No. 2024AP358-CR

In the
Wisconsin Court of Appeals
District I

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

BERNABE GONZALEZ,
Defendant-Respondent.

On Appeal from the Circuit Court for Milwaukee County
Case No. 2023-CM-1483
The Honorable Anderson M. Gansner Presiding

DEFENDANT-RESPONDENT'S BRIEF

WISCONSIN APPELLATE LITIGATION SERVICES LLC

ANTHONY F. LOCOCO
SBN 1101773
13435 Watertown Plank Rd.
Ste 5
Elm Grove, WI 53122
(262) 228-8486
anthony@wisconsinappellate.com

ADAMS LAW GROUP LLC

DANIEL M. ADAMS
SBN 1067564
1200 E. Capitol Dr.
Ste 360
Milwaukee, WI 53211
(414) 921-1945
dmorganadams@gmail.com

Attorneys for Defendant-Respondent Bernabe Gonzalez

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Second Amendment's plain text covers the Defendant-Respondent's conduct of publicly keeping and/or bearing a firearm as authorized by his Wisconsin Concealed Carry Weapon permit.

The Circuit Court concluded that the State forfeited its argument that the Second Amendment does not cover the Defendant-Respondent's conduct but also concluded on the merits that the Second Amendment clearly applied anyway. R. 20:15; 21:20-21.

This Court should affirm on the ground that the State forfeited its argument on this issue. Alternatively, this Court should affirm on the merits.

2. Whether the State met its burden to show that it may, consistent with the Second Amendment of the United States Constitution, criminalize constructive, intoxicated possession of a properly-permitted firearm.

The Circuit Court concluded that the State failed to establish that a criminal prohibition on merely being within reach of a properly-permitted firearm while intoxicated "is consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 17 (2022); *see, e.g.*, R. 20:21-34.

This Court should affirm on the ground that the State forfeited its arguments on this issue. Alternatively, this Court should affirm on the merits.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not warranted because "[t]he briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant." Wis. Stat. § 809.22(2)(b).

Publication is not warranted because the issues will be decided "by one court of appeals judge under [Wis. Stat. §] 752.31(2) and (3)" "on the basis of controlling precedent and no reason appears for questioning or qualifying the precedent." § 809.23(1)(b)3.-4.

INTRODUCTION

This case is not about whether the State may criminalize intoxicated use of a firearm. Nor is it about whether the State may criminalize intoxicated brandishing, holding, or direct possession of a firearm. Nor is it about whether the State may criminalize intoxicated use of a vehicle. At issue in this case is the much more limited question of whether the State may, consistent with the Second Amendment, charge a citizen with a crime merely for being within *reach* of a properly-permitted firearm while intoxicated.

The Defendant-Respondent Bernabe Gonzalez has separately pleaded no contest to operating a motor vehicle while intoxicated, here a forfeiture offense. He was sentenced for that offense. But *this* case would be the same even if a family member had driven Mr. Gonzalez home, or if Mr. Gonzalez had fallen asleep in the car without turning it on. According to the State, anyone who consumes one drink too many and then passes within reach of a lawfully-owned firearm can be thrown in jail, even if (as in this case) they never even touch the gun.

The Supreme Court's recent decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 17 (2022), makes clear that the State must justify this sweeping application of the criminal law by showing that it "is consistent with this Nation's historical tradition of firearm regulation." But below the State utterly failed to meet this burden by forfeiting every argument it now belatedly tries to make.

Even setting forfeiture aside, the State is unable to show that this prosecution—a criminal charge that Mr. Gonzalez somehow "[e]ndanger[ed] safety by use of [a] dangerous weapon" that he never handled, Wis. Stat. § 941.20(1)(b)—would have been anything but

foreign to the Americans who ratified the Second Amendment. The Circuit Court below correctly dismissed this case.

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal by the State arising from the dismissal of a case in which the State had charged Mr. Gonzalez with a Class A misdemeanor, namely one count of endangering safety by use of a dangerous weapon—operating or going armed with a firearm while under the influence of an intoxicant. *See* Wis. Stat. §§ 941.20(1)(b); R. 2:1. Importantly, this case does *not* concern the State's separate charge against Mr. Gonzalez for operation of a motor vehicle while intoxicated (first offense). *See* Wis. Stat. § 346.63(1)(a); *see generally State v. Gonzalez*, No. 2023-TR-13515 (Milwaukee County Cir. Ct. 2023). Mr. Gonzalez pleaded no contest to this forfeiture (non-criminal) offense. *See id.* He has already been sentenced (*i.e.*, punished) for that conduct. *See id.*[1]

II. Factual Background

The relevant facts of this case are both limited and, for purposes of this appeal from a decision on a motion to dismiss, undisputed. *See, e.g.*, *State v. Chvala*, 2004 WI App 53, ¶3 n.3, 271 Wis. 2d 115, 678 N.W.2d 880, *aff'd*, 2005 WI 30, 279 Wis. 2d 216, 693 N.W.2d 747 (per curiam).

On February 11, 2023, a deputy of the Milwaukee County Sheriff's Department pulled Mr. Gonzalez over for running a red light and almost striking a squad car. R. 2:1. Based on the deputy's observations, field sobriety tests, and a preliminary breath test showing a result of 0.104,

[1] This Court can take judicial notice of CCAP entries. *See, e.g.*, *State v. Aderemi*, 2023 WI App 8, ¶7 n.3, 406 Wis. 2d 132, 986 N.W.2d 306 (citing Wis. Stat. § 902.01).

Mr. Gonzalez was arrested for operating a motor vehicle while intoxicated—first offense. *Id.* Mr. Gonzalez would plead no contest to that offense—a forfeiture rather than a crime, *see* Wis. Stat. § 346.65(2)—later that year. *See generally State v. Gonzalez*, *supra*. His sentence for that offense included a fine, temporary revocation of Mr. Gonzalez' driver's license, the payment of mandatory costs, fees, assessments, and surcharges, and the requirement that Mr. Gonzalez complete a safe driver assessment plan. *Id.*; R. 21:25-26. Again, the OWI proceedings are not at issue on this appeal.

During an inventory search of Mr. Gonzalez' vehicle, the deputy located a handgun which would have been within Mr. Gonzalez' reach. R. 2:1. Mr. Gonzalez informed the deputy that he had a Wisconsin Concealed Carry Weapon ("CCW") permit for the firearm, which the deputy ultimately confirmed was correct. *Id.* There is no allegation by the State that Mr. Gonzalez ever shot, brandished, handled, or otherwise touched the firearm in any way during the relevant time period. Further, there is no allegation by the State that Mr. Gonzalez has a criminal record or that he was otherwise prohibited from possessing a firearm generally. To the contrary, Mr. Gonzalez' CCW permit means that he completed a firearms training safety course and passed a background check run by the State. R. 20:8. Nor did the State contest that, aside from the conduct resulting in the OWI offense for which Mr. Gonzalez has already been sentenced, Mr. Gonzalez has otherwise been "a wonderful member of this community; a business owner; a community activist; and a family man." R. 21:25.

III. Procedural Background

On May 18, 2023, the Milwaukee County District Attorney issued a criminal complaint charging Mr. Gonzalez with "Endangering Safety by Use of Dangerous Weapon (Under the Influence of Intoxicant)," citing Wis. Stat. § 941.20(1)(b). R. 2:1 (capitalization altered).

That statute provides in relevant part:

> (1) Whoever does any of the following is guilty of a Class A misdemeanor: . . . .
> (b) Operates or *goes armed with a firearm while he or she is under the influence of an intoxicant.*

(Emphasis added.)

Unlike the penalty for Mr. Gonzalez' OWI-1st forfeiture offense, the potential penalties for a Class A misdemeanor include a fine of up to $10,000 and/or imprisonment of up to 9 months. *See* Wis. Stat. § 939.51(3)(a).

On June 27, 2023, Mr. Gonzalez filed a motion to dismiss the complaint. R. 6. Because the State's conduct in briefing that motion is relevant to his forfeiture arguments, Mr. Gonzalez will discuss it in greater than ordinary detail.

In his motion to dismiss, Mr. Gonzalez argued, among other things, that applying Wis. Stat. § 941.20(1)(b) to the facts of this case would violate Mr. Gonzalez' Second Amendment right to keep and bear arms. *See id.* In particular, Mr. Gonzalez noted that the Supreme Court's recent decision in *Bruen* had significantly altered Second Amendment jurisprudence across the country, "presumptively protect[ing]" Mr. Gonzalez' conduct and requiring the State to show that application of the statute at issue was "consistent with the Nation's historical tradition of firearm regulation." *See id.* at 3-5 (quoting *Bruen*, 597 U.S. at 24).

In response, the State filed a 2-paragraph argument that did not address *Bruen* in any way, much less set forth historical argument

justifying its application of Wis. Stat. § 941.20(1)(b). R. 8:2. Mr. Gonzalez asked that the Circuit Court find the State had waived the Second Amendment argument, R. 9:1.

The Circuit Court, the Honorable Anderson M. Gansner presiding, held oral argument on August 18, 2018 during which the State, in the Circuit Court's words, "for the first time offered *one* historical argument, simply stating that the law in question has existed in some form since 1883 and has not been challenged or declared unconstitutional before." R. 20:11-12 (emphasis added). The Circuit Court took the motion to dismiss under consideration, setting a date of September 6 for its decision. *See id.* at 12.

On September 1, without moving for leave to do so, the State filed a "supplemental brief in letter form," R. 20:13, in which it set forth substantial amounts of new argument, but still no historical case as contemplated by *Bruen*. *See* R. 10.

On September 6, the Circuit Court announced its decision orally. It began by declining to strike the State's supplemental brief while admonishing the State to seek permission before filing supplemental pleadings in the future. R. 20:6. It then observed that the State was not contesting that Mr. Gonzalez' conduct was "covered by the second amendment's plain text" and that Mr. Gonzalez was "undoubtedly" one of "the people" the Second Amendment addresses. *Id.* at 15. Addressing the principal legal question at issue, the Court noted that the State "ha[d] not even tried to present this court with any meaningful historical analogues" as required by *Bruen* and openly wondered "how much work [the Court] should do for the State when evaluating this motion." R. 20:20-21. Answering this rhetorical question for itself, the Court

acknowledged that Mr. Gonzalez had objected to the Court doing *any* "work" for the State given that it was the State's burden to support the constitutionality of the statute at issue, but added that "as a fairly new judge, I was uncomfortable with that." *Id.* at 21. The Circuit Court then explained that in the absence of State argument the Court had done its own historical research. *Id.*

The Court's independent work turned out to be enormous in scope, spanning hundreds of years and apparently every relevant state in the country, from a 17th Century Virginia statute to 19th Century Missouri case law. R. 20:13-34. The Court concluded, after recounting its extensive independent research, that "beyond a reasonable doubt the statute violates the federal second amendment of the United States Constitution as applied to Mr. Gonzalez" because there is no historical tradition of prohibiting proximity to a firearm while intoxicated. R. 20:33. Before dismissing the case, the Court emphasized the "unique" aspects of this case, such as the facts that Mr. Gonzalez had a clean record, held a concealed carry permit, and never even touched the gun at issue. R. 20:33.

On September 19, facing the prospect of appeal on the record just discussed, the State filed what it called a "Motion for Reconsideration," citing Wis. Stat. § 806.07(1)(h) ("Relief from judgment or order"). R. 11. That motion was comprised of over a dozen pages of historical argument and statutory citations. *See id.* The State also maintained in that motion, for the first time, that Mr. Gonzalez was not one of the "people" covered by the Second Amendment. *See id.* at 7-8. Mr. Gonzalez objected, by letter, to the filing of the new motion and sought direction from the Circuit Court before responding to it. R. 12.

On October 16, the Circuit Court issued an oral ruling on the State's motion without "allow[ing] for any further briefing" or "oral argument." *See* R. 21:3-4. The Court disagreed with the State's characterization of its motion as a Motion for Reconsideration, noting it was instead a motion for relief from the judgment based on the citation to § 806.07(1)(h). R. 21:4, 21. It also questioned whether § 806.07(1)(h) even authorized the State to file such a motion in a criminal case, but assumed without deciding that it did. *Id.* at 6.

The Court then found that the State's motion did not "cite any new facts or new controlling authority" and that the State was doing "what [the Court] think[s] [the State] probably would admit it should have done months ago, and that's try to provide some actual historical analogues." R. 21:11. Nevertheless, the Court meticulously addressed each of the State's cited authorities and concluded that none justified modification of its earlier decision. *See id.* at 11-22. Of note, the Court explicitly found that the State had waived or forfeited any argument that Mr. Gonzalez is not one of the "people" covered by the Second Amendment. *Id.* at 6; 20.

This appeal by the State follows.

STANDARD OF REVIEW

"The constitutionality of a statute presents a question of law that [this Court] review[s] de novo." *State v. VanderGalien*, 2024 WI App 4, ¶19, 410 Wis. 2d 517, 2 N.W.3d 774.

ARGUMENT

I. The analytical framework governing this case is set forth in *New York State Rifle & Pistol Association, Inc. v. Bruen*.

For most of United States history, the Second Amendment received scant attention in Supreme Court case law. It was not until the landmark 2008 case of *District of Columbia v. Heller*—over 200 years

after the founding—that the Court concluded that the Second Amendment even "confer[s] an individual right to keep and bear arms" in the first place. 554 U.S. 570, 595. And it was not until 2010 that the Court held in *McDonald v. City of Chicago* that the Second Amendment "is fully applicable to the States" via the Fourteenth Amendment. 561 U.S. 742, 749.

In neither of these cases, however, did the Court provide much guidance on *how* courts should apply the Second Amendment to challenged firearm regulations. In their wake, courts across the country were left to determine how to assess laws that fell short of the unqualified bans on handgun possession for self-defense in the home the Court had previously invalidated. *See id.* at 749-51; *Heller*, 554 U.S. at 628. Many courts applied traditional means-end scrutiny, *i.e.* strict or intermediate scrutiny depending on the severity of the regulation. *See Bruen*, 597 U.S. at 18-19. The Supreme Court of Wisconsin took this approach itself in the 2021 case of *State v. Christen*, 2021 WI 39, 396 Wis. 2d 705, 958 N.W.2d 746. Like this one, that case involved an as-applied challenge to Wis. Stat. § 941.20(1)(b). *See Christen*, 396 Wis. 2d 705, ¶¶1-2. Unlike this case, however, in *Christen* the intoxicated defendant allegedly brandished the firearm and threated to shoot other individuals. *See id.* at ¶¶5-14. Applying intermediate scrutiny, the *Christen* Court rejected the defendant's as-applied constitutional challenge to the statute. *Id.* at ¶53-62.[2]

Then came *Bruen* in 2022, in which the Supreme Court announced for the first time the framework applicable to Second Amendment

[2] *See also State v. Roundtree*, 2021 WI 1, ¶¶1-5, 395 Wis. 2d 94, 952 N.W.2d 765 (applying intermediate scrutiny to as-applied challenge to felon-in-possession statute and upholding statute).

challenges and made clear that means-end scrutiny is inappropriate in Second Amendment cases. *See Bruen*, 597 U.S. at 19.

Bruen involved a New York law that conditioned issuance of a license to carry handguns publicly for self defense on the "showing of some . . . special need." *Id.* at 11. In striking down the regulation and declaring that the Second and Fourteenth Amendments "protect an individual's right to carry a handgun for self-defense outside the home," *id.* at 10, the Court rejected lower courts' application of the "popular[]" means-end test to assess Second Amendment challenges generally and use of intermediate scrutiny specifically. *See id.* at 19, 23.

Instead, the Court announced a two-part analysis:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 24 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961)).

The Court provided several helpful rules for conducting the historical analysis the Second Amendment demands, including the following:

- "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a *distinctly* similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.* at 26 (emphasis added).
- "[I]f earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id.* at 26-27.

- When considering "modern regulations that were unimaginable at the founding," the "historical inquiry that courts must conduct will often involve reasoning by analogy." *Id.* at 28. Any analogues must be "*relevantly* similar," and two metrics that may render regulations relevantly similar for purposes of the Second Amendment are "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 28-29 (quoting C. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 773 (1993)) (emphasis added).
- Courts should neither "uphold every modern law that remotely resembles a historical analogue," nor demand a "historical *twin*" as opposed to an analogue. *Id.* at 30 (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021)).
- In terms of number of analogues necessary to demonstrate a historical *tradition* of firearm regulation, the Court opined that it "doubt[ed] that three colonial regulations could suffice." *Id.* at 46 (emphasis removed); *see also id.* at 65-66.
- Finally, "not all history is created equal." *Id.* at 34. The Supreme Court has "generally assumed," though not definitively ruled, that "the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id.* at 37. Thus "post-Civil War discussions of the right to keep and bear arms," for example, "do not provide as much insight into its original meaning as earlier sources." *Id.* at 36 (quoting *Heller*, 554 U.S. at 614).

II. The Second Amendment's plain text covers Mr. Gonzalez' conduct.

The Second Amendment 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 threshold inquiry in this case is whether the Second Amendment's plain text contemplates Mr. Gonzalez' decision to publicly keep and bear his firearm.

Heller, *McDonald,* and *Bruen* already answer this question in the affirmative. *Heller* makes clear that the initial "prefatory" clause of the Amendment (discussing the Militia) does not limit the second, "operative" clause of the Second Amendment, and that this latter clause "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *See, e.g.*, *Heller*, 554 U.S. at 578, 592, 598-600. *McDonald* confirms that the absolute prohibition on infringement by the government applies to state governments. *See McDonald*, 561 U.S. at 749. And *Bruen* clarifies that this individual right includes "a general right to public carry." *Bruen*, 597 U.S. at 33.

Examining the individual words of the Second Amendment ("people," "keep," "bear," and "Arms") produces the same result. As an "ordinary, law-abiding, adult citizen[]," *id.* at 31, who has committed no felonies, has no record of serious mental illness, owns an insurance agency, and underwent training and a background check to obtain his CCW permit, *see* R. 20:15, 21:25, Mr. Gonzalez is one of "the people" mentioned in the Amendment. *See Bruen*, 597 U.S. at 31-32; *see also Heller*, 554 U.S. at 580 (suggesting that "the people" refers to that "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" (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 249, 265 (1990)). The word "keep" means "have" or "possess" and the word "bear" means "carry" for the "purpose" of "confrontation."

Heller, 554 U.S. at 582-84. "Bear" in particular "naturally encompasses public carry," especially since "self-defense is 'the *central component* of the [Second Amendment] right itself" and "[m]any Americans hazard greater danger outside the home than in it." *Bruen*, 597 U.S. at 32-33 (quoting *Heller*, 554 U.S. at 599) (first alteration in original). There is likewise no "home/public distinction" with respect to the right to "keep" arms. *See id.* at 32. Lastly, "Arms" include handguns, the "quintessential self-defense weapon." *Heller*, 554 U.S. at 628-29; *see also Bruen*, 597 U.S. at 32.

That the Second Amendment at least applies here is "plain[]," R. 20:15, which is why the State did not dispute the question during the motion-to-dismiss proceedings below. *See* R. 20:15; 21:20.

A. The State forfeited any argument that Mr. Gonzalez is not one of the "people" to whom the Second Amendment refers.

Before this Court, however, the State argues that "Mr. Gonzalez did not meet the criterion of 'the people' for purposes of the Second Amendment" because the Second Amendment does not "protect the conduct of those who choose to drive drunk." State's Br. 12.

Candor would seem to dictate an acknowledgment by the State that the Circuit Court *explicitly* found this argument "waived . . . or at least forfeited" below. R. 21:20. Not only did the State not make this argument in its brief in response to Mr. Gonzalez' motion to dismiss, and not only did the State not make this argument in its later, improperly-filed supplemental brief, but at its oral ruling on the motion on September 6 the Circuit Court noted on the record that the State was not contesting this part of the inquiry, and the State did not correct the Circuit Court or otherwise object in any way. *See* R. 20:15. It was only in the State's motion under Wis. Stat. § 806.07(1)(h) *following the Circuit*

Court's decision to dismiss the case that the State argued for the first time that Mr. Gonzalez was not one of the "people" within the meaning of the Second Amendment. R. 11:7-8. The Circuit Court properly found the argument waived or forfeited. R. 21:20.

This means the argument cannot be raised now. This Court consistently applies a rule that "a party seeking reversal may not advance arguments on appeal which were not presented to the trial court." *State v. Rogers*, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995). And although this Court has "recognized that the rule would seemingly disadvantage criminal defendants, since they are most likely to challenge the trial court," it reassured the public that it would "without hesitation apply the waiver rule against the state where the issue was not first raised by it at the trial court." *Id.* (quoting *State v. Holt*, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985)).

The result is not changed by the fact that the State tried to supplement the record for appeal with a post-decision motion containing new arguments, regardless of whether the motion below is considered as one for reconsideration or one for relief from judgment under § 806.07(1)(h).

Beginning with the former, a motion for reconsideration requires a movant to present "either newly discovered evidence or establish a manifest error of law or fact." *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. The State presented neither below (and did not attempt to do so). To be clear, "manifest error" of law means " the "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Id.* (quoting *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606

(7th Cir.2000)). No new controlling precedent was cited by the State, just new arguments under the controlling precedent that the Circuit Court had already exhaustively discussed. But it is black letter law that new arguments that could have been offered earlier cannot be made in a motion for reconsideration. *See, e.g.*, *Lynch v. Crossroads Counseling Ctr., Inc.*, 2004 WI App 114, ¶23, 275 Wis. 2d 171, 684 N.W.2d 141 (summary judgment context). Likewise, a litigant may not "resurrect an issue laid to rest by virtue of waiver, abandonment, stipulation or concession under the guise of reconsideration." *Matter of Estate of O'Neill*, 186 Wis. 2d 229, 235, 519 N.W.2d 750. This rule

> provides finality as to orders or judgments rendered by the court and promotes judicial economy by requiring arguments to be presented at the time scheduled in the litigation, except in extreme circumstances. Any injustice this rule affords litigants is justified by these public policy concerns as well as the knowledge that the litigants affected brought about the situation through their own neglect and inaction.

Id.

This may be why the State cited Wis. Stat. § 806.07(1)(h) in its motion, which is not a reconsideration statute but instead allows a Court to "relieve a party or legal representative from a judgment, order or stipulation" for "[a]ny other reasons [besides those enumerated in (a)-(g)] justifying relief from the operation of the judgment." But Wis. Stat. § 806.07 is a civil procedure statute, *see* Wis. Stat. ch. 806 ("Civil Procedure — Judgment"), and the State has never explained why it would apply here. Indeed, in *State v. Henley*, 2010 WI 97, ¶70, 328 Wis. 2d 544, 787 N.W.2d 350, the Supreme Court of Wisconsin held that § 806.07(1)(h) is unavailable to criminal *defendants* in light of the postconviction procedures specified in the criminal procedure statutes. *See* Wis. Stat. §§ 974.02, 974.06. Yet the criminal procedure statutes also

set forth procedures for the State following an adverse decision. *See* Wis. Stat. § 974.05.[3]

Even assuming that this statute applies in the criminal context (and it does not), (1)(h) applies where there are "[u]nique and extraordinary circumstances," *i.e.* those where "the sanctity of the final judgment is outweighed by 'the incessant command of the court's conscience that justice be done in light of *all* the facts.'" *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶¶11-13, 282 Wis. 2d 46, 698 N.W.2d 610 (quoting *Mogged v. Mogged*, 2000 WI App 39, ¶13, 233 Wis.2d 90, 607 N.W.2d 662).

Below, the State did not even try to offer justification for its "neglect and inaction," *O'Neill*, 186 Wis. 2d at 235, even though it was its burden to do so, *see, e.g.*, *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶34, 326 Wis. 2d 640, 785 N.W.2d 493, and the Circuit Court understandably found that "the State has not presented anything close to extraordinary circumstances justifying relief from judgement here." R. 21:21. In its initial brief the State does not argue this finding was incorrect, thereby forfeiting or waiving any challenge to the ruling that (1)(h) was not met.

O'Neill is highly analogous to this case. In *O'Neill* the movant failed to appear at a will construction hearing and offer argument. *O'Neill*, 186 Wis. 2d at 231. He thereafter belatedly sought the opportunity to present an argument, citing both Wis. Stat. § 806.07(1)(a) (a different ground under the same relief-from-judgment statute) and Wis. Stat. § 805.17(3) (which permits reconsideration following civil trial). *Id.* at 231, 234. This Court explained that reconsideration was not

[3] As respondent, Mr. Gonzalez may advance any theory or reasoning justifying sustaining the Circuit Court's final order, even though Mr. Gonzalez was not given an opportunity to present it below. *See, e.g.*, *Holt*, 128 Wis. 2d at 124-25.

available because "reconsideration assumes that the question has previously been considered." *Id.* at 234. Under § 806.07(1)(a), in contrast, a showing of "excusable neglect" was required to obtain relief from the judgment under sub. (1)(a), and the movant had not argued on appeal that the Circuit Court's finding that neglect was inexcusable was erroneous. *Id.* at 235. Relief was therefore unavailable, as it is here. *See id.*

In sum, the State is wholly barred from advancing its novel "people" argument before this Court.[4]

B. The Second Amendment's scope plainly encompasses Mr. Gonzalez' conduct.

Although Mr. Gonzalez should not have to devote briefing space to a clearly-forfeited issue, he will briefly do so out of an abundance of caution. The State's contention that he is not one of "the people" contemplated by the Second Amendment for purposes of this case is meritless.

For starters, the State's argument is undeveloped. To the extent the State means to argue that the "plain text" of the phrase "the people" in the Second Amendment does not cover intoxicated individuals (or intoxicated drivers), *Bruen*, 597 U.S. at 17, it offers *no* textual or

[4] Mr. Gonzalez objects to any justifications the State may attempt to offer in reply for overlooking forfeiture or reversing the Circuit Court's ruling on its Wis. Stat. § 806.07(1)(h) motion. The State was required to provide those justifications in its initial brief so that Mr. Gonzalez could fairly respond to them in this one but chose to take the approach of not acknowledging that it had forfeited the argument. *See Bilda v. Cnty. of Milwaukee*, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 (this Court does not consider arguments first raised in reply) Regardless, this is not the rare case in which overlooking forfeiture might be appropriate. That Mr. Gonzalez is not a felon and never even touched the gun at issue makes this case an "outlier." R. 20:33. With Mr. Gonzalez' liberty at stake, the State should not be rewarded for entirely failing to prosecute its case below.

historical evidence of that fact, despite the Supreme Court's admonition that it is text and history that matter in Second Amendment analyses, and not any "judge-empowering 'interest-balancing inquiry.'" *Bruen*, 597 U.S. at 22 (quoting *Heller*, 554 U.S. at 634); *see also id.* ("Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history.").

Instead the State relies solely on general references by the Supreme Court to the fact that the Second Amendment applies to "law-abiding, responsible citizens," State's Br. 11 (quoting *Heller*, 554 U.S. at 635), apparently asking this Court to interpret this phrase to mean that the commission by a citizen of *any* offense—*even (as here) one that is not a felony or misdemeanor*—removes the protection of the Second Amendment.

It's not hard to see the absurdity of this argument. The *Heller* Court *did* note that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons" (which is not the same as saying those measures are always constitutional), *Heller*, 554 U.S. at 626, but never said anything about regulation of those who commit *misdemeanors*, much less *non-criminal* offenses. Under the State's theory, may those who impede traffic by slow speeds, Wis. Stat. § 346.60(1), or fail to yield to a pedestrian at an uncontrolled intersection, § 346.30(2), or, for that matter, litter, § 287.81(2), or refuse to present their bus fare when requested, § 943.225(2), now be criminally charged for endangering safety by use of a

dangerous weapon if they do so while carrying or near a permitted weapon?

Mr. Gonzalez' response is not meant to minimize the importance of staying away from the wheel of a car while intoxicated. But the State's heretofore undiscovered constitutional loophole for excluding citizens from the meaning of "people" is staggering in scope. Surely the State must offer some kind of authority in support of its claimed exception beyond the Supreme Court's cursory statements that the Second Amendment applies to the "law-abiding" and "responsible." *Heller*, 554 U.S. at 635. In the context of *Heller* and its progeny, this phrase is obviously meant to leave space for those "longstanding prohibitions" *Heller* referenced, like restrictions on "felons and the mentally ill," *Heller*, 554 U.S. at 626—not to authorize the government to confiscate firearms from anyone who has ever broken a law, a restriction (unlike those *Heller* explicitly mentioned) with no apparent precedent.

The two non-binding cases the State cites are in accord. *See United State v. Grinage*, No. SA-21-CR-399-JKP, 2022 WL 17420390, at *5 (W.D. Tex. Dec. 5, 2022) (mentioning the "convicted felons" limitation); *United States v. Carpio-Leon*, 701 F.3d 974, 975, 981 (4th Cir. 2012) (in ruling that "illegal aliens" are not "law-abiding members of the political community," carefully noting it was "not hold[ing] that any person committing any crime" (much less a non-criminal offense) "automatically loses the protection of the Second Amendment" and instead relying in part on "illegal aliens['] . . . particular relationship to the United States").

Mr. Gonzalez, a U.S. citizen and CCW permit holder with no prior felonies, *see* R. 21:6, retains the protection of the Second Amendment, notwithstanding his OWI-first no-contest plea.

III. The State failed to meet its burden to show that criminalizing constructive, intoxicated possession of a properly-permitted firearm is consistent with this Nation's historical tradition of firearm regulation.

The Circuit Court correctly recognized that this case hinges on whether the State could meet its burden to show that its application of Wis. Stat. § 941.20(1)(b) comported with the country's historical tradition of firearm regulation. R. 20:16. But the State offered virtually no historical argument during briefing, forfeiting what it tries to assert now. In any event, none of its arguments come close to justifying application of the law.

A. The State forfeited the historical arguments it now attempts to make and the Circuit Court's exhaustive independent research does not cure the State's forfeiture.

During the actual briefing of Mr. Gonzalez' motion to dismiss, the State did not offer any argument, as required by Supreme Court precedent, attempting to show Wis. Stat. § 941.20(1)(b)'s consistency with this Nation's historical tradition of firearm regulation. *See Bruen*, 597 U.S. at 33-34; R. 8; R. 20:20.

With two possible exceptions discussed below, the State made all of its historical arguments for the first time in its post-decision "Motion for Reconsideration" (which was a motion for relief from the judgment under Wis. Stat. § 806.07). R.11. Mr. Gonzalez respectfully refers this Court to its earlier discussion of why new arguments cannot be made in such a motion, why the motion itself was not authorized by § 806.07(1)(h) in a criminal case, why the (1)(h) standard was not met anyway, and why the State should not now be permitted to offer new arguments against forfeiture in its reply brief. *See supra* Section IIA. That discussion fully applies here.

The State may nevertheless argue that its forfeiture was cured because the Circuit Court itself raised many of these arguments in its September oral ruling (which followed briefing but preceded the State's motion). With all due respect to the Circuit Court, its extensive independent research was improper and cannot save the State here. The Circuit Court confirmed on the record that the State had "not even tried to present this court with any meaningful historical analogues" and asked "how much work [it] should do for the State." R. 20:20-21. Noting that it appreciated "the State is very busy" the Court explained that "as a fairly new judge, [it] was uncomfortable" concluding that "if the State fails to carry [its] burden, so be it," rejected Mr. Gonzalez' objections, and proceeded to do *all* the work for the State. R. 20:20-21.

This approach violates Wisconsin precedent. "The opinions of our appellate courts are replete with precatory admonitions that trial judges must not function as partisans or advocates or betray bias or prejudice . . . ." *State v. Carprue,* 2004 WI 111, ¶44, 274 Wis. 2d 656, 683 N.W.2d 31 (citations omitted). *State v. Jiles* is instructive. There the State was woefully underprepared for a hearing on a motion challenging the admissibility of the defendant's confession and in response "the circuit judge intervened and assumed the State's burden of establishing the existence of proper *Miranda* warnings and voluntariness." 2003 WI 66, ¶38, 262 Wis. 2d 457, 663 N.W.2d 798. Writing that it was "disturbed by the disregard of established procedure that we see in the record," the Supreme Court unanimously declared that in fact "the State did not meet its burden of proof," reversed, and warned circuit courts that they may not "permit [themselves] to become a witness or an advocate for one party." *Id.* at ¶39.

Consistent with *Jiles*, the Circuit Court should have simply found that the State failed to meet its burden and left its historical analysis for a case where the State was ready to attempt to meet its obligation. That being so, the State cannot be permitted to assert historical arguments on appeal that are only in the record by virtue of the Circuit Court's improper undertaking to do "work" for the State. Those arguments are forfeited. *See, e.g.*, *Rogers*, 196 Wis. 2d at 826.

Similarly, given that the State was not permitted to make new arguments in its Motion for Reconsideration for reasons already discussed, the Court's comments on those arguments at the October hearing for purposes of its conclusion that "extraordinary circumstances justifying relief from judgment" were not present, R. 21:21, likewise provide no basis for the State to attempt to reassert those arguments here. *See O'Neill*, 186 Wis. 2d at 253.

As noted above, there were two possible exceptions to the State's decision to raise all historical arguments in its post-decision motion. First, during the August 2024 oral argument on the motion to dismiss, the State "for the first time offered one historical argument, simply stating that the law in question has existed in some form since 1883 and has not been challenged or declared unconstitutional." R. 20:11.[5] The

[5] For reasons unknown to Mr. Gonzalez, the State did not request a transcript of this hearing for its appeal and one does not appear in the record. "It is the appellant's responsibility to ensure completion of the appellate record and 'when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.'" *State v. McAttee*, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (quoting *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993)).

Circuit Court rejected this argument for multiple reasons and the State appears to have abandoned it on this appeal.[6]

This leaves just one additional historical argument that the State made in an undeveloped (two-sentence, R. 10:3) fashion in its unapproved supplemental brief following the August argument, but before decision: that Wis. Stat. § 941.20(1)(b) is analogous to laws governing firearm possession by the mentally ill. Mr. Gonzalez objected to consideration of the improper supplemental brief below and moved to strike it. *See* R. 20:5-6. The Circuit Court declined to do so, but apparently only because of its view that "it's not going to [a]ffect my decision in this matter." *Id.* at 6. Relevant here, the Court did not rule on whether the letter was timely (in fact, it strongly indicated it was not, *see id.*) and the brief's obvious untimeliness, combined with the undeveloped nature of the argument it contained, means this Court should consider the "mental illness argument" likewise forfeited on this appeal. *Cf., e.g.*, *Evjen v. Evjen*, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (explaining that Court of Appeals will not decide issues not "properly" raised before Circuit Court, and concluding that letter brief to Circuit Court was insufficient to preserve issue because it contained new facts).

B. The State's forfeited historical arguments do not suffice to show that Wis. Stat. § 941.20(1)(b), as applied to Mr. Gonzalez' conduct, comports with this Nation's historical tradition of firearm regulation.

[6] *See, e.g.*, R. 20:18-20 (concluding that the challenged prohibition *as interpreted by the State* dates to 1930 at the earliest and that the lack of challenges can be explained by the unavailability of a federal constitutional defense until *McDonald*, as illustrated by the fact that from 1872 to 2011 Wisconsin unconstitutionally banned all forms of concealed carry). For the record, the Circuit Court was correct in its ruling and, besides, the State has not presented authority that it can use a challenged regulation itself as meaningful evidence of a pre-existing tradition supporting that regulation.

If this Court nevertheless examines the State's forfeited historical arguments, it should come to the same conclusion that the Circuit Court did: none of the State's proposed analogues suffice, separately or together, to establish that § 941.20(1)(b), as applied to intoxicated persons within reach of a weapon, is constitutional.

i. *Bruen* requires the State to locate more than a single historical analogue.

The State attempts to simplify its task by arguing that "*Bruen* does not require a plethora of historical analogues for the State to meet its burden" and in fact that "*Bruen* only requires '*a* historical analogue." State's Br. 18-19. But *Bruen* does not say this. So far as Mr. Gonzalez can tell, the State appears to be taking out of context a statement in *Bruen* setting forth what *types* of analogues suffice to show a tradition of firearm regulation, not how many. *See Bruen*, 597 U.S. at 30.

Were there any uncertainty as to this question, the Supreme Court later explains in its opinion that it "doubt[s] that *three* colonial regulations could suffice to show a tradition of public-carry regulation." *Id.* at 46; *see also id.* at 65-66. This is unsurprising, since a tradition is "[a] mode of thought or behavior followed by a people continuously from generation to generation; a custom or usage." *Tradition*, The American Heritage Dictionary of the English Language (5th ed. 2022), *available at* https://www.ahdictionary.com/word/search.html?q=tradition; *see also Tradition*, Black's Law Dictionary (11th ed. 2019) ("Past customs and usages that influence or govern present acts or practices."). One instance does not make a custom, establish a tradition, or meet the State's burden.

ii. The State's "mental illness" argument fails.

Before examining specific historical analogues, the State makes a generalized assertion that Wis. Stat. § 941.20(1)(b), as applied to

intoxicated, constructive possession of firearms, is analogous to one kind of law that the *Heller* Court characterized as "presumptively lawful," namely "longstanding prohibitions on the possession of firearms by . . . the mentally ill." *Heller*, 554 U.S. at 626-27 n.26; *see* State's Br. 12-15.

This argument is wrong on multiple levels. At the outset, it should be noted that it is undisputed (and judicially noticeable) that the general societal problem of intoxicated use of firearms existed at the founding and indeed for as long as both firearms and alcohol have coexisted. *See, e.g.*, R. 20:17; *see also id.* at 29 (explaining that "in the colonial era people drank a lot of alcohol" in part because "[w]ater was often not safe"); *id.* at 30 (citing article for proposition that at least 50% of all male and female wealthholders owned guns in colonial America); *United States v. Daniels*, 77 F.4th 337, 345 (5th Cir. 2023). *Bruen* therefore dictates 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*, 597 U.S. at 26 (emphasis added). This is to be contrasted with more difficult cases involving "modern regulations that were unimaginable at the founding" requiring the more "nuanced approach" of assessing whether a historical regulation is "*relevantly* similar" by way of analogy. *Id.* at 27-29 (quoting C. Sunstein, *supra*, at 773). The State wrongly conflates the standards. *See* State's Br. 10, 18; *Daniels*, 77 F.4th at 343. The State's failure to show the existence of "distinctly similar" historical bans on the constructive possession of firearms by the intoxicated, and its attempt to appeal to a wholly different type of firearm regulation (regulations of the

mentally ill), therefore by itself resolves this issue in Mr. Gonzalez' favor.[7]

In any event, bans on the possession of firearms by the mentally ill are not even "relevantly" similar to the State's ban on constructive possession of firearms by the intoxicated. Determining "relevant similarity" between two laws requires the State to first cite a comparator law banning firearm possession by the mentally ill so that Mr. Gonzalez and this Court can examine its contours. But—although the Circuit Court criticized the State for failing to do so below—the State does not cite any such law. *See* R. 20:28. This argument, in other words, is undeveloped. *See Indus. Risk Insurers v. Am. Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[W]e will not abandon our neutrality to develop arguments." (citation omitted)).

Proceeding to consider the State's argument in the abstract, *Bruen* suggests looking at "how and why the regulations [being compared] burden a law-abiding citizen's right to armed self-defense." *Id.* at 29. Beginning with the "why," the State argues that the mentally ill are deemed unsafe to handle firearms because they are "unable to rationally exercise [their] mental faculties." State's Br. 13. But as the Circuit Court

[7] At one point the State suggests that mixing firearms and alcohol is more dangerous today because of a higher population, a greater need to protect law enforcement, and/or drunk drivers. State's Br. 18-19. Apart from the merits of this position—dense crowds and police existed at the founding and a blanket ban on being near a gun while intoxicated has nothing to do with drunk drivers, which is an entirely separate issue—the "*general* societal problem" of intoxicated use of firearms, *Bruen*, 597 U.S. at 26 (emphasis added), existed at the founding regardless of whether it has worsened in degree. *See* States Br. 17 ("Possessing a dangerous weapon while at a level of intoxicat[ion] from alcohol has always created a potential risk and danger to the public."). Put differently, the idea of prohibiting intoxicated, constructive possession of firearms was not "unimaginable at the founding," *id.* at 28, even though, as will be shown, the States uniformly declined to adopt such provisions at that time.

explained, the "significant[]" "degree of impairment" experienced by mentally ill individuals, who "lack the intent required to commit many criminal offenses," will frequently far exceed that experienced by an intoxicated person, "whom the law almost always holds responsible for their decisions." R.20:29. Mr. Gonzalez was lucid enough in this case to conduct sobriety tests and inform the arresting officer that he had a CCW permit. R. 2:1. That's a far cry from being "mentally ill"—the State, at least, has not presented any evidence to the contrary.

With respect to "how" the laws burden citizens' Second Amendment rights, the historical regulations in question targeted individuals based on permanent or semi-permanent characteristics (their general mental capacity) and would have affected a small amount of the population. *See* R. 20:29. The State's interpretation of Wis. Stat. § 914.20(1)(b), in contrast, targets a transitory activity—drinking alcohol—and affects the entire adult population of the country.

Finally, and perhaps most importantly, this is not a case about direct possession of a firearm. Mr. Gonzalez never touched the firearm in question and need not dispute, because it is not at issue, that the State could criminalize intoxicated direct possession of a firearm, *i.e.* having a firearm on one's person while intoxicated. The question is whether the State may prohibit an intoxicated individual from being within *reach* of a firearm (constructive possession). As the Circuit Court noted, had Mr. Gonzalez chosen not to drive and instead taken a nap in the seat of his car with the car off, or been driven home by a friend, the State still could have charged him with constructive possession of a firearm. R. 20:33. The State's cursory argument on mental illness prohibitions does not address this question, and this Court is left to guess as to whether the

unidentified historical laws the State references but does not cite would have even worked the same way, making its analogy even more attenuated.[8]

The Supreme Court has never held that any specific statute prohibiting firearm possession by the mentally ill is constitutional, much less that all such statutes, considered in the abstract, are. It has only, in dicta, labeled these laws "presumptively lawful" until such time as a court can examine them. *Heller*, 554 U.S. at 627 n.26. But even assuming their validity in all cases, that the Founders may have been comfortable disarming the mentally ill does not establish that they considered it lawful to put a citizen in jail for having a firearm nearby while drunk. The two types of laws are simply too dissimilar.

iii. The State's own historical analogues demonstrate that there is no tradition of barring intoxicated, constructive possession of firearms.

The historical analogues the State *specifically* cites can be divided by time period. Beginning with what *Bruen* indicates is the most probative time period, namely the colonial era into the founding, the State cites a pair of laws from Virginia and New York City. The first bars

[8] The non-binding opinions that the State cites in the relevant section of its brief are all easily distinguishable. *See State v. Weber*, 163 Ohio St. 3d 125, 148-152, 168 N.E.3d 468 (2020) (DeWine, J., concurring in the judgment) (pre-*Bruen* concurrence explicitly noting that statute at issue applies only to intoxicated *handling* of a firearm and not constructive possession); *United States v. Veasley*, 98 F.4th 906, 912-16 (8th Cir. 2024) (facial challenge to statute prohibiting *drug addicts and habitual drug users* from possessing firearms, discussed *infra*); *United States v. Yancey*, 621 F.3d 681, 682 (7th Cir. 2010) (per curiam) (pre-*Bruen* challenge to same statute involving daily marijuana smoker); *Daniels*, 77 F.4th at 349 (in challenge to same statute, noting that someone high on marijuana only "may be" comparable to a mentally ill individual, and *sustaining* as-applied challenge to statute); *Antonyuk v. Chiumento*, 89 F.4th 271, 366-67 (2d Cir. 2023) (examining laws variously regulating saloons and the *sale* or *physical carrying* of firearms and not referencing the mentally ill as part of the discussion).

"persons [from] shoot[ing] any guns at drinking (marriages and funerals only excepted)." 1655 Va. Acts 401, Acts of March 10, 1655, Act XII. The second apparently prohibited firing guns around New Year's Eve out of a concern for drunken shooters. Ch. 1501, 5 Colonial Laws of New York 244-46 (1894).

The State admits these are not "exact replicas" of Wis. Stat. § 921.20(1)(b). Indeed. Mr. Gonzalez does not need to point out that laws that *do* permit drunken shooting at marriages and funerals (in the first case) and most other days of the year (in the second) provide rather poor evidence of a tradition of separating firearms and alcohol, given that Mr. Gonzalez is not being prosecuted for firing a gun while intoxicated in the first place. He did not even hold the gun in question.[9]

The State then provides a handful of laws that regulated intoxication by on-duty militiamen. Again, that only on-duty militiamen were regulated is evidence *against* the State, as Wis. Stat. § 941.20(1)(b)

[9] The State does not provide copies of the many now-ancient and often-obscure laws it cites and Mr. Gonzalez does not in every case have direct access to them. Nor do they appear in the record (the State's Motion for Reconsideration at R. 11 contains only the State's characterizations of what the laws contain along with links that only sometimes provide access to materials). Mr. Gonzalez is therefore sometimes unfairly forced to rely on second-hand, online reports of what these statutes say and/or the State's own description of these statutes, and Mr. Gonzalez' citation of these sources should not be read to imply otherwise. For the record, Mr. Gonzalez objects to this approach as inconsistent with Wis. Stat. § 902.02(4). Under that statute, "Any party may . . . present *to the trial court* any *admissible* evidence of [other states'] laws, *but*, to enable a party to offer evidence of the law in another jurisdiction *or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise*." (Emphases added.) Mr. Gonzalez was not given reasonable notice below—these statutes were cited by the State for the first time in its post-decision Motion for Reconsideration, which was not briefed or argued. Had notice been given, Mr. Gonzalez could have objected to the clear inadmissibility of the State's proffer of other states' laws or, at the very least, ensured that an orderly set of agreed-upon copies of statutes were in the record to aid appellate review. Any difficulty in assessing the State's historical arguments and "evidence" on this appeal simply underlines the impropriety of the State's haphazard litigation strategy below.

does not involve the military, law enforcement, or analogous groups but applies to citizens in their private capacities. Obviously, the State has a much different set of interests at play (the "why" of analogical reasoning) when ensuring a well-functioning militia than it does when regulating what ordinary citizens do during their personal time.

The State tries to address this problem by arguing that a single one of these laws applies to militiamen "even when they are not on duty." But the statutory text discloses otherwise:

> IX. Any officer or private man found drunk when under arms, shall be suspended from doing duty in the battalion, company or troop on that day, and be fined at the discretion of a General or Regimental Court-Martial.
>
> X. Whatever centinel shall be found sleeping or drunk on his post, or shall leave it before he is regularly relieved, shall be fined at the discretion of a Court-Martial.

An Act to regulate the Militia of the Common-Wealth of Pennsylvania, §§ IX-X (1777). The second provision plainly applies only to those standing post. And that the punishment of the first provision is *suspension of officers and privates from that day's duty* implies that the men in question are on, or at the very least about to, enter duty. There is no evidence it applies to the general public at all times. Conversely, the Pennsylvania law enacted three years later in 1780 that the State cites as evidence for its "off-duty" argument was separately enacted *not* because it explicitly applies to on-duty militiamen but instead because it specifically applies to certain *activities*: the "occasion of parading the company," meeting at or marching to a tavern while engaged in exercises, and bringing liquor to training. *See* An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania §§ XLV, XLVIII (1780).

None of these colonial era laws are "relevantly similar" to § 941.20(1)(b), much less "distinctly similar" as *Bruen* demands. *Bruen*, 142 S. Ct. at 26, 28. The relevant legislative bodies cabined these laws to narrowly defined types of persons (*e.g.* militiamen), events (*e.g.* New Year's Eve), dangerous activities (*e.g.* shooting), or sensitive places (*e.g.* taverns)—each of which presents special grounds for regulation—leaving unaddressed intoxicated possession, direct *or* constructive, by the general populace. A law prohibiting the latter would cover a much larger share of the American public and American public life and thus would not "impose a comparable burden on the right of armed self-defense" or be "comparably justified." *Id.* at 29.

Moving to the Civil War era, the State cites three state laws that "regulate[d] liquor sales rather than the individuals possessing firearms themselves" by barring entry into places like taverns while armed. State's Br. 16. These laws, because they were enacted so long after the ratification of the Second Amendment, "do not provide as much insight into its original meaning as earlier sources." *See Bruen*, 597 U.S. at 36 (quoting *Heller*, 554 U.S. at 614). But what they do show does not help the State: the Supreme Court has explained that where "earlier generations addressed the societal problem . . . through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id.* at 26. Regulation of places is different in kind from regulation of persons. Had Mr. Gonzalez been subject to a regulation barring entry into a bar while armed, all evidence is that there would have been no criminal charge, his lawfully-permitted gun being safely stowed in his vehicle.

The State finally cites three more-modern laws (from 1867 (Kansas), 1879 (Missouri), and 1909 (Idaho)) that prohibit possession of firearms by intoxicated persons.[10] While these may be closer to the mark from an analogical perspective (more on that below), they are too distant from the founding to be probative. Citing an 1869 law (among others) as an example of "late-19th-century evidence," the *Bruen* Court warned that "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence"—here, that "earlier evidence" is the absence of such regulations at the time the Second Amendment was ratified. *Bruen*, 597 U.S. at 66. The same is true for 20th-century evidence. *Id.* at n.28 (declining to even address such evidence).

This Court may be inclined to consider the 1867 law as mid- rather than late-19th-century evidence. *See id.* at 64 (seemingly treating 1870 and 1871 laws this way). But it is not clear that the Supreme Court considers even mid-century evidence as particularly instructive. *See, e.g.*, *id.* at 37; *id.* at 83 (Barrett, J., concurring); *cf. Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 482 (2020). Either way, the 1867 law only applies to an intoxicated individual who has a firearm "on his person." 1867 Kan. Sess. Laws. 25, ch. 12, § 1. Again, Mr. Gonzalez' central argument is that constructive possession is different in kind, and need not dispute for purposes of this appeal that Wis. Stat. § 941.20(1)(b) can be applied to those who travel intoxicated with a firearm on their person.[11]

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[10] A fourth, 1890 law (Oklahoma) again applies only to officers.

[11] For this reason the State's quotation from *Antonyuk*, 89 F.4th at 367 is inapposite. The laws cited there involved *physically carrying* firearms, the *sale* of firearms, and places like saloons.

This is not a distinction without difference. A constructive possession law (1) is a far greater imposition on the populace than one covering only direct possession as it would cover not only physically carrying a firearm but also keeping one nearby; and (2) it would be substantially less justified, because the obvious goal of any firearm regulation involving the intoxicated is to prevent intoxicated use of a firearm, and it is virtually impossible to use a firearm while possessing it only constructively. *See Bruen*, 597 U.S. at 29 (comparable burden and justification key to an analogical inquiry).

The only two laws that the State cites that could possibly be read to include constructive, intoxicated possession are the 1879 (Missouri), and 1909 (Idaho) laws, as these refer to one who has a concealed firearm "upon *or about* his person." § 1274, The Revised Statutes of the State of Missouri, 1879, at 224; 1909 Id. Sess. Laws 6, no. 62, § 1 (emphases added). But just as the Supreme Court advised that it "doubt[ed] that three *colonial* regulations could suffice to show a tradition of public-carry regulation" in *Bruen*, 597 U.S. at 46 (emphasis added), *a fortiori* two late-19th-century regulations (against a denominator of many more states than existed at the founding) are inadequate.[12]

Lastly, the State argues that "the historical laws cited above have already been used in a pre-*Bruen* historical analysis to determine that Wisconsin's prohibition has historical analogues." State's Br. 19. For this proposition it cites to a non-binding concurrence in *Christen*, 396 Wis. 2d 705. That pre-*Bruen* concurrence is not nearly as helpful to the State as

[12] The State cites no authority for its position that "prioritiz[ation]" by a young state of a firearm regulation indicates that the regulation fits within the historical tradition of firearm regulation. State's Br. 17. If a 51st State were added to the Union this year and that State immediately adopted an unconstitutional gun law, it would remain unconstitutional.

the State insinuates. Justice Hagedorn's carefully-stated conclusion was only that the Second Amendment permits the government to "enact[] reasonable regulations to curtail the reckless *handling* of firearms, such as prohibitions on firing in a crowded area or brandishing a firearm in ways dangerous to others and not in self-defense." *Id.* at ¶81 (emphasis added). As already explained *supra*, *Christen*'s facts were much more problematic than those at issue here as they did involve "handling" and "brandishing." What appears in the concurrence that is most relevant to *this* case (*i.e.* constructive possession) is Justice Hagedorn's frank acknowledgment that "[i]t appears that no jurisdiction had a law criminalizing armed intoxication on its books when the Second Amendment was adopted in 1791." *Id.* at ¶75; *see also id.* at ¶106 (R.G. Bradley, J., dissenting) ("Legislatures did not historically limit an individual's right to bear arms while under the influence of an intoxicant.").

At bottom, after canvassing all of American history, the State has only presented one late-19th-century and one early-20th-century law that appear to prohibit intoxicated, constructive possession of a firearm (and no instances of enforcement, *see Bruen,* 597 U.S. at 58). That is insufficient to show that Wis. Stat. § 941.20(1)(b) fits within the Nation's historical tradition of firearm regulation.

iv. That some courts have upheld 18 U.S.C. § 922(g)3. does not mean that Wis. Stat. § 941.20(1)(b) was applied constitutionally to Mr. Gonzalez.

In a final (but still forfeited) effort, the State string-cites to numerous non-binding lower federal court rulings rejecting various Second Amendment challenges to 18 U.S.C. § 922(g)3. State's Br. 19-20. That federal law prohibits anyone "who is an unlawful user of or addicted

to any controlled substance [as defined] . . . to . . . possess in or affecting commerce, any firearm or ammunition." *Id.*[13]

This entire line of argument is again undeveloped as the State does not actually discuss any historical analogues. Responding to the different facts, legal issues, and citations in each of the many cases string-cited would essentially require developing arguments on behalf of the State. *See* R. 21:15 (statement of Circuit Court that "all the State does is drop a string cite and it does not substantively discuss any of those cases").

That being said, the State appears to wish to use these cases to make two general points. First, it says that § 922(g)3. is "substantially similar" to Wis. Stat. § 941.20(1)(b), the implication being that if the former was upheld, so should be the latter. State's Br. 19. The State is wrong. Section 922(g)3. (which involves drugs, not alcohol, which is not a controlled substance, *see* 21 U.S.C. § 802), does not apply based on state of intoxication, but instead to those who are "addicted to" controlled substances or "unlawful user[s]" of such substances. The latter phrase does not require that the person used drugs at the time of firearm possession, just that he or she is in the category of person who is "actively engaged in such conduct." *See* 27 C.F.R. § 478.11; *see* R.21:15 (explaining that the law does not "cover occasional users of illegal drugs"). In other words, like laws targeting felons or the mentally ill, the law is status-based and focuses on drugs addicts/habitual users (although, again, it would not even cover alcoholics). The State's interpretation of § 941.20(1)(b), in contrast, applies to occasional and otherwise-lawful activities and thus has a much greater scope.

[13] The State briefly appears to suggest that other provisions of § 922(g) were at issue in these cases but all dealt with (g)(3).

Even if the laws were comparable, federal courts are split on the constitutionality of § 922(g)3., so the State's vague appeal to (non) authority fails on its own terms. *See, e.g.*, *Daniels*, 77 F.4th 337 (concluding § 922(g)3. violated Second Amendment as applied); *United State v. Harrison*, 654 F. Supp. 3d 1191, 1222 (W.D. Okla. 2023) (same); *United States v. Alston*, No. 5:23-CR-021-FL-1, 2023 WL 7003235 (E.D.N.C. Oct. 24, 2023) (same). As the result in this case depends upon the State's ability to establish a national tradition supporting § 941.20(1)(b), these cases are only relevant to the extent that they present meaningful historical analogues also relevant here—but, again, the State neither cites nor discusses any such analogues.

Second, the State points to a proposition appearing in some of these cases that the State historically could disarm classes of individuals deemed "untrustworthy or dangerous," like religious or racial minorities. *See, e.g. United States v. Espinoza-Melgar*, 687 F. Supp. 3d 1196, 1203, 1207 (D. Utah 2023). But as the Court of Appeals for the Fifth Circuit warned in *Daniels*, 77 F.4th at 353, it would render the Second Amendment a nullity to read this history at the highest level of generality and conclude that a legislature may simply "designate a group of persons as 'dangerous'"—like "immigrants, the indigent, or the politically unpopular"—and disarm them. Further, after *Bruen*, Courts are prohibited from using scrutiny-based analysis to determine whether a legislature's judgment of dangerousness—of the intoxicated, say—is justified. *See id.* Instead, then, courts must assess whether "a historical danger-based disarmament is analogous to the challenged regulation," that is, ask "[*w*]*hy* . . . the group was considered dangerous" and *"how . .*

. the historical regulation limit[ed]" their rights, as compared to the modern regulation. *See id.* at 354.

This simply brings the discussion full circle to the State's failure to show that there is any historical tradition of (1) disarming groups of persons at the founding thought dangerous for reasons sufficiently comparable to why the State might disarm an intoxicated individual; and/or (2) a tradition of disarming them to the same extent. *See id.* at 354-55 (noting that those disarmed at the Founding as "dangerous" were those viewed as "potential insurrectionists," those who the Founders thought "threatened violent revolt," "political traitors," and those who threatened "violence or rebellion").

Mr. Gonzalez' briefing to this point is sufficient to distinguish those cases cited by the State in as brief a fashion as the State's presentation of them. *See Espinoza-Melgar*, 687 F. Supp. 3d at 1206-07 (relying in part on historical laws targeting entire classes to support the class-based § 922(g)3.); *United States v. Lewis*, 650 F. Supp. 3d 1235, 1241 (W.D. Okla. 2023) (relying in part on presumptive lawfulness of class-based mental illness statutes and improperly relying in part on only two ill-fitting colonial era precedents); *Fried v. Garland*, 640 F. Supp. 3d 1252, 1260-63 (N.D. Fla. 2022) (same, and referencing unidentified 19th-century state statutes, in case where plaintiffs did not fully contest the State's claimed traditions); *United States v. Okello*, No. 4:22-CR-40096-KES, 2023 WL 5515828, at *3-*5 (D.S.D. Aug. 25, 2023) (incorrectly relying on laws already distinguished *supra*, and *not* relying on regulations of the mentally ill or lawbreakers as the State suggests); *United States v. Posey*, 655 F. Supp. 3d 762, 772-76 (N.D. Ind. 2023) (seemingly relying on uncited modern statutes from a pre-*Bruen* case in

addition to class-based statutes). *United States v. Seiwert*, No. 20 CR 443, 2022 WL 4534605, at *1 (N.D. Ill. Sept. 28, 2022) (almost no analysis).

CONCLUSION

For the foregoing reasons, Mr. Gonzalez respectfully requests that this Court affirm the decision of the Circuit Court.

Dated: June 12, 2024

WISCONSIN APPELLATE LITIGATION SERVICES LLC

ADAMS LAW GROUP LLC

Electronically signed by Anthony LoCoco

ANTHONY F. LOCOCO
SBN 1101773
13435 Watertown Plank Rd.
Ste 5
Elm Grove, WI 53122
(262) 228-8486
anthony@wisconsinappellate.com

DANIEL M. ADAMS
SBN 1067564
1200 E. Capitol Dr.
Ste 360
Milwaukee, WI 53211
(414) 921-1945
dmorganadams@gmail.com

Attorneys for Defendant-Respondent Bernabe Gonzalez

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 10,970 words.

Dated: June 12, 2024

Electronically signed by Anthony LoCoco
ANTHONY F. LOCOCO