No. _____

In The
Supreme Court of the United States

JEFFERSON WAYNE SCHRADER and
SECOND AMENDMENT FOUNDATION, INC.,

Petitioners,

v.

ERIC HOLDER, JR., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

ALAN GURA
Counsel of Record
THOMAS M. HUFF
GURA & POSSESSKY, PLLC
101 N. Columbus Street
Suite 405
Alexandria, Virginia 22314
703.835.9085
alan@gurapossessky.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

In 1968, Petitioner Jefferson Wayne Schrader was involved in an altercation with a gang member who had previously assaulted him. Consequently, Schrader was convicted of simple (*i.e.*, non-aggravated) assault and battery, an uncodified common law misdemeanor under Maryland law lacking any statutory punishment criteria. Schrader's sole punishment was a $100 fine and $9 in court costs. Schrader went on to serve a tour in Vietnam, earn an honorable discharge from the Navy, and has had no meaningful encounters with law enforcement in the 45 years since.

The Government forbids Schrader from possessing guns under 18 U.S.C. § 922(g)(1), which disarms those convicted of an offense "punishable by imprisonment for a term exceeding one year," excluding misdemeanors "punishable by a term of imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B).

The questions presented are:

1. Whether a common law misdemeanor offense lacking any statutory sentencing range is "a crime punishable by imprisonment for a term exceeding one year" per 18 U.S.C. §§ 921(a)(20)(B) and 922(g)(1).

2. Whether an individual may be barred from exercising Second Amendment rights upon conviction of a non-aggravated common law misdemeanor.

PARTIES TO THE PROCEEDINGS

Petitioners Jefferson Wayne Schrader and Second Amendment Foundation, Inc., were Plaintiffs and Appellants below.

Respondents Eric Holder, Jr., Attorney General of the United States; the Federal Bureau of Investigation; and the United States of America, were Defendants and Appellees below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in Second Amendment Foundation, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Jefferson Wayne Schrader and Second Amendment Foundation, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this matter.

OPINIONS BELOW

The decision of the court of appeals, reported at 704 F.3d 980, is reprinted in the Appendix (App.) at 1a-25a. The district court's opinion, reported at 831 F. Supp. 2d 304, is reprinted at App. 26a-43a.

JURISDICTION

The court of appeals entered its judgment on January 11, 2013, and denied a petition for rehearing and rehearing en banc on March 13, 2013. App. 45a-47a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the United States Constitution provides: "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."

Title 18, United States Code, Sections 921(a)(20) and 922(g)(1) are reproduced in the appendix at App. 48a-49a.

INTRODUCTION

On May 11, 1761, a Justice of the Peace convicted 26-year-old future Revolutionary War hero Paul Revere of misdemeanor assault and battery for his role in a fistfight. See Esther Forbes, *Paul Revere and the World He Lived In* 67, 69 (1942); 2 Elbridge Henry Goss, *The Life of Col. Paul Revere* 667-68 Appx. H (1891). Revere received no jail time, but was ordered to pay "as small a fine as was consistent with any decency," Forbes at 69, and have two sureties bond for his good behavior. *Id.*; Goss at 668.

Were he alive today, Revere would doubtless be astonished to learn not only that Congress has denied him the right to keep and bear arms on account of that minor transgression, but that the Second Amendment tolerates the categorical disarmament of all simple common law misdemeanants.

Though less illustrious a figure than Paul Revere, Petitioner Jeff Schrader, too, served his country honorably in war, and has lived a peaceful life save for one youthful common-law misdemeanor long ago for which he received a small fine and no jail sentence.

A few months after Schrader's common-law misdemeanor conviction, Congress enacted 18 U.S.C. § 922(g)(1), which disarms all individuals convicted of any offense "punishable by imprisonment for a term exceeding one year," excluding misdemeanors "punishable by a term of imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B).[1]

Because nothing (other than the Eighth Amendment) limits potential sentences for common-law misdemeanors, the Government asserts that all such offenses are "punishable by a term" *exceeding* two years, and are thus covered by Section 922(g)(1). Moreover, because some common-law misdemeanors may be serious, broad application of this so-called "felon-in-possession" prohibition to all common-law misdemeanors does not violate the Second Amendment.[2] The lower court agrees.

The decision below grants Section 922(g)(1) an unduly expansive reading, while declining to acknowledge the fundamental nature of Second Amendment rights. Each flaw leads to an extreme result contemplated neither by Congress in enacting the felon-in-possession prohibition, nor by the Second

---

[1] All further statutory references are to Title 18 of the United States Code unless otherwise noted.

[2] Courts generally refer to this provision as the felon-in-possession statute, though the statute itself does not use that terminology. See, *e.g.*, *Davis* v. *United States*, 131 S. Ct. 2419, 2425-26 (2011) ("possession of a firearm by a convicted felon"); *Sykes* v. *United States*, 131 S. Ct. 2267, 2270 (2011).

Amendment's Framers. This Court should review, and reverse, the lower court's decision.

STATEMENT OF THE CASE

1. In July 1968, while walking peaceably in Annapolis, Maryland, then 20-year-old Navy enlistee Jefferson Wayne Schrader was violently assaulted by a street gang that claimed he had broached upon its territory. App. 27a. Some time later, on July 23, 1968, Schrader again encountered one of his assailants on an Annapolis sidewalk, and an altercation arose between the two. App. 3a-4a, 27a.

On July 31, 1968, Schrader was found guilty of misdemeanor assault and battery for his role in the fistfight. App. 4a, 28a. He received no jail time, but as ordered, paid $109 in fines and court costs. *Id.*

"Schrader went on to complete a tour in Vietnam and received an honorable discharge from the Navy. Except for a single traffic violation, he has had no other encounter with the law." App. 4a (citation omitted), 28a.

2. "Forty years later, Mr. Schrader attempted to acquire a shotgun and a handgun for self-defense purposes." App. 28a; see also App. 4a. On account of his 1968 common-law misdemeanor conviction, Respondents forbade Schrader from completing the transactions, and advised him "to dispose or surrender any

firearms he might possess or he could face criminal prosecution," App. 28a-29a, 4a.

Section 922(g)(1) prohibits firearm possession by individuals convicted of "a crime punishable by imprisonment for a term exceeding one year" – a standard modern demarcation for felony crimes, see, *e.g.*, Black's Law Dictionary, 694 (9th ed., 2009). But this prohibition excludes any state misdemeanor crime that is "punishable by a term of imprisonment of two years or less." See Section 921(a)(20)(B).

"At the time of Schrader's conviction, '[t]he common law crimes of assault and battery [in Maryland] had no statutory penalty.'" App. 5a (quoting *Robinson* v. *State*, 353 Md. 683, 693 n.6, 728 A.2d 698, 702 n.6 (1999)). "[W]hen Schrader was convicted '[t]he maximum term of imprisonment [for these offenses] was ordinarily limited only by the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and Articles 16 and 25 of the Maryland Declaration of Rights,'" *id.* (quoting *Robinson*, 353 Md. at 693 n.6, 728 A.2d at 702 n.6).[3]

---

[3] Today, the offense of common law assault and battery no longer exists in Maryland, having been abrogated by statute in 1996. *Robinson*, 353 Md. at 686-87, 728 A.2d at 699. First Degree Assault is a felony punishable by up to 25 years imprisonment, and covers any assault that causes (or attempts to cause) serious physical injuries or that is carried out with a firearm. Md. Criminal Law Code Ann. § 3-202. Second Degree Assault, a misdemeanor punishable by up to 10 years imprisonment,

(Continued on following page)

"Because the common law misdemeanor for which Mr. Schrader was convicted had no legislatively-capped punishment range, the government treats him as it would a convicted felon for the purpose of federal law, banning him for life from possessing any firearm for any purpose and listing his name in the NICS database as disqualified from owning firearms." App. 29a.[4]

3. On October 13, 2010, Schrader brought suit against Respondents Holder and FBI in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief from application of the "felon-in-possession" ban. The Complaint sought removal of Schrader's record from the National Instant Criminal Background Check System, and an injunction against Section 922(g)(1)'s application to "simple common-law misdemeanor offenses

---

covers assault against law enforcement officers and other remaining forms of assault. *Id*. at § 3-203. Disorderly conduct, which also covers assaults, is a misdemeanor punishable by up to 60 days in jail. *Id*. at § 10-201.

[4] Schrader's offense triggers no firearms disability under Maryland law. See Md. Public Safety Code Ann. §§ 5-101(g)(3) ("disqualifying crime" includes a misdemeanor "that carries a *statutory* penalty of more than 2 years") (emphasis added), 5-133(b)(2) (individual convicted of "common law crime" disarmed if "received a term of imprisonment of more than 2 years"). Nor is Schrader disarmed under the laws of Georgia, where he currently resides. See *State* v. *Langlands*, 276 Ga. 721, 724-25, 583 S.E.2d 18, 21-22 (2003) (Georgia felon-in-possession scheme may not be applied to out-of-state misdemeanor offenses).

carrying no statutory penalties." App. 6a (citing Second Am. Compl. Prayer for Relief ¶¶ 1-2).

Schrader asserted that "Maryland's failure to codify a statutory penalty for a simple common law misdemeanor does not create a firearms disability under federal law for conviction of such common law misdemeanor offense." App. 6a (citation omitted). Mirroring Maryland's approach to firearms disabilities for common law misdemeanors, as well as that once adopted by the Fourth Circuit, see *infra*, Schrader also asserted his offense could not serve as a Section 922(g)(1) predicate "because [he] was not actually sentenced to a term of imprisonment exceeding two years." App. 6a (citation omitted). Schrader further asserted that Section 922(g)(1)'s application "on account of simple common-law misdemeanor offenses carrying no statutory penalties" violates the Second Amendment. App. 6a (citation omitted).

Schrader, a member of Petitioner Second Amendment Foundation, Inc. ("SAF"), was joined in his complaint by SAF, owing to the challenged practice's impact on the organization and its other members.[5]

[5] Petitioners based their action upon the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq*., as well as 18 U.S.C. § 925A, which provides a mechanism for correcting erroneous firearm prohibition records. Respondent United States was added by stipulation as a defendant when Respondents insisted that it was a necessary party under Section 925A.

4. On December 23, 2011, the district court denied Petitioners' motion for summary judgment and granted Respondents' motion to dismiss. After turning away Respondents' standing arguments, App. 32a-34a, the district court held that Schrader's "offense was 'punishable' by a term of more than two years in jail" because a judge could theoretically have imposed a sentence exceeding two years. App. 36a-37a. The district court held that Sections 921(a)(20) and 922(g)(1) did not necessarily reference statutorily-defined terms of imprisonment. *Id.*

The district court summarily dismissed Petitioners' constitutional challenge. Notwithstanding the fact that Schrader was convicted of a common-law misdemeanor, the district court found dispositive this Court's admonition that the Second Amendment tolerates "longstanding *prohibitions on the possession of firearms by felons*. . . ." App. 40a (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 626-27 & n.6 (2008)) (emphasis added by district court).

> It must be noted that the definition which so offends Mr. Schrader's constitutional sensibilities was added to § 921(a) on October 22, 1968, the year of his infamous encounter with a gang member whom he punched on the streets of Annapolis . . . Its hoary age strongly suggests no constitutional impediment and, indeed, the Court finds none under *Heller*'s reading of the Second Amendment or the caselaw that preceded *Heller*.

App. 42a.

5. On January 11, 2013, the court of appeals affirmed. Conceding that "the category of 'common-law offenses' is rather broad, varying widely from state to state," the lower court noted that "many common-law crimes involved quite violent behavior." App. 9a. The lower court also noted that prior to 1968, federal law barred the receipt of firearms across state lines upon conviction of offenses that were occasionally punished at common law. It reasoned that Congress would not have intended to exclude all those offenses from Section 922(g)(1). App. 11a.

Turning to the statutory text, the lower court held:

> Because common law offenses carry no statutory maximum term of imprisonment, they are capable of being punished by a term of imprisonment exceeding one year and thus fall within Section 922(g)(1)'s purview. And because such offenses are also capable of being punished by *more than* two year's imprisonment, they are ineligible for Section 921(a)(20)(B)'s misdemeanor exception.

App. 11a (emphasis added). Critically, the lower court held that the federal statutes at issue referenced not only legislative judgments regarding possible terms of imprisonment, but encompassed legislative deference to judicial discretion in setting possible terms of imprisonment. App. 13a.

Petitioners had argued that in specifically targeting misdemeanor crimes of domestic violence, see

Section 922(g)(9), Congress demonstrated that it knew how to target particularly dangerous misdemeanor offenses. But the lower court found the point irrelevant, maintaining that Section 921(a)(20)(B) (excluding misdemeanors "punishable by a term of imprisonment of two years or less") evinced the intent to target misdemeanors "punishable by more than two years' imprisonment." App. 15a.

The lower court next rejected Petitioners' constitutional challenge to the "felon-in-possession" statute's application against common-law misdemeanants. Purporting to apply intermediate scrutiny, because misdemeanants are not law-abiding, App. 19a, the court summarily held that "the statute's overarching objective is obviously 'important.'" *Id.*

"Second, the government has carried its burden of demonstrating a substantial relationship between this important objective – crime prevention – and section 922(g)(1)'s firearms ban." App. 20a. "[W]e afford substantial deference to the predictive judgments of Congress." *Id.* (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 665 (1994)).

> In enacting section 922(g)(1), Congress determined – reasonably in our view – that in order to accomplish the goal of preventing gun violence "firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them."

App. 21a (citation omitted).

Of course, Petitioners did not facially challenge the felon-in-possession prohibition, only its application to simple common-law misdemeanors. But the court below noted that *some* common-law misdemeanors are "quite egregious," App. 22a, and thus rejected the challenge because "plaintiffs have offered no evidence that individuals convicted of [common law misdemeanor] offenses pose an insignificant risk of future armed violence." *Id.*

Finally, the court of appeals noted "Schrader's sympathetic characteristics," App. 24a, and offered that "to the extent that these allegations are true, we would hesitate to find Schrader outside the class of 'law-abiding, responsible citizens' whose possession of firearms is, under *Heller*, protected by the Second Amendment." App. 23a (citation omitted). But while the district court understood that "Mr. Schrader challenges the government's application of § 922(g)(1) *to his facts* and asserts that *he* has a constitutional right under the Second Amendment to purchase firearms," App. 27a (emphasis added), the court of appeals took a narrower view of the pleadings and claimed no such particularized challenge had been made. Schrader's petition for panel rehearing disputed this characterization, specifically identifying the various parts of the record reflecting an individualized claim. However, this petition is not based upon that argument.

On March 13, 2013, the lower court denied the petition for rehearing and rehearing en banc. App. 45a-47a.

REASONS FOR GRANTING THE PETITION

Questions of whether or how the federal "felon-in-possession" ban might apply to common-law misdemeanors have received conflicting answers from federal courts in the years since the provision's enactment. Indeed, the lower court's opinion itself raises serious questions of internal consistency. Given the statute's ambiguous wording in the context of uncodified offenses, and the constitutionally dubious and ahistorical result of the Government's desired application, established rules of statutory construction call for reversal.

Moreover, the opinion below contributes to an emerging conflict among the courts of appeals as to whether this Court's precedent foreclosing rational basis review in Second Amendment cases does so in name only. The courts of appeals are divided on the question of whether individuals seeking to vindicate their fundamental right to keep and bear arms must overcome a presumption of constitutionality operating in favor of any hypothetical rationale supporting a firearms prohibition. The lower court opinion's far-reaching consequences, and the plainly important nature of the issues it raises make this case a compelling vehicle by which to provide the lower courts needed guidance.

This Court should grant the petition and reverse the court below.

I. The D.C. Circuit's Decision Contravenes the Decisions of This Court in Selecting an Overbroad Interpretation of Ambiguous Criminal Statutes.

As courts have long recognized, the felon-in-possession ban's text lends itself to multiple interpretations in the context of common-law misdemeanors. This Court's pragmatic, context-based approach to the interpretation of criminal statutes; the rule of lenity; and the fact that the lower court's internally inconsistent view yields absurd and constitutionally dubious results, all counsel adoption of a different statutory interpretation.

A. The Felon-in-Possession Ban May Be Interpreted Multiple Ways in the Context of Common Law Misdemeanors.

Schrader was not always held to fall within the felon-in-possession ban's purview. In 1973, the Fourth Circuit rejected the Government's claim that the felon-in-possession ban extends generally to common-law misdemeanors, concluding that a Maryland conviction for common-law misdemeanor assault and battery was not "properly classified as a 'felony' within the meaning of the federal statute." *United States* v. *Schultheis*, 486 F.2d 1331, 1335 & n.2 (4th Cir. 1973).

Observing that the statute is "silent regarding its application to common law convictions," *id.* at 1333, the court held that it would look to the actual sentence imposed to appraise the seriousness of the conviction in such cases. *Id*. at 1335. Thus, only a common-law misdemeanor conviction resulting in an actual sentence of two years or greater would trigger the statute.

Schultheis's actual-sentence-based approach is not without support. To be sure, one way to view common law offenses is to assume, as did the lower court, that these reflect a positive decision to allow for unlimited maximum sentences. But another view holds that there is, in fact, a maximum sentence in each common-law case – and that the "maximum sentence for common law assault or battery [is] limited by that which was considered reasonable and proportionate under the circumstances of the case, both as to the offense and as to the offender." *Robinson*, 353 Md. at 693 n.6, 728 A.2d at 702 n.6. The legislature, in effect, accepts through inaction that the trial judge would establish the "maximum" term in a given case.

Acknowledging that judges define a maximum sentence in each common-law misdemeanor case avoids the difficult supposition that a legislature prescribing lengthy but terminal sentences for serious crimes such as rape, Md. Criminal Law Code Ann. § 3-304(c)(1) (20 years maximum term); child kidnapping, *id.* § 3-503(b)(1) (same); and armed robbery, *id.* § 3-403(b) (same) would wish to positively allow harsher, *unlimited* sentences for disorderly conduct,

disturbing the peace, and other relatively minor offenses falling within the rubric of common-law misdemeanors.

In 1998, however, *Schultheis* was overruled in *United States* v. *Coleman*, 158 F.3d 199 (4th Cir. 1998) (en banc). Most of *Coleman*'s analysis involved the separate issue of whether a common-law assault conviction may properly qualify as a "violent felony" for purposes of the related Armed Career Criminal Act, Section 924(e). But *Coleman* also reconsidered *Schultheis*'s practice of looking to the actual sentence imposed in cases implicating common-law predicate convictions. In overruling *Schultheis*, the court cited various non-common law cases reasoning that the proper focus should be "whether the offense is 'punishable' by a term of imprisonment greater than two years – not whether the offense 'was punished' by such a term of imprisonment." *Id*. at 203-04.

Coleman did not discuss the unusual characteristics of uncodified common-law offenses (which are not "punishable by" *any* specified punishment criteria), but nevertheless concluded that the "plain wording of the statute applies equally when the potential term of imprisonment is established by the common law and limited only by the prohibition on cruel and unusual punishments as when the range of possible terms of imprisonment is determined by a statute." *Id*. at 204.

Dissenting, Judge Widener warned that the majority "would blindly lump into the same category the most trivial and the most heinous assaults, thereby defeating the clear Congressional desire to exclude

minor transgressions of the law from the sweep of" the statute. *Id*. at 205 (Widener, J., dissenting) (citing *Schultheis*, 486 F.2d at 1333).

Coleman's approach, adopted by the court below, also yields internally illogical results in light of Section 921(a)(20)(B)'s actual text. If "punishable by" means "capable of being punished," App. 11a, then Schrader's offense, for which he received no jail time, must be excluded from Section 922(g)(1). After all, as his sentence demonstrated, Schrader's offense was "capable of being punished," App. 11a, "by a term of imprisonment of two years or less." See Section 921(a)(20)(B).

The lower court misread the statutory text. Only Section 922(g)(1) addresses terms exceeding a benchmark (one year). Section 922(a)(20)(B) targets terms *failing* to exceed a benchmark – "two years *or less*." (emphasis added). The plain text of the statute does *not* exclude, as the court misread, misdemeanors that are not "capable of being punished by *more than* two year's imprisonment." App. 11a (emphasis added). Respectfully, that is simply not what the statute provides. The only misdemeanors that are not "capable of being punished," App. 11a, "by a term of imprisonment of two years or less," Section 921(a)(20)(B), are those misdemeanors carrying a mandatory minimum sentence exceeding two years.

And yet a third interpretation of the felon in possession ban is feasible. In general terms, "punishable" is defined as "deserving of, or liable to, punishment: capable of being punished by law or right."

Webster's New International Dictionary 1843 (3d ed. 1961). But its meaning is also subject to significant variations, depending on whether used in reference to a person (*e.g.*, "a punishable offender") or an offense (*e.g.*, "a crime punishable by death").

Black's Law Dictionary recognizes this distinction with separate entries for each – the former meaning "subject to a punishment," but the latter defined as "giving rise to a *specified punishment*." Black's at 1353 (emphasis added). Quite plainly, Section 922(g)(1) speaks not of predicate persons, but of predicate crimes – *i.e.*, those that are "punishable by" a specified punishment range. See Black's at 1353 (providing as exemplary usage: "a felony *punishable by* imprisonment for up to 20 years") (emphasis added). An offense "giv[es] rise to a specified punishment," whereas its offender is "subject to" that "specified punishment."

Properly understood, the applicability of the felon-in-possession scheme turns on the predicate crime's *specified* length of potential punishment – a traditional legislative determination. As the legislature did not determine common-law misdemeanor assault to warrant a specific punishment exceeding one year, that offense cannot qualify for felony treatment.

As the federal felon-in-possession ban relies upon the judgment of state law, this interpretation is especially compelling here, considering Maryland law specifically declines to disarm Schrader on the basis of his common-law misdemeanor conviction carrying

no actual prison sentence. See Md. Public Safety Code Ann. §§ 5-101(g)(3), 5-133(b)(2); *supra* n.4.

B. The Lower Court Erred In Adopting the Harshest Possible Interpretation of an Ambiguous Criminal Statute, Leading to Illogical and Possibly Unconstitutional Results.

The lower court could have adopted the *Schultheis* approach, as reflected in Maryland's felon-in-possession ban, and looked to the actual sentence received to determine how a common-law misdemeanor might be "punishable" for federal felon in possession purposes. It could have viewed the statute as calling for a specified term of punishment. It could have even stuck to its "capable of being punished by" framework, App. 11a, and acknowledged that common-law misdemeanors are capable of drawing prison terms of "less than two years." Section 921(a)(20)(B).

Instead, the lower court adopted the broadest, most punitive statutory interpretation, holding that the felon-in-possession ban reaches all common-law misdemeanors. It erred in doing so.

A "well established principle of statutory interpretation [holds] that the law favors rational and sensible construction." Norman J. Singer, 2A *Sutherland on Statutory Construction* § 45:12, 94-99 (7th ed. 2008) (citations and quotations omitted).

> [I]t has been called a golden rule of statutory interpretation that, when one of several

> possible interpretations produces an unreasonable result, that is a reason for rejecting that interpretation in favor of another which would produce a reasonable result.

Id. Accordingly, this Court's most recent pronouncements on the federal firearms statutes emphasize context-oriented over hyperliteral construction. See, *e.g.*, *Small* v. *United States*, 544 U.S. 385, 394 (2005) (holding that the Section 922 phrase "convicted in *any* court" (emphasis added) refers only to domestic courts, not to foreign courts); *United States* v. *Hayes*, 555 U.S. 415, 426 (2009) (domestic relationship need not be proven as an element of underlying offense to qualify as misdemeanor crime of domestic violence); *Johnson* v. *United States*, 559 U.S. 133, 141-42 (2010) ("physical force" denoting "violent felony" under Section 924(e)(2)(B)(i) requires more than common-law offensive touching).

Yet because some common-law misdemeanors are severe, the lower court approved of extending a lifetime firearms prohibition to anyone caught up in minor transgressions of the sort typically resolved by small fines. Neither the Government, nor the lower court, cited evidence elucidating what proportion of common-law misdemeanors were "quite egregious," App. 22a, relative to garden-variety squabbles today punished as low-level misdemeanors or infractions for disturbance of the peace. And nothing prevents Congress from legislating with greater precision, and from adding, as it might from time to time, additional categories of narrowly-targeted prohibited people based upon specific evidence. See, *e.g.*, Section

922(g)(9). As Judge Widener's *Coleman* dissent declared, the overreaching result is manifestly unreasonable.

For the same reason, the lower court's interpretive choice violated the rule of lenity.

> It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government . . . and in favor of the persons on whom penalties are sought to be imposed . . . any reasonable doubt about the meaning is decided in favor of anyone subjected to a criminal statute.

3 Sutherland § 59:3, at 167-75 (collecting cases); see also *id*. at 187-88 (discussing this Court's adoption of the rule of lenity). "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). Courts construe ambiguous criminal statutes narrowly to avoid "making criminal law in Congress's stead." *United States* v. *Santos*, 553 U.S. 507, 514 (2008).

> In various ways over the years, we have stated that when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to

> require that Congress should have spoken in language that is clear and definite.

Bass, 404 U.S. at 347-48 (citations and quotations omitted).

Moreover, "when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Harris* v. *United States*, 536 U.S. 545, 555 (2002) (citation and quotation omitted). "[T]he fact that one among alternative constructions would involve serious constitutional difficulties is reason to reject that interpretation in favor of another." 2A Sutherland § 45.11, at 87 (collecting cases); see, *e.g.*, *United States* v. *Rehlander*, 666 F.3d 45, 49 (1st Cir. 2012) ("statutes are to be read to avoid serious constitutional doubts" if possible) (narrowly construing Section 922(g)(4) to avoid Second Amendment questions).

As the lower court conceded that applying the felon-in-possession ban against Schrader might be unconstitutional, App. 23a, it should have given greater weight to alternative statutory interpretations.

The lower court also assumed too much with respect to Congressional intent, citing no evidence for its proposition that Congress actually intended to target common-law misdemeanants. Such legislative history remains elusive. The recorded legislative history behind the Federal Gun Control Act of 1968 is fairly sparse. As this Court explained, the law was

"added by way of a floor amendment . . . and thus was not a subject of discussion in the legislative reports." *Lewis* v. *United States*, 445 U.S. 55, 62 (1980); see also *United States* v. *Batchelder*, 442 U.S. 114, 120 (1979); *Scarborough* v. *United States*, 431 U.S. 563, 569-570 (1977); *Bass*, 404 U.S. at 344 & n.11.

"What little legislative history there is that is relevant reflects an intent to impose a firearms disability on any *felon* based on the fact of conviction." *Lewis*, 445 U.S. at 62 (emphasis added). Senator Long, who introduced and directed the act's passage, explained:

> So, under Title VII, every citizen could possess a gun until the commission of his first *felony*. Upon his conviction, however, Title VII would deny every *assassin, murderer, thief and burglar* of the right to possess a firearm in the future except where he has been pardoned by the President or a State Governor and had been expressedly authorized by his pardon to possess a firearm.

114 Cong. Rec. 14773 (1968) (emphasis added).[6]

---

[6] "Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight." *Lewis*, 445 U.S. at 63 (citation omitted).

The Government below sought support in a Senate report predating the Gun Control Act by four years, which evinced concern with misdemeanant access to mail order guns. S. Rep. No. 88-1340 (1964) at 4. But even that report references only an elevated group of misdemeanants with "undesirable character"

(Continued on following page)

That Congress would have wanted to target common-law misdemeanors, or would have tolerated application of a felon prohibition to trivial misdemeanor offenses, remains mere conjecture. At least equally likely, Congress never considered the topic, and would have legislated with greater care and precision if it had.

Of course, it is not for courts to improve the statute – only to select, among various possible interpretations, that which is most lenient, and which avoids both constitutional difficulty and absurd results. This, the lower court failed to do.

II. The Lower Courts Are Deeply Split Regarding the Level of Deference Afforded the Political Branches in Restricting Second Amendment Rights.

Three years have passed since this Court declared the Second Amendment right "fundamental," *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3042 (2010) (plurality opinion); *id.* at 3059 (Thomas, J., concurring in part and in the judgment). Since then, the Seventh Circuit has afforded meaningful review in cases seeking vindication of the right to arms. But the D.C., Second, Fourth, and Fifth Circuits have largely resisted *McDonald* and *Heller*, applying

---

and extensive records of arrests spanning "several years," placing them on par with "felons, narcotic addicts, [and] mental defectives. . . ." *Id.*

(whatever the label) a level of scrutiny functionally indistinguishable from rational basis review to perfunctorily dismiss significant Second Amendment arguments.

As one commentator noted, "[w]ithout clear or complete guidance from the Supreme Court, lower court judges have proposed an array of different approaches and formulations, producing a 'morass of conflicting lower court opinions' regarding the proper analysis to apply" in Second Amendment cases. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706 (2012) (footnote omitted).

And on balance, it is not unfair to claim that "the lower courts' decisions strongly reflect the pragmatic spirit of the dissenting opinions that Justice Stephen Breyer wrote in *Heller* and *McDonald*." *Id.* at 707. If the Second Amendment is to retain its substantive meaning, this case presents an ideal vehicle for this Court to examine whether the lower court's methodology here comports with the *majority* opinions in those cases.

Heller steered clear of interest-balancing inquiries and means-ends standards of review. This Court struck down Washington, D.C.'s prohibition on the keeping of functional firearms simply by finding the statute to be in derogation of the Second Amendment right's core guarantee. The functional firearms ban "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence

unconstitutional." *Heller*, 554 U.S. at 630. Washington's handgun ban failed on categorical grounds. While "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," *id.* at 625, "[i]t is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* at 629. "[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id.*

The lower courts, however, have largely eschewed interpretive or categorical approaches, preferring to adopt interest-balancing, means-ends review in nearly all cases. Second Amendment analysis in the lower courts typically involves a two-step process. Courts claim to first examine whether the case implicates a right secured by the Second Amendment; if so, they select a standard of review to weigh the right against any purported regulatory interest. See, *e.g.*, App. 17a; *Heller* v. *District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("*Heller II*"); *Ezell* v. *City of Chicago*, 651 F.3d 684, 702-03 (7th Cir. 2011); *United States* v. *Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States* v. *Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States* v. *Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

But courts have implemented this framework in highly disparate ways.

The Seventh Circuit "requires a textual and historical inquiry into original meaning" to determine whether a claim falls within the Second Amendment. *Ezell*, 651 F.3d at 701 (citations omitted). The government bears the burden of disproving the Second Amendment's applicability. "[I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment – 1791 or 1868 – then the analysis can stop there. . . ." *Id.* at 702-03. But

> [i]f the government cannot establish this – if the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected – then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights.

Id. at 703. "Borrowing from the Court's First Amendment doctrine, the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Id.* (citations omitted).

If called for, the Seventh Circuit would apply greater than intermediate, "if not quite 'strict scrutiny.'" *Id.* at 708. Indeed, that court does not shy away from dispensing with interest-balancing and resolving cases solely by interpreting the Second Amendment. See *id.* at 701 ("threshold inquiry in

some Second Amendment cases"); *Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012).

But the Seventh Circuit's approach is unique. To begin with, many courts simply dispense with the first step of discerning a right through interpretation, only assuming that a right (of abstract dimension) is implicated, thus carefully avoiding any holding that the right has any substantive content. By assuming, rather than finding and thus defining the right's existence, courts reduce the right to a cypher that cannot withstand the second step's application, always alleged to be intermediate scrutiny.

Following this formula, Second Amendment cases can be readily disposed of. See, *e.g.*, App. 18a ("[w]e need not resolve the first question"); *Woollard* v. *Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013) ("we merely assume that the *Heller* right exists. . . . We are free to make that assumption because the [law] passes constitutional muster under what we have deemed to be the applicable standard – intermediate scrutiny"); *Kachalsky* v. *County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) ("the Amendment must have *some* application. . . . Our analysis proceeds on this assumption"); *Heller II*, 670 F.3d at 1261 ("[w]e need not resolve that [first] question, because even assuming [the laws] do impinge upon the right . . . the prohibitions survive [intermediate review]"); *United States* v. *Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) ("[w]e have no reason to expound on where the *Heller* right may or may not apply outside the home because . . . intermediate scrutiny of any

burden on the alleged right would plainly lead the court to uphold the [provision]").

It is far from obvious why intermediate scrutiny would be nearly presumptively fatal to claimants asserting a fundamental right. After all, while not as rigorous as strict scrutiny, intermediate scrutiny is nonetheless an exacting test that requires the government to show the challenged action is "substantially related to an important governmental objective." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). A "fit" between the regulation and the important or substantial governmental interest must be established, "whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Bd. of Trs.* v. *Fox*, 492 U.S. 469, 480 (1989) (citation omitted).

And "[s]ignificantly, intermediate scrutiny places the burden of establishing the required fit squarely upon the government." *Chester*, 628 F.3d at 683 (citing *Fox*, 492 U.S. at 480-81). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996).

Occasionally, courts purporting to apply intermediate scrutiny to Second Amendment claims will require the government to supply actual evidence justifying its regulations. For example, in *Chester*, the Fourth Circuit reversed a district court opinion

upholding Section 922(g)(9)'s constitutionality absent evidentiary proof under intermediate scrutiny:

> The government has offered numerous plausible *reasons* why the disarmament of domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient *evidence* to establish a substantial relationship between § 922(g)(9) and an important governmental goal.

Chester, 628 F.3d at 683 (emphasis original).

And for much the same reasons, the Fourth Circuit reversed a decision upholding Section 922(g)(3)'s disarmament of drug users:

> [T]he government still bears the burden of showing that § 922(g)(3)'s limited imposition on Second Amendment rights proportionately advances the goal of preventing gun violence. And we conclude that in this case, the record it made is insufficient. Without pointing to any study, empirical data, or legislative findings, it merely argued to the district court that the fit was a matter of common sense.

United States v. *Carter*, 669 F.3d 411, 419 (4th Cir. 2012). Demonstrating this concept in action, the Fourth Circuit upheld Section 922(g)(9)'s constitutionality where the category of triggering misdemeanors had already been limited, rendering the "prohibitory sweep narrow," *United States* v. *Staten*, 666 F.3d 154, 163 (4th Cir. 2011), and the government

offered substantial, *specific* evidence of recidivism by domestic violence perpetrators, *id.* at 165-66.

The lower court, too, once acknowledged the government's intermediate scrutiny burden:

> Although we do "accord substantial deference to the predictive judgments" of the legislature, the District is not thereby "insulated from meaningful judicial review." Rather, we must "assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." Therefore, the District needs to present some meaningful evidence, not mere assertions, to justify its predictive judgments.

Heller II, 670 F.3d at 1259 (citations omitted)

But in many cases, "intermediate scrutiny" functions in a manner indistinguishable from the rational basis review *Heller* forbade. The Second Circuit upheld New York's widespread prohibition of the right to bear arms, under the guise of demanding "proper cause" for its exercise, N.Y. Penal Law § 400.00(2)(f), by offering that "'substantial deference to the predictive judgments of [the legislature]' is warranted." *Kachalsky*, 701 F.3d at 97 (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997)). "The Supreme Court has long granted deference to legislative findings regarding matters that are beyond the competence of courts." *Id.* (citations omitted).

> In the context of firearm regulation, the legislature is "far better equipped than the judiciary" to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks. Thus, our role is only "to assure that, in formulating its judgments, [New York] has drawn reasonable inferences based on substantial evidence."

Id.

The state averred that the right, albeit "fundamental," was essentially a social evil to be afforded only to select individuals who could prove a need for their rights. The court was interested neither in the fact that it was balancing a right out of existence, nor in evaluating any evidence purporting to justify such a balancing exercise: "It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments." *Id.* at 99. And the burden would, in any event, fall upon individuals seeking to exercise the right, not the government:

> To be sure, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. But there is also a "general reticence to invalidate the acts of [our] elected leaders." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2579 (2012). "'Proper respect for a coordinate branch of government' requires that we strike down [legislation] only if 'the lack of constitutional authority to pass

> [the] act in question is *clearly demonstrated*.'" *Id.*

Id. at 100-01 (emphasis added) (citation omitted).

The Fourth Circuit followed *Kachalsky*, reversing a district court opinion that had struck down Maryland's requirement that handgun carry license applicants demonstrate a "good and substantial reason," Md. Public Safety Code Ann. § 5-306(a)(5)(ii), for exercising their fundamental right. See *Woollard*, 712 F.3d at 881 ("legislature's job, not ours, to weigh conflicting evidence and make policy judgments") (quoting *Kachalsky*, 701 F.3d at 99).

And in *NRA of Am.* v. *BATFE*, 700 F.3d 185 (5th Cir. 2012), the Fifth Circuit purportedly invoked intermediate scrutiny to uphold laws forbidding all adults aged 18-20 from purchasing handguns in the regulated market. "[A]s with felons and the mentally ill," "Congress found that persons under 21 tend to be relatively irresponsible and can be prone to violent crime." *Id.* at 206. The en banc court divided sharply, denying rehearing by an 8-7 vote. *NRA* v. *BATFE*, 714 F.3d 334 (5th Cir. 2013) (en banc). For herself and five colleagues, Judge Jones penned a strong dissent, asserting that the panel's analysis would be considered "odious" if applied to a First Amendment claim. *Id.*, 714 F.3d at __, 2013 U.S. App. LEXIS 8779 at *38.

The lower court's opinion here accords with the dismissive line of purported "intermediate scrutiny" cases. The lower court's review amounted to citing the general proposition that Congress may disarm

dangerous people, App. 20a; the familiar invocation of "substantial deference to the predictive judgments of Congress" and legislative superiority in "mak[ing] sensitive public policy judgments," *id.* (citations omitted); and the observation that some common-law misdemeanants are dangerous, App. 22a. Deference and a plausible rationale defeated, again, this fundamental right – especially considering "plaintiffs have offered no evidence" overcoming (on a motion to dismiss) the court's presumptive rationale. *Id.*

III. The Court of Appeals Erred in Applying a Level of Scrutiny Functionally Equivalent to Rational Basis Review to Uphold a Broad and Ahistorical Prohibition of Fundamental Second Amendment Rights.

As Blackstone explained,

> [I]n common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler names of "misdemeanors" only.

4 William Blackstone, *Commentaries on the Laws of England* 5 (1769). At common law, all forms of battery were classified as misdemeanor offenses. *Id.* at 216-18. The felon classification was historically reserved for violent and extreme crimes that were frequently punishable by death. See *NRA*, 2013 U.S. App. LEXIS 8779, at *27 (Jones, J., dissenting).

While "felon" dispossession laws may be "longstanding" and thus "presumptively lawful," *Heller*, 554 U.S. at 626 & 627 n.26, "misdemeanants" are not "felons." Nor may Congress label any infraction a "felony" and thus bootstrap a newly-minted firearm prohibition into historical practice.

In any event, this is not a case presenting a newly-created offense requiring difficult Framing Era analogies. The offense of which Schrader was convicted predates the Second Amendment. And in 1791, misdemeanants at common law were not disarmed. Nobody relieved Paul Revere of his musket. No American court had approved the result reached here until *Coleman*, in 1998.[7]

Presumably, this Court referenced longstanding prohibitions targeting "felons and the mentally ill," *Heller*, 554 U.S. at 626, to distinguish these specific categories of dangerous and irresponsible people from the general population's default condition.

But to some of the lower courts, the "felons and the mentally ill" exclusion merely demonstrates that laws disarming categories of people are constitutional. After all, some rationale may be conjured to

[7] This is not to say that Congress cannot specifically disarm truly dangerous common-law misdemeanants. For example, Section 922(g)(9)'s domestic violence prohibition would apply had Schrader attacked an intimate partner. But Section 922(g)(9) has been upheld as an evidentiary, not a presumptive matter. See, *e.g.*, *Staten*, *supra*, 666 F.3d 154.

justify any law. Misdemeanants might be as dangerous as felons. Adults aged 18-20 might be as irresponsible as the mentally ill. Anyone who wishes to "bear arms" might pose a hazard, too, enough that the right may be denied those lacking the government's idea of a "good and substantial reason" or "proper cause" to carry a gun. All the better if the plaintiffs, not the government, bear the burden of disproving a presumption of constitutionality, and the courts in any event lack the expertise to second-guess legislative judgments.

This cannot be what the Court had in mind when it expressly invoked the doctrine of *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938) in condemning the general presumption of constitutionality in Second Amendment cases. *Heller*, 554 U.S. at 629 n.27. This state of affairs is not compatible with *Heller*'s admonition against a "freestanding 'interest-balancing' approach." *Id.* at 634. And it does not comport with the Court's "reject[ion]" of the suggestion "that the Second Amendment should be singled out for special – and specially unfavorable – treatment." *McDonald*, 130 S. Ct. at 3043.

The questions presented here are of the greatest importance. Considering the concise factual pattern, and the expansive scope of the lower court's overreach, the case also presents an especially effective vehicle to bring needed clarity and guidance to this area of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN GURA
Counsel of Record
THOMAS M. HUFF
GURA & POSSESSKY, PLLC
101 N. Columbus Street
Suite 405
Alexandria, VA 22314
703.835.9085
alan@gurapossessky.com

June 11, 2013

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 10, 2012 Decided January 11, 2013

No. 11-5352

JEFFERSON WAYNE SCHRADER AND
SECOND AMENDMENT FOUNDATION, INC.,
APPELLANTS

v.

ERIC H. HOLDER, JR., ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:10-cv-01736).

Alan Gura argued the cause for appellants. With him on the briefs was Thomas M. Huff.

Anisha S. Dasgupta, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were Stuart F. Delery, Acting Assistant Attorney General, Ronald C. Machen, Jr., U.S. Attorney, Michael S. Raab, Attorney, and Jane M. Lyons and R. Craig Lawrence, Assistant U.S. Attorneys.

Before: TATEL, *Circuit Judge*, and WILLIAMS and RANDOLPH, Senior *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: Due to a conviction some forty years ago for common-law misdemeanor assault and battery for which he served no jail time, plaintiff Jefferson Wayne Schrader, now a sixty-four-year-old veteran, is, by virtue of 18 U.S.C. § 922(g)(1), barred for life from ever possessing a firearm. Together with the Second Amendment Foundation, Schrader contends that section 922(g)(1) is inapplicable to common-law misdemeanants as a class and, alternatively, that application of the statute to this class of individuals violates the Second Amendment. Because we find plaintiffs' statutory argument unpersuasive and see no constitutional infirmity in applying section 922(g)(1) to common-law misdemeanants, we affirm the district court's dismissal of the complaint.

I.

Enacted in its current form in 1968, section 922(g)(1) of Title 18 of the United States Code prohibits firearm possession by persons convicted of "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Section 921(a)(20)(B), however, exempts "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20)(B). This case concerns the application of these provisions to convictions for common-law misdemeanors that carry no statutory maximum term of imprisonment.

Section 922(g)(1)'s prohibition on firearm possession applies, with some exceptions not relevant here, for life. The statute, however, contains a "safety valve" that permits individuals to apply to the Attorney General for restoration of their firearms rights. *Logan v. United States,* 552 U.S. 23, 28 n.1 (2007). Specifically, section 925(c) provides that the Attorney General may grant such individuals relief "if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c). But since 1992, "Congress has repeatedly barred the Attorney General from using appropriated funds to investigate or act upon relief applications," leaving the provision "inoperative." *Logan,* 552 U.S. at 28 n.1, (internal quotation marks and alterations omitted); *see also United States v. Bean,* 537 U.S. 71, 74-75 (2002).

In 1968, while walking down the street in Annapolis, Maryland, plaintiff Jefferson Wayne Schrader, then twenty years old and serving in the United States Navy, encountered a member of a street gang who, according to the complaint, had assaulted him a week or two earlier. Second Am. Compl. ¶¶ 9-10; *see also Wagener v. SBC Pension Benefit Plan-Non Bargained Program,* 407 F.3d 395, 397 (D.C. Cir. 2005) (explaining that, in reviewing district court's grant of motion to dismiss, the court must assume that facts alleged

in the complaint are true). "A dispute broke out between the two, in the course of which Schrader punched his assailant." Second Am. Compl. ¶ 10. As a result, Schrader was convicted of common-law misdemeanor assault and battery in a Maryland court and fined $100. *Id.* ¶ 11. The court imposed no jail time. *Id.* Schrader went on to complete a tour in Vietnam and received an honorable discharge from the Navy. *Id.* ¶ 12. Except for a single traffic violation, he has had no other encounter with the law. *Id.*

According to the complaint, "[o]n or about November 11, 2008, Schrader's companion attempted to purchase him a shotgun as a gift," and some two months later, "Schrader ordered a handgun from his local firearms dealer, which he would keep for self-defense." *Id.* ¶ 14. Both transactions "resulted in . . . denial decision[s] by the FBI when the National Instant Criminal Background Check ('NICS') computer system indicated that Mr. Schrader is prohibited under federal law from purchasing firearms." *Id.* ¶ 15. The FBI later "advised Schrader that the shotgun transaction was rejected pursuant to 18 U.S.C. § 922(g)(1) on the basis of his 1968 Maryland misdemeanor assault conviction." *Id.* ¶ 16. In a letter to Schrader, the FBI explained that he had "been matched with the following federally prohibitive criteria under Title 18, United States Code, Sections 921(a)(20) and 922(g)(1): A person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year or any state offense classified by the state as a misdemeanor

and . . . punishable by a term of imprisonment of more than two years."

At the time of Schrader's conviction, "[t]he common law crimes of assault and battery [in Maryland] had no statutory penalty." *Robinson v. State,* 728 A.2d 698, 702 n.6 (Md. 1999). Although Maryland later codified these offenses, *see* Md. Code Ann., Crim. Law §§ 3-201, 3-202, 3-203, when Schrader was convicted "[t]he maximum term of imprisonment [for these offenses] was ordinarily limited only by the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and Articles 16 and 25 of the Maryland Declaration of Rights," *Robinson,* 728 A.2d at 702 n.6. As the FBI explained in a declaration filed in the district court, because "[a]t the time of Schrader's 1968 assault conviction, Maryland law did not set a maximum sentence for misdemeanor assault," the FBI "determined that the conviction triggered 18 U.S.C. § 921(a)(20) and 18 U.S.C. § 922(g)(1), which prohibit firearm possession by an individual convicted of a state offense classified by the state as a misdemeanor that is punishable by a term of imprisonment of more than two years."

Schrader and the Second Amendment Foundation – an organization that conducts "education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control," Second Am. Compl. ¶ 2 – sued the Attorney General and the FBI in the United States District Court for

the District of Columbia, raising two claims. The first is statutory. Plaintiffs argued that Schrader's "conviction for misdemeanor assault cannot be the basis for a firearms disability under 18 U.S.C. § 922(g)(1), because Schrader was not actually sentenced to a term of imprisonment exceeding two years." *Id.* ¶ 19. Plaintiffs further alleged that "Maryland's failure to codify a statutory penalty for a simple common law misdemeanor does not create a firearms disability under federal law for conviction of such common law misdemeanor offense." *Id.* Second, presenting an as-applied constitutional claim, plaintiffs asserted that "barring possession of firearms by individuals on account of simple common-law misdemeanor offenses carrying no statutory penalties . . . violates the Second Amendment right to keep and bear arms." *Id.* ¶ 22. Plaintiffs sought "[i]njunctive relief commanding Defendants to withdraw their record pertaining to Plaintiff Schrader from NICS" and an order enjoining defendants "from enforcing 18 U.S.C. § 922(g)(1) on the basis of simple common-law misdemeanor offenses carrying no statutory penalties." *Id.* Prayer for Relief ¶¶ 1-2.

The government moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and plaintiffs cross-moved for summary judgment. The district court, concluding that plaintiffs had failed to state either a statutory or constitutional claim for relief, granted the motion to dismiss and denied the cross-motion for summary judgment. With respect to the statutory claim, the district court

rejected plaintiffs' argument that Schrader's actual sentence of less than two years' imprisonment was dispositive, noting that "only the possibility of punishment of more than two years for a misdemeanor matters for purposes of § 922(g)(1)." *Schrader v. Holder,* 831 F. Supp. 2d 304, 310 n.4 (D.D.C. 2011). Thus, the district court found Schrader's offense ineligible for the misdemeanor exception for offenses "punishable by a term of imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B), because the absence of a statutory maximum punishment meant that the Maryland court could have sentenced Schrader to more than two years' imprisonment, *Schrader,* 831 F. Supp. 2d at 310. Finally, the district court rejected plaintiffs' argument that "uncodified common-law offenses are not 'punishable' by any particular statutory criteria and, therefore, do not fall within the purview of § 922(g) at all." *Id.* at 309.

In rejecting plaintiffs' constitutional claim, the district court relied on the Supreme Court's observation in *District of Columbia v. Heller,* 554 U.S. 570 (2008), that "'the right secured by the Second Amendment is not unlimited,'" as well as the Court's inclusion of "'longstanding prohibitions on the possession of firearms by felons'" within a list of "'presumptively lawful regulatory measures.'" *Schrader,* 831 F. Supp. 2d at 311-12 (quoting *Heller,* 554 U.S. at 626-27 & n.2) (emphasis omitted). The district court found "no constitutional impediment" to including common-law misdemeanants like Schrader within the federal firearms ban. *Id.* at 312.

Plaintiffs appeal, reiterating the statutory and constitutional claims raised in the district court. We consider each in turn, reviewing de novo the district court's dismissal of the complaint. *Hettinga v. United States,* 677 F.3d 471, 476 (D.C. Cir. 2012) (per curiam).

II.

Recall the statutory language at issue. Section 922(g)(1) prohibits firearm possession by persons convicted of "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Section 921(a)(20)(B) exempts "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." *Id.* § 921(a)(20)(B).

As an initial matter, plaintiffs no longer appear to be arguing, as they did in their complaint, that section 921(a)(20)(B) exempts Schrader's offense from the federal firearms ban "because Schrader was not actually sentenced to a term of imprisonment exceeding two years." Second Am. Compl. ¶ 19. Indeed, other courts of appeals have uniformly rejected the argument that the actual sentence imposed is controlling for purposes of triggering the federal firearms ban. *See, e.g., United States v. Coleman,* 158 F.3d 199, 203-04 (4th Cir. 1998) (en banc); *United States v. Horodner,* 993 F.2d 191, 194 (9th Cir. 1993).

Instead, plaintiffs argue more broadly that section 922(g)(1) is inapplicable to common-law offenses because such offenses "are not 'punishable by' any

particular statutory criteria." Appellants' Br. 17. Given the nature of common-law offenses, this argument fails. Although the category of "common-law offenses" is rather broad, varying widely from state to state, when Congress enacted section 922(g)(1) in 1968, many common-law crimes involved quite violent behavior. In Maryland, for example, attempted rape and attempted murder were common-law misdemeanors that carried no statutory maximum sentence. *See Hardy v. State,* 482 A.2d 474, 476-77 (Md. 1984); *Glass v. State,* 329 A.2d 109, 112 (Md. Ct. Spec. App. 1974). The offense for which Schrader was convicted – common-law assault and battery – provides another example. Before Maryland codified the crime of common-law assault in 1996, the offense included all forms of assault with the exception of certain narrow categories of statutory aggravated assaults that were defined as felonies. *See Walker v. State,* 452 A.2d 1234, 1247 & n.11 (Md. Ct. Spec. App. 1982). As a result, the offense "embrace[d] an almost infinite variety of fact patterns." *Simms v. State,* 421 A.2d 957, 965 (Md. 1980). Many of these fact patterns involved serious, violent conduct, and many offenders received sentences of ten or twenty years' imprisonment. *See Thomas v. State,* 634 A.2d 1, 8 & nn. 3, 4 (Md. 1993) (collecting cases). In one case, for example, a defendant was sentenced to fifteen years for common-law assault where he forced a man "into a car, stabbed him twice in the neck and three times in the chest, dragged him out of the car and left him bleeding in a street gutter." *Sutton v. Maryland,* 886 F.2d

708, 709 (4th Cir. 1989) (en banc). As one Maryland court explained:

> [S]tatutory assaults have not preempted the field of all serious and aggravated assaults. Our Legislature has cut out of the herd for special treatment four assaults where the aggravating factor is a special *mens rea* or specific intent. This by no means exhausts the category of more grievous and blameworthy assaults. The aggravating factor in a particular case might well be the modality of an assault, and not its *mens rea* – assault with a deadly weapon, assault by poison . . . , assault by bomb. . . . Even where . . . there simply has been no specific intent, a brutal beating that leaves its victim blinded, crippled, disfigured, in a wheelchair for life, in a psychiatric ward for life, is severely aggravated. . . . Maryland has not dealt with this form of aggravation legislatively but has left it to the discretion of common law sentencing.

Walker, 452 A.2d at 1247-48; *see also Simms,* 421 A.2d at 965 ("Some 'simple assaults' may involve more brutal or heinous conduct than may be present in other cases falling within one of the statutory aggravated assaults.").

Significantly, moreover, the earliest version of the federal firearms ban, which applied to certain "crime[s] of violence," specifically included among such crimes "assault with a dangerous weapon," Federal Firearms Act, ch. 850, §§ 1(6), 2(f), 52 Stat. 1250,

1250-51 (1938) – a crime that Maryland, at the time of section 922(g)(1)'s enactment, punished as a common-law misdemeanor, *see Walker,* 452 A.2d at 1248 (noting that Maryland punished assault with a deadly weapon as a common-law misdemeanor rather than as a statutory offense). We doubt very much that when Congress expanded the firearms prohibition to cover, as the statute now does, all individuals convicted of a "crime punishable by imprisonment for a term exceeding one year," *see* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, § 2, 75. Stat. 757, 757 (1961), it intended to exclude all common-law offenses, even those that previously fell within the ambit of the federal firearms ban.

Plaintiffs' argument also runs counter to the commonsense meaning of the term "punishable," which refers to any punishment capable of being imposed, not necessarily a punishment specified by statute. *See* Webster's Third New International Dictionary 1843 (1993) (defining "punishable" as "deserving of, or liable to, punishment: capable of being punished by law or right"). Because common-law offenses carry no statutory maximum term of imprisonment, they are capable of being punished by a term of imprisonment exceeding one year and thus fall within section 922(g)(1)'s purview. And because such offenses are also capable of being punished by more than two years' imprisonment, they are ineligible for section 921(a)(20)(B)'s misdemeanor exception.

The sparse case law interpreting the term "punishable" in the context of uncodified common-law

offenses reinforces our conclusion that the term refers to the maximum potential punishment a court can impose, whether or not set by statute. In *United States v. Coleman,* 158 F.3d 199 (4th Cir. 1998) (en banc), the defendant argued that his Maryland conviction for common-law misdemeanor assault should not trigger the Armed Career Criminal Act sentence enhancement which, like section 922(g)(1), turns on whether a predicate conviction qualifies as a "crime punishable by imprisonment for a term exceeding one year." *See* 18 U.S.C. § 924(e)(1), (e)(2)(B). The defendant asserted that "because he actually received a sentence of 18 months imprisonment, . . . his conviction should fit within the [section 921(a)(20)(B)] misdemeanor exclusion." *Coleman,* 158 F.3d at 203. In rejecting this argument, the Fourth Circuit, sitting en banc, overruled an earlier panel opinion which had held that, for convictions of common-law simple assault in Maryland, "the actual sentence imposed should control whether or not a conviction for such a crime should be" deemed an offense "punishable by imprisonment for a term exceeding one year." *United States v. Schultheis,* 486 F.2d 1331, 1332, 1335 (4th Cir. 1973). The court instead defined "punishable" in relation to the maximum potential punishment a defendant could receive. "While a Maryland conviction for common-law assault is classified as a misdemeanor," the court explained, "the offense carries no maximum punishment; the only limits on punishment are the Cruel and Unusual Punishment Clauses of the Maryland and United States Constitutions. As such, a Maryland common-law assault clearly

is punishable by more than two years imprison ment. . . .” *Coleman,* 158 F.3d at 203 (internal quotation marks and citation omitted). Rejecting the argument that the absence of statutory sentencing criteria compelled a different reading of the statute, the court explained that “[t]he plain wording of the statute applies equally when the potential term of imprisonment is established by the common law and limited only by the prohibition on cruel and unusual punishments as when the range of possible terms of imprisonment is determined by a statute.” *Id.* at 204.

Plaintiffs insist that their interpretation of the statute is “compelled by the federal scheme’s structural reliance on the judgment of the convicting jurisdiction’s legislature” regarding the seriousness of an offense. Appellants’ Br. 19. According to plaintiffs, because “[t]he State chooses how harshly to punish its own crimes, and Congress defers to the wisdom of that localized judgment,” to permit the federal firearms ban “to encompass state common law crimes for which no legislative judgment has been expressed would grant the federal government a power that has been statutorily entrusted to the States.” Appellants’ Br. 20. As the district court pointed out, however, “the choice of a State legislature to rely on judicial discretion at sentencing on certain common law misdemeanors represents a legislative choice just as the adoption of a statute would.” *Schrader,* 831 F. Supp. 2d at 310. With respect to common-law assaults, for example, Maryland courts have observed that the State, through its legislature, decided to

"trust[ ] the wide discretion of the common law sentencing provisions to deal appropriately with" the broad range of "severely aggravated assaults" that were at the time uncodified in Maryland. *Walker,* 452 A.2d at 1248. We see no basis for thinking that Maryland, having left such sentencing to the discretion of common-law judges, had somehow signaled its view that these offenses were insufficiently serious to trigger the federal firearms ban. "Rather than trying to list by statute every circumstance that might make an assault more 'grievous and blameworthy,'" the Fourth Circuit has explained, "Maryland wisely left common law assault in place and trusted its trial judges to fashion an appropriate punishment within constitutional limits." *Sutton,* 886 F.2d at 711. Indeed, when codifying the offense in 1996, Maryland demonstrated the seriousness with which it views common-law assaults by authorizing imprisonment of up to twenty-five years for felony First Degree Assault and up to ten years for misdemeanor Second Degree Assault. Md. Code Ann., Crim. Law §§ 3-202, 3-203.

Next, plaintiffs claim that "[s]ection 922's overarching design reveals no intent to impose a blanket firearms ban on common law misdemeanants." Appellants' Br. 22. In support, plaintiffs point out that Congress subjected a specific category of misdemeanor convictions to the federal firearms ban when it enacted the 1996 Lautenberg Amendment to the Gun Control Act of 1968, which prohibits firearm possession by any person convicted of "a misdemeanor crime of domestic violence." Omnibus Consolidated

Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 to -372 (1996). According to plaintiffs, "Congress's explicit reference to this special category of misdemeanor convictions shows that when it wants to reach beyond traditional felonies, it does so clearly." Appellants' Br. 23. But Congress *did* reach beyond felonies when it enacted section 921(a)(20)(B), which expressly provides that certain State misdemeanors – those punishable by more than two years' imprisonment – fall within the scope of section 922(g)(1). Plaintiffs' argument, then, boils down to the proposition that common-law misdemeanors should be viewed differently from other State misdemeanors punishable by more than two years' imprisonment. This contention, however, flows not from any insight gleaned from the statute, but rather from plaintiffs' flawed belief that all common-law offenses are trivial.

Finally, plaintiffs argue that the canon of constitutional avoidance requires us to adopt an alternative construction of the term "punishable by" that would exclude common-law misdemeanants from section 922(g)(1)'s purview. *See Northwest Austin Municipal Utility District No. One v. Holder,* 557 U.S. 193, 204, 207 (2009) (reading statute to avoid deciding "serious constitutional questions"). As explained below, however, section 922(g)(1)'s application to common-law misdemeanants as a class creates no constitutional problem that we need to avoid.

III.

The Second Amendment provides: "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. In *Heller,* the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," and struck down District of Columbia laws banning handgun possession in the home and requiring that citizens keep their firearms in an inoperable condition. 554 U.S. at 592, 635. In doing so, the Court made clear that the right guaranteed by the Second Amendment "is not unlimited." *Id.* at 626. "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* Instead, at the core of the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. Although declining to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," the Court made clear that

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws

> imposing conditions and qualifications on the commercial sale of arms.

Id. at 626-27. The Court emphasized that it identified "these presumptively lawful regulatory measures only as examples" and that its list did "not purport to be exhaustive." *Id.* at 627 n.26; *see also McDonald v. City of Chicago,* 130 S. Ct. 3020, 3047 (2010) ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill'. . . . We repeat those assurances here." (quoting *Heller,* 554 U.S. at 626)).

After *Heller,* the District of Columbia adopted new gun laws that were challenged in *Heller v. District of Columbia,* 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"). There we adopted, as have other circuits, a "two-step approach" to analyzing Second Amendment challenges. *Id.* at 1252 (collecting cases). Given that "[u]nder *Heller,* . . . there are certain types of firearms regulations that do not govern conduct within the scope of the Amendment," we first ask whether the activity or offender subject to the challenged regulation falls outside the Second Amendment's protections. *Id.* If the answer is yes, that appears to end the matter. *Id.* If the answer is no, "then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny." *Id.*

Courts of appeals have unanimously rejected Second Amendment challenges to section 922(g)(1), typically relying on the Supreme Court's warning in

Heller that nothing in its opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Heller,* 554 U.S. at 626; *see United States v. Moore,* 666 F.3d 313, 316-17 (4th Cir. 2012) (collecting cases). Seeking to distinguish these cases, plaintiffs here argue that common-law misdemeanants differ from felons and fall within the scope of Second Amendment protection at the first step of the analysis. Moreover, they assert, banning firearm possession by common-law misdemeanants fails under the appropriate level of constitutional scrutiny. The government disagrees on both points. We need not resolve the first question, however, because even if common-law misdemeanants fall within the scope of the Second Amendment, the firearms ban imposed on this class of individuals passes muster under the appropriate level of constitutional scrutiny. *See Heller II,* 670 F.3d at 1261 (declining to resolve the scope inquiry "because even assuming [the challenged regulations] do impinge upon the right protected by the Second Amendment, we think intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard").

"As with the First Amendment, the level of scrutiny applicable under the Second Amendment surely 'depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.'" *Id.* at 1257 (quoting *United States v. Chester,* 628 F.3d 673, 682 (4th Cir. 2010)). "That is, a regulation that imposes a substantial burden upon

the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify." *Id.* Plaintiffs urge us to apply strict scrutiny, arguing that section 922(g)(1), by completely disarming a class of individuals, places a substantial burden on Second Amendment rights. In our view, strict scrutiny is inappropriate. Although section 922(g)(1)'s burden is certainly severe, it falls on individuals who cannot be said to be exercising the core of the Second Amendment right identified in *Heller,* i.e., "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. Because common-law misdemeanants as a class cannot be considered law-abiding and responsible, *supra* at 7-9, we follow those "courts of appeals [that] have generally applied intermediate scrutiny" in considering challenges to "Congress' effort under § 922(g) to ban firearm possession by certain classes of non-law-abiding, non-responsible persons who fall outside the Second Amendment's core protections." *United States v. Mahin,* 668 F.3d 119, 123 (4th Cir. 2012) (collecting cases).

Intermediate scrutiny requires the government to show that disarming common-law misdemeanants is "'substantially related to an important governmental objective.'" *Heller II,* 670 F.3d at 1258 (quoting *Clark v. Jeter,* 486 U.S. 456, 461 (1988)). Section 922(g)(1) easily satisfies this standard.

First, the statute's overarching objective is obviously "important." As the Supreme Court has explained,

"[t]he principal purpose of the federal gun control legislation . . . was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *Huddleston v. United States,* 415 U.S. 814, 824 (1974) (internal quotation marks omitted); *see also United States v. Yancey,* 621 F.3d 681, 683-84 (7th Cir. 2010) ("Congress enacted the exclusions in § 922(g) to keep guns out of the hands of presumptively risky people. The broad objective of § 922(g) – suppressing armed violence – is without doubt an important one. . . ." (citations omitted)). The Supreme Court has also made clear that this "general interest in preventing crime is compelling." *United States v. Salerno,* 481 U.S. 739, 750 (1987).

Second, the government has carried its burden of demonstrating a substantial relationship between this important objective – crime prevention – and section 922(g)(1)'s firearms ban. Under intermediate scrutiny, "the fit between the challenged regulation and the asserted objective [need only] be reasonable, not perfect." *United States v. Marzzarella,* 614 F.3d 85, 98 (3d Cir. 2010) (collecting cases). In assessing this "fit," we afford "substantial deference to the predictive judgments of Congress." *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 665 (1994). "In the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks."

Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012) (quoting *Turner Broadcasting,* 512 U.S. at 665). In enacting section 922(g)(1), Congress determined – reasonably in our view – that in order to accomplish the goal of preventing gun violence "firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." *Dickerson v. New Banner Institute, Inc.,* 460 U.S. 103, 119 (1983), *superseded by statute on other grounds,* Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986). Indeed, several courts of appeals have held that section 922(g)'s exclusions satisfy intermediate scrutiny, explaining that individuals with prior criminal convictions for felonies or domestic violence misdemeanors can reasonably be disarmed because such individuals pose a heightened risk of future armed violence. *See, e.g., United States v. Booker,* 644 F.3d 12, 25-26 (1st Cir. 2011) (affirming section 922(g)(9)'s ban on firearm possession by persons convicted of misdemeanor crime of domestic violence); *United States v. Williams,* 616 F.3d 685, 692-93 (7th Cir. 2010) (affirming section 922(g)(1)'s ban on firearm possession by convicted felon); *see also Mahin,* 668 F.3d at 123 (collecting cases).

Plaintiffs acknowledge that disarming felons and other serious criminals bears a substantial relationship to the prevention of gun violence. They emphasize, however, that they challenge the constitutionality of section 922(g)(1) as applied to *common-law misdemeanants* and insist that no substantial fit exists

between disarming such individuals and preventing gun violence. But as explained above, at the time of section 922(g)(1)'s enactment, common-law misdemeanors included a wide variety of violent conduct, much of it quite egregious. *See supra* at 7-9. And although the category of common-law misdemeanors has since been narrowed through codification, plaintiffs have offered no evidence that individuals convicted of such offenses pose an insignificant risk of future armed violence. To be sure, *some* common-law misdemeanants, perhaps even Schrader, may well present no such risk, but "Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, nor need these limits be established by evidence presented in court." *United States v. Skoien,* 614 F.3d 638, 641 (7th Cir. 2010) (en banc).

Accordingly, because disarmament of common-law misdemeanants as a class is substantially related to the important governmental objective of crime prevention, we reject plaintiffs' constitutional challenge.

IV.

At several points in their briefs, plaintiffs appear to go beyond their argument that section 922(g)(1) is unconstitutional as applied to common-law misdemeanants as a class and claim that the statute is invalid as applied to Schrader specifically. Were this argument properly before us, *Heller* might well

dictate a different outcome. According to the complaint's allegations, Schrader's offense occurred over forty years ago and involved only a fistfight. Second Am. Compl. ¶ 10. Schrader received no jail time, served honorably in Vietnam, and, except for a single traffic violation, has had no encounter with the law since then. *Id.* ¶¶ 11-12. To the extent that these allegations are true, we would hesitate to find Schrader outside the class of "law-abiding, responsible citizens" whose possession of firearms is, under *Heller,* protected by the Second Amendment. *Heller,* 554 U.S. at 635.

But we need not wade into these waters because plaintiffs never argued in the district court that section 922(g)(1) was unconstitutional as applied to Schrader. *See Jicarilla Apache Nation v. U.S. Dep't of Interior,* 613 F.3d 1112, 1117 (D.C. Cir. 2010) (explaining that arguments not raised before the district court are ordinarily waived). In their complaint, plaintiffs frame their constitutional claim with reference to common-law misdemeanants as a class, arguing that "barring possession of firearms by individuals on account of simple common-law misdemeanor offenses carrying no statutory penalties" violates the Second Amendment. Second Am. Compl. ¶ 22. Indeed, plaintiffs' counsel conceded at oral argument that an as-applied challenge with respect to Schrader was not "specifically elucidated in the complaint." Oral Arg. Rec. 15:29-15:34. To be sure, the complaint seeks some relief on behalf of Schrader specifically, i.e., withdrawal of his record of conviction

from the NICS. Second Am. Compl. Prayer for Relief ¶ 1. But given that the injunctive relief plaintiffs seek with respect to section 922(g)(1) is far broader – an injunction barring the statute's enforcement "on the basis of simple common-law misdemeanor offenses carrying no statutory penalties," *id.* Prayer for Relief ¶ 2 – and given that plaintiffs raised no as-applied challenge with respect to Schrader in their district court briefs, we view this more specific claim as simply derivative of the broader claim that the statute is unconstitutional as applied to common-law misdemeanants as a class. And although plaintiffs referred to the specific circumstances of Schrader's offense, they did so in the context of arguing that common-law misdemeanants *as a class* can be expected to share Schrader's sympathetic characteristics.

Given this, we believe the wisest course of action is to leave the resolution of these difficult constitutional questions to a case where the issues are properly raised and fully briefed. "[A]ppellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). This fundamental principle of judicial restraint is especially important where, as here, constitutional issues are at stake. *See Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it

is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

Leaving these questions for their proper day has an added benefit: it gives Congress time to consider lifting the prohibition on the use of appropriated funds for the implementation of section 925(c), which, as explained above, permits individuals to obtain relief from section 922(g)(1) by demonstrating that they no longer pose a risk to public safety. Without the relief authorized by section 925(c), the federal firearms ban will remain vulnerable to a properly raised as-applied constitutional challenge brought by an individual who, despite a prior conviction, has become a "law-abiding, responsible citizen[ ]" entitled to "use arms in defense of hearth and home." *Heller,* 554 U.S at 635.

For the foregoing reasons, we affirm the district court's dismissal of this action.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFERSON WAYNE SCHRADER, *et al.*	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 10-1736(RMC)**
ERIC HOLDER, Attorney General, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

(Filed Dec. 23, 2011)

Back in 1968 when Jefferson Schrader was 20 years old and in the Navy, he was in a fistfight with a member of a gang that had previously attacked him on the street in Annapolis, Maryland. He was arrested and convicted in a Maryland State court of common law misdemeanor assault and battery. He received a $100 fine and no jail time. Because it was an uncodified common law violation, no State statute specified a maximum term of incarceration. Forty years later, as Mr. Schrader attempted to purchase firearms, his attempts were rebuffed when he was identified in the National Instant Criminal Background Check System ("NICS") as ineligible since his 1968 conviction could have resulted in a sentence of two years or more and federal law prohibited his purchase. *See* 18 U.S.C. § 922(g).

Mr. Schrader challenges the government's application of § 922(g) to his facts and asserts that he has a constitutional right under the Second Amendment to purchase firearms. All parties recognize that federal law bars anyone convicted of certain crimes from purchasing guns, including those convicted of a State-law misdemeanor that is punishable by more than two years in prison. *See* 18 U.S.C. § 921(a)(20)(B). The questions presented are whether an uncodified misdemeanor of a garden-variety sort comes within the federal definition and whether, if so, such treatment violates Mr. Schrader's rights under the Second Amendment. The government moves to dismiss and Mr. Schrader cross moves for summary judgment.

I. FACTS

The relevant facts are simple and, unless otherwise stated, uncontested. In July of 1968, Mr. Schrader was enlisted in the Navy and stationed in Annapolis, Maryland. While walking on the streets of Annapolis, Mr. Schrader was assaulted by a street gang for allegedly entering their territory. Sometime later, on or about July 23, 1968, Mr. Schrader was again walking in Annapolis and encountered one of the gang members who had previously assaulted him.[1] A fight broke out, and Mr. Schrader punched

[1] Defendants view with skepticism Mr. Schrader's statement that he was previously assaulted by a street gang but have no basis to deny the account. Even if the account were properly

(Continued on following page)

the gang member. A nearby police officer arrested Mr. Schrader for assault and battery and disorderly conduct. Eight days later, Mr. Schrader was found guilty of assault and battery and ordered to pay a $100 fine and $9 in court costs. Mr. Schrader paid the fine and costs and was released. Aside from this incident, Mr. Schrader has no other convictions and has had no other meaningful encounters with law enforcement.

Forty years later, Mr. Schrader attempted to acquire a shotgun and a handgun for self-defense purposes. As required by the Brady Handgun Violence and Prevention Act, Pub. L. 103-159, 107 Stat. 1536, Mr. Schrader's name and information was checked against the National Instant Criminal Background System ("NICS") to see if he was eligible to purchase a firearm. The background check revealed Mr. Schrader's prior conviction, and he was deemed ineligible.

Mr. Schrader wrote to the FBI and asked why his firearms transactions had been cancelled. On June 3, 2009, the FBI advised that it had made a "denial decision" under 18 U.S.C. § 922(g)(1) on the basis of the 1968 Maryland misdemeanor common law assault and battery conviction. The FBI further advised

---

disputed it is not material to this decision. Moreover, in granting Defendants' motion, the Court views the facts in a light most favorable to Mr. Schrader. *See, e.g., Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007).

him to dispose of or surrender any firearms he might possess or he could face criminal prosecution. Because the common law misdemeanor for which Mr. Schrader was convicted had no legislatively-capped punishment range, the government treats him as it would a convicted felon for the purpose of federal law, banning him for life from possessing any firearm for any purpose and listing his name in the NICS database as disqualified from owning firearms.

Mr. Schrader complains that the government's expansive reading of § 922(g)(1) is mistaken. Even assuming that the federal scheme could be read to encompass common law misdemeanants, he complains that the government's attempt to limit his right to purchase guns under § 922(g)(1) fails constitutional scrutiny under the Second Amendment. Mr. Schrader and the Second Amendment Foundation[2] filed this lawsuit seeking an order requiring Defendants to remove Mr. Schrader's firearms disability from NICS pursuant to 18 U.S.C. § 925(a) and permanently enjoining Defendants from enforcing 18 U.S.C. § 922(g)(1) with respect to his uncodified common law misdemeanor offense on the ground that it has no statutory punishment criteria.

---

[2] The Second Amendment Foundation is a non-profit membership organization incorporated under the laws of the State of Washington, with its principal place of business in Bellevue, Washington. It says that it has over 650,000 members and supporters nationwide. 2nd Am. Compl. ¶ 2.

II. LEGAL STANDARDS

A. Jurisdiction and Venue

The Court has jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 2201 (Declaratory Judgment Act). Venue is proper under 28 U.S.C. § 1391.

B. Motion to Dismiss

A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face. Fed. R. Civ. P. 12(b)(6). A complaint must be sufficient "to give a defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly,* 550 U.S. at 555 (2007) (internal citations omitted). Although a complaint does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is "plausible on its face." *Twombly,* 550 U.S. at 570.

A court must treat the complaint's factual allegations as true, "even if doubtful in fact." *Twombly,* 550 U.S. at 555. But a court need not accept as true legal conclusions set forth in a complaint. *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009). In deciding a motion under Rule 12(b)(6), a court may consider the facts alleged in the complaint, documents attached to the

complaint as exhibits or incorporated by reference, and matters about which the court may take judicial notice. *Abhe & Svoboda, Inc. v. Chao,* 508 F.3d 1052, 1059 (D.C. Cir. 2007).

C. Standing

A plaintiff bears the burden of establishing his own standing for each claim that he makes. *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 663 (1993); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1002) [sic]. Federal courts are courts of limited jurisdiction and a plaintiff must show a "justiciable controversy" with the defendant – one that is "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. V. Haworth,* 300 U.S. 227, 240-41 (1937). To establish constitutional standing, a plaintiff must show an "injury-in-fact," which means "an invasion of a legally protected interests [sic] that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560 & n.1. A plaintiff must also demonstrate a "causal connection between the injury and the conduct complained of." *Id.* Finally, the injury must be redressable by the relief sought in the complaint. *Id.* at 561.

Organizations can establish standing in one of two ways. First, they can demonstrate injury, causality, and redressability in the same way as a traditional plaintiff. *See, e.g., American Legal Found. v.*

FCC, 808 F.2d 84, 89 (D.C. Cir. 1987) (citing *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378-79 (1982)). Second, an organization can have representational standing "on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.,* 528 U.S. 167, 181 (2000).

III. ANALYSIS

A. Standing

The government contests the standing of both Mr. Schrader and the Second Amendment Foundation. According to the government, Mr. Schrader lacks standing for three reasons. First, he fails to identify where, when or how he intends to purchase or possess a handgun and long gun. Second, his past inability to acquire or possess a firearm legally is not presently harming him so that there is no existing "actual controversy." *See Haase v. Sessions,* 835 F.2d 902, 911 (D.C. Cir. 1987). Third, the allegations in the Second Amended Complaint are too vague to find that any injury concerning future firearms purchases or possession is traceable to the Defendants or redressable by the Court.

Mr. Schrader presently intends to purchase and possess a handgun and long gun for self-defense

within his home. He does not face any of the typical disqualifying barriers under federal gun control laws. He is not under indictment, has never been convicted of a felony or misdemeanor crime of domestic violence, is not a fugitive from justice, is not a user of unlawful controlled substances or an addict, has never been adjudicated as having a mental defect or been committed to a mental institution, has not been discharged under dishonorable circumstances, has never renounced his citizenship, and has never been the subject of a restraining order relating to an intimate partner. *See* 18 U.S.C. § 922(g). He is also fully qualified to possess firearms under the laws of Georgia, his State of citizenship.

Mr. Schrader has been denied the right to purchase guns on two occasions because he is listed in the NICS database as disqualified. He complains that this listing prevents him, now and into the future, from any such exercise of his Second Amendment rights. The government does not dispute this fact but protests that his future intentions are too imprecise.

The Court disagrees. The D.C. Circuit has "consistently treated a license or permit denial pursuant to a state or federal administrative scheme as an Article III injury." *Parker v. District of Columbia,* 370 F.3d 376 (2007) (collecting cases), *aff'd sub nom. Dist. of Columbia v. Heller,* 554 U.S. 570 (2008). The FBI explained its denial decision in 2009 and Mr. Schrader sued in 2010. There is not a "pre-enforcement challenge," as to which the Circuit has concluded a plaintiff lacks standing due to the

absence of an injury-in-fact. *Id.* at 374 (citing *Seegars v. Gonzales,* 393 [sic] F.3d 1248 (D.C. Cir. 2005)). Moreover, Mr. Schrader presents "an actual and well-founded fear that the law will be enforced against [him.]" *Id.* at 375 (quoting *Virginia v. American Booksellers Ass'n,* 484 U.S. 383 (1988)). The Court finds no ambiguity, undue delay, or uncertainty here about Mr. Schrader's suit or claims. His standing is at least as secure as Dick Heller in *Parker v. D.C. See also Dearth v. Holder,* 641 F.3d 499 (D.C. Cir. 2011) (finding standing when plaintiff alleged that he intended to purchase and store a firearm in the United States and that the federal regulatory scheme thwarted his continuing desire to purchase a firearm).

Because the Second Amendment Foundation has not raised issues separate from those raised by Mr. Schrader, the Court need not decide whether it has standing. *See Dearth v. Holder,* 641 F.3d 499, 503 n.* (2011) (citing *Environmental Action, Inc. v. FERC,* 939 F.2d 1057, 1061 n.* (D.C. Cir. 1991)).

B. Applicability of § 922(g)

Although § 922(g)(1) is colloquially referred to as the felon-in-possession statute, that description is underinclusive. *See United States v. Williams,* No. 09-00044-CG-C, 2009 U.S. Dist. LEXIS 70299, at *3 (S.D. Ala. Aug. 11, 2009) ("In fact, felon-in-possession is a misnomer because it is possible under 18 U.S.C. §§ 922(g)(1) and 921(a)(20)(B) for a misdemeanor conviction to disqualify a person from possessing a

firearm."). The relevant language prohibits any person convicted of "a crime punishable by imprisonment for a term exceeding one year" from possessing firearms. 18 U.S.C. § 922(g)(1). The statute defines the term "crime punishable by imprisonment for a term exceeding one year" to exclude "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20). The question, thus, is whether Mr. Schrader's common law assault and battery conviction is a crime "punishable by a term of imprisonment of two years or less." *Id.*

Neither party disagrees with this analysis. Where they part company is in its application to these facts. The United States contends that when a common law crime is involved, for which a State legislature has set no specific penalty, a court's sentencing discretion in [sic] limited only by the bar to cruel and unusual punishment guaranteed by the Eighth Amendment.[3] By this calculus, Mr. Schrader's assault and battery conviction constituted a State misdemeanor punishable by more than two years. Mr. Schrader responds that uncodified common-law offenses are not "punishable" by any particular statutory criteria and, therefore, do not fall within the purview of § 922(g) at all. The Government complains that adopting Mr. Schrader's reading of

[3] The Eight [sic] Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

§ 922 would eliminate all uncodified common law offenses, regardless of their violence or seriousness, from precluding an individual from carrying firearms. Mr. Schrader responds that adopting the Government's reading of § 922 would lump even the simplest common law offense with violent felonies.

While the parties spend time combing history and dictionaries to make their arguments, the Court need not tarry. There is one insurmountable hole in Mr. Schrader's logic. His argument that the lack of *statutory* criteria makes a common law crime not "punishable" within the meaning of federal law imports a requirement that neither the law nor logic requires or suggests. Whether any particular State has codified its criminal common law cannot limit the effect of federal law. The absence of a legislatively-defined sentence leaves sentencing to the discretion of the judge, limited only by constitutional (federal or State) provisions. Mr. Schrader does not argue, nor could he, that a Maryland State court judge could not have sentenced him, or another offender of the same common law crime, to more than two years in jail.[4]

[4] The actual term of the sentence given is not controlling; only the possibility of punishment of more than two years for a misdemeanor matters for purposes of § 922(g)(1). *See, e.g., United States v. Hill,* 539 F.3d 1213, 1219-21 (10th Cir. 2008) (Section 922(g)(1) was satisfied where maximum federal penalty was 23 months imprisonment even though defendant was only sentenced to ten months); *United States v. Jones,* 195 F.3d 205, 207 (4th Cir. 1999) ("[I]t was plainly irrelevant to Congress whether the individual in question actually receives a prison term; the statute imposes disabilities on one convicted of a crime

(Continued on following page)

Thus, his offense was "punishable" by a term of more than two years in jail.

Mr. Schrader further argues that the federalism concerns that undergird our government structure in the United States allow only a State's legislature to decide how harshly it chooses to punish its own crimes and Congress defers to the wisdom of that localized judgment. *See United States v. McKenzie,* 99 F.3d 813, 820 (7th Cir. 1977 [sic]) ("[W]hile states may vary on what offenses are punishable by a term exceeding one year, it does not alter Congress' intent to keep guns out of the hands of anyone that a given state determines to be a felon."). However, the choice of a State legislature to rely on judicial discretion at sentencing on certain common law misdemeanors represents a legislative choice just as the adoption of a statute would. To the extent that reliance on judicial discretion represents legislative "inaction," only the citizens of the State might change that, not the federal government.[5] Giving "punishable" its common

---

punishable by imprisonment for a term exceeding one year."); *United States v. Arnold,* 113 F.3d 1146, 1148 (10th Cir. 1997) ("Appellant attempts to rewrite 18 U.S.C. § 922(g)(1) by converting the word 'punishable' into 'punished.' What matters is not the actual sentence . . . but the maximum possible sentence."); *United States v. Qualls,* 108 F.3d 1019, 1021-22 (9th Cir. 1997).

[5] In fact, since Mr. Schrader's conviction in 1968, the State of Maryland has codified the common law crime of assault. First Degree Assault is a felony punishable by up to 25 years imprisonment and covers assault that causes or attempts to cause serious physical injuries or that is carried out with a firearm. *See* Md. Criminal Law Code Ann. § 3-202. Second Degree

(Continued on following page)

sense definition does not undermine Maryland's ability to choose how to punish its citizens who are convicted of State crimes.

Moreover, if Maryland wanted to limit the reach of § 922 to misdemeanants who have been convicted of crimes that carry a *statutory* penalty, it knew how to do so. *See* MD Public Safety Code Ann. §§ 5-101, 5-133 (Maryland's gun control statute prohibits gun ownership by a person convicted of a "misdemeanor in the State that carries a *statutory penalty* of more than 2 years. . . .") (emphasis added). Maryland's gun control statute indicates that the State legislature appreciated the difference between codified and uncodified penalties and chose not to make such a distinction before it codified this common law criminal misdemeanor. Again, the silence of the State legislature is as telling as its post-1968 action.

The Fourth Circuit Court of Appeals encompasses Maryland, and the United States urges the Court to adopt the reasoning and holdings of Fourth Circuit decisions on point. *See United States v. Coleman,* 158 F.3d 199, 203-04 (4th Cir. 1998) (*en banc*);[6] *United States v. Hassan El,* 5 F.3d 726, 732-33 (4th

---

Assault is a misdemeanor punishable by up to 10 years imprisonment and covers all other forms of assault. *See id.* at § 3-203.

[6] *Coleman* overruled *United States v. Schultheis,* 486 F.2d 1331 (4th Cir. 1973), which had adopted the practice of using the actual sentence imposed on common law offenders to determine status, rather than the range of incarceration for which a crime was "punishable."

Cir. 1993). Mr. Schrader argues that these decisions are flawed and unpersuasive and predated *District of Columbia v. Heller,* 554 U.S. 570 (2008), which held that the Second Amendment protects an individual right to keep and bear arms. Unless there is a possible Second Amendment problem, however, the Court is otherwise persuaded by the Fourth Circuit.

Two more points should be added. First, because Mr. Schrader's Maryland assault and battery conviction actually involved violence, which he admits, his offense was of a kind to which § 922(g)(1) speaks to keep firearms out of the hands of violent offenders. Second, clarity of the criminal laws is necessary for both law enforcement and the people to know and foresee when the law applies. In 1968, Mr. Schrader had no idea that Congress would later pass the Brady Handgun Violence and Prevention Act. As to the precise question here, and without intending any broader application, the Court concludes that federal criminal law enforcement cannot depend on divining the meaning of legislative silence in the 50 States.

B. [sic] **Alleged Second Amendment Violation**

Mr. Schrader also advances a constitutional claim: reading § 922(g) as broadly as the government proposes would run afoul of the Second Amendment as construed by *District of Columbia v. Heller. Heller* decided that the Second Amendment confers an individual right to keep and bear arms and not just a collective right to participate in State militias. 554

U.S. at 592 (finding the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation"); *id.* at 594 ("[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*." (emphasis in original)).

Mr. Schrader's desire to have one or more guns in his house for safety echoes through American history. *Id.* at 611 (quoting *Johnson v. Tompkins,* 13 F. Cas. 840, 850, 852 (CC Pa. 1833) ("a citizen has 'a right to carry arms in defense of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either.' ")). He correctly relies on *Heller's* exposition of the history and application of the Second Amendment to argue that there is an individual constitutional right to "keep and bear arms." U.S. CONST. amend II. *See also Heller,* 554 U.S. at 628 (noting "the inherent right of self-defense has been central to the Second Amendment right").

Section III of *Heller,* however, notes that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Heller,* 554 U.S. at 626. Most importantly for present purposes, the Supreme Court specified that:

> [N]othing in our opinion should be taken to cast doubt on longstanding *prohibitions on the possession of firearms by felons* and the

> mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.*
>
> *We identify these presumptively lawful regulatory measures only as examples. . . .

Heller, 554 U.S. at 626-27 & n.26. In the decision under review in *Heller,* known below as *Parker v. District of Columbia,* the D.C. Circuit made the same point: "Personal characteristics, such as insanity or felonious conduct, . . . make gun ownership dangerous to society. . . ." *Parker,* 478 F.3d at 399.

Parker cited *Lewis v. United States,* 445 U.S. 55, 65 n.8 (1974), for the proposition that "convicted felons may be deprived of their right to keep and bear arms." 478 F.3d at 399. *Lewis*, in turn, had approvingly cited *United States v. Johnson,* 497 F.2d 34 (4th Cir. 1974), for its holding that § 922(g) does not violate the Second Amendment because "the Second Amendment only confers a collective right of keeping and bearing arms which bear a 'reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Lewis,* 445 U.S. at 65 n.8 (citation omitted). *Parker* and *Heller*, of course, discarded the theory that the Second Amendment does not guarantee an individual right. The D.C. Circuit explained its reliance on the result, if not the rationale, of *Lewis* and *Johnson,* by instructing that regulations on the use and ownership of guns "promote the government's interest in public safety consistent with our common

law tradition . . . [and] do not impair the core conduct upon which the right was premised." *Parker,* 478 F.3d at 399.

It must be noted that the definition which so offends Mr. Schrader's constitutional sensibilities was added to § 921(a) on October 22, 1968, the year of his infamous encounter with a gang member whom he punched on the streets of Annapolis. *See Gun Control Act of 1968,* Pub. L. 90-618, 82 Stat. 1213. The law was adopted "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence" but not to "place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens. . . ." *Id.* The bill amended 18 U.S.C. § 921(a)(20)(B) to provide that the term "'crime punishable by imprisonment for a term exceeding one year' shall not include . . . (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." *Id.* While § 921(a)(20)(B) no longer includes the parenthetical phrase, the language which covers Mr. Schrader's old crime was made a part of the statute in the very year of its commission. No challenge to the definition has been raised successfully in the decades since. Its hoary age strongly suggests no constitutional impediment and, indeed, the Court finds none under *Heller's* reading of the Second Amendment or the caselaw that preceded *Heller.*

IV. CONCLUSION

Mr. Schrader presents neither a statutory claim nor a constitutional one against the enforcement of 18 U.S.C. §§ 922(g)(1) and 921(a)(20)(B) against him. His real complaint is with the 1993 Brady Handgun Violence Prevention Act which ordered the Attorney General to establish and rely on NICS for nationwide tracking of federal and State crimes. Mr. Schrader may have completely forgotten his fistfight of 40 years ago but this Court cannot say that the FBI's memory of it was faulty in any respect. The Defendants' motion to dismiss [Dkt. # 20] will be granted, and Mr. Schrader's cross motion for summary judgment [Dkt. # 21] will be denied. A memorializing Order accompanies this Memorandum Opinion.

Date:
December 23, 2011

/s/
ROSEMARY M. COLLYER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFERSON WAYNE SCHRADER *et al.*	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 10-1736(RMC)**
ERIC HOLDER, Attorney General, *et al.*,	)	
Defendants.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is:

ORDERED that Defendants' motion to dismiss [Dkt. # 20] is **GRANTED**; and it is

FURTHER ORDERED that Plaintiffs' motion for summary judgment [Dkt. # 21] is **DENIED**; and it is

FURTHER ORDERED that the case is **DISMISSED**. This is a final appealable order. *See* Fed. R. App. P. 4(a). This case is closed.

Date:
December 23, 2011

/s/
ROSEMARY M. COLLYER
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5352 **September Term, 2012**

1:10-cv-01736-RMC

Filed On: March 13, 2013

Jefferson Wayne Schrader and
Second Amendment Foundation, Inc.,

Appellants

v.

Eric H. Holder, Jr., et al.,

Appellees

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, and Kavanaugh, Circuit Judges; Williams and Randolph, Senior Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5352 **September Term, 2012**

1:10-cv-01736-RMC

Filed On: March 13, 2013

Jefferson Wayne Schrader and
Second Amendment Foundation, Inc.,

Appellants

v.

Eric H. Holder, Jr., et al.,

Appellees

BEFORE: Tatel, Circuit Judge; Williams and Randolph, Senior Circuit Judges

ORDER

Upon consideration of appellants' petition for panel rehearing filed on February 25, 2013, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

Title 18 U.S.C. § 921 provides in pertinent part:

(a) As used in this chapter [18 USCS §§ 921 et seq.] –

* * *

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include –

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

* * *

Title 18 U.S.C. § 922 provides in pertinent part:

(g) It shall be unlawful for any person –

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.