No. 11-5352
ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

JEFFERSON WAYNE SCHRADER, ET AL.,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from a Judgment of the
United States District Court for the District of Columbia
The Hon. Rosemary M. Collyer, District Judge
(Dist. Ct. No. 1:10-cv-1736-RMC)

APPELLANTS' BRIEF

Alan Gura
Thomas M. Huff
GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, VA 22314
703.835.9085/703.997.7665
Counsel for Appellants

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties in the district court were plaintiffs Jefferson Wayne Schrader and Second Amendment Foundation, Inc., and defendants Attorney General Eric J. Holder, Jr., the Federal Bureau of Investigation, and the United States of America. All parties below remain parties in this appeal.

There were no amici below for either party. At present, there are no known amici parties appearing in this appeal.

B. Rulings Under Review

The rulings under review are the district court's order and corresponding memorandum opinion, both issued on December 23, 2011 by the Hon. Rosemary M. Collyer, granting Defendants-Appellees' motion to dismiss and denying Plaintiffs-Appellants' cross-motion for summary judgment. The district court's opinion is not published, but appears at *Schrader* v. *Holder*, No. 10-1736(RMC), 2011 U.S. Dist. LEXIS 147717 (D.D.C. Dec. 23, 2011). The ruling under review and order being appealed are set forth in the Joint Appendix at JA 142-157.

C. Related Cases

The case has not previously been before this or any other court, apart from the original proceeding in the United States District Court. Counsel is not aware of any related cases pending before this or any other court.

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Second Amendment Foundation, Inc. ("SAF") has no parent corporations. No publicly traded company owns 10% or more of its stock.

SAF, a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code, is a non-profit educational foundation incorporated in 1974 under the laws of the State of Washington. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters residing throughout the United States.

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GLOSSARY

JA: Joint Appendix

NICS: National Instant Criminal Background Check database

APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants ("Plaintiffs") seek declaratory and injunctive relief barring application of 18 U.S.C. § 922(g)(1)'s lifetime firearms ban against common law misdemeanants. The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

On December 23, 2011, the district court entered a final order granting Defendants-Appellees' ("Defendants") motion to dismiss and denying Plaintiffs' cross-motion for summary judgment. JA 157. Plaintiffs timely noticed this appeal on the same date. JA 6. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Federal law bans firearm possession by any person previously convicted of an offense "punishable by imprisonment for a term exceeding one year," with an exception for any State misdemeanor "punishable by a term of imprisonment of two years or less." 18 U.S.C. §§ 921(a)(20) and 922(g)(1).

In 1968, Plaintiff Schrader was involved in a fistfight with a gang member who had previously attacked him, and was subsequently convicted of simple (*i.e.*, non-aggravated) assault and battery, an uncodified common law misdemeanor under Maryland law lacking any statutory punishment criteria. His sole punishment was a $100 fine and $9 in court costs. Schrader went on to serve a tour in Vietnam, earn an honorable discharge from the Navy, and has had no meaningful encounters with law enforcement in the more than 40 years since.

1. Does Schrader's conviction for this common law misdemeanor trigger application of the federal firearms ban, 18 U.S.C. §§ 921(a)(20) and 922(g)(1)?

2. Does the government's application of Section 922(g)(1)'s lifetime firearms ban against Schrader, on the basis of this 1968 common law misdemeanor conviction, violate Schrader's Second Amendment right to keep and bear arms?

STATUTES AND REGULATIONS

A statutory addendum to this brief includes:

U.S. CONST. AMEND. II; 18 U.S.C. §§ 921(a)(20), 922(g)(1).

STATEMENT OF THE CASE

Congress enacted the basic federal gun control regime decades before the Supreme Court held that the Second Amendment secures fundamental individual rights. *District of Columbia* v. *Heller*, 554 U.S. 570 (2008); *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010). The Second Amendment, to be sure, does not prevent Congress from disarming dangerous individuals. Yet in *Heller* and *McDonald*'s wake, federal courts have carefully cautioned against maximalist applications of the 1968 Gun Control Act, 18 U.S.C. § 921 et seq., recognizing that the Act's broad language might be applied under constitutionally dubious circumstances.[1]

Were any application of Section 922(g)(1)'s so-called "felon in possession" prohibition beyond the outer limits of constitutionality, the facts of this case would qualify. In 1968, then-20 year old Navy serviceman Jefferson Schrader was convicted of simple common law misdemeanor assault and battery for his involvement in a minor fistfight. His only punishment was $109 in fines and costs, he received

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

no jail time, and he has had no meaningful encounters with law enforcement since. But "[b]ecause the common law misdemeanor for which he was convicted had no legislatively-capped punishment range," the federal government now

> treats him as it would a convicted felon for the purpose of federal law, banning him for life from possessing any firearm for any purpose, and listing his name in the NICS database as disqualified from owning firearms.

JA 144 (district court opinion).

Individuals convicted of misdemeanors at common law were not historically disarmed, and it is impossible to maintain that permanently and categorically disarming such low-level transgressors, without more, would survive any level of heightened scrutiny. Yet this Court need not reach the constitutional problem, as the government's sweeping interpretation of Section 922(g)(1) is not supported by the text, structure, or history of the federal gun control scheme. Well before *Heller*, and for many years, a correctly narrower interpretation of Section 922(g)(1) prevailed in the Fourth Circuit. That approach should be revisited here.

Plaintiffs filed this suit on October 13, 2010, seeking declaratory and injunctive relief requiring the government to remove Schrader's firearms disability from NICS pursuant to Section 925A, and barring enforcement of Section 922(g)(1)'s prohibition upon common law misdemeanor offenses. JA 2, JA 36.

The government first moved to dismiss the complaint on January 31, 2011, with Plaintiffs cross-moving for summary judgment on March 11, 2011. JA 3. As briefing progressed, a pleadings dispute arose among the parties, prompting Plaintiffs to seek leave to file a Second Amended Complaint to narrow the parties' disagreement. JA 4. The district court granted the motion for leave to amend, and denied the parties' dispositive motions without prejudice. *Id*. The government filed a new motion to dismiss on June 17, 2011, and Plaintiffs renewed their cross-motion for summary judgment on July 1, 2011. JA 5.

In an opinion and order issued on December 23, 2012, the district court granted the government's motion to dismiss and denied Plaintiffs' summary judgment motion. JA 157; see also JA 142-156. Plaintiffs immediately noticed their appeal from the court's final judgment. JA 6.

STATEMENT OF FACTS

I. *The Regulatory Framework*

Over the last 75 years, Congress has established a federal legislative scheme that bans narrow groups of disqualified persons from possessing firearms. Beginning with the Federal Firearms Act of 1938, Congress proscribed the receipt across state lines of firearms by persons convicted of certain violent offenses. Congress expanded the prohibition in 1961 to include all felons, and again in 1968 to cover the "possession" (rather than mere receipt across state lines) of a firearm.[2] See *United States* v. *Barton*, 633 F.3d 168, 173 (3d Cir. 2011) (discussing history of federal firearms laws); *United States* v. *Skoien*, 614 F.3d 638, 640-41 (7th Cir. 2010) (en banc) (same).

In 1986, however, Congress eased a number of firearms restrictions when it passed the Firearm Owners' Protection Act ("FOPA"). Among

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[2] In passing the Federal Gun Control Act of 1968, Congress also issued findings concerning "veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship," and banned firearms possession from each of these groups of persons as well. See *Scarborough* v. *United States*, 431 U.S. 563, 571 n.10 (1977) (quoting congressional findings of fact).

other issues, Congress became concerned with the Supreme Court's opinion in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983), which had held that even an expunged state felony conviction would disqualify a person from gun ownership. Congress superceded *Dickerson* by shrinking the scope of the felon-in-possession law: a new statutory provision was enacted to expressly exempt all pardoned or expunged convictions, as well as those for which a convict's civil rights have been restored. 18 U.S.C. § 921(a)(20). This exemption applies unless the relevant "pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.*; see also *Logan* v. *United States*, 552 U.S. 23, 27-28 (2007) (discussing history of the Firearm Owners' Protection Act); *United States* v. *Logan*, 453 F.3d 804, 806-07 (7th Cir. 2006) (same).

FOPA also significantly reorganized the federal firearms laws. The "felon-in-possession" ban was re-codified at Section 922(g)(1), where it currently applies to any person convicted of "a crime punishable by imprisonment for a term exceeding one year"—a standard modern

demarcation for felony crimes.[3] The ban specifically exempts from its reach any state misdemeanor crime that is "punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20)(B). Thus, with respect to any State conviction, the applicability of the "felon-in-possession" ban will turn on how severely that State has chosen to punish the offense at issue. Violation of the ban is a felony criminal offense punishable by a prison sentence of up to ten years. See 18 U.S.C. § 924(a)(2).

In 1996, Congress slightly expanded the federal firearms ban to include a narrow and acute class of misdemeanor offenses involving domestic violence. 18 U.S.C. § 922(g)(9). As the Supreme Court explained, domestic violence abusers raised unique aggravated concerns that Congress wished to address:

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[3] See, e.g., BLACK'S LAW DICTIONARY, 694 (9th ed., 2009) ("BLACK'S") (defining felony as "[a] serious crime usu. punishable by imprisonment for more than one year or by death. Examples include murder, rape, arson, and burglary."). Accordingly, the Supreme Court and other courts generally refer to § 922(g)(1) as the "felon-in-possession" statute, though the statute itself does not use that terminology. See, e.g., *Abbott* v. *United States*, 131 S. Ct. 18, 23 (2010) (GINSBURG, J.); *Carr* v. *United States*, 130 S. Ct. 2229, 2234, n.1 (2010) (SOTOMAYOR, J.); *Bloate* v. *United States*, 130 S. Ct. 1345, 1350 (2010) (THOMAS, J.).

> Existing felon in possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies." 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg). By extending the federal firearm prohibition to persons convicted of "misdemeanor crime[s] of domestic violence," proponents of § 922(g)(9) sought to "close this dangerous loophole." *Id*., at 22986.

United States v. *Hayes*, 555 U.S. 415, 426 (2009). Beyond this special case, however, Congress has shown no predilection for extending the gun ban to ordinary misdemeanants.

II. *The prohibition's impact on Plaintiffs*

Plaintiff Jefferson Schrader is a 64-year-old United States citizen who presently intends to purchase and possess a handgun and long gun for self-defense within his home. JA 147. As the district court noted, "[h]e does not face any of the typical disqualifying barriers under the federal gun control laws." *Id*. Schrader is not under indictment, has never been convicted of a felony or misdemeanor crime of domestic violence, is not a fugitive from justice, is not an unlawful controlled substance user or addict, has never been adjudicated as a mental defective or committed to a mental institution, has not been discharged from the Armed Forces under dishonorable conditions, has never

renounced his citizenship, and has never been the subject of a restraining order relating to an intimate partner. *Id.*; cf. 18 U.S.C. § 922(g) (defining categories of persons prohibited from possessing firearms). He is also fully qualified to possess firearms under the laws of Georgia, his State of citizenship. *Id.*; see also JA 49.

The government, however, prohibits Schrader from purchasing or possessing firearms based on a 1968 common law misdemeanor conviction for simple assault and battery. JA 143-144. While Schrader's only punishment was a $100 fine and $9 in court costs, *Id.*; see also JA 49, assault and battery in Maryland was at that time a *common law* misdemeanor.[4] As such, it was uncodified and simply had no statutory sentencing criteria at all. Theoretically, its punishment was limited

[4] Today, the offense of common law assault and battery no longer exists in Maryland, having been abrogated by statute in 1996. *Robinson* v. *State*, 353 Md. 683, 686-87 (Md. 1999). Maryland currently has two forms of statutory assault. First Degree Assault is a felony punishable by up to 25 years imprisonment, and covers any assault that causes (or attempts to cause) serious physical injuries or that is carried out with a firearm. MD. CRIMINAL LAW CODE ANN. § 3-202. Second Degree Assault, a misdemeanor punishable by up to 10 years imprisonment, covers assault against law enforcement officers and other remaining forms of assault. *Id.* at § 3-203. Disorderly conduct, which may also cover assaults, is a misdemeanor punishable by up to 60 days in jail. *Id.* at § 10-201.

only by the Eighth Amendment's ban on cruel and unusual punishment. See *Simms* v. *State*, 288 Md. 712, 714 (Md. 1980). The government now treats this simple misdemeanor conviction as "a crime punishable by imprisonment for a term exceeding one year," thus placing Schrader in the same category as a convicted felon for purposes of the federal "felon-in-possession" statute.

Schrader's conviction occurred in 1968 in Annapolis, Maryland, where he was stationed with the United States Navy. JA 143; see also JA 49. He was 20 years old. JA 142; see also JA 50. While walking peaceably one night in July of that year, he was violently attacked by a street gang that claimed he had entered their territory.[5] JA 143; see also JA 49. A week or two later, on July 23, Schrader was again walking peaceably in Annapolis when he encountered one of the gang members who had previously assaulted him. *Id*. A dispute broke out

[5] The government sought to contest this fact below, but the district court noted that it was unpersuaded. See JA 143, n.1 ("Defendants view with skepticism Mr. Schrader's statement that he was previously assaulted by a street gang but have no basis to deny the account. Even if the account were properly disputed it is not material to this decision. Moreover, in granting Defendants' motion, the Court views the facts in a light most favorable to Mr. Schrader.")

between the two men, and Schrader punched the gang member. *Id*. A nearby police officer arrested Schrader, and charged him with common law assault and battery and disorderly conduct—both simple misdemeanor offenses. *Id*. A week later on July 31, he was found guilty of misdemeanor assault and battery with a punishment of $109 in fines and court costs, which he paid. *Id*. He was not sentenced to any jail time. *Id*. Schrader later completed a tour of Vietnam, and was honorably discharged from the Navy. JA 40, 50. He has not had any further police encounters, save one traffic infraction. JA 143; see also JA 50.

More than 40 years later, in November of 2008, Schrader learned that the federal government's NICS computer system listed him as legally ineligible to purchase a firearm when his companion attempted pay for a shotgun for him as a gift from a Georgia firearms dealer. JA 143-144; see also JA 50. The transaction resulted in a "denial decision" by Defendant FBI when Schrader's name appeared in the NICS database. *Id*. Around the same time, Schrader had also ordered a handgun from a Georgia firearms dealer to keep for self-defense; this

transaction too was met with a denial decision. JA 143-144, see also JA 50-51.

Schrader inquired with the FBI (the NICS system's administrator) as to why his firearms transactions had been cancelled. The FBI advised Schrader via written correspondence that it had made a "denial decision" of his attempted transactions pursuant to Section 922(g)(1), on the basis of his 1968 Maryland misdemeanor common law assault conviction. JA 50-51, 144. An ATF agent further advised him to dispose of or surrender any firearms he might possess or face criminal prosecution. *Id*. Schrader complied. JA 41.

Plaintiff Second Amendment Foundation, Inc.'s ("SAF") members and supporters, including Schrader, are directly impacted by the "felon ban's" application to common law misdemeanors. JA 32, 35; see also JA 144, n.2. Additionally, SAF routinely expends resources responding to inquiries about Section 922(g)(1)'s applicability under a variety of circumstances, including those similar to Schrader's. *Id*.

STANDARD OF REVIEW

A lower court's adjudication of a Rule 12(b)(6) motion to dismiss or a Rule 56 motion for summary judgment is reviewed *de novo* on appeal. *Prime Time Int'l Co.* v. *Vilsack*, 599 F.3d 678, 679 (D.C. Cir. 2010).

Under a Rule 12(b)(6) motion, a court "construe[s] the complaint liberally in the plaintiff's favor, accepting as true all of the factual allegations contained in the complaint, with the benefit of all reasonable inferences derived from the facts alleged." *Aktieselskabet AF 21November 2001* v. *Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) (citations and quotations omitted).

"Summary judgment is appropriate if, viewing all evidence 'in the light most favorable to the nonmoving party and drawing all reasonable inferences in its favor, there is no genuine dispute as to any material fact." *Capitol Sprinkler Inspection, Inc.* v. *Guest Servs.*, 630 F.3d 217, 223-24 (D.C. Cir. 2011) (citing Fed. R. Civ. P. 56(a)) (other citation and internal punctuation omitted).

SUMMARY OF ARGUMENT

Two independent reasons compel reversal of the order below.

1. Longstanding legislative tradition confirms that the phrase "punishable by," as used in Section 922(g)(1)'s description of offenses "punishable by a term of imprisonment exceeding one year," refers to statutorily specified punishment criteria. Congress chose the word "punishable" to describe predicate offenses that a convicting jurisdiction's legislature has affirmatively deemed serious enough to warrant a prison sentence exceeding one year.

This interpretation best comports with the Gun Control Act's structure, which depends heavily on localized legislative judgment. Moreover, the overarching structure of the federal scheme (which unambiguously specifies certain heightened categories of misdemeanor offenses) demonstrates that when Congress wishes to reach non-felons, it does so clearly. The recorded legislative history reveals that no one in Congress contemplated—let alone intended—a categorical firearms ban for uncodified common law misdemeanor offenses. Traditional canons of statutory construction caution against broad readings of statutes where

Congressional intent is unclear. By contrast, the government's position turns Section 922(g)(1) on its head, lumping the simplest uncodified misdemeanor offenses together with most serious violent crimes.

2. While historical support exists for disarming certain categories of presumptively dangerous persons consistent with the right to keep and bear arms, there is no analogous justification for disarming Schrader. His sole conviction is for simple, non-aggravated assault and battery—a misdemeanor not only at the time of his conviction, but at the time of the Second Amendment's ratification.

Moreover, Schrader's conviction involved no additional aggravating factors. It occurred in 1968, as a 20-year-old Navy serviceman, for his involvement in a fistfight with a gang member who had previously attacked him. He fully complied with his punishment, served a tour in Vietnam, earned an honorable discharge from the Navy, and has had no meaningful involvement with law enforcement in the more than 40 years since.

Finally, while only strict scrutiny is appropriate for evaluating a complete firearms ban against a person not traditionally disqualified

from the Second Amendment's core protections, the constitutional case here does not turn on the selection of a standard of review. Depriving Schrader and similarly situated individuals of Second Amendment rights fails under any level of heightened judicial scrutiny.

ARGUMENT

I. SECTION 922(g)(1)'S PROHIBITION DOES NOT APPLY AGAINST PERSONS CONVICTED OF UNCODIFIED COMMON LAW MISDEMEANOR OFFENSES.

A. Uncodified common law offenses do not meet Section 922(g)(1)'s textual requirements because they are not "punishable" by any statutory criteria.

The relevant language of the federal "felon-in-possession" statute prohibits any person convicted of "a crime punishable by imprisonment for a term exceeding one year" from possessing firearms, 18 U.S.C. § 922 (g)(1), with an exception for "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20). Because uncodified common law offenses are not "punishable by" any particular statutory criteria, they cannot fall within the ban's purview.

The term "punishable" is not defined by statute and should therefore be given its ordinary meaning, consistent with its purpose and placement in the overall statutory scheme. *Baily* v. *United States*, 516 U.S. 137, 144-45 (1995). In general terms, "punishable" is defined as "deserving of, or liable to, punishment : capable of being punished by law or right." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1843 (3d ed. 1961). But its meaning is also subject to significant variations, depending on whether used in reference to a person (*e.g.*, "a punishable offender") or an offense (*e.g.*, "a crime punishable by death").

Black's Law Dictionary recognizes this distinction with separate entries for each—the former meaning "subject to a punishment," but the latter defined as "giving rise to a *specified punishment*." BLACK'S at 1353 (emphasis added). It is this latter usage—referring to "specified punishment[s]"—that Congress used here. Quite plainly, the statute speaks not of predicate persons, but of predicate crimes—*i.e.*, those that are "punishable by" a specified punishment range. See *id.* (providing as exemplary usage: "a felony *punishable by* imprisonment for up to 20 years") (emphasis added). An offense "giv[es] rise to a specified

punishment," whereas its offender is "subject to" that "specified punishment."

Properly understood, the applicability of the felon-in-possession scheme turns on the predicate crime's *specified* length of potential punishment—a traditional legislative determination. This construction is further compelled by the federal scheme's structural reliance on the judgment of the convicting jurisdiction's legislature. By affirmatively specifying a punishment term equaling or exceeding two years (in the case of a misdemeanor) or exceeding one year (in the case of any other offense), a State legislature renders an explicit judgment about the seriousness of the corresponding offense. Congress has chosen this legislative assessment as its trigger. See *Small* v. *United States*, 544 U.S. 385, 392 (2005) (noting that Congress' exemption of state misdemeanor crimes punishable by less than two years imprisonment is "presumably based on the determination that such state crimes are not sufficiently serious or dangerous so as to preclude an individual from possessing a firearm.") (majority opinion); see also *id.* at 403 ("It was eminently reasonable for Congress to use convictions punishable

by imprisonment for more than a year . . . as a proxy for dangerousness.") (THOMAS, J., dissenting).

This reading is also most congruent with the notions of federalism built into the federal scheme, which empower state legislatures to decide for themselves the extent to which they will expose convicts to the federal gun control laws. The State chooses how harshly to punish its own crimes, and Congress defers to the wisdom of that localized judgment. "[W]hile states may vary on what offenses are punishable by a term exceeding one year, it does not alter Congress' intent to keep guns out of the hands of anyone that a given state determines to be a felon." *United States* v. *McKenzie*, 99 F.3d 813, 820 (7th Cir. 1996).

The government's reading is discordant with these structural values: Allowing the federal felon-in-possession statute to encompass state common law crimes for which no legislative judgment has been expressed would grant the federal government a power that has been statutorily entrusted to the States. And notably, Maryland's own State gun control laws show a disinclination to ban guns from ordinary common law misdemeanants. Maryland's gun control statute closely

tracks federal law, except that its wording prohibits gun ownership by a person convicted of a "misdemeanor in the State that carries a *statutory penalty* of more than 2 years." MD. PUBLIC SAFETY CODE ANN. §§ 5-101, 5-133 (emphasis added). Maryland's specific requirement of a "statutory" penalty strongly suggests its intent to keep common law misdemeanants outside the scope of its own gun control laws. It would make little sense to place those same individuals within the reach of a federal gun control scheme that specifically depends on the reach of State law.

Simply put, Schrader's conviction for common law misdemeanor assault was not "punishable by . . . a term exceeding one year"; it had no specified punishment criteria at all.

B. Extending Section 922(g)(1) to common law misdemeanors fundamentally alters its structure

A statute's text is not read in isolation, but in the context of its broader overall structure. A "fundamental principle of statutory construction (and, indeed, of language itself) [holds] that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U.S. 129, 132

(1993). As a leading treatise observes:

> A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed. It has also been held that the court will not only consider the particular statute in question, but also the entire legislative scheme of which it is a part.

Norman J. Singer, 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 46:5, at 189 205 (7th ed. 2008) ("SUTHERLAND") (collecting cases); see also *Castillo* v. *United States*, 530 U.S. 120, 124 (2000) ("The statute's structure clarifies any ambiguity inherent in its literal language"). But the government's construction clashes with the structure of the felon-in-possession statute, improperly expanding the prohibition's breadth beyond the statutory framework.

Section 922's overarching design reveals no intent to impose a blanket firearms ban on common law misdemeanants. As noted above, Congress has applied the firearms ban to unambiguously-specified categories of misdemeanor convictions: In 1996, Congress passed Section 922(g)(9) to prohibit gun ownership by any person convicted of a "misdemeanor crime of domestic violence." Congress did so to "close

[a] dangerous loophole" that had previously permitted many domestic abusers to own firearms—*i.e.*, those whose domestic abuse crimes had not resulted in felony convictions. *Hayes*, 555 U.S. at 426. Congress's explicit reference to this special category of misdemeanor convictions shows that when it wants to reach beyond traditional felonies, it does so clearly. Without a similarly clear statement here, the government should not be permitted to elevate Schrader's conviction for ordinary assault and battery to the same level as a conviction for domestic violence assault and battery—the aggravated category of misdemeanor offenses that Congress has chosen to address.

A "well established principle of statutory interpretation [holds] that the law favors rational and sensible construction." 2A SUTHERLAND at § 45:12, 94-99.

> [I]t has been called a golden rule of statutory interpretation that, when one of several possible interpretations produces an unreasonable result, that is a reason for rejecting that interpretation in favor of another which would produce a reasonable result.

Id. Accordingly, the Supreme Court's most recent pronouncements on the federal firearms statutes further emphasize context-oriented constructions over hyperliteral ones.

Two terms ago, the Court decided *Hayes*, supra, 555 U.S. 415, interpreting the federal firearms ban on a person convicted of a "misdemeanor crime of domestic violence." That term is statutorily defined to include (among other things) any offense that "has, as an element, the use . . . of physical force . . . committed by a [domestic partner]." 18 U.S.C. § 921(a)(33)(A). Hayes—who had been convicted in West Virginia of battery against his spouse—attempted to argue that a predicate offense must have, as a discrete element, the requirement of a domestic relationship. *Hayes*, 555 U.S. at 419-20. Because the crime of battery is not specifically limited to domestic situations, Hayes argued, his conviction for battery against his wife should not trigger the statute. *Id*. The Court rejected this argument, concluding that limiting "misdemeanor crime[s] of domestic violence" to only those that have a domestic relationship as an actual element of the offense would not be a reasonable interpretation of a statute aimed at keeping firearms away from domestic violence situations. *Id*. at 426-29.

The Court continued this theme in *Johnson* v. *United States*, 130 S. Ct. 1265 (2010), interpreting a provision of the federal Armed Career

Criminal Act that imposes an enhanced sentence on any person who illegally possesses a firearm after having three or more convictions for a "violent felony." 18 U.S.C. § 924(e)(1). To qualify as a violent felony, a predicate crime must have an element of "physical force"—a term undefined by the statute. The government had urged the Court to adopt a broad common law definition, which would have included "even the slightest offensive touching." *Johnson*, 130 S. Ct. at 1271. But the Court disagreed, reasoning that a "violent felony" must include some aspect of violent force, and that it made little sense to borrow a common law misdemeanor definition of force for purposes of defining a "violent felony." *Id*.

In rejecting the government's broad proposed construction, the Court cautioned that "[u]ltimately, context determines meaning, and we do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense." *Id*. at 1270 (citations and quotations omitted). Critically, the Court observed,

> It is significant, moreover, that the meaning of "physical force" the Government would seek to import into this definition of "violent felony" is a meaning derived from a common-law *misdemeanor* . . . It is unlikely that Congress would select as a term of art defining

> "violent felony" a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor.

Id. at 1271-72 (emphasis in original).

In much the same way here, the government's sweeping interpretation of the "felon-in-possession" statute produces the highly counterintuitive result of lumping all ordinary common law misdemeanants into a heightened category reserved for felons and domestic abusers.

C. Congress never considered disarming misdemeanants at common law

> Some courts look to the legislative purpose of a statute in cases
>
> where the effect of a statute on the situation at hand is unclear either because the situation was unforeseen at the time when the act was passed, or the statutory articulation of the rule or policy is so incomplete that it cannot clearly be said to speak to the situation in issue.

2A SUTHERLAND § 45:9, at 59. In interpreting a statute, a court should "adopt that sense of words which best harmonizes with [the statute's] context and promotes [the] policy and objectives of [the] legislature." *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221, n.10 (1991) (citing *United States* v. *Hartwell*, 73 U.S. 385 (1868)). With respect to Section

922(g)(1), those objectives did not include dispossessing ordinary common law misdemeanants of their firearms rights.

Although the use of legislative history as a general tool of statutory construction sometimes evokes controversy, even noted textualists have sanctioned its use for the narrow purpose of verifying that an untenable proposed statutory construction was in fact never contemplated by the legislature.

> We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the [word at issue] that avoids this consequence . . . I think it entirely appropriate to consult all public materials, including the background of [the rule at issue] and the legislative history of its adoption, *to verify that what seems to us an unthinkable disposition . . . was indeed unthought of*, and thus to justify a departure from the ordinary meaning of the [word at issue]. For that purpose, however, it would suffice to observe that counsel have not provided, nor have we discovered, a shred of evidence that anyone has ever proposed or assumed such a bizarre disposition.

Green v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (SCALIA, J., concurring) (emphasis added); see also *Small*, 544 U.S. at 393 ("The statute's lengthy legislative history confirms the fact that Congress did not consider whether foreign convictions should or should not serve as a

predicate to liability under the provision here at issue.") (holding such foreign convictions inapplicable under the felon-in-possession statute).

The recorded legislative history behind the Federal Gun Control Act of 1968 act is fairly sparse. As the Supreme Court has explained, the law was "added by way of a floor amendment . . . and thus was not a subject of discussion in the legislative reports." *Lewis* v. *United States*, 445 U.S. 55, 62 (1980); see also *United States* v. *Batchelder*, 442 U.S. 114, 120 (1979); *Scarborough* v. *United States*, 431 U.S. 563, 569-570 (1977); *United States* v. *Bass*, 404 U.S. 336, 344, and n.11 (1971). However, "[w]hat little legislative history there is that is relevant reflects an intent to impose a firearms disability on any felon based on the fact of conviction." *Lewis*, 445 U.S. at 62 (emphasis added). Senator Long, who introduced and directed the passage of the Act, explained:

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

114 Cong. Rec. 14773 (1968); see also *Lewis*, 445 U.S. at 62-63

("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight.") (citation omitted).

Much like the situations presented in *Green* and *Small*, the legislative history behind § 922(g) ban reveals no evidence that its enacting Congress contemplated the bizarre and (as outlined below) unconstitutional result of banning firearm possession from anyone ever convicted of a common law misdemeanor, simply for its lack of sentencing criteria. To the contrary, Congress appears to have focused squarely on keeping guns away from the traditional categories of dangerous felons.

D. The Fourth Circuit's approach

The Fourth Circuit appears to be the only circuit court to have considered the applicability of the federal "felon-in-possession" scheme to common law misdemeanants. In 1973, a panel of that court concluded that a Maryland conviction for common law misdemeanor assault and battery was not "properly classified as a 'felony' within the meaning of the federal statute." *United States* v. *Schultheis*, 486 F.2d 1331, 1335 & n.2 (4th Cir. 1973). Observing that the statute is "silent

regarding its application to common law convictions," the court held that it would look to the actual sentence imposed to appraise the seriousness of the conviction in such cases. *Id.* at 1334. Thus, only a common law misdemeanor conviction resulting in an actual sentence of two years or greater would trigger the statute.

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

"punishable by" *any* specified punishment criteria), but nevertheless concluded that the "plain wording of the statute applies equally when the potential term of imprisonment is established by the common law and limited only by the prohibition on cruel and unusual punishments as when the range of possible terms of imprisonment is determined by a statute." *Id.* at 204.

Dissenting, Judge Widener warned that the majority "would blindly lump into the same category the most trivial and the most heinous assaults, thereby defeating the clear Congressional desire to exclude minor transgressions of the law from the sweep of" the statute. *Id.* at 205 (WIDENER, J., dissenting) (citing *Schultheis*, 486 F.2d at 1333).

While *Coleman* is not controlling in this jurisdiction, it should not carry persuasive value either. For one, the *Coleman* majority engaged in only a cursory analysis of the statute's text, dedicating just three sentences to the issue. See *id.* at 203-04. *Coleman* was also decided without the benefit of the Supreme Court's recent opinions in *Johnson* and *Hayes*, both of which emphasize context-oriented interpretations of the federal gun laws over hyperliteral ones. And *Coleman* also

anteceded the 1996 congressional expansion of the felon-in-possession ban to misdemeanor crimes of domestic violence, which further confirmed Congress' intent to reach only narrow classes of misdemeanants.

Perhaps most significantly, though, *Coleman* predated the Supreme Court's landmark *Heller* decision, which confirmed that the Second Amendment protects an individual right to keep and bear arms. As outlined below, *Coleman*'s broad interpretation of the statute would raise serious Second Amendment issues.[6]

"[T]he fact that one among alternative constructions would involve serious constitutional difficulties is reason to reject that interpretation in favor of another." 2A SUTHERLAND § 45.11, at 87 (collecting cases). The First Circuit recently followed this very doctrine in the Second Amendment context, narrowly construing Section 922(g)(4), which bans

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[6] Notably, no post-*Heller* decision within the Fourth Circuit has cited *Coleman* to affirm a firearms ban against a common law misdemeanant. That court has, however, begun applying Second Amendment scrutiny to firearms bans—even those implicating the more serious misdemeanor crimes of domestic violence. See *United States* v. *Chester*, 628 F.3d 673, 674 (4th Cir. 2010). Thus, *Coleman*'s continuing viability in the wake of *Heller* is reasonably questionable even within the Fourth Circuit.

firearm possession by persons who have been "committed to a mental institution." *United States* v. *Rehlander*, 666 F.3d 45 (1st Cir. 2012). Explaining that "statutes are to be read to avoid serious constitutional doubts" if possible, *id.* at 49, the court limited Section 922(g)(4)'s reach to exclude temporary hospitalizations that result from ex parte hearings without the benefit of a formal judicial finding of mental incompetence. *Id.* at 48-49. The same narrowing principles should apply here.

E. The rule of lenity further counsels against broad construction

Finally, the government's broad reading of the "felon-in-possession" scheme is further undermined by the traditional rule of lenity, which cautions that any nonobvious reading of a penal statute should be strictly construed against the government:

> It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed. This simply means that words are given their ordinary meaning and that any reasonable doubt about the meaning is decided in favor of anyone subjected to a criminal statute. This canon of interpretation has been accorded the status of a constitutional rule under principles of due process, not subject to abrogation by statute.

3 SUTHERLAND § 59:3, at 167-75 (collecting cases); see also *id*. at 187-88 (discussing the Supreme Court's adoption of the rule of lenity).

"[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348. Thus, courts construe ambiguous criminal statutes narrowly to avoid "making criminal law in Congress's stead." *United States* v. *Santos*, 553 U.S. 507, 514 (2008).

> In various ways over the years, we have stated that when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.

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

Section 922(g) is a criminal provision, carrying penalties of up to 10 years imprisonment. 18 U.S.C. § 924(a)(2). Because Congress cannot be said to have contemplated (let alone clearly elucidated) the application of § 922(g) to common law misdemeanants, the government's broad reading would effectively sidestep the legislative process.

* * *

Congress enacted Section 922(g)(1)'s felon-in-possession scheme to disarm the nation's most dangerous criminals, not the least serious of misdemeanants.

II. DISARMING INDIVIDUALS CONVICTED OF COMMON LAW MISDEMEANORS, WITHOUT MORE, VIOLATES THE SECOND AMENDMENT

Federal appellate courts have repeatedly recognized that Section 922(g)(1) may have unconstitutional applications. "We do 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).

> [A] felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen. Similarly, a court might find that a felon whose crime of conviction is decades-old poses no continuing threat to society.

Barton, 633 F.3d at 174 (citing *Britt* v. *State*, 363 N.C. 546, 681 S.E.2d 320 (N.C. 2009)). "[W]e recognize that § 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent . . ." *United States* v. *Williams*, 616 F.3d 685, 693 (7th Cir. 2010).

While a variety of other challenges have been raised to the felon-in-possession ban and other categorical firearms disability provisions, this is apparently the first such challenge raised on behalf of individuals convicted of only a non-aggravated common law misdemeanor. So applied, the prohibition of Section 922(g)(1) cannot be constitutional.

A. Barring common law misdemeanants from having firearms is not presumptively lawful

The Supreme Court cautioned that nothing in *Heller* "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons," which the Court termed "presumptively lawful." *Heller*, 554 U.S. at 626-27 & n.26. But it does not follow that the government can label any infraction a "felony," and proceed to disarm whomever it wants. History and tradition informed the Supreme Court's view of the Second Amendment, and they inform the content of "longstanding" prohibitions. Moreover, even firearm prohibitions based on actual felonies trigger only a presumption of constitutionality, not an absolute and universal guarantee of constitutionality.

> [T]here are two ways of conceptualizing presumptively lawful restrictions. First, these restrictions may be so ingrained in our understanding of the Second Amendment that there is little doubt

> that they withstand the applicable level of heightened scrutiny. Alternatively, the right itself can be seen as failing to extend into areas where, historically, limitations were commonplace and well accepted.

Woollard v. *Sheridan*, No. 10-2068-BEL, 2012 U.S. Dist. LEXIS 28498, at *19 (D. Md. Mar. 2, 2012); see also *United States* v. *Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("the identified restrictions are presumptively lawful [either] because they regulate conduct outside the scope of the Second Amendment," or "because they pass muster under any standard of scrutiny.")[7]

"The academic writing on the subject of whether felons were excluded from firearm possession at the time of the founding is inconclusive at best . . ." *Williams*, 616 F.3d at 692 (citation and quotation omitted); compare Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1360 61 (2009) ("[T]here is every reason to believe

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[7]In endorsing the categorical approach to *Heller*'s "presumptively lawful" restrictions, the Third Circuit noted that at least one item on the Supreme Court's list could not be given categorical scope construction. "Commercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment under this reading . . . Such a result would be untenable under *Heller*." *Marzzarella*, 614 F.3d at 92 n.8.

that the Founding Fathers would have deemed persons convicted of any of the common law felonies not to be among "the [virtuous] people" to whom they were guaranteeing the right to arms.") (citations omitted); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1984); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA L. REV. 65, 96 (1983); *and* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 714-28 (2009) (questioning the historical compatibility of blanket felon dispossession laws with the right to keep and bear arms); Adam Winkler, *Heller's Catch 22*, 56 UCLA L. REV. 1551, 1562-65 (2009) (same).

In any event, this Court follows the more permissive, non-categorical approach, under which a presumption of lawfulness for longstanding prohibitions can be overcome under heightened scrutiny analysis. In *Heller* v. *District of Columbia* ("*Heller II*"), 671 F.3d 1244, 2011 U.S. App. LEXIS 20130 (D.C. Cir. 2011), this Court offered that the

Supreme Court had "identified . . . historical limitations upon the scope of the right protected by the Second Amendment," and "*also* provided a list of some 'presumptively lawful regulatory measures,'" including the felon prohibition. *Id.* at *16-*17 (emphasis added). This Court upheld Washington, D.C.'s gun registration requirement "because it is longstanding, hence 'presumptively lawful,' and the presumption stands unrebutted." *Id.* at *18-*19.

Thus, even if common law misdemeanants were "felons," and Section 922(g)(1) reached such individuals, *Heller*'s "presumptively lawful" dicta would not be the final word as to the provision's application against them. Of course, common law misdemeanants are not felons. Some limiting principle is in play when it comes to the term "felony," and that principle is derived from the same history that informed the traditional scope and permissible regulation of the right to bear arms. As noted supra, Section 922(g)(1) does not even employ the term "felony," and does not purport to be a formal classification tool for distinguishing between felonies and misdemeanors, leaving that work to state law.

The offense of which Schrader was convicted is ancient. Yet in ancient times, and indeed arguably through 1998's *Coleman* decision, there existed no historical correlation between Schrader's simple assault and battery and a felony level offense. Ordinary fistfights have never been viewed on par with serious felony offenses. For example, the Ninth Circuit held that a college student's initiation of a fistfight with another student who had yelled a racial epithet at him was an improper basis for revoking his federal education aid.

> Green's offense was not a crime of a 'serious nature' contemplated by Congress. Fist fights between male college students have long been a part of the undergraduate scene and are not generally considered serious; prosecutions are very rare. A fist fight cannot be escalated into a serious crime unless we can say that the aggressor intended to provoke consequences beyond his personal feud with his fellow student.

Green v. *Dumke*, 480 F.2d 624, 630 (9th Cir. 1973).

And while Plaintiffs do not condone fistfights, notable Americans not often grouped with "felons" have transgressed in this fashion. Paul Revere, for example, was sentenced to a modest fine and costs at age 26 for his involvement in a fistfight with his cousin's husband, as described in a Pulitzer-winning biography:

> [O]n the eleventh day of May, 1761, the two embattled young cousins, with their witnesses, appeared before Mr. Justice Richard Dana of the Court of Common Pleas. At first Paul pleaded not guilty, but 'after a full hearing' the Judge noted down 'it appears that he is guilty.' . . . He gave Paul Revere as small a fine as was consistent with any decency—six shillings, sevenpence, and costs. He also asked that two reputable citizens go bond for Paul Revere's good behavior until the next general session.

Esther Forbes, PAUL REVERE AND THE WORLD HE LIVED IN 67, 69 (1st Mariner Books ed. 1942).

At common law, all forms of battery were classified as misdemeanor offenses. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 216-18 (1769). The felon classification was historically reserved for violent and extreme crimes that were frequently punishable by death.

> Amongst indictable crimes, the common law singled out some as being so conspicuously heinous that a man adjudged guilty of any of them incurred—not as any express part of his sentence but as a consequence that necessary ensued upon it—a forfeiture of property, whether of his lands or of his goods or of both (in the case of treason). Such crimes came to be called "felonies." The other, and lesser, crimes were known as "transgressions" or "trespasses," and did not obtain their present name of misdemeanours until a much later date. A felony is, therefore, a crime which either involved by common law such a forfeiture, or else has been placed by statute on the footing of those crimes which did involve it.

J.W. Cecil Turner, KENNY'S OUTLINES OF CRIMINAL LAW 93 (16th ed. 1952).

To be sure, *Heller* noted its list of presumptively lawful prohibitions was non-exhaustive. *Heller*, 554 U.S. at 627 n.26. But if the Court were inclined to exclude all convicts—felons and misdemeanants alike—from the protection of the Second Amendment, it would be unusual to limit its discussion to felons.

None of this is to suggest that Congress cannot disarm particularly dangerous misdemeanants, including common law misdemeanants, such as individuals convicted of domestic violence offenses. 18 U.S.C. § 922(g)(9).[8] But if such prohibitions are constitutional, they are constitutional because they survive constitutional scrutiny, not necessarily because felons are categorically beyond the Second

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[8] *Hayes* confirms that courts may look to the intrinsic facts of a battery conviction to discern whether the crime involved a domestic relationship per Section 922(g)(9). *Schultheis* suggests another limiting principle, as the severity of the sentence received can be a useful proxy for the severity of the criminal misconduct. Indeed, the nation's most populous state codifies many "wobbler" offenses, convictions under which are classified as misdemeanors or felonies based upon the sentence actually imposed. *Garcia-Lopez* v. *Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003); Cal. Penal Code § 17(b)(1).

Amendment, and certainly not because *Heller*'s reference to "felons" actually meant "felons, plus whomever else the government elects to disarm."

B. Section 922(g)(1)'s application against non-aggravated common law misdemeanants is subject to heightened means-ends scrutiny

As this Court demonstrated in striking down the District of Columbia's handgun and functional firearms bans, some Second Amendment claims can be disposed of without resort to means-ends scrutiny. The District's handgun ban was struck down because it barred a category of protected arms. "Once it is determined—as we have done–that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." *Parker* v. *District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (citation omitted). The District's functional firearms ban was struck down for flatly conflicting with the Second Amendment's core self-defense guarantee. "[The provision] amounts to a complete prohibition on the lawful use of handguns for self-defense. As such, we hold it unconstitutional." *Id.* at 401.

The Supreme Court confirmed the practice. "Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629. The District's functional firearms ban "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* at 630. "Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right . . . are categorically unconstitutional." *Ezell* v. *City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011).

Yet Section 922(g)(1) does not broadly prohibit a core Second Amendment activity, or a category of arguably protected arms. Rather, it targets only specified classes of law-breakers. Moreover, this case questions only one application of that provision—against non-aggravated common law misdemeanants. To resolve such claims, *Heller II*'s two-step doctrinal approach, borrowed largely from the fundamental rights jurisprudence of the First Amendment, provides the means of analysis. *Heller II*, 2011 U.S. App. LEXIS 20130 at *16-17; accord *Ezell*, 651 F.3d at 702-03; *Chester*, 628 F.3d at 680;

Marzzarella, 614 F.3d at 89; *United States* v. *Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010).

The first step of the analysis asks whether the challenger's claim falls within the Second Amendment's scope. *Heller II*, 2011 U.S. App. LEXIS 20130 at *17. Courts typically do this by examining how closely the challenged action entrenches upon a "core" Second Amendment right, such as the right of "law abiding, responsible citizens to use arms in defense of hearth and home" the Supreme Court identified in *Heller*.[9]

If the government can demonstrate that the challenged action falls outside the scope of the Second Amendment altogether, then the analysis goes no further. Otherwise, the second step requires application of the appropriate level of judicial scrutiny. *Heller II,* at *17 & *28-32; accord *Ezell*, 651 F.3d at 703; *Chester*, 628 F.3d at 681-682; *Marzzarella*, 614 F.3d at 89; *Reese*, 627 F.3d at 800-801.

[9] *Heller*, 554 U.S. at 635; see also *United States* v. *Rene E.*, 583 F.3d 8, 12-16 (1st Cir. 2009) (conducting a historical analysis and concluding that juveniles fall outside the scope of the Second Amendment's core protections).

C. Applying a lifetime firearms prohibition on the basis of a common law misdemeanor conviction implicates the Second Amendment's scope

In this circuit, the initial scope inquiry is further guided by whether the challenged government action is one of "longstanding" tradition. *Heller II*, 2011 U.S. App. LEXIS 20130 at *17-18. Firearms regulations "long [] accepted by the public . . . [are] not likely to burden a constitutional right." *Id.* at *18. However, "[a] plaintiff may rebut this presumption by showing the regulation does have more than a de minimis effect upon his right." *Id.* By contrast, "[a] requirement of newer vintage is not . . . presumed to be valid." *Id.*

1. The government cannot demonstrate a "longstanding" tradition of banning persons convicted of non-aggravated common law misdemeanors from purchasing or possessing firearms

Whether looking to the time of the Second Amendment's historical origins or to more contemporary American history, the government can demonstrate no longstanding tradition of banning non-aggravated common law misdemeanants from possessing firearms.

Assuming *arguendo* that Section 922(g)(1) may be construed to cover uncodified misdemeanor offenses at all, it is surely an uncommon

practice with little precedent. As explained supra, the Fourth Circuit appears to be the only federal jurisdiction ever confronted with the issue, and in only a handful of cases. Indeed, when the issue first arose in 1973, the court found it necessary to adopt a unique rule for "the peculiar characteristics of Maryland's common law simple assault," *Schultheis*, 486 F.2d at 1335, n.2, which looked to "the seriousness of the crime as evidenced by the actual sentence imposed." *Id*. at 1335. This remained the Fourth Circuit's law for a quarter century until it was overruled en banc in 1998. *Coleman*, 158 F.3d at 203-04.

Thus, the government's blanket disarmament of common law misdemeanants under § 922(g)(1) is a practice approved by only one regional circuit, which itself only began allowing it in 1998 after 25 years of internal disagreement. Given this extended judicial struggle, it would be difficult to describe it as a practice that has "long been accepted by the public." *Heller II*, 2011 U.S. App. LEXIS 20130 at *18.

Moreover, while not challenging § 922(g)(1) on its face, Plaintiffs note that current statutory scheme was enacted in 1968, and the first statutory usage of the language "crime punishable by imprisonment for

a term exceeding one year" did not appear until 1961. JA 161. Prior to that, federal firearm disqualifications were governed by the Federal Firearms Act of 1938, which covered only an enumerated list of very serious aggravated felonies.[10] Thus, even Section 922(g) on the whole is only eight years older than the 1976 District of Columbia ban struck down by the Supreme Court in *Heller*—all without any particular focus on its age at all.[11] See *Heller*, 554 U.S. at 693 (BREYER, J., dissenting) (observing that the District had "enacted the statute in 1976").

2. The government's application of a lifetime firearms ban against Schrader has "more than a de minimis effect" on his core Second Amendment rights

Even were this Court to find the government's gun ban policy against common law misdemeanants "longstanding," any presumption of validity would be overcome by the "more than [] de minimis effect"

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[10]These were "murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year." JA 158.

[11] The 1982 Chicago firearms ban at issue in *McDonald* was also struck down by the Court without any particular discussion of its age. *McDonald*, 130 S. Ct. at 3026.

that § 922(g)(1)'s total ban on firearms possession has on Schrader's core Second Amendment rights. Because the ban is directly blocking his efforts to purchase and possess firearms for self defense, it goes directly to the core Second Amendment right of "law abiding, responsible citizens to use arms in defense of hearth and home" identified by the Supreme Court in *Heller*. 554 U.S. at 635.

Accordingly, the analysis must proceed to the next step of determining whether the firearms ban can withstand the appropriate level of scrutiny demanded by the Second Amendment.

D. Imposition of complete lifetime firearm disabilities on the basis of common law misdemeanor convictions warrants strict scrutiny review

"[T]he Supreme Court often applies strict scrutiny to legislation that impinges upon a fundamental right . . . [but it] has not said, however, and it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake." *Heller II*, at *28. "As with the First Amendment, the level of scrutiny applicable under the Second Amendment surely 'depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the

right.'" *Id.* at 30 (citations omitted); *Marzzarella*, 614 F.3d at 96-97; *United States* v. *Masciandaro,* 638 F.3d 458, 470 (4th Cir. 2011); *Williams*, 616 F.3d at 692 (no "level of scrutiny applicable to every disarmament challenge . . .").

> [A] severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end . . . laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.

Ezell, 651 F.3d at 708.

The Fourth Circuit applies strict scrutiny to cases implicating the Second Amendment's fundamental core. "[W]e assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny." *Masciandaro*, 638 F.3d at 470; see also *Bateman* v. *Perdue*, No. 5:10-cv-265-H, 2012 U.S. Dist. LEXIS 47336, *15-16 (E.D.N.C. Mar. 29, 2012) (applying strict scrutiny to North Carolina law that would prohibit citizens from buying guns and ammunition, and carrying firearms outside their homes during times of declared emergency).

But that court applies intermediate scrutiny where the "claim is not within the core right identified in *Heller*—the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense." *Chester*, 628 F.3d at 683. "[I]ntermediate scrutiny is more appropriate than strict scrutiny for [domestic violence misdemeanant] and similarly situated persons." *Id.*; see also *United States* v. *Carter*, 669 F.3d 411 (4th Cir. 2012) (marijuana user); accord *United States* v. *Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (Second Amendment claimant's propensity for law-breaking may determine the standard of review).

Likewise, the Seventh Circuit applied intermediate scrutiny in reviewing the constitutionality of the federal firearms prohibition directed at domestic violence misdemeanants. *Skoien*, 614 F.3d 638. But enjoining Chicago's ban on the operation and use of gun ranges, the Seventh Circuit concluded that "a more rigorous showing . . . should be required, if not quite 'strict scrutiny.'" *Ezell*, 651 F.3d at 708.

In contrast, the burden here is substantial, implicating the core rights of responsible, law-abiding citizens to exercise all firearms-

related Second Amendment rights.[12] The challenged regulation does not function as one restricting the right as to time, place, or manner, but generally, at all times and places. Given the Second Amendment's status as a fundamental right, and given the prevailing trend among this and other circuit courts of guiding their Second Amendment jurisprudence with principles from the First Amendment, there is no apparent basis for evaluating the government's complete disarmament of Schrader—a person not historically or traditionally disqualified from its protective scope—under a standard lower than strict scrutiny. Strict scrutiny is thus the most applicable standard. After all, the Second Amendment secures a fundamental right, and absent any of the foregoing reasons for reducing the standard of review, "classifications affecting fundamental rights are given the most exacting scrutiny." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) (citation omitted).

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[12]Schrader may have broken the law during one fistfight in 1968, but his lack of police interactions before and since, save for one traffic offense, speaks to his law-abiding nature. The rarity of his transgression, and its lack of severity, contrast sharply with the criminal records presented in cases such as *Chester* and *Skoien*. It would plainly be inaccurate to categorize all individuals with one common law misdemeanor offense as not law-abiding.

E. The application of a firearms ban against non-aggravated common law misdemeanants cannot survive review under any appropriate level of judicial scrutiny

As applied against Schrader, the government's categorical lifetime firearms ban cannot survive any appropriate standard of review, whether strict or intermediate scrutiny.

1. A complete firearms ban applied to an ordinary common law misdemeanant like Schrader cannot survive strict scrutiny review

Applying strict scrutiny, the government's application of an absolute ban on Schrader's right to possess a firearm cannot be justified under the Second Amendment. A law subject to strict scrutiny must be narrowly tailored to achieve a compelling governmental interest. See, e.g., *Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003); *Bateman*, 2012 U.S. Dist. LEXIS 47336 at *12-13. And while "[s]trict scrutiny is not strict in theory, but fatal in fact," *Grutter*, 539 U.S. at 326 (internal quotation marks omitted), it is nevertheless an "exacting standard and deliberately difficult to pass, in deference to the primacy of the individual liberties the Constitution secures." *United States* v. *Skoien*, 587 F.3d 803, 811 n.5 (7th Cir. 2009), *vacated*, 2010 U.S. App. LEXIS

6584 (2010). The reviewing court "presume[s] the law is invalid, and the government bears the burden of rebutting that presumption." *Marzzarella*, 614 F.3d at 99 (citing *United States* v. *Playboy Entm't Group*, 529 U.S. 803, 817 (2000)).

In the First Amendment context, for example, a court applying strict scrutiny asks whether "the challenged regulation is the least restrictive means among available, effective alternatives." *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004) (emphasis added). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy Entm't Group*, 529 U.S. at 813. Strict scrutiny requires a "detailed examination, both as to ends and as to means." *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007) (quotation and citation omitted). And in an as-applied challenge, the challenger should also be permitted to "present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections." *Barton*, 633 F.3d at 174. For example,

> a felon convicted of a minor, non violent crime might show that he is no more dangerous than a typical law abiding citizen. Similarly, a

> court might find that a felon whose crime of conviction is decades old poses no continuing threat to society. The North Carolina Supreme Court did just that in *Britt* v. *State*, 363 N.C. 546, 681 S.E.2d 320 (N.C. 2009), finding that a felon convicted in 1979 of one count of possession of a controlled substance with intent to distribute had a constitutional right to keep and bear arms, at least as that right is understood under the North Carolina Constitution. *Id*. at 323.

Id.

Here, the government seeks to apply against Schrader an absolute ban on the possession of any firearm for any reason. Far from being narrowly tailored, the firearms ban imposed on Schrader is essentially the most restrictive regulatory scheme imaginable. The government has made no individualized finding that his possession of a firearm presents any sort of danger to society.

Moreover, the ban is for life, and provides no effective vehicle for reacquiring his rights. While the law theoretically allows an affected party to petition the Attorney General for relief of the disability, 18 U.S.C. § 925(c), this "relief provision has been rendered inoperative," as Congress has repeatedly barred the Attorney General from using appropriated funds to investigate or act upon any such petitions. *Logan*, 552 U.S. at 28 n.1. This leaves Schrader's Second Amendment

right entirely eviscerated, with no effective means of restoration. Such a scheme is plainly incompatible with the requirements of strict scrutiny. Cf. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited") (quotations and citations omitted).

The government also has no "compelling interest" for dispossessing a non-aggravated misdemeanant like Schrader of his firearms rights. The government has made no finding that Schrader's possession of a firearm poses any danger to society at all. To the contrary, its application of the federal gun ban against him is based on a single non-aggravated misdemeanor conviction that occurred over forty years ago when he was a 20-year-old serviceman. That such transgressions warrant permanent disarmament has escaped understanding for centuries.

2. A complete firearms ban applied to an ordinary common law misdemeanant like Schrader fails intermediate scrutiny review

Intermediate scrutiny requires the government to show the challenged action is "'substantially related to an important governmental objective.'" *Heller II,* at *33 (quoting *Clark*, 486 U.S. at 461). While not as rigorous as strict scrutiny, intermediate scrutiny is nonetheless an exacting test that requires "a tight fit" between the regulation and the important or substantial governmental interest—one "that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id*. (quoting *Bd. of Trs.* v. *Fox*, 492 U.S. 469, 480 (1989)). And "[s]ignificantly, intermediate scrutiny places the burden of establishing the required fit squarely upon the government." *Chester*, 628 F.3d at 683 (citing *Fox*, 492 U.S. at 480-81). The "justification must be genuine, not hypothesized or invented post hoc in response to litigation." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996).

While intermediate scrutiny has been employed to uphold laws disarming violent or plainly dangerous people, courts have not done so

automatically. Rather, courts have usually limited the reach of their decisions, and demanded the government meet its burden to sustain even those laws whose constitutionality, or at least vast constitutional application, was never in serious doubt. In contrast, intermediate scrutiny has been used to invalidate gun laws that apply broadly to law-abiding, responsible people.

While courts typically apply intermediate scrutiny to claims by individuals with a criminal record, *see, e.g. Chester*, 628 F.3d at 682-83, they often do so acknowledging that the government may fail that standard in some applications. See *Moore*, 666 F.3d at 320; *Barton*, 633 F.3d at 174; *Williams*, 616 F.3d at 693.

The federal prohibition against individuals subject to domestic violence restraining orders, 18 U.S.C. § 922(g)(8), survived individual scrutiny because it was "temporally limited and therefore exceedingly narrow," and further "applied only to persons individually adjudged to pose a future threat of domestic abuse" after hearing and notice. *United States* v. *Mahin*, 668 F.3d 119, 125 (4th Cir. 2011) (citation omitted). "The risk of recidivism and future gun violence is . . . especially salient

with respect to persons covered by § 922(g)(8), namely those personally enjoined from committing future acts of domestic abuse." *Id.* at 126.

But the lack of thorough, due process-based assessment of dangerousness in connection with emergency hospitalizations sufficed to prompt the First Circuit to avoid construing Section 922(g)(4)'s prohibition to encompass such incidents. *Rehlander*, 666 F.3d 45. And at least on first pass in one circuit, the government failed to sustain its intermediate scrutiny burden with respect to the federal provision disarming habitual drug users, 18 U.S.C. § 922(g)(3). "To discharge its burden of establishing a reasonable fit between the important goal of reducing gun violence and the prohibition in § 922(g)(3), the government may not rely upon mere 'anecdote and supposition.'" *Carter*, 669 F.3d at 418 (citation omitted). Section 922(g)(3) is temporally limited, and is effective only for individuals while they continue to use drugs. "Nonetheless, the government still bears the burden of showing that § 922(g)(3)'s limited imposition on Second Amendment rights proportionately advances the goal of preventing gun violence." *Id.* at 419. When the government failed to adduce "any study,

empirical data, or legislative findings, [but] merely argued to the district court that the fit was a matter of common sense," the Fourth Circuit reversed and remanded a 922(g)(3) conviction. *Id.*

Applying intermediate scrutiny, the District of Maryland struck down that state's requirement that applicants demonstrate a "good and substantial reason" for seeking a gun carry permit. The requirement

> does not, for example, advance the interests of public safety by ensuring that guns are kept out of the hands of those adjudged most likely to misuse them, such as criminals or the mentally ill. It does not ban handguns from places where the possibility of mayhem is most acute . . . It does not attempt to reduce accidents, as would a requirement that all permit applicants complete a safety course. It does not even, as some other States' laws do, limit the carrying of handguns to persons deemed "suitable" by denying a permit to anyone "whose conduct indicates that he or she is potentially a danger to the public if entrusted with a handgun."

Woollard, at *30-*31 (citation omitted).

The *Bateman* court applied strict scrutiny in striking down North Carolina's various gun restrictions imposed during declared "states of emergency." Yet in doing so, the court indicated that the statutes could not survive time, place and manner analysis, ordinarily a level of intermediate scrutiny. The emergency declaration prohibitions

> do not target dangerous individuals or dangerous conduct. Nor do they seek to impose reasonable time, place and manner restrictions by, for example, imposing a curfew to allow the exercise of Second Amendment rights during circumscribed times. Rather, the statutes here excessively intrude upon plaintiffs' Second Amendment rights by effectively banning them (and the public at large) from engaging in conduct that is at the very core of the Second Amendment at a time when the need for self-defense may be at its very greatest . . . .

Bateman, 2012 U.S. Dist. LEXIS 47336 at *17-*18 (citation omitted).

Another gun regulation recently held to fail intermediate scrutiny was Massachusetts' provision disarming resident aliens. *Fletcher* v. *Haas*, No. 11-10644-DPW, 2012 U.S. Dist. LEXIS 44623 (D. Mass. Mar. 30, 2012). Again, to survive intermediate scrutiny, the court demanded some particularized demonstration that the individuals targeted by the law are dangerous.

> Although Massachusetts has an interest in regulating firearms to prevent dangerous persons from obtaining firearms . . . the statute here fails to distinguish between dangerous non-citizens and those non-citizens who would pose no particular threat if allowed to possess handguns. Nor does it distinguish between temporary non-immigrant residents and permanent residents. Any classification based on the assumption that lawful permanent residents are categorically dangerous and that all American citizens by contrast are trustworthy lacks even a reasonable basis.

Id. at *46-*47.

Section 922(g)(1)'s application to non-aggravated common law misdemeanor offenses plainly fails intermediate scrutiny. The 1968 enactment of the current felon-in-possession scheme pre-dated *Heller*, and did not appear to reflect any considerations at all for the people's fundamental right to keep and bear arms. Congress' relevant findings of fact appear to have focused instead on potential threats to interstate commerce and other issues unrelated to the Second Amendment. See, e.g., *Scarborough*, 431 U.S. at 571 n.10 (1977) (quoting the congressional findings of fact associated with the Federal Gun Control Act of 1968). Intermediate scrutiny will not permit the government to suddenly invent post hoc justifications for banning the possession of firearms by common law misdemeanants, a circumstance not apparently considered by Congress.

Moreover, Schrader and other similarly situated individuals have been entirely stripped of their core Second Amendment rights to "to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. The government has made no individualized findings that such individuals, who may often be quite law-abiding, pose a threat to public safety.

CONCLUSION

The government's imposition of a categorical, lifetime firearms ban against Schrader and others convicted only of minor transgressions at common law finds no basis in federal law and violates their Second Amendment right to keep and bear arms. Plaintiffs respectfully seek reversal of the district court with instructions to enter summary judgment for the removal of Schrader's firearms disability from the NICS computer database and for an injunction against the government's enforcement of Section 922(g)(1) for non-aggravated common law misdemeanor convictions.

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Respectfully submitted,

Alan Gura
Thomas M. Huff
GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, VA 22314
703.835.9085/703.997.7665

By: /s/ Alan Gura
Alan Gura

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,159 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel Wordperfect X4 in 14-point Century Schoolbook font.

/s/ Alan Gura
Alan Gura

CERTIFICATE OF SERVICE

I certify that on this 20th day of April, 2012, I filed the foregoing Brief electronically with the Clerk of the Court using the CM/ECF System. On April 20th, 2012, I served two true and correct copies of the foregoing Brief on the following by Federal Express:

Jane M. Lyons
United States Attorney's Office
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 514-7161

I further certify that on this, the 20th day of April, 2012, I served the electronic copy of the foregoing Brief on above-listed counsel by email to jane.lyons@usdoj.gov

The Brief was also filed this day by dispatch to the Clerk via Federal Express.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 20th day of April, 2012.

/s/ Alan Gura
Alan Gura

Counsel for Plaintiffs-Appellants

STATUTORY ADDENDUM

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U.S. CONST, AMEND. II states:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

18 U.S.C. § 922(g)(1) states:

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 921(a)(20) states:

> (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.