No. 12-1443

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 statement contained in the Petition for a Writ of Certiorari remains accurate.

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INTRODUCTION

Prefacing a recitation of the lower court's holding with "[t]he court of appeals correctly held," BIO 5, is not responsive to the Petition. The Government's merits-style opposition largely fails to address the question of whether this Court's review is necessary. It is.

1. The Government declares that its preferred statutory interpretation is correct, but exerts virtually no effort disproving that other interpretations, which are at least equally or more plausible, better serve the constitutional avoidance doctrine and the rule of lenity.

These canons cannot be so lightly disregarded, in light of the Government's inability to overcome three essential facts:

- For over two centuries since the Second Amendment's 1791 ratification, and not until the Fourth Circuit's 1998 *en banc* decision overturning a previous understanding,[1] *nobody* appears to have been disarmed on account of a non-aggravated common-law misdemeanor, under 18

[1] *United States* v. *Schultheis*, 486 F.2d 1331 (4th Cir. 1973), *overruled*, *United States* v. *Coleman*, 158 F.3d 199 (4th Cir. 1998) (en banc). The Fourth Circuit struggled with this issue well-before the Second Amendment enjoyed operative force as an individual right. See, *e.g.*, *United States* v. *Johnson*, 497 F.3d 548, 550 (4th Cir. 1974), *overruled*, *District of Columbia* v. *Heller*, 554 U.S. 570 (2008).

U.S.C. § 922(g)(1)[2] or any other provision. Questions of whether or how Section 922(g)(1)'s so-called "felon-in-possession" ban applies to common-law misdemeanors are hardly as simple as the Government asserts;

- The Government submitted zero evidence – none – showing that non-aggravated common-law misdemeanants, as a class, pose any special risk warranting disarmament; and
- Congress knows how to constitutionally disarm, specifically and based upon actual evidence, classes of dangerous misdemeanants. See, *e.g.*, Section 922(g)(9) (disarming those convicted of misdemeanor domestic violence crimes).[3]

The question is not which of several fairly possible statutory interpretations best advance the Government's desired outcome – the most punitive option invariably wins that contest. Rather, the question remains whether the lower court's preferred interpretation (a) avoids serious constitutional difficulty and (b) demands that Congress legislate with the greatest

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[2] All further statutory references are to Title 18 of the United States Code.

[3] Ironically, the Government just obtained this Court's review of an apparent ambiguity underlying this provision, which plainly addresses a specific subset of dangerous misdemeanors. See *United States* v. *Castleman*, 2013 U.S. LEXIS 5129, 2013 WL 2155706 (Oct. 1, 2013).

care possible in imposing criminal liability for what would otherwise be the exercise of a fundamental right.

The opinion below is deficient on both counts.

2. Conflicts among the circuits, or between this Court and the lower courts, do not exist only where identical facts have yielded different results. And respectfully, neither the lower courts' resistance to this Court's Second Amendment precedent, nor the circuit split presented here, concern "[d]ivergences in the application of a standard to different circumstances." BIO 16. That framing assumes the truth of the Government's position, and the correctness of the decision below.

There is not "a standard" that all lower courts utilize in Second Amendment cases. There are multiple standards, and the one most prevalent, including in the court below, is for all intents and purposes rational basis review – regardless of the euphemistic "intermediate" label in which it is often clothed. The essential issue, for certiorari purposes, is whether lower courts consistently apply analytical standards mandated by this Court's Second Amendment precedent. Plainly, that is not the case. Courts are wildly inconsistent – with this Court's precedent and with each other – in their approach to Second Amendment questions.

3. This Court's review has grown only more urgently necessary since the Petition's filing, as additional decisions heading this way have thickened the

"'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). Perhaps a half dozen or more petitions this term alone raise the same essential question – are all gun laws for which the government identifies a rationale, essentially, all gun laws, constitutional under so-called "intermediate" scrutiny? The problem is serious and recurring.

At a minimum, this Petition should be held pending the disposition of others raising the same essential analytical Second Amendment questions, including *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 13-137 (filed July 29, 2013) and the imminent petitions to review *Drake* v. *Filko*, 724 F.3d 426 (3d Cir. 2013), and *Kwong* v. *Bloomberg*, 723 F.3d 160 (2d Cir. 2013), among others.

ARGUMENT

I. The Decision Below, Adopting The Most Punitive Interpretation Of A Plainly Ambiguous Criminal Statute, Raises Serious Constitutional Difficulty.

The Government fails to address the constitutional avoidance doctrine, beyond a footnoted citation

to its *ipse dixit* summation of the lower court's opinion. BIO 9 n.1. And notwithstanding the fact that for a quarter-century, at least one appellate court rejected its statutory interpretation as irrationally harsh, the Government dismisses the rule of lenity on grounds that applying something known as a "felon-in-possession" ban to *common-law misdemeanants* does not implicate "grievous ambiguity or uncertainty." BIO 8.

1. The lower court's constitutional analysis is not so obviously free from doubt – a contention belied by its six page length, App. 16a-22a, and the eight and a half single-spaced pages the Government requires to defend it. BIO 10-18.

Under the constitutional avoidance doctrine, there is no need to enter the thicket of whether the lower court's constitutional analysis is correct, although assuredly, it is not.[4] "[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 206 (2009) (citation omitted).

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[4] Because Jeff Schrader committed a simple, non-aggravated common-law misdemeanor forty-five years ago, the lower court reasoned he is not *today* "law abiding" or "responsible." On that thin basis, it allegedly applied "intermediate" review to Petitioners' Second Amendment claim, which the Government survived by asserting that *some* common-law misdemeanors are serious.

It should suffice to note that any application of federal law that would have permanently disarmed Paul Revere, Pet. 2, raises "grave and doubtful constitutional questions." *Harris* v. *United States*, 536 U.S. 545, 555 (2002) (citation and quotation omitted). Perhaps little constitutional doubt attends "longstanding" prohibitions on the possession of firearms by "felons," *Heller*, 554 U.S. at 626, but that admonition's limits alone signal that blanket disarmament of all common-law misdemeanors, unheard of at the time of the Second Amendment's framing, would warrant serious review.[5] Under such circumstances, courts do not place the constitutional interpretation cart before the avoidance horse.

Accordingly, "[t]he question is not whether" an alternative statutory interpretation "is the most natural interpretation of the [law], but only whether it is a 'fairly possible' one. As we have explained, 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566,

[5] The Government errs in asserting that Petitioners "incorrect[ly]" claimed that the court of appeals based its decision upon this Court's reference to "longstanding prohibitions on the firearms possession of felons [sic]." BIO 13 (quoting *Heller*, at 626). Petitioners made no such claim in summarizing the decision below. Pet. 9-11. Petitioners accurately noted that the lower court presumed the constitutionality of Section 922(g)(1)'s application to common-law misdemeanants, and in that context, it was more than fair to note that this Court, at most, extended presumptive constitutionality to *felon* bans. Pet. 33-35.

2594 (2012) (Roberts, C.J.) (citations omitted); cf. *PDK Labs. Inc.* v. *United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) ("if it is not necessary to decide more, it is necessary not to decide more").

Some statutory interpretations may not appear "most natural" to the Government – but plainly, they are "fairly possible." To recap:

a. The Fourth Circuit certainly thought that the actual-sentence based approach was "fairly possible" – it adopted it in *Schultheis*, and maintained it for a quarter century thereafter. Maryland's legislature, too, prefers that approach. Schrader is not disarmed under Maryland law, because he did not receive a sentence exceeding 2 years. Md. Code Ann., Pub. Safety § 5-133(b)(2).

Maryland's high court does not view common-law offenses as lacking definite punishment caps, preferring the logic that the judge in each case sets a maximum punishment "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* v. *State*, 353 Md. 683, 693 n.6, 728 A.2d 698, 702 n.6 (1999).

That reasoning avoids the Government's difficult supposition, that the legislature wanted to set maximum sentences for extremely serious, violent crimes such as rape, while preferring that disorderly conduct and minor fisticuffs be subject to *unlimited* punishment, up to and including the death penalty (subject

only to Eighth Amendment limitation). Pet. 14-15. Respectfully, *that* outcome, inherent in the Government's position, is hard to accept as "fairly possible."

b. If the felon-in-possession ban excludes misdemeanors "punishable by a term of imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B), and "punishable by" means "capable of being punished," App. 11a, common-law misdemeanors like Schrader's, that are "capable of being punished" by *no* jail time, are excluded from the felon ban's operation. Under this quite-sensible scenario, the felon-in-possession ban encompasses only those misdemeanors serious enough to carry a mandatory minimum sentence exceeding two years.

c. An offense "punishable" by a given term is an offense "giving rise to a specified punishment." Black's Law Dictionary 1353 (9th ed. 2009). A common-law misdemeanor offense containing no specified punishments is thus not "punishable by imprisonment for a term exceeding one year." Section 922(g)(1).

Against this backdrop of "fairly possible" alternative interpretations – any of which would have avoided the constitutional difficulty presented by the ultimate outcome – the lower court adopted the Government's harsh, internally inconsistent approach. Section 921(a)(20)(B) excludes misdemeanors "punishable by" imprisonment for "two years or less," but this the lower court read to mean that it excluded only those crimes subject to a maximum punishment of two years. In other words, the lower court rejected

Petitioners' claim that "punishable by" means giving rise to a specified punishment for purposes of Section 922(g)(1), but relied upon a "specified punishment" approach to define Section 921(a)(20)(B) as referencing a maximum sentence.

That decision is not merely erroneous. It warrants reversal for inviting serious constitutional doubt in the face of "fairly possible" alternatives.

2. When alternative statutory interpretations leap from the pages of conflicting appellate court precedent, *Schultheis*, *Coleman*; state high court opinions, *Robinson*; Black's Law Dictionary; and even the lower court's opinion itself, App. 11a (Schrader's offense was obviously "punishable by" less than two years' imprisonment), there exists "grievous ambiguity or uncertainty." BIO 8 (citation omitted). Had the lower court followed any of these paths, Schrader would not be criminally barred from enjoying a fundamental right. The rule of lenity is implicated.

II. This Case Presents Serious Conflicts Among The Circuits, And Between The Lower Court's Opinion And This Court's Precedent.

1. Circuit splits do not exist only when identical facts or circumstances have received disparate treatment among appellate courts. Were that so, the most bizarre and unusual constitutional violations – like the violation of Schrader's rights – could more readily escape review, as they would not likely be repeated

across multiple states and circuits. The issue is whether the conflict concerns "the same important matter," Sup. Ct. R. 10(a), here, the manner in which Second Amendment claims are evaluated.

The Seventh Circuit begins, and sometimes ends, with historical analysis, and largely accepts that meaningful means-ends scrutiny will apply where interpretation fails to resolve a case. *Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012); *Ezell* v. *City of Chicago*, 651 F.3d 684 (7th Cir. 2011). The other appellate courts believe means-ends scrutiny is always required. Of these, some pay lip service to interpretation of the Second Amendment's meaning, quickly skipping to an interest-balancing inquiry where the government's asserted justification is the only and final word. *Woollard* v. *Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185 (2012), *reh'g en banc denied*, 714 F.3d 334 (5th Cir. 2013), *petition for cert. pending*, No. 13-137 (filed July 29, 2013) ("*NRA*"); *Kachalsky* v. *County of Westchester*, 701 F.3d 81 (2d Cir. 2012). But in some cases, "intermediate" scrutiny requires the Government present actual evidence justifying its position, even if the outcome is not in doubt. *United States* v. *Carter*, 669 F.3d 411 (4th Cir. 2012); *United States* v. *Staten*, 666 F.3d 154 (4th Cir. 2011).

Here, the lower court followed the rational basis version of "intermediate scrutiny." *Some* common-law misdemeanors are serious crimes, therefore, Congress

may enact a law providing that all common-law misdemeanors must lead to a lifetime prohibition of fundamental Second Amendment rights. The legislative record contains no evidence of Congress ever contemplating this result, nor does the evidentiary record contain any evidence reflecting the generalized dangerousness of common-law misdemeanors, let alone simple ones. Common sense would suggest that of the universe of common-law misdemeanors, the vast majority would be minor scuffles and other forms of what would now be categorized as disorderly conduct or disturbing the peace. Yet Plaintiffs were the ones burdened with disproving the correctness of the judicially-supplied legislative presumption.

It does not matter what the lower court called this type of analysis. What matters is that other courts, or even the same court on a different day, would have at least required the Government "to present some meaningful evidence, not mere assertions, to justify its predictive judgment." *Heller* v. *District of Columbia*, 670 F.3d 1244, 1259 (D.C. Cir. 2011).

2. Likewise, certiorari is warranted where a lower court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

There is no need to repeat either this Court's rejection of rational basis review (by whatever label) in Second Amendment cases, or this Court's admonition that longstanding felon dispossession laws be considered presumptively lawful, a presumption that

should not be extended (by whatever analysis) to misdemeanor bans finding no considered expression in American law prior to 1998.

It is difficult to read *Heller* as sanctioning the blanket disarmament of all common-law misdemeanors, a practice unknown to history, especially considering (1) the complete lack of evidence regarding the supposed dangerousness of this class, and (2) Congress's ability to enact narrowly-tailored misdemeanor prohibitions, *e.g.*, Section 922(g)(9).

III. At A Minimum, This Petition Should Be Held Pending The Outcome Of Other Petitions Raising Essentially The Same Analytical Second Amendment Questions.

As noted *supra*, a significant petition for certiorari, questioning the same allegedly "intermediate" scrutiny employed below, is now pending in *NRA*. At least two others are forthcoming in similar cases decided since the Petition's filing.

In *Kwong*, *supra*, 723 F.3d 160, the Second Circuit upheld New York City's $340 three-year license fee for handgun ownership. Here is the entirety of *Kwong*'s alleged "intermediate" scrutiny analysis:

> We recently observed that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention." Because the record demonstrates that the licensing fee is designed to allow the City of New York to recover the costs incurred

> through operating its licensing scheme, which is designed to promote public safety and prevent gun violence, we agree with the District Court that [the $340 fee] easily survives "intermediate scrutiny."

Id. at 168 (citations omitted).

In *Drake*, *supra*, 724 F.3d 426, the Third Circuit upheld New Jersey's requirement that individuals prove a "justifiable need" to exercise the right to bear arms, N.J.S.A. § 2C:58-4(c), reasoning that carrying handguns for self-defense does not implicate the Second Amendment. 724 F.3d at 434. But in dicta clearly intended to influence future decisions, that court adopted the *Kachalsky*/*Woollard* version of so-called "intermediate" scrutiny and held that it must defer, in Second Amendment cases, to the legislature's judgment. *Id.* at 434-40.

These decisions, like the one below, conflict with appellate opinions taking the Second Amendment seriously, as well as with this Court's Second Amendment precedent. Should the Court be inclined to hear *NRA*, *Drake*, *Kwong*, or any other decision this term implicating the Second Amendment's analytical framework, it should at least hold this Petition until the field is clarified.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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