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)

REPLY 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

Dated: June 19, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

**Authorities upon which we chiefly rely are marked with asterisks*

Statutes and Court Rules

Other Authorities

GLOSSARY

Govt. Opp.: Brief of Appellees

JA: Joint Appendix

NICS: National Instant Criminal Background Check database

Pl. Br.: Appellants' Brief

REPLY BRIEF

SUMMARY OF ARGUMENT

The government submits the alternative statutory interpretation that would support its position, but does not actually respond to most of Plaintiffs' arguments. Indeed, the government fails to cite, much less discuss, the Fourth Circuit's decision in *United States* v. *Schultheis*, 486 F.2d 1331 (4th Cir. 1973), which directly contradicted the government's position in that circuit for a quarter-century. *Schultheis*, and Judge Widener's dissent in *United States* v. *Coleman*, 158 F.3d 199 (4th Cir. 1998) (en banc), warrant meaningful attention, especially considering the cursory treatment given the issue in *Coleman*.

Plaintiffs submit that careful consideration of the statutory issue—consideration now required by the recognition that a fundamental constitutional right is at stake—counsels reversal. The government simply fails to establish its statutory authority to impose a firearms ban on Schrader. Although it points to 18 U.S.C. § 922(g)(1)—which bans firearm possession by any person previously convicted of a "crime punishable by imprisonment for a term exceeding one year," with an exception for any State misdemeanor punishable by

imprisonment for two years or less—Schrader's only conviction is for a simple uncodified misdemeanor offense that had *no* statutory punishment criteria at all. The text, structure, and legislative history of the scheme all indicate that Congress never intended or contemplated the reading the government asserts in this case.

The government also fails to justify its imposition of a lifetime firearms ban against Schrader under the Second Amendment. The government attempts a threshold argument that Schrader's 1968 misdemeanor conviction disqualifies him entirely from the Second Amendment's protective scope, but this is rejected by the very sources it cites and is unsupported by the historical record.

The government's alternative effort to justify the ban under elevated judicial scrutiny relies on inapposite congressional findings that pertain to dangerous felons and other heightened classes of irresponsible persons. Plaintiffs do not quarrel with the validity of such concerns, but they have little relevance to this as-applied challenge brought by Schrader—a 64-year-old Vietnam veteran whose only prior conviction was for a simple misdemeanor that occurred over four decades ago.

ARGUMENT

I. The Government Fails To Establish That Section 922 Imposes A Blanket Firearms Ban On Common Law Misdemeanants

A. The text, structure, and legislative history of Section 922(g)(1) all demonstrate that Congress neither intended nor contemplated its applicability to uncodified misdemeanor offenses

The government asserts that uncodified misdemeanor offenses fit "squarely within the ambit of Section 922(g)(1)," Govt. Opp. at 15, claiming that the statute "focuses on the maximum potential punishment" for a prior offense, and "not on whether a maximum penalty has been codified by the legislature." *Id*. at 16. But this simply assumes the government's side of a complicated statutory issue that has divided the Fourth Circuit for nearly 40 years.

All parties acknowledge that the text of 18 U.S.C. § 922(g)(1) bans firearm possession by any person previously convicted of a "crime punishable by imprisonment for a term exceeding one year," with an exception for any State misdemeanor punishable by imprisonment for two years or less. 18 U.S.C. §§ 922(g)(1) & 921(a)(20). The question here is how this framework applies to convictions for state common law

misdemeanors—uncodified offenses for which *no* statutorily-specified punishment criteria exists at all.

The government urges that the scheme be construed to simply cover *all* common law misdemeanors. Under the government's view, any misdemeanor that lacks statutory punishment criteria will be per se classifiable as a disqualifying offense; the absence of any legislative pronouncement is immaterial. See Govt. Opp. at 15-16. Plaintiffs disagree, and argue that Congress used the word "punishable"—a term that traditionally refers to statutorily-specified punishments—to describe predicate offenses that a convicting jurisdiction's legislature has affirmatively deemed serious enough to warrant a prison sentence exceeding one or two years. See Pl. Br. at 17-35.

While the government's brief seeks to frame the issue as a simple one, the unavoidable reality is that a conviction for a simple uncodified common law misdemeanor offense presents a unique scenario that does not fit easily into the federal statutory scheme. As explained in greater detail below, this issue has divided the Fourth Circuit and appears never to have been contemplated by the enacting Congress at all. *Id*. at 26-29; see also *Small* v. *United States*, 544 U.S. 385, 393 (2005)

(holding that the statute's reference to convictions "in any court" should be read to exclude convictions in foreign courts, noting that "[t]he 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").

These complications are largely ignored by the government's opposition, but Plaintiffs' opening brief discusses them in detail with eighteen pages of analysis that apply standard principles of statutory construction to the Act's text, structure, and recorded legislative history. *See* Pl. Br. at 17-35. Plaintiffs submit that this analysis establishes that Schrader's 1968 conviction for an ordinary, non-aggravated common law misdemeanor should not be treated as a disqualifying offense under federal law.

B. The identical statutory issue has divided the Fourth Circuit for nearly 40 years

The government's statutory argument focuses largely on the Fourth Circuit's opinion in *Coleman*, which found common law assault to meet the criteria of § 922(g)(1). See Govt. Opp. at 17-18. Although *Coleman* is not controlling in this jurisdiction, Plaintiffs' opening brief devotes a

full section to why it should not carry persuasive merit either. The *Coleman* court offered little textual analysis of § 922(g)(1), dedicating just three sentences to the issue, see 158 F.3d at 203-04, and did not appear to confront any of the arguments that Plaintiffs raise here. *Coleman* was also decided without the benefit of the Supreme Court's later decisions in cases such as *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), *Small*, 544 U.S. 385, and *Johnson* v. *United States*, 130 S. Ct. 1265 (2010).

Plaintiffs rest primarily on the arguments in their opening brief, but are compelled to note an important detail that the government omits: for the quarter century prior to *Coleman*, the Fourth Circuit's jurisprudence on the matter was controlled by *Schultheis*, supra, which had held 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." *Id*. at 1334-35 & n.2. The *Schultheis* court took note of the statute's "silen[ce] regarding its application to common law convictions" and concluded that it would look to the actual sentence imposed to appraise the seriousness of the conviction in such cases. *Id*. While *Coleman* would eventually reverse *Schultheis*, it did so

only over a dissent that criticized the majority for "blindly lump[ing] 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 felon-in-possession scheme. *Id*. at 205 (WIDENER, J., dissenting) (citing *Schultheis*, 486 F.2d at 1333). Plainly, the issue is not as simple as the government suggests.

Of greater relevance is the Supreme Court's repeated instruction under the constitutional avoidance canon that "when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Harris* v. *United States*, 536 U.S. 545, 555 (2002) (citation and quotation omitted). *Coleman* predated the Supreme Court's decisions in *Heller*, 554 U.S. 570 and *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010), which confirmed that the Second Amendment protects an individual, fundamental right to keep and bear arms. In the wake of *Heller*, federal courts have already invoked the avoidance canon to narrow the constructions of other provisions of Section 922(g). See *United States* v. *Rehlander*, 666

F.3d 45, 48-49 (1st Cir. 2009); see also Pl. Br. at 33. Because *Coleman*'s broad interpretation of the federal felon-in-possession scheme entrenches on the core values of the Second Amendment,[1] the same narrowing principles should apply here.

C. The government's references to Maryland's statutory crime of Second Degree Assault are inapposite because Schrader has never been charged with or convicted of that offense

As all parties note, Maryland formally codified the offenses of First and Second Degree Assault in 1996. See Pl. Br. at 10, n.4; Govt. Opp. at 19-20. First Degree Assault is a very serious felony-level offense punishable by up to 25 years imprisonment, and encompasses any assault that causes (or attempts to cause) "a substantial risk of death" or "permanent or protracted . . . disfigurement" or "impairment of . . . any body member or organ," or that is carried out with a firearm. MD. CRIMINAL LAW CODE ANN. §§ 3-201; 3-202. Second Degree Assault is a

---

[1]Moreover, as Plaintiffs observe in their opening brief, the Fourth Circuit itself has since begun applying Second Amendment scrutiny to firearms bans—even those implicating more serious misdemeanor crimes of domestic violence. See *United States* v. *Chester*, 628 F.3d 673, 674 (4th Cir. 2010) ("Chester II"); see also Pl. Br. at 32, n.6. By contrast, no post-*Heller* decision within the Fourth Circuit has cited *Coleman* to affirm a firearms ban against a common law misdemeanant.

catch-all misdemeanor offense that covers all other forms of assault, as well as the "intentional[] caus[ing of] physical injury to" a "law enforcement" or "parole" officer; it is punishable by up to 10 years imprisonment. *Id*. at § 3-203. Disorderly Conduct is a misdemeanor punishable by up to 60 days in jail. *Id*. at § 10-201.

As a catch-all, the Maryland offense of Second Degree Assault encompasses a wide variety of aggravated forms of assault. Aside from expressly covering assault upon a law enforcement officer,[2] it also covers spousal abuse,[3] child abuse, and other elevated and very serious forms of aggravated assault.[4] Plaintiffs do not dispute that a conviction for Second Degree Assault—which is statutorily "punishable by" up to 10 years imprisonment—would trigger the federal felon-in-possession scheme as a statutory matter. But Schrader does not have a conviction

---

[2] See *Housley* v. *Holquist*, No. 10-1881, 2011 U.S. Dist. LEXIS 97297, at *10-11, n.3 (D. Md. Aug. 30, 2011).

[3] See *Atty. Griev. Comm'n* v. *Theriault*, 390 Md. 202, 205 (Md. 2005).

[4] See *Hannah* v. *United States*, No. WDQ 09-0507, 2010 U.S. Dist. LEXIS 130326, at *1-2 (D. Md. Dec. 8, 2010) (defendant pleaded guilty to Maryland Second Degree Assault after duct-taping victim at gunpoint and "caus[ing] two pit bulls to chew on his legs and buttocks.") (citation and internal quotation omitted).

for statutory Second Degree Assault; he has a 44-year-old conviction for simple assault and battery at common law for his role in a minor fistfight against a gang member who had previously attacked him. Thus, the government's hypothetical claim that Schrader might today have been convicted of Second Degree statutory assault is misplaced.[5]

---

[5] The government also cites a year 2000 advisory opinion letter by the Office of the Maryland Attorney General, which declared its intention to treat former convictions for common law assault as identical to Second Degree Assault for purposes of Maryland's local gun control laws, despite the fact that common law assault is not listed as a disqualifying crime in the local statute. See 85 Md. Op. Atty. Gen 259, Op. No. 00-024 (Sept. 28, 2000); see also Govt. Opp. at 20; MD. PUBLIC SAFETY CODE § 5-101(c).

While this opinion letter does not purport to interpret the federal gun control laws, Plaintiffs note that no reported court decision in Maryland appears to have adopted it, and that Maryland's highest court has since rejected a similar executive effort to treat the former crime of "housebreaking" as a form of "burglary" for purposes of the very same statute. *Price* v. *State*, 378 Md. 378, 389 (Md. 2003) (explaining that "[b]y including precise, statutory crimes in [the statute], the General Assembly signals a clear intent to exclude any crimes missing from the list" and noting that "the General Assembly was fully capable of drafting the statute in a way to include repealed crimes if it so intended."). Moreover, the same Maryland gun control statute expressly covers any "assault with intent to commit . . . a crime punishable by imprisonment for more than 1 year." See § 5-101(c)(17). The opinion letter would appear to make surplusage of this provision by simply treating *all* forms of common law assault as disqualifying. Finally, Plaintiffs note that the statute also expressly covers the "previously proscribed" crimes of maiming and mayhem, *id*. at §§ 5-101(c)(9) & (10), suggesting that when the Maryland legislature intends to cover a former crime, it knows how to do so clearly.

If the sentence is a proxy for the severity of the crime, it is more likely that Schrader's conduct would today net a conviction for nothing more than disorderly conduct—plainly, an offense that does not trigger federal firearms prohibitions.

II. The Government Fails To Justify Its Imposition Of A Blanket Firearms Ban On Ordinary Common Law Misdemeanants Under The Second Amendment

The government offers two constitutional arguments in defense of its firearms ban against Schrader: first, that the imposed ban does not implicate the Second Amendment at all, Govt. Opp. at 22-26, and second, that it can survive elevated judicial scrutiny. Govt. Opp. at 26-34. As detailed below, both arguments fail.

A. The government's attempt to characterize Schrader as outside the scope of the Second Amendment fails

The government's first argument seeks to read into *Heller* a number of broad limitations on the Second Amendment's scope—limitations that are impossible to reconcile with the entirety of the opinion. While both parties note *Heller*'s mention of *felon* dispossession laws as presumptively lawful, the government attempts to stretch this into a much broader categorical rule that would seem to completely disqualify any person with any prior conviction from the protective scope of the

Second Amendment. Accordingly, the government concludes that Congress is free to ban firearms even from persons convicted of simple, non-aggravated misdemeanor offenses, and that Schrader simply "fall[s] outside the scope of the Supreme Court's holding in *Heller*." Govt. Opp. at 22. This reading lacks merit and is also contradicted by the very sources the government cites.

The government begins by quoting two Fourth Circuit opinions as follows:

> [N]o court of appeals has applied *Heller*'s analysis to conclude that a person disqualified from firearm access on the basis of a prior criminal conviction possesses "Second Amendment rights [that] are intact" or that such a person "is entitled to some measure of Second Amendment protection to keep and possess firearms in his home for self-defense," *United States* v. *Staten*, 666 F. 3d 154, 160 (4th Cir. 2011); see also *United States* v. *Moore*, 666 F. 3d 313, 319 (4th Cir. 2012) (rejecting as-applied challenge to Section 922(g)(1) on the basis that person with prior convictions "simply does not fall within the category of citizens to which the *Heller* court ascribed the Second Amendment protection of 'the right of law-abiding responsible citizens to use arms in defense of hearth and home'" (quoting 554 U.S. 635)).

Govt. Opp. at 23-24. Both citations, however, appear to be mistaken; neither opinion supports these propositions, and the Fourth Circuit's broader jurisprudence squarely rejects it.

Staten—a case that implicated a heightened misdemeanor crime of domestic violence—expressly declined to render any judgment on the scope of the Second Amendment at all. While the court did ultimately affirm the disarmament of a domestic violence misdemeanant, it did so under intermediate scrutiny after "assuming arguendo that [his] Second Amendment rights are intact and that he is entitled to some measure of Second Amendment protection to keep and possess firearms in his home for self-defense." 666 F. 3d at 160. The *Staten* court also expressly rejected the argument that his disarmament could be upheld as presumptively lawful under *Heller*:

> [T]he government first defends Staten's § 922(g)(9) conviction on the basis that § 922(g)(9) is presumptively lawful under *Heller*. The government promptly acknowledges, however, that we rejected this exact argument in *Chester II*, 628 F.3d at 679, but explains that it nonetheless presented it in the event of further appellate review. Again, we are bound by *Chester II*, and thus reject the government's argument that § 922(g)(9) is presumptively lawful under *Heller*. *Jones*, 94 F.3d at 905.

Id. at 160.

The government is also flatly mistaken in citing *Moore* for the proposition that a "person with prior convictions" falls outside the scope of the Second Amendment. Govt. Opp. at 23-24. To the contrary, the

Moore decision was based not on the simple fact that he had a "prior conviction," but that he had multiple serious felony-level convictions, including three for common law robbery and one for assault with a deadly weapon on a government official, *id*. at 319-20—convictions that are not remotely analogous to Schrader's. Moreover, the opinion explicitly disclaims the broad proposition the government cites it for:

> 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. But while we acknowledge such a showing theoretically could be made, Moore is not remotely close.

Id. at 320.

In reality, nearly every federal appeals court to consider the constitutionality of a misdemeanant firearms ban has declined the government's scope argument and instead proceeded to apply some form of elevated judicial scrutiny—even in more serious cases involving persons convicted of acts of domestic violence. See, e.g., *Chester II*, 628 F.3d at 681-82 ("we are certainly not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors. We must assume, therefore, that Chester's Second Amendment rights are intact and that

he is entitled to some measure of Second Amendment protection to keep and possess firearms in his home for self-defense."); *United States* v. *Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) ("The United States concedes that some form of strong showing ('intermediate scrutiny,' many opinions say) is essential, and that § 922(g)(9) is valid only if substantially related to an important governmental objective.") (citations omitted).

Any categorical limitation on the Second Amendment's *scope* must be established by historical evidence.[6] As the Seventh Circuit explains, the burden for establishing such a proposition lies with the government:

---

[6] See *Heller*, 554 U.S. at 634-35 ("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."); *McDonald*, 130 S. Ct. at 3047 ("In *Heller* . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing."); *Ezell* v. *City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) (". . . this wider historical lense is required if we are to follow the Court's lead in resolving questions about the scope of the Second Amendment by consulting its original public meaning as both a starting point and an important constraint on the analysis") (citing *Heller*, 554 U.S. at 610-19; *McDonald*, 130 S. Ct. at 3038-42).

> [I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 or 1868—then the analysis can stop there; the regulated activity is categorically unprotected . . . If the government cannot establish this—if the historical evidence is inconclusive or suggests that the regulated activity is not categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights.

Ezell, 651 F.3d at 703.

The government's brief provides no historical evidence for the blanket disarmament of persons convicted of simple misdemeanor offenses at common law. To the contrary, it offers only a page and a half of arguments that the Supreme Court has already evaluated in *Heller*. Govt. Opp. at 24-25. For example, the government cites a Pennsylvania minority proposal from the Pennsylvania convention, which had proposed

> [t]hat the people have a right to bear arms for the defense of themselves and their own state or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; * * * .

The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, 1787, reprinted in 2 Schwartz, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 665 (1971);

see also Govt. Opp. at 24. *Heller* cited this proposal as evidence that the original public meaning of the term "bear arms" was not limited to the carrying of arms in a militia. See *Heller*, 554 U.S. at 604-05. Its qualifying language concerning the disarmament of persons "for crimes committed" did not make its way into the text of the actual Second Amendment. But even if it had, Blackstone explains that the term "crime" was ordinarily used to describe felony-level offenses, as opposed to misdemeanors:

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

4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769).

Finally, the government claims that Schrader's common law assault and battery conviction would disqualify him from possessing firearms under the laws of certain states today, including Georgia and Maryland. Govt. Opp. at 25, n.7. With respect to Georgia law, the government is simply incorrect. While Georgia law does indeed disqualify persons convicted of "any offense punishable by imprisonment for a term of one year or more," the Georgia Supreme Court has expressly held that this state felon-in-possession scheme

may not be applied to out-of-state misdemeanor offenses. *State* v. *Langlands*, 276 Ga. 721, 724-25 (Ga. 2003). And with respect to Maryland law, Plaintiffs explain above in Section I.C that the government's reading is unsupported by case law and in considerable tension with a related decision by the Maryland Court of Appeals.

B. The government's arguments against strict scrutiny fail

With respect to the appropriate level of judicial scrutiny, the government summarily asserts that "Plaintiffs offer no serious arguments" for applying strict scrutiny. Govt. Opp. at 27. But the government neglects to confront or discuss the doctrinal framework adopted by this Court in *Heller II*, which, borrowing from First Amendment principles, bases the appropriate level of judicial scrutiny on how closely the challenge government action entrenches on the Second Amendment's core. *Heller* v. *District of Columbia* ("Heller II"), 670 F.3d 1244, 1257 (D.C. Cir. 2011) ("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.'") (citations omitted).

Operating under this framework, Plaintiffs opening brief submits that strict scrutiny is most appropriate for this case because the government's application of a lifetime firearms ban against Schrader impinges directly on his "core" Second Amendment right to keep a firearm in "defense of hearth and home." Pl. Br. at 49-52.

The government summarily counters that Schrader's 1968 misdemeanor conviction prevents him from qualifying as a "law-abiding, responsible citizen" under *Heller*, and thus places him outside of the core right of the Second Amendment. Govt. Opp. at 28. But as detailed in Schrader's opening brief (and further developed in his summary judgment motion below), Schrader's conviction is 44 years old and resulted from his involvement in a fist fight with a gang member who had previously attacked him. Schrader went on to serve a tour in Vietnam and earn an honorable discharge from the United States Navy. And aside from a minor traffic offense, he has had no meaningful encounters with law enforcement since. While the Supreme Court has not offered a detailed definition of the "law-abiding, responsible citizen," Plaintiffs submit that Schrader's full record places his challenge within the core protections of the Second Amendment and

that strict scrutiny is most the appropriate test for evaluation of his case.

C. Under any appropriate level of judicial scrutiny, the government fails to justify its application of a firearms ban against Schrader

Plaintiffs' opening brief analyzes the challenged firearms ban against Schrader under both strict and intermediate scrutiny, surveying in detail the decisions of this and other courts. Pl. Br. 53-62. The government's opposition, however, appears to simply ignore those cases. Accordingly, Plaintiffs rest primarily on their opening brief but respond briefly here to the government's two asserted arguments for upholding Schrader's firearms disqualification under a standard of intermediate scrutiny.

First, the government briefly surveys the legislative history of the Gun Control Act of 1968, and quotes a Senate Report, noting Congress' aim "to 'regulate more effectively interstate commerce in firearms so as to reduce the likelihood that they fall into the hands of the lawless or those who might misuse them.'" Govt. Opp. at 30 (citing S. Rep. No. 89-1866, at 1 (1966)). While this may be true, Plaintiffs are not challenging Section 922(g)(1) on its face and do not quarrel with the

proposition that Congress may properly disarm the most dangerous members of society. Plaintiffs are merely asserting that the firearms ban is overbroad as-applied against Schrader—a 64-year-old Navy veteran whose only conviction was for a simple misdemeanor offense in 1968.

The government's only cited reference to misdemeanants is a 1964 Senate Report, quoted for the proposition that "'persons with records of misdemeanor arrests' were among those whose access to firearms concerned Congress." *Id.* (citing S. Rep. No. 88-1340 (1964) at 4). But even that report references only an elevated group of misdemeanants with "undesirable character" and extensive records of arrests spanning several years:

> As our investigation progressed, it became apparent that a major source of firearms to juveniles and young adults was the mail-order common carrier route. * * * It was further determined during the investigation that not only juveniles were availing themselves of this source of firearms, but also young adult and adult felons, narcotic addicts, mental defectives, and others of generally undesirable character. The term 'undesirable' as used in this report refers to *persons with records of misdemeanor arrests of a period of several years*.

S. Rep. No. 88-1340 (1964), at 4 (emphasis added). These concerns do

not speak to Schrader, who has only one misdemeanor conviction that occurred nearly half a century ago.[7]

The government next points to its "general interest in preventing crime" as a compelling interest. Govt. Opp. at 31 (quotation and citation omitted). While few quarrel with the importance of this interest in the abstract, the government does not attempt to explain its relevance to Schrader's case. It urges judicial deference to the judgments of Congress concerning "irresponsible persons" and "convicted felons," *id*. at 32, but as Plaintiffs point out in their opening brief, the recorded legislative history suggests that no member of Congress even contemplated the applicability of Section 922(g)(1) to common law misdemeanants. Pl. Br. at 26-29. Furthermore, 922(g)(1) predated the Supreme Court's intervening decisions in *Heller* and *McDonald*, and is thus unlikely to have reflected any legislative weighing of Second Amendment rights at all. *Id*. at 62.

In sum, even the intermediate scrutiny standard that the government urges requires the challenged action to be "substantially

[7] Plaintiffs also note that this Senate report is directed to the issue of regulating interstate traffic in mail order firearms, not disarmament.

related to an important governmental interest." *Heller II*, 670 F.3d at 1258 (quoting *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988)), and "places the burden of establishing the required fit squarely upon the government." *Chester II*, 628 F.3d at 683 (citing *Bd. of Trs.* v. *Fox*, 492 U.S. 469, 480-81 (1989)). Section 922(g)(1) may be an appropriate legislative tool for keeping firearms away from the most dangerous members of society, but Schrader is not such a person. The government cannot meet its burden in this case.

CONCLUSION

The government's imposition of a categorical, lifetime firearms ban against Schrader finds no basis in federal law and violates his 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.

Dated: June 19, 2012

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/ Thomas M. Huff
Thomas M. Huff

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,781 words, as calculated by the word count feature in Corel WordPerfect X4, and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced 14-point Century Schoolbook typeface.

/s/ Thomas M. Huff
Thomas M. Huff

Counsel for Appellants

CERTIFICATE OF SERVICE

I certify that on this 19th day of June, 2012, I filed the foregoing Reply Brief with the Clerk of the Court using the CM/ECF System. I further certify that counsel for Appellees are registered CM/ECF users and will be served via the CM/ECF system. This 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.

/s/ Thomas M. Huff
Thomas M. Huff

Counsel for Appellants