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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 S. POCAN, PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF, THE HONORABLE DAVID A. HANSHER, PRESIDING, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

The State reframes the issues presented as follows:

1. Under Wisconsin and federal law, Leevan Roundtree cannot legally possess a firearm, based on his felony conviction for failure to pay child support for more than 120 days.[1] Nevertheless, he illegally obtained a gun and pleaded guilty to a felon-in-possession charge. Now, he claims that Wisconsin's felon-dispossession statute violates the Second Amendment as applied to him because his disqualifying felony was over ten years old and nonviolent. Does it?

The court of appeals said no. This Court should affirm and hold that as-applied Second Amendment challenges to the felon-dispossession statute based on the age and nonviolent nature of the disqualifying felony are not viable.

2. Wisconsin's guilty plea waiver rule provides that a defendant waives as-applied constitutional challenges to the statute of conviction when he pleads guilty, which Roundtree did here. Did the postconviction court soundly deem his claim waived?

If this Court reaches this question, it should hold that Wisconsin's guilty plea waiver rule continues to apply to as-applied constitutional challenges.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court typically publishes its opinions and holds oral argument. Both are appropriate in this case.

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[1] *See* Wis. Stat. § 948.22(2) (2003–04).

INTRODUCTION

Roundtree, a felon, is subject to Wis. Stat. § 941.29(1m), Wisconsin's felon-dispossession statute, which he violated when he illegally purchased a gun. After pleading guilty, he raised an as-applied Second Amendment challenge to section 941.29(1m) based on the nonviolent nature of his disqualifying felony, failure to pay child support for more than 120 days.

Scores of defendants in Wisconsin and around the country have raised similar as-applied Second Amendment challenges to felon-dispossession statutes based on the nonviolent nature of their disqualifying felonies. With one distinguishable exception, they never have succeeded. So too here, there is no road to reversal for Roundtree. The question for this Court is which road to affirmance to take.

This Court should affirm and hold that as-applied Second Amendment challenges to Wisconsin's felon-dispossession statute based on the age and nonviolent nature of the appellant's felony are not viable, based on United States Supreme Court law and persuasive reasoning from multiple federal courts of appeal.

Alternatively, this Court may affirm by holding either (1) based on his felony conviction, Roundtree is not protected under the Second Amendment, or (2) the statute as applied satisfies intermediate scrutiny.

Finally, Roundtree also forfeited his as-applied claim, under Wisconsin's guilty plea waiver rule.

STATEMENT OF THE CASE

The State charged Roundtree with possession of a firearm by a felon, after police found a revolver and bullets in his home pursuant to a search warrant. (R. 1:1.) Roundtree had felony convictions from two cases in 2003 involving four

counts of failure to pay child support. (R. 1:1.)[2] After police found the gun, Roundtree admitted that he was a convicted felon and that he knew he could not have a firearm. (R. 1:1.) Roundtree told police that he purchased the gun—which police learned had been stolen in Texas—"from a kid on the street" a year earlier and that he did not know it had been stolen. (R. 1:1.)

Roundtree entered a guilty plea. (R. 18:1.) The court sentenced him to 18 months' initial confinement and 18 months' extended supervision. (R. 18:1.) The court at sentencing was primarily concerned that Roundtree chose to support illegal gun commerce. (R. 47:14.) It noted that guns and their illegal sales are "a huge problem for our community" and that Roundtree's actions "sort of encourage[] this unfortunate commerce that we have in this community that has caused so much pain and loss of life." (R. 47:14–15.) It further noted that Roundtree, at sentencing, asserted that he did not know that he could not have a gun, despite his statement to the contrary in the complaint. (R. 47:17.) The court did not believe Roundtree's claim of ignorance: "I think you knew that you couldn't have a gun as a convicted felon. And I think that's why you bought it from the kid on the streets." (R. 47:16–17.)

Roundtree filed a postconviction motion, arguing that the felon-in-possession statute was unconstitutional as applied to him, based on his nonviolent underlying felony of failure to pay child support. (R. 29.) The postconviction court denied the motion, holding that Roundtree, by his guilty plea,

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[2] *See also* Wisconsin Court System Circuit Court Access, *State of Wisconsin v. Leevan Roundtree*, Milwaukee County Case Nos. 2003CF2243 & 2003CF2244, https://wcca.wicourts.gov (last visited March 27, 2020). This Court may take judicial notice of CCAP entries. *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

waived his constitutional challenge. (R. 40:2.) It declined to disregard the guilty plea waiver rule because the merits of his claim appeared to be foreclosed by *State v. Pocian*, 2012 WI App 58, 341 Wis. 2d 380, 814 N.W.2d 894. (R. 40:2–3.)

Roundtree appealed and the Wisconsin Court of Appeals affirmed the judgment and order. *State v. Roundtree*, No. 2018AP0594-CR, 2019 WL 1474960, ¶ 12 (Wis. Ct. App. Apr. 4, 2019) (unpublished) (P-App. 105). The court of appeals declined to address whether Roundtree waived his as-applied challenge when he pleaded guilty because "Roundtree's notion that his particular nonviolent felony matters is incorrect. Rather it is settled law that the firearm ban applies regardless of the defendant's particular felony." (P-App. 104 (discussing *Pocian*, 341 Wis. 2d 380, and *State v. Culver*, 2018 WI App 55, 384 Wis. 2d 222, 918 N.W.2d 103).)

This Court granted Roundtree's petition for review.

STANDARD OF REVIEW

This Court reviews de novo whether § 941.29(1m) is unconstitutional as applied to Roundtree. *See Pocian*, 341 Wis. 2d 380, ¶ 6. This Court presumes that statutes are constitutional; therefore, "a party attempting to argue a statute is unconstitutional carries a heavy burden." *Id.* (citing *State v. Smith*, 2010 WI 16, ¶ 8, 323 Wis. 2d 377, 780 N.W.2d 90). "In an as-applied challenge, the challenger must prove that the statute as-applied to him or her is unconstitutional." *Id.* (citing *Smith*, 323 Wis. 2d 377, ¶ 9). The statute must survive this Court's intermediate scrutiny, under which "a law 'is valid only if substantially related to an important governmental objective.'" *Id.* ¶ 11 (citation omitted).

Whether Roundtree's guilty plea relinquished his right to appeal the constitutionality of his statute of conviction on an as-applied basis is a question of law that this Court

reviews de novo. *See State v. Kelty*, 2006 WI 101, ¶ 13, 294 Wis. 2d 62, 716 N.W.2d 886.

ARGUMENT

I. Wisconsin's felon-dispossession statute, as applied to nonviolent felons like Roundtree, does not violate the Second Amendment.

Wisconsin, like nearly every other state and the federal government, restricts felons from possessing firearms. Wis. Stat. § 941.29(1m); *see also* 18 U.S.C. § 922(g). Roundtree, who was convicted of multiple felony counts of failure to pay child support for more than 120 days, illegally possessed a firearm. After pleading guilty to possession of a firearm by a felon, Roundtree claimed that Wisconsin's felon-dispossession statute violates the Second Amendment as applied to him, because his underlying felony was over ten years old and did not involve violence.

While this is the first time that this Court has considered an as-applied challenge to Wisconsin's felon-dispossession statute based on the lack of violence in the defendant's underlying felony, Roundtree is far from the first defendant to raise this claim. The Wisconsin Court of Appeals has considered—and uniformly rejected—similar challenges. *See Pocian*, 341 Wis. 2d 380; *Culver*, 384 Wis. 2d 222; *State v. Rueden*, No. 2011AP1034-CR, 2012 WL 2036008 (Wis. Ct. App. June 7, 2012) (unpublished) (P-App. 109). Indeed, defendants raising similar as-applied Second Amendment challenges in other courts have fared no better.

Accordingly, there is virtually no basis for this Court to reverse. Nevertheless, this case presents an opportunity for this Court to clarify the law in Wisconsin on whether and how defendants may raise this category of as-applied Second Amendment challenges and if so, how courts should evaluate them. As discussed below, this Court should hold that these

types of as-applied Second Amendment challenges are not viable.

A. Felons in Wisconsin are barred from possessing firearms under federal and state law.

"[L]ongstanding" federal and state laws "prohibit[the] possession of firearms by felons." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). In 1968, Congress passed the Crime Control and Safe Streets Act. Pub. L. No. 90-351, 82 Stat. 197. The law's felon-dispossession provision, 18 U.S.C. § 922(g)(1), generally prohibits anyone convicted of a crime "punishable by imprisonment for a term" greater than "one year" from possessing guns. In creating this law, Congress declared that "possession of" firearms by felons was "contrary to the public interest" and "a significant factor in the prevalence of lawlessness and violent crime in the United States." Pub. L. No. 90-351 at tit. IV, § 901(a)(2).

States, including Wisconsin, have likewise adopted some form of restriction on felons possessing firearms.[3] Wis. Stat. § 941.29(1m)(a) ("the felon-dispossession law"). And Wisconsin's felon-dispossession law is identical in scope to its federal counterpart to the extent that it bars felons as a category, regardless of the nature of the disqualifying felony. Under section 941.29, if an individual has "been convicted of a felony in" Wisconsin or "a crime elsewhere that would be a felony" in Wisconsin, he cannot possess a firearm. *See* Wis. Stat. § 941.29(1m)(a)–(b). The felon-dispossession law does

[3] *See* Giffords Law Center, *Categories of Prohibited People: State by State*, https://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/prohibited-people-state-by-state/, (last updated Nov. 8, 2019).

not exempt any types of active felonies, though it does not apply to pardoned felonies. Wis. Stat. § 941.29(5)(a)–(b).[4]

B. Both the federal and the state felon-dispossession statutes are facially valid under the Second Amendment to the extent that they categorically restrict felons from possessing firearms.

The Second Amendment, which is applicable to the states,[5] protects an individual right "to keep and bear Arms." U.S. Const. amend. II; *see Heller*, 554 U.S. at 635. More particularly, this Amendment secures the right of "*law-abiding*, *responsible* citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635 (emphasis added). Accordingly, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. To that end, the Court described "longstanding prohibitions on the possession of firearms by felons and the mentally ill" as "permissible" regulations that qualify as exceptions to the Second Amendment right to bear arms. *Id.* at 626, 635.

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[4] The felon-dispossession law also exempts those who have been granted an exemption from the federal felon-dispossession law under 18 U.S.C. § 925(c). Wis. Stat. § 941.29(5)(a)–(b). But as discussed *infra*, the § 925(c) program—which would allow the United States Attorney General to exempt individual felons from the ambit of the federal felon-dispossession statute—has been unfunded and inoperative since 1992. *See Logan v. United States*, 552 U.S. 23, 28 n.1 (2007); *Kanter v. Barr*, 919 F.3d 437, 439 (7th Cir. 2019).

[5] *See McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). Article I, Section 25 of the Wisconsin Constitution is the corollary provision to the Second Amendment. Wisconsin courts have interpreted article I, section 25 to provide rights identical to those guaranteed by the Second Amendment. *See State v. Pocian*, 2012 WI App 58, ¶ 7, 341 Wis. 2d 380, 814 N.W.2d 894.

Heller involved the Court's striking down a District of Columbia regulation barring residential handgun possession, not a felon-dispossession statute. *Id.* at 574. But in its general discussion of well-recognized regulations on the right to present arms, the Court cautioned that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons" and described such regulations as "presumptively lawful." *Id.* at 626, 627 n.26. A few years later, the court doubled down on that point: in striking down a different municipal handgun ban, the Court "repeat[ed its] assurances" that its decisions there and in *Heller* did not cast doubt on longstanding felon-dispossession laws and other laws regulating firearms. *See McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

Consistently with that language, "every federal court of appeals to address" the facial validity of § 922(g)(1) has held that it "does not violate the Second Amendment on its face." *Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019) (listing cases). Likewise, Wis. Stat. § 941.29 does not facially violate the Second Amendment to the extent that it restricts all felons, including nonviolent ones, from possessing a firearm. *Pocian*, 341 Wis. 2d 380, ¶¶ 11–12. In *Pocian*, the court applied intermediate scrutiny and explained that "the legislature determined as a matter of public safety that it was desirable to keep weapons out of the hands of individuals who had committed felonies," and that the felon-dispossession statute was substantially related to that important objective. *Id.* (citation omitted).

Roundtree raises only an as-applied challenge here. Hence, *Pocian*, to the extent that it holds that section 941.29 is facially constitutional, is the controlling law of this state. *See* Wis. Stat. § 752.41(2); *Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997) ("[O]fficially published opinions of the court of appeals shall have statewide precedential effect.").

So, there is no question that felon-dispossession statutes are facially valid under the Second Amendment. What is unsettled—and what this Court must answer—is how courts consider as-applied challenges to a felon-dispossession statute based on the nature and circumstances of the disqualifying felony. As discussed below, courts have split into two camps in their approach to this question. Some courts, including the Wisconsin Court of Appeals, understand the facial validity of felon-dispossession statutes to foreclose as-applied challenges based on the nature of the disqualifying felony. Other courts apply intermediate scrutiny to as-applied challenges, though defendants virtually never succeed on these claims.

For the reasons below, this Court should hold consistently with the first camp of cases holding that as-applied challenges to section 941.29(1m) based on the age or nonviolent nature of the disqualifying felony are not viable.

C. As-applied challenges to section 941.29(1m) based on the age or nonviolent nature of the disqualifying felony are not viable.

Two published court of appeals cases, *Pocian* and *Culver*, along with an unpublished-but-persuasive decision in *Rueden*, reflect the straightforward approach that Wisconsin courts have taken to as-applied challenges like Roundtree's.

Pocian had been convicted in 1986 of writing forged checks, and in 2008 was charged and convicted under section 941.29 after he attempted to register a deer he had shot while hunting. 341 Wis. 2d 380, ¶¶ 3, 4. Pocian raised facial and as-applied challenges to section 941.29 as violating the Second Amendment, arguing that the statute was facially overbroad for categorially banning felons from possessing firearms and, alternatively, it was unconstitutional as applied to him, a nonviolent felon. *Id.* ¶¶ 2, 8, 13.

Following *Heller* in employing intermediate scrutiny, the court of appeals rejected Pocian's facial overbreadth challenge. It noted that "[n]o state law banning felons from possessing guns has ever been struck down," that "no federal ban on felons possessing guns has been struck down in the wake of *Heller*," and that "[t]he Seventh Circuit recently held that it is constitutional to categorically ban felons from possessing guns." *Pocian*, 341 Wis. 2d 380, ¶ 12 (citing *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)). Agreeing with those precedents, the Court suggested that if Pocian wanted the felon-dispossession statute to not apply to him, "the proper route is through the legislature." *Id.*

The court also rejected Pocian's as-applied challenge, again applying intermediate scrutiny: "The governmental objective of public safety is an important one, and we hold that the legislature's decision to deprive Pocian of his right to possess a firearm is substantially related to this goal." *Pocian*, 341 Wis. 2d 380, ¶ 15. The court reasoned that the Framers "[tied] the right to bear arms . . . to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *Id.* (quoting *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010)). In the court's view, the Legislature therefore had the right to deprive all "unvirtuous citizens"—i.e., both violent and nonviolent felons—of the right to possess firearms. *See id.* In Pocian's case, the Legislature had designated his past crimes felonies, and as a result, he "has legislatively lost his right to possess a firearm." *Id.*

In subsequent decisions, the court of appeals has correctly understood the *Pocian* court's holding essentially to foreclose as-applied challenges to section 941.29 based on the nonviolent nature of the appellant's felony. For example, in *State v. Culver*, Culver's disqualifying felony was OWI (fourth). 384 Wis. 2d 222, ¶ 2. Culver claimed that section 941.29(1m) violated the Second Amendment as applied to him

because his disqualifying crime was a nonviolent and "non-serious" Class H felony. *Id.* ¶ 41.

While the court addressed intermediate scrutiny, it ultimately rejected Culver's proposition that the nonviolent nature of his disqualifying felony mattered, given that the *Pocian* court "plainly concluded that the ban on both violent and nonviolent felons is constitutional and we plainly must follow that holding." *Id.* ¶ 46 (citation omitted). It rejected the distinctions Culver attempted to make between his felony and those in *Pocian*. *Id.* ¶ 47.

Similarly, in *Rueden*, 2012 WL 2036008, ¶ 9 (P-App. 110), the court summarily rejected Rueden's as-applied challenge based on his underlying nonviolent felony (theft) because *Pocian* "plainly controls." The court noted that it held in *Pocian* that the felon-dispossession statute satisfied intermediate scrutiny as-applied to a nonviolent felon "because the law is substantially related to an important governmental interest." *Id.* And while the court briefly addressed Rueden's factual distinctions between his case and those in *Pocian*, the court observed that it "did not delve into the particular facts of the underlying nonviolent felony when rejecting [Pocian's] as-applied challenge." *Id.* ¶ 10.

In essence, the court of appeals' approach is simple and logical: because the felon-dispossession statute validly bans all felons, regardless of the nature of the disqualifying felony, from possessing a firearm, an as-applied challenge based on the age or nonviolent nature of the disqualifying felony is simply not viable. And while the court in *Culver* and *Rueden* briefly addressed (and rejected) the defendants' factual distinctions from those in *Pocian*, those courts ultimately returned to *Pocian*'s main point: the Legislature can restrict all felons from possessing firearms. Hence, the nonviolent nature of the disqualifying felony is irrelevant and can't support a viable as-applied challenge.

The court of appeals' approach mirrors that of at least five federal courts of appeals that reject outright as-applied challenges to felon-dispossession laws. *See Kanter*, 919 F.3d at 442 ("On the one hand, the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have suggested that § 922(g)(1) is always constitutional as applied to felons as a class, regardless of their individual circumstances or the nature of their offenses."). Those courts, again relying on the "presumptively lawful" language in *Heller* and *McDonald*, hold that "felons are categorically different from the individuals who have a fundamental right to bear arms." *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010). Accordingly, in those jurisdictions' view, as-applied challenges based on the disqualifying felony's lack of violence or its age are not viable because felons are excluded from the Second Amendment's protections.[6]

That approach makes logical sense. To start, the Second Amendment confers an individual right to bear arms. *See Heller*, 554 U.S. at 603–04. Because legislatures may designate felons as a class of individuals that is not entitled to firearm possession, felons—by committing felony-level crimes—fall outside the scope of the Second Amendment and

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

lose its individualized protections. *See, e.g.*, *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (concluding that "Rozier's Second Amendment right to bear arms is not weighed in the same manner as that of a law-abiding citizen" and reading *Heller* to suggest that "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment"); *Vongxay*, 594 F.3d at 1115 (rejecting as-applied Second Amendment challenge to § 922(g)(1) without analysis of disqualifying felony because "felons are categorically different from the individuals who have a fundamental right to bear arms").

This approach also makes sense for practical and administrative reasons. By advancing this as-applied challenge, Roundtree and other defendants in his position are asking the courts to make a highly individualized determination on his dangerousness when such a task is best left to the other branches of government. While courts certainly are equipped to make judgments in other types of highly fact-intensive cases, making a dangerousness assessment on a case-by-case basis based on the nature of the litigant's disqualifying felony "raises serious institutional and administrative concerns." *Kanter*, 919 F.3d at 450; *see United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011) ("[S]uch an approach, applied to countless variations in individual circumstances, would obviously present serious problems of administration, consistency and fair warning."); *see also Medina v. Whitaker*, 913 F.3d 152, 159–60 (D.C. Cir. 2019) (rejecting argument that "non-dangerous felons have a right to bear arms" because "[u]sing an amorphous 'dangerousness' standard to delineate the scope of the Second Amendment would require the government to make case-by-case predictive judgments before barring the possession of weapons").

And this analysis is particularly daunting for a court to make in the context of assessing future risk associated with firearm possession. Instructive to that point is the history of a provision of the federal felon-in-possession statute in which Congress allowed individual felons to apply to the United States Attorney General to restore their firearms rights. 18 U.S.C. § 925(c). Specifically, § 925(c) permits the Attorney General to lift the federal prohibition against an applicant's firearm possession if the applicant satisfactorily establishes "that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c).

Yet since 1992, "Congress has repeatedly barred the Attorney General from using appropriated funds 'to investigate or act upon [relief] applications,'" which has rendered the provision inoperative. *Kanter*, 919 F.3d at 439 (quoting *Logan v. United States*, 552 U.S. 23, 28 n.1 (2007)). As the *Kanter* court further summarized, the high-stakes task of investigating whether an individual did not pose a risk if armed was daunting both financially and administratively, even for the agencies equipped to do it:

> The Committee on Appropriations eliminated funding because the restoration procedure under § 925(c) was "a very difficult task" that required ATF officials to "spend many hours investigating a particular applicant for relief." H.R. Rep. No. 102-618, at 14 (1992). Even then, there was "no way to know with any certainty whether the applicant [was] still a danger to public safety." *Id.* Accordingly, ATF officials were effectively "required to guess whether a convicted felon . . . [could] be entrusted with a firearm." *Id.* Moreover, they were "forced to make these decisions knowing that a mistake could have devastating consequences for innocent citizens." *Id.* Ultimately, the Committee determined that "the

> $3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by ATF in fighting violent crime." *Id.* The Committee addressed the funding issue again in 1995, adding that "too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms." H.R. Rep. No. 104-183, at 15 (1995).

Kanter, 919 F.3d at 439. That Congress tried, and failed, to develop a system to evaluate future dangerousness in the context of gun possession reflects that courts, with their limited resources, are no better equipped to assess whether individual felons sufficiently demonstrate that their rights to firearm possession should be reinstated.

Accordingly, to the extent that Roundtree is asking this Court to hold that failure to pay child support for more than 120 days should not be a disqualifying felony under Wis. Stat. § 941.29 because those who commit can be safely considered nonviolent or nondangerous, that is a policy question best left to the Legislature. *See Kanter*, 919 F.3d at 451 (stating that "the legislature is far better equipped than the judiciary to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks" (quoting *Schrader v. Holder*, 704 F.3d 980, 990 (D.C. Cir. 2013))). Indeed, Roundtree and others in his position can lobby the Legislature to rethink its existing public-policy position and codify exceptions to the felon-dispossession statute.

And if Roundtree believes that his circumstances warrant an individual exemption from the firearms ban, he may seek pardon for his past crimes from the Governor's office. *See Kanter*, 919 F.3d at 450 ("At bottom, the fact-specific inquiry Kanter asks this Court to undertake is 'a function best performed by the Executive, which, unlike courts, is institutionally equipped for conducting a neutral,

wide-ranging investigation.'" (quoting *United States v. Bean*, 537 U.S. 71, 77 (2002))).

Roundtree does not address these logical and practical considerations. Rather, he argues that because the *Heller* Court called the validity of felon-dispossession statutes "presumptively lawful," that it "implied that the presumption may be rebutted." (Roundtree's Br. 15.) He also suggests that the Wisconsin Court of Appeals entertains such as-applied challenges. (Roundtree's Br. 15–16.) On the former point, the "presumptively lawful" language in *Heller* modifies a wider variety of laws banning categories of individuals from firearms possession, including the mentally ill and laws restricting "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." *Heller*, 554 U.S. at 626–27. Accordingly, the *Heller* Court was not referring to nonviolent felons per se, but a host of regulations. Nor has the Supreme Court seen fit to grant certiorari in the host of cases following *Heller* and *McDonald* in which federal courts relied on the "presumptively lawful" language to reject nonviolent felons' as-applied Second Amendment challenges to felon-dispossession statutes.[7]

And on the latter point, the State reads the court of appeals' decisions differently than Roundtree does. True, the *Pocian* court referenced intermediate scrutiny in concluding that the felon-dispossession statute was constitutional as

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[7] *See, e.g.*, *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010), *cert. denied*, 562 U.S. 895 (2010); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010), *cert. denied*, 562 U.S. 867 (2010); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010), *cert. denied*, 560 U.S. 958 (2010); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010), *cert. denied*, 562 U.S. 921 (2010); *see also Medina v. Whitaker*, 913 F.3d 152, 159 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 645 (2019).

applied to Pocian. 341 Wis. 2d 380, ¶¶ 14–15. But in applying that standard, the court explained that its reasoning supporting why the statute was facially valid applied with equal force to the as-applied claim. *Id.* ¶ 15. Importantly, it did not delve into the facts of Pocian's claim, as it would in a true as-applied analysis. And the Courts in *Culver* and *Rueden* followed suit; while both of those courts briefly compared the facts in those cases with those in *Pocian*, both courts viewed *Pocian*'s general holding of facial validity foreclosing the as-applied claims. *See, e.g.*, *Culver*, 384 Wis. 2d 222, ¶ 42 ("Culver's argument has already been settled, and he fails to distinguish his case from the binding precedent."); *id.* ¶ 46 ("Despite the distinctions made by Culver, *Pocian* controls. We plainly concluded that the ban on both violent and nonviolent felons is constitutional, and we plainly must follow that holding."); *Rueden*, 2012 WL 2036008, ¶¶ 9–10 (explaining that "*Pocian* plainly controls" the merits of Rueden's as-applied challenge and noting that "[i]n *Pocian*, we did not delve into the particular facts of the underlying nonviolent felony when rejecting the as-applied challenge").

The points in *Rueden* and *Culver* were the same: *Pocian*'s holding that a ban on felons possessing firearms was constitutional regardless of the age or nonviolent nature of the disqualifying felony, which made as-applied challenges based on the nonviolent nature of the disqualifying felony unviable. As the court of appeals succinctly said: "Roundtree's notion that his particular nonviolent felony matters is incorrect. Rather, it is settled law that the firearm ban applies regardless of the defendant's particular felony." *Roundtree*, 2019 WL 1474960, ¶ 7. (P-App. 104.)

To be sure, some federal courts since *Heller* have declined to foreclose the possibility that felon-dispossession statutes can be unconstitutional as-applied. *See, e.g.*, *Kanter*,

919 F.3d at 443 (explaining that the Third, Fourth, Seventh, Eighth, and D.C. Circuits "have left room for as-applied challenges to the statute" and listing cases). Yet none of those courts, save the Third Circuit in a fractured and distinguishable decision, ever has "actually upheld such a challenge in practice." *Id.* at 443–44.[8] And that uniform outcome reflects that as-applied challenges—at least for felons who argue that their disqualifying crime was too old or nonviolent for them to be subject to the law—are simply not viable.

Accordingly, this Court should hold that as-applied challenges to the felon-dispossession statute based on the age or nonviolent nature of the disqualifying felony are not viable because the Second Amendment does not protect convicted felons. This approach is consistent with *Heller*, the approach taken by many federal courts of appeal, and the approach the Wisconsin Court of Appeals has implemented.

D. Alternatively, the felon-dispossession statute passes intermediate scrutiny as applied to Roundtree.

As noted, the Fourth, Seventh, Eighth, and D.C. Circuits—as well as the First Circuit, to a degree[9]—"have left room for as-applied challenges" to § 922(g) by felons arguing

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[8] *See Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc). The State briefly discusses this case in Part I.D.4 *infra*.

[9] The *Kanter* court described the First Circuit's approach as "not foreclos[ing] as-applied challenges, but . . . express[ing] some skepticism about them." *Kanter*, 919 F.3d at 443. *See*, *e.g.*, *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011) (acknowledging that even if the Supreme Court might be receptive to as-applied claims based on the nonviolent nature of the underlying felony, "such an approach, applied to countless variations in individual circumstances, would obviously present serious problems of administration, consistency and fair warning").

that their disqualifying felonies were nonviolent. *See Kanter*, 919 F.3d at 443 (and cases cited therein). Yet not one of those federal courts of appeals upheld an as-applied Second Amendment challenge to § 922(g). *Id.* Roundtree nevertheless urges this Court to be an outlier and hold in his favor. (Roundtree's Br. 15–16.)

As discussed above, this Court should hold that by virtue of his felony, Roundtree is outside the protections of the Second Amendment and hence his as-applied claim is unavailable. Even so, Roundtree's claim fails even if this Court opts to entertain its merits.

1. To be invalid, the challenged law must burden conduct falling within the scope of the Second Amendment and fail intermediate means-end scrutiny.

Second Amendment challenges require a two-step analysis. First, courts ask "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *State v. Herrmann*, 2015 WI App 97, ¶ 9, 366 Wis. 2d 312, 873 N.W.2d 257 (citing *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)). "If it does not, the inquiry is complete; if it does," the court must undertake a second step and "evaluate the law under some form of means-end scrutiny." *Id.* (citing same).

Although *Heller* did not prescribe the particular level of scrutiny courts are to apply in the second step, every court since then has interpreted it to require intermediate scrutiny, including the Wisconsin Court of Appeals, *Pocian*, 341 Wis. 2d 380, ¶¶ 11–12, and the Seventh Circuit Court of Appeals. *See Kanter*, 919 F.3d at 442 ("We have consistently described [the means-ends test] as 'akin to intermediate scrutiny' . . . ." (quoting *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015))). Under the means-ends test, the law must be

"substantially related to an important governmental objective." *Pocian*, 341 Wis. 2d 380, ¶ 11.

Even though Roundtree conceded to the court of appeals that intermediate scrutiny applies, he now asks this Court to apply strict scrutiny. (Roundtree's Br. 12–13.) He bases his new position on a misreading of *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). In *Ezell*, the court evaluated a regulation requiring range training for gun ownership and, after deciding that the regulation came close to the core of the Second Amendment right to bear arms, the court applied a more-rigorous "not quite 'strict scrutiny'" standard. *Id.* at 708. Roundtree contends that Wisconsin's felon-dispossession law is even closer to the core of the Second Amendment because "it completely strips an individual of his right to bear arms." (Roundtree's Br. 13.)

Roundtree's reliance on *Ezell* is misplaced. The Seventh Circuit in *Kanter*, in the context of a challenge similar to Roundtree's, made clear that its means-ends test requires intermediate scrutiny in the context of felon-dispossession laws. *Kanter*, 919 F.3d at 441–42. In fact, the *Kanter* court made clear that its "means-ends review is arguably *less rigorous*" in felon-dispossession cases "because the weight of the historical evidence . . . suggests that felon dispossession laws do not restrict the 'core right of armed defense,' but rather burden 'activity lying closer to the margins of the right.'" *Id.* at 448 n.10 (emphasis added) (citation omitted). To that end, Roundtree identifies no court that has applied strict scrutiny when reviewing an as-applied Second Amendment challenge to a felon-dispossession statute. For this Court to apply that standard would be wholly unprecedented and unsupported in the law.

Further, Roundtree's request for strict scrutiny would require this Court to overrule *Pocian*, *Culver*, and *Rueden*, the former two of which are published decisions and entitled to

stare decisis. *See Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405 ("[S]tare decisis requires us to follow court of appeals precedent unless a compelling reason exists to overrule it."). Roundtree does not and cannot show that the Wisconsin Court of Appeals' application of intermediate scrutiny in similar challenges was objectively wrong. *Id.*

2. Felons as a category have been historically excluded from the Second Amendment's scope.

The analysis in this step is essentially a long-form version of the reasoning and discussion above for why as-applied challenges to felon-dispossession statutes by nonviolent felons are not viable: because felons have historically been excluded from exercising the right to bear arms, their claims based on the nonviolent nature of their underlying felony fall outside the scope of the Second Amendment, and therefore do not proceed to the means-end test.

Courts have described this concept as barring citizens based on demonstrated unvirtuousness: "Whatever the pedigree of the rule against even nonviolent felons possessing weapons (which was codified in federal law in 1938), most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *Yancey*, 621 F.3d at 684–85.[10] "The 'virtuous citizen'

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[10] *See also, e.g.*, *Medina*, 913 F.3d at 159, 160 (noting that while some misdemeanors might not "remove[] one from the category of 'law abiding and responsible,' . . . [t]hose who commit felonies . . . cannot profit from our recognition of such borderline cases"); *Vongxay*, 594 F.3d at 1118; *Binderup*, 836 F.3d at 348;

theory is drawn from 'classical republican political philosophy' and stresses that the 'right to arms does not preclude laws disarming the unvirtuous (i.e., criminals) or those who, like children or the mentally imbalanced, are deemed incapable of virtue.'" *Medina*, 913 F.3d at 159 (citations omitted).

In addition to numerous courts endorsing this view, so have most legal historians. *See Kanter*, 919 F.3d at 446 n.6 (compiling articles). Those scholars agree that the Founders conceived of the right to bear arms—like the rights to vote, hold public office, and serve on juries—as belonging only to virtuous citizens, and the commission of any serious offense excluded one from that group. As Thomas Cooley, the "most famous" "late-19th-century legal scholar," stated in his "massively popular 1868 treatise," *Heller*, 554 U.S. at 616, it "was essential to subsequent good order and satisfaction with the government" that some people be excluded from the exercise of certain civic rights "on the ground of want of capacity *or of moral fitness*," Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 29 (Boston, Little, Brown, & Co. 1868) (emphasis added). To that end, certain groups were "almost universally excluded" from exercising certain civic rights including "the idiot, the lunatic, and the felon, on obvious grounds." *Id.*; *see also Yancey*, 621 F.3d at 685.

To be sure—as Roundtree points out and as is surely the case with any question of historical intent—some scholars and dissenting federal judges disagree with the "unvirtuous citizenry" theory. (Roundtree's Br. 16–17.) In the dissenters'

United States v. Carpio-Leon, 701 F.3d 974, 979 (4th Cir. 2012); *Pocian*, 341 Wis. 2d 380, ¶ 15.

view, the categorical restrictions at the founding were to those who "threatened violence and the risk of public injury." *See Kanter*, 919 F.3d at 456 (Barrett, J., dissenting). But absolute consensus is not required; courts have adopted the unvirtuous citizenry notion even though "the historical question has not been definitively resolved." *Vongxay*, 594 F.3d at 1118. Likewise, this Court may nevertheless conclude, consistent with the "presumptively lawful" and "law-abiding" language in *Heller* and *McDonald* and that of the many other courts that have so held, that Roundtree, by committing a felony, is outside the protections of the Second Amendment.

3. The felon-dispossession statute satisfies intermediate scrutiny.

Since Roundtree falls outside the protections of the Second Amendment, the analysis ends there. *See Herrmann*, 366 Wis. 2d 312, ¶ 9. Yet even if this Court were to apply the means-end test in the second step of the analysis, Roundtree's claim fails.

Under the means-ends test, the law must be "substantially related to an important governmental objective." *Pocian*, 341 Wis. 2d 380, ¶ 11. To satisfy this standard, the State must establish "a 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (citations omitted). That fit need not be "perfect, but reasonable;" the fit is one "that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.* (citation omitted).

Recently, the Seventh Circuit Court of Appeals applied the means-end test in a similar as-applied challenge and held

that the federal and Wisconsin's felon-dispossession laws satisfied intermediate scrutiny. *Kanter*, 919 F.3d at 448–49. The State's argument here mirrors its argument there, and that court's analysis proves strong persuasive guidance for this Court.

There, Kanter, a Wisconsin resident, had committed mail fraud, bilking Medicare out of $375,000, and was convicted of that felony-level crime in the federal system. 919 F.3d at 440. He filed a suit in federal court arguing that 18 U.S.C. § 922(g)(1) and Wis. Stat. § 941.29(1m) were unconstitutional under the Second Amendment as applied to him because his underlying felony was nonviolent. *Id.*

The district court rejected his claim and the Seventh Circuit affirmed, holding that the federal and Wisconsin's felon-dispossession statutes[11] passed constitutional muster.

First, the court held that the government identified an important objective of "preventing gun violence by keeping firearms away from persons, such as those convicted of serious crimes, who might be expected to misuse them." *Id.* at 448. The court noted that Kanter had conceded this point and that the stated objective was consistent with its precedents. *Id.* (citing *Yancey*, 621 F.3d at 683; *Williams*, 616 F.3d at 693; *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010)). Similarly, here, Roundtree does not even address the means-end test or appear to dispute the importance of the government's objective.

Second, the court held that "the government has shown that prohibiting even nonviolent felons like Kanter from possessing firearms is substantially related to its interest in

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[11] Though the court primarily referred to 18 U.S.C. § 922(g)(1) in its analysis, its analysis applied to Wis. Stat. § 941.29(1m) as well. *Kanter*, 919 F.3d at 441 n.3.

preventing gun violence." *Id.* It reached that conclusion based on statistical data demonstrating "a connection between nonviolent offenders like Kanter and a risk of future violent crime." *Id.* at 449.

To start, courts have consistently recognized the correlation between a felony conviction and a heightened rate of gun-based reoffense compared to the general population. *See, e.g.*, *Yancey*, 621 F.3d at 685 (stating that "most felons are nonviolent, but someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use"). In *Kaemmerling v. Lappin*, 553 F.3d 669, 683 (D.C. Cir. 2008), that court concluded that in addition to having a higher rate of offense than the general population, certain groups of nonviolent offenders "have an even higher recidivism rate than violent offenders, and a large percentage of the crimes nonviolent recidivists later commit are violent."

Moreover, as the *Kanter* court observed, multiple studies recognized a correlation between nonviolent offenders and the risk of future crime. *See Kanter*, 919 F.3d at 449 (citing and discussing studies). In one study, the authors found that "even handgun purchasers with only 1 prior *misdemeanor* conviction and no convictions for offenses involving firearms or violence were nearly 5 times as likely as those with no prior criminal history to be charged with new offenses involving firearms or violence." *Id.* at 449 (quoting Garen J. Wintemute et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 J. Am. Med. Ass'n 2083, 2083 (1998) (emphasis in *Kanter*)).

Data from the Wisconsin Department of Corrections reflect similar results. In a study of 156,026 offenders who were released from the Wisconsin prison system between 1990 and 2013, around 30 to 31 percent recidivated within three years of release. Joseph R. Tatar II & Megan Jones,

Recidivism after Release from Prison, Wisconsin Dep't of Corrections, at 4 (August 2016), https://doc.wi.gov/DataResearch/ArchivedReports/Recidivism/0614RecidivismAfterReleasefromPrisonUpdated.pdf. According to the study, those who had committed lower-level crimes (reflected by shorter sentences) and who committed nonviolent crimes recidivated at significantly higher rates than those without convictions committed first-time offenses and, in some cases, higher than felons who committed violent crimes.

To start, the data showed that shorter prison stays correlated with the highest recidivism rates. For example, for offenders released in 2011, 26.6 percent of those who served three-to-five-year sentences recidivated within three years. *Id.* at 11. That recidivism rate increased with shorter prison stays of two to three years (31.2 percent), one to two years (32.7 percent), and one year or less (35.6 percent). *Id.*

In addition, using select release years, the authors found that even released prisoners who were deemed "low risk" upon release recidivated at not-insignificant rates of between 18.5 and 21.4 percent. *Id.* at 12.

Finally, the authors also considered offense types and their correlating recidivism rates. *Id.* at 13–14. While the general recidivism rate for prisoners released between 2000 and 2011 for public order offenses—the category that includes felony failure to support—fell by 18 percentage points, those offenders' recidivism rates were still at 28.3 percent in 2011. *Id.* at 13, 24.

Moreover, public-order offenders had a significant rate of recidivating with violent crimes. For example, based on data from prisoners released in 2011 for public order offenses, 21.4 percent recidivated with a violent offense, 15.1 percent with a property offense, 10.9 percent with a drug offense, and 52.6 percent with another public order offense. *Id.* at 14.

Notably, the 21.4 percent rate of public order offenders recidivating with a violent crime was higher than that of property offenders (16 percent) and drug offenders (17.9 percent). And it was just seven percentage points lower than the rate of violent offenders (28.3 percent). *Id.*

Given that data, Wisconsin's felon-dispossession statute is substantially related to the objective of keeping guns out of the hands of felons, regardless of the nature of the disqualifying felony because they present a much higher risk compared to nonoffenders that they will misuse them. And even if a majority of nonviolent felons will not later commit a gun-related violent offense, that fact does not render the restriction unconstitutional "because it merely suggests that the fit is not a perfect one." *Kanter*, 919 F.3d at 449. A reasonable fit is all that is required under intermediate scrutiny. *Id.*

4. This Court should reject Roundtree's proposed fact-intensive approach.

Roundtree asserts that "[t]o 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." (Roundtree's Br. 16 (citing *Heller*, 554 U.S. at 605, 634–35, *Binderup v. Att'y Gen.*, 836 F.3d 336, 350–53 (3d Cir. 2016)).) The cited pages of *Heller* do not clearly support that proposition, at least in the context of a nonviolent felon's challenge to a felon-dispossession statute.

And *Binderup* represents an approach that is unique to the Third Circuit Court of Appeals; that court applied that approach to easily distinguishable circumstances. There, a narrow majority (eight of fifteen judges sitting en banc) held that § 922(g)(1) was unconstitutional as applied to two individuals convicted of state-law misdemeanors (corrupting

a minor and carrying a handgun without a permit) that—because they were punishable by more than one year in prison—pulled them under the ambit of the definition of felony in § 922(g) and thus barred them from possessing guns. *Binderup*, 836 F.3d at 340, 356.

Although eight judges[12] ultimately agreed on the outcome, the reasoning in *Binderup* was fractured. To start, seven judges adopted the unvirtuous citizenry theory of exclusion from the Second Amendment and held that "persons who have committed serious crimes" lose their right to bear arms. *Id.* at 348–49. They also applied the same two-part test, asking first whether the challengers were excluded from exercising Second Amendment rights and if so, applying the means-ends test. *Id.*

Under the first part of the test, three of those seven judges held that challengers in the appellants' shoes showed that their offenses "were not serious enough to strip them of their Second Amendment rights." *Id.* at 351; *see Kanter*, 919 F.3d at 444 (discussing *Binderup*). Those judges explained that while the two appellants' offenses technically met the definition of a felony in § 922(g), the respective state legislatures designated them as misdemeanors. *Binderup*, 836 F.3d at 351. Those designations were highly significant: "a state legislature's classification of an offense as a misdemeanor is a powerful expression of its belief that the offense is not serious enough to be disqualifying." *Id.* It was

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[12] The eight judges included three who agreed on the portions of the opinion holding that § 922(g) was unconstitutional as applied to the appellants because they were not excluded from Second Amendment protections and the statute did not satisfy intermediate scrutiny. *Binderup*, 836 F.3d at 351–54. Those three were joined by five judges who concurred in the result, but under different reasoning. *See id.* at 367, 375–76 (Hardiman, J., concurring in part and concurring in judgments).

also significant to those three judges that neither of the defendants' offenses were violent, each offender received a "minor" sentence, and any consensus from other jurisdictions that the crimes were considered "serious" was lacking. *Id.* at 352.

As for the means-ends test, the three judges concluded that the government failed its burden under intermediate scrutiny because it relied on "off-point statistical studies" involving incarcerated felons, whereas the appellants in this case were misdemeanants who had served no jail time. *Id.* at 354.

The *Binderup* analysis is inapt. The challengers in that case had committed nonviolent state *misdemeanors* that were swept within § 922(g) simply because their maximum exposure was akin to a low-level felony. The challenge involved the intersection of state legislative intent in designating the challengers' crimes misdemeanors with a federal statute that appeared to be directed at persons who had committed crimes that state legislatures recognized as felonies. Unlike in *Binderup*, Roundtree committed a felony in Wisconsin, and he is claiming that he should not be subject to Wisconsin's felon-dispossession statute, which is facially constitutional to the extent that it bars felons as a category from gun possession.

Moreover, no other courts have appeared to embrace the Third Circuit's approach. Notably, the Seventh Circuit rejected the *Binderup* approach, highlighting the "serious institutional and administrative concerns" that this highly fact-intensive analysis would require courts to make. *Kanter*, 919 F.3d at 450. As that court discussed—as does the State in Part I.C *supra*—the question whether a particular offense should fall under the ambit of Wisconsin's felon-dispossession law is a policy question best left to the Legislature; the question whether Roundtree is worthy of no longer having a

felony conviction on his record is best left to the Executive.[13] Deciding case by case whether a particular felon and the nature of their particular felony should exclude them from the felon-dispossession law is a fact-intensive task that implicates policy and clemency concerns outside the judiciary's proper scope and that is ill-suited given its limited resources.

Finally, Roundtree does not offer this court much by way of facts that would support the conclusion that the felon-dispossession statute should not apply to him. He says that his past crime "took place more than ten years ago, [and] did not involve any physical or violent act that implicates public safety concerns." (Roundtree's Br. 17.) He also suggests that since he was not caught in public with the gun he illegally purchased, "this case also did not involve any physical or violent act." (*Id.*) Roundtree otherwise tries to distinguish his situation from those in the other Wisconsin cases rejecting nonviolent felon as-applied challenges. (*Id.* at 18.)

Roundtree's arguments miss the point. As discussed, this sort of factual determination is inappropriate and impractical. Moreover, for courts to fact-match a defendant's circumstances with those from the few other citable Wisconsin appellate cases creates an unstable, amorphous

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[13] Roundtree also cites *Britt v. North Carolina*, 681 S.E.2d 320 (N.C. 2009), as an example of a court entertaining an as-applied constitutional challenge to felon-dispossession laws. (Roundtree's Br. 15.) *Britt* is unpersuasive legally because the challenge was based on North Carolina's constitution, not the Second Amendment. 681 S.E.2d at 322. It is also distinguishable factually because Britt had had his civil rights fully restored for 17 years following his felony conviction, only to have the law later change to dispossess him of his right to bear arms. *Id.* at 321. In addition, it was significant to the court that Britt complied with the change in law by turning over his firearms and filing suit, rather than violating the law, *id.* at 323, as Roundtree did.

standard. Even if this Court were to make a factual assessment and comparison, the touchstone isn't Roundtree's past or present dangerousness or violence. It is Roundtree's act of at least four times failing to pay support for over 120 days, a crime that the Wisconsin Legislature, like most other legislatures,[14] deemed serious enough to be a felony. And, because Roundtree committed a felony, the Legislature, like its federal and state counterparts, has deemed Roundtree ineligible to possess firearms.

In all events, the facts aren't on Roundtree's side. Roundtree had four disqualifying felonies: four counts of felony failure to support across two cases. In those cases, Roundtree was ordered to pay arrears totaling $7300 to the custodial parent.[15] That Roundtree effectively *kept* $7300 in contempt of a court order earmarking that money for his children is not readily distinguishable from other cases in which the defendants' felonies involved *taking* property. *See, e.g.*, *Pocian*, 341 Wis. 2d 380, ¶ 15 (Pocian's disqualifying felonies were for uttering a forged writing, ultimately stealing $1500 in others' money); *Rueden*, 2012 WL 2036008, ¶ 10 (disqualifying felony was illegal entry and stealing items from a person's shed).

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[14] Failure to pay child support for more than 120 days has been a Class E felony in Wisconsin since 1985. *See* 1985 Wis. Act 56. As of 2015, every state has some form of criminal sanction for failure to pay child support; Wisconsin is one of 35 states imposing felony liability or its equivalent under certain circumstances. *See* Nat'l Conf. of State Legislatures, *Criminal Nonsupport and Child Support*, June 8, 2015, https://www.ncsl.org/research/human-services/criminal-nonsupport-and-child-support.aspx#50-State%20Table.

[15] *See* Wisconsin Court System Circuit Court Access, *State of Wisconsin v. Leevan Roundtree*, Milwaukee County Case Nos. 2003CF2243 & 2003CF2244, https://wcca.wicourts.gov (last visited March 27, 2020).

Further, Roundtree is in no position to claim that he "poses no danger to public safety" (Roundtree's Br. 19) because he has continued to violate the law when he purchased a stolen handgun from a "kid on the street." *Cf. Britt v. North Carolina*, 681 S.E.2d 320, 323 (N.C. 2009) (noting in civil action raising as-applied challenge that Britt's history of law-abiding behavior included his complying with the felon-dispossession statute). That Roundtree did not know that the gun was stolen is irrelevant. Even if Roundtree didn't know, he certainly had reason to suspect that he was purchasing an illegally obtained gun. More importantly, Roundtree's back-alley purchase necessarily supported street-level gun commerce, which is inextricably linked to gun violence.

In sum, this Court should hold that as-applied constitutional challenges to section 941.29(1m) by felons based on the age or lack of violence in their disqualifying crimes are not viable. Alternatively, however, should this Court entertain the facts of Roundtree's claim, the statute is constitutional as applied to him under intermediate scrutiny.

II. Wisconsin law currently holds that *Class* does not affect Wisconsin's guilty plea waiver rule.

The postconviction court in this case rejected Roundtree's claim by applying the guilty plea waiver rule, which deems forfeited as-applied challenges to the statute of conviction. (R. 40:2.) While the State recognizes that the postconviction court's decision is not the focus of this case and that this Court is unlikely to apply waiver, the State presents this argument to respond to Roundtree's position that the waiver rule should not apply to defendants raising as-applied claims like his.

A. Under Wisconsin's guilty plea waiver rule, a guilty plea waives (or forfeits) an as-applied constitutional challenge to the statute of conviction.

With a few exceptions not relevant here, a valid guilty or no contest plea waives all nonjurisdictional defenses to a conviction, including constitutional violations. *See State v. Riekkoff*, 112 Wis. 2d 119, 122–23, 332 N.W.2d 744 (1983). Courts refer to this as the guilty plea waiver rule, although it is more accurately described as a rule of forfeiture. *See Kelty*, 294 Wis. 2d 62, ¶ 18 & n.11.

In Wisconsin, whether a guilty plea forecloses a constitutional challenge to the statute under which a defendant was convicted depends on whether the challenge is facial or as applied. The guilty plea waiver rule does not foreclose a facial constitutional challenge because that type of challenge involves an issue of subject matter jurisdiction. *See State v. Cole*, 2003 WI 112, ¶ 46, 264 Wis. 2d 520, 665 N.W.2d 328; *see also State v. Olson*, 127 Wis. 2d 412, 420, 380 N.W.2d 375 (Ct. App. 1985) ("A statute, unconstitutional on its face, is void from its beginning to the end . . . ." (quoting *State ex rel. Comm'rs of Pub. Lands v. Anderson*, 56 Wis. 2d 666, 672, 203 N.W.2d 84 (1973))).

An as-applied challenge, in contrast, raises a non-jurisdictional defect that may be waived. *See Cole*, 264 Wis. 2d 520, ¶ 46. For example, in *Cole*, Cole pleaded guilty to Wis. Stat. § 941.23, which prohibited his carrying a concealed weapon, and he raised an as-applied constitutional challenge in a motion for postconviction relief. *Id.* The supreme court held that as a result of his plea, Cole "waived the opportunity to challenge the constitutionality of" section 941.23 as applied to him. *Id.*

B. *Class* has no effect on Wisconsin's guilty plea waiver rule.

Roundtree contends that *Class v. United States*, 138 S. Ct. 798 (2018), changes Wisconsin's guilty plea waiver rule to provide that defendants who plead guilty retain the right to appeal with an as-applied constitutional challenge to the statute of conviction. (Roundtree's Br. 19–20.)

Not so. The Wisconsin Court of Appeals recently held that *Class* does not change Wisconsin's guilty plea waiver rule. *See State v. Jackson*, 2020 WI App 4, ¶ 9, 390 Wis. 2d 402, 938 N.W.2d 639.[16]

That decision is sound. *Class* involved a federal criminal defendant who entered an unconditional guilty plea under Federal Rule of Criminal Procedure 11. He then challenged the statute of conviction, which bars individuals from carrying a firearm on Capitol grounds, as violating the Second Amendment and violating the due process fair-notice requirement. *Class*, 138 S. Ct. at 802. The question before the Supreme Court was "whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal." *Id*. at 803.

The Court held that Class's guilty plea did not waive his constitutional claims on direct appeal because they "challenge the Government's power to criminalize Class' (admitted) conduct. They thereby call into question the Government's power to 'constitutionally prosecute' him." *Class*, 138 S. Ct. at 805. Moreover, the Court held, nothing in Rule 11 prevented Class from raising the claims simply based on his guilty plea. *Id*. at 805–07.

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[16] As of this writing, Jackson's petition for review is pending before this Court.

Class does not impact Wisconsin's guilty plea waiver rule. By the Court's words, the question presented was whether a *federal* criminal defendant's guilty plea, pursuant to federal Rule 11, waived his constitutional challenges to the statute of conviction. *Class*, 138 S. Ct. at 803.

More significantly, the Supreme Court's distinction between a constitutional challenge calling into question the government's power to prosecute and one that does not, *id.* at 803–04, echoes the jurisdictional distinction recognized in Wisconsin between facial and as-applied challenges. *See Jackson*, 390 Wis. 2d 402, ¶ 9. A facial challenge is one that "strip[s] the government of its ability to obtain a conviction against any defendant." *United States v. Phillips*, 645 F.3d 859, 863 (7th Cir. 2011). In contrast, an as-applied challenge "does not dispute the court's power to hear cases under the statute; rather, it questions the court's limited ability to enter a conviction in the case before it." *Id.* (citing *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)). Wisconsin courts, in developing the guilty plea waiver rule, have long applied that distinction between facial challenges implicating the court's jurisdiction and nonjurisdictional as-applied challenges.[17]

Accordingly, *Class* does not affect Wisconsin's guilty plea waiver rule. Even if Roundtree's as-applied claim is viable, he has forfeited it with his guilty plea. The postconviction court soundly rejected Roundtree's postconviction motion on that basis.

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[17] *See, e.g.*, *State v. Cole*, 2003 WI 112, ¶ 46, 264 Wis. 2d 520, 665 N.W.2d 328; *State v. Trochinski*, 2002 WI 56, ¶ 34 n.15, 253 Wis. 2d 38, 644 N.W.2d 891; *State v. Molitor*, 210 Wis. 2d 415, 419, 565 N.W.2d 248 (Ct. App. 1997); *see also State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 538, 280 N.W.2d 316 (Ct. App. 1979) (successful facial constitutional challenge renders statute void and deprives court of power to convict any defendant for violating it).

CONCLUSION

This Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 22nd day of May 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9943 words.

Dated this 22nd day of May 2020.

SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 22nd day of May 2020.

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