No. 21-5905

In the

Supreme Court of the United States

Mitchell L. Christen,
Petitioner

v.

State of Wisconsin
Respondent

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

Reply Brief for Petitioner

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Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Statutory Provisions

Reply Brief

The Respondent's Brief in Opposition to Mr. Christen's Petition for Writ of Certiorari reinforces how critical it is for this Court to accept review and clarify this enumerated constitutional right for the country.

First, the respondent argues the federal circuits have "developed a consensus framework for analyzing Second Amendment challenges that is faithful to *Heller*, *McDonald*, and the Second Amendment. This statement ignores the plain language of the federal circuit opinions clearly applying divergent standards for Second Amendment challenges. More importantly, it ignores the commands of *Heller* and *McDonald*, which prohibit the use of an interest balancing test–the approach which now dominates the lower courts.

Next, the respondent argues Mr. Christen's Second Amendment right was not violated as a jury found Mr. Christen did not engage in self-defense. The respondent confuses acting in lawful self-defense with arming oneself in case of confrontation. The first is a natural right and affirmative defense. The second, an enumerated constitutional right. The respondent also ignores the multi-step test fashioned by the circuit court. This test places significant burdens on Mr. Christen's

constitutional right which are inconsistent with a constitutional guarantee.

Finally, the respondent argues Wis. Stat. §941.20(1)(b) is plainly constitutional. It cites to laws passed after the ratification of the Second Amendment to support the statute. These laws do not provide much insight into the original meaning of the Amendment. This flawed methodology is beginning to find its way into lower court decisions. Should this Court reinforce *Heller* and *McDonald*'s commands to analyze the text, history, and tradition of the Second Amendment, the bench and bar would benefit from further guidance in conducting this textual and historical analysis.

I. The Lower Courts Have Not Developed a Uniform Framework to Protect the Second Amendment Right Consistent with *Heller*.

The respondent is correct when it claims that eleven of the federal circuit courts and several state supreme courts have adopted some form of a "tripartite binary test with a sliding scale and a reasonable fit" to analyze Second Amendment claims *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020)(Internal citations omitted).

The respondents ignores the division amongst the courts as to what the "core right" is. 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. 2012); *United States v. Marzzarella*, 614 F. 3d 85, 94 (3d Cir. 2010). The Fourth Circuit is internally divided, first stating 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, *United States v. Chester*, 628 F. 3d 673, 683 (4th Cir. 2010), but then 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). This Court is well aware of the entrenched circuit split over whether ordinary citizens may carry handguns outside of the home, but the respondent chooses to ignore a case presently in front of this Court. *New York State Rifle & Pistol Association, Inc., Robert Nash, Brandon Koch, v. Kevin P. Bruen* (No. 20-843).

Continuing to gloss over the relevant caselaw, the respondent claims the level of scrutiny courts are applying is based on how close a challenged law strikes to the "core right" and how substantial the burden on the right is.[1] While citing to *Ezell v. City of Chicago*, it

[1] PET 17, n7. This analytical method is entirely circular and self-determinate.

ignores the Seventh Circuit's rejection of the traditional categories of rational, intermediate, and strict scrutiny, and has adopted a sliding scale to evaluate Second Amendment claims. *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011). The Second Circuit refuses to apply weighted scrutiny unless 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 respondent attempts to paint a picture of a harmonious methodology. When one departs the headnotes of the cases, this picture falls apart. The lower courts methodology is producing chaos which can only be corrected by this court.

The respondent claims this analytical method is "faithful to *Heller*, [and] *McDonald*". It spends nearly ten pages on its argument– there is no mention of *Heller* or *McDonald* after the first page and a half. BIO 9-19. It invokes what little remains of *Heller*, "the right secured by the Second Amendment is not unlimited…and 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". BIO 10. The respondent utterly ignores the back and forth between the majorities in *Heller I* and *McDonald* and Justice Breyer's dissent in both cases. Justice Breyer advocated for a "judge-empowering interest balancing inquiry asking whether the statute

burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important interests." *Heller v. District of Columbia,* (*Heller II*), 670 F.3d 1244, 1277 (D.C. Cir. 2011). The *Heller* majority emphatically rejected this approach. *Id*. The *McDonald* court explicitly acknowledged Justice Breyer's opinion in *Heller I*, and again rejected the interest balancing approach stating:

> Justice Breyer is incorrect that incorporation will require judges to assess the cost and benefits of firearm restrictions and thus to make difficult empirical judgements in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. *Id*., at 1279, quoting *McDonald* at 790-791 (internal citations omitted).

The respondent, like the lower courts, seem to have forgotten this. The respondent offers no explanation of how the "tripartite binary test with a sliding scale and a reasonable fit" fashioned by the lower courts could possible comply with binding opinions which forbade an interest balancing approach. This Court should grant certiorari to correct the lower courts refusal to comply with the commands of this Court.

II. TheRespondent Continues to Assert Mr. Christen Did Not Act In Self-Defense. This is Inaccurate and Irrelevant.

The respondent argues Wis. Stat. §941.20(1)(b) does not affect Mr. Christen's core Second Amendment right because a jury found he did not act in self defense.[2] BIO.14. The Second Amendment guarantees the right to keep and bear arms for the purpose of being ready for offensive or defensive conflict. *Heller*, at 584. Notably, the Second Amendment does not provide a blanket protection for the operation of firearms. It only guarantees the right to bear and keep arms. Self-defense is a natural right, and an affirmative defense to allegations not protected by the Second Amendment, e.g. discharging a firearm towards another.

If this Court choses to indulge the respondent's red herring argument, a simple analysis of the jury instructions reveals how flawed this argument is, and how severely the statutory scheme

[2] This claim was raised for the first time in the State's response brief in before the Supreme Court of Wisconsin. Mr. Christen's motion to dismiss the charge, the motion this appeal stems from, was filed well in advance of trial.

ignores *Heller* and the guarantees of the Second Amendment. The jury was instructed:[3]

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 going 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.

First, Mr. Christen's right to armed self defense was only permissible if he reasonably believed he was subject to death or great bodily harm. This imposes a restriction based on the severity of harm possible as well as imposing a reasonableness requirement on Mr. Christen's constitutional right to bear arms.

Writing for the majority in *Heller*, Justice Scalia provides a detailed history of the purpose of the Second amendment. *Heller*, 554 U.S. 581-596. The textual elements placed together "guarantee the individual right to possess and carry weapons in case of confrontation".

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[3] This jury instruction is more restrictive than if Mr. Christen had actually used force. The pattern jury instructions for self defense: force intended or likely to cause death or great bodily harm only requires a defendant to demonstrate he reasonably believed there was an actual or imminent unlawful interference with his person and he reasonably believed the amount of force used or threatened was necessary to prevent imminent death or great bodily harm to himself. Wis JI-Criminal 805.

Heller, at 592. Further the *Heller* court instructs there is a well understood natural right to repel force by force to prevent an injury. *Id*. at 595. The natural right protected by the Second Amendment does not require a belief of imminent great bodily harm, or even a belief of imminent confrontation. Imposing such a restriction is inconsistent with the text and tradition of the Second Amendment.

Even more troubling is the requirement of a reasonable belief imposed by the circuit court's instructions. The enumeration of a constitutional right removes the power of all three branches of government to decide on a case by case basis whether the right is worth insisting upon. *Heller*, at 634. A constitutional guarantee subject to future assessments of reasonableness and usefulness is no guarantee at all. *Id*. The Second Amendment is the very product of an interest balancing of the people, and having a jury conduct an assessment of reasonableness any time someone asserts their constitutional rights defeats the purpose of the constitutional guarantee.

The second restriction placed on Mr. Christen's right to bear arms for self-defense is equally ignorant of the Second Amendment and Heller's guidance. The instruction allows Mr. Christen to exercise his right to bear arms only if he reasonably believed there was no other

way to avoid the threatened harm. This again imposes an additional improper reasonableness requirement, and requires Mr. Christen to consider alternative measures before arming himself. As noted above, requiring a reasonableness to Mr. Christen's actions is inappropriate. Requiring Mr. Christen to consider alternative measures also runs afoul of the Second Amendment. The Second Amendment guarantees the right to bear arms in case of confrontation. There is no such qualifications to the guarantee, and the guarantee is a product of interest balancing by the people. Reevaluating the constitutional guarantee on a case by cases is no guarantee at all.

There is no support for a restriction an individual may not place themselves in a position where they may be forced to go armed. Early American settlers knowingly expanded into land populated by the indigenous peoples of America. It is absurd to suggest because they recklessly, negligently, or even knowingly placed themselves in situations where it was probable they would need to go armed, they deprived themselves of the natural right to armed self-defense.

The circuit court further imposed a temporal restriction on Mr. Christen's right to armed defense. First, there is no suggestion Mr. Christen went armed prior to being in a situation where confrontation

was actively occurring.[4] Mr. Christen was in his home with four other people, with whom he had severe disagreements and a history of confrontations. There was absolutely the possibility of further confrontations as the four would not leave Mr. Christen be until he armed himself.[5] Secondly, the temporal restriction is not supported by the Heller Court's guidance on the Second Amendment. As the Court noted the Second Amendment guarantees the individual right to possess and carry weapons in case of confrontation. Heller, at 592. The Second Amendment does not require an actualized threatened harm.

The respondent makes the bold assertion Mr. Christen did not act in self-defense, and the jury found this beyond a reasonable doubt. This is inaccurate; they jury found Mr. Christen did not act lawfully act in self-defense. However, the conditions for acting lawfully do not comport with the guarantees of the Second Amendment, and impose restrictions which have been rejected by binding Supreme Court precedent

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[4] The respondent asserts Mr. Christen was the instigator of this conflict. It is irrelevant who started the conflict. Further, it is not contested the living arrangement had become so contentious, Mr. Christen had made plans to move the very next day.

[5] The respondent asserts "MA testified that Christen pointed the gun at him." BIO 3. This is demonstrably false. When MA was asked if he said anything to another roommate about a gun being pointed at him, MA responded "No, I can't remember that". When asked if he believed a gun was pointed at him, MA responded "No, I can't remember". When MA was asked if he told police officers Mr. Christen pointed a gun at him, he responded, "No, I can't remember".

III. The Historical Analysis Offered by the Respondent is Unpersuasive

The respondent attempts to justify the Wis. Stat. §941.20(1)(b) using laws passed shortly before and after the passage of the Fourteenth Amendment. This approach has now been utilized by Justice Hagedorn in this case, as well as Justice DeWine in *State v. Weber*, 163 Ohio St. 3d 125, 2020-Ohio-6832, 168 N.E.3d 468. 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 earliest of these laws was enacted multiple generations after the Second Amendment was ratified. These laws "do not provide as much insight into its original meaning as earlier sources. *Heller*, at 614. This Court should grant certiorari to instruct the bench and bar as we begin to conduct analysis based on a body of evidence susceptible to reasoned analysis rather than the balancing of a variety of vague ethico-political principles the lower courts have indulged in.

Conclusion

Mr. Christen respectfully request the Court grant certiorari in this case and correct the course the lower courts have charted for Second Amendment claims.

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Respectfully submitted,

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