No. 21-5905

In the

Supreme Court of the United States

MITCHELL L. CHRISTEN,

Petitioner,

v.

WISCONSIN,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Wisconsin Stat. § 941.20(1)(b) makes it a misdemeanor to carry a firearm while intoxicated, with a built-in exception for self-defense. Do the Second and Fourteenth Amendments render section 941.20(1)(b) unconstitutional as applied to Mitchell L. Christen?

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INTRODUCTION

The scope of Wis. Stat. § 941.20(1)(b) is narrow. It does not purport to dispossess anyone of a firearm. It merely prohibits an intoxicated person from operating or carrying a firearm during the brief period of time in which he has chosen to drink to the point of intoxication. A heavily intoxicated person can sit just a few feet away from his loaded firearm without violating section § 941.20(1)(b). Further, there is no blood alcohol level that violates the statute; instead, the state must prove beyond a reasonable doubt that a person's ability to operate a firearm was actually impaired by his excessive alcohol consumption. The statutory scheme even contains a built-in exception for self-defense, such that an intoxicated person may carry or operate a firearm if he reasonably deems it necessary to defend himself. Wis. Stat. § 941.20(3)(e).

Mitchell L. Christen was convicted of violating section 941.20(1)(b) after picking up a gun and drunkenly threatening to shoot his roommates' invited guest in response to a slight annoyance. On appeal, he argued that the Second Amendment guaranteed him the absolute right to handle a firearm while intoxicated because he was in his own home. The Wisconsin Supreme Court disagreed and, relying on the federal circuits' consensus framework for analyzing Second Amendment challenges, held that Christen's Second Amendment right was not violated. Christen now asks this Court to take this case on the

basis that the Wisconsin Supreme Court erroneously relied on the federal circuits' consensus approach to Second Amendment challenges, which he terms "chaotic." He asks this Court to overhaul the federal circuits' approach in favor of a new approach based on the text, history, and tradition of the Second Amendment.

This Court should deny Christen's request for two reasons. First, despite Christen's assertion, the federal circuits' approach to Second Amendment challenges is not chaotic; on the contrary, the federal circuits have uniformly and faithfully applied *Heller* and *McDonald* for the past decade. Second, this case would be a poor vehicle for clarifying the framework for Second Amendment challenges because section 941.20(1)(b) is plainly constitutional even under Christen's proposed approach.

STATEMENT OF THE CASE

On February 2, 2018, Christen and his roommates got into an argument.[1] (Pet-App. 103.) Christen had been drinking alcohol and was intoxicated. (Pet-App. 103.) Christen's two roommates, BH and CR, and their friend, KL, left the apartment to go to a bar.

[1] In his statement of the case, Christen asserts that one of his former roommates previously shoved him, hit his other roommate, and told Christen to "shoot him." (Pet. 11.) These are not facts of the case; they are merely Christen's own uncorroborated trial testimony.

(Pet-App. 103.) They returned later that night. (Pet-App. 103.) A fourth friend, MA, then came over to the apartment. (Pet-App. 103.)

Christen opened the door for MA and said, "[h]ere's the asshole roommates you were looking for." (Pet-App. 103.) A second argument ensued; Christen claimed at trial that MA pushed him with his chest, which MA and the others denied.[2] (Pet-App. 103.) After the argument, Christen went into his room and closed the door while the others stayed in the apartment's common areas. (Pet-App. 103.)

Later that night, MA went to Christen's room because he knew Christen was upset. (Pet-App. 103.) MA told Christen, "hey, just take it easy, have fun with us." (Pet-App. 103.) Christen responded to this innocuous request by picking up a firearm and threatening to shoot MA. (Pet-App. 103.) MA testified that Christen pointed the gun at him, while Christen testified that he pointed it at the wall. (Pet-App. 103.) MA returned to the others and Christen began recording a video on his cell phone. (Pet-App. 104.)

In the video, Christen announced that if anyone came through the door, he would shoot them. (Pet-App. 104.) He also yelled at MA to "get the fuck out of

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[2] Christen himself had previously admitted to law enforcement that MA did not physically attack him. (Pet-App. 104.)

here." (Pet-App. 104.) MA could be heard threatening to call 911. (Pet-App. 104.) He could also be heard saying, "Be nice, be nice man, be nice." (Pet-App. 104.) The video subsequently showed Christen, intoxicated and armed, making an ominous threat to his roommates and their friends that "it would just be smart for them" to leave the apartment. (Pet-App. 104.)

Shortly after making these threats, Christen left his room and entered the kitchen with no pants on and with a gun tucked into the waistband of his underwear. (Pet-App. 104.) MA and KL quickly disarmed him and disassembled the gun. (Pet-App. 104.) Christen returned to his room and retrieved and cocked his shotgun. (Pet-App. 104.)

Christen then called 911 and told police that MA "stole" his gun. (Pet-App. 104.) He also said anyone who came through his door was "getting a fucking face full of lead." (Pet-App. 104.) He falsely told the dispatcher that he had not threatened MA. (Pet-App. 104.) And contrary to his trial testimony, he admitted to the dispatcher that MA did not physically attack him before the kitchen incident. (Pet-App. 104.)

The police arrived in response to Christen's call. (Pet-App. 104.) BH, CR, KL, and MA all exited and explained that Christen was intoxicated and had threatened them with firearms. (Pet-App. 104.) Police

finally convinced Christen to leave approximately 30 minutes later. (Pet-App. 104.) Police "observed an odor of intoxicants coming from [Christen's] breath." (Pet-App. 104.) Police also observed that Christen's eyes were bloodshot and glassy and that he appeared "worked up" and "paranoid." (Pet-App. 104.) Christen was arrested and booked. (Pet-App. 104.) In the booking area, he eventually claimed that he armed himself in self-defense. (Pet-App. 104.)

Christen was charged with pointing a firearm at another, operating or going armed with a firearm while intoxicated in violation of Wis. Stat. § 941.20(1)(b), and disorderly conduct. (Pet-App. 104.) He moved to dismiss the operating a firearm while intoxicated count on the ground that section 941.20(1)(b) violated his Second Amendment right. (Pet-App. 104.) He made a broad constitutional argument that section 941.20(1)(b) could never be constitutionally applied to anyone inside his or her residence. (Pet-App. 132.) The trial court denied the motion. (Pet-App. 148.)

At trial, the court read the jury a self-defense instruction and told the jury that it could not find Christen guilty of going armed while intoxicated unless it was satisfied beyond a reasonable doubt that he did not act lawfully in self-defense. (Pet-App. 105.) Christen was found guilty of going armed while intoxicated and disorderly conduct; he was found not

guilty of pointing a firearm at another. (Pet-App. 105.) He was sentenced to four months in jail. (Pet-App. 105.)

Christen appealed the denial of his motion to dismiss on Second Amendment grounds. (Pet-App. 131–32.) On appeal, he attempted to raise an as-applied constitutional challenge to section 941.20(1)(b). (Pet-App. 134.) However, he did not address the facts of his case, but relied "entirely on hypotheticals about those who do *not* endanger the safety of others." (Pet-App. 134.) The court of appeals therefore affirmed the trial court's decision. (Pet-App. 134.)

The Wisconsin Supreme Court affirmed the court of appeals in a 5-1-1 decision.[3] (Pet-App. 102.) The majority applied the two-step framework developed by the federal circuit courts following this Court's decisions in *Heller*[4] and *McDonald*.[5] (Pet-App. 106.) First, the court examined whether the historical record was clear that armed intoxication was categorically unprotected by the Second Amendment. (Pet-App. 108.) The court assumed, without deciding, that armed intoxication was not categorically unprotected. (Pet-App. 108.)

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[3] *State v. Christen*, 2021 WI 39, 396 Wis. 2d 705, 958 N.W.2d 746.

[4] *District of Columbia v. Heller (Heller I)* 554 U.S. 570 (2008).

[5] *McDonald v. City of Chicago,* 561 U.S. 742 (2010).

The Wisconsin Supreme Court then concluded that intermediate scrutiny applied to Christen's challenge because section 941.20(1)(b) did not burden the core Second Amendment right to armed self-defense in the home. (Pet-App. 109-10.) This is because Christen did not arm himself in self-defense. (Pet-App. 109-10.)

The law passed intermediate scrutiny as applied to Christen because it is substantially related to the important governmental objective of protecting public safety. (Pet-App. 111.) The Wisconsin Supreme Court explained that an abundance of data supports the widespread common-sense understanding that armed intoxication is tremendously dangerous. (Pet-App. 112.) For example, there is a strong correlation between intoxication and self-inflicted injury, including suicides, from firearms. Branas, Han & Wiebe, *Alcohol Use and Firearm Violence*, 38 Epidemiologic Reviews 32, 36 (2016) (Pet-App. 112.) And "Horrifically, '[f]or men, deaths from alcohol-related firearm violence equal those from alcohol-related motor vehicle crashes.'" (Pet-App. 112) (citations omitted); *See also State v. Weber*, 168 N.E.3d 468, 476–77 (Ohio 2020) (compiling evidence of the dangers associated with armed intoxication). The government therefore had an important interest in preventing armed intoxication. (Pet-App. 112–13.)

The Wisconsin Supreme Court held that section 941.20(1)(b) was substantially related to this goal because it prohibits carrying a firearm "only when 'the defendant's ability to handle a firearm was materially impaired because of the consumption of an alcoholic beverage.'" (Pet-App. 112.) "Indeed, '[i]t is difficult to understand how the government could have attempted to further that interest in any other manner." (Pet-App. 113 (quoting *Weber*, 168 N.E.3d at 478.).)

Finally, the court emphasized the extremely limited nature of section 941.20(1)(b), which prohibits a person only from carrying or operating a firearm while actually intoxicated such that he is "less able to exercise the clear judgment and steady hand necessary to handle a firearm," with a built-in exception for self-defense. (Pet-App. 110–11.)

Justice Brian Hagedorn filed a concurring opinion. (Pet-App. 113.) He agreed that section § 941.20(1)(b) was constitutional as applied to Christen but would have based his conclusion on "the history of the Second Amendment right as understood when adopted and incorporated against the states." (Pet-App. 113.) Justice Hagedorn explained that the historical record—including laws passed around the time the Second Amendment was passed as well as laws passed around the time the Fourteenth Amendment incorporated it against the states—

showed that the Second Amendment was never understood to protect armed intoxication. (Pet-App. 113–18.)

Justice Rebecca Bradley filed the lone dissent. (Pet-App. 118.) She would have held that section § 941.20(1)(b)'s prohibition on armed intoxication can never be constitutionally applied to a person who is inside his home. (Pet-App. 119, 128.)

REASONS TO DENY THE PETITION

I. The federal circuits have uniformly and faithfully protected the Second Amendment right following *Heller* and *McDonald*.

Despite Christen's claims to the contrary, the federal circuits have developed a consensus framework for analyzing Second Amendment challenges that is faithful to *Heller*, *McDonald*, and the Second Amendment.

The Second Amendment to the United States Constitution states: "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." U.S. Const. amend. II. This Court held in *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 592, 634–35 (2008), that the Second Amendment right to keep and bear arms is an individual right and that

the "core" right protected by the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Two years later, this Court held that the Due Process Clause of the Fourteenth Amendment protects the Second Amendment right to keep and bear arms against state infringement. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010). This Court reaffirmed that individual self-defense is "the central component" of the Second Amendment right. *Id.* at 767 (citation omitted).

Like most rights, "the right secured by the Second Amendment is not unlimited." *Heller (Heller I)*, 554 U.S. at 626. The Second Amendment does not guarantee "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.*

This Court explained in *Heller I*, for example, that the Second Amendment did not invalidate "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27.

In the years following *Heller* and *McDonald*, the federal circuits have been presented with numerous Second Amendment challenges and have reached a

consensus on the framework for analyzing them. The circuit courts have developed a two-step approach. The first step is to answer the threshold question of "whether the regulated activity falls within the scope of the Second Amendment." *Ezell v. City of Chicago* (*Ezell II*), 846 F.3d 888, 892 (7th Cir. 2017); *see also Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir. 2018). "This is a textual and historical inquiry; if the government can establish that the challenged law regulates activity falling outside the scope of the right as originally understood, then 'the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.'" *Ezell (Ezell II)*, 846 F.3d at 892 (citation omitted).

If the regulated activity falls within the scope of the Second Amendment as originally understood, or if the history is not entirely clear, the next step is an "inquiry into the strength of the government's justification for restricting or regulating" the defendant's conduct. *Ezell (Ezell II)*, 846 F.3d at 892 (quoting *Ezell v. City of Chicago (Ezell I)*, 651 F.3d 684, 703 (7th Cir. 2011)).

The level of means-end scrutiny used to review the challenged regulation "is dependent on 'how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right.'" *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019) (citation omitted). The "core" of the Second

Amendment right is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* (quoting *Heller (Heller I)*, 554 U.S at 634–35); *see also, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010) ("At its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home."); *United States v. Chester*, 628 F.3d 673, 676 (4th Cir. 2010). The level of scrutiny courts apply in Second Amendment cases depends on two things: whether a challenged law strikes at the core right of the Second Amendment, and if so, whether the challenged law substantially burdens the core right. *Ezell (Ezell II)*, 846 F.3d at 892.

Laws that do not strike at the core of the Second Amendment right, or do not substantially burden the core right, are subject to intermediate scrutiny. *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020); *see also Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1262 (D.C. Cir. 2011). Such laws are upheld only if they are "substantially related to an important government objective." *Kanter*, 919 F.3d at 448. On the other hand, laws that *do* substantially burden the core Second Amendment right are subject to strict scrutiny and are therefore upheld only if narrowly tailored to promote a compelling government objective. *See, e.g.*, *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013). This consensus approach

has been adopted by eleven of the federal circuits,[6] as well as by several state supreme courts.[7]

The Wisconsin Supreme Court recently adopted this consensus approach in *State v. Roundtree*, 2021 WI 1, 395 Wis. 2d 94, 952 N.W.2d 765, *cert. denied*, *Roundtree v. Wisconsin*, 142 S. Ct. 100 (2021), and used this consensus approach here to analyze Wisconsin's extremely limited prohibition on armed intoxication. The court first assumed, without

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[6] *Gould v. Morgan*, 907 F.3d 659, 670–71 (1st Cir. 2018); *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *National Rifle Ass'n of America, Inc. v. McCraw*, 719 F.3d 338, 346–47 (5th Cir. 2013); *Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir. 2018); *Ezell v. City of Chicago (Ezell II)*, 846 F.3d 888, 892 (7th Cir. 2017); *Teixeira v. County of Alameda*, 873 F.3d 670, 681–82 (9th Cir. 2017); *United States v. Reese*, 627 F.3d 792, 800–801 (10th Cir. 2010); *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252–53 (D.C. Cir. 2011).

[7] *Norman v. State*, 215 So.3d 18, 35 (Fla. 2017) ("[W]e apply the two-step analysis that has been employed by the United States Court of Appeals for the Eleventh Circuit . . . and nearly every other federal circuit court of appeal after *Heller* and *McDonald* to determine the appropriate the level of scrutiny."); *State v. DeCiccio*, 105 A.3d 165, 187 (Conn. 2014); *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 654–55 (Del. 2017); *Hertz v. Bennett*, 751 S.E.2d 90, 93 (Ga. 2013); *People v. Chairez*, 104 N.E.3d 1158, 1167 (Ill. 2018); *Pohlabel v. State*, 268 P.3d 1264, 1267 (Nev. 2012); *City of Seattle v. Evans*, 366 P.3d 906, 918 (Wa. 2015) (en banc).

deciding, that section 941.20(1)(b)[8] regulated conduct that falls within the scope of the Second Amendment as originally understood. (Pet-App. 108.) The court then explained that section 941.20(1)(b) did not affect Christen's core Second Amendment right to armed self-defense because, as the jury concluded, he did not arm himself in self-defense. (Pet-App. 107.)

Applying intermediate scrutiny, the court explained that the law was substantially related to the important governmental objective of "protecting people from harm from the combination of firearms and alcohol." (Pet-App. 111.) The Wisconsin Supreme Court's decision was correct, unremarkable, and was based on the well-established consensus approach to Second Amendment challenges among the federal circuits and several state courts. It therefore presents no need for this Court's review.

Christen claims that "[t]he facts of this case are straightforward and simple," allowing this Court to focus entirely on the law. (Pet. 14.) But in the very next breath he asserts, as if it were a proven fact of the case, that he "found himself in a situation where it was necessary to go armed in case of confrontation." (Pet. 14.) This is false. On the contrary, the jury found

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[8] Wisconsin Stat. § 941.20(1)(b) is far less restrictive than most firearm regulations reviewed by the federal circuit cases, many of which involved permanent bans from even *possessing* a firearm.

that he did not arm himself in self-defense. (Pet-App. 109.)

Christen also argues that the Second Amendment right to carry weapons "in case of confrontation" is broader than Wisconsin's statutory self-defense privilege, (Pet. 21), but this argument fails for two reasons.

First and most importantly, Christen forfeited this argument by failing to develop it in the Wisconsin Supreme Court. The Wisconsin Supreme Court held that Christen failed to develop an argument that the scope of the Second Amendment right was broader than Wisconsin's self-defense privilege. (Pet. 109.) Specifically, the Wisconsin Supreme Court held:

> Christen does not assert that the self-defense jury instruction was flawed. Furthermore, Christen does not assert that the scope of the self-defense jury instruction contradicts the scope of self-defense that the Second Amendment protects. As such, we will not develop this argument for him. *See Serv. Emp. Ind Union, Loc. 1 v. Vos*, 2020 WI 67, 524. 393 Wis. 2d 38, 946 N.W.2d 35 ("We do not step out of our neutral role to develop or construct arguments for parties; it is up to them to make their

> case."). Accordingly, we assume, without deciding, that the scope of the self-defense jury instruction is commensurate with the scope of self-defense that the Second Amendment protects.

(Pet. 109.) Thus, while it might be true that the Second Amendment right is broader than Wisconsin's statutory self-defense privilege, that is not an issue in this case.

Second, the facts at trial showed that Christen picked up his gun not "in case of confrontation," but to intimidate his roommates' unarmed, invited guest. Based on the evidence presented at trial, the jury did not conclude that Christen picked up his firearm because he found it "necessary to go armed in case of confrontation." (Pet. 15.) Rather, he picked it up to intimidate his roommate's unarmed guest because he was annoyed by the guest's innocuous request to come and have a drink with him. (Pet-App. 103.) And the fact that Christen later went into the occupied kitchen to retrieve a piece of string cheese from the fridge (Pet. 12), disproves any possible argument that he found it "necessary to go armed in case of confrontation." (Pet. 15). If Christen had had any concern whatsoever about the possibility of a physical or armed confrontation, he surely would not have

chosen to risk his health or his life for a piece of string cheese.

Simply put, the State of Wisconsin has never conceded—nor has any factfinder ever found—that Christen's decision to arm himself had anything to do with self-defense. To the contrary, the jury rejected his self-defense claim.

Christen also argues that slight differences in framing among the circuits lead to the Second Amendment right being "protected differently in each jurisdiction." (Pet. 13.) This also is not true. Christen is correct that while most circuits apply either intermediate or strict scrutiny depending on whether a law implicates the core Second Amendment right, others use a sliding scale between intermediate and strict scrutiny depending on how close a restriction comes to the core right. *Compare United States v. Jimenez*, 895 F.3d 228, 234 (2d Cir. 2018), *with Kanter*, 919 F.3d at 441. But these two approaches are functionally identical and Christen does not posit even a single scenario in which they could lead to divergent results. More importantly, any possible difference has nothing to do with this case because, as explained above, this case does not implicate the core Second Amendment right to armed self-defense.

Finally, Christen appears to argue that the federal circuits' consensus approach, which uses strict

scrutiny for restrictions on the core Second Amendment right and intermediate scrutiny for restrictions that do not, offers insufficient protection for that right. (Pet. 18–19.) But the tiers of scrutiny approach is very similar to the approach courts use to protect the fundamental First Amendment right to free speech. Courts use strict scrutiny for content-based restrictions on speech in a public forum, for example, while content-neutral time, place, and manner restrictions trigger intermediate scrutiny. *Marzzarella*, 614 F.3d at 96–97. It is not clear from Christen's argument why this framework, which is sufficient to protect the sacred First Amendment right to free speech, would somehow be insufficiently protective when applied to the Second Amendment right to bear arms.

The Wisconsin Supreme Court's decision in this case broke no new ground. The court relied on widely established precedent that Christen has presented no good reason to unsettle. This Court should therefore deny the petition.

II. This case is a poor vehicle for clarifying the framework to review Second Amendment challenges because Wis. Stat. § 941.20(1)(b) is plainly constitutional even under *Christen's* proposed framework.

The federal circuits' established approach to reviewing Second Amendment challenges is clear and requires no overhaul. Even if this Court disagreed, this case would be a poor vehicle for establishing a new framework. Even under *Christen's* proposed new framework based on text, history, and tradition, section 941.20(1)(b) is plainly constitutional. Under either framework, this is not a close case.

Under *Christen's* proposed framework, courts would not use the tiers of scrutiny to examine Second and Fourteenth Amendment challenges, but would instead look the text, history, and tradition to gain insight into the original public meaning of the right to bear arms. (Pet. 8); *Heller (Heller II)*, 670 F.3d at 1285 (Kavanaugh, J., dissenting). This was the approach proposed by Justice Hagedorn in his concurrence in this case (Pet-App. 113–18), as well as by Justice DeWine in his concurrence in *Weber*, 168 N.E.3d 468 (DeWine, J., Concurring).[9] But *Christen* would not

[9] This Court recently denied certiorari in *Weber v. Ohio*, 142 S. Ct. 91 (2021), a case nearly identical to this one in which the Ohio Supreme Court similarly rejected a defendant's claim that

prevail under this alternative approach because the text, history, and tradition of the Second and Fourteenth Amendments are clear that states may constitutionally proscribe armed intoxication.

As Justice Hagedorn explained in his concurrence in this case, "the historical record suggests states could permissibly curtail the reckless handling of firearms and recognized the aggravating nature of intoxication, particularly when paired with weapons." (Pet-App. 116.) As early as 1655, Virginia law prohibited firing a gun while intoxicated. Act of March 10, 1655, 1655 Va. Laws 401-02; (Pet-App. 116.) Justice Haggedorn also noted that New York in 1785 and Pennsylvania in 1774 prohibited firing a gun on New Year's due to the dangers posed by armed intoxication. An Act to Suppress the Disorderly Practice of Firing Guns, etc., on the Times Therein Mentioned, 1759-1776 Pa. Acts 421, § 1; An Act to Prevent the Firing of Guns and other Fire Arms within this State on Certain Days Therein Mentioned, 1784-1785 N.Y. Laws 152; (Pet-App. 116.) These prohibitions align with the general historical understanding that "legislatures have the power to prohibit dangerous persons from possessing guns."[10]

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the Second Amendment protected his right to armed intoxication. *State v. Weber*, 168 N.E. 3d 468 (Ohio 2020).

[10] Again, section 941.20(1)(b) does not even prohibit an intoxicated person from possessing a gun. It merely prohibits an

Kanter, 919 F.3d at 451 (Barrett, J., Dissenting). As explained above, an abundance of data supports the commonsense notion that an intoxicated individual with a firearm poses a tremendous danger to himself and others. (Pet-App. 112.)

Several laws passed shortly before and after the passage of the Fourteenth Amendment, which incorporated the fundamental right to armed self-defense against the states, *McDonald*, 561 U.S. at 767, confirm that pursuant to the original public meaning of the Second and Fourteenth Amendments, states may constitutionally prohibit armed intoxication.

For example, an 1868 Kansas law prohibited anyone "under the influence of intoxicating drink" from "carrying on his person a pistol, bowie-knife, dirk or other deadly weapon." 2 General Statutes of the State of Kansas 353 (1897). Texas followed suit in 1871, *English v. State*, 35 Tex. 473, 474–77 (1871), as did Missouri in 1883, *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886). Similarly, an 1878 Missouri law prohibited the sale of firearms to an intoxicated individual or a minor. An Act to Prevent the Carrying of Concealed Weapons and for Other Purposes, 1878 Miss. Laws 175, § 2. (Pet-App. 117.)

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intoxicated person from operating or carrying a gun during the brief period of time in which he has chosen to become intoxicated.

Even on a more general level, it has long been understood that states may constitutionally prohibit reckless or dangerous handling of firearms. Several states, for example, have long prohibited the reckless brandishing of a weapon when not in self-defense, even if the weapon is not fired. This includes Mississippi in 1840[11]; Washington in 1854[12]; California in 1855[13]; Idaho in 1864[14]; Texas in 1866[15]; and Arizona in 1867.[16] *See generally Kanter*, 919 F.3d at 451 (Barrett, J., Dissenting) ("[L]egislatures have the power to prohibit dangerous persons from

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[11] Volney Erskine Howard, *The Statutes of the State of Mississippi of a Public and General Nature, with the Constitutions of the United States and of this State: And an Appendix Containing Acts of Congress Affecting Land Titles, Naturalization, and a Manual for Clerks, Sheriffs and Justices of the Peace* 676 (1840). (Pet-App. 116.)

[12] An Act Relative to Crimes and Punishments, and Proceedings in Criminal Cases, 1854 Wash. Sess. Law 80, ch. 2, § 30. (Pet-App. 116.)

[13] William H.R. Wood, Digest of the Laws of California: Containing All Laws of a General Character Which were in Force on the First Day of January, 1858 at 334 (1861) (Pet-App. 116.)

[14] An Act Concerning Crimes and Punishments, 1864 Id. Sess. Laws 304, § 40 (Pet-App. 116.)

[15] George Washington Paschal, 2 A Digest of the Laws of Texas: Containing Laws in Force, and the Repealed Laws on Which Rights Rest 1321 (1873) (Pet-App. 116.)

[16] An Act to Prevent the Improper Use of Deadly Weapons and the Indiscriminate Use of Fire Arms in the Towns and Villages of the Territory, 1867 Ariz. Sess. Laws 21-22, § 1. (Pet-App. 116–17.)

possessing guns."). As explained above, carrying a firearm while intoxicated is unquestionably reckless and dangerous. "The extreme danger posed by a drunken person with a gun is real and cannot be over emphasized." *People v. Wilder*, 861 N.W.2d 645, 653 (Mich. Ct. App. 2014).

For these reasons, section 941.20(1)(b) would plainly be constitutional under Christen's proposed approach to analyzing Second Amendment challenges. Therefore, even if this Court determined that clarification of the framework for Second amendment challenges were needed, this case would be a poor vehicle to do so. Even under Christen's proposed approach, section 941.20(1)(b) would be constitutional both on its face and as applied to the facts of Christen's case.[17]

[17] Again, no factfinder has found that Christen picked up his gun in self-defense or in case of confrontation. He picked it up for the sole purpose of *starting* a confrontation with a nonthreatening guest. The State of Wisconsin maintains, as the jury concluded, that Christen's decision to handle his gun while intoxicated had nothing to do with self-defense.

CONCLUSION

The petition should be denied.

Dated: December 29, 2021.

Respectfully submitted,

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