STATE OF WISCONSIN
SUPREME COURT

IN THE MATTTER OF THE PETITION
FOR RETURN OF PROPERTY:
ANDRES VEGAS,
Petitioner-Appellant-Plaintiff,

v.

CITY OF MILWAUKEE,
Respondent-Respondent.

Appeal No. 2008 AP 000167
Trial Court Case No. 07 GF 000118
(Milwaukee County Circuit Court)

On a Petition for Review of a Decision of the Wisconsin Court of Appeals, District I, Dismissing Appeal as Moot after the Circuit Court for Milwaukee County, the Honorable Kevin Martens Presiding, Ordered Petitioner's Property Returned Pursuant to § 968.20, Following an Earlier Remand by the Court of Appeals

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PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

Article I, § 25 of the Wisconsin Constitution, enacted in November 1998, provides that "(t)he people have a right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." Wis. Stat. § 941.23, ("CCW statute") prohibits any person, except a peace officer, from "go[ing] armed" with a "concealed and dangerous" weapon. In *State v. Cole*, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328, the Court recognized that Art. I, § 25 created a fundamental right but rejected a facial challenge to the CCW statute. In *State v. Hamdan,* 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785, the Court attempted to reconcile the fundamental right created by the constitutional amendment with the earlier-enacted CCW statute by setting forth a case-by-case, fact-intensive test for determining whether an individual's conduct amounts to (a) the exercise of a fundamental constitutional right or (b) a crime.

Petitioner earned a living delivering pizza in a high-crime area of Milwaukee. He was the victim of four robbery attempts while doing his job over an approximately two-year period. He was threatened at gunpoint, pepper sprayed, and physically assaulted. On two occasions, Petitioner was in possession of a firearm and used it to defend himself, both times shooting and wounding his attacker. R.3 (*Pet. App.* 191-200). On each occasion, the use of force was deemed justified and lawful. (*Pet. App.* 178-179). In connection with the second act of self-defense, the Milwaukee County District Attorney's Office instituted a misdemeanor prosecution, alleging violation of the CCW statute, § 941.23. (Milw. Co. Case No. 2007-CM-0687). The Circuit Court, the Honorable Daniel Noonan presiding, dismissed the case, holding that Art I, § 25 of the Wisconsin Constitution, as interpreted by *Hamdan*, rendered the CCW statute unconstitutional as applied. R.3 (*Pet. App.* 191-200).

The City of Milwaukee retained possession of the firearms used in each act of self-defense. Petitioner sought return of the two firearms pursuant to Wis. Stat. § 968.20. The City (represented by the Milwaukee County District Attorney's Office) did not oppose return of the firearm involved in Milw. Co. Case No. 2007-CM-0687. R.11 (*Pet. App.* 182-190). The City did, however, oppose return of the firearm used in the previous uncharged instance of self-defense. Though at the time

that conduct had been investigated, the District Attorneys Office had found it to be "justifiable self-defense," (*Pet. App.* 178-179) it opposed return of the firearm, arguing that it had been used in a crime, a violation of the CCW statute. R.11 (*Pet. App.* 182-190). Without holding an evidentiary hearing, the Circuit Court, the Honorable Jeffrey A. Kremers presiding, ruled that the firearm had been used in committing a violation of the CCW statute and would not be returned to Petitioner. R.11 (*Pet. App.* 182-190). The Court of Appeals remanded to the trial court for an evidentiary hearing, and retained jurisdiction. R.13 (*Pet. App.* 103-107). On remand, the Circuit Court, the Honorable Kevin E. Martens presiding, found that CCW statute would be unconstitutional as applied to Petitioner's conduct and ordered the firearm returned. R.18-19 (*Pet. App.* 108-165).

Throughout these proceedings, Petitioner has pursued both an as-applied challenge to the CCW statute and a two-pronged facial challenge to its continued validity under Art. I, § 25.

The first facial challenge contends that *Cole* and *Hamdan* should be revisited. The second challenge contends that the CCW statute, as interpreted by *Hamdan*, has proven to be incapable of consistent, knowable, and non-arbitrary application. In mandating that individuals must learn whether their conduct represents the exercise of a fundamental right or, alternatively, a criminal offense only after withstanding criminal prosecution and the litigation of a fact-based, unpredictable "balancing-test," the statute violates principles of due process and fair notice established by both the United States and Wisconsin Constitutions.

The courts below declined to reach either of the two facial challenges and, following remand and Judge Martens' order that the firearm be returned, the Court of Appeals dismissed the case as moot. (*Pet. App.* 101-102). Presently, petitioner seeks review of the Court of Appeals dismissal order and of his substantive facial challenges to the CCW statute. Accordingly, the questions presented are:

(1) Does Wis. Const. Art. I, § 25, or the Second

Amendment to the United States Constitution render Wis. Stat. § 941.23 facially unconstitutional requiring reconsideration of the Court's holdings in *Cole* and *Hamdan*?

While this issue has been raised, argued, and preserved throughout these proceedings, the lower courts did not reach it.

(2) Does Wis. Stat. § 941.23 violate principles of due process and fair notice established by the United States and Wisconsin Constitutions?

While this issue has been raised, argued, and preserved throughout these proceedings, the lower courts did not reach it. While specifically limiting the circuit court's ruling to the statute as applied, Judge Martens offered, among other observations, that: "[the court has] grave concerns about notice issues." R.19 (*Pet. App.* 153).

(3) Does this case satisfy one or more of the established exceptions to the mootness doctrine?

The Court of Appeals, having raised and decided the mootness issue *sua sponte*, found that Petitioner received the relief he sought, rendering the remaining issues "academic." (*Pet. App.* 101-102).

STATEMENT OF CRITERIA SUPPORTING REVIEW AND SATISFYING EXCEPTIONS TO MOOTNESS

Petitioner respectfully submits that this case meets several criteria for review set out in Wis. Stat. § 809.62, and falls within a number of well-recognized exceptions to the mootness doctrine for the same reasons.

This appeal presents substantial questions regarding the reach and effect of Art. I, § 25 of the Wisconsin Constitution (enacted in 1998), the impact of the "fundamental right" created by that provision on Wis. Stat. § 941.13, and the process established by this Court in *Hamdan*, by which the trial courts are to determine on a case-by-case basis whether an individual has exercised his or her "fundamental right" or committed a crime. This appeal asks the Court to revisit *Hamdan*, *Cole*, and

their limited progeny, with the benefit of over five and a half-years of judicial experience in applying the *Hamdan* framework in individual cases.

The *Hamdan* decision concludes with the following advice to the legislative branch and the recognition that there would exist "a continuing dilemma until the legislature acts to clarify the law":

> We urge the legislature to thoughtfully examine Wis. Stat. § 941.23 in the wake of the amendment and to consider the possibility of a licensing or permit system for persons who have a good reason to carry a concealed weapon. We happily concede that the legislature is better able than this court to determine public policy on firearms and other weapons.
>
> . . .
>
> In the meantime, we must give effect to the constitutional right embodied in Article I, Section 25.

Hamdan at ¶¶ 85, 86.

The legislature has yet to address the "dilemma" perceived by the Court.

Petitioner respectfully contends that his case demonstrates that the *Hamdan* framework has not proven amendable to knowable, consistent, non-arbitrary, and objectively reviewable administration. In making it impossible for one to know whether carrying a concealed firearm for legitimate self-defense and security purposes is the exercise of a fundamental right or a crime until after the conclusion of substantial, typically criminal, litigation, the framework has fallen short of the Court's goal of giving meaningful effect to Art. I, § 25. It has also compromised basic principles of due process and fair notice. *Hamdan* does not provide meaningful guidance for the trial courts and bar, leaving them to struggle anew in each case.

Specifically noting that in this very case, different judges came to different conclusions on largely identical sets of facts, Judge Martens expressed the ongoing dilemma facing the bench, the bar, and would-be defendants:

> [I] do wonder whether ultimately it's fair to individuals who have a genuine interest in security to essentially subject them to prosecution and then have a court after the fact be the Monday morning quarterback with the attorney's help and decide, well, in your case it's okay but in someone else's case maybe the cashier next to you, it's not, so I have real concerns about that.

R.19 (*Pet. App.* 153-154).

Over five and a half years since *Hamdan's* call for legislative action to resolve this "continuing dilemma," Judge Martens concludes this passage by reiterating that "legislative guidance would be extremely helpful and valuable." *Id.*

Petitioner suggests that *Hamdan* has likely had the unintended consequence of inhibiting needed legislative guidance by diluting both the urgency of the need for such guidance and the legislative branch's ultimate responsibility for providing it.

Petitioner respectfully submits that the foregoing demonstrates that this matter meets the statutory alternative criteria for review set forth in Wis. Stat. § 809.62(1r):

> (a) A real and significant question of federal or state constitutional law is presented.
>
> (b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.
>
> (c) A decision by the supreme court will help develop, clarify or harmonize the law, and
>
> > 1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
> >
> > 2. The question presented is a novel one, the resolution of which will have statewide impact; or
> >
> > 3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.
>
> (d) The court of appeals' decision is in conflict with controlling

> opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.
>
> (e) The court of appeals' decision is in accord with opinions of the Supreme Court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

This case also falls within several established exceptions to the mootness doctrine. It squarely presents issues of great public importance, and it directly involves the constitutionality of a statute. It seeks resolution of questions that arise frequently in the circuit courts such that a definitive decision is essential to avoid uncertainty. *See Matter of Guardianship of L.W.*, 167 Wis. 2d 53, 66-67, 482 N.W.2d 60, 64-65 (1992). These questions arise repeatedly and affect the clarification of a constitutional right. *See State ex. Rel Olson v. Litscher*, 2000 WI App 61, ¶ 4, 233 Wis. 2d 685, 689, 608 N.W.2d 425, 427.

This case exemplifies that experience over the intervening years has shown that *Hamdan* has failed to effectively serve its purpose. It has had unintended consequences, is burdensome to the bench and bar, to defendants, and to those who desire to exercise a fundamental constitutional right without fear and uncertainty.

For these reasons, Petitioner suggests that this case meets the criteria for review and should not be deemed moot.

STATEMENT OF THE CASE

On October 8th, 2007 Petitioner filed a petition for return of his property, two firearms that he used to defend himself on July 15th, 2006, and January 4th, 2007 during robbery attempts on him while he worked as a pizza delivery driver in Milwaukee. (Milwaukee County Case No. 07 GF 000118) R.2, 4. The City did not oppose return of the firearm involved in the January 2007 incident. R.11 (*Pet. App.* 182-190). On November 30th, 2007, a hearing was held on that petition in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Kremers presiding. Judge Kremers ordered return of the firearm used in the January 2007 incident, and denied return of the firearm from the July 2006 incident, finding that the relevant firearm was used in the commission of a crime, carrying a concealed

weapon, in violation of Wis. Stat. § 941.23. R.6, 11 (*Pet. App.* 182-190).

On December 20th, 2007, Petitioner filed a motion for reconsideration of that decision and requesting an evidentiary hearing. R.7. On January 2nd, 2008 Judge Kremers denied that motion without a hearing. R.8.

Petitioner filed a Notice of Appeal on January 11th, 2008. R.9. On October 28th, 2008,the Court of Appeals, District I, remanded the matter for an evidentiary hearing to determine whether Petitioner committed a crime using the seized property in light of the framework detailed in *Hamdan*. R.13 (*Pet. App.* 103-107). Further, the Court of Appeals retained jurisdiction.

On December 16th, 2008, the Honorable Judge Kevin E. Martens held a hearing ordered by the Court of Appeals, considered evidence introduced by stipulation and ordered return of Petitioner's property. R.18, 19 (*Pet. App.* 108, 109-165). Specifically, Judge Martens held that Petitioner established the facts necessary to establish that Wis. Stat. § 941.23 would be unconstitutional as applied to Petitioner. R.18, 19 (*Pet. App.* 108, 109-165).

On February 11th, 2009, the Court of Appeals dismissed this case as moot. Petitioner seeks review of that order and consideration of the outstanding substantive issues presented. (*Pet. App.* 101-102).

DISCUSSION

I. ART I. § 25 RENDERS WIS. STAT. § 941.23 FACIALLY INVALID; THE CONTRARY HOLDINGS OF *COLE* AND *HAMDAN* DO NOT, IN PRACTICE, GIVE EFFECT TO A FUNDAMENTAL CONSTITUTIONAL RIGHT AND SHOULD BE REVISITED

Article I, § 25 of the Wisconsin Constitution, as enacted in November 1998, establishes that "(t)he people have a right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." Wis. Const. art. I, § 25. Wisconsin's carrying concealed weapon statute prohibits any person, except a peace officer, from "go[ing] armed" with a "concealed and

dangerous" weapon. Wis. Stat. § 941.23 ("CCW statute").

In *State v. Hamdan*, the majority opinion recognized that Wisconsin's CCW statute is "very broad" and "essentially a strict liability" law, for which the legislature has created no exceptions other than for peace officers. *Hamdan* at ¶ 47.[1] Additionally, the statute contains no exceptions for pursuit of any of the lawful purposes enumerated in Art. I. § 25. The Amendment expressly grants citizens the constitutional right to keep and bear arms for any lawful purpose. "The breadth of the statute is incompatible with the broad constitutional right to bear arms. Its prohibition extends to anyone at any time and therefore, improperly and unnecessarily impinges on a person's right to bear arms 'for security, defense, hunting, recreation or any other lawful purpose.'" *Hamdan* at ¶ 103 (Crooks, J. concurring/dissenting). There is a conflict between the text of the Constitutional provision and the text of the earlier-enacted statute: one tells citizens they have a right to do something, the other tells them that the same conduct is a crime.

Taking into account the inconsistency between the statute and the Amendment, *Hamdan* crafted an exception in the CCW statute. In *Hamdan*, the Court held that in order for a defendant to successfully challenge the constitutionality of the CCW statute as applied, he must secure an affirmative answer to two questions: First, does the defendant's interest in carrying a concealed weapon substantially outweigh the state's interest in enforcing the CCW statute? Second, was concealment the only reasonable means for the defendant to exercise the right to bear arms? *Id.* at ¶ 86. If a defendant secures a "yes" answer to these two inquiries, the state may still proceed with the prosecution by arguing and proving at trial that the defendant had an unlawful

[1] A weapon is concealed for purposes of the CCW statute if it is lying on the front passenger seat of a vehicle. *See State v. Walls*, 190 Wis. 2d 65, 526 N.W.2d 765 (Wis. Ct. App. 1994). The statute applies to a weapon located in an automobile, and readily accessible to, but not physically carried by, a person in that vehicle. *See State v. Fry*, 131 Wis. 2d 153, 388 N.W.2d 565 (1986) (unlawful where the gun was carried in a car's glove compartment). Absolute invisibility to others is not required to establish concealment under the CCW statute. *State v. Mularkey*, 201 Wis. 429, 432, 230 N.W. 76 (1930). Finally, the statute does not require that a person actually "go" anywhere with the weapon. *State v. Keith*, 175 Wis. 2d 75, 79, 498 N.W.2d 865 (Ct. App. 1993).

purpose when he carried the weapon. *Id*. at ¶ 87.

The *Hamdan* majority recognized that the conflict between the CCW statute and the Constitutional Amendment would cause a "continuing dilemma" for courts and law enforcement. *Id.* at ¶ 85. The Court urged the legislature to clarify the law, and offered suggestions about how to do so in a way that would allow the statute and the Amendment to coexist, such as creating a separate licensing or permit system to allow individuals to carry a concealed weapon. *Id*. *See also Hamdan* at ¶ 109 (Crooks, J. concurring/dissenting) ("As examination of other jurisdictions facing the same question shows, Wisconsin must modify its statutes in order that it does not, in effect, bar its citizens from legally exercising their right to bear arms.").

The framework established in *Hamdan* was intended to "provide some guidance to counsel and the courts until the legislature takes further action." *Hamdan* at ¶ 89. Since Hamdan was decided, however, the legislative process has not provided a more meaningful solution to the problem.[2]

When compared with other states that, like Wisconsin, have a right to bear arms Constitutional Amendment, the *Hamdan* court recognized that Wisconsin's CCW law is the broadest in the nation. *Hamdan* at ¶¶ 49, 50. These other states provide a range of examples of potential legislative solutions to resolve the contradiction between the CCW statute and Art. I, § 25. Wisconsin is one of forty-four states with a constitutional provision providing some right to bear arms.[3] Of these states, Wisconsin is one of only four that does not have any type of permit or licensing system. The three other states in this category, Illinois, Missouri, and Ohio, have enacted CCW statutes that contain explicit exceptions for specific locations or circumstances.[4] Such compromises balance state police power

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[2] It should be noted that, following *Cole* and *Hamdan*, the legislature twice attempted to address these issues and create a licensing system. In both instances, the governor vetoed the legislation. *See State v. Fisher*, 2006 WI 44 at ¶¶ 51-53, 290 Wis. 2d 121, 714 N.W. 2d 495.

[3] The six states that do not have such constitutional provisions are: California, Iowa, Maryland, Minnesota, New Jersey and New York. *See Hamdan* at ¶ 49, n.21.

[4] See, Illinois, 720 Ill. Comp. Stat. Ann. 5/24-1(a)(4) (West 2000) ("except when on his land or in his own abode or dwelling or fixed place of

with the constitutional right to keep and bear arms for the purposes enumerated in the amendments.

Hamdan reasoned that the state has broad police power to regulate the possession and ownership of firearms, but that such regulation must meet a "reasonableness" standard and "cannot be invoked in such a manner that it amounts to the *destruction* of the right to bear arms." *Hamdan* at ¶ 40 (internal citation omitted). The *Hamdan* majority held that

> the amendment's broad declaration of the right to keep and bear arms inevitably impacts the exercise of that power. In this state, constitutional rights do not expand the police power; they restrict the police power.

Hamdan at ¶ 39 (internal citations omitted). The majority in *Cole and Hamdan* nonetheless found that the CCW statute was a reasonable restriction on the manner in which one may possess a firearm subject to constitutional limitations to its application embodied in the *Hamdan* balancing test. *Cole* at ¶ 35; *Hamdan* at ¶ 46.

In his concurring/dissenting opinion in *Hamdan*, Justice Crooks reasoned:

> A state may permissibly exercise its police power in order to promote the general welfare. However, the state's police power is subject to limitations, and is not to be used in an unreasonable or excessive fashion, and, as such, is limited by the state and federal constitutions. Other Wisconsin weapons laws have been more narrowly tailored, and, thus, do not suffer the same constitutional vulnerability as the one at hand here. The state's police power cannot save a prohibition that sweeps as broadly as Wis. Stat. § 941.23.

Hamdan at ¶ 104 (Crooks, J. dissenting/concurring) (internal citations omitted). *See also Town of Beloit v. Rock County,* 2003 WI 8, ¶ 23, 259 Wis. 2d 37, 657 N.W.2d 344 ("the legislature has plenary power to act except where forbidden by the

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business"); Missouri, Mo. Ann. Stat. § 571.030(3) (West 2008) ("in his or her dwelling unit or upon premises over which the actor has possession, authority or control"); and Ohio, Ohio Rev. Code Ann. § 2923.12(C) (West 1995-96) (providing exception for "going to or from his lawful business or occupation," and "while in his own home."). *See also Hamdan*, 2003 WI 113, ¶107 n.7 (Crooks, J., concurring/dissenting).

Wisconsin Constitution . . . the police powers of the state are inherent and are only limited by the constitution") (citations omitted).

In addition to the sweeping and rigid nature of Wisconsin's CCW law, it is also important to note that, since *Hamdan*, other states are trending toward greater constitutional protections under their respective right to bear arms amendments. Since 2003, both Kansas and Nebraska have created licensing/permit systems authorizing concealed carry.[5]

The legislature's failure to conform Wisconsin's CCW statute to the Amendment so as to permit meaningful enjoyment of the constitutional privilege[6] renders the case-by-case balancing test the exclusive conduit conveying the privilege to its intended recipients, the citizens of Wisconsin. This conduit fails to meaningfully deliver constitutional protection to those who would lawfully avail themselves of the privilege. The result is that the privilege is "functionally disallowed" by the broad sweep of the unchanged CCW statute. *See Hamdan* at ¶ 41.

Since 2003, questions related to engaging the constitutional right to bear arms for the purposes of security and defense have remained unanswered. The functional supremacy of the CCW statute over the constitutional privilege has become the *status quo.*

In addition to recent movement on right to bear arms amendments and firearm legislation by other state legislatures, in 2008, the U.S. Supreme Court clarified that the Second Amendment to the U.S. Constitution guarantees an individual right to keep and bear arms. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). The *Heller* decision struck down Washington D.C. ordinances that prohibited, generally, the possession of handguns, including in the home, and required residents to keep any lawfully owned firearms unloaded and dissembled, or bound by a trigger lock at all times. *See* D.C.

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[5] *See* Kan. Stat. Ann. § 75-7c03 (2006), and Neb. Rev. Stat. § 69-2428 (2008). This reduces the number of states with right to bear arms amendments and without a licensing/permit system from six when *Hamdan* was decided to four. *Hamdan* at ¶¶ 49, 50.

[6] As other states have done, *supra*.

Code §§ 7-2501.01, 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02 (2001)**.** In rendering the District's ordinances unconstitutional, the *Heller* Court emphasized that the "inherent right of self defense" is "central to the second Amendment right." *Heller* at 2817. The District's categorical handgun ban amounted to a "prohibition on an entire class of 'arms' that Americans overwhelmingly choose" for the lawful purpose of self-defense. *Id.* at 2817-18.

The *Heller* Court noted that its ruling did not directly affect the legality of most individual state CCW statutes. *Id.* at 2816-17. However, as explained above, the vast majority of state CCW statutes are more narrowly-tailored, or provide greater exceptions, than Wisconsin's uniquely severe statute, which essentially amounts to a de facto total ban on carrying a concealed weapon, even for self-defense. Rather Wisconsin's statute is more akin to the Washington D.C. ordinances deemed unconstitutional in *Heller*: a prohibition on a class of firearms that Americans overwhelmingly use for the purpose of self-defense. Indeed, the state conceded at oral argument in *Hamdan* that Wisconsin's CCW statute prohibits "a gun owner from storing his weapons out of plain sight, such as in a gun cabinet, closet, or drawer in his home." *Hamdan* at ¶ 105 (Crooks, J., concurring/dissenting). Such a strict prohibition amounts to a functional nullification of the constitutional right to bear arms guaranteed by Art. I, § 25.

Based on all of the foregoing, Petitioner respectfully submits that: *Cole* and *Hamdan* should be revisited.

II. AS CONSTRUED BY *HAMDAN*, WIS. STAT. § 941.23 VIOLATES PRINCIPLES OF DUE PROCESS AND FAIR NOTICE ESTABLISHED BY THE UNITED STATES AND WISCONSIN CONSTITUTIONS

As discussed above, *Hamdan's* judicially crafted exception to the CCW statute requires an individual facing a CCW prosecution to produce facts showing that, based on a number of factors, a balancing of interests tips toward the right established by Art. I, § 25, and away from the government's interest in enforcing the CCW statute. If a defendant succeeds in this showing, the government may nonetheless proceed with a

prosecution by attempting to prove at trial that the defendant had an unlawful purpose at the time that he carried the concealed firearm. *Hamdan* at ¶ 78.

The due process guarantees of the Wisconsin and United States Constitutions require reasonable and reasonably clear notice of the difference between criminal and non-criminal conduct. *A fortiori*, the law must provide reasonable and reasonably clear notice between the exercise of a fundamental right and a criminal offense.

"The constitutional foundation of the vagueness challenge to a penal statute is the procedural due process requirement of fair notice." *State v. Ehlenfeldt,* 94 Wis.2d 347, 355, 288 N.W.2d 786 (1980) (citation omitted). "A criminal statute is unconstitutionally vague if it either fails to afford proper notice of the conduct it seeks to proscribe, or fails to provide an objective standard for enforcement." *State v. Hahn,* 221 Wis. 2d 670, 677, 586 N.W.2d 5 (Ct. App. 1998) (citation omitted). The same constitutional prohibitions extend to vagueness and notice problems created by judicial interpretation. *Bouie v. City of Columbia,* 378 U.S. 347, 353-55 (1964), forbids "an unforeseeable judicial enlargement of a criminal statute" that deprives a defendant of fair warning that his conduct may give rise to criminal liability.

Under *Hamdan's* multifactor "reasonableness" test, applied on a case-by-case basis, the difference between criminality and the exercise of a fundamental constitutional right is unknowable until a district attorney and then a court conducts an open-ended, fact-intensive balancing test. The result of *Cole* and *Hamdan* makes it impossible for the CCW statute to afford any meaningful notice to citizens of the conduct that it prohibits. Indeed, it is safe to say that no well-versed Wisconsin attorney could advise a client where the line falls. The answer comes into existence only after the fact.

The CCW statute was clear and its application rested on objectively demonstrable facts prior to *Cole* and *Hamdan*. Those decisions deprive the CCW statute of any objective standard for enforcement. Its applicability is now dependant on a conclusion reached by balancing an undefined array of factual details, the scope of which differs with each decision. The

decision as to whether the government or a would-be defendant wins the balancing of interests is necessarily a subjective one, resting first with individual district attorneys who are left to conclude one way or the other based on the facts they select as relevant and to which they attach whatever weight they personally deem appropriate.

As Judge Martens' suggested in the case at bar, Petitioner's case makes this clear:

> It's just very hard kind of to sort of put all of this together I think in sort of a logical format, and I was kind of joking about this, but it almost literally becomes to me the kind of question, you know, how many times does a person involved in employment or perhaps a business needs to be victimized before the law – as at least Judge Noonan recognized it on the fourth attempt I suppose, the constitution I believe it is – would allow them to exercise their right to bear arms not in violation of carrying concealed weapons laws? I don't know what the answer is.
>
> You know if it's twice, then presumably I think one could argue that every pizza delivery person, every store owner, and everybody else is literally going to have to be the subject of a robbery attempt at least once before they may be able to argue that right.

R.19 (*Pet. App.* 145-146).

> I don't know if that suggests or at least gives notice that apparently if you live in Milwaukee County or possess a firearm in Milwaukee County that you literally may be subject to a charge anytime, whether it's the second time, the fourth time or any other time.
>
> Is that – I mean that's – I suppose notices in one sense. I think the alternative remains that the Court has to assess this and, you know, how does anybody know when they're going to get in front of a Judge, whether it's going to be Judge Noonan who says four times is enough or whether it's going to be Judge Kremers who says two times isn't enough, or how is that going to play out?

R.19 (*Pet. App.* 147).

Apart from the difficultly administering the test presents to circuit courts, Judge Martens expressed "grave concerns about notice issues" and questioned whether the mandated

analysis can be applied fairly:

> I mean there are a whole range of things where, you know, these different sort of interests can be highlighted and argued and become almost in the status of, well, now just a fact specific exercise that I do wonder whether ultimately it's fair to individuals who have a genuine interest in security to essentially subject them to prosecution and then have a Court after the fact be the Monday morning quarterback with the attorney's help and decide, well, in your case it's okay but in someone else's case maybe the cashier next to you it's not, so I have real concerns about that. I think that legislative guidance would be extremely helpful and valuable.

R.19 (*Pet. App.* 153-154). Judge Martens ruled that the CCW statute was unconstitutional as applied to Petitioner. R.19 (*Pet. App.* 163-164).

Petitioner's case illustrates the constitutional problem: he is a crime victim who, without dispute, used reasonable and justified force in defending himself. Nonetheless, a district attorney (representing the City) asserted that the government's interests in Petitioner being unable to protect himself with a firearm while earning a living outweighed his right to do so. One Circuit Judge agreed with that assertion, and, upon remand, another Circuit Judge disagreed with that assertion.

As it exists, the *Hamdan* analysis is incapable of being measured against a meaningful objective standard and is necessarily dependent mainly on the sensibilities of individual district attorneys and, ultimately judges.[7] Consistent and predictable application has proven impossible. Indeed, it is safe to say that no well-versed Wisconsin attorney could advise a client where the line between privileged and criminal conduct falls.

Hamdan recognized that the broad sweep of Wis. Stat. § 941.23 must under some circumstances bend to the fundamental right established by Art. I § 25. *Hamdan* at ¶ 40. The statute's text was understood to run afoul the constitutional provision in

[7] *See Hamdan,* "I am not convinced that the procedural mechanism created . . . is consistent with established methods of raising constitutional defenses. I am also concerned that some unique aspects of these procedures may prove to be unworkable and create confusion." *Id.* at ¶ 98, (Bradley, J. concurring).

certain cases. But the statute contains no exceptions. Recognizing that the legislature is better able to determine to the public policy on which statutory exceptions rest, the Court fashioned a balancing test to create exceptions on a case-by-case basis, and called for prompt legislative action. The legislature has not acted. *Hamdan* creates an unpredictable, multi-factor, balancing test to fill a constitutional gap in statutory text. But the judicially created test lacks a critical aspect of proper legislation – fair, reasonably clear notice of the difference between (a) lawful or, as here, constitutionally privileged conduct, and (b) crime.

Even if *Cole* and *Hamdan* are correct in holding that the police power can qualify rights conferred by the Constitution – it is up to the legislature to enact legislation that meets the most basic constitutional standards of notice and clarity.[8] *Hamdan* attempts to fill the void without the benefit of the tools available to the legislative branch, *e.g.*, the ability to alter statutory text.

The judicially created test also lacks a key hallmark of

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[8] "While a statute should be held valid whenever by any fair interpretation it may be construed to serve a constitutional purpose, courts cannot go beyond the province of legitimate construction to save it, and where the meaning is plain, words cannot be read into it or out of it for the purpose of saving one or another possible alternative." *State v. Hall*, 207 Wis. 2d 54, 82, 557 N.W. 2d 778, 789 (1997). The United States Supreme Court also recently spoke on this issue. *See District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). The *Heller* majority declined to apply an "interest-balancing" test to the question of whether Washington D.C.'s categorical handgun ban violated individual citizens' Second Amendment rights under the United States Constitution. In addressing the invalidity of this type of approach, the Court stated:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that that scope too broad.

Heller at 2821.

legislation, a knowable definition that offers the public, the bar, and the bench necessary parameters and guidance. An unintended consequence is that, as construed by *Hamdan*, Wis. Stat. § 941.23 no longer meets basic fair notice and reasonable clarity standards that due process requires of all statutes, penal statutes in particular.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court accept review of this appeal.

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