No._____

In the

Supreme Court of the United States

Mitchell L. Christen,
Petitioner

v.

State of Wisconsin
Respondents

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

Petition for Writ of Certiorari

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Question Presented

Wisconsin Statute §941.20(1)(b) criminalizes possessing a firearm while under the influence of alcohol. Mitchell Christen had five drinks over an evening, and later armed himself with a firearm in response to an ongoing confrontation in his home. May the State criminalize Mr. Christen's otherwise constitutionally protected actions purely on the basis of his legal intoxication?

Parties to the Proceeding

The petitioner is Mitchell Christen who was the defendant in the circuit court, defendant-appellant in the Wisconsin Court of Appeals, and the defendant-appellant-petitioner in the Supreme Court of Wisconsin.

The respondent is the State of Wisconsin, who was the the plaintiff in the circuit court, and the plaintiff-respondent in subsequent appellate proceedings.

Statement of Related Proceedings

This case arises from the following proceedings:

- *State of Wisconsin v. Mitchell Christen*, 2021 WI 39, 396 Wis. 2d 705, 958 N.W.2d 746 (Wis.) (opinion affirming the judgement of conviction)
- *State of Wisconsin v. Mitchell Christen*, 2020 WI App 19, 391 Wis. 2d 650, 943 N.W.2d 357 (Wis. Ct. App.) (opinion affirming the judgement of conviction)
- *State of Wisconsin v. Mitchell Christen*, Dane County 2018-CM-198

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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In 2008, this Court issued the decision in *District of Columbia v. Heller*, affirming the Second Amendment codifies the individual right to keep and bear arms. *District of Columbia v. Heller*, 544 U.S. 570 (2008). This Court subsequently confirmed this is a fundamental right and is applicable to both state and local governments. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).[1] While *Heller* and *McDonald* affirmed this individual right, the lower courts have struggled to determine the proper approach for analyzing Second Amendment challenges. *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from denial of certiorari).

Heller did not provide a precise standard for evaluating all Second Amendment claims, but provided the general frame work, recognizing "the Second Amendment...codified a *pre-existing* right" which was "enshrined with the scope [it was] understood to have when the people adopted it". *Heller*, 544 *at* 592, 634. The lower courts have consistently disregarded this framework, and have instead applied a "tripartite binary test with a sliding scale and a reasonable fit." *Rogers*

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[1] In *New York State Rifle & Pistol Association, Inc., Robert Nash, Brandon Koch, v. Kevin P. Bruen* (No. 20-843) this Court has been asked to resolve the circuit split regarding whether the Second Amendment applies outside of the home. The regulations in question are so restrictive, they are unconstitutional under any mode of constitutional analysis, similar to those in *Heller*. The law in this case is less restrictive than those presented in *New York State Rifle & Pistol Association, Inc., Robert Nash, Brandon Koch, v. Kevin P. Bruen,* and present the Court an opportunity to delve further into the Constitutional analysis of Second Amendment claims.

v. Grewal, 140 *at* 1867 (Internal citations omitted). This test bears little resemblance to *Heller's* directive to the lower courts to analyze the text, history, and tradition in analyzing Second Amendment claims. *Heller v. District of Columbia*, 670 F. 3d 1244, 1285, 399 U.S. App. D.C. 314 (D.C. Cir. 2011) (*Heller II*) (Kavanaugh, J., dissenting).

Equally alarming is the division amongst the lower courts as to what the "core" of the Second Amendment is. *Heller* plainly states the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Heller*, 544 *at* 592. Despite this clear language, the Fifth Circuit held the core is the right of a law-abiding, responsible adult to use a handgun to defend his or her home and family, while the Third Circuit recognizes the core right only as defense of hearth and home. N*at'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F. 3d 185, 195 (5th Cir. 2012); *United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010). The Fourth Circuit appears to be internally divided, first stating a broader view of the right before narrowing the right a year later. *United States v. Chester*, 628 F. 3d 673, 683 (4th Cir. 2010); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011). The Supreme Court of Wisconsin has ignored this Court's instruction the Second Amendment protects the right to possess a firearm, and concluded unless a jury determines an individual *reasonably acts* in self-defense, the "core" of

the Second Amendment is not implicated. *State v. Christen*, 396 Wis. 2d 705, 732, 958 N.W.2d 746, 2021 WI 39 (Wis.)(2021).

The decisions of the lower courts have led to an enumerated fundamental right in disarray. This case presents the opportunity to provide guidance on the proper approach for evaluating Second Amendment claims. The Court should grant certiorari to correct the lower courts' misguided efforts and restore reasoned analysis to the highly flawed methodologies permeating the lower courts.

Opinions Below

The Wisconsin Supreme Court's decision affirming the the decision of the court of appeals is reported at *State v. Christen,* 396 Wis. 2d 705, 958 N.W.2d 746, 2021 WI 39, and has been reproduced at App.101-129. The court of appeals opinion affirming the decision of the circuit court is unpublished, but can be found at 2020 WI App 19, 391 Wis. 2d 650, 943 N.W.2d 357, and is reproduced at App.130-135. The circuit court's oral decision is reproduced at App.136-148.

Jurisdiction

The Supreme Court of Wisconsin issued its opinion on May 4, 2021. A copy of this decision is reproduced at Appendix 101-129. On March 19, 2020 this Court extended the deadline to file any petition of certiorari due on or after that date to 150 days. The Supreme Court of Wisconsin's decision predates this Court's July 19, 2020 recision of the March 19, 2020 order. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

Constitutional, Statutory, and Regulatory Provisions Involved

The Second Amendment to the United States Constitution and relevant portions of the Wisconsin statutes are reproduced at App. 149-153.

Statement of the Case

In early 2018, Mr. Christen was living with Mr. Brandon Hughes and Mr. Chase Ravesteijn. Mr. Hughes, one of Mr. Christen's "drinking buddies" had convinced Mr. Christen to move in with him. Prior to February, the living situation had been in severe decline. Mr. Hughes had previously shoved Mr. Christen and hit Mr. Ravesteijn when he had too much to drink. Mr. Hughes had also told Mr. Christen to shoot him on another occasion when he was drunk.

On February 2, 2018 Mr. Christen had enough of his roommates' alarming and confrontational behaviors and decided to move out. He called the person he would be living with to see if he could come pick him up that night, but Mr. Christen's new roommate had been drinking that evening and made the wise decision not to drive while under the influence. Mr. Christen joined his uncle for dinner and enjoyed a few drinks. After dinner, Mr. Christen went to a bar, the Tipsy Cow, and then walked back to the shared apartment. Mr. Christen estimated he consumed four beers and one shot over the course of the entire evening.

When Mr. Christen returned, Mr. Hughes and Mr. Ravesteijn were at the apartment drinking. Mr. Christen asked his roommates to stop eating and throwing out his food which led to an argument

between the three of them. Mr. Hughes and Mr. Ravesteijn then left and continued drinking. Mr. Hughes and Mr. Ravesteijn returned later that night and were joined by two of their friends. This quartet continued drinking in the apartment.

There was another argument between Mr. Christen and the quartet of friends. Mr. Christen retreated to his room, pointed towards his handgun, and shut the door in his effort to be left alone. One of Mr. Ravesteijn's friends, Mr. Mana Alyami, opened Mr. Christen's door. In response, Mr. Christen picked up his handgun, and told the intruder to get out of his room.

Mr. Christen began recording the situation on his iPhone. After six minutes, Mr. Christen left his room to go to the kitchen. In case of further confrontation, he tucked his handgun into his waist-band, and continued filming the situation with his iPhone. While in the kitchen, Mr. Christen held his iPhone in his right hand, and reached for string cheese with his left hand. Mr. Alyami hit Mr. Christen in his chest and grabbed Mr. Christen's handgun. Mr. Christen quickly retreated to his room, closed the door, retrieved his secondary weapon, and called 911. Police arrived, and shortly thereafter Mr. Christen was taken into custody.

A criminal complaint was filed on February 6, 2018. On March 21, 2018, Mr. Christen filed a motion to have the charge of operating a firearm while intoxicated dismissed on the grounds it violated his right to bear arms and is unconstitutional as applied to the defendant. The Circuit Court held a hearing on this motion on July 13, 2018, and ruled the "statute is focused narrowly enough to withstand [the] constitutional challenge that's been raised....It's operating the gun or going armed with the gun. And I recognize the going armed aspect is a little broad perhaps under some scenarios, but I don't think that the definition of going armed is so broad that it makes it impossible for a homeowner to enjoy constitutional rights to bear arms in the home."

Mr. Christen proceeded to trial and was found guilty of going armed while intoxicated as well as disorderly conduct. A notice of intent to seek post-conviction relief was filed the day of sentencing. A timely notice of appeal was filed on September 13, 2019. Mr. Christen filed his brief on November 20, 2019. The State of Wisconsin did not file a response. On March 17, 2020, Judge Blanchard affirmed the circuit court's ruling concluding Mr. Christen had not demonstrated how Wis. Stat. §941.20(1)(b) violated his constitutional right to bear arms. Mr. Christen petitioned the Supreme Court of Wisconsin for review. The court accepted the case, and on May 4, 2021 issued a

decision affirming the constitutionality of Wis. Stat §941.20(1)(b) as applied to Mr. Christen.

Reasons for Granting the Petition

It is well settled the Second Amendment protects an individual right to keep and bear arms; this right vindicates the "basic right of individual self-defense". *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (Alito, J., concurring). In the years since this Court confirmed this basic and fundamental right, the lower courts have "fail[ed] to afford the Second Amendment the respect due an enumerated constitutional right". *Silvester v. Becerra*, 138 S. Ct. 945, 945, (2018) (Thomas, J., Dissenting from denial of certiorari). *Heller* forbade an interest balancing approach, yet this is exactly the methodology the lower courts have chosen, preferring to balance "a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor," rather than depending on "a body of evidence susceptible to reasoned analysis." *Heller v. District of Columbia,* 670 F. 3d at 1274 (Kavanaugh, J., dissenting).

The dissension amongst the lower courts has lead to an enumerated right being interpreted and protected differently in each jurisdiction. This case presents a factually simplistic scenario with a

final judgement which will allow this Court to quash the dissension in the lower courts and reverse the Supreme Court of Wisconsin's erroneous decision evicerating the Second Amendment's protections.

I. This Case Presents an Ideal Vehicle For in-Depth Constitutional Analysis

The facts of this case are straightforward and simple. Mr. Christen was intoxicated, at his home, and found himself in a situation where it was necessary to go armed in case of confrontation. As he was intoxicated when he armed himself, the State could, and did convict him of endangering safety by going armed while intoxicated.

This case stems from a criminal conviction in which a final judgment has been entered. No party can alter the laws and regulations of the state in a manner which would cause the case to become moot. *See, N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S.Ct. 1525, 206 L.Ed. 2d 798 (2020). Additionally there are no other legal or factual issues which could potentially cloud the scope of review. This case rests entirely on the *de novo* analysis of constitutional law: Does the consumption of a legal intoxicant void the Second Amendment's guarantee of the right to carry a firearm in case of confrontation?

II. The Lower Courts' Failure To Honor the Plain Language of Heller and McDonald Has Led to Confusion, Chaos, and Disorder; Granting Certiorari Is Necessary To Restore Reasoned Analysis to Second Amendment Claims

The majority opinion in the Supreme Court of Wisconsin is illustrative of the "doctrinal chaos" in the lower courts.[2] Wisconsin, like the majority of the federal circuits has adopted a two part test first developed in *United States v. Marzzarella*.[3,4] *United States v.*

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[2] *See*, David T. Hardy, *Standards of Review, The Second Amendment, and Doctrinal Chaos*, 43 S. Ill. U.L.J. 91 (2018), Kopel, David B. and Greenlee, Joseph G.S., *The Federal Circuits' Second Amendment Doctrines*, Saint Louis University Law Journal: Vol. 61 : No. 2 , Article 4. (2017)

[3] In *Marzarella*, the Third Circuit was tasked with determining whether the Second Amendment protects the right to own a firearm with an obliterated serial number. *Heller* and *Miller* dictate the result: "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes" *Heller* at 625. The Third Circuit ignored the doctrine of constitutional avoidance and instead determined a two-pronged interest balancing test was suggested by *Heller*. *see e.g. Pearson v. Callahan*, 555 U.S. 223, 241, 129 S.Ct. 909 (2009). The *Marzarella* Court explained its reasoning in a footnote; *Heller*'s references to First Amendment jurisprudence is the reason to adopt interest-balancing tests. The footnote fails to address *Heller's* explicit rejection of an interest-balancing test and the existence of categoricalism in other areas of Constitutional law.

[4] United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); Adopted in: NYSRPA, Inc. v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); NRA v. BATFE, 700 F.3d 185, 194 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Ezell v. City of Chicago, 651 F.3d 684, 701–03 (7th Cir. 2011) (but see Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015) ("[I]nstead of trying to decide what 'level' of scrutiny applies, and how it works, inquiries that do not resolve any concrete dispute, we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia,' and whether law-abiding citizens retain adequate means of self-defense.")) (internal citations omitted); United States v. Chovan, 735 F.3d 1127, 1136–37 (9th Cir. 2013); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010) ("Heller thus suggests a two-pronged approach to Second Amendment challenges to federal statutes.") (internal quotations omitted); GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1261 n.34 (11th Cir. 2012); Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1252 (D.C. Cir. 2011)

Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010). While the majority of the lower courts agree laws which burden the Second Amendment must receive more than rational basis scrutiny,[5] the determination of the level of review remains chaotic. Some circuits have developed a dual standard of review, applying higher standards to serious

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[5] United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011) ("The Court made plain in Heller that a rational basis alone would be insufficient to justify laws burdening the Second Amendment."); Drake v. Filko, 724 F.3d 426, 436 (3d Cir. 2013) ("Heller makes clear that we may not apply rational basis review to a law that burdens protected Second Amendment conduct."); United States v. Huet, 665 F.3d 588, 600 (3d Cir. 2012) ("Although the Court did not decide on a level of scrutiny to be applied in cases involving Second Amendment challenges, it rejected rational basis review."); NRA v. BATFE, 700 F.3d 185, 195 (5th Cir. 2012) ("rational basis review, which Heller held 'could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right' such as 'the right to keep and bear arms.'"); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) ("Heller left open the issue of the standard of review, rejecting only rational-basis review."); Hollis v. Lynch, 827 F.3d 436, 446–47 (5th Cir. 2016) ("[If a] law impinges upon a right protected by the Second Amendment . . . we proceed to the second step, which is to determine whether to apply intermediate or strict scrutiny to the law.") (internal quotations and brackets omitted); United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) ("If a rational basis were enough, the Second Amendment would not do anything— because a rational basis is essential for legislation in general.") (citations omitted); United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010) ("But though Congress may exclude certain categories of persons from firearm possession, the exclusion must be more than merely 'rational,' and must withstand 'some form of strong showing.'") (citations omitted); Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011) ("For our purposes, however, we know that Heller's reference to 'any standard of scrutiny' means any heightened standard of scrutiny; the Court specifically excluded rational-basis review.") (emphasis in original); Moore v. Madigan, 702 F.3d 933, 939 (7th Cir. 2012) ("[A] ban as broad as Illinois's can't be upheld merely on the ground that it's not irrational.");; United States v. Chovan, 735 F.3d 1127, 1137 (9th Cir. 2013) ("In Heller, the Supreme Court did not specify what level of scrutiny courts must apply to a statute challenged under the Second Amendment. The Heller Court did, however, indicate that rational basis review is not appropriate."); Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 960 (9th Cir. 2014) ("While Heller did not specify the appropriate level of scrutiny for Second Amendment claims, it nevertheless confirmed that rational basis review is not appropriate."); Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1141 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part) ("[W]hile the government's justifications might suffice to uphold this regulation on rational basis review, Heller demands more."); Heller v. District of Columbia (Heller II), 670 F.3d 1244,1256 (D.C. Cir. 2011) ("Heller clearly does reject any kind of 'rational basis' or reasonableness test . . .")

infringements, or infringements to the "core" right.[6] Of circuits using this dual standard, several circuits at least purport to use strict scrutiny when the challenged law seriously infringes on the Second Amendment guarantees, or when the challenged law strikes at the "core" right. Yet the Second Circuit only applies weighted scrutiny when the challenged law both affects the core of the Second Amendment and substantially burdens it. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 56 (2d Cir. 2018). The Seventh Circuit has rejected traditional means-end scrutiny, instead applying a sliding scale dependent on how close a restriction comes to the core of the right. *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

The lower court's disdain for the Second Amendment is clear in their self-determinate and circular analytical method.[7] While this Court has approved of interesting-balancing means-end scrutiny as a method for several constitutional claims, the lower courts have seemingly ignored these precedents as well. This Court has confirmed

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[6] See United States v. Decastro, 682 F.3d 160, 166 (2d Cir. 2012); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 93 (2d Cir. 2012); Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011); Jackson v. City & Cty. of S.F., 746 F.3d 953, 968 (9th Cir. 2014).

[7] In determining the level of scrutiny to apply, the lower courts frequently assess how close the law comes to the "core" of the Second Amendment, and the severity of the burden on that right. In other words, the courts are determining how narrowly tailored the restrictions are to determine whether to review the restriction under a narrowly-tailored, least restrictive means test or simply requiring a reasonable fit. Assessing the "fit" to determine how closely the law must "fit" in order to determine its constitutionality creates a system in which any judge can justify any conclusion they wish. This is simply not a sustainable or reliable mode of constitutional analysis.

the right to possess and bear arms is a fundamental right; strict scrutiny is the appropriate analytical methodology for fundamental rights in means-end scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 16 (1973); *see, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).; *See also Lawrence v. Texas,* 539 U.S. 558, 586 (2003)(Scalia, J., dissenting); *Troxel v. Granville*, 530 U.S. 57, 80 (2000)(Thomas, J., concurring in the judgement). The lower courts have refused to recognize this as they fail to follow this Court's binding precedent, slowly eviscerating the Second Amendment on a case by case basis.

The analysis of Second Amendment claims is further complicated by the split on what the core of the Second Amendment actually is.[8] The Fifth Circuit has held the core is the right of a law-abiding, responsible adult to use a handgun to defend his or her home and family, while the Third Circuit recognizes the core right only as defense of hearth and home. N*at'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F. 3d 185, 195 (5th Cir.

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[8] *see e.g.* Hardy, *Standards of Review, The Second Amendment and Doctrinal Chaos,* 94-95

2012); *Marzzarella*, 614 F. 3d at 94. The Fourth Circuit initially stated a moderate view of the core right being "the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense, *Chester*, 628 F. 3d 673, 683 (4th Cir. 2010), but a year later, announced a narrower view limiting the core right to self-defense to the home by a law-abiding citizen. *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011).

The Supreme Court of Wisconsin allegedly recognizes the "core" of the Second Amendment protection to be the "right to *possess or carry* a firearm for self-defense". *Christen*, 396 Wis.2d at 712 (Emphasis added). In the same breath, the court contradicts itself, reasoning a jury finding Mr. Christen did not *act* in self-defense removes his possession of a firearm from the core of the Second Amendment's protection.[9] *Id.* The right to bear arms refers to the right to wear, bear, or carry upon the person or in the clothing or in a pocket, for the

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[9] The jury was instructed:
The law allows a person under the influence of an intoxicant to go armed with a firearm if all the following circumstances are present:
1. The defendant reasonably believed he was under an unlawful threat of imminent death or great bodily harm;
2. The defendant reasonably believed he had no alternative way to avoid the threatened harm other than by doing armed with a firearm;
3. The defendant did not recklessly or negligently place himself in a situation in which it was probably he would be forced to go armed with a firearm; and
4. The defendant went armed with a firearm only for the time necessary to prevent the threatened harm.

The imposition of a multi-stage reasonableness test flatly ignores *Heller's* wise words instructing courts that a constitutional guarantee which is subject to future assessments of reasonableness and usefulness is no guarantee at all. *Heller*, at 634.

purpose of being armed and ready for offensive or defensive action in a case of conflict with another person. *Heller* at 584, *quoting Muscarello v. United States*, 524 U.S. 125, 143, 118 S. Ct. 1911 (1998). The majority opinion misapprehends the difference between *operating* a firearm in self-defense and *going armed* in case of confrontation. *Christen* at 750 (Rebecca Grassl Bradley, J., dissenting)(Emphasis added). That Mr. Christen did not *act* in self-defense has little to do with his Second Amendment right to *go armed* in case of confrontation. *Id.* The Supreme Court of Wisconsin's requirement a jury must find an individual reasonably acted in self defense before recognizing the individuals fundamental right to possess arms in case of confrontation raises a serious question: Does the Second Amendment actually guarantee anything in the State of Wisconsin?

III. Wisconsin Statute §941.20(1)(B) Is Plainly Unconstitutional As Applied to Mr. Christen

The need for defense of self, family, and property is most acute while in the home, a law which prohibits individuals from going armed while intoxicated cannot constitutionally be applied to an individual who goes armed in his own home. *Christen*, at 750 (Rebecca Grassl. Bradley, J., dissenting). Under any mode of analysis Wis. Stat. §941.20(1)(b) is unconstitutional.

Examining the text, history, and tradition surrounding the Second Amendment, it is clear intoxication did not serve as a qualification for dispossession. Prior to and after the ratification of the Second Amendment, legislatures did not dispossess individuals from the right to bear firearms while intoxicated. Justice R.G. Bradley summarized the state of regulations concerning intoxication and firearms at the time of the enactment of the Second Amendment in her dissent:

> From before the enactment of the Second Amendment through the late-18th and early-19th centuries, legislatures did not limit the individual right to bear arms while under the influence of an intoxicant. Indeed, few colonial-era laws even regulated the use of firearms while consuming alcohol, and none dealt with carrying while intoxicated. See Mark Frassetto, Firearms and Weapons Legislation up to the Early 20th Century (January 15, 2013).
>
> ....
>
> This law had nothing to do with bearing a firearm while drinking; instead, it prohibited shooting while drinking[.]
>
> ....
>
> Other laws closely predating ratification of the Second Amendment also indicate that early Americans regulated only the shooting or operation of guns but not the act of bearing them.
>
> ....
>
> The realities of life in early America explain why individuals under the influence of an intoxicant were able to carry arms with no legal impediment. "In early America, drinking alcohol was an accepted part of everyday life at a time when water was suspect[.]" Bruce I. Bustard, Alcohol's Evolving Role in U.S. History, Spirited Republic, Winter 2014, at 15, 15. "Farmers took cider, beer, or whiskey into their fields," and ale would often accompany supper for many early Americans. Id. From the late-18th century until the mid-19th century, annual alcohol consumption was on average much higher than present day. Id.;

> see Bradley J. Nicholson, Courts-Martial in the Legion Army: American Military in the Early Republic, 1792-1796, 144 Mil. L. Rev. 77, 93 n.69 ("Heavy alcohol consumption was common in early America.") (citation omitted). In 1790, the average early American consumed approximately 5.8 gallons of alcohol annually, a figure which rose to 7.1 gallons by 1830. Bustard, supra, at 15. Contrast this to contemporary times, during which the average American consumes only 2.3 gallons per year. Id.
> *Christen*, 762-766
> The Supreme Court of Ohio disagrees with Justice R.G.

Bradley's analysis, and cites to four laws passed after the ratification of the Fourteenth Amendment to illustrate the historical support for criminalizing the possession of a firearm while intoxicated. *State v. Wever*, 163 Ohio St.3d 125 ¶20, 2020-Ohio-6832 (2020)(Ohio). This argument is fallacious. Constitutional rights are enshrined with the scope it was understood that have when the people adopted it. *Heller*, 544 *at* 634. The Second Amendment was ratified on December 15, 1791. The four laws cited to by the Ohio Court are from 1868, 1883, and 1909. The earliest of these laws was enacted 77 years after the Second Amendment was ratified.[10] "[T]hey do not provide as much insight into its original meaning as earlier sources. *Heller*, at 614.

The historical sources pre-ratifiaction and closely thereafter clearly indicate intoxication did not restrict the right to possess a firearm. Generations after the enactment, several states began to

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[10] The life expectancy in the period surrounding the ratification of the Second Amendment was only 38 years.

enact laws which conflict with the original intent of the Second Amendment. When the later sources conflict with those at the time of ratification, the sources at the time of ratification should control the analysis. The Second Amendment protects an individuals right to possess a firearm while intoxicated, but certainly permits States to regulate the discharge of a firearm by an intoxicated person.

If this Court were to deviate from *Heller* and *McDonald*, and apply the means-end scrutiny applied by the lower courts, strict scrutiny must apply to a fundamental right particularly when and where it is at its most elevated interest. Strict scrutiny requires a state law to be narrowly tailored to achieve a compelling interest. *Miller v. Johnson*, 515 U.S. 900, 920, 115 S. Ct. 2475. If there are other reasonable ways to achieve the states compelling interest with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. *Id.*, at 64 quoting *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 909-10, 106 S. Ct. 2317.

The State's interest in protecting the public from unnecessary injury caused by the *use* of a firearm by an intoxicated individual is an important interest. However, Wis. Stat. §941.20(1)(b) does not require a trigger to be pulled, or any actual harm to occur; it criminalizes the mere possession of a firearm. The State's interest in protecting the

public from unnecessary injury is covered by two other statutes: Wis. Stat. §940.24 criminalizes the negligent use of a dangerous weapon, and Wis. Stat. §941.20(1)(a) allows the state to punish individuals who are negligent in their operation or handling of a dangerous weapon and endanger another's safety. Neither of these statutes impose a significant burden on the Second Amendment as they allow for an intoxicated individual to possess a firearm, as long as they do so in a responsible manner. Surely intoxication could be a factor in the determination of negligence, but the statutes only criminalize the behavior when there is actual injury or endangering of another's safety. These statutes demonstrate the State has less restrictive means of enforcing its interest, and as such Wis. Stat. §941.20(1)(b) is not the least restrictive means and must fail strict scrutiny analysis.

Conclusion

The "true palladium of liberty" has been under judicial assault in the decade since this court decided *Heller* and *McDonald*. The lower courts have failed to honor *Heller* and have restricted the scope of an enumerated right, inventing a judge-empowering constitutional test which allows judges to uphold any law restricting the right to keep and bear arms on the basis of any principles judges choose to apply. Mr. Christen respectfully request the Court grant certiorari in this case

and correct the course the lower courts have charted for Second Amendment claims.

Dated: Tuesday, September 28, 2021

Respectfully submitted,

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