also Hamilton v. Pallozzi*, 848 F.3d 614, 627 (4th Cir. 2017) (stating that Second Amendment does not require consideration of rehabilitation, recidivism, and passage of time in as-applied challenges, which would permit any felon "to argue what is essentially jury nullification").

And contrary to Roundtree's suggestion that he no longer presents a danger to the public since he "did not reoffend" since 2003 (Pet. 28), he did reoffend when he purchased a stolen gun from "a kid on the street," when both federal and Wisconsin law barred him from possessing a firearm. And the state court that sentenced Roundtree in 2016 concluded that he presented enough of a danger to the public to warrant a prison sentence. In choosing that sentence, the court found significant Roundtree's criminal record, which also included in addition to his felonies a 2002 disorderly conduct misdemeanor with use of a dangerous weapon; Roundtree's choice to arm himself by supporting back-channel gun sales; and Roundtree's incredible assertion that he did not know he was disqualified from having a gun. (State Ct. R. 47 at 12–17.)

This Court should also reject Roundtree's suggestion that his street-level purchase was benign and even sensible under the circumstances. (Pet. 9–10.) Roundtree knew he couldn't possess a gun. He could have sought to restore his rights through a pardon. He could have attempted to challenge the prohibitions in Wis. Stat. § 941.29(1m) and § 922(g)(1)

by, like many of the petitioners in the federal cases cited, seeking declaratory or injunctive relief.[14] Roundtree's conduct in violating Wisconsin's felon-dispossession statute effectively takes him out of the group of "law-abiding, responsible citizens" guaranteed full Second Amendment protections. *See Heller*, 554 U.S. at 626, 635. In effect, Roundtree's petition asks this Court to reward that violation and encourage others in his position to break the law first when he had legal means to challenge his disqualified status.

Finally, Roundtree assures that this Court's taking review and ruling in his favor "will not suddenly invalidate [Wis. Stat.] § 941.29(1m) or any other dispossession law" and "the result will be a remand for the Wisconsin Supreme Court" to reconsider Roundtree's as-applied claim. (Pet. 28.) Roundtree's assurances ring hollow. They do not square with his insistence that review is necessary to resolve the alleged federal circuit split. Nor would this Court's taking review and reversing convey the ultimate relief Roundtree is seeking, i.e., possessing a firearm. To wit, even if this Court took review, it reversed and remanded, and the Wisconsin Supreme Court granted Roundtree as-applied relief from the effects of Wis. Stat. § 941.29(1), he would still remain a felon subject to § 922,(g)(1) and in the eyes of federal courts. Thus, a state-court decision relieving Roundtree from the application of Wisconsin's felon-dispossession statute would not necessarily compel a

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[14] *See, e.g.*, *Folajtar*, 980 F.3d at 900; *Kanter*, 919 F.3d at 440; *Medina*, 913 F.3d at 157; *Binderup*, 836 F.3d at 340.

federal court to relieve him from his disability under § 922(g)(1).

In sum, the Wisconsin Supreme Court did not foreclose as-applied challenges to its felon-dispossession statute. Hence, Roundtree's first question presented is a non-starter. Moreover, the Wisconsin Supreme Court's decision was correct. To the extent that that decision implicates an alleged federal court conflict regarding standards for as-applied challenges to the federal felon-dispossession statute, this case, which involves the applicability of a state statute that Roundtree knowingly violated, is an ill-suited vehicle with which to resolve it.

IV. No hold is warranted.

This Court should decline Roundtree's alternative proposal to hold this petition pending the outcome in *New York State Rifle & Pistol Assoc., Inc., v. Bruen*, which this Court will decide in the coming term. The issue there is "[w]hether the State's denial of petitioner's applications for concealed-carry licenses for self-defense violated the Second Amendment," Brief of Petitioners at i, *N.Y. State Rifle & Pistol Assoc.*, ___ S. Ct. ___ (2021) (No. 20-843).

That case involves a New York law requiring citizens to establish "proper cause" to obtain a license to carry a firearm outside the home. *Id.* at 15–16. Nothing about the facts or law involved in that case are reasonably likely to implicate as-applied challenges to felon-dispossession laws either generally or in Roundtree's case. Accordingly, a hold is not warranted; denial is.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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