STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1767-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MITCHELL L. CHRISTEN,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS MCNAMARA, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Mitchell L. Christen, who was intoxicated, brandished a loaded firearm and threatened to shoot his roommate's invited guest. Christen was convicted of going armed while intoxicated in violation of Wis. Stat. § 941.20(1)(b), a misdemeanor, after a jury found that the State disproved self-defense beyond a reasonable doubt.

Does the Second Amendment to the United States Constitution render Wis. Stat. § 941.20(1)(b) unconstitutional as applied to Christen?[1]

The circuit court answered: "No."

The court of appeals answered: "No."

This Court should answer: "No."

INTRODUCTION

This case is about the State's ability to protect public safety by preventing intoxicated individuals from handling firearms. Christen got into an argument with his roommate after drinking. MA, an invited guest of Christen's roommates, approached Christen and asked him to relax, have fun, and join them for a drink. Christen, who was intoxicated, picked up a loaded firearm and threatened to shoot MA. Five minutes later, Christen entered the common area to retrieve a piece of string cheese and carried his firearm with him. MA disarmed

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[1] Christen frames the issue as, "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?" (Christen's Br. 5.) By framing the issue this way, Christen implicitly assumes what he is trying to prove—that he in fact acted in self-defense. The State agrees that intoxication does not void the fundamental right to armed self-defense in the home, but disagrees with Christen's claim that he picked up his firearm in self-defense.

him. Christen returned to his room, cocked his loaded shotgun, and called the police. The police quickly arrived and eventually persuaded Christen to put down his shotgun and leave the apartment.

Christen was charged with pointing a firearm at another, going armed while intoxicated, and disorderly conduct. He moved to dismiss the going armed while intoxicated count on the grounds that it violated his Second Amendment right. The circuit court denied his motion. At trial, the jury was instructed that the State was required to disprove self-defense beyond a reasonable doubt on each count. The jury found Christen guilty of going armed while intoxicated and disorderly conduct. Christen appealed his conviction for intoxicated use of a firearm and asserted that the statute violated the Second Amendment as applied to him. The court of appeals rejected his as-applied challenge. Christen then filed a petition for review with this Court, which was granted.

Christen is not entitled to any relief. Courts review Second Amendment challenges using a well-established two-step test. The first step is to determine whether the challenged law falls outside the scope of the Second Amendment as traditionally understood. If it does not, the second step is to determine to appropriate level of scrutiny by determining whether the challenged law burdens the core Second Amendment right to self-defense in the home. Laws that do not substantially burden the core right are subject to intermediate scrutiny.

The challenged statute in this case did not burden Christen's core right to self-defense in the home. The statutory scheme contains an exception for self-defense, and the jury found that Christen did not act in self-defense. The statute is therefore subject to intermediate scrutiny. Because the statute is substantially related to the important

governmental objective of protecting public safety, the statute does not violate the Second Amendment as applied to Christen.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case significant enough to warrant this Court's review, oral argument and publication are appropriate.

STATEMENT OF THE CASE

In the early morning of February 3, 2018, police responded to Christen's King Street apartment in Madison after he called 911 to report a stolen firearm. (R. 2:2–3.) Christen's two roommates and their two friends all exited the apartment and informed police that Christen was intoxicated and had threatened them with his firearms. (R. 2:2–3.) Christen was charged with pointing a firearm at another, going armed while intoxicated, and disorderly conduct. (R. 2:1.)

Christen moved to dismiss the going armed while intoxicated count on the grounds that the Second Amendment rendered Wis. Stat. § 941.20(1)(b) unconstitutional as applied to him and to anyone else who is armed and intoxicated inside his home. (R. 17.) The circuit court denied Christen's motion to dismiss. (R. 109:23.) The case proceeded to a jury trial beginning on October 15, 2018 (R. 113) where the following evidence was presented.

Madison police officer Eric Prey testified that at 3:22 a.m. on February 3, 2018, he responded to 211 King Street in Madison after a caller stated that a Turkish male took his gun and left the apartment. (R. 114:76–77.) Four individuals then exited the apartment one by one. (R. 114:82.) MA was the first to exit the apartment, followed by KL, BH, and CR.

(R. 114:82–90.) When BH exited, he excitedly stated, "Mitch is in there with a loaded shotgun." (R. 114:89.) MA, KL, BH, and CR were all unarmed. (R. 114:91.) Christen remained alone in the apartment on the phone with the police for approximately 30 more minutes before he agreed to exit the apartment unarmed. (R. 114:93–94.)

Police searched the apartment and found a loaded 12-guage shotgun on Christen's bed. (R. 114:98–99.) KL informed the police that he had disassembled the handgun and placed it in the kitchen cabinet. (R. 114:104.) Police retrieved the disassembled gun from the cabinet. (R. 114:104.) Officer Prey testified that he noticed an odor of intoxicants coming from Christen's mouth and that Christen's eyes were "glassy and bloodshot." (R. 114:107–08.) Christen told police that he had the handgun tucked into his pants and that MA was the one who took it. (R. 114:122.) Christen was then arrested and brought to the booking area of the jail, where he eventually claimed he armed himself in self-defense. (R. 114:123.) Officer Doroteo Cano testified that the bullets found in the handgun were hollow-point bullets, which are designed to cause "maximum injury." (R. 114:145–46.)

CR testified that he, BH, and Christen were all roommates in the King Street apartment. (R. 114:153.) He explained that the roommates had occasional verbal arguments about unwashed dishes and similar issues, but never any physical altercations. (R. 114:155.) He testified that on the night of the crime, Christen and BH were arguing over dishes. (R. 114:157–158.) CR, BH, and their friend KL then left and went to a bar. (R. 114:159.) When the three of them returned to the apartment, MA came over to join them. (R. 114:161–62.) Christen let MA inside and said, "Here's the asshole roommates you were looking for." (R. 114:162.)

MA went to use the bathroom, which required him to pass by Christen's bedroom. (R. 114:164.) CR testified that

MA stopped in front of Christen's room and began taking to him. (R. 114:164.) CR then saw a gun, and MA shut the door and said, "fucking roommate just pulled a gun on me." (R. 114:164–65.) Christen then came out of his room in his underwear with the firearm tucked into his waistband. (R. 114:166–67.) MA was able to disarm him, and KL disassembled the gun. (R. 114:167.) Christen then returned to his room, and CR testified that he heard Christen cock his shotgun. (R. 114:168.) Christen called the police. (R. 114:170.) CR testified that Christen was acting "irrational" and "less than sober" and "shouldn't have been handling a gun." (R. 114:170–71.)

MA testified that he was a Saudi Arabian citizen living in Wisconsin who became friends with CR two years earlier. (R. 115:9.) On the night of the crime, he went over to the apartment and drank beer in the living room with CR, BH, and KL. (R. 115:12–13.) He testified that he knew Christen was upset, so he walked to the door of Christen's room and said, "hey, just take it easy, have fun with us." (R. 115:13.) He asked Christen to join them in the living room. (R. 115:13.) Christen responded by picking up a gun and saying, "get out of here or I will shoot you." (R. 115:13.) MA then closed Christen's door and retreated to the kitchen. (R. 115:14.) He testified that Christen then "darted" out in his underwear with the gun in his waistband. (R. 115:13–14.) MA disarmed him and pushed him away. (R. 115:15.) He then left the apartment and the police arrived. (R. 115:17–18.) On cross-examination, MA was asked whether he had pushed Christen earlier that night while breaking up an argument between Christen and CR. (R. 115:21.) He denied ever pushing Christen before Christen threatened to shoot him. (R. 115:21.) Officer Prey then testified that when MA left the apartment, MA told him that Christen pointed a gun at him. (R. 115:27.)

BH testified that he was Christen's friend for five to six years and that the three roommates had never had a physical altercation. (R. 115:35–36.) He testified that before he, CR, and KL left for the bar that night, Christen said "[s]omething aggressive" to CR and called CR's mother a "piece of trash drunk." (R. 115:39.)

BH testified that after they returned from the bar and MA came over, MA went to Christen's room, then left and appeared distraught. (R. 115:42–43.) BH later saw Christen leave his room wearing "white briefs," but turned away and continued watching TV. (R. 115:45–46.) He then heard a "commotion and a [] door slam" and saw KL taking apart a gun. (R. 115:46.)

A recording of Christen's 911 call was played for the jury (R. 115:59) and the CD and transcript of the call were entered as evidence (R. 78; 79). The call lasted approximately 20 minutes. (R. 78.) During the call, Christen told the dispatcher, "If someone comes through this door, they're getting a fucking face full of lead." (R. 78:2.) He told the police that MA took his gun. (R. 78:1.) Christen denied that he ever threatened MA with the gun. (R. 78:9.) When asked whether MA attacked him before he picked up his gun, Christen replied, "Not physically." (R. 78:9.)

Police sergeant Nathan Becker spoke with Christen on the phone after Christen spoke with 911 dispatch. (R. 115:69.) He testified that Christen appeared "worked up" and "paranoid." (R. 115:69.) Christen claimed that he could hear people moving around the apartment several minutes after everyone else had left. (R. 115:69.) Sergeant Becker was able to convince him to leave the shotgun in his room and come downstairs, where he laid prone on the ground without being asked. (R. 115:69–70.)

Christen testified that the roommate situation between himself, CR, and BH was in "[r]apid decline" and claimed BH had acted violently several times after drinking. (R. 116:15–17.) He claimed that on one occasion BH shoved him and "hit [CR]," forcing CR to lock himself in the bathroom. (R. 116:16.) He claimed that on another occasion, he heard BH loudly cursing and throwing his safe or some other heavy object into the walls. (R. 116:17.) He also testified that BH "broke the radiator in his bedroom" and speculated that he must have "hit it with whatever object he was throwing around and it must have bent the valve." (R. 116:51.) He additionally claimed BH asked him to shoot him during a "drunken stupor." (R. 116:17.)

Christen testified that on the night of the crime, he went to dinner with his uncle and had "a couple of drinks." (R. 116:19.) He then went to a bar from there before returning to the apartment. (R. 116:19.) He estimated that he had four beers and one shot of liquor throughout the night. (R. 116:58–59.) He returned home and had an argument with CR and BH, after which CR and BH left the apartment. (R. 116:20.)

When CR, BH, and KL returned to the apartment later that night, Christen testified that he got into an argument with CR. (R. 116:22.) He admitted that he insulted CR's mother and claimed that this caused MA to get in between them. (R. 116:23.) He claimed that MA, using his chest, pushed him into the door frame. (R. 116:23.) Christen testified that he pointed to his gun, which caused MA and CR to back up. (R. 116:23.) Later, MA came back toward Christen's room and opened his door. (R. 116:24.) Christen testified that when MA opened the door, Christen picked up his gun, "held it sideways towards the wall away from" MA, and told MA to leave. (R. 116:24.) After MA closed the door and left, Christen began recording a video on his cell phone, which was played for the jury. (R. 116:24–26.)

Christen begins the video by saying, "If someone comes through this door I will shoot them." (R. 80:2.) MA can be heard outside the door threatening to call the police. (R. 80:2.) Christen tells MA to "get the fuck out of here," and MA tells him, "be nice man, be nice." (R. 80:2.) Christen later says that those in the apartment should leave because "it would just be smart for them." (R. 80:2.) Minutes later, he calmly announces that he is going to the kitchen with his gun because he does not "trust anybody in this house." (R. 80:3.) When Christen walks into the kitchen, the video shows two individuals standing near the refrigerator talking with one another. (R. 55 Ex. 26 at 6:30–7:00.) The footage then becomes jostled and unclear at the point when MA disarms Christen. (R. 55 Ex. 26 at 6:45–7:30.) Christen is then seen cocking a large shotgun. (R. 55 Ex. 26 at 7:15–8:00.)

On cross-examination, Christen was asked about his claim that BH had pushed him and "hit" CR, forcing CR to lock himself in the bathroom. (116:42–43.) Christen changed his story and asserted that BH actually picked up a large drying rack full of clothing and threw it at CR. (R. 116:42–43.) Both CR and BH testified that to the best of their knowledge, the alleged drying rack incident never occurred. (R. 116:85–86.) CR testified that he never locked himself in the bathroom and would not have been scared of BH. (R. 116:93.) CR also testified that MA did not get in between Christen and himself to break up an argument and that MA did not give Christen a chest bump. (R. 116:96.) BH testified that contrary to Christen's story, he never damaged the radiator—the valve simply leaked because it was old. (R. 116:87.) CR testified that the previous tenants had told them the radiator leaked. (R. 116:95.) Both CR and BH denied that BH ever asked Christen to shoot him. (R. 116:88, 95.)

The jury was read a self-defense instruction on each count. The circuit court told the jury that in order to find Christen guilty, it was required to find beyond a reasonable doubt that Christen did not act lawfully in self-defense. (R. 116:122–24, 128–29, 132–33.) The jury found Christen guilty of going armed while intoxicated and disorderly conduct. (R. 86; 87.) He was found not guilty of pointing a firearm at another. (R. 85.) Christen was sentenced to four months in the Dane County Jail on the going armed while intoxicated count, with his sentence stayed pending appeal. (R. 100:1.)

Christen appealed his conviction on the going armed while intoxicated count. He asserted that Wis. Stat. § 941.20(1)(b) was unconstitutional as applied to him. *State v. Christen*, No. 2019AP1767-CR, 2020 WL 1271117 (Wis. Ct. App. March 17, 2020) (unpublished) (R-App. 101–102). The court of appeals concluded that Christen's brief "relie[d] entirely on hypotheticals about those who do *not* endanger the safety of others, and avoid[ed] even attempting to address the facts of his own case." *Christen*, 2020 WL 1271117 at *2, (R App. 101). The court of appeals held that Christen's failure to address the facts of his own case was "so complete that I do not need to address the standard of review or other points referenced in his brief." *Christen*, 2020 WL 1271117 at *2, (R. App. 101). The court of appeals therefore affirmed the circuit court's denial of Christen's motion to dismiss. *Christen*, 2020 WL 1271117 at *2 (R-App. 101).

Christen filed a petition for review, which this Court granted.

STANDARD OF REVIEW

"The constitutionality of a statute is a question of law" that this Court reviews de novo. *State v. McGuire*, 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227.

ARGUMENT

I. Wis. Stat. 941.20(1)(b) is constitutional as applied to Christen because it does not burden his fundamental Second Amendment right to armed self-defense.

Statutes that do not substantially burden the core Second Amendment right to armed self-defense are subject to intermediate scrutiny. Wisconsin Stat. § 941.20(1)(b) did not burden Christen's right to armed self-defense. Because Wis. Stat. § 941.20(1)(b) is substantially related to an important government objective, it survives intermediate scrutiny and is therefore constitutional as applied to Christen.

A. An as-applied challenge requires a defendant to prove that a statute actually violated his constitutional rights based on the particular facts of his case.

There are two types of constitutional challenges to a statute: facial challenges and as-applied challenges. A party making a facial challenge must prove that the statute cannot constitutionally "be enforced 'under any circumstances.'" *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63 (citation omitted). A successful facial challenge renders a law "void 'from its beginning to the end.'" *Id* (citation omitted)

An as-applied challenge, in contrast, questions only the constitutionality of a statute "on the facts of a particular case or [as applied] to a particular party." *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 27, 383 Wis. 2d 1, 914 N.W.2d 678 (citation omitted). For this reason, an as-applied challenge requires this Court to "assess the merits of the challenge by considering the facts of the particular case in front of [this Court], 'not hypothetical facts

in other situations.'" *Wood*, 323 Wis. 2d 321, ¶ 13 (citation omitted).

Christen's Second Amendment challenge to Wis. Stat. § 941.20(1)(b) is an as-applied challenge, not a facial challenge. (Christen's Br. 12, 17.) For this reason, he cannot succeed by showing that the statute may violate other defendants' Second Amendment right under different facts. He must instead prove that his own Second Amendment right to armed self-defense was actually violated under the specific facts of this case. *Wood*, 323 Wis. 2d 321, ¶ 13.

B. Firearm restrictions that do not burden the core Second Amendment right to bear arms for self-defense in the home are subject to intermediate scrutiny

The Second Amendment to the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The United States Supreme Court held in *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 592, 634–35 (2008), that the Second Amendment right to keep and bear arms is an individual right and that the "core" right protected by the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."

Two years later, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment protects the Second Amendment right to keep and bear arms against state infringement. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010). The Supreme Court reaffirmed that individual self-defense is "the central component" of the Second Amendment right. *Id.* at 767 (citation omitted). "[I]t has always been widely understood that the Second

Amendment, like the First and Fourth Amendments, codified a *pre-existing* right"—the amendment presupposed the existence of the right and declares only that it "shall not be infringed." *Heller*, 554 U.S. at 592.

Like most rights, however, "the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. The Second Amendment does not guarantee "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* The *Heller* court explained, for example, that the Second Amendment did not invalidate "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27. The Supreme Court did not specify a framework for determining the level of scrutiny to apply when analyzing Second Amendment challenges. *Id.* at 628. The Supreme Court did explain, however, that rational basis would be inappropriate because it would make the Second Amendment "redundant with the separate constitutional prohibitions on irrational laws." *Id.* at 628 n.27.

In the years following *Heller* and *McDonald*, the federal circuits have been presented with numerous Second Amendment challenges and have reached an overwhelming consensus on the framework for analyzing them. The circuit courts have developed a two-step approach. The first step is to answer the threshold question of "whether the regulated activity falls within the scope of the Second Amendment." *Ezell v. City of Chicago* (*Ezell II*), 846 F.3d 888, 892 (7th Cir. 2017); *see also Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir. 2018). "This is a textual and historical inquiry; if the government can establish that the challenged law regulates activity falling outside the scope of the right as originally

understood, then 'the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.'" *Ezell*, 846 F.3d at 892 (citation omitted); *see National Rifle Ass'n of America, Inc. v. McCraw*, 719 F.3d 338, 346–47 (5th Cir. 2013).

If the regulated activity falls within the scope of the Second Amendment as originally understood, or if the history is not entirely clear, the next step is an "inquiry into the strength of the government's justification for restricting or regulating" the defendant's conduct. *Ezell*, 846 F.3d at 892 (quoting *Ezell v. City of Chicago (Ezell I)*, 651 F.3d 684, 703 (7th Cir. 2011)). The level of means-end scrutiny used to review the challenged regulation "is dependent on 'how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right.'" *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019) (citation omitted). The closer a law comes to substantially burdening the core right, the higher the level of scrutiny. *Id.*

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

Courts are divided on exactly which level of scrutiny applies if a law substantially burdens the core Second Amendment right. Some circuits, such as the Ninth and D.C.

Circuits, apply strict scrutiny to laws "that both implicate a core Second Amendment right and place a substantial burden on that right," while applying intermediate scrutiny to laws that either do not strike at the core right or do not impose a substantial burden on the core right. *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020); *see also Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1262 (D.C. Cir. 2011). Other circuits, including the Seventh Circuit, apply intermediate scrutiny but use a sliding scale approach. *Kanter*, 919 F.3d at 441. "Severe burdens on the core right of armed defense require a very strong public-interest justification and a close means-end fit; lesser burdens, and burdens on activity lying closer to the margins of the right, are more easily justified." *Ezell*, 846 F.3d at 892. Under either approach, however, laws that do *not* substantially burden the core Second Amendment right to self-defense are upheld so long as they are "substantially related to an important government objective." *Kanter*, 919 F.3d at 448. The fit between the challenged law and the governmental objective "need only 'be reasonable, not perfect.'" *Kanter*, 919 F.3d at 448 (quoting *Mazzarella* 614 F.3d at 98).

This two-step approach has become the consensus framework for analyzing Second Amendment challenges in light of *Heller* and *McDonald*. This framework has been adopted by the First,[2] Second,[3] Third,[4] Fourth,[5] Fifth,[6] Sixth,[7]

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[2] *Gould v. Morgan*, 907 F.3d 659, 670–71 (1st Cir. 2018).

[3] *United States v. Jimenez*, 895 F.3d 228, 232 (2nd Cir. 2018).

[4] *United States v. Marzzarella*, 614 F.3d 85, 89 (3rd Cir. 2010).

[5] *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

[6] *National Rifle Ass'n of America, Inc. v. McCraw*, 719 F.3d 338, 346–47 (5th Cir. 2013).

[7] *Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir. 2018).

Seventh,[8] Ninth,[9] Tenth,[10] Eleventh,[11] and D.C.[12] Circuits. Several state supreme courts have had occasion to address Second Amendment challenges after *Heller* and *McDonald* and have also adopted the federal circuits' consensus approach. *See, e.g.*, *Norman v. State*, 215 So.3d 18, 35 (Fla. 2017) ("[W]e apply the two-step analysis that has been employed by the United States Court of Appeals for the Eleventh Circuit . . . and nearly every other federal circuit court of appeal after *Heller* and *McDonald* to determine the appropriate the level of scrutiny."); *State v. DeCiccio*, 105 A.3d 165, 187 (Conn. 2014); *Bridgeville Rifle & Pistol Club, Ltd. V. Small*, 176 A.3d 632, 654–55 (Del. 2017); *Hertz v. Bennett*, 751 S.E.2d 90, 93 (Ga. 2013); *People v. Chairez*, 104 N.E.3d 1158, 1167 (Ill. 2018); *Pohlabel v. State*, 268 P.3d 1264, 1267 (Nev. 2012); *City of Seattle v. Evans*, 366 P.3d 906, 918 (Wa. 2015) (en banc). Likewise, the Wisconsin Court of Appeals used the consensus approach in *State v. Herrmann*, 2015 WI App 97, ¶ 9, 366 Wis. 2d 312, 873 N.W.2d 257.

Christen asks this Court to ignore all this well-established law and to adopt a novel approach to Second Amendment challenges that he calls the "categorical approach." (Christen's Br. 12.) Under Christen's proposed "categorical approach," a statute regulating the use of firearms can be constitutional only if there is a founding-era

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[8] *Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017).

[9] *Teixeira v. County of Alameda*, 873 F.3d 670, 681–82 (9th Cir. 2017).

[10] *United States v. Reese*, 627 F.3d 792, 800–801 (10th Cir. 2010).

[11] *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017).

[12] *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1252–53 (D.C. Cir. 2011).

"historical precedent" for such a regulation. (Christen's Br. 16.) This would mean Wis. Stat. § 941.20(1)(b) could not be constitutional as applied to Christen unless historical precedent showed that similar or analogous regulations existed at the time the Second Amendment was drafted. (Christen's Br. 16.) He claims that a "significant minority of judges and scholars" espouse his categorical approach. (Christen's Br. 9.) In support of this assertion, he cites two dissents, as well as two law review articles that predate the *McDonald* decision. (Christen's Br. 9.)

This Court should reject Christen's extraordinary request to create a novel approach to analyzing Second Amendment challenges. While Christen refers to his proposed approach as the "minority view" (Christen's Br. 10), he fails to cite a single published opinion by any court, state or federal, that has ever adopted it. This failure comes despite the fact that the federal circuits and several state supreme courts have squarely addressed the issue since *Heller* and *McDonald* were decided more than a decade ago.

Given this complete lack of support in the law for his proposed approach, Christen relies almost exclusively on a single dissent, written by now-Supreme Court Justice Brett Kavanaugh in *Heller II*, 670 F.3d 1244. (Christen's Br. 12–13.) But a dissent is not the law. "A dissent is what the law is not." *State v. Perry*, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993).

Further, Christen does not explain why his proposed approach is more faithful to the Second Amendment's original meaning. The mere fact that a certain type of law did not happen to exist at the time of the founding does not imply that it conflicts with the Constitution as originally understood. *See, e.g., Marzzarella*, 614 F.3d at 87, 93 (upholding a law that prohibited owning a firearm with an obliterated serial

number despite the fact that serial numbers on firearms did not exist at the time of the founding).

Finally, Christen's argument ignores stare decisis. "This court follows the doctrine of stare decisis scrupulously because of [its] abiding respect for the rule of law." *State v. Luedtke*, 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 863 N.W.2d 592 (citation omitted). "The principle of stare decisis applies to the published decisions of the court of appeals, and stare decisis requires [this Court] to follow court of appeals precedent unless a compelling reason exists to overrule it." *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405 (citations omitted). This point is significant here because the proper framework for analyzing a Second Amendment claim is not a matter of first impression in Wisconsin. The court of appeals in *Herrmann* used the two-step framework that virtually every court to consider the issue has adopted. *Herrmann*, 366 Wis. 2d 312, ¶ 9. Christen has not provided a compelling reason for overturning *Herrmann*.

In short, the choice between the federal circuits' two-pronged approach to Second Amendment challenges and Christen's proposed "categorical approach" is not merely a choice between majority and minority approaches. It is a choice between the overwhelming consensus approach that the Wisconsin Court of Appeals adopted five years ago, and a novel approach that Christen does not even claim any court has ever used. This Court should decline to chart an entirely new course in Second Amendment law and should apply the well-established, well-developed consensus approach used by the federal circuits, several other state supreme courts, and the Wisconsin Court of Appeals.

C. Wisconsin Stat. § 941.20(1)(b) does not burden Christen's core Second Amendment right to self-defense in his home, and the statute passes intermediate scrutiny

As discussed above, determining whether Wis. Stat. § 941.20(1)(b) violated Christen's Second Amendment right to armed self-defense requires a two-step analysis. First, this Court must determine whether the regulated conduct clearly falls outside the scope of the Second Amendment as traditionally understood. *Ezell* 846 F.3d at 892; *Herrmann*, 366 Wis. 2d 312, ¶ 9. If it does, the inquiry is over. If it does not, this Court must determine which level of scrutiny to apply by determining whether Wis. Stat. § 941.20(1)(b) substantially burdens the core Second Amendment right to self-defense in the home. *See Ezell* 846 F.3d at 892; *Kanter*, 919 F.3d at 441; *Herrmann*, 366 Wis. 2d 312, ¶ 9.

In this case, it is not clear that the conduct regulated by Wis. Stat. § 939.20(1)(b) falls entirely outside the scope of the Second Amendment as traditionally understood. However, the statute does not implicate Christen's core Second Amendment right to armed self-defense, so it is subject to intermediate scrutiny. Wisconsin Stat. § 941.20(1)(b) passes intermediate scrutiny because it is substantially related to the important governmental objectives of protecting public safety and preventing intoxicated individuals from handling firearms.

1. Wisconsin Stat. § 941.20(1)(b) and the statutory scheme of which it is a part did not impose any burden on Christen's fundamental right to armed self-defense in the home.

Wisconsin Stat. § 941.20(1)(b) imposes no burden on the core Second Amendment right of self-defense in the home. Contrary to Christen's assertions, it does not "restrict the

right of armed self-defense to individuals who are sober." (Christen's Br. 10.) When read in isolation, the subsection under which Christen was convicted does not explicitly mention self-defense. But the statute does not exist in isolation—it exists as part of a coherent statutory scheme that strongly protects the fundamental right to armed self-defense.

Several other criminal statutes qualify Wis. Stat. § 941.20(1)(b) and make clear that it does not restrict the fundamental right to armed self-defense in the home. Wisconsin Stat. § 939.48(1), titled "Self-defense and defense of others," states, "A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person." A person is entitled to intentionally use force likely to cause death or great bodily harm if he reasonably believes it necessary to prevent an imminent threat of death or great bodily harm. Wis. Stat. § 939.48(1).

The right to self-defense is even stronger inside one's home. Under Wis. Stat. § 939.48(1m), known as the "Castle Doctrine," a person is entitled to use deadly force against another who unlawfully and forcibly enters his or her dwelling. In such a situation, a court "may not consider whether the actor had an opportunity to flee or retreat before he or she used force." Wis. Stat. § 939.48(1m)(ar). Additionally, a court is required to "presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself" if the actor so claims. Wis. Stat. § 939.48(1m)(ar). These statutes limit the reach of Wis. Stat. § 941.20(1)(b) to situations in which a person does not act in self-defense.

Further, under Wis. Stat. § 939.45, the fact that a person acted in self-defense, even if his conduct were

otherwise criminal, "is a defense to prosecution for any crime based on that conduct," including violations of Wis. Stat. § 941.20(1)(b). Where self-defense is an issue, the State has the burden to disprove self-defense beyond a reasonable doubt at trial. *State v. Austin*, 2013 WI App 96, ¶ 12, 349 Wis.2d 744, 836 N.W.2d 833. This Court has previously explained, for example, that "a person is privileged to point a gun at another person in self-defense if the person reasonably believes that such a threat of force is necessary to prevent or terminate what he or she reasonably believes to be an unlawful interference." *State v. Watkins*, 2002 WI 101, ¶ 56, 255 Wis. 2d 265, 647 N.W.2d 244.

Simply put, Wisconsin's statutes protect an intoxicated individual's fundamental right to armed self-defense. Where self-defense is an issue, an individual cannot be convicted of violating Wis. Stat. § 941.20(1)(b) unless the State proves beyond a reasonable doubt that the actor did not act in lawful self-defense. Therefore, Wis. Stat. § 941.20(1)(b) does not burden the core Second Amendment right to armed self-defense in the home.

Additionally, under the specific facts of Christen's case, the record shows that Wis. Stat. § 941.20(1)(b) did not burden Christen's right to armed self-defense because Christen did not act in self-defense. Christen claims in his brief that the State "has never contested" that he carried his firearms "for the purpose of self-defense." (Christen's Br. 11.) Christen is incorrect. The State not only contested that Christen carried his firearm in self-defense, but proved at trial beyond a reasonable doubt that Christen did *not* carry his firearm in self-defense.

Christen raised self-defense as an issue at trial and attempted to convince the jury that he carried his firearms for the purpose of self-defense. He testified that when he had an argument with CR after everyone returned from the bar, MA

got in between them and, using his chest, pushed Christen into the door frame. (R. 116:23.) After this, he claimed, he decided he was "not going to be a victim" and picked up his gun "as a deterrent." (R. 116:23.) After this alleged incident, he claims that MA came back and opened his door, at which point he picked up his firearm, pointed it at the wall but not directly at MA, and told MA to leave. (R. 116:24.)

The State presented evidence that rebutted this story and showed that Christen was not acting in self-defense. First, both MA and CR testified that MA did not get in between Christen and CR and did not push Christen with his chest. (R. 115:21; 116:96.) Christen himself even admitted during his 911 call that contrary to his trial testimony, MA never physically attacked him before he picked up his firearm and threatened to shoot MA. (R. 78:9.)

MA testified that he noticed Christen was upset and simply wanted to ask Christen to join him and his friends for a drink. (R. 115:13.) He testified that he stood outside Christen's door and told Christen, "hey, just take it easy, have fun with us." (R. 115:13.) This was when Christen threatened MA with his firearm, causing MA to shut the door and retreat to the kitchen. (R. 115:13.) CR corroborated MA's account and testified that MA shut Christen's door and then told him, "fucking roommate just pulled a gun on me." (R. 114:164–65.) Additionally, in the video Christen recorded, MA can be heard saying "be nice man, be nice" and threatening to call the police. (R. 80:2.) The evidence showed that Christen picked up his firearm not for the purpose of self-defense, but for the purpose of threatening MA.

Christen also provided other testimony that called his credibility into question. Christen claimed that BH broke his radiator during a violent, drunken outburst. (R. 116:51.) BH denied this and explained that the radiator simply leaked because it was old (R. 116:87), and CR added that the previous

tenants told them the radiator leaked, (R. 116:95.) Christen also alleged that BH had pushed him and "hit" CR during a drunken, violent outburst, forcing CR to lock himself in the bathroom. (R. 116:16.) On cross-examination, however, Christen changed his story and claimed that when he said "hit," he actually meant that BH picked up a drying rack full of clothing and threw it at CR. (R. 116:42–43.) BH and CR both denied that this occurred (R. 116:85–86, 93), and CR added that he never locked himself in the bathroom and would not have been scared of BH, (R. 116:93.) Additionally, Christen insisted during his 911 call that he could hear people moving around his apartment despite the fact that everyone had been gone for several minutes. (R. 115:69.)

Finally, the context provided by the video Christen recorded shows that his claim of self-defense was dubious. Christen alleged that he picked up his gun to deter a threat to his person, and even testified he did not leave the apartment because he did not want to get "flanked" by MA, CR, BH, and KL upon leaving the safety of his bedroom. (R. 116:74.) Contrary to this testimony, the video shows—and Christen admits—that Christen left the safety of his bedroom to retrieve a piece of string cheese from the kitchen. (R. 116:28). This action cannot be reconciled with Christen's alleged fear of being "flanked"—if Christen had been at all concerned for his physical safety, he would not have chosen to risk his health or his life for a piece of string cheese.

After hearing all this evidence against Christen, the jury was read a self-defense instruction on the going armed while intoxicated. (R. 116:128–29.) The jury was also read a separate self-defense instruction on the disorderly conduct count that arose from the same incident. (R. 116:132–33.) On both counts, the jury was instructed that the State had the burden to disprove self-defense beyond a reasonable doubt. (R. 116:129, 134.) The jury found Christen guilty on both

counts, which means the jury found, beyond a reasonable doubt, that Christen did not arm himself in self-defense. Christen does not argue that the self-defense jury instruction misstated the law. "Jurors are presumed to have followed jury instructions." *State v. LaCount*, 2008 WI 59, ¶ 23, 310 Wis. 2d 85, 750 N.W.2d 780.

Finally, while Christen may point to the fact that MA disarmed him as support for his alleged fear of being attacked, this incident is a red herring for two reasons. First, Christen had already committed the crime well before MA acted to disarm him. Christen admitted that he picked up his firearm and threatened to shoot MA with it before he began recording his video. This was at least five minutes before MA disarmed Christen. (R. 116:24.)

Second, and relatedly, the fact that MA disarmed Christen does not indicate in any way that MA posed a threat. MA testified that he stood near Christen's doorway and spoke to him with good intentions, asking him to come and have a drink with his friends. (R. 115:13.) Christen responded to this innocuous request by picking up a firearm and threatening to shoot MA. (R. 115:13.) After this act of aggression toward MA, Christen entered the kitchen carrying a firearm. (R. 115:14.) At this point, it was reasonable and unsurprising for MA to believe he needed to disarm Christen for his and everyone else's safety.

For all these reasons, Wis. Stat. § 941.20(1)(b) did not burden Christen's fundamental right to armed self-defense. Intermediate scrutiny is therefore appropriate.

2. Wisconsin Stat. § 941.20(1)(b) is reasonably related to the important government objectives of protecting public safety and preventing intoxicated individuals from using firearms.

As applied to Christen, Wis. Stat. § 941.20(1)(b) survives intermediate scrutiny. In order to survive intermediate scrutiny, a statute must be "substantially related to an important governmental objective." *Kanter*, 919 F.3d at 442. Wisconsin Stat. § 941.20(1)(b) meets and surpasses this requirement.

First, the governmental objective promoted by Wis. Stat. § 941.20(1)(b)—protecting public safety and preventing intoxicated individuals from using firearms—is substantial. The government has a substantial and even compelling interest in "public safety and crime prevention." *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2nd Cir. 2012). In the specific context of intoxication, the Michigan Court of Appeals has explained that "[t]he extreme danger posed by a drunken person with a gun is real and cannot be over emphasized." *People v. Wilder*, 861 N.W.2d 645, 653 (Mich. Ct. App. 2014); *see also State v. Weber*, 132 N.E.3d 1140, 1148 (Ohio Ct. App. 2019) (Explaining, in the context of a defendant's challenge to his conviction for carrying a firearm while intoxicated, that "[t]he state possesses a strong compelling interest in maintaining public safety and preventing gun violence.").

A person who is "intoxicated" under Wis. Stat. § 941.20(1)(b) has a "materially impaired" ability to safely handle a firearm and is less able to exercise "clear judgment" or a "steady hand." (R. 82:7.) Such an individual by definition presents a serious threat to public safety if allowed to control

a firearm. Wisconsin Stat. § 941.20(1)(b) therefore serves the substantial government interest of protecting public safety.

Second, Wis. Stat. § 941.20(1)(b) is substantially related to the government's interest in protecting public safety. In order to be substantially related to a governmental interest, "the 'fit' between the challenged regulation and the asserted governmental objective need only 'be reasonable, not perfect.'" *Kanter*, 919 F.3d at 448 (citations omitted). The law need not be the least restrictive means of accomplishing the government's goal, but should not burden more conduct than is reasonably necessary.

Wisconsin Stat. § 941.20(1)(b) does not restrict more conduct than is necessary to promote the governmental objective of protecting public safety. Most of the cases from the federal circuits upholding firearm regulations involved challenges to lifetime prohibitions on felons or domestic violence misdemeanants possessing firearms. *See, e.g.*, *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). These statutes generally pass intermediate scrutiny even though they impose the "severe" burden of "a *permanent* disqualification from the exercise of a fundamental right" even on nonviolent felons. *Kanter*, 919 F.3d at 465 (Barrett, J., dissenting).

Wisconsin Stat. § 941.20(1)(b) comes nowhere near imposing such a severe burden. It merely prohibits an intoxicated person from having a loaded firearm within his "immediate control and available for use" while intoxicated. (R. 116:127.) This prohibition is limited to persons who are actually intoxicated, and who are therefore by definition "less able to exercise the clear judgment and steady hand necessary to handle a firearm." (R. 82:7.) A defendant cannot be convicted under Wis. Stat. § 941.20(1)(b) unless his ability to safety operate a firearm is in fact "materially impaired." (R. 82:7.) And far from establishing anything like a lifetime

ban, the statute prohibits a person from going armed only during the brief period of time in which he is intoxicated, a voluntary choice.

While not directly on point, *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010), is instructive. In that case, the defendant challenged a federal statute that prohibited users of unlawful drugs from possessing firearms. *Id.* at 682. After rejecting rational basis as the appropriate level of scrutiny, the court explained that habitual drug users are "likely to have difficulty exercising self-control, making it dangerous for them to possess deadly firearms." *Id.* at 683, 685. The court considered it significant that the law did not permanently prevent the defendant from owning a firearm—he could "regain his right to possess a firearm simply by ending his drug abuse." *Id.* at 686. The Second Amendment did not "require Congress to allow him to simultaneously choose both gun possession and drug abuse." *Id.* at 687.

Wisconsin Stat. § 941.20(1)(b) is far less onerous than even the temporary prohibition at issue in *Yancey*. This statute does not prohibit Christen from owning firearms even temporarily—it merely prohibits him from having loaded firearms within his immediate control and available for use while intoxicated, with an exception for self-defense. Just as in *Yancey*, Christen is free to choose between intoxication or handling his loaded firearms, but the State is not required to allow him to simultaneously choose both.

Additionally, while Wisconsin courts have not yet been presented with Second Amendment challenges to Wis. Stat. § 941.20(1)(b), other states' courts have examined analogues to this statute and reached similar conclusions. In *Weber*, 132 N.E.3d at 1143–44, for example, the defendant was arrested for carrying a shotgun in his home while intoxicated. He was convicted of violating Ohio's analog to Wis. Stat. § 941.20(1)(b), which prohibits "the use or carrying of a

firearm by a person who has imbibed to the point of intoxication." *Id.* at 1145. The Ohio Court of Appeals rejected the defendant's challenge and concluded that the regulation was "narrowly tailored to serve the significant government interest of guarding public safety and [left] open alternate means of exercising the fundamental right to bear arms." *Id.* at 1147. Like Wis. Stat. § 941.20(1)(b), Ohio's limitation on intoxicated firearm handling "is only temporary and only exists during the time in which the person is intoxicated." *Id.* at 1149. *See also Wilder*, 861 N.W. 2d at 654 (rejecting a challenge to Michigan's analog to Wis. Stat. § 941.20(1)(b) and explaining that any infringement upon the defendant's right to bear arms was "substantially related to the important governmental interest in preventing intoxicated individuals from possessing firearms").

Finally, as explained above, even Wis. Stat. § 941.20(1)(b)'s brief and temporary prohibition on firearm use is limited by a built-in exception for self-defense. *See* Wis. Stat. § 939.48. The law would not burden, for example, an innocent person who drinks to intoxication in his home and then notices an intruder attempting to break in. *See* Wis. Stat. § 939.48(1m). Further, unlike Wisconsin's laws surrounding intoxicated driving, there is no specific blood alcohol concentration that violated Wis. Stat. § 941.20(1)(b)—the State must prove that the defendant's ability to operate the firearm was in fact materially impaired. Wisconsin Stat. § 941.20(1)(b) affects only those individuals who are actually intoxicated and who are not acting in lawful self-defense. Wisconsin Stat. § 941.20(1)(b) is therefore substantially related to an important governmental objective and withstands intermediate scrutiny. *See Kanter*, 919 F.3d at 448.

3. If this Court applies strict scrutiny, Wis. Stat. § 941.20(1)(b) survives strict scrutiny for the same reasons it survives intermediate scrutiny.

As discussed above, intermediate scrutiny is the correct standard for reviewing Christen's as-applied challenge to Wis. Stat. § 941.20(1)(b). Even if this Court applies strict scrutiny, however, the statute survives strict scrutiny as applied to Christen for the same reasons it survives intermediate scrutiny. In order to survive strict scrutiny, a regulation must be narrowly tailored to promote a compelling government objective. *See, e.g.*, *Drake v. Filko*, 724 F.3d 426, 436 (3rd Cir. 2013). A regulation does not pass strict scrutiny if there is a less restrictive alternative available to serve the government's objective. *Id.*

In this case, as Christen acknowledges (Christen's Br. 22), the government has a compelling interest in protecting public safety by preventing intoxicated individuals from using firearms. Intoxicated individuals are by definition "less able to exercise the clear judgment and steady hand necessary to handle a firearm," and their ability to safely handle a firearm is by definition "materially impaired" (R. 82:7), making them a danger to public safety. *See also Marzzarella*, 614 F.3d at 99 (explaining that a statute preventing the possession of firearms with obliterated serial numbers served the government's "compelling interest" in preventing crime).

As applied to Christen, Wis. Stat. § 941.20(1)(b) is the least restrictive means of serving the compelling government interest of protecting public safety. As discussed above, the statute prohibits no more conduct than is necessary to serve its goal. The only time the statute affects a person's conduct is when that person is actually intoxicated and therefore poses a significant safety risk. The statute restricts conduct for no longer than the actual period of time in which a person

is intoxicated, and it contains an exception for self-defense. While Christen may argue that the statute does not require a person to physically handle a firearm, he cannot obtain relief on this basis because he did handle a firearm in this case. *See Wood*, 323 Wis. 2d 321, ¶ 13 (explaining that that this Court analyzes as-applied challenges by determining whether the defendant's constitutional rights were actually violated, not whether a hypothetical defendant's rights may potentially be violated under different facts). Wisconsin Stat. § 941.20(1)(b) therefore survives strict scrutiny as applied to Christen.

CONCLUSION

This Court should affirm the court of appeals' decision and hold that Wis. Stat. § 941.20(1)(b) is constitutional as applied to Christen.

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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 8261 words.

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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 24th day of November 2020.

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