STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2024AP000358 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BERNABE GONZALEZ

Defendant-Respondent.

ON APPEAL FROM A JUDGMENT OF DISMISSAL ENTERED IN THE MILWAUKE COUNTY CIRCUIT COURT, THE HONORABLE ANDERSON GANSNER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLANT

John Chisholm
Milwaukee District Attorney

Kyle J. Elderkin
Assistant District Attorney
State Bar #1122604

Attorneys for Plaintiff-Appellant

Milwaukee County District Attorney's Office
821 West State Street, Rm 405
Milwaukee, Wisconsin 53233
(414) 278-4646
kyle.elderkin@da.wi.gov

TABLE OF CONTENTS

Page

ISSUES PRESENTED....1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION....1

INTRODUCTION....1

STATEMENT OF THE CASE....2

STANDARD OF REVIEW....3

ARGUMENT....3

I. The circuit court erred in granting Gonzalez's motion to dismiss because the Second Amendment Right does not include persons driving a vehicle while intoxicated....5

II. Wisconsin's prohibition is analogous in application to other laws found to be presumptively lawful....6

III. Wisconsin's prohibition on possession of a firearm while intoxicated is historically rooted in this nation's history and tradition....9

A. Historical analogues to Wisconsin's intoxicated possession prohibition date back to the seventeenth century....9

B. *Bruen* does not require a plethora of historical analogues for the State to meet its burden. 12

C. Wisconsin's intoxicated possession prohibition is substantially similar to Federal Statute 18 USC 922(g)(3) which has withstood numerous challenges since *Bruen*....13

CONCLUSION....15

Page

TABLE OF AUTHORITIES

Cases

New York State Rifle & Pistol Ass'n, Inc. v. Bruen,
213 L. Ed. 2d 387, 142 S.Ct. 2111 (2022)
..... 1, 2, 3, 4, 5, 6, 7, 12, 13, 14

Data Key Partners v. Permira Advisers LLC,
2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693 3

Meyers v. Bayer AG, 2007 WI 99
303 Wis. 2d 295, 735 N.W.2d 448 3

State v. Christen, 2021 WI 39
396 Wis. 2d 705, 958 N.W.2d 746, ...4, 13

United States v. Posey, No. 2:22-CR-83 JD, 2023 WL 1869095 (N.D. Ind. Feb. 9, 2023).....4,14

United States v. Daniels,
77 F.4th 337 (5th Cir. 2023) 4, 7, 13

McDonald v. City of Chicago, Ill.,
561 U.S. 742 (2010).....3, 4, 5, 7

District of Columbia v. Heller,
554 U.S. 570, 599 (2008).....4, 5, 6, 7

United States v. Verdugo-Urquidez,
494 U.S. 259 (1990).....5

United States v. Carpio-Leon,
701 F.3d 974 (4th Cir. 2012) 5

United States v. Grinage,
JKP-21-399, 2022 WL 17420390 (W.D. Tex. Dec. 5, 2022)....5

State v. Weber,
168 N.E.3d 468 (Ohio 2020) 6

United States v. Veasley,
No. 23-1114, 2024 WL 1649267 (8th Cir. Apr. 17, 2024).....6

Page

United States v. Yancey,
621 F.3d 681 (7th Cir. 2010). 8

Antonyuk v. Chiumento,
89 F.4th 271 (2d Cir. 2023) 8, 11

State v. Shelby,
90 Mo. 302, 2 S.W. 468 (1886) 8

United States v. Okello,
No. 4:22-CR-40096-KES, 2023 WL 5515828 (D.S.D. Aug. 25, 2023) 10, 15

United States v. Espinoza-Melgar,
No. 2:21-CR-204-DAK, 2023 WL 5279654, (D. Utah Aug. 16, 2023) 13

United States v. Lewis,
Case No. CR-22-368-F, 2023 WL 187582, n.5 (W.D. Okla., Jan. 13, 2023) 13

Fried v. Garland,
F. Supp. 3d , 2022 WL 16731233 (N.D. Fla. Nov. 4, 2022) ...14

United States v. Seiwert,
2022 WL 4534605 (N.D. Ill. 2022) 14

Wisconsin State Statutes

Wis. Stat. § 941.20(1)(b)..... 1, 2, 3, 4, 9

Wis. Stat. § 346.63(1)(a).....6

Wis. Stat. § 346.63(1)(b).....6

Wis. Stat. § 921.20(1)(b).....10

United States Code

18 USC § 922.....8

18 USC § 922(g)(1-9) 13

Page

18 USC § 922(g)(3).....13, 15

Periodicals

Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda
UCLA L.Rev. 1443, 1535 (2009).....8

The Statutes at Large: Being a Collection of All the Laws of Virginia, From the First Session of the Legislature in the Year 1619,
401-02 (William Waller Henning ed., 1823).....9

Saul Cornell & Nathan DeDino,
A Well-Regulated Right: The Early American Origins of Gun Control
73 FORDHAM L. REV. 487, 509 (2004).....10

Other Sources of Legal Authority

§ 3, ch. 329, Laws of 1883.....9

1655 Va. Acts 401-402, Act XII.....9

Ch. 1501, 5 Colonial Laws of New York 244-46 (1894).....9

An Act for regulating and ordering the Troops that are, or may be raised, for the Defence of this Colony (1775) (art. XIX).....10

An Act to regulate the Militia of the Common-Wealth of Pennsylvania (1777) (§§ IX-X).....10

An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania (1780) §§ XLV, XLVIII.....10

1844 R.I. Pub. Laws 503-16, §§ 1, 45.....10

1852 N.M. Laws 67, § 3.....10

Statutes of Oklahoma, 1890, at 496 (1891) (§ 7).....10

The Laws and Ordinances of the City of New Orleans 1 (1882) (§ 1).....10

Page

1867 Kan. Sess. Laws. 25, ch. 12, §1 11

§1274, The Revised Statutes of the State of Missouri*, 1879* (1879) ..11

Will T. Little et al., *Statutes of Oklahoma*, 1890 (1891) 11

"Guns and Alcohol." Everytown Law, 5 Apr. 2023, everytownlaw.org/everytown-center-for-the-defense-of-gun-safety/guns-and-alcohol 11

1909 Id. Sess. Laws 6, no. 62, § 1 11

Constitutioncenter.org.....12

NHTSA: https://www.nhtsa.gov/risky-driving/drunk-driving 14

ISSUES PRESENTED

1. Whether an intoxicated driver has a constitutional right to possess a firearm under the Second Amendment.

The circuit court concluded that Wisconsin's law, which criminalizes going armed with a firearm while intoxicated, was not deeply rooted or supported in this nation's historical tradition and was therefore unconstitutional under the Second Amendment.

This Court should reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The brief adequately sets forth this parties' argument, and this Court can resolve this case by applying settled legal principles to the facts.

INTRODUCTION

On February 11, 2023, defendant Bernabe Gonzalez ("Gonzalez") was pulled over by the Milwaukee County Sheriff's Department for running a red light. After detecting signs of possible intoxication, law enforcement conducted standard field sobriety tests. A preliminary breath test netted a result of .104 blood alcohol content. After performing poorly on the field sobriety tests, Gonzalez was issued a citation for Operating a Motor Vehicle While Intoxicated ("OWI") as a first offense. During the stop of Gonzalez, a 9mm Smith & Wesson handgun was located and recovered in the driver's door of Gonzalez's vehicle for which Mr. Gonzalez had been issued a concealed carry weapons license by the state of Wisconsin.

The State charged Mr. Gonzalez with the misdemeanor offense of possession of a firearm while intoxicated, contrary to Wis. Stat. § 941.20(1)(b). Mr. Gonzalez ultimately pled guilty to an OWI first offense citation on October 16, 2023 arising out of the same incident. However, Mr. Gonzalez filed a motion to dismiss the criminal possession of a firearm while intoxicated charge on the grounds that the U.S. Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 213 L. Ed. 2d 387, 142 S.Ct. 2111, 2162 (2022), invalidated Wisconsin's prohibition on possession of firearms by intoxicated individuals. In a finding that the statute was

unconstitutional, the circuit court granted the defense's motion to dismiss on September 6, 2023 and denied the State's motion for reconsideration on October 16, 2023. The State now seeks review of the circuit court's decision in the Court of Appeals.

STATEMENT OF THE CASE

In the early morning hours of February 11, 2023, Milwaukee County Sheriff's deputies pulled over Bernabe Gonzalez for running a red traffic signal. (R. 2:1). Law enforcement officers detected signs of possible intoxication and subsequently requested that Mr. Gonzalez perform standard field sobriety tests. (R. 2:1). During the tests, Mr. Gonzalez demonstrated 6 of 6 clues of intoxication on the horizontal gaze nystagmus test, 5 out of 8 clues on the walk and turn test, and 2 out of 4 clues on the one legged stand test. (R. 2:1). Additionally, a preliminary breath test was performed. (R. 2:1). That breath test showed Mr. Gonzalez to have a blood alcohol concentration of 0.104. (R. 2:1). After performing poorly on the field sobriety tests, Mr. Gonzalez received a citation for an OWI first offense. (R. 2:1). A blood draw was subsequently taken. (R. 2:1). Blood results from the Wisconsin State Laboratory of Hygiene confirmed that within three hours of Mr. Gonzalez's operation of a motor vehicle, his blood contained 0.118 g/100 mL of ethanol. (R. 2:1).

An inventory search of Gonzalez's car was performed prior to towing. During that search, police recovered a 9mm Smith & Wesson handgun from the driver's side door of Mr. Gonzalez's vehicle. (R. 2:1). Mr. Gonzalez was in possession of a Wisconsin issued concealed carry license that enabled him to lawfully conceal and carry a firearm at the time of this incident. (R. 2:1). However, due to the level of his intoxication, the State charged Mr. Gonzalez with the misdemeanor offense of possession of a firearm while intoxicated, contrary to Wis. Stat. § 941.20(1)(b). (R. 2:1).

Mr. Gonzalez resolved the OWI citation on October 16, 2023. (R. 21:24). On that date, Mr. Gonzalez entered a guilty plea which was accepted by the circuit court and remains of record. (R. 21:24).

Mr. Gonzalez filed a motion to dismiss the criminal possession of a firearm while intoxicated charge on the grounds that the U.S. Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 213 L. Ed. 2d 387, 142 S.Ct. 2111, 2162 (2022), invalidated Wisconsin's prohibition on firearms possession for intoxicated persons.

(R. 6:1-5). The circuit court granted Mr. Gonzalez's motion to dismiss on September 6, 2023. (R. 20:33-34). In reaching its decision, the circuit court noted that the State had a burden to show "distinctly similar" laws from the time of the founding. The circuit court found that the State failed to show "any 18th century or older laws that were distinctly similar to Wis. Stat. § 941.20(1)(b), "as called for by the *Bruen* decision." (R. 20:21).

The State filed a motion for reconsideration on September 16, 2023, raising several arguments that it believed were not fully considered by the circuit court. (R. 11:1-16). Among those were (1) Gonzalez's commission of an OWI offense at the time of the possession, (2) additional historical analogues not previously considered, and (3) State and federal decisions on this issue since *Bruen* was decided. (R. 11:1-16). The State's motion for reconsideration was rejected by the circuit court on October 16, 2023. The State now seeks review of both decisions in the Court of Appeals.

STANDARD OF REVIEW

Appellate courts review a circuit court's decision to resolve a motion to dismiss a complaint de novo. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693. When the motion to dismiss is based on "[i]nterpretation and application of statutes and case law to a set of facts" appellate courts review those decisions de novo. *Meyers v. Bayer AG*, 2007 WI 99, ¶22, 303 Wis. 2d 295, 735 N.W.2d 448.

ARGUMENT

The Second Amendment right to bear arms for self-defense is not unlimited. *McDonald v. City of Chicago, Ill*., 561 U.S. 742 (2010). Wisconsin law imposes one such limitation by criminalizing and prohibiting the act of going "armed with a firearm while … under the influence of an intoxicant." Wis. Stat. § 941.20(1)(b). Wisconsin's prohibition has been in effect since 1883 when § 3, ch. 329, Laws of 1883, was passed. The original statute declared: "It shall be unlawful for any person in a state of intoxication, to go armed with any pistol or revolver".

Over the course of the 140 years following the passage of Wisconsin's prohibition, the law has been deemed to be valid and unreversed in the face of challenges. *See State v. Christen*, 2021 WI 39,

¶ 52, 396 Wis. 2d 705, 732, 958 N.W.2d 746, 759 (finding Wis. Stat. § 941.20(1)(b) "does not strike at the core right of the Second Amendment"). However, in 2022, the United States Supreme Court in *Bruen* refined the established test that courts must apply to review laws which limit possession of firearms to individuals. That newly refined test requires courts to determine (1) whether the plain text of the Second Amendment covers the conduct at issue, and (2) whether the State established the regulation as being consistent with the historical tradition of firearm regulation in the United States. *United States v. Posey*, No. 2:22-CR-83 JD, 2023 WL 1869095, at *2 (N.D. Ind. Feb. 9, 2023), citing *Bruen*, 142 S.Ct. at 2129-30.

In creating this test, the Supreme Court imposed a duty on the government to "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id*. at 2127. To satisfy this duty, the government must show the use of a "historical analogue." *Id*. at 2132. The *Bruen* court insisted that this requirement compels the State to simply find a historical analogue in the modern law, and did not require a "historical twin." *Id*. at 2133. Indeed, *Bruen* only requires "relevant" similarity. *United States v. Daniels*, 77 F.4th 337, 343 (5th Cir. 2023). "Even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Bruen,* 142 S.Ct. 2111, 2132 (2022).

In determining whether a law is analogous enough, courts examine "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* (quoting *McDonald*, 561 U.S. at 767 (itself quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

Wisconsin State Statute Section 941.20(1)(b) is valid under the newly revised *Bruen* analysis for three primary reasons. First, the Second Amendment's right to possess a firearm applies to law-abiding citizens for self-defense. Gonzalez was not acting as a law-abiding citizen when this incident occurred because he was operating a motor vehicle while intoxicated. That conduct is expressly illegal in the state of Wisconsin. Second, Wisconsin's law is analogous to laws already deemed presumptively lawful. Third, Wisconsin's law is historically analogous to numerous other state laws from the founding and reconstruction eras of this nation's history.

These analogous laws are commonly cited in the many federal cases that have been decided since the *Bruen* decision. Based on the foregoing, this Court should reverse the circuit court's decision.

I. The circuit court erred in granting Gonzalez's motion to dismiss because the Second Amendment Right does not include persons driving a vehicle while intoxicated.

The Second Amendment right of "the people to keep and bear arms" does not apply to all people. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (holding that "'the people' seems to have been a term of art" that was employed during the drafting and ratification of the Constitution); *Heller*, 554 U.S. at 580. The phrase "the people" refers to the "class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id*.

The contours of the term, "the people", were defined by the *Heller* Court in the Second Amendment context as "law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. Thus, the Second Amendment right to bear arms exists only for those people who are (1) law abiding, responsible citizens, (2) in possession of a handgun, (3) in the home. *Id*., at 635-636.

The right of law abiding citizens to possess a handgun for self-defense was incorporated (applied) against the states two years after *Heller* in the *McDonald,* 561 U.S. 742 (2010), decision. Nonetheless, the discussion pertaining to application of the term, "the people", continued to receive attention. *See United States v. Carpio-Leon*, 701 F.3d 974, 975 (4th Cir. 2012) (stating that "the Second Amendment does not extend to provide protection to illegal aliens, because illegal aliens are not law-abiding members of the political community"), *United States v. Grinage*, JKP-21-399, 2022 WL 17420390, at *5 (W.D. Tex. Dec. 5, 2022) (explaining that *Heller* and *Bruen* establish that convicted felons are not included in "the people" protected by the Second Amendment).

Bruen expanded the Second Amendment analysis to modify the third requirement to include possession of firearms outside of the home as well. *Bruen*, 142 S.Ct. 2111, 2122 (2022). However, *Bruen* did not change the requirement pertaining to the application of the first two elements.

Police first encountered Mr. Gonzalez after observing him operate a motor vehicle without paying heed to a red traffic signal. (R. 2:1). After the lawful stop of his vehicle, police made direct contact with Mr. Gonzalez whom they believed to be intoxicated. Standard field sobriety tests and a preliminary breath test led to confirmation of their suspicions. (R. 2:1). Mr. Gonzalez was arrested, and he pled guilty to the OWI offense. (R. 21:24).

Driving drunk is illegal in Wisconsin, pursuant to Wis. Stat. § 346.63(1)(a). Operating a motor vehicle with a prohibited blood alcohol concentration above Wisconsin's threshold is also illegal pursuant to Wis. Stat. § 346.63(1)(b). The Wisconsin State Laboratory of Hygiene determined that Mr. Gonzalez's blood contained 0.118 g/100 mL of ethanol. (R. 1:2). When police arrested Mr. Gonzalez for committing an OWI offense in violation of Wisconsin state law, he was not acting as a member of "the people" as the United States Supreme Court has defined the term. Neither should the Second Amendment be construed to protect the conduct of those who choose to drive drunk.

Mr. Gonzalez fell short of meeting the definition of "law-abiding" and "responsible" at the time he possessed a firearm. For that reason, Mr. Gonzalez did not meet the criterion of "the people" for purposes of the Second Amendment. Therefore, the Second Amendment protections cannot extend to Mr. Gonzalez in the same manner as would be extended and applied to protect the rights of law-abiding citizens.

II. Wisconsin's prohibition is analogous in application to other laws found to be presumptively lawful.

Bruen was unable to shed light in its decision on which types of restrictions are deeply rooted in this nation's history and tradition. However, the Court already laid a foundation to that issue in *Heller*. The *Heller* Court did not apply its decision to felons, the mentally ill, and sensitive places:

> [N]othing in our opinion should be taken to cast doubt on longstanding 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.

Heller, 554 U.S. at 626.

Heller held these types of state regulations to be "presumptively lawful". Its list is not exhaustive. *Id*., 554 U.S. at 627. In *McDonald*, Justice Alito repeated those assurances. *McDonald*, 561 U.S. at 786 (stating: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill'"). Justice Kavanaugh reiterated the same language from *Heller* and *McDonald* in *Bruen*, ensuring that states retain authority to regulate the possession of firearms in the hands of the mentally ill. *Bruen*, 142 S.Ct. at 2162 (concurring opinion). Since *Heller*, courts seem to universally agree that state regulations on the possession of firearms by the mentally ill are presumptively valid. *See, for e.g., State v. Weber*, 168 N.E.3d 468 at 487 (Ohio 2020) (DeWine, J., concurring in judgment).

The State urges this Court to consider that many of the same arguments favoring firearms prohibitions for the mentally ill[1] can be likened to the context of intoxicated individuals possessing firearms. *Id*., at 488-491. The *Weber* court and other courts share in this belief. See *United States v. Veasley*, No. 23-1114, 2024 WL 1649267 (8th Cir. Apr. 17, 2024); *Daniels*, 77 F.4th at 349.

When raised in this case, comparisons between mentally ill and intoxicated individuals were distinguished by the circuit court as such:

> The mentally ill, especially those who have been determined to be so ill that they cannot possess a firearm, are significantly impaired. One would assume that we are talking about people who lack the intent required to commit many criminal offenses. And that degree of impairment is not coming close to an intoxicated person whom the law almost always holds responsible for their decisions.

(R. 20:29).

Revisiting the topic, in either circumstance, whether intoxicated or mentally ill, the individual is presumed to be unable to rationally exercise his or her mental faculties, whether that be for a temporary period of time or in a more permanent circumstance.

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[1] The use of the term, "mentally ill", is meant to refer to those subject to court ordered restrictions related to their mental capacity.

Our legislature deems that intoxicated and mentally ill individuals lack the capacity to bear firearms in a safe and responsible way. In passing firearm prohibitions against intoxicated and mentally ill individuals alike, the legislature focuses on the impairment itself, not the temporal aspect of the impairment. In much the same way that the legislature desires to keep drunk individuals from driving cars, the legislature has also deemed it unsafe for drunk and mentally ill individuals to possess firearms. Said differently, "there seems to be little reason to treat those who are briefly mentally infirm as a result of intoxication differently from those who are permanently mentally infirm as a result of illness or retardation." Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda,* UCLA L.Rev. 1443, 1535 (2009).

Extending this logic further, a similar application extends to drug users under 18 USC § 922, where "habitual drug abusers, like the mentally ill, are more likely to have difficulty exercising self-control, making it dangerous for them to possess deadly firearms." *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010).

Implicit in this analysis is the notion that Wisconsin's prohibition related to intoxication is far less onerous and restrictive upon a person's Second Amendment right than the prohibition related to the mentally ill. The firearm prohibition for intoxication lasts only for the hours the person is intoxicated, so the prohibition is merely temporary in nature. It follows that intoxication is more akin to a "waiting period" until the human body naturally processes and eliminates the intoxicating substance. An individual is not prohibited from owning a firearm forever; rather, he or she must simply wait until the intoxicated state wanes.

There is also a "control" feature as well. Unlike mental illness, an intoxicated person exercises control. Essentially, an intoxicated person makes a conscious decision to waive his or her Second Amendment right when choosing to drink to the point of intoxication.

This Court may also be persuaded to look to the presumptively lawful "Safe Place" regulations for guidance, as other courts have. *Antonyuk v. Chiumento*, 89 F.4th 271, 367 (2d Cir. 2023), citing *State v. Shelby*, 90 Mo. 302, 2 S.W. 468, 468 (1886) (noting that if the state could constitutionally regulate firearms in "time and place, ... no good

reason is seen why the legislature may not do the same thing with reference to the condition of the person who carries such weapons").

The Wisconsin Legislature's prohibition against intoxicated persons possessing firearms is purposeful and an expression of wisdom. As courts from other jurisdictions have done, the State urges this Court to hold that the prohibition against intoxicated persons possessing firearms be deemed a constitutionally valid regulatory measure.

III. Wisconsin's prohibition on possession of a firearm while intoxicated is historically rooted in this nation's history and tradition.

Wisconsin has a long history and tradition of prohibiting the possession of firearms by intoxicated individuals. Wisconsin's earliest law on the books dates back to 1883, when § 3, ch. 329, Laws of 1883 barred intoxicated individuals from possessing a pistol or a revolver. Other state prohibitions predate Wisconsin. Their laws and history demonstrate that Wisconsin was by no means alone in its restrictions on the possession of firearms by intoxicated individuals.

A. Historical analogues to Wisconsin's intoxicated possession prohibition date back to the seventeenth century.

The earliest restrictions date back to Virginia in 1655, well over a century before the ratification of the United States Constitution. For example, 1655 Va. Acts 401-402, Act XII made it illegal to "shoot any guns at drinking." While the law did create a carveout for marriages and funerals, it also set the bar lower than even intoxication. Acts of Mar. 10, 1655, Act 12, *reprinted in* 1 *The Statutes at Large: Being a Collection of All the Laws of Virginia, From the First Session of the Legislature in the Year 1619*, 401-02 (William Waller Henning ed., 1823) (sic). Virginia's law prohibited firing a weapon where *any* alcohol consumption was involved.

Similarly, New York banned firing guns on New Year's Eve as early as 1771 to prevent "great Damages ... frequently done on [those days] by persons ... with Guns and other Fire Arms and being often intoxicated with Liquor." Ch. 1501, 5 Colonial Laws of New York 244-46 (1894). While these two laws from Virginia and New York are not exact replicas of Wis. Stat. § 921.20(1)(b), the codification of general

principles restricting mixing firearms with alcohol make them historically analogous.

At the time of the founding, many State laws regulated militiamen from being drunk while possessing a firearm. For example, Pennsylvania took action against "[a]ny officer or private man found drunk when under arms." *An Act to regulate the Militia of the Common-Wealth of Pennsylvania* (1777) (§§ IX-X). Pennsylvania's law is separate and distinct from one prohibiting officers and privates from being drunk on duty, meaning that §§ IX-X would seemingly regulate the conduct of those militiamen even when they are not on duty. *An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania* (1780) §§ XLV, XLVIII.

Connecticut punished all militiamen found intoxicated during "any duty under arms." *An Act for regulating and ordering the Troops that are, or may be raised, for the Defence of this Colony* (1775) (art. XIX). Even Rhode Island's law excluding "common drunkards" from enrolling in militias is analogous. 1844 R.I. Pub. Laws 503-16, §§ 1, 45.

Many other states had similar concerns to those listed above but chose to regulate liquor sales rather than the individuals possessing firearms themselves. For instance, New Mexico passed a law 60 years before obtaining statehood that prohibited persons from entering "Ball or room adjoining said ball where liquors are sold … with fire arms or other deathly weapons." 1852 N.M. Laws 67, § 3.

Oklahoma went one step further and prohibited pistols and "other offensive or defensive weapons" in "any place where intoxicating liquors are sold." Will T. Little et al., *Statutes of Oklahoma, 1890*, at 496 (1891) (§ 7). Similarly, Louisiana outlawed dangerous or concealed weapons in all public halls and taverns. Edwin L. Jewell, *The Laws and Ordinances of the City of New Orleans* 1 (1882) (§ 1).

While these laws may seem narrower in application than Wis. Stat. § 921.20(1)(b), in practice, they affected a large swath of the population. *United States v. Okello*, No. 4:22-CR-40096-KES, 2023 WL 5515828, at *4 (D.S.D. Aug. 25, 2023) (citing, Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 509 (2004)).

As more states were added to the union, many quickly passed laws facially similar to that of Wisconsin. Kansas law made it a misdemeanor crime to carry "on his person a pistol, bowie-knife, dirk or other deadly weapon while under the influence of intoxicating drink." 1867 Kan. Sess. Laws. 25, ch. 12, §1. Missouri punished any person who "shall have or carry [any kind of firearms, bowie-knife, dirk, dagger, slung-shot, or other deadly weapon] upon or about his person when intoxicated or under the influence of intoxicating drinks. §1274, The Revised Statutes of the State of Missouri*, 1879*, at 224 (1879). Oklahoma, which was not officially a state until 1907, passed a law prohibiting officers from carrying arms "while under the influence of intoxicating drinks". Will T. Little et al., *Statutes of Oklahoma*, 1890, at 495 §4 (1891). "Guns and Alcohol." Everytown Law, 5 Apr. 2023, everytownlaw.org/everytown-center-for-the-defense-of-gun-safety/guns-and-alcohol/.

Some of these laws went far beyond Wisconsin's. For example, Idaho's earliest law on the topic prohibits an intoxicated individual from having or carrying "any dirk, dirk knife, bowie knife, dagger, slung shot, pistol, revolver, gun or any other deadly or dangerous weapon." 1909 Id. Sess. Laws 6, no. 62, § 1.

All of the above-cited laws are evidence that legislative bodies have recognized that the overconsumption of alcohol affects the decision making, judgment, reaction time, and behavior of individuals. Possessing a dangerous weapon while at a level of intoxicated from alcohol has always created a potential risk and danger to the public. That centuries-old recognition is enough to establish a historical tradition, as required by *Bruen*. *Antonyuk*, 89 F.4th at 367 (finding that the above-cite laws "establish a consistent and representative national tradition of regulating firearms due to the dangers posed by armed intoxicated individuals").

This circuit court distinguished all of these laws. The circuit court found it weighty that many states had no such law restricting the *possession* of a firearm to intoxicated individuals, instead restricting the use and discharge of firearms. It then discredited statutes enacted within a century of the founding of this country by newly admitted states. While the laws in Kansas, Idaho, Missouri, and Wisconsin were passed decades after the ratification of the United State Constitution, most of these laws were passed relatively quickly after (or even, in some instances, before) becoming a state. That these states prioritized prohibitions against intoxicated possession of firearms in the infancy of

statehood lends credence and support to the historical tradition of reasonable restrictions placed upon the Second Amendment's right to bear arms.

The State believes that the meaning, intent, and sentiments of the historical examples demonstrate that, from even before the founding of this nation, state governments passed laws to restrict intoxicated persons from accessing firearms. Behind the sentiment of these state governments is a simple objective: Protection of the public. Given a lengthy set of historically analogous statutes, prohibitions against the possession of firearms by those in an intoxicated state is strongly rooted as a concept and in practice.

B. *Bruen* does not require a plethora of historical analogues for the State to meet its burden.

The State need only show a "historical analogue, not a historical twin." *Bruen*, 142 S.Ct. 2133. The Circuit Court noted that it did not find "any 18th century or older laws that were, 'distinctly similar,' as called for by the *Bruen* decision." (R. 20:21). However, *Bruen* does not require the State to show a "distinctly similar" law to meet its burden. *Bruen* notes that "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S.Ct. 2131. However, relevancy should not be mistaken as a requirement. Rather, *Bruen* clearly states that the government need only "identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.*, 142 S.Ct. 2133.

Simply put, so long as the State can point to an analogous restriction on the Second Amendment right, the State meets its burden. Here, several historical laws date from the 17th, 18th, 19th and 20th centuries, including the 1655 Virginia law, as well as other analogous laws from the states of Missouri, New York, and Kansas. These laws demonstrate that a historical tradition exists. All of the cited laws share the same sentiments, concerns, and Second Amendment restrictions as Wisconsin's 1883 law.

Bruen explicitly does not require a sister statute because the world in which we live, and the laws passed to govern that world, are entirely different than in the 1600's and 1700's. Per the website Constitutioncenter.org, at the time of ratification of the United States Constitution, the United States had approximately 3.9 million people

living in it, and the largest city had a population of 40,000. The danger posed to the community by a single armed gunman is different today compared to 300+ years ago. This danger is amplified when the gunman is intoxicated. For example, the need to protect law enforcement in 1787 did not exist in the same way it does today because cities of 40,000 did not require the level of law enforcement and protection that modern metropolitan areas require. Neither did the need to protect the public from drunk drivers exist in the way it does today. *Bruen* seems to understand that. That is why the "perfect" sister law is not required. However, the laws from yesteryear and the laws today still have analogous language, sentiment, and intent to protect the public from intoxicated individuals who possess firearms.

The historical laws cited above have already been used in a pre-*Bruen* historical analysis to determine that Wisconsin's prohibition has historical analogues. *Christen*, 2021 WI 39 at ¶ 73 (Hagedorn, B., Concurring in Judgment). These examples demonstrate analogous language, sentiment, and intent to Wisconsin's law. Because *Bruen* only requires "*a* historical analogue", and numerous were cited, this Court has a full record of historically rooted examples sufficient for a reversal.

C. Wisconsin's intoxicated possession prohibition is substantially similar to Federal Statute 18 USC 922(g)(3) which has withstood numerous challenges since ***Bruen*.**

Federal courts have faced challenges to 18 USC §922(g)(3) which bars anyone using or addicted to any controlled substance from possessing a firearm.[2] While not identical, many federal courts have turned to possession while intoxicated historical examples for guidance. When relying on such examples, numerous federal courts have upheld the federal prohibition, despite having far less historical support in drug-related cases than that of intoxication. *See United States v. Espinoza-Melgar*, No. 2:21-CR-204-DAK, 2023 WL 5279654, at *8 (D. Utah Aug. 16, 2023) (finding no distinction between *possession* while intoxicated and *use* while intoxicated); *United States v. Lewis*, Case No. CR-22-368-F, 2023 WL 187582, at *4 n.5 (W.D. Okla., Jan.

[2] The State does not mean to suggest that all circuits have upheld 18 USC §922. At least one circuit held the federal law to be invalid under the new *Bruen* test. *Daniels*, 77 F.4th 337 (5th Cir. 2023).

13, 2023) (finding 18 USC §922 relevantly similar to intoxicated individuals); *Fried v. Garland*, F. Supp. 3d , 2022 WL 16731233, at *7 (N.D. Fla. Nov. 4, 2022) (recognizing a history of statutes from the founding and reconstruction eras that restricted gun possession by the intoxicated); *United States v. Seiwert*, 2022 WL 4534605 (N.D. Ill. 2022).

Some federal courts addressing challenges to the various subsections of 18 USC § 922(g)(1-9) have also justified upholding the federal prohibitors related to felons, the mentally ill, and drug addicted individuals by deeming there to be analogous treatment of "dangerous" groups. *See United States v. Seiwert*, 2022 WL 4534605, at *2 (N.D. Ill. Sept. 28, 2022) ("§922(g)(3) is relevantly similar to regulations aimed at preventing dangerous or untrustworthy persons from possessing and using firearms"); *Fried v. Garland*, 2022 WL 16731233, at *7 (N.D. Fla. Nov. 4, 2022) ("the historical tradition of keeping guns from those the government fairly views as dangerous... is sufficiently analogous to modern laws keeping guns from habitual users of controlled substances."); *United States v. Posey*, 2023 WL 1869095, at *9 (N.D. Ind. Feb. 9, 2023) (finding § 922(g)(3) "analogous to historical regulations preventing dangerous persons, such as felons and the mentally ill, from possessing firearms").

Were this Court to apply a similar logical framework to the circumstances in this case, then the result would be intuitive: recognition that the legislature meant to prohibit "dangerous" people from possession of firearms, including felons, mentally ill persons, and intoxicated individuals.

Intoxicated people are less able to think rationally and perform advanced motor skills in a safe manner. Those who drive motor vehicles while intoxicated are "dangerous" due to the potential risk of harm to the community. Evidence supports the argument that intoxicated people should be prohibited from driving. Per the National Highway Traffic Safety Administration, 37 people die in the United States every day from drunk-driving related crashes.[3] Motor vehicle related crashes are one of the largest killers in the State of Wisconsin, and OWI related crashes comprise a significant portion of those. If intoxicated persons are "dangerous" and should be prohibited from

[3] https://www.nhtsa.gov/risky-driving/drunk-driving

driving, the same basic logic can be applied to the prohibition of intoxicated persons in possession of firearms.

Federal courts have faced numerous challenges to prohibitions on gun possession since *Bruen*. Some examine the history of intoxication statutes, while others examine the meaning of "dangerous" individuals. Some courts have examined the above cases and noted that all of them are historically analogous to laws like we have in Wisconsin. *United States v. Okello*, No. 4:22-CR-40096-KES, 2023 WL 5515828, at *3 (D.S.D. Aug. 25, 2023) (finding that (1) regulations on the mentally ill, (2) regulations on the intoxicated, and (3) regulations on lawbreakers are all adequate to find a historical analogue to 18 USC §922(g)(3)).

So, this Court has an abundance of historical laws directing us to a buoyant history and tradition of legislatures who all believe(d) that community safety benefits when intoxicated individuals are prohibited from possessing firearms. This Court has ample federal decisions with sound reasoning which support upholding laws analogous to Wisconsin's prohibition of intoxicated individuals from possessing firearms. This Court should be persuaded by the quality and quantity of laws and decisions in similar cases, as well as the variety of approaches taken in the federal courts to address this issue, and uphold Wisconsin's intoxicated firearm prohibition.

CONCLUSION

This Court should reverse the circuit court's decision and remand the matter for further proceedings.

Dated this 6th day of May, 2024.

Respectfully submitted,

Kyle J. Elderkin
Assistant District Attorney
State Bar #1122604

Milwaukee County District Attorney
821 West State Street, Room 405
Milwaukee, Wisconsin 53233
(414) 278-4646
kyle.elderkin@da.wi.gov

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6408 words.

Dated this 10th day of May, 2024.

Electronically Signed by:

Kyle J. Elderkin
KYLE J. ELDERKIN
Assistant District Attorney

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 6th day of May, 2024.

Electronically Signed by:

Kyle J. Elderkin
KYLE J. ELDERKIN
Assistant District Attorney