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SUPREME COURT

Supreme Court of Wisconsin

2019AP1767-CR

State of Wisconsin,
Plaintiff-Respondent

v.

Mitchell L. Christen
Defendant-Appellant-Petitioner

Appeal from The Circuit Court of Dane County
The Honorable Nicholas McNamara, presiding

Brief of Appellant-Petitioner Mitchell L. Christen

Steven Roy
Attorney for the Defendant-Appellant
Wisconsin State Bar No. 1115155
1310 O'Keeffe Ave. #315
Sun Prairie, WI 53590

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Does the consumption of a legal intoxicant void the Second Amendment's guarantee of the right to carry a firearm for the purpose of self-defense?

Statement on Oral Argument and Publication

Oral argument and publication are requested.

Statement of Facts and the Case

In February of 2018, Mr. Christen was living with Mr. Brandon Hughes and Mr. Chase Ravesteijn. (R. 116:13). Mr. Hughes, one of Mr. Christen's "drinking buddies" had convinced Mr. Christen to move in with him. (R. 116:13). Prior to February, the living situation had been in severe decline. (R. 116:15). Mr. Hughes had previously shoved Mr. Christen and hit Mr. Ravesteijn when he had too much to drink. (R. 116:16). On another occasion when he was drunk, Mr. Hughes had also told Mr. Christen to shoot him. (R. 116:17).

On February 2, 2018, Mr. Christen had enough of his roommates alarming behavior and decided to move out. (R. 116:18). He called the person he would be living with to see if he could come pick him up that night, but Mr. Christen's new roommate had been drinking that evening and made the wise decision to not drive while under the influence. (R. 116:18). Mr. Christen then joined his uncle for dinner and Mr. Christen enjoyed a couple of drinks. (R. 116:19). After dinner, Mr. Christen went to the Tipsy Cow, and then walked back to the shared apartment. (R. 116:19). Mr. Christen estimated he consumed four beers and one shot over the course of the entire evening. (R. 116:60).

When Mr. Christen returned, Mr. Hughes and Mr. Ravesteijn were at the shared apartment drinking. (R. 115:38). Mr. Christen asked his roommates to stop eating and throwing out his food which led to an argument between the three of them. (R. 116:20). Mr. Hughes and Mr. Ravesteijn then left and continued drinking. (R. 115:40). Mr. Hughes and Mr. Ravesteijn returned later that night and were joined by two of their friends. (R. 115:41). This quartet continued drinking in the apartment. (R. 115:41).

There was another argument between Mr. Christen and the quartet of friends. (R. 116:23). Mr. Christen retreated to his room, pointed towards his handgun, and shut the door in his effort to be left alone. (R. 116:24). One of Mr. Ravesteijn's friends, Mr. Mana Alyami, opened Mr. Christen's door. (R. 116:24). In response, Mr. Christen picked up his handgun, and told the intruder to get out of his room. (R. 116:24).

Mr. Christen began recording the situation on his iPhone. (R. 116:24). After about six minutes, Mr. Christen left his room to go to the kitchen. (R. 116:27). For his protection, he tucked his handgun into his waist-band, and continued filming the situation with his iPhone. (R. 116:27-29). In the kitchen, Mr. Christen kept holding his iPhone in his right hand, and reached for string cheese with his left hand. (R. 116:29). Mr. Alyami hit Mr. Christen in his chest and grabbed Mr. Christen's handgun. (R. 115:15, 116:28). Mr. Christen quickly retreated to his room, closed the door, retrieved his secondary weapon, and called 911.

(R. 116:29). Police arrived, and shortly thereafter Mr. Christen was taken into custody. (R. 116:30-31).

A criminal complaint was filed on February 6, 2018. (R. 2:1-3). On March 21, 2018, Mr. Christen filed a motion to have the charge of operating a firearm while intoxicated dismissed on the grounds it violated his right to bear arms and is unconstitutional as applied to the defendant. (R. 17:1). The Circuit Court held a hearing on this motion on July 13, 2018, and ruled the "statute is focused narrowly enough to withstand [the] constitutional challenge that's been raised....It's operating the gun or going armed with the gun. And I recognize the going armed aspect is a little broad perhaps under some scenarios, but I don't think that the definition of going armed is so broad that it makes it impossible for a homeowner to enjoy constitutional rights to bear arms in the home." (R. 109:21-22).

Mr. Christen proceeded to trial and was found guilty of going armed while intoxicated as well as disorderly conduct. (R. 100:1). A notice of intent to seek postconviction relief was filed the day of sentencing. (R. 92:1). A timely notice of appeal was filed on September 13, 2019. (R. 105:1). Mr. Christen filed his brief on November 20, 2019. The State of Wisconsin did not file a response. On March 17, 2020 Judge Blanchard affirmed the circuit court's ruling concluding Mr. Christen had not demonstrate how Wis. Stat. §941.20(1)(b) violated his constitutional right to bear arms.

Argument

I. Background and Standard of Review

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amed. II. Twelve years ago the Supreme Court of United States engaged in its first meaningful discussion of the Second Amendment. Writing for the Court, Justice Scalia undertook an exhaustive investigation into the roots of the Amendment, and concluded the Second Amendment codifies and guarantees the preexisting right of an individual to possess and carry weapons in case of confrontation. *District of Columbia v. Heller*, 544 U.S. 570, 592, 128 S. Ct. 2783 (2008). Like most rights, the right to armed self-defense is not unlimited. *Heller* at 627.

Two years later, the Court held the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment rights recognized in *Heller*. *McDonald v City of Chicago*, 561 U.S. 742, 791, 130 S. Ct. 3020 (2010). The Court concluded the central component of the Second Amendment, the right to individual self-defense, is fundamental to our scheme of ordered liberty and deeply rooted in our history and traditions. *McDonald*, at 767-768.

Neither *Heller*, or *McDonald*, provided a familiar analytical framework to use when addressing the constitutionality of a challenged statute or regulation. In *Heller*, the Court held the District's handgun ban would be unconstitutional under any of the standards of scrutiny the court has applied to constitutional

rights. *Heller* at 628. The federal courts of appeal have filled the "analytical vacuum" with what has been described as "a tripartite binary test with a sliding scale and a reasonable fit". *Rogers v. Grewal,* 140 S. Ct 1865, 1866-1867 (2020)(Thomas, J., dissenting from denial of certiorari). There is a significant minority of judges and scholars who have interpreted *Heller* as commanding the use of text, history, and tradition in determining whether a challenged law violates the right to keep and bear arms. *Rogers v. Grewal*, 140 S.Ct. 1866, *see also*, *Heller v. District of Columbia*, (*Heller II*) 670 F.3d 1244, 1272-73, 399 U.S. App. D.C. 314 (D.C. Cir. 2011)(Kavanaugh, J., dissenting); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and Research Agenda*, 56 UCLA L. Rev. 1443, 1462 (2009); Joseph Blocher, *Categoricalism and Balancing in Fist and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375, 377, 380 (2009).

The lack of clear analytical framework is evident in the circuit court hearing on the constitutionality of Wisconsin Statute §941.20(1)(b). The State assumed intermediate scrutiny should apply, and stated "regulations prohibiting drunken operations of a firearm, even within the home, easily falls within the category of reasonable exercise of police power...It's not hard to visualize a bullet, or shotgun slug, or buckshot passing through windows or walls and causing injury". (R.109:13-14). Without addressing the framework used to justify its holding, the circuit court announced the statute was "focused narrowly enough to

withstand [the] constitutional challenge that's been raised". (R.109:22).

The constitutionality of a statute presents a question of law which is reviewed *de novo*. *State v. Herrmann*, 2015 WI App 97 ¶6, 366 Wis. 2d 312, 873 N.W.2d 257 (2015). First, this Court must determine if Mr. Christen's carrying of a firearm in his home after several drinks is within the scope of the Second Amendment. Next, this court must determine which constitutional test to apply: the categorical approach championed by Justices Thomas, Alito, Scalia and Kavanaugh, or the modified tiers of scrutiny adopted by the federal courts of appeals. Should this Court adopt the minority view espousing a categorical approach, the only remaining step would be to determine if the text, history and tradition of Second Amendment regulations support the conclusion the government may restrict the right of armed self-defense to individuals who are sober. If this Court adopts the means-end test favored by the federal courts of appeal, this Court would then need to adopt a level of review dependent on how close the law comes to the core of the Second Amendment right and he severity of the law's burden. After determining the level of scrutiny to apply, this Court would need to address the State's interest and the fit of the law to the interest.

II. Mr. Christen's Possession of his Firearms Is Within the Scope of the Second Amendment

An as-applied challenge does not contend a law is unconstitutional as written, but the application to a particular person under particular circumstances deprived that person of a constitutional right. *Binderup v. AG of United States*, 836 F.3d 336, 345 (3rd Cir. 2016). The Second Amendment guarantees the inherent right to possess and carry weapons in case of confrontation. *Heller*, at 592. The Second Amendment elevates the right of a law-abiding, responsible citizen to use arms in the defense of hearth and home over all other interests. *Heller*, at 635.

Mr. Christen carried his firearms in his home, for the purpose of self-defense. Mr. Christen owned his firearms legally. Mr. Christen had not been convicted of any criminal offenses, or been dispossessed of his right to bear arms by any other means. The State has never contested these facts.

The Second Amendment guarantees the right to keep and bear arms in case of confrontation. There can be no reasonable dispute Mr. Christen was armed in response to an ongoing situation in which he was afraid he may need to resort to self-defense. This conduct is unquestionably within the scope of the Second Amendment as applied to Mr. Christen. The only question remaining is if the State may strip the Mr. Christen of his rights due to his otherwise lawful behavior of enjoying a few alcoholic beverages.

III. Under a Categorical Approach to the Second Amendment, Wisconsin Statute §941.20(1)(B) Is Unconstitutional As Applied to Mr. Christen

Justice Kavanaugh presents a compelling argument for a categorical approach to analyzing gun bans and restrictions in his dissent in *Heller v. District of Columbia,* (*Heller II*), 670 F.3d 1244, 1274-1284. Justice Kavanaugh notes the methodology approved by the majority in *Heller* I will be "more determinative and much less subjective as it depends on a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor." *Heller II*, 670 F.3d 1274, *quoting McDonald v. City of Chicago*, 561 U.S. 742, 804, 130 S. Ct. 3020 (2010)(Scalia, J., concurring). Justice Kavanaugh continues his analysis, noting the back and forth between the majorities in *Heller I* and *McDonald* and Justice Breyer's dissent in both cases. *Heller II*, 1276-1283. Justice Breyer advocated for a "judge-empowering interest balancing inquiry asking whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important interests." *Id.* at 1277. The *Heller* majority explicitly rejected this emphatically stating there is no other enumerated constitutional right to which the core protection is subject to an interest-balancing approach, and noting the Second Amendment is the very product of an interest balancing by the people and judges should not conduct the balancing anew. *Id.* Dissenting again in *McDonald*, Justice

Breyer raised the specter of courts wrestling with difficult empirical questions required by weighing the constitutional right to bear arms against the government's concern for the safety of its citizens. *Id.*, 1279. The *McDonald* court explicitly acknowledged Justice Breyer's opinion in *Heller I*, and again rejected the interest balancing approach stating:

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

A. <u>There Is Little Historical Precedent Supporting the Notion the State May Disposes an Otherwise Law Abiding Citizen From Keeping and Bearing Firearms While Under the Influence of Alcohol</u>

Should this Court adopt the methodology suggested by Justices Thomas, Alito, Scalia and Kavanaugh, this Court will find there is little to no historical precedent for banning the possession of firearms due to alcoholic intoxication. In fact, there

are a plethora of historical sources which plainly contradict this position.

In a letter to John Hancock dated 16 August 1777, George Washington begged the Continental Congress to erect public distilleries in different states. *The Papers of George Washington*, Revolutionary War Series, vol. 10, *11 June 1777–18 August 1777*, ed. Frank E. Grizzard, Jr. Charlottesville: University Press of Virginia, 2000, pp. 637–640]. The British Fleet had blockaded the coast and the supply of strong liquor had become precarious. *Id.* Washington wrote all armies had experienced the benefits from the moderate consumption, and the benefits could not be disputed. *Id.*

Washington was far from alone; the Nation's navy was also fueled by spirits. *"The State Navy of Pennsylvania to Meredith & Clymer."* Liquors delivered to the Navy, November 2, 1777, National Archives, Records of the Continental and Confederation Congresses and the Constitutional Convention. In 1790, Congress gave each enlisted man a basic ration of half a gill of rum, brandy, or whiskey. Willam A. Ganoe, *The History of the United States Army* (New York: Appleton, 1924), 95-96. This ration was increased to a full gill (approximately 4 ounces) in 1802. *The United States Army Rations*, Miscellaneous Files (Food), Mimeo compilation of ration ingredients, 1775-1930s. U.S. Army Military History Institute, Carlisle Barracks, Carlisle, Pennsylvania.

During the Whiskey Rebellion of 1794, a young Meriwether Lewis wrote home that "We have mountains of beef and oceans of

whiskey." Richard Dillon, *Meriwether Lewis, A Biography* (New York: Coward-McCann, 1965), 19. It is estimated the Lewis and Clark expedition set out with 120 gallons of whiskey. Robert Hunt, *Gills and Drams of Consolation: Ardent Spirits on the Lewis and Clark Expedition*, We Proceed On, Vol. 17 No. 3 (1991).

Consumption of alcohol in early America was not limited to the military. Drinking was an accepted part of everyday life. Jane O'Brien *The Time when Americans Drank All Day Long*, (BBC News March 2015). It was not uncommon for early Americans to begin their day with a drink, sip whiskey at lunch, drink an ale with supper, and finish with a nightcap. *Id.* In 1790, Americans consumed an average of 5.8 gallons of pure alcohol a year, more than twice the modern average. *Id.*

It is implausible to believe founding-era Americans believed they gave up their right to armed self-defense after consuming alcohol. Would the Continental Army have failed to counter a British attack simply because they had imbibed their ration too soon? Did Lewis and Clark forbid the men of their expedition from carrying their firearms on nights when an extra ration was given? Did the frontiersman believe they had to chose between their nightcap and defending their hearth and home?

This view is confirmed when surveying the lack of founding era laws which restricted the right to possess arms while consuming alcohol. Attorney and scholar Mark Frassetto has compiled a list of nearly one thousand gun laws from colonial times to 1934. Frassetto, Mark, *Firearms and Weapons Legislation up to the Early 20th Century* (January 15, 2013).

Available at SSRN: https://ssrn.com/abstract=2200991 or http://dx.doi.org/10.2139/ssrn.2200991. This compilation provides only two examples of early regulations restricting the usage of firearms in relationship to alcohol. Virginia enacted a prohibition on wasting gun powder while drinking in 1631 and again in 1632. *1631 Va. Acts 155, Acts of February 24th, 1631 Act L.* (No commander of any plantation shall either himself or suffer others to spend powder unnecessarily, that is to say, in drinking or entertainments). Virginia again enacted a similar regulation in 1655. *1655 Va. Acts 401, Acts of March 10, 1655, Act XII.* (What persons or persons soever shall after publication hereof, shoot any guns at drinking (marriages and funerals only excepted) that such person or persons so offending shall forfeit 100 lb. of tobacco to be levied by distress in case of refusal and to be disposed of by the militia in ammunition towards a magazine for the county where the offence shall be committed). Notably these restrictions only penalize the actual shooting of a firearm, not the possession of a firearm.

If this Court adopts a categorical approach to Second Amendment Claims, the result of this case is clear. There is no historical precedent which would allow the state to disarm otherwise lawful citizens simply because of inebriation, much less disarm citizens in their home, where the need for self-defense is most acute. As such, Wisconsin Statute §941.20(1)(b) is unconstitutional as applied to Mr. Christen.

IV. Under a Means-End Approach to the Second Amendment, Wisconsin Statute §941.20(1)(B) Is Unconstitutional As Applied to Mr. Christen

The majority of federal circuits have adopted a two-part test created by the Third Circuit in *United States v. Marzzarella*.[1] The Wisconsin court of appeals also appears to have adopted this test. *State v. Pocian*, 2012 WI App 58, 341 Wis. 2d 380. The initial step is to identify if the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee; if it does not, then the inquiry is complete. *United* States *v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). If the law does burden the Second Amendment's guarantee, then the circuits have moved to some form of means-end scrutiny. *Id.* As demonstrated above, the challenged law does burden the rights guaranteed to Mr. Christen by the Second Amendment.

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

The majority of the circuits agree laws which burden Second Amendment rights must receive something stricter than rational basis review.[2] Some circuits have developed a dual

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

standard of review, applying higher standards to serious infringements, or infringements to the "core" right.[3] Of circuits using this dual standard, several circuits at least purport to use strict scrutiny when the challenged law seriously infringes on the Second Amendment guarantees, or when the challenged law strikes at the "core" right. Yet the Second Circuit only applies weighted scrutiny when the challenged law both affects the core of the Second Amendment and substantially burdens it. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 56 (2d Cir. 2018) *cert. granted*, 139 S. Ct. 939. The Seventh Circuit has rejected traditional means-end scrutiny applying a sliding scale dependent on how close a restriction comes to the core of the right. *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

A. Strict Scrutiny Is Required in Analyzing Wisconsin Statute §941.20(1)(B) as the Right To Bear Arms Is Fundamental, and as Applied to Mr. Christen, the Law Burdens the Core of the Second Amendment's Guarantee.

After *Heller* and *McDonnald*, there can be no doubt the right to possess and bear arms is fundamental. Indeed the Wisconsin Supreme Court wrote in *Wis. Carry, Inc. v. City of Madison*, "This is a species of right we denominate as 'fundamental', reflecting our understanding that it finds its protection, but not its source, in our constitutions." *Wis. Carry, Inc. v. City of Madison* 2017 WI 19 ¶9. When a regulation

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

interferes with fundamental constitutional rights, strict scrutiny applies. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 16 (1973); *see, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).; *See also Lawrence v. Texas,* 539 U.S. 558, 586 (2003)(Scalia, J., dissenting); *Troxel v. Granville*, 530 U.S. 57, 80 (2000)(Thomas, J., concurring in the judgement).

Several courts determine the level of review based on how close the law comes to the core of the Second Amendment right and the severity of the law's burden upon the right. *Kanter v. Barr*, 919 F.3d 437, 441-442 (7th Cir.2019). Severe burdens on the core right require very strong public-interest justifications and a close means-end fit; lesser burdens are more easily justified. *Id. See also, United States v. Chester,* 628 F.3d 673, 683 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010).

Wisconsin Statute §941.20(1)(b), as applied to Mr. Christen, strikes at the core of the Second Amendment. The core of the Second Amendment guarantees is the right to possess and carry weapons in case of confrontation. *Heller,* at 592. The need for defense of self is most acute in the home. *Id.* at 628. Mr. Christen carried his pistol, and later his shotgun, in his home for the purpose of self-defense. Any statute which would prohibit Mr. Christen from doing so implicates the core of the Second

Amendment guarantee. *See, Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2018)(Barrett, J., dissenting)("felon dispossession statutes target the whole right, including its core: they restrict even mere possession of a firearm in the home for the purpose of self-defense). As the Ninth Circuit has recently stated, "[t]his is a simple inquiry: If a law regulating arms adversely affects a law-abiding citizen's right of defense of hearth and home, that law strikes at the core Second Amendment right". *Duncan v. Becerra*, 970 F.3d 1133, 2020 U.S. App. LEXIS 25836, 34 (9th. Cir. 2020). If the government imposes a substantial limitation on the fundamental rights enumerated in our Constitution, then such a law restricting the people's liberty should face the highest tier of scrutiny. *Id.*, 63.

1. Wisconsin Statute §941.20(1)(B) Cannot Survive Strict Scrutiny Review

A law challenged on Second Amendment grounds is not presumed constitutional and the burden is on the government to establish the law's constitutionality. *Herrmann* at ¶11; *see also Ezell v. City of Chicago*, 6541 F.3d 684, 706 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010). Strict scrutiny requires a state law to be narrowly tailored to achieve a compelling interest. *Duncan v. Becerra*, at 63. quoting *Miller v. Johnson*, 515 U.S. 900, 920, 115 S. Ct. 2475. If there are other reasonable ways to achieve the states compelling interest with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. *Id.*, at 64 quoting

Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 909-10, 106 S. Ct. 2317.

a) The State Has Identified an Arguably Compelling Interest

At the July 13, 2018 motion hearing, the State argued "regulations prohibiting drunken operations of a firearm, even within the home, easily falls within the category of reasonable exercise of police power." (R. 109:13). The State followed this statement by arguing "[i]t's not hard to visualize a bullet, or shotgun slug, or buckshot passing through windows or walls and causing injury". (R. 109:14). Protecting the public from unnecessary injury caused by the *use* of a firearm by an intoxicated individual is arguably an important interest for the State.

b) Wisconsin Statute §941.20(1)(B) Does Not Advance the State's Identified Interest

Operating or going armed with a firearm while under the influence of an intoxicant does not advance the State's purported interest in protecting its citizens from unnecessary injury. Wis. Stat. 941.20(1)(b) does not require the defendant pull the trigger, or cause injury of any sort, or even create a dangerous situation for another; it only requires the party operate or go armed with a firearm while under the influence. Wis. Stat. §941.20(1)(b) creates situations in which it prohibits for an otherwise law-abiding individual from exercising their Second Amendment rights.

c) The State's Interest Is Enforced by Other Statutes

Wisconsin Statute §940.24 is entitled "Injury by Negligent Handling of a Dangerous Weapon, Explosive or Fire. It criminalizes the negligent use of dangerous weapons, which would include the negligent usage of a firearm. This provision is sufficient to address the State's interest in protecting the public from a bullet, shotgun slug, or buckshot passing though windows and walls, causing injury.

Additionally, Wis. Stat. §941.20(1)(a) allows the state to punish individuals who are negligent in their operation or handling of a dangerous weapon and endanger another's safety. This also advances the State's interest of protecting its citizens from stray armaments.

These provisions do not significantly burden the Second Amendment; an individual may be intoxicated and still bear arms to defend themself. Their intoxication would certainly be a factor in deciding if there was negligence in the use, operation, or handling of their firearm, but a jury would be allowed to consider other factors as well. Further, the right to carry a firearm in self-defense is not burdened. Only when the individual carrying the firearm causes injury, or endangers another's safety is there cause for State intervention. These are the proper statutes for addressing the interest the State has identified.

d) Wisconsin Statute §941.20(1)(B) Is Unconstitutional as It Does Not Advance the States Interest, and Is Not Narrowly Tailored

Strict scrutiny is the most rigorous and exacting standard of constitutional review. *Miller v. Johnson*, 515 U.S. 900, 920, 115 S. Ct. 2475 (1995). It requires a state law to be narrowly tailored to achieve a compelling interest. *Id.* Wis. Stat. §941.20(1)(b) fails this test as it fails to advance the State's purported interest, it is over inclusive, and there are less restrictive alternatives which are already in place. As such, Wis Stat. §941.20(1)(b) must be unconstitutional as applied to Mr. Christen.

B. Should This Court Erroneously Apply Intermediate Scrutiny, Wisconsin Statute §941.20(1)(B) Is Still Unconstitutional As Applied to Mr. Christen

Intermediate scrutiny has been used by the federal circuits when challenged laws apply to regulations which do not significantly burden the right to possess a lawful firearm, *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), *Heller v. District of Columbia* (*Heller III*), 801. F.3d 264 (D.C. Cir. 2015), and regulations which restrict certain categories of people from possessing firearms. *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010), *United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012). In *United States v. Yancey*, the Seventh Circuit concluded the government only needed to demonstrate the regulation prohibiting unlawful users or addicts of controlled substances from possessing firearms was substantially related to

an important governmental objective. *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010). The Seventh Circuit did not conduct any inquiry as to nature of the conduct being regulated, or the degree to which the challenged law burdens the right. This position has been sharply criticized. See, *Kanter v. Barr*, 919 F.3d 437, 465 (Barrett, J., dissenting)("the government does not get a free pass simply because Congress has established a categorical ban. The Government could quickly swallow the right if it had broad power to designate any group as dangerous and thereby disqualify its members from having a gun. The legislature must be able to justify its designation...felon dispossessions statutes target the whole right, including the core...the burden is severe: it is a *permanent* disqualification from the exercise of a fundamental right.")(internal citations omitted).

Even if this Court were to find *Yancey* persuasive, its relevancy to Mr. Christen is extremely limited. Yancey was found in possession of controlled substances, and the record supported a significant addiction. *Yancey* at 682. By possessing a controlled substance, Yancey had already demonstrated a willingness to break the law, and could reasonably fall into the category of presumptively risky people Congress sought to prevent from bearing arms. In contrast, Mr. Christen had not engaged in any unlawful, or even uncommon behavior; he merely had a few drinks over the course of an evening. Further, Yancey was carrying his firearm outside of his home, while Mr. Christen was inside his home, where the need for armed self-defense is

most acute. *Yancey* at 682; *Heller* at 628. The vastly different scenarios illustrate the need for more than intermediate scrutiny when evaluating Wis. Stat. §941.20(1)(b) as applied to Mr. Christen.

1. The State Cannot Justify the Burden on Mr. Christen's Second Amendment Rights Under Intermediate Scrutiny for the Same Reasons as It Cannot Pass Strict Scrutiny

While the precise language of intermediate scrutiny does vary amongst cases, all forms require a significant, substantial, or important government interest, and a reasonable fit between the challenged regulation and the asserted objective. *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 693 (6th Cir. 2016). Under intermediate scrutiny the burden of justification is demanding and rests entirely on the State. *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264 (1996).

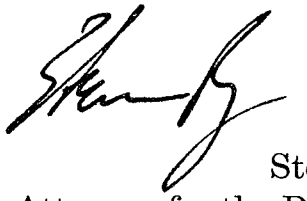
The State's purported interest is in preventing injury to its citizens by limiting the operation of firearms by intoxicated people. As discussed *supra*, this interest is not served by Wis. Stat. §941.20(1)(b). The statute goes beyond operation of a firearm and restricts the right to bear arms in the home. Wisconsin already has statutes which advance its interest, and do not place significant burdens on the right to keep and bear arms. Intermediate scrutiny does allow for overreach, but it must be reasonable, and it is the Government's burden to demonstrate Wis. Stat. §941.20(1)(b)'s scope is in proportion to the interest served. *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837

F.3d 698. The Government has yet to defend the broad overreach of Wis. Stat. §941.20(1)(b). As the State has failed to meet is burden, and likely could not meet this burden in the future, Wis. Stat. §941.20(1)(b) must be declared unconstitutional as applied to Mr. Christen.

Conclusion

Mr. Christen respectfully requests this court recognize he was exercising a fundamental right guaranteed to him by the United States Constitution, and vacate his convictions as his conduct on February 2, 2018 is protected by the Second Amendment.

Dated: Thursday, October 15, 2020
Respectfully submitted,



Steven Roy
Attorney for the Defendant
Wisconsin State Bar No. 1115155

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I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6,044 words.

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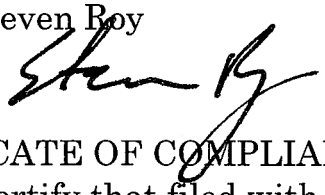
Signature 

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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.

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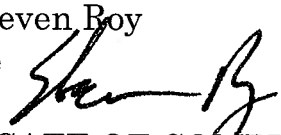
Signature 

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