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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP594-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEEVAN ROUNDTREE,

Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction, the Honorable William Pocan Presiding, and the Decision and Order Denying Postconviction Relief, the Honorable David A. Hansher Presiding, Entered in the Milwaukee County Circuit Court.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

Like many people, Leevan Roundtree kept a gun in his bedroom for the protection of his home and his family. He was not supposed to possess a gun because, over a decade ago, he was convicted of failure to pay child support—a felony offense. Under the sweeping language of Wis. Stat. § 941.29(2)(2015)[1], every person convicted of a felony—even a felony involving no physical violence—is banned from possessing a firearm for the rest of his life. The ban has no time limit and the statute contains no mechanism by which a person may petition for the return of his constitutional right to keep and bear arms. At issue in this case is whether Wisconsin's lifetime firearm ban is unconstitutional as applied to Mr. Roundtree, who was convicted over ten years ago of failure to pay child support, a nonviolent felony.

The postconviction court declined to reach the merits of this issue, finding that Mr. Roundtree's plea forfeited his right to challenge the constitutionality of the firearm statute.

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[1] Mr. Roundtree was convicted under Wis. Stat. § 941.29(2). Since then, the legislature repealed and renumbered subsection (2) to (1m)(a), leaving the language essentially the same. *See* 2015 Wisconsin Act 109. Unless otherwise indicated, all statutes in this brief refer to the statute in place at the time of Mr. Roundtree's offense, October 30, 2015. (1).

The court of appeals did not address whether the guilty plea waiver rule barred Mr. Roundtree from pursuing his as-applied constitutional challenge, finding that the argument failed on the merits.

POSITION ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed this case appropriate for oral argument and publication.

STATEMENT OF FACTS

On October 30, 2015, Milwaukee police executed a search warrant at Mr. Roundtree's home where he lives with his wife and four adult children. (1:1; 44:5). A revolver and bullets were found in his bedroom, underneath his mattress. (1:1).

The state charged Mr. Roundtree with one count of possession of a firearm by a felon, contrary to Wis. Stat. § 941.29(2). (1:1). The complaint alleged that Mr. Roundtree had previously been convicted in Milwaukee County Case No. 2003-CF-2243, for failure to support a child (120+ days), a Class I felony, contrary to Wis. Stat. § 948.22(2). (1:1-2).[2]

[2] According to the state at sentencing, Mr. Roundtree was convicted of two counts of failure to pay child support in 2003-CF-2243 and two counts of failure to pay child support in an earlier 2003 Milwaukee County case. (47:5). The State (continued)

Mr. Roundtree promptly entered a guilty plea on January 5, 2016 to a single count of felon in possession of a firearm as charged. (46; 18). At his subsequent sentencing hearing, the state noted:

> Our office's general position is that, if you are a felon and you have a gun, absen[t] extraordinary circumstances, we recommend prison. It's appropriate given the nature of these offenses.
>
> And, perhaps, you can make the argument that it's unfair to Mr. Roundtree that the general problem of guns that we have in our town rubs off on him a little bit; but it does. We have a huge gun problem here. And the rule is, if you are a convicted felon whether it's for child support or murder, it doesn't matter, you can't have a gun.
>
> And this particular gun had been reported stolen out of Texas. The defendant told police that had he known that it was stolen, he would not have bought it. But then at one point then he didn't know he couldn't have a gun [sic]. But he didn't buy this at a gun club, obviously. He bought it he said from some kid on the street or words to that effect.
>
> *So, Mr. Roundtree has not been a problem for society at large; it's a problem for his kids*. He's not paying his child support. But that's something that I'm assuming since those cases haven't come back up, I'm assuming or guessing that he [has] … taken care of that.

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indicated that Mr. Roundtree was sentenced in both cases at the same time and received probation. (*Id.*).

(47:6-7) (emphasis added).

The defense noted Mr. Roundtree, who was forty-seven years old at the time of sentencing, was an older individual and was not "young and reckless." (47:10). Defense counsel argued Mr. Roundtree "did not have a lengthy habitual criminal record. His prior felony is for failure to pay child support which, in itself, is not an inherently dangerous crime. He has not engaged in considerable acts of violence. Mr. Roun[d]tree has six (6) kids. Unfortunately, he did not uphold to [sic] his father responsibilities in these kinds of cases." (47:7). The defense further noted that Mr. Roundtree "actually did not know that he was prohibited from possessing a firearm" and "even had a hunting license." (47:7-9).

The Honorable William S. Pocan sentenced Mr. Roundtree to eighteen months of initial confinement and eighteen months of extended supervision. (47:19; 18:1).

Mr. Roundtree filed a postconviction motion, arguing that Wisconsin's felon in possession of a firearm statute was unconstitutional as applied to him. (29). The postconviction court ordered briefing, after which it entered an order holding the postconviction motion in abeyance pending a decision in *Class v. United States*, 138 S.Ct. 798 (2018), in which the United States Supreme Court was considering whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction. (30; 33).

After the United States Supreme Court issued a decision in *Class* holding that a guilty plea does not waive a claim that a charge is unconstitutional, the postconviction court issued a decision. (40). Despite the holding in *Class,* the Honorable David A. Hansher determined that Mr. Roundtree waived his constitutional challenge to his conviction by entering a guilty plea. (40:2; App.107). In addition, the court explained that it was not persuaded that this case "raises an issue of state-wide importance which would warrant putting aside the guilty plea waiver rule." (40:2-3; App.107-108).

Mr. Roundtree appealed. The court of appeals, in a per curiam decision, found that the firearm ban was constitutional as applied to Mr. Roundtree. *State v. Roundtree*, No. 2018AP0594, ¶ 12 (April 4, 2019) (unpublished) (App. 105). The court of appeals rejected the proposition that "it matters what particular nonviolent felony is the subject of the underlying conviction" and explained it was bound by its previous decisions in *State v. Pocian*, 2012 WI App 58, 341 Wis. 2d 380, 814 N.W.2d 894 (holding that the felon in possession statute was constitutional facially and as applied to a defendant whose three underlying felonies involved "physically taking a victim's property"), and *State v. Culver,* 2018 WI App 55, 348 Wis. 222, 918 N.W.2d 103 (holding that the firearm ban was constitutional as applied to a defendant whose underlying felony was for an operating while intoxicated, fourth offense). *See Roundtree*, No. 2018AP0594, ¶¶ 8-11 (App. 104-05).

Mr. Roundtree filed a petition for review from the decision of the court of appeals, which this Court granted.

Additional facts will be included as necessary below.

ARGUMENT

I. Wisconsin's lifetime firearm ban for all felons is unconstitutional as applied to Mr. Roundtree, who was convicted over ten years ago of failure to pay child support, a nonviolent felony.

A. Introduction.

Wisconsin Stat. § 941.29(2) provides that a person convicted of a felony in this state:

> [I]s guilty of a Class G felony if he or she possesses a firearm under any of the following circumstances:
>
> (a) The person possesses a firearm subsequent to the conviction for the felony or other crime, as specified in sub. (1)(a) or (b).

This statute bars a person convicted of *any* felony from possessing a firearm after that conviction—forever.[3] Wis. Stat. § 941.29(2). The

[3] Notably, there are hundreds of crimes that amount to felonies in Wisconsin: adultery; income tax evasion; theft of (continued)

statute does not distinguish between serious felonies, such as first-degree intentional homicide punishable by life in prison, and less serious felonies, such as releasing an animal three times without authorization, which carries a maximum potential term of initial confinement of eighteen months. *See* Wis. Stat. §§ 940.01; 943.75 (2). Nor does it distinguish between violent felonies and non-violent felonies. *Compare with* Wis. Stat. § 941.291 (prohibiting persons convicted of a violent felony from possessing body armor); *see also* Wis. Stat. §§ 301.048(2)(bm)1.a, 973.017(5)(a)2.

As a previous decision observed regarding Wisconsin's statutory designations:

> One man beats his wife, harming her physically and emotionally and traumatizing their children who witness the assault. He may, however, *only* have committed battery, a misdemeanor punishable by less than one year in jail. Another man enters a garage to steal a shovel; he has committed burglary, punishable by years in prison.
>
> One woman drives while intoxicated, threatening the lives of countless citizens. Under Wisconsin's drunk driving laws—the weakest in the nation—she has committed a *non-criminal* offense if it is her first, or only a misdemeanor unless it is her fifth (or subsequent) offense. Another woman,

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farm-raised fish, twice; graffiti; unlawful use of a recording device in a motion picture theater, twice; falsifying business documents; or forgery.

> however, forges a check; she has committed a felony.
>
> The felony/misdemeanor statutory designations are replete with anomalies such as these . . . .

State v. Thomas, 2004 WI App 115, ¶¶ 47-49, 274 Wis. 2d 513, 683 N.W.2d 497 (Shudson, J., concurring) (footnote omitted).[4]

The statute also does not contain a time limit for a felon's firearm dispossession, nor does it provide any mechanism by which a felon may petition for reinstatement of their rights in the future. Wis. Stat. § 941.29(2).

Rather, a person who possesses a firearm at any time, if they have previously been convicted of any kind of felony, is always subject to prosecution for a Class G felony in Wisconsin, which carries a maximum possible penalty of ten years in the Wisconsin state prison system, and/or a $25,000 fine. Wis. Stat. §§ 941.29; 939.50(3)(g).

In this case, as discussed below, Wis. Stat. § 941.29(2) is unconstitutional as applied to Mr.

[4] *Thomas* applied the rational basis test to analyze a challenge to Wis. Stat. § 941.29. *See Thomas*, 2004 WI App 115, ¶¶ 21, 23. In *District of Columbia v. Heller*, 554 U.S. 570, 628 n. 27 (2008), however, the United States Supreme Court held that this test was improper when analyzing a Second Amendment challenge.

Roundtree, who was convicted over ten years ago of failure to pay child support, a nonviolent felony.

B. Standard of review.

The constitutionality of a statute is a question of law which this Court reviews de novo. *State v. Baron*, 2009 WI 58, ¶ 10, 318 Wis. 2d 60, 769 N.W.2d 34.

Usually, courts presume the constitutionality of a statute. *See State v. Alger*, 2015 WI 3, ¶ 22, 360 Wis. 2d 193, 858 N.W.2d 346. However, a law that is challenged on Second Amendment grounds is *not* presumed constitutional. *State v. Herrmann*, 2015 WI App 97, ¶ 11, 366 Wis. 2d 312, 873 N.W.2d 257 (citing *Ezell v. City of Chicago*, 651 F.3d 684, 706 (7th Cir. 2011); *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008)). Rather, the state has the burden of establishing the law's constitutionality. *Id.*

C. Individuals have a right to keep and bear arms.

The Second Amendment to the United States Constitution provides that "[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." Similarly, Article I, Section 25 of the Wisconsin Constitution, states "[t]he people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."

As this Court recently stated, "[t]his is a species of right we denominate as 'fundamental,' reflecting our understanding that it finds its protection, but not its source, in our constitutions." *Wisconsin Carry*, *Inc. v. City of Madison*, 2017 WI 19, ¶ 9, 373 Wis. 2d 543, 892 N.W.2d 233. (citation omitted).

In 2008, the United States Supreme Court held that the Second Amendment confers an "individual right to keep and bear arms," rejecting an argument that the amendment conferred only a collective right limited to militia members. *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008). The Court's historical analysis noted that the predecessor to the Second Amendment was the English Declaration of Rights in 1689, which assured that Protestants would never be disarmed. *Id.* at 592-95. By the time the United States was founded, the right secured in 1689 was "understood to be an individual right protecting against public and private violence." *Id.* at 593-94. The "central component" of the Second Amendment, the Court held, was individual self-defense. *Id.* at 599, 628-29.

Two years later, the Court extended the applicability of the Second Amendment to the states and struck down a ban on handguns. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).[5]

[5] Five Justices—Roberts, Scalia, Kennedy, Thomas, and Alioto—voted for the judgment of the Court that the Chicago handgun ban was unconstitutional and that the Second (continued)

Both *McDonald* and *Heller* acknowledged that, like the First Amendment and most other rights, the Second Amendment is not unlimited. *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786. However, neither case defined the precise limitations of the Second Amendment.

D. This Court should apply strict scrutiny.

Heller and *McDonald* did not identify the applicable level of judicial scrutiny that should be used to determine whether a law is unconstitutional under the Second Amendment. *Heller*, however, rejected the rational basis test and an interest-balancing test, suggesting that a heightened standard, such as strict scrutiny or intermediate scrutiny, should be used. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27, 634-35 (2008).

Since *Heller*, lower courts have used a variety of approaches to determine whether or not a law is unconstitutional under the Second Amendment. *See, e.g., United States v. Vongxay*, 594 F.3d 1111, 1115

Amendment applied to the states. Four voted to incorporate the Second Amendment via the Due Process Clause of the Fourteenth Amendment. *McDonald*, 561 U.S. at 747. Justice Thomas argued that the right to keep and bear arms is a privilege of American citizenship that applies to the states through the Fourth Amendment's Privileges or Immunities Clause. *Id.* at 806 (Thomas, J., *concurring*).

(9th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).[6]

In *Ezell v. Chicago*, the Seventh Circuit Court of Appeals suggested that the standard of scrutiny depends on how "close" the law is to the "core" of the Second Amendment right and the "severity of the law's burden on the right." *Ezell*, 651 F.3d 684, 703 (7th Cir. 2011). A severe burden on a core Second Amendment right requires an "extremely strong public-interest justification" and "a close fit between the government's means and its end." *Id.* at 708. Conversely, laws further from the core of the Second Amendment, such as those that "regulate rather than restrict" and create "modest burdens on the right" require a lesser burden. *Id.*

In *Ezell*, an ordinance mandated range training as a prerequisite to lawful gun ownership, yet, at the same time, prohibited all firing ranges in the city. *Id.* at 691. The court stated that the right to maintain proficiency in firearm use was an "important

[6] The Wisconsin Court of Appeals has previously applied an intermediate level of scrutiny to an as-applied challenge to the felon in possession of a firearm statute. *See State v. Culver*, 2018 WI App 55, ¶ 37, 348 Wis. 222, 918 N.W.2d 103; *State v. Pocian*, 2012 WI App 58, ¶ 11, 341 Wis. 2d 380, 814 N.W.2d 894; *State v. Rueden*, No. 2011AP1034-CR, ¶ 6 (WI App June 7, 2012) (unpublished) (App. 110). Mr. Roundtree respectfully requests that this Court overrule these cases regarding the applicable standard of scrutiny.

corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Id.* at 708. Holding that the regulation came close to the core of the Second Amendment right, the court used a standard that was "not quite 'strict scrutiny.'" *Id*.

Unlike the ordinance in *Ezell,* Wis. Stat. § 941.29(2) more severely burdens the Second Amendment core because it completely strips an individual of his right to bears arms. In *Ezell,* an individual who wanted to lawfully own a gun could simply travel outside the city to use a firing range. In contrast, under § 941.29 individuals convicted of a felony are never allowed to own a firearm. Thus, strict scrutiny should be applied.

To satisfy strict scrutiny, the provision "must be narrowly tailored to serve a compelling state interest." *Monroe Cnty. Dep't of Human Servs. v. Kelli B.*, 2004 WI 48, ¶ 17, 271 Wis. 2d 51, 678 N.W.2d 831. The United States Supreme Court has observed "that it is the rare case in which we have held that a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

If this Court rejects strict scrutiny, intermediate scrutiny should be applied. Intermediate scrutiny requires a state to demonstrate that the challenged statute serves an important government interest, and that the means used are substantially related to achieving that interest. *State v. Herrmann*, 2015 WI App 97, ¶ 11, 366 Wis. 2d 312, 873 N.W.2d 257. To survive

intermediate scrutiny, "the government must demonstrate 'that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" *Id.* (citation omitted).

As demonstrated below, even under an intermediate scrutiny standard, the government cannot meet its burden to establish that Wis. Stat. § 941.29(2) is constitutional as applied to Mr. Roundtree.

E. Statutes categorically banning felons from possessing firearms for life are subject to individualized as-applied constitutional challenges.

Heller and *McDonald* both struck down laws that banned the possession of handguns in the home. In *dictum*, the *Heller* decision noted, "although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *District of Columbia v. Heller,* 554 U.S. 570, 626 (2008). It added in a footnote, "[w]e identify these *presumptively* lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26 (emphasis added). *Heller*, also, warned that:

> since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field

> *. . . And there will be time enough to expound upon historical justifications for the exceptions we have mentioned if and when those exceptions come before us.*

Id. at 635 (emphasis added).

Heller's statement regarding the "presumptive" validity of felon gun dispossession statutes does not foreclose an as-applied challenge. By describing the felon disarmament ban as presumptively lawful, the Supreme Court implied that the presumption may be rebutted. *See United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010).

Thus, a number of courts, including Wisconsin, have examined whether firearm dispossession laws are unconstitutional as applied. *See, e.g., Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336 (3d Cir. 2016) (en banc) (concluding that the misdemeanor offenses of two challengers were not serious enough to strip them of their Second Amendment rights under the federal firearm statute); *Britt v. North Carolina*, 363 N.C. 546 (2009) (holding that a state statute prohibiting convicted felons from possessing a firearm was unconstitutional as applied to a man convicted of a non-violent felony drug charge that did not involve a gun 30 years ago); *Culver*, 2018 WI App 55 (holding that Wis. Stat. § 941.29 was constitutional as applied to a defendant who had been convicted of operating while intoxicated, a "plainly dangerous offense"); *Pocian*, 2012 WI App 58 (holding that Wis. Stat. § 941.29 was constitutional as applied to a defendant who

physically took his victim's property); *State v. Rueden*, No. 2011AP1034-CR, (WI App June 7, 2012) (unpublished) (App. 109-11) (holding that Wis. Stat. § 941.29 was constitutional as applied to a defendant who had been previously convicted of felony theft and whose current conviction involved stealing a handgun and selling it).

To raise an as-applied challenge, an individual must present facts about himself and his background that distinguish his circumstances from individuals historically barred from Second Amendment protections. *See Heller*, 554 U.S. at 605, 634-35; *Binderup*, 836 F.3d at 350-53 (3d Cir. 2016).

F. Mr. Roundtree is distinguishable from individuals historically barred from Second Amendment protections.

Legislatures have the power to prohibit people from possessing guns. However, that power extends only to people who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten public safety.

Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons. In 1791—and for well more than a century afterward—legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect the public. For a detailed discussion, *see Kanter v. Barr*, 919 F.3d 437, 453-58 (Barrett, J., *dissenting*) (7th Cir. 2019) (stating that "founding-era legislatures

categorically disarmed groups whom they judged to be a threat to the public safety. But neither the convention proposals nor historical practice supports a legislative power to categorically disarm felons because of their status as felons"); *Binderup*, 836 F.3d at 367-70 (Hardiman, J., *concurring in part and concurring in the judgments*) (stating that the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses or pose a danger to the public).

Wis. Stat. § 941.29's dispossession of *all* felons—both violent and nonviolent—is unconstitutional as applied to Mr. Roundtree, who failed to pay child support. Disarming Mr. Roundtree does not in any way advance public safety, but deprives him of his right to keep and bear arms for self-defense. Mr. Roundtree's failure to pay child support, which took place more than ten years ago, did not involve any physical or violent act that implicates public safety concerns. Likewise, this case also did not involve any physical or violent act. Mr. Roundtree was not walking around town with a gun in his pocket, nor was he transporting it in a vehicle. Rather, the handgun was found in his home under his mattress. (1:1).

Moreover, Mr. Roundtree's individual characteristics and background differ from the defendants in *Culver*, *Pocian*, and *Rueden* who previously challenged Wisconsin's lifetime firearm ban in light of *Heller* and *McDonald*.

In *Culver*, the defendant previously "committed crimes that could have caused death, bodily injury, or property damage." *State v. Culver,* 2018 WI App 55, ¶ 47, 348 Wis. 222, 918 N.W.2d. The court of appeals stated that "Culver's crime–OWI—may be nonviolent, but it is plainly dangerous." *Id.*

And, in both *Pocian* and *Rueden*, the defendants physically took property. *See State v. Pocian*, 2012 WI App 58, ¶ 15, 341 Wis. 2d 380, 814 N.W.2d 894 (stating that the defendant's three previous felonies for "uttering a forged writing" involved "physically taking a victim's property); *State v. Rueden*, No. 2011AP1034-CR, ¶ 10, (WI App June 7, 2012) (unpublished) (App. 109-11) (stating that the defendant's prior offense involved going onto another person's property and stealing from a shed and his current offense involved stealing a handgun and selling it).

In contrast, here, there are no allegations that Mr. Roundtree has committed any crimes "that could have caused death, bodily injury, or property damage" or that he stole or damaged property. *Contrast also with Williams*, 616 F.3d 685 (7th Cir. 2010) (rejecting an as-applied challenge brought by a defendant convicted of felony robbery who "beat[] the victim so badly that the victim required sixty-five stitches"); *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc) (rejecting an as-applied challenge brought by a domestic violence misdemeanant because violence was "an element of

the offense" and data suggested high rates of recidivism).

Therefore, Mr. Roundtree's conduct does not logically support forever barring him from possessing a firearm to protect himself and his home. Mr. Roundtree poses no danger to public safety, and, therefore, no justification exists to permanently deprive him of his fundamental right to keep and bear arms for self-defense. As a result, Wis. Stat. § 941.29 as applied to Mr. Roundtree is not narrowly tailored to the state's interest in public safety nor is it substantially related to achieving that interest.

G. This Court should not apply waiver to Mr. Roundtree's as-applied challenge.

In the past, Wisconsin courts have stated that a guilty plea waives an as-applied constitutional challenge. *See State v. Cole*, 2003 WI 112, ¶ 46, 264 Wis. 2d 520, 665 N.W.2d 328.

However, this Court should not apply waiver to Mr. Roundtree's as-applied challenge.

Recently, in *Class v. United States*, 138 S. Ct. 798 (2018), the United States Supreme Court examined whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction.

In *Class*, the defendant entered a guilty plea to possessing a gun on the grounds of the U.S. Capitol after unsuccessfully moving to dismiss the charge in

part based on Second Amendment grounds. *Id.* at 802; *see also*, *id.* at 813 n.4 (Alito, J. dissenting) (noting that Mr. Class's "Second Amendment argument is that banning firearms in the Maryland Avenue parking lot of the Capitol Building goes too far, at least as applied to him specifically"). The federal court of appeals held that the defendant's guilty plea had waived his constitutional challenges. *Id.* at 802-03.

The Supreme Court reversed. It held that a guilty plea waives certain constitutional claims: claims having to do with rules governing trials, claims regarding government conduct before trial, and claims that "contradict the admissions necessarily made upon entry of a plea of guilty." *Id.* at 805. However, claims that "challenge the Government's power to criminalize" the defendant's admitted conduct survive a guilty plea. *Id.*

As in *Class*, here, Mr. Roundtree is challenging the government's power to criminalize his conduct. As discussed above, Mr. Roundtree alleges that the statute of his conviction, Wis. Stat. § 941.29, is unconstitutional as applied to him. Accordingly, like the Supreme Court in *Class*, this Court should hold that Mr. Roundtree's claim is not waived.

However, even if this Court disagrees with Mr. Roundtree and finds waiver, this Court should still decide Mr. Roundtree's argument on the merits. The guilty plea waiver rule is a rule of judicial administration, and courts may decline to apply the

waiver rule "particularly if the issues are of state-wide importance." *State v. Tarrant*, 2009 WI App 121, ¶ 6, 321 Wis. 2d 69, 772 N.W.2d 750. Gun ownership rights and the right to protect oneself and one's family are undeniably important issues; as is the question of the application of Wis. Stat. § 941.29(2) to a person with dated, nonviolent felonies for failure to pay child support. Thus, a decision from this Court would be useful and provide future guidance to courts and practitioners.

CONCLUSION

For the reasons stated above, Mr. Roundtree respectfully requests that this Court issue an order vacating his conviction.

Dated this 4th day of March, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,270 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of March, 2020.

Signed:

KAITLIN A. LAMB
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 4th day of March, 2020.

Signed:

KAITLIN A. LAMB
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APPENDIX

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