No. 16-847

In the Supreme Court of the United States

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

DANIEL BINDERUP, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether as-applied challenges to felon dispossession laws, including 18 U.S.C. § 922(g)(1), are needed to protect the individual right to bear arms under the Second Amendment.

2. Whether 18 U.S.C. § 922(g)(1) exceeds the bounds of historically lawful felon dispossession laws as applied to respondents, in violation of their Second Amendment rights.

3. Whether means-end scrutiny should be applied to a law with burdens as severe as 18 U.S.C. § 922(g)(1), and if so, what level of heightened scrutiny is appropriate here.

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INTRODUCTION

Respondents in this case are average American citizens. Mr. Daniel Binderup is a husband of forty years, a father of two, and the owner of a plumbing business. Mr. Julio Suarez is a husband of twenty years, a father of three, a leader in his church community, and a technology contractor whom the federal government trusts with state secrets. Yet 18 U.S.C. § 922(g)(1) deprives both Mr. Binderup and Mr. Suarez of their Second Amendment rights on the basis of nonviolent misdemeanors that occurred nineteen and twenty-seven years ago, and for which they served no prison time. Respondents are more than their long-ago errors in judgment. Neither has had a run-in with the law in many years, and Pennsylvania has removed the state-level restrictions on their ability to possess firearms. Respondents seek to exercise their Second Amendment rights for the reason many Americans do: to protect themselves and their families in their homes. They respectfully ask the Court to find that 18 U.S.C. § 922(g)(1) is unconstitutional as applied to them.

STATEMENT OF THE CASE

I. Respondents' Past and Present

In July 1998, respondent Daniel Binderup pled guilty to the Pennsylvania misdemeanor of corrupting a minor as the result of a months-long affair with a seventeen-year-old employee of his bakery. R. at 174a, 215a–16a. Despite a maximum possible sentence of five years in prison, he served only three years of probation and paid a fine, court costs, and restitution. R. at 6a, 217a. He sold the firearms he lawfully possessed at the time. R. at 219a. Mr. Binderup's record reflects not one arrest, charge, or conviction since that time. R. at 218a. Neither is there evidence of domestic violence or substance abuse. R. at 173a, 218a–19a. Today, Mr. Binderup and his

wife have been married for over forty-three years and have raised two children. R. at 215a. He works as the owner and operator a plumbing business. R. at 175a, 218a. In 2009, Pennsylvania removed its state-level restrictions on Mr. Binderup's ability to possess firearms. R. at 175a.

Nearly twenty-eight years ago in 1990, respondent Julio Suarez pled guilty to the Maryland misdemeanor of carrying a handgun without a permit. R. at 6a, 244a. The possible sentence ranged from thirty days to three years, but Mr. Suarez's 180-day sentence and $500 fee were both suspended. R. at 6a, 244a. As a result, he spent no time in prison and only one year on probation. R. at 244a, 264a. Other than a twenty-year-old conviction for driving under the influence of alcohol in Pennsylvania,[1] Mr. Suarez has had no more trouble with the law. R. at 7a. Today, he has been married for over twenty-three years, has three children, and has a leadership position in his church. R. at 263a. He has developed a career in technology over the last two decades, and he now provides services to Department of Defense clients. R. at 263a. He has a "Secret" government security clearance. R. at 263a. In 2009, Pennsylvania removed its state-level restrictions on Mr. Suarez's ability to possess firearms. R. at 263a.

Both respondents seek to possess firearms for self-defense and defense of their families. R. at 173a, 175a, 244a. 18 U.S.C. § 922(g)(1) prevents them from doing so. *See* 18 U.S.C. § 922(g)(1); R. at 12a. The law bars possession by those have been convicted of "a crime punishable by imprisonment for a term exceeding one year." § 922(g)(1); R. at 23a. It excepts state misdemeanor convictions that carry a possible punishment of less than two years in prison. § 921(a)(20)(B); R. at 23a. Mr. Binderup's misdemeanor is punishable by up to five years, and Mr. Suarez's up to three. R. at 23a. Under § 921(a)(20), those barred under § 922(g)(1) "may under some circumstances possess handguns if (1) their convictions are expunged or set aside,

[1] This offense is not subject to § 922(g)(1). R. at 7a.

(2) they receive pardons, or (3) they have their civil rights restored." R. at 17a; *see* § 921(a)(20). Under § 925(c), individuals may seek relief from the United States Attorney General, but Congress has left that provision unfunded since 1992. *See* R. at 39a, 142a.

II. The District Court in Mr. Binderup's Case

The District Court for the Eastern District of Pennsylvania granted Mr. Binderup's motion for summary judgment in part.[2] R. at 165a, 167a–68a. Applying Third Circuit authority from *United States v. Barton*, the court used the future dangerousness test to determine whether or not § 922(g)(1) could constitutionally dispossess Mr. Binderup based on him posing a threat to society. R. at 213a–15a; *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011). It found that there was "simply nothing in the record" to suggest that his crime had involved violence or force or that he had been violent or threatening at any time before or after that the offense. R. at 218a–19a, 221a, 227a. With no evidence of a propensity for violence, the court concluded that "if allowed to keep and bear arms in his home for purposes of self-defense, [Mr. Binderup] would present no more threat to the community that the average law-abiding citizen." *See* R. at 221a, 228a. The court rejected as inapposite several studies cited by petitioners because they addressed the likelihood of violence and recidivism of individuals who had served time in prison, who had substance abuse problems, who had already recidivated, who had committed statutory rape, who were within a few years of release, who were younger than fifty, and who had extensive criminal records. R. at 228a–37a. Mr. Binderup fit none of those descriptions. R. at 228–35a. The court thus found § 922(g)(1) unconstitutional as applied to Mr. Binderup. R. at 239a.

[2] Respondents do not appeal the court's ruling on count one. *See* R. at 165a.

III. The District Court in Mr. Suarez's Case

The District Court for the Middle District of Pennsylvania granted Mr. Suarez's motion for summary judgment in part.[3] R. at 242a. Relying on Third Circuit authority from *United States v. Marzzarella* and *United States v. Barton*,[4] the court concluded that challengers could overcome the presumptive validity of laws such as § 922(g)(1) by showing that their circumstances placed them outside the historical categories of exclusion. R. at 256a; *United States v. Marzzarella*, 614 F.3d 85, 93–94 (3d Cir. 2010); *Barton*, 633 F.3d at 174. Mr. Suarez satisfied this first prong of the inquiry because he "[was] no more dangerous than a typical law-abiding citizen and pose[d] no continuing threat to society." R. at 264a. For prong two of *Marzzarella*, the court found that "in theory" a law burdening Second Amendment rights should be evaluated under means-end scrutiny. R. at 257a. For § 922(g)(1), however, the inquiry would be "futile" because Mr. Suarez fell within the Second Amendment's core guarantee. R. at 257a–58a. The court nonetheless wrote in a footnote that strict scrutiny would be appropriate because the law amounted to "a straight prohibition of firearms possession . . . and not just a regulation of possession." R. at 257a n.9. The court held that § 922(g)(1) was unconstitutional as applied to Mr. Suarez. *See* R. at 270a.

IV. The Third Circuit

A. Plurality Opinion

On a joint appeal to the Third Circuit sitting *en banc*, a fractured plurality upheld respondents' challenge using a two-step framework derived from *Marzzarella* and in part from *Barton*.[5] *See* R. at 1a–3a; R. at 21a–22a; *Marzzarella*, 614 F.3d at 93–94; *Barton*, 633 F.3d at

[3] Respondents do not appeal the court's ruling on count one. *See* R. at 243a.
[4] The court found that *Marzzarella* provides the two-step framework for Second Amendment challenges while *Barton* instructs specifically on step one. R. at 256a–57a.
[5] The plurality observed that the two cases were "neither wholly distinct nor incompatible." R. at 21a–22a.

174. Writing for the plurality, Judge Ambro observed that the *Heller* Court's "presumptively lawful" language indicated an openness to as-applied challenges because "[u]nless flagged as irrebuttable, presumptions are rebuttable." *See* R. at 29a; *District of Columbia v. Heller*, 554 U.S. 570, 626 n.26 (2008). In addition, as-applied challenges would prevent the government from being able to "make an end-run around the Second Amendment and undermine the right to keep and bear arms in contravention of *Heller*." R. at 29a. The plurality observed that at step one of the as-applied framework, a challenger must overcome the presumptive lawfulness of felon disarmament laws (as articulated in *Heller*) by distinguishing himself from those historically denied Second Amendment protections. R. at 21a. According to the plurality, laws traditionally excluded "unvirtuous" citizens. R. at 24a–25a. Judge Ambro quoted evidence from a source,[6] also relied on in *Heller*, which indicated that commission of certain crimes brought people into the category of the unvirtuous. *See* R. at 25a–26a. Thus, the plurality concluded that historical exclusions covered "any person who ha[d] committed a *serious* criminal offense, violent or nonviolent."[7] R. at 25a–26a (emphasis added).

The court then analyzed a number of factors to conclude that respondents had not committed a "serious" crime. *See* R. at 26a–34a. The court first observed that the misdemeanor classification was a "powerful expression of [the state legislature's] belief that the offense [was] not serious enough to be disqualifying." *See* R. at 31a. While the maximum possible punishments weighed against respondents, the court noted the light sentences that each one in fact received. *See* R. at 31a–32a. The court placed trust in the judges who, with direct knowledge

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[6] This source was the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents. R. at 25a–26a.

[7] In so doing, the plurality wrote, "To the extent *Barton* suggests that people who commit serious crimes retain or regain their Second Amendment rights if they are not likely to commit a violent crime, 633 F.3d at 174, it is overruled." R. at 25a. The plurality also specifically rejected *Barton*'s "claim that the passage of time or evidence of rehabilitation will restore the Second Amendment rights of people who committed serious crimes." R. at 27a–28a.

of the respondents and their crimes, had determined that the violations merited no jail time. *See* R. at 32a–33a. Finally, a state survey revealed that many treated respondents' crimes as non-serious as evidenced by the criminal code labels and sentence lengths. *See* R. at 33a–34a.

At step two of the framework, the plurality determined that means-end scrutiny was appropriate but that the government could not meet the burden. The plurality concluded that respondents' opportunities to reinstate their rights under § 921(a)(20) meant that § 922(g)(1)'s burdens were not as severe as those in *Heller*, making intermediate scrutiny appropriate. R. at 17a. Judge Ambro wrote that the government fell "well short" of meeting its burden under both intermediate and strict scrutiny.[8] R. at 35a. The public safety interest behind § 922(g)(1) was both important and compelling, but the record contained "no evidence explaining why banning people like [respondents] (*i.e.*, people who decades ago committed similar misdemeanors) from possessing firearms promotes public safety." R. at 35a–36a. Like the district court, the Third Circuit noted that the government's studies were inapplicable to respondents in this case because they had spent no time in prison, because the "sex offender" label was questionable as to Mr. Binderup, and because they addressed offenses occurring much more recently than respondents' had.[9] *See* R. at 36a–39a. The court observed that the avenues for relief available to respondents were either closed or not meaningfully related to the risk of allowing them to possess handguns. *See* R. at 39a–40a.

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[8] The plurality declined to hold that § 922(g)(1) was *per se* unconstitutional as applied because of the "escape hatches" that would allow respondents and others falling under the law to overcome its restrictions. R. at 18a. A contrary ruling, the plurality observed, would "condemn without exception all laws and regulations containing preconditions for the possession of firearms by individuals with Second Amendment rights." R. at 18a.

[9] The court did note that such evidence could be relevant in other cases to show "an appropriate fit between the Challengers' total disarmament and the promotion of public safety if [the studies] contained reliable statistical evidence that people with the Challengers' backgrounds were more likely to misuse firearms or were otherwise irresponsible or dangerous." R. at 38a–39a.

B. Concurring Opinion

Judge Hardiman wrote separately on behalf of four other judges, concurring in part and concurring in the judgment. R. at 3a, 43a. From both *Barton* and *Marzzarella* Judge Hardiman observed that "the threshold question in a Second Amendment challenge [was] one of scope: whether the Second Amendment protects the person, the weapon, or the activity in the first place." R. at 55a. He thus looked to the scope of the longstanding felon disarmament laws that *Heller* deemed "presumptively lawful." *See* R. at 53a. The evidenced showed that the Second Amendment did not protect those who, in possession of firearms, were likely to present a danger to the public. *See* R. at 44a, 53a, 81a. Such individuals were not within the amendment's protections at the time of ratification. *See* R. at 53a. As-applied challenges could thus be successful when challengers could differentiate themselves from these violent tendencies and show they were "'no more dangerous than a typical law-abiding citizen.'" R. at 45a, 53a–54a (*quoting Barton*, 633 F.3d at 174). Judge Hardiman noted an inconsistency between *Heller* and the "virtue" or "serious crime" test adopted by both the plurality and the dissent. The vague test, he reasoned, would allow judges broad authority to "pick and choose whom the government may permanently disarm" in contravention of *Heller*'s emphasis on protecting the Second Amendment's scope. R. at 45a. Judge Hardiman pointed to examples of crimes that disarm people under § 922(g)(1): marijuana possession in any amount in Arizona and returning out-of-state recyclables in Michigan. *See* R. at 77a n.20.

Evaluating this case, Judge Hardiman agreed with the district courts that both men were entitled to Second Amendment protections. R. at 81a. Neither their crimes nor their personal histories indicated a tendency toward violence. R. at 81a–84a. Instead, both "presented compelling evidence that they [were] responsible citizens, each with a job, a family, and a clean

record since 1997 and 1998." R. at 86a. Like the district courts and the plurality, the concurrence dismissed the government's studies as inapplicable to respondents. *See* R. at 86a. After determining that respondents had Second Amendment protections, Judge Hardiman then concluded, per *Heller*, that means-end scrutiny was unwarranted. R. at 45a–46a, 89a. He relied on *Heller* to determine that because respondents were entitled to the Second Amendment's guarantee, "'certain policy choices'"—like the ban § 922(g)(1) imposed—were no longer options. R. at 92a (*quoting Heller*, 554 U.S. at 636). In Judge Hardiman's view, such a balancing by judges would violate a clear principle from *Heller*. R. at 89a. Instead, a law like § 922(g)(1) that "criminaliz[ed] exercise of the right entirely . . . [was] categorically unconstitutional." R. at 45a–46a.

C. Dissenting Opinion[10]

Judge Fuentes concurred in part, dissented in part, and dissented from the judgments, in an opinion six judges joined. R. at 3a, 93a. As a preliminary matter, Judge Fuentes read *Heller* to place felons in a "a complete carve-out" from Second Amendment rights, thus making all felon disarmament laws constitutional. R. at 109a–11a, 121a. The dissent agreed with the plurality that felon disarmament laws were historically based on the "seriousness" of crimes but disagreed over the manner in which the court should assess seriousness. *See* R. at 109a. Rather than engaging in a person-specific inquiry, Judge Fuentes would have held that all crimes falling under § 922(g)(1)—including those labeled misdemeanors—were "serious" because of their maximum sentence lengths. R. at 109a–110a. Judge Fuentes saw no meaningful distinction between felonies and misdemeanors punishable by two years. *See* R. at 117a–21a. The dissent

[10] For purposes of clarity, this brief identifies Judge Fuentes's opinion as a dissent.

thus concluded that all convictions under § 922(g)(1) justified permanent disarmament and that respondents' challenges should fail at step one. R. at 110a, 121a–22a.

Nonetheless moving beyond step one, the dissent argued that the law should succeed under intermediate scrutiny. R. at 95a, 134a–35a. The dissent noted that the burdens of § 922(g)(1) did not warrant strict scrutiny because respondents, who had broken the law, were not "law-abiding citizens." R. at 130a–31a. Thus, according to Judge Fuentes § 922(g)(1) did not impact the core of the Second Amendment right. R. at 130a–31a. The dissent found a reasonable fit between § 922(g)(1) and the government's public safety goals because it was willing to look at the studies the government provided at a greater level of generality. R. at 135a–36a. In the dissent's view, the plurality had engaged in the inquiry in a way that was too tailored to the respondents. R. at 127a–28a.

Finally, the dissent articulated that it would have disallowed as-applied challenges altogether because the individual determinations were too difficult and the stakes too high. R. at 140a, 150a. Judge Fuentes relied on Congress's decision to defund the 18 U.S.C. § 925(c), which allowed individuals to apply to the Attorney General for reinstatement of their Second Amendment rights. R. at 140a–41a. According to the dissent, Congress had decided against respondents' "way of doing things," and the courts should defer to that judgment. R. at 142a. The dissent acknowledged as legitimate concerns that such a ruling could give legislatures broad power to disarm citizens. R. at 146a. But "institutional considerations [led him] to conclude that Congress [could] permissibly use the existence of a prior criminal conviction as a trigger for collateral consequences under federal law." R. at 146a.

This Court granted certiorari, and respondents now respectfully request that the Court affirm the judgment of the Third Circuit.

SUMMARY OF ARGUMENT

I. This Court should permit as-applied challenges to felon dispossession laws in order to protect and maintain the proper scope of the Second Amendment right to bear arms. In *District of Columbia v. Heller*, the Court held that the Second Amendment codifies a preexisting individual right to bear arms. 554 U.S. 570, 634–35 (2008). The Court articulated that its holding "should not be taken to cast doubt" on preexisting restrictions on firearm possession, including by felons. *Id.* at 626 n.26. The Court did not, however, address these restrictions in detail or instruct lower courts on how to evaluate challenges to them. In *McDonald v. City of Chicago*, this Court affirmed *Heller* and held that the Second Amendment is a fundamental right that applies to the states through the Fourteenth Amendment. 561 U.S. 742, 780 (2010).

A. The *Heller* Court called felon firearm restrictions "*presumptively* lawful," language which indicates an openness to as-applied challenges. *Id.* at 626 n.26 (emphasis added). Presumptions are, by definition, not set in stone. Felons who bring as-applied challenges carry the burden of rebutting the presumed lawfulness of restrictions on their rights, but *Heller* communicates that they have the opportunity to do so. The *Heller* Court also emphasized that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Id.* at 634–35. For the Second Amendment to retain its scope, the exclusions on its coverage necessarily must retain *their* scope. Only through as-applied challenges will this Court and the lower courts be able to police the proper historical bounds of the Second Amendment.

B. Further, as-applied challenges are needed to ensure proper separation of powers. The *Heller* Court expressed concern about legislative encroachment on Second Amendment rights when it emphasized the importance of scope in the constitutional analysis. *See id.* at 635.

Without as-applied challenges, legislatures could undermine the right to bear arms by impermissibly expanding the scope of felon disarmament laws—thus altering the scope of the Constitution itself. These laws may not rise above judicial review.

II. As respondents' as-applied challenge moves forward, they must first overcome the presumptive lawfulness of § 922(g)(1) and show that they are entitled to Second Amendment protections. Then, *Heller* indicates that the law is *per se* unconstitutional as applied to respondents because it strikes at the core of the Second Amendment guarantee. If, however, the Court finds the law less burdensome, the government still must show that it overcomes heightened scrutiny.

A. Respondents overcome the presumptive lawfulness of § 922(g)(1) by showing that they fall outside the category of felons who were historically dispossessed. Respondents respectfully ask the Court to adopt a test of public dangerousness, which derives from Second Amendment ratification debates in Massachusetts, New Hampshire, and Pennsylvania. These debates, along with the history of federal dispossession laws, show that exclusions are constitutional only insofar as they apply to individuals who present a danger to the public. In the alternative, a historical report from Pennsylvania points to exclusions based on commission of a serious crime. Seriousness depends on factors including the felony-misdemeanor label, whether force or violence is an element of the crime, the maximum length of the sentence, the sentence actually imposed, and the consensus (or lack thereof) across jurisdictions. Under either test, respondents can differentiate themselves because they committed nonviolent misdemeanors that were not serious. As such, the Second Amendment protects respondents. In fact, they fall within the core of its guarantee because they seek to possess firearms for self-defense in their homes.

B. For a law such as § 922(g)(1), which strikes at the core of respondents' rights under the Second Amendment, *Heller* teaches that no further inquiry is necessary. The balancing of core rights took place at the time of ratification, and any further balancing would problematically elevate the judgment of Congress or the courts above the judgment of the American people. After this Court has concluded that respondents have Second Amendment protections, a law such as § 922(g)(1) cannot stand because it completely bans the right's exercise. As was the case in *Heller*, the unlikely statutory exceptions available to respondents do not save § 922(g)(1) from unconstitutionality.

C. If, however, the Court applies means-end scrutiny, strict scrutiny is appropriate because this law burdens the core of the Second Amendment right: the ability to possess a firearm in the home for defense of self and family. Under either strict or intermediate scrutiny, § 922(g)(1) fails because there is no evidence that disarming nonviolent state misdemeanants is tied to the government's public safety goals. Respondents respectfully ask the Court to hold that § 922(g)(1) is unconstitutional as applied to them.

ARGUMENT

I. AS-APPLIED CHALLENGES TO FELON DISPOSSESSION LAWS ARE NEEDED TO PROTECT THE FUNDAMENTAL RIGHT TO BEAR ARMS.

The Court should allow as-applied challenges to felon disarmament laws in order to ensure they do not alter the Second Amendment's proper scope. 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 *District of Columbia v. Heller*, the Supreme Court interpreted this language as codifying a preexisting individual right to bear arms. 554 U.S. 570, 595 (2008). The Court observed that the amendment

"elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. *Heller* was the first time the Court had directly interpreted the Second Amendment, and it did not purport to engage in "an exhaustive historical analysis" of the amendment's scope. *See id.* at 626. Nonetheless, it observed that the decision should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."[11] *Id.* at 626. The Court noted that such restrictions are "presumptively lawful."[12] *Id.* at 627 n.26. Two years later in *McDonald v. City of Chicago* the Court reaffirmed *Heller* and held that the Second Amendment is "among those fundamental rights necessary to our system of ordered liberty." 561 U.S. 742, 778 (2010).

The Court should permit respondents' as-applied challenges to proceed for two reasons. First, they fall within the scope of the Second Amendment's protections because *Heller* merely held that felons' Second Amendment rights can be lawfully restricted, not that felons fall outside the scope of the amendment. As such, respondents have the opportunity to rebut the presumption of § 922(g)(1)'s lawfulness. Second, separation of powers requires that that individuals whose Second Amendment rights have been restricted through legislative enactments have a judicial avenue to vindicate their rights. If as-applied challenges are barred, federal and state legislatures could pass and amend criminal sentencing laws that serve to impermissibly alter the Second Amendment's scope, and the individuals whose rights were infringed would have no judicial remedy.

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[11] The Court also mentioned prohibitions on possession of firearms by "the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626–27.

[12] The Court thus ordered that the District of Columbia permit Mr. Heller to register a handgun so long as he was not "disqualified from the exercise of Second Amendment rights." *Id.* at 647. This condition shows that the Court's discussion of felon disarmament laws was not dicta. Rather than being "abstract and hypothetical," its finding of presumptive lawfulness of such laws was "outcome-determinative." *See Barton*, 633 F.3d at 171–72.

A. Per *Heller*, Felon Dispossession Laws Are Only Presumptively Lawful.

Respondents should have the opportunity to rebut the presumption that § 922(g)(1) lawfully restricts their Second Amendment rights. This Court has called as-applied challenges "the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (*quoting* Richard Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)). As-applied challenges are based on the idea that a facially constitutional law can be unconstitutional depending on the circumstances of its application to an individual or a group.[13] *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006); *see also Wash. State Grange v. Wash. Republican Party*, 552 U.S. 442, 457–58 (2008) (denying a facial challenge because it relied on factual assumptions that "must await an as-applied challenge"). "It is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another." *Ayotte*, 546 U.S. at 329 (internal quotation marks omitted).

The *Heller* Court implied an openness to as-applied challenges when it observed that felon disarmament laws, including § 922(g)(1), are "*presumptively* lawful." *See Heller*, 554 U.S. at 626–27 n.26 (emphasis added). Presumptions are, by definition, not absolute. In this case, the Third Circuit observed, "Unless flagged as irrebuttable, presumptions are rebuttable." R. at 29a. *Heller*'s language teaches that—within the bounds of the Constitution—the government may sometimes restrict individuals' fundamental right to bear arms. *See Heller*, 554 U.S. at 626–27. Because, when it comes to felons, those restrictions carry a presumption of lawfulness,

[13] Respondents do not dispute that § 922(g)(1) is facially constitutional because of the presumption of lawfulness felon disarmament laws carry. *See Heller*, 554 U.S. at 626 n.26; *Barton*, 633 F.3d at 172 (rejecting a facial challenge to § 922(g)(1)).

respondents carry the burden to prove that a law like § 922(g)(1) is in fact an *unconstitutional* limit as applied to them. But *Heller* also indicates that they have the right to do so. *See id.*

The need for as-applied challenges goes beyond the text of *Heller*. As *Heller* emphasized, scope is a vital part of constitutional interpretation. *See id.* at 634–35. As-applied challenges are the only meaningful avenue through which the courts can protect the scope the Second Amendment had when it was ratified. As this brief addresses in detail in II.A., past restrictions on felon firearm possession were not blanket exclusions of all individuals who had ever committed a crime; rather, they excluded those who, in possession of a firearm, were likely to be a danger to the public.[14] *See* R. at 44a. If laws like § 922(g)(1) rise above constitutional challenge, they will inevitably have the effect of dispossessing individuals who in fact fall *within* the scope of the Second Amendment's protections. Such a result would be constitutionally impermissible. As-applied challenges will ensure that these restrictions on Second Amendment rights remain within constitutional bounds.

Multiple circuit courts have either entertained or not foreclosed as-applied challenges, though none had upheld one until the Third Circuit did so in this case. The First Circuit wrote that *Heller*'s language indicated openness to the possibility that "some felonies do not indicate potential violence and cannot be the basis for applying a categorical ban." *See United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011). The Fourth Circuit "[did] not foreclose the possibility that a case might exist in which an as-applied Second Amendment challenge to § 922(g)(1) could succeed." *United States v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012). The Third

[14] Or, as respondents argue in the alternative, seriousness of the crime. The Third Circuit dissent below observed that holistic, individualized assessments could be difficult under either the concurrence's violent felony test or the plurality's serious crime test. *See* R. at 156a–59a. Such a concern, no matter how valid, should impact neither the historical accuracy with which the Court identifies the boundaries of a fundamental right nor the level of protection that right is afforded.

Circuit, both below and in two prior cases, has permitted as-applied challenges. *See* R. at 18a; *Marzzarella*, 614 F.3d at 88–89; *Barton*, 633 F.3d at 173. The Sixth Circuit noted that as-applied challenges would depend on whether a challenger was "within the category of felons" whose Second Amendment rights "Congress can constitutionally restrict." *See United States v. Khami*, 362 F. App'x 501, 508 (6th Cir. 2010). The Seventh Circuit agreed that *Heller*'s "presumptively lawful" language, "by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." *See United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010). The Eighth Circuit has left open the possibility of as-applied challenges. *See United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014). The D.C. Circuit rejected an as-applied challenge brought by a class but observed that if the class representative had brought an individual challenge, its decision might have been different because it seemed likely that the representative would fall within the Second Amendment's protections. *See Schrader v. Holder*, 704 F.3d 980, 991–92 (D.C. Cir. 2013). Not all circuit courts have been clear, and some have seemed to preclude as-applied challenges. *See United States v. Bogle*, 717 F.3d 281, 281 (2d Cir. 2013) (holding § 922(g)(1) is constitutional without clarifying whether the challenge before it was facial or as applied); *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010) (reading *Heller* to indicate that the Second Amendment is "specifically *limited* in the case of felon prohibitions").

B. Separation Of Powers Requires As-Applied Challenges To Prevent Legislative Encroachment On Second Amendment Rights.

If the Court precludes as-applied challenges to felon disarmament laws, unconstitutional applications of § 922(g)(1) would be insulated from judicial review. The *Heller* Court emphasized the importance of scope in its analysis: "Constitutional rights are enshrined with the

scope they were understood to have when the people adopted them, *whether or not future legislatures* or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634–35 (emphasis added). Its language communicates a concern with protecting this enumerated constitutional right from legislative encroachment. *See id.* The scope of exclusions including felon disarmament laws directly impacts the scope of the amendment itself. In his concurring opinion below, Judge Hardiman used the First Amendment context to make a scope comparison. *See* R. at 78a–79a n.20. While Congress can constitutionally restrict people's free speech when it comes to obscenity, it cannot modify or redefine the *bounds* of the obscenity category itself. *See* R. at 78a–79a n.20. The same is true for the felon category in the Second Amendment context.

If felon disarmament laws rise above challenge, state legislatures and Congress could effectively alter the scope of the Second Amendment in contravention of *Heller*. Legislatures could use their broad power in the realm of criminal law and sentencing to unconstitutionally exclude more individuals from the Second Amendment's coverage. By increasing maximum possible penalties to two years or renaming misdemeanors as felonies, state legislatures could disarm many more Americans all under the protective umbrella of § 922(g)(1)—to say nothing of additional legislation the federal government might pass. And because § 922(g)(1) operates around the maximum *possible* punishment rather than the actual sentence imposed, state legislatures would not have to impose those longer sentences or expose their budgets to the associated increased costs.

If blanket exclusions like § 922(g)(1) remain insulated from challenges, legislatures could do real damage to the fundamental right to bear arms and "make an end-run around the Second Amendment." *See* R. at 29a. Already, our federal and state criminal codes contain numerous offenses "so tame and technical as to be insufficient to justify the [felon-in-possession] ban." *See*

United States v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011). In Arizona, § 922(g)(1) reaches individuals convicted of marijuana possession in any amount. R. at 77a n.20; Ariz. Rev. Stat. Ann. § 13-3405. In Michigan, it reaches someone who returns recyclables for a ten-cent reward without knowing they were purchased out of state. R. at 77a n.20; Mich. Comp. Laws § 445.574a(1)(d). Over half of the approximately 1.46 million prisoners in the United States today did not commit violent offenses. *See* Dr. James Austin, Lauren-Brooke Eisen, James Cullen, and Jonathan Frank, *How Many Americans Are Unnecessarily Incarcerated?* Brennan Center for Justice at the N.Y. Univ. School of Law 9 (2016). And without as-applied challenges, all of the citizens impacted by these laws would have no recourse to vindicate their Second Amendment rights. This result would disrupt *Heller*'s commitment to insulate the Second Amendment from legislative encroachment.

This result would also violate this Court's commitment to protect the Second Amendment to the same degree as other enumerated constitutional rights. In *McDonald*, the Court expressly declined to treat the right to bear arms as a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause." *McDonald*, 561 U.S. at 778. In *Heller*, the Court observed, "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *See Heller*, 554 U.S. at 634). In *Marbury v. Madison*, the Supreme Court confirmed its role of upholding the Constitution in the face of laws that are "repugnant" to it. 5 U.S. 137, 180 (1803). In the absence of as-applied challenges, these principles would be impossible to effectuate. *See Heller*, 554 U.S. at 634; *McDonald*, 561 U.S. at 780. To preclude as-applied challenges would set the Second Amendment apart from other constitutional amendments.

The Third Circuit dissent would have precluded as-applied challenges for reasons outside of the Second Amendment's history and the Supreme Court's guidance in *Heller*. Judge Fuentes observed that it is challenging to determine exactly who might use firearms for the wrong reasons. *See* R. at 140a. Congress defunded the Attorney General's investigations into relief under § 922(c) at least in part based on the difficulty of these determinations.[15] *See* R. at 140a–42a. The dissent thus concluded that courts should defer to the legislature's judgment that individual determinations carry too much risk. *See* R. at 140a–42a. But that view is faithful neither to the judiciary's role in protecting constitutional rights nor to the text of *Heller*. No matter how difficult the task, it is the courts' constitutional obligation to protect individuals' Second Amendment rights.

The Third Circuit dissent also misapplied *United Public Workers of America v. Mitchell* to the facts of this case. 330 U.S. 75, 96–104 (1947); R. at 143a. That case dealt with a constitutional challenge to the Hatch Act, which prohibited civil servants from engaging in partisan political activity. *Id.* at 103–04. The Court upheld the law as constitutional, reasoning that it should defer to the legislative judgment that such political activity could impair the "integrity and the competency of the public service." *Id.* at 103. The Court emphasized, however, that the restrictions at issue imposed a "measure of interference" and left a "wide range of public activities with which there is no interference by the legislation." By contrast, Section 922(g)(1) does not restrict or burden individuals' right to bear arms in a minor way, for example, by requiring them to complete extra training or by limiting the number of firearms they may lawfully own. Instead, it restricts their exercise of the Second Amendment right in its entirety. As

[15] While the dissent suggested that the decision was based entirely on concerns about the accuracy of individual determinations, it is hard to believe that funding decisions are made for one reason alone.

such, *Mitchell*'s reasoning cannot apply to this case because it analyzed restrictions fundamentally different from those at issue here.

Congress and state legislatures can pass gun possession laws in the name of public safety. Those laws might restrict *who* may carry *what* types of firearms and *where*. Those laws will carry the *Heller* presumption of lawfulness. But that presumption cannot allow disarmament laws to "evade constitutional scrutiny." *See* R. at 15a. In order to protect the fundamental right to bear arms, these laws must be subject to challenge.

II. SECTION 922(g)(1) IS UNCONSTITUTIONAL AS APPLIED TO RESPONDENTS BECAUSE THEY CAN OVERCOME ITS PRESUMPTIVE LAWFULNESS AND THUS ARE ENTITLED TO THE SECOND AMENDMENT'S PROTECTIONS.

Respondents' as-applied challenge to § 922(g)(1) should succeed. Respondents respectfully ask the Court to adopt the test articulated by the Third Circuit, in the concurrence below and in *United States v. Barton*. *See* R. at 53a–62a; *Barton*, 633 F.3d at 173–75. As an initial matter, the Court should determine the historical scope of felon dispossession laws. *See Heller*, 554 U.S. at 634–35 (observing that constitutional rights retain their scope from the time of ratification). Only if § 922(g)(1) operates *within* that scope as applied to respondents can it constitutionally restrict their Second Amendment rights.

Respondents respectfully request that the Court adopt the public danger test, which is supported by the debates from the ratifying conventions in Massachusetts, New Hampshire, and Pennsylvania along with early federal laws. *See* R. at 53a; *Barton*, 633 F.3d at 173. In the alternative, respondents respectfully request that the Court adopt the serious crime test, which is supported by the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents. *See* R. at 25a. Under either test, respondents overcome §

922(g)(1)’s presumptive lawfulness because they and their crimes fall outside the scope of constitutional dispossession laws and thus within the Second Amendment’s protections. Second, respondents respectfully request that the Court follow the *Heller* line of reasoning and find the law unconstitutional without the need for means-end scrutiny. Because § 922(g)(1) completely prevents respondents from exercising the right to bear arms absent unlikely relief, the law must fall after respondents have shown that they are entitled to the Second Amendment’s protection. Third, under the alternative means-end test, the government can overcome neither strict nor intermediate scrutiny because there is no evidence that disarming people like respondents is substantially related to public safety goals. Section 922(g)(1) is unconstitutional as applied to respondents in this case.

A. The Historical Justifications For Dispossessing Felons Do Not Apply To Respondents Or Their Crimes.

Petitioners overcome the *Heller* presumption because they fall outside the historical categories of felon dispossession laws. Though the *Heller* Court did not “expound upon the historical justifications” for dispossession laws, such an inquiry is necessary to resolve this case. *See Heller*, 554 U.S. at 627 n.26, 635. *Heller* provides a principle important in this inquiry: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.” *See id.* at 605, 634–35; R. at 65a. This scope must remain fixed notwithstanding legislative or judicial preference. *See id.* at 634–35. While the Court interprets the Constitution in light of modern changes, it does so without altering the bounds of each provision. *See id.* at 582 (noting that just as the First and Fourth Amendments protect modern forms of communications and search, so too the Second Amendment protects modern “bearable arms”). Felon disarmament laws—those that *Heller* characterized as “longstanding”—carry a

presumption of constitutionality *precisely because* they existed alongside the preexisting right to bear arms when the Second Amendment was ratified. *See id.* at 626.

Two inquiries are necessary to determine whether respondents are entitled to Second Amendment protections. First, the Court must determine the historical scope of the felon disarmament laws—because only modern laws within that scope carry the *Heller* presumption of lawfulness. Second, the Court must ask whether respondents fall within that category of individuals. Respondents respectfully ask the Court to find that "longstanding" prohibitions excluded those who were a danger to the public. In the alternative, respondents ask the Court to find that they excluded those who had committed a "serious" crime. On either test, respondents can successfully differentiate themselves.

i. At no time have respondents been violent or presented a danger to the public.

Respondents maintain their Second Amendment protections because they show no likelihood of future dangerousness. Historically, felon disarmament laws were aimed at individuals who had committed crimes of violence or force that indicated they might be a danger to the public. *See* R. at 65a–66a; *Barton*, 633 F.3d at 174. The Federal Firearms Act of 1938—the first federal law of its kind—disarmed people based on conviction of violent crimes. *See* Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Policy 695, 699 (2009) (internal quotation marks omitted). Those crimes included "'murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking,' and certain forms of aggravated assault." *Id.* This federal law had its roots in Pennsylvania's Uniform Firearms Act of 1926, which disarmed individuals on the same basis. *See id.* at 701. Seven other states had similar disabilities in the 1920s. *See id.* at 702. This evidence leads to the conclusion that "a firearms disability can be

consistent with the Second Amendment to the extent that . . . its basis credibly indicates a present danger that one will misuse arms against others and the disability redresses that danger." *See id.* at 698.

In *United States v. Barton*, the Third Circuit used the public danger test to evaluate an as-applied challenge to § 922(g)(1). *Barton*, 633 F.3d at 174. The court relied on evidence from ratifying conventions in Massachusetts, New Hampshire, and Pennsylvania, which the *Heller* Court had considered "highly influential." *See id.* at 174 (internal quotation marks omitted). The court then looked to § 922(g)(1)'s predecessors going back to 1938 to identify the traditional justifications for felon dispossession laws that *Heller* said carried a presumption of lawfulness. *See id.* at 173. That first federal law and the ones that followed for the next twenty-three years arose from an effort to keep firearms out of the hands of those likely to be a danger to the public. *Id.* That group included people who had committed violent crimes. *Id.*

The court then identified ways in which a person can "distinguish his circumstances from those of persons historically barred from Second Amendment protections" in order to mount a successful as-applied challenge. *Id.* at 174. First, "a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen."[16] *Id.* Second, a felon with a decades-old conviction might no longer be a danger to the public. *Id.* The challenger in *Barton* could show neither because he had committed several crimes involving drugs, stolen weapons, and firearms with obliterated serial numbers, and one of the crimes had occurred recently. *See id.* at 170, 174; *see also United States v. Cheeseman*, 600 F.3d 270, 280 (3d Cir. 2010) (noting that felon dispossession laws had the goal of "keep[ing] guns out of the

[16] The Third Circuit dissent argued that the difficulties associated with applying this test should preclude it. R. at 140a–42a. These individual determinations will not always be easy, but courts engage with challenging questions of life or death every day. These inquiries will serve to protect the proper scope of the Second Amendment and individual citizens' right to bear arms.

hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society”); *see also* R. at 65a–66a (citing language from the Massachusetts, New Hampshire, and Pennsylvania ratification debates that referenced “real danger of public injury” and “Actual Rebellion”).

Respondents in this case are regular Americans—both husbands, both fathers, both gainfully employed. *See* R. at 215a, 217a, 263a. They are in stable family structures. *See* R. at 215a, 263a. They have roots in their communities. *See* R. at 263a. They have no record of substance abuse, violence, or domestic abuse. *See* R. at 173a, 218a–19a. Their long-ago crimes involved no violence or force, and they have had no criminal trouble of any kind in many years. R. at 6a, 7a, 218a–19a, 264a. In short, these men are not now and never have been a danger to the public. They fall outside the historical scope of felon disarmament laws and within the scope of the Second Amendment’s protections.

ii. Respondents did not commit crimes serious enough to justify disarmament.

Respondents retain their Second Amendment protections because the crimes they committed were not serious enough to justify their loss. Other historical sources suggest that felon dispossession laws were grounded in the idea that citizens who commit *serious* crimes lose their Second Amendment right. *See* R. at 23a–25a. The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, which the Third Circuit plurality identified as one source of its historical reading, informed the Supreme Court’s analysis in *Heller*. *See* R. at 25a; *Heller*, 554 U.S. at 604. This report includes language suggesting that commission of a crime formed a basis for dispossession. *See* R. at 25a–26a. For an as-applied challenge to succeed under this test, challengers must show that they did not

commit a serious crime and thus have at all times retained their ability to exercise the right to bear arms. R. at 26a–27a. Seriousness depends on the felony-misdemeanor label, the length of the sentence, whether force is an element, the actual sentence imposed on the challenger, and how other jurisdictions treat the offense. *See* R. at 31a–33a.

As respondents' cases have progressed, several independent authorities have reached a judgment their crimes were not serious. First, when defining the crime, the state legislature classified them as misdemeanors, which the Third Circuit plurality found "a powerful expression of its belief that the offense is not serious enough to be disqualifying." *See* R. at 31a. In addition, force is not an element of either crime, and the Third Circuit plurality observed that the record reflects no evidence that either respondent committed his crime in a violent way. *See* R. at 31a n.4. Second, the respondents "received a minor sentence by any measure" because neither judge assessed the need for longer punishments. *See* R. at 32a–33a. Third, in the case of Mr. Suarez, the federal government did not find his serious enough to warrant denial of the "Secret" security clearance necessary for him to obtain the consulting position he now has. *See* R. at 7a. Fourth, both district courts and the Third Circuit plurality upheld Respondents' challenges. *See* R. at 21a–22a, 165a, 242a. Finally, there is no jurisdictional consensus on this question because other criminal codes treat these same crimes both more and less severely. *See* R. at 33a–34a.

The Third Circuit dissent incorrectly concluded that all laws falling under § 922(g)(1) are necessarily serious because of their maximum sentences. *See* R. at 122a. But criminal codes offer sentencing guidelines in broad ranges; for example, Mr. Suarez's ranged from thirty days to three years (though he himself received a suspended sentence). *See* R. at 6a. These guidelines are designed to allow judges flexibility to dole out sentences based on the particularities of the

individuals and their crimes.[17] To treat the maximum sentence as the end of the inquiry would be as problematic as treating the felony-misdemeanor line as decisive. Respondents do not assert that the misdemeanor label ends the inquiry here but rather that it is one helpful clue among many. *See* R. at 31a (acknowledging that it is possible for a misdemeanor to be serious). Even those with little knowledge of the criminal law likely know that felonies are more serious crimes than misdemeanors. Through both the maximum sentence and the felony or misdemeanor label, the legislature communicates its opinion about seriousness. *See* R. at 121a–22a. Respondents respectfully urge the Court to consider more than just one factor in determining seriousness. Given the considerations above, respondents have assembled a strong body of support to show their crimes were not serious enough to justify disarmament. Thus, the Second Amendment protects their right to bear arms.

B. *Heller* Compels *Per Se* Unconstitutionality Because § 922(g)(1) Entirely Bars Respondents From Exercising The Second Amendment's Core Guarantee Of Self-Defense In The Home.

Means-end scrutiny is not appropriate for a law like § 922(g)(1), which goes beyond "burdening" rights to the point of eliminating their exercise with no meaningful recourse. In *Heller*, the Court flatly declined to apply means-end scrutiny to the District of Columbia laws because they struck at the "core protection" of the Second Amendment: defense of self and family in the home. *See Heller*, 554 U.S. at 628, 634–35. The Court observed that in the home, "the need for defense of self, family, and property is most acute." *See id.* at 628. These features of the law made it unnecessary, even inappropriate, to engage in a means-end inquiry. *See id.* at 634. The Court found that such an analysis would set the Second Amendment apart: "We know

[17] And here, those judges determined that neither crime merited any jail time. *See* R. at 32a–33a.

of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Id.* The Second Amendment, wrote Justice Scalia, is "the very *product* of an interest balancing by the people." *Id.* at 635. By ratifying it, the people chose to "elevate[] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. The Court further concluded that the laws would be unconstitutional under any form of scrutiny. *Id.* at 628; *see also Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) ("Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional.").

The *Heller* decision did not hinge on the fact that, for two reasons, the restrictions at issue were not *technically* outright bans. *See Heller*, 554 U.S. at 574–75; R. at 61a, n.11. District of Columbia residents could keep firearms in their homes as long as the weapons were "unloaded and disassembled or bound by a trigger lock." *See Heller*, 554 U.S. at 574–75; R. at 61a n.11. In addition, the Chief of Police could make exceptions to the handgun ban with one-year licenses. *See id.* These remote windows of possibility did nothing to ease the Court's concerns about the "severe" restrictions the law imposed on core Second Amendment protections. *See Heller*, 554 U.S. at 574–75. As Judge Hardiman wrote in his concurrence below, the Court did not view these aspects of the law as "condition[s] precedent" or "mere precondition[s]." *See* R. at 61a n.11. Rather, the Court concluded that the law's restrictions functioned as "unconstitutional destructions of the Second Amendment right." *Heller*, 554 U.S. at 574–75.

This principle applies directly to this case because § 922(g)(1) "completely eviscerates" respondents' Second Amendment rights. *See* R. at 59a–60a. It is more than a ban on handguns or

a requirement that firearms be disassembled or locked. *See Heller*, 554 U.S. at 628. It is a ban on all firearms, in all states of assembly, at all times, and in all locations—including, of course, the home, where respondents seek to possess firearms for self-defense and defense of their families. *See* R. at 59a–60a, 173a, 175a, 244a. This outright ban on exercising the core Second Amendment protection is leaps and bounds more "severe" than the constellation of restrictions at issue in *Heller*. *See Heller*, 544 U.S. at 574–75. "'[U]nder the pretence of regulating,'" § 922(g)(1) in fact "'amounts to a destruction of the [Second Amendment] right.'" *See id.* at 629 (*quoting State v. Reid*, 1 Ala. 612, 616–617 (1840). As such, means-end scrutiny would be redundant—it took place when the American people ratified an amendment that "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *See Heller*, 554 U.S. at 635; R. at 56a. Just as the unlikely workarounds in the District of Columbia laws did not assuage the *Heller* Court's concerns, here, too, respondents' opportunities to restore their Second Amendment rights under § 921(a)(20) are so remote as to be meaningless.[18] *See Heller*, 554 U.S. at 574–75; R. at 61a n.11. As Judge Hardiman put it, "To frame this moon-shot as a mere condition precedent to arms possession not unlike a training-course requirement strains credulity." R. at 61a n.11.

By mentioning the possibility of means-end scrutiny then declining to apply it to the law at issue, the *Heller* Court implicitly acknowledged that not all laws burdening Second Amendment rights are the same. *See Heller*, 554 U.S. at 628. Thus, if this Court holds that § 922(g)(1) is unconstitutional here without a means-end inquiry, it will not be instructing courts to respond to all Second Amendment challenges in the same way. The Third Circuit plurality incorrectly predicted such a result in response to Judge Hardiman's concurrence. *See* R. at 18a.

[18] And § 925(c) is in fact meaningless as Congress has left it unfunded since 1992. *See* R. at 39a, 142a.

The plurality reasoned that declining to apply means-end scrutiny to respondents' case "would condemn without exception all laws and regulations containing preconditions for the possession of firearms by individuals with Second Amendment rights." *See* R. at 18a. Not so. The meaning, scope, and constitutionality of other restrictions—on who can carry what types of firearms and where—are not before the Court. *See* Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-Defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. Rev. 1443, 1443 (2009) (differentiating between types of firearm restrictions). For a law that merely burdens protected conduct, means-end scrutiny would be appropriate. *See* R. at 56a. It might be that few firearm restrictions will trigger the categorical rule necessary here. *See* R. at 59a ("[W]e suspect that most firearm regulations probably will not trigger this categorical rule."). But in this case, no further inquiry is necessary to conclude that § 922(g)(1) is unconstitutional as applied to respondents.

C. The Law Fails Under Either Form Of Heightened Scrutiny Because There Is No Evidence That Permanently Disarming People Like Respondents Is Tied To Public Safety.

The government cannot show that § 922(g)(1) is narrowly tailored or substantially related to its public safety goal as applied to respondents. Though the level of scrutiny is an open question in the Second Amendment context, the *Heller* Court observed in a footnote that the right to bear arms is too important to be burdened by a law capable of overcoming only the rational basis test. *See Heller*, 554 U.S. at 628 n.27 ("Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right."). Rather, laws that restrict Second Amendment rights must satisfy heightened scrutiny, either strict or intermediate. *See id.* The *Heller* Court did not apply means-end scrutiny to the law before it but did observe that due to its "severe" burdens—including a complete prohibition on

Americans' preferred firearm and a requirement that all firearms be disassembled or bound in the home—it would "would fail constitutional muster" under any test. *Id.* at 628, 629.

Different levels of scrutiny are likely appropriate depending on the nature of the burdens the challenged law imposes on Second Amendment rights; such is the case in the First Amendment context. *See Marzzarella*, 614 F.3d at 96; *see also* Volokh, 56 UCLA L. Rev. at 1447 ("[E]ven if some kinds of gun bans are presumptively unconstitutional, under something like strict scrutiny or a rule of per se invalidity, it doesn't follow that less burdensome restrictions must be judged under the same test."). The Seventh Circuit observed, "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." *Ezell*, 651 F.3d at 703. When a law functions more as a regulation than a total ban, intermediate scrutiny might be appropriate. *See* Volokh, 56 UCLA L. Rev. at 1454; *Marzzarella*, 614 F.3d at 88, 96–97 (applying intermediate scrutiny to a law that merely disallowed possession of firearms with altered serial numbers). As such, the Court would not, by applying strict scrutiny in this case, require all future laws burdening Second Amendment rights to meet that exacting standard.

Respondents respectfully ask the Court to apply strict scrutiny to § 922(g)(1), which effectively functions as a permanent bar to respondents' exercise of their Second Amendment rights. The law fails strict scrutiny because it is not narrowly tailored to the government's public safety interests. None of the statistical evidence the government has produced applies to respondents or their crimes, so there is nothing in the record to suggest they would present a public danger if they were permitted to exercise their Second Amendment rights. In the

alternative, respondents ask the court to find that the law fails under intermediate scrutiny because the government's evidence is similarly insufficient to show a substantial relationship.

i. Disarming nonviolent state misdemeanants who never spent time in prison is not narrowly tailored to public safety goals.

The government has not produced evidence sufficient to establish a narrow tailoring between disarming people like respondents and achieving public safety goals. Strict scrutiny requires the government to justify a "compelling" state interest and show that the law's means are "narrowly tailored" to achieving that interest. *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). This Court has also framed the analysis as one of determining "whether the exclusions are necessary to promote a compelling state interest." *See Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627 (1969).

Strict scrutiny is appropriate in this case. The individual right to bear arms is a fundamental, enumerated constitutional right. *See Heller*, 554 U.S. at 628; *McDonald*, 561 U.S. at 778. Section 922(g)(1) bans respondents from exercising their Second Amendment right absent exceedingly unlikely relief under § 921(a)(20) or § 925(c), the latter of which has remained unfunded for decades. *See* R. at 17a, 23a, 61a n.11. Thus, the burdens at issue here are on par with if not greater than those the *Heller* Court identified as "severe"—and strict scrutiny is appropriate. *See Heller*, 554 U.S. at 629; *see also Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny to § 922(k) because it imposed lesser burdens than the law in *Heller*). The district court in Mr. Suarez's case noted that strict scrutiny was appropriate because the law amounts to "a straight prohibition of firearms possession . . . and not just a regulation of possession." *See* R. at 257a n.9.

The government cannot show narrow tailoring between disarming individuals who committed nonviolent misdemeanors and furthering public safety goals. As compelling as the government interest in public safety might be,[19] its application to individuals like respondents does nothing to further it. *See* R. at 35a. Respondents have never presented a danger to the public and surely do not now. The studies the government cites simply do not apply to individuals like respondents. The recidivism studies are not only inapposite because respondents never spent time in jail, but they are yet more attenuated in light of the amount of time—twenty and twenty-seven years—that has passed since each respondent committed his crime. *See* R. at 3a, 6a, 36a–37a. Studies about felons do not apply because both committed state misdemeanors.[20] *See* R. at 36a. While such empirical studies can be relevant to a strict scrutiny analysis, here they miss the mark. *See* R. at 38a–39a.

Finally, the avenues for relief do not save the law from unconstitutionality. *See* R. at 39a–40a. The unfunded § 922(c) is not an option, and the other avenues—based on age and based on a gubernatorial pardon—bear no relationship with the government's public safety goals. *See* R. at 40a–41a. As the Third Circuit plurality said, these options "do not satisfy even intermediate scrutiny," and they surely do not satisfy strict. R. at 39a.

ii. Disarming nonviolent state misdemeanants who never spent time in prison is not substantially related to public safety goals.

The law still falls to the less exacting standard of intermediate scrutiny because there is not a substantial relationship between disarming respondents and achieving the government's public safety goals. To withstand intermediate scrutiny, the governmental objectives behind the

[19] Respondents recognize that firearms can cause great devastation in the wrong hands.
[20] Whether or not one views the felony-misdemeanor line as significant, it surely informed the creation and implementation studies themselves.

law must be "important." *Califano v. Westcott*, 443 U.S. 76, 89 (1979); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980). The means employed must have a "direct, substantial relationship" with the objectives. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725–26 (1982) ("The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis . . . ."); *see also Califano v. Webster*, 430 U.S. 313, 317 (1977) (observing the means must be "substantially related to the achievement of [the government's] objectives") (internal quotation marks omitted); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (same). A law will not likely withstand intermediate scrutiny if there is merely a tenuous correlational relationship between the result sought and the means employed by the law. *See Craig*, 429 U.S. at 203–04.

In *United States v. Marzzarella*, the Third Circuit held that a law satisfied intermediate scrutiny because it fit reasonably with an important government interest. 614 F.3d at 98. The defendant brought a Second Amendment challenge to his conviction under 18 U.S.C. § 922(k), which made it unlawful to possess a firearm with an altered serial number. *Id.* at 88. The Third Circuit observed that the law advanced the "substantial" government interest of allowing law enforcement officers to track firearms. *Id.* The law fit "closely" with that goal for two reasons. *See id.* at 98–99. First, the law "reache[d] only conduct creating a substantial risk of rendering a firearm untraceable." *Id.* at 98. Second, the court observed that it was likely that only those intending to commit criminal activity would be likely to prefer an unmarked firearm to a marked one, meaning that the law's burden rightfully fell on them. *See id.* at 98–99.

Here too, § 922(g)(1) cannot pass muster because there is not a substantial fit between excluding individuals like respondents and achieving public safety goals. The Third Circuit plurality concluded that "the Government [fell] well short of satisfying its burden—even under

intermediate scrutiny." R. at 35a. The government's interest in public safety is surely important, but the means it has chosen in the broad sweep of § 922(g)(1) bear no more than a loose relation when it comes to respondents. Unlike *Marzzarella*, in which the law requiring serial numbers allowed the government to track firearms, here the law does not promote responsible firearm use because there is no reason to think that individuals like respondents would ever use them irresponsibly. By covering so many felonies that involve no violence or force, § 922(g)(1) unnecessarily disarms many nonviolent individuals. As outlined above, the studies that petitioners cite are inapposite when it comes to the characteristics of respondents and their crimes. Because § 922(g)(1) bears little relationship with public safety through its coverage of regular Americans like respondents, it is unconstitutional under intermediate scrutiny.

CONCLUSION

Respondents fall within the Second Amendment's protections, § 922(g)(1) is an unconstitutional ban on their right to bear arms. For the foregoing reasons, respondents respectfully request that this Court affirm the judgment of the U.S. Court of Appeals for the Third Circuit and uphold respondents' as-applied challenge.

DATED: February 12, 2018

Respectfully Submitted,

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APPENDIX

1. U.S. Const. amend. II 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.

2. 18 U.S.C. § 921 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(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.

3. 18 U.S.C. § 922(g)(1) provides:

Unlawful acts

(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;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to

any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person rep- resents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicity prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily in- jury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

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.

4. 18 U.S.C. 925(c) provides:

Exceptions: Relief from disabilities

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such 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. Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result

in a miscarriage of justice. A li- censed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations un- der this chapter, who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Attorney General grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.