No. 14-4549

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DANIEL BINDERUP,

Plaintiff-Appellee,

v.

ERIC H. HOLDER, JR., in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Pennsylvania (No. 13-6750) (Gardner, J.)

BRIEF FOR THE APPELLANTS

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INTRODUCTION

Plaintiff Daniel Binderup challenges the constitutionality of 18 U.S.C. § 922(g)(1), which prohibits the possession of firearms by persons convicted of serious crimes. Binderup is subject to section 922(g)(1) because he was convicted under Pennsylvania law of corruption of a minor, which is punishable by up to five years' imprisonment. At the age of 41, Binderup engaged in repeated unlawful sexual intercourse with his 17-year-old employee. Despite this criminal conduct, which in some States would be classified as rape, the district court held that section 922(g)(1) is unconstitutional as applied to Binderup because he "is no more dangerous than a typical law-abiding citizen." 1 App. 61 (internal quotation marks omitted).

As this Court has held, Congress permissibly prohibited persons convicted of serious crimes punishable by imprisonment from possessing firearms. Although this Court did not foreclose the possibility that an individual might "present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections," Binderup has not done so. *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011). To the contrary, the seriousness of Binderup's crime is confirmed by the long tradition of outlawing sex with minors, the treatment of the same conduct as rape or sexual assault in many States, and Pennsylvania law's provision of a sentence of up to five years in prison for the offense.

Even if Binderup were entitled to some Second Amendment protection despite his conviction, section 922(g)(1) would still be constitutional as applied to him because it serves the government's compelling interest in keeping firearms out of the hands of individuals who are particularly likely to misuse them due to their criminal history. The facts of this case present no reason to diverge from other courts of appeals, which have consistently rejected similar constitutional challenges to the application of section 922(g)(1).

STATEMENT OF JURISDICTION

Plaintiff Daniel Binderup invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343, 1346, 2201, 2202. 2 App. 99. The district court issued an order granting in part and denying in part Binderup's motion for summary judgment on September 25, 2014. 1 App. 90-92. The government filed a timely notice of appeal on November 21, 2014. 1 App. 1. Binderup filed a timely notice of appeal on that same date. This Court has appellate jurisdiction over these cross-appeals under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Federal law prohibits the possession of firearms by a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" (with an exception for state misdemeanors punishable by less than two years' imprisonment). 18 U.S.C. § 922(g)(1). The issue presented is whether the district court erred in holding section 922(g)(1) unconstitutional as applied to Daniel

Binderup, who pled guilty in 1998 to corruption of a minor, a crime punishable by up to five years' imprisonment. [Ruled upon at 1 App. 37-89.]

STATEMENT OF RELATED CASES

This case has not previously been before any court other than the district court, and there are no currently pending related cases.

STATEMENT OF THE CASE

A. Statutory Background

Following a multi-year inquiry that included "field investigation and public hearings," S. Rep. No. 88-1340, at 1 (1964), Congress found "that the ease with which" handguns could be acquired by "criminals . . . and others whose possession of such weapons is similarly contrary to the public interest[] is a significant factor in the prevalence of lawlessness and violent crime in the United States," Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title IV, § 901(a)(2), 82 Stat. 197, 225. Congress found "that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power." *Id.* § 901(a)(1), 82 Stat. at 225. Congress determined "that only through adequate Federal Control over interstate and foreign commerce in these weapons . . . can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible." *Id.* § 901(a)(3), 82 Stat. at 225.

Congress's investigations revealed "a serious problem of firearms misuse in the United States," S. Rep. No. 89-1866, at 53 (1966), and a "relationship between the apparent easy availability of firearms and criminal behavior," *id.* at 3. Law enforcement officials testified to the "tragic results" of firearm misuse by persons with prior criminal convictions. S. Rep. No. 88-1340, at 12, 17-18. Statistical evidence showed "the terrible abuse and slaughter caused by virtually unrestricted access to firearms by all individuals, regardless of their backgrounds." 114 Cong. Rec. 13,219 (1968) (statement of Sen. Tydings).

Congress accordingly aimed 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." S. Rep. No. 89-1866, at 1. To that end, Congress included in both the Omnibus Crime Control Act and the Gun Control Act of 1968, Pub. L. No. 90-618, Title I, § 101, 82 Stat. 1213, statutory provisions limiting firearms access by persons with "criminal background[s]," S. Rep. No. 90-1097, at 28 (1968). These provisions include 18 U.S.C. § 922(g)(1), which provides that "[it] shall be unlawful for any person . . . who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

"The term 'crime punishable by imprisonment for a term exceeding one year' does not include" a "State offense classified by the laws of the State as a misdemeanor

and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20)(B). It also excludes "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.* § 921(a)(20).[1]

B. Factual and Procedural Background

1. In the mid-1990's Daniel Binderup owned and operated a bakery. In 1996, when he was 41 years old, Binderup began engaging in repeated acts of sexual intercourse with a 17-year-old girl who worked in the bakery as his employee. Binderup was aware that his employee was a minor. 2 App. 114-15.

In 1998, Binderup pled guilty in the Court of Common Pleas of Lancaster County, Pennsylvania to violating 18 Pa. Cons. Stat. Ann. § 6301, Corruption of Minors. 2 App. 117-21. Section 6301 provides, in relevant part, that "whoever, being the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age . . . commits a misdemeanor of the first degree." *Id.* § 6301(a)(1)(i). Pennsylvania law includes three degrees of misdemeanors, and a person convicted of a misdemeanor of the first degree "may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall be not

[1] Congress also excluded 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." 18 U.S.C. § 921(a)(20)(A).

more than . . . [f]ive years." *Id.* § 1104. Binderup was sentenced to three years' probation, and fined $300, plus court costs and restitution. 2 App. 116.[2]

2. In 2013, Binderup filed a complaint in the Eastern District of Pennsylvania, seeking declaratory and injunctive relief barring enforcement of 18 U.S.C. § 922(g)(1) against him. 2 App. 98-108. Binderup claimed that he is outside the scope of section 922(g)(1)'s prohibition because his conviction falls within section 921(a)(20)(B)'s exception for a "State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 2 App. 106. In the alternative, he claimed that section 922(g)(1) violates the Second Amendment as applied to him. 2 App. 107.

On September 25, 2014, the district court issued an order granting in part and denying in part Binderup's motion for summary judgment, and granting in part and denying in part the government's cross-motion for summary judgment. 1 App. 90-92. The court rejected Binderup's claim that his conviction falls outside of section 922(g)(1)'s prohibition, relying on well-established Third Circuit and Supreme Court

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[2] In 2009, a Pennsylvania court granted Binderup's petition under 18 Pa. Cons. Stat. Ann. § 6105(d) to remove his disqualification from possessing firearms under Pennsylvania law. The granting of that petition, however, did not restore all of Binderup's civil rights for purposes of 18 U.S.C. § 921(a)(20). In particular, it did not restore Binderup's right to serve on a jury. *See* 42 Pa. Cons. Stat. Ann. § 4502(a)(3) (providing that a citizen may not serve on a jury if he or she "has been convicted of a crime punishable by imprisonment for more than one year and has not been granted a pardon or amnesty therefor").

precedent to hold that the application of section 922(g)(1) turns on the maximum punishment that may be imposed for a conviction. 1 App. 18-29. Because Binderup was convicted of a first-degree misdemeanor punishable by up to five years' imprisonment, the court held that Binderup falls within the scope of section 922(g)(1) and does not qualify for the exception set forth in section 921(a)(20)(B). 1 App. 29.

The court entered summary judgment for Binderup, however, as to his constitutional claim, holding that section 922(g)(1) violates the Second Amendment as applied to him. 1 App. 61-87. The district court read this Court's opinion in *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011), as establishing a comprehensive test for evaluating an as-applied challenge to section 922(g)(1), under which the statute is unconstitutional as applied if a plaintiff can demonstrate that "he is no more dangerous than a typical law-abiding citizen, and poses no continuing threat to society." 1 App. 48-53 (internal quotation marks omitted). The court held that Binderup satisfied that requirement, reasoning that corruption of a minor is distinguishable from statutory rape and therefore is not a crime of violence. 1 App. 68-75. The court rejected the significance of studies showing high recidivism rates among individuals convicted of similarly serious crimes, reasoning that those studies did not focus on individuals in identical circumstances to Binderup. 1 App. 75-87. The court concluded that, "despite his prior criminal conviction which brings him within [the] scope of § 922(g)(1)'s firearm prohibition, [Binderup] poses no greater

risk of future violent conduct than the average law-abiding citizen." 1 App. 88. It therefore held section 922(g)(1) unconstitutional as applied to Binderup. *Id.*

SUMMARY OF ARGUMENT

A. Binderup's challenge to 18 U.S.C. § 922(g(1) fails because he falls within the class of individuals who are disqualified from asserting Second Amendment rights by virtue of a past conviction. In *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), the Supreme Court recognized that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." The Court provided a non-"exhaustive" list of "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons." *Id.* at 626 & 627 n.26. Accordingly, in *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011), this Court rejected an as-applied challenge to section 922(g)(1), holding that the plaintiff was unable to "present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections."

In this case, Binderup is also unable to rebut the presumption that he falls outside of Second Amendment protection due to his prior conviction. There is a long history of outlawing sexual relations with minors. And, while the district court attempted to distinguish Binderup's conviction from statutory rape under Pennsylvania law, many States would treat his conduct as constituting rape or felony sexual assault. Indeed, the seriousness of his crime is confirmed by the fact that it is punishable under Pennsylvania law by up to five years in prison.

B. Binderup's challenge also fails because section 922(g)(1) withstands constitutional scrutiny. Even if the district court were correct that Binderup is entitled to Second Amendment protection, it erred by failing to proceed to the second step of the analysis. Like a number of other courts of appeals, this Court properly applies a two-step test in evaluating an as-applied Second Amendment challenge to 18 U.S.C. § 922(g)(1). As explained in *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), this Court first considers whether application of the statute to a plaintiff implicates Second Amendment rights and, if so, next considers whether the statute nonetheless is permissible because it withstands constitutional scrutiny. The district court erred in reading *Barton* as supplying a different, one-step test for evaluating as-applied challenges to firearm restrictions. In *Barton*, this Court merely applied the first prong of the two-step analysis. The Court declined to proceed to the second step of the analysis only because it determined that the plaintiff could not assert a Second Amendment right.

Under the second step of this Court's Second Amendment analysis, section 922(g)(1) properly is evaluated under intermediate scrutiny because it does not implicate the Second Amendment's core "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. It satisfies that scrutiny because it serves the government's compelling interest in preventing crime by keeping firearms out of the hands of individuals who, by virtue of their prior

convictions for serious crimes, have proven to be particularly likely to misuse firearms.

While the district court attempted to distinguish Binderup from other individuals convicted of serious crimes, section 922(g)(1) need not satisfy means-end scrutiny as to each individual plaintiff that raises an as-applied challenge to the statute. Because there is a reasonable fit between the scope of section 922(g)(1) and the compelling interests it serves, it satisfies intermediate scrutiny. In any event, the government has a compelling interest in applying section 922(g)(1) to individuals convicted of the sort of sexual misconduct underlying Binderup' s conviction. Ample evidence demonstrates that such individuals present a significant risk of recidivism and therefore have proven to be untrustworthy to possess firearms.

STANDARD OF REVIEW

This Court "'exercise[s] plenary review over the District Court's grant of summary judgment' and 'appl[ies] the same standard that the District Court should have applied.'" *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 146 (3d Cir. 2005) (quoting *Abramson v. William Paterson Coll.*, 260 F.3d 265, 276 (3d Cir. 2001).

ARGUMENT

BINDERUP'S CONSTITUTIONAL CHALLENGE TO SECTION 922(g)(1) LACKS MERIT

A. Application of Section 922(g)(1) to Binderup Does Not Implicate the Second Amendment.

1. The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), recognized that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." The Court provided a non-"exhaustive" list of "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons." *Id.* at 626 & 627 n.26. The Court explained that "nothing in [its] opinion should be taken to cast doubt on" such measures, *id.* at 626, and "repeat[ed] those assurances" in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion). The Court thus restricted its holding to "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635; *see also id.* at 625 ("[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes."). As the Court stated, *"[a]ssuming that Heller is not disqualified from the exercise of Second Amendment rights*, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Id.* at 635 (emphasis added).

Accordingly, in *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011), this Court rejected both a facial and an as-applied challenge to section 922(g)(1), concluding that

the plaintiff was not entitled to Second Amendment protection. *See id.* at 172-75.[3] Relying on the Supreme Court's decision in *Heller*, this Court held that, "under most circumstances, . . . felon dispossession statutes regulate conduct which is unprotected by the Second Amendment." *Id.* at 172. It recognized that "denying felons the right to possess firearms is entirely consistent with the purpose of the Second Amendment to maintain 'the security of a free State.'" *Id.* at 175 (quoting U.S. Const. amend. II). "In this regard, the Second Amendment is not unique," because "felons forfeit other civil liberties, including fundamental constitutional rights such as the right to vote or to serve on a jury." *Id.*

Other court of appeals have likewise applied *Heller*'s analysis to conclude that the Second Amendment provides no protection to individuals subject to section 922(g)(1) as a result of prior criminal convictions. *See United States v. Pruess*, 703 F.3d 242, 245-47 (4th Cir. 2012) (holding that the plaintiff was not subject to Second Amendment protection because he "undoubtedly flunks the 'law-abiding responsible citizen requirement'" (quoting *United States v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012)); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (finding that "felons are categorically different from the individuals who have a fundamental right to bear arms, and Vongxay's reliance on *Heller* is misplaced"); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam) (rejecting as-applied challenge to

[3] The plaintiff in *Barton* had "prior felony convictions for possession of cocaine with intent to distribute and for receipt of a stolen firearm." 633 F.3d at 170.

section 922(g)(1), and noting that *Heller* "suggests that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment"); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) (rejecting defendant's contention that "his conviction for possession of firearms by a felon, without any further showing of violent intent, violates his Second Amendment rights"); *see also Tyler v. Hillsdale Cnty. Sherriff's Dep't*, 775 F.3d 308, 335 (6th Cir. 2014) (compiling cases upholding section 922(g)(1) as constitutional, but reaching a different conclusion as to a particular application of 18 U.S.C. § 922(g)(4)), *reh'g en banc petition pending*, No. 13-1876 (filed Feb. 12, 2015).

The historical record supports courts' reluctance to extend *Heller*'s holding by recognizing Second Amendment protections for persons with prior criminal convictions for crimes punishable by more than one year's imprisonment. "[M]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010) (quoting *Vongxay*, 594 F.3d at 1118). "*Heller* identified . . . as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (quoting 554 U.S. at 604). "The report asserted that citizens have a personal right to bear arms 'unless for crimes committed, or real danger of public injury.'" *Id.* (quoting Bernard Schwarz, 2

The Bill of Rights: A Documentary History 662, 665 (1971)). Another of the "Second Amendment precursors" referenced in *Heller*, 554 U.S. at 603, "Samuel Adams' proposal in Massachusetts," *id.* at 604, "would have precluded the Constitution from ever being 'construed' to 'prevent the people of the United States, who are peaceable citizens, from keeping their own arms,'" *id.* at 716 (Breyer, J., dissenting) (quoting 6 *Documentary History of the Ratification of the Constitution* 1453 (J. Kaminski & G. Saladino eds. 2000)).

2. The district court erred in holding that, despite being subject to section 922(g)(1), Binderup is distinguishable from the class of individuals barred from Second Amendment protection. In recognizing section 922(g)(1) as a "presumptively lawful regulatory measure[]," *Heller*, 554 U.S. at 627 n.26, the Supreme Court did not suggest that the statute nonetheless could be subject to a successful as-applied constitutional challenge, and the Court's decision should not be read to permit such a challenge.

In any event, while this Court in *Barton* noted the possibility that a hypothetical individual might be entitled to assert Second Amendment rights despite being subject to section 922(g)(1), it explained that any such individual would bear the burden of rebutting the presumption that he falls outside the scope of Second Amendment protection. *See* 633 F.3d at 173 (stating that while section 922(g)(1) is "presumptively lawful," it is possible that the "presumption may be rebutted" (internal quotation marks omitted)). Before an individual subject to section 922(g)(1) may assert a

Second Amendment right, that individual "must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections." *Id.* at 174. The Court stated that "a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen," and therefore might be entitled to some Second Amendment protection. *Id.*; *see also, e.g.*, *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011) ("Assuming *arguendo* that the Supreme Court might find some felonies so tame and technical as to be insufficient to justify the ban, drug dealing is not likely to be among them.").

In this case, Binderup cannot satisfy that burden because his crime was not "minor," and he is not "a typical law-abiding citizen." *Barton*, 633 F.3d at 174. Binderup engaged in repeated sexual conduct with a 17-year-old girl, who was more than 20 years his junior, and who served as his employee. This unlawful use of a position of authority over a minor distinguishes Binderup from a "typical law-abiding citizen," *id.*, and his conviction falls outside the category of "felonies so tame and technical as to be insufficient to justify the ban" on possession of firearms, *Torres-Rosario*, 658 F.3d at 113.

The conduct underlying Binderup's conviction falls well within the scope of convictions that have traditionally been treated seriously enough to disqualify individuals from possessing firearms. There is a long history of outlawing sexual relations with minors. *See, e.g.*, Mortimer Levine, *A More Than Ordinary Case of "Rape,"*

13 and 14 Elizabeth I, 7 Am. J. Legal Hist. 159, 163 (1963) (describing a 1576 statute that provided that, "if any person shall unlawfully and carnally know any woman child under the age of ten years, every such unlawful and carnal knowledge shall be felony, and the offender thereof being duly convicted shall suffer as a felon without allowance of clergy"); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 494 n.9 (1981) (Brennan, J., dissenting) (detailing the history of California's statutory rape law, which "had its origins in the Statutes of Westminster enacted during the reign of Edward I at the close of the 13th century," and which was amended in 1913 to make the age of consent 18). And, while the district court attempted to distinguish Pennsylvania law's treatment of corruption of a minor from statutory rape (which it acknowledged involves implicit violence), 1 App. 68-75, many States would treat Binderup's conduct as a serious crime.

Indeed, Binderup's criminal conduct—repeated acts of sexual intercourse with a 17-year-old girl more than 20 years younger than Binderup and over whom he had supervisory authority—would be characterized as rape in several States. *See, e.g.*, 11 Del. Code Ann. § 770(a)(2) ("A person is guilty of rape in the fourth degree when the person . . . [i]ntentionally engages in sexual intercourse with another person, and the victim has not yet reached that victim's eighteenth birthday, and the person is 30 years of age or older."); Idaho Code Ann. § 18-6101(2) ("Rape is defined as the penetration, however slight, . . . [w]here the female is sixteen (16) or seventeen (17) years of age and the perpetrator is three (3) years or more older than the female."); Tenn. Code

Ann. § 39-13-506 (defining aggravated statutory rape, a Class D felony, where the "victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least ten (10) years older than the victim"). In many other States, Binderup's conduct would constitute either a felony or a misdemeanor subject to significant criminal penalty.[4]

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[4] *See, e.g.*, Alaska Stat. Ann. § 11.41.436(a)(6) (defining "sexual abuse of a minor in the second degree," a class B felony, where "being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim."); *id.* § 11.41.470(5) ("position of authority" includes "an employer"); Ariz. Rev. Stat. Ann. § 13-1405(A), (B) (defining "sexual conduct with a minor" as "sexual intercourse . . . with any person who is under eighteen years of age," and deeming it a felony); Cal. Penal Code § 261.5(a), (c) (defining minor as "a person under the age of 18 years," and providing that "[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony"); Conn. Gen. Stat. Ann. § 53a-71(a)(10) (defining "sexual assault in the second degree" to include "sexual intercourse with another person and . . . the actor is twenty years of age or older and stands in a position of power, authority or supervision over such other person by virtue of the actor's professional, legal, occupational or volunteer status and such other person's participation in a program or activity, and such other person is under eighteen years of age."); D.C. Code § 22-3009.01 ("Whoever, being 18 years of age or older, is in a significant relationship with a minor, and engages in a sexual act with that minor . . . shall be imprisoned for not more than 15 years."); Fla. Stat. Ann. § 794.05(1) ("A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree."); 720 Ill. Comp. Stat. Ann. 5/11-1.20(a)(4) (defining "criminal sexual assault" where the offender "commits an act of sexual penetration and . . . is 17 years of age or over and holds a position of trust, authority, or supervision in relation to the victim, and the victim is at least 13 years of age but under 18 years of age."); Ind. Code Ann. § 35-42-4-7(n), (q)(2) (defining "child seduction," a Level 5 felony, to include "a person who . . . has or had a professional relationship with a child at least sixteen (16) years of age but less than eighteen (18) years of age" who "may exert undue influence on the child because of the persons' current or previous professional

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relationship with the child" and "uses or exerts the person's professional relationship to engage in sexual intercourse"); Ky. Rev. Stat. Ann. § 510.110(1)(d) (defining "sexual abuse in the first degree" where "a person in a position of authority or position of special trust . . . subjects a minor who is less than eighteen (18) years old, with whom he or she comes into contact as a result of that position, to sexual contact"); Mass. Gen. Laws Ann. ch. 272, § 4 ("Whoever induces any person under 18 years of age of chaste life to have unlawful sexual intercourse shall be punished by imprisonment in the state prison for not more than three years or in a jail or house of correction for not more than two and one-half years or by a fine of not more than $1,000 or by both such fine and imprisonment."); Miss. Code. Ann. § 97-3-95(2) ("A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child."); *id.* § 97-3-101(1) (providing for prison sentence "of not more than thirty (30) years"); N.J. Stat. Ann. § 2C:14-2(c)(3) (defining "sexual assault," a crime of the second degree, to include an "act of sexual penetration with another person" where the "victim is at least 16 but less than 18 years old and . . . [t]he actor has a supervisory or disciplinary power of any nature or in any capacity over the victim."); *id.* § 2C:43-6(a)(2) (providing for imprisonment "between five years and 10 years"); N.D. Cent. Code § 12.1-20-07(1)(f), (2) (defining as sexual assault and a class C felony, knowing "sexual contact with another person" where the "other person is a minor, fifteen years of age or older, and the actor is an adult" who "is at least twenty-two years of age"); Ohio Rev. Code Ann. § 2907.03(A)(9), (B) (defining "sexual battery," a felony of the third degree, where a person "engage[s] in sexual conduct with another, not the spouse of the offender, when . . . [t]he other person is a minor, and the offender . . . is a person with temporary or occasional disciplinary control over the other person"); Utah Code Ann. § 76-5-401.2(2)(a) (providing that it is "unlawful sexual conduct with a minor" and a third degree felony for an individual more than ten years older to have sex with a victim that is 16 or 17 year old); Wash. Rev. Code § 9A.44.010(9), 9A.44.093(1)(a) (providing that it is a class C felony for a person at least sixty months older than a 16- or 17-year old victim, and who has a supervisory position with respect to that victim, to "exploit" that position to cause the victim to engage in sexual intercourse); Wyo. Stat. Ann. § 6-2-316(a)(ii), (b) (defining "sexual abuse of a minor in the third degree" where, "[b]eing twenty (20) years of age or older, the actor engages in sexual intrusion with a victim who is either sixteen (16) or seventeen (17) years of age, and the victim is at least four (4) years younger than the actor, and the actor occupies a position of authority in relation to the victim," and providing for "imprisonment for not more than fifteen (15) years"); *see also* Or. Rev. Stat. Ann. § 163.315(1)(a) (providing that "[a] person is considered incapable of consenting to a sexual act if the person is . . . [u]nder 18 years of age"); Vt. Stat. Ann.

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The severity of Binderup's conviction under Pennsylvania law is clear from the fact that it was punishable by up to five years in prison. *See* 18 Pa. Cons. Stat. Ann. § 6301(a)(1)(i); *see also id.* § 1104. It is irrelevant that Pennsylvania labels the crime a misdemeanor. Though the distinction between a misdemeanor and a felony may once have been significant, today the difference is "minor and often arbitrary," given that "numerous misdemeanors involve conduct more dangerous than many felonies." *Tennessee v. Garner*, 471 U.S. 1, 14 (1985). For example, Pennsylvania classifies as misdemeanors a number of other indisputably serious crimes, including involuntary manslaughter, assault on a child under 12, and terroristic threats. *See* 18 Pa. Cons. Stat. Ann. § 2504 (involuntary manslaughter); *id.* § 2701(b)(2) (assault on child under 12); *id.* § 2706(d) (terroristic threats); *see also, e.g.*, *id.* § 2707(a) (propelling any "deadly or dangerous missile, or fire bomb" into an occupied vehicle); *id.* § 2709.1(a), (c)(1) (stalking); 34 Pa. Cons. Stat. Ann. § 2522(a), (b)(3) (killing a human being, through carelessness or negligence, while hunting). Given the length of the potential sentence for Binderup's conviction, it is properly treated as equivalent to a felony, regardless of its label under Pennsylvania law. *See* 107 Cong. Rec. 20248 (1961) (statement of Rep.

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tit. 13, § 3258 ("No person shall engage in a sexual act with a minor if the actor is at least 48 months older than the minor; and the actor is in a position of power, authority, or supervision over the minor."); Va. Code Ann. § 18.2-371 ("Any person 18 years of age or older . . . who . . . engages in consensual sexual intercourse . . . with a child 15 or older not his spouse . . . is guilty of a Class 1 misdemeanor."); Wis. Stat. Ann. § 948.09 ("Whoever has sexual intercourse with a child who is not the defendant's spouse and who has attained the age of 16 years is guilty of a Class A misdemeanor.").

Mills) ("Imprisonment for [a term exceeding one year] is the Federal standard of what constitutes a felony."). Indeed, Binderup's conviction of a misdemeanor punishable by up to five years' imprisonment would restrict him from possessing firearms under the laws of several States.[5]

As a person disqualified from possessing a firearm because of a prior conviction for a serious criminal offense, Binderup falls outside the scope of the Second Amendment protection. *See Heller*, 554 U.S. at 635 ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the

[5] *See, e.g.*, D.C. Code § 22-4503(a)(1) (disqualifying persons "convicted in any court of a crime punishable by imprisonment for a term exceeding one year"); Ga. Code Ann. § 16-11-131 (prohibiting firearm possession by persons "convicted of a felony by a court of this state or any other state" and providing that "'[f]elony' means any offense punishable by imprisonment for a term of one year or more"); Iowa Code Ann. §§ 724.25, .26 (prohibiting firearm possession by "[a] person who is convicted of a felony in a state or federal court" and providing that "the word 'felony' means any offense punishable in the jurisdiction where it occurred by imprisonment for a term exceeding one year, but does not include any offense, other than an offense involving a firearm or explosive, classified as a misdemeanor under the laws of the state and punishable by a term of imprisonment of two years or less"); Me. Rev. Stat. Ann. tit. 15, § 393 (imposing limitations on possession of firearms by persons convicted of "[a] crime under the laws of any other state that, in accordance with the laws of that jurisdiction, is punishable by a term of imprisonment exceeding one year" except if that crime "is classified by the laws of that state as a misdemeanor and is punishable by a term of imprisonment of 2 years or less"); Mass. Gen. Laws ch.140, § 129B (prohibiting possession of firearms by a person who has "in any other state or federal jurisdiction, been convicted . . . for the commission of . . . a misdemeanor punishable by imprisonment for more than 2 years"); 18 Pa. Cons. Stat. Ann. § 6105(a)(1) (disqualifying persons convicted of enumerated crimes, "regardless of the length of sentence").

home."); *Barton*, 633 F.3d at 174 ("Because Barton has failed to demonstrate that his circumstances place him outside the intended scope of § 922(g)(1), we find no error in the District Court's dismissal of his as-applied challenge."); *see also Dutton v. Pennsylvania*, No. 11-7285, 2012 WL 3020651, at *2 n.3 (3d Cir. July 23, 2012) (unreported) (rejecting as-applied Second Amendment challenge to section 922(g)(1) brought by plaintiff with misdemeanor convictions for carrying a firearm on a public street and for carrying a firearm without a license). The Second Amendment therefore provides no basis for Binderup to challenge the application of section 922(g)(1) against him.

B. Even if Binderup Were Entitled to Second Amendment Protection, Section 922(g)(1) Would Still Be Constitutional As Applied to Him.

1. Even if the district court were correct that Binderup is entitled to assert a Second Amendment right, it erred by failing to proceed to evaluate whether section 922(g)(1) withstands constitutional means-end scrutiny. In *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), this Court adopted a two-step test for evaluating the constitutionality of a firearm restriction. Pursuant to that test, the Court first considers whether application of the statute to a plaintiff implicates Second Amendment rights. *Id.* at 89. "If it does not, [the Court's] inquiry is complete." *Id.* If it does implicate Second Amendment rights, the Court next considers whether the statute nonetheless is permissible because it withstands constitutional scrutiny. *Id.*; *see also Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013) (applying same two-step test to a

challenge to a firearm restriction). Other courts of appeals have adopted the same approach to Second Amendment challenges. *See, e.g.*, *United States v. Chovan*, 735 F.3d 1127, 1136-38 (9th Cir. 2013); *United States v. Greeno*, 679 F.3d 510, 518-21 (6th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010).

This Court's decision in *Barton* that certain convicted criminals are exempt altogether from the Second Amendment is consistent with the two-step approach established in *Marzzarella*. In *Barton*, this Court simply resolved the case before it at the first step. 633 F.3d at 175 (finding section 922(g)(1) "constitutional as applied to Barton because he has presented no facts distinguishing his circumstances from those of other felons who are categorically unprotected by the Second Amendment"). Because this Court found that the plaintiff was not entitled to any Second Amendment protection in the first place, it did not need to proceed to the second step of the analysis. *Cf. Drake*, 724 F.3d at 429-30 (noting that if a firearm restriction "does not burden conduct within the scope of the Second Amendment's guarantee," the Court "need not move to the second step").

The district court in this case erred by failing to follow the two-step test established in *Marzzarella* and instead treating *Barton* as if it overruled *Marzzarella sub silentio*. The district court recognized that, in *Marzzarella*, this Court "did not explicitly limit the application of [the two-step] framework (including the application of means-

end scrutiny to provisions which infringe on Second-Amendment-protected activity) to facial constitutional challenges." 1 App. 58-59. But the district court nonetheless concluded that the *Marzzarella* two-step framework does not apply to as-applied challenges. It read *Barton* as supplying a different, one-step test for evaluating as-applied challenges to firearm restrictions, whereby a plaintiff need only satisfy his burden of demonstrating that he is entitled to assert Second Amendment rights in order to succeed in an as-applied challenge to section 922(g)(1). 1 App. 58-61.

The district court misunderstood the import of *Barton*, which merely reflected an application of the first step of this Court's Second Amendment analysis. Although this Court left open the possibility that an individual might be able to demonstrate an entitlement to assert Second Amendment rights, the Court nowhere indicated that such an individual would automatically succeed in his as-applied challenge. *See Barton*, 633 F.3d at 173-75. Such a conclusion would be tantamount to requiring a perfect fit between the scope of the statutory prohibition and the class of individuals barred from asserting Second Amendment rights. But even as to laws that actually burden Second Amendment rights, this Court has required only a "reasonable, not perfect," fit with an important government interest. *Marzzarella*, 614 F.3d at 98.

The district court's analysis cannot be reconciled with *Marzzarella*. The framework set forth in *Marzzarella* governs both as-applied and facial challenges under the Second Amendment. Indeed, *Marzzarella* itself involved an as-applied challenge to section 922(k). In that case, this Court evaluated the plaintiff's motion "to dismiss the

indictment, arguing § 922(k), *as applied*, violated his Second Amendment right to keep and bear arms." *Marzzarella*, 614 F.3d at 88 (emphasis added); *see also Drake*, 724 F.3d at 429 (applying two-step test to evaluate plaintiffs' challenge to a firearm permit requirement). Other courts of appeals have similarly applied the same two-step analysis to as-applied challenges. *See, e.g.*, *Chovan*, 735 F.3d at 1136-38 (proceeding to intermediate scrutiny of section 922(g)(9) in as-applied challenge, after assuming that the statute implicated Second Amendment rights); *Chester*, 628 F.3d at 681-82 (same).[6]

2. Under the second step of the Second Amendment analysis, section 922(g)(1) is properly evaluated under intermediate scrutiny. "As laws burdening protected conduct under the First Amendment are susceptible to different levels of scrutiny, similarly 'the Second Amendment can trigger more than one particular standard of scrutiny, depending, at least in part, upon the type of law challenged and the type of Second Amendment restriction at issue.'" *Drake*, 724 F.3d at 435 (quoting *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010)). "[T]he level of scrutiny should depend on (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right." *Chovan*, 735 F.3d at 1138 (internal quotation marks omitted).

[6] In the district court, the parties treated *Marzzarella* and *Barton* as two distinct tests. As discussed, the proper framework addresses the *Barton* analysis first, but recognizes that if a plaintiff satisfies his burden of demonstrating he is entitled to Second Amendment rights under *Barton*, the statute may still be constitutional as applied if it satisfies the appropriate level of scrutiny under *Marzzarella*. In this case, the government prevails under both steps of the analysis.

This Court has applied intermediate scrutiny when evaluating firearms restrictions that do not implicate the core of the Second Amendment right. *See Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny to evaluate section 922(k) of the Gun Control Act, which prohibits the movement of any firearm with an obliterated or altered serial number); *Drake*, 724 F.3d at 435-46 (applying intermediate scrutiny to evaluate Pennsylvania's requirement that individuals obtain a permit to carry a handgun outside of the home).

Section 922(g)(1) restricts firearm possession only by individuals convicted of serious crimes, and therefore does not implicate the Second Amendment's core "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. Accordingly, courts that have proceeded to the second step of the analysis "have generally applied intermediate scrutiny to uphold Congress' effort under § 922(g) to ban firearm possession by certain classes of non-law-abiding, non-responsible persons who fall outside the Second Amendment's core protections." *United States v. Mahin*, 668 F.3d 119, 123 (4th Cir. 2012) (collecting cases); *see also, e.g.*, *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (applying intermediate scrutiny to section 922(g)(1)); *Schrader v. Holder*, 704 F.3d 980, 989 (D.C. Cir. 2013) (same); *Chovan*, 735 F.3d at 1138 (applying intermediate scrutiny to section 922(g)(9)).

Under intermediate scrutiny, section 922(g)(1) must be upheld as constitutional if "the asserted governmental end [is] more than just legitimate" and is "either 'significant,' 'substantial,' or 'important,'" and "the fit between the challenged

regulation and the asserted objective" is "reasonable, not perfect." *Marzzarella*, 614 F.3d at 98; *see also Chovan*, 735 F.3d at 1138 (requiring "the government's stated objective to be significant, substantial or important," and "a reasonable fit between the challenged regulation and the asserted objective"). "The regulation need not be the least restrictive means of serving the interest, but may not burden more [protected conduct] than is reasonably necessary." *Marzzarella*, 614 F.3d at 98 (citations omitted).

3. Section 922(g)(1) satisfies intermediate scrutiny, because it serves the government's compelling interest in preventing crime by keeping firearms out of the hands of individuals who, by virtue of their prior convictions for serious crimes, have proven to be particularly likely to misuse firearms.[7]

"[T]he Government's general interest in preventing crime is compelling," *United States v. Salerno*, 481 U.S. 739, 750 (1987), and the Supreme Court's cases have "recognized and given weight" to Congress's "broad prophylactic purpose" in enacting the provisions in section 922(g), *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983), *overruled on other grounds by* Firearms Owners' Protection Act of 1986, 18 U.S.C. § 921(a)(20). As the Supreme Court has observed, "[t]he history of the 1968 Act reflects" Congress's "concern with keeping firearms out of the hands of

[7] For the same reasons, section 922(g)(1) would also satisfy strict scrutiny, were such scrutiny appropriate. *Cf. Tyler*, 775 F.3d at 329 ("The courts of appeals' post-*Heller* jurisprudence does not suggest that the decision to apply intermediate scrutiny over strict scrutiny was generally the crucial keystone that won the government's case.").

categories of potentially irresponsible persons, including convicted felons." *Barrett v. United States*, 423 U.S. 212, 220 (1976). Congress "was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest." *Dickerson*, 460 U.S. at 118 (quoting *Huddleston v. United States*, 415 U.S. 814, 824 (1974)). ""The principal purpose of federal gun control legislation, therefore, was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."""" *Id.* (quoting *Huddleston*, 415 U.S. at 824 (quoting S. Rep. No. 90-1501, at 22 (1968))).

The Supreme Court has explained that, "[i]n order to accomplish this goal, Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." *Dickerson*, 460 U.S. at 119. Recidivism is a "reality" that legislatures need not ignore. *Samson v. California*, 547 U.S. 843, 849 (2006). Accordingly, "Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, nor need these limits be established by evidence presented in court." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010). "*Heller* did not suggest that disqualifications would be effective only if the statute's benefits are first established by admissible evidence." *Id.*

Although this Court therefore need not engage in an in-depth statistical analysis to uphold section 922(g)(1), there is ample evidence in support of the conclusion that

the law reasonably serves its objectives of protecting public safety and combating violent crime. "It is well-established that felons are more likely to commit violent crimes than are other law-abiding citizens." *Barton*, 633 F.3d at 175 (citing Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, at 6 (2002), finding that within a population of 234,358 federal inmates released in 1994, the rates of arrest for homicides were 53 times that the national average). And at least one study found that the "denial of handgun purchase is associated with a reduction in risk for later criminal activity of approximately 20% to 30%." Mona A. Wright et al., *Effectiveness of Denial of Handgun Purchase to Persons Believed To Be at High Risk for Firearm Violence*, 89 Am. J. of Pub. Health 88, 89 (1999).

Sex offenders, including individuals convicted for crimes similar to Binderup's, present a high risk of recidivism.[8] It is irrelevant whether Binderup's conviction is characterized as violent (because it would qualify as rape in some States), or as nonviolent. Convicted offenders as a group—including those convicted of crimes

[8] *See* Pennsylvania Dep't of Corrections, *Recidivism Report*, at 21, tbl.12 (Feb. 8, 2013), *available at* http://www.portal.state.pa.us/portal/server.pt/document /1324154/2013_pa_doc_recidivism_report_pdf (50% of individuals convicted of statutory rape and 60.2% of individuals convicted of other sexual offenses were rearrested or reincarcerated within three years of release from Pennsylvania prison); U.S. Dep't of Justice, Office of Justice Programs, *Bureau of Justice Statistics Special Report: Recidivism of Prisoners Released in 1994*, at 8, tbl.9, 15, *available at* http://bjs.gov/content /pub/pdf/rpr94.pdf (41.4% rearrest rate among individuals convicted for "other sexual assault," which includes, among other things, nonforcible sexual acts with a minor); *see also infra* p. 33-34 (describing similar rearrest rates found in several State studies of recidivism).

that did not involve violence—present a significant risk of recidivism for violent crime. A study of 210,886 nonviolent offenders released in 1994 from prisons in 15 States demonstrated that approximately one in five offenders was rearrested for violent offenses within three years of his or her release. *See* Bureau of Justice Statistics Fact Sheet, *Profile of Nonviolent Offenders Exiting State Prisons*, tbl.11 (Oct. 2004)[9]; s*ee also Kaemmerling v. Lappin*, 553 F.3d 669, 683 (D.C. Cir. 2008) ("Other courts . . . have observed that nonviolent offenders not only have a higher recidivism rate than the general population, but certain groups—such as property offenders—have an even higher recidivism rate than violent offenders, and a *large percentage of the crimes nonviolent recidivists later commit are violent*.") (emphasis added) (citing cases); *Yancey*, 621 F.3d at 685 ("[M]ost felons are nonviolent, but someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use.").

4. The district court attempted to distinguish Binderup from other individuals convicted of serious crimes. 1 App. 75-84. But section 922(g)(1) need not satisfy means-end scrutiny as to each individual plaintiff that raises an as-applied challenge to the statute. Because there is a reasonable fit between the scope of section 922(g)(1) and the compelling interests it serves, it satisfies intermediate scrutiny. *See Drake*, 724 F.3d at 436 & n.14 (observing that, under intermediate scrutiny, the fit between the

[9] *Available at* http://bjs.gov/content/pub/pdf/pnoesp.pdf.

asserted interest and the challenged law need only be "reasonable"); *Marzzarella*, 614 F.3d at 98 (same).

In applying intermediate scrutiny to Binderup's as-applied challenge, this Court should not limit its analysis only to the interests served by application of section 922(g)(1) to Binderup alone, but should consider the interests served by the statute more generally. In analogous circumstances, the Supreme Court held that, in evaluating a First Amendment as-applied challenge to a restriction on commercial speech under intermediate scrutiny, "it is readily apparent that this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity." *United States v. Edge Broad. Co.*, 509 U.S. 418, 427 (1993). The Supreme Court emphasized that the law could not be held unconstitutional solely on the basis that "applying the general statutory restriction to [the plaintiff], in isolation, would no more than marginally" serve the government's purpose. *Id.* at 430. "Even if there were no advancement as applied" to an individual plaintiff, "there would remain the regulation's general application to others." *Id.* at 427; *see also Sanjour v. EPA*, 56 F.3d 85, 91-93 (D.C. Cir. 1995) (expressing "doubt" as to "the centrality of the 'facial'/'as-applied' distinction in the . . . context" of the application of a First Amendment balancing test (citing *Edenfield v. Fane*, 507 U.S. 761 (1993); *Edge Broad. Co.*, 509 U.S. at 427)).

The same approach applies equally to evaluation of a statute under intermediate scrutiny in the Second Amendment context. Thus, in rejecting an as-applied

challenge to an analogous provision, the Fourth Circuit recognized "that the prohibitory net cast by [the law] may be somewhat over-inclusive given that not every person who falls [within] it would misuse a firearm against his own child, an intimate partner, or a child of such intimate partner, if permitted to possess one. This point does not undermine the constitutionality of [the statute] however, because it merely suggests that the fit is not a perfect one; a reasonable fit is all that is required under intermediate scrutiny." *United States v. Chapman*, 666 F.3d 220, 231 (4th Cir. 2012) (upholding 18 U.S.C. § 922(g)(8), which prohibits a person subject to a domestic violence protective order issued from possessing a firearm). And other courts of appeals have similarly expressed skepticism regarding the adoption of a constitutional analysis that varies as applied to each individual plaintiff. As the First Circuit observed, "such an approach, applied to countless variations in individual circumstances, would obviously present serious problems of administration, consistency and fair warning." *Torres-Rosario*, 658 F.3d at 113; *see also, e.g.*, *Chovan*, 735 F.3d at 1142 (noting "that if Chovan's as-applied challenge succeeds, a significant exception to § 922(g)(9) would emerge").

In any event, the district court's attempts to distinguish Binderup are unconvincing. Although the district court relied on the fact that Binderup was not sentenced to time in prison, 1 App. 77-79, Congress reasonably tied section 922(g)(1)'s prohibition to the sentence a crime is punishable by under state law, not the sentence that a particular individual actually receives. *See Dickerson*, 460 U.S. at 113

("It was plainly irrelevant to Congress whether the individual in question actually receives a prison term; the statute imposes disabilities on one convicted of 'a crime *punishable* by imprisonment for a term exceeding one year.'").

There are a number of reasons a convicted individual might avoid prison time that are unrelated to the severity of his crime or the likelihood that he would commit further crime in the future. Prosecution of a crime involving sexual misconduct with a minor, like crimes involving domestic violence, poses particular obstacles that might make prosecutors more willing to except a plea deal that does not involve prison time. *Cf. Skoien*, 614 F.3d at 643 (discussing obstacles to prosecution of domestic violence). A victim of statutory rape, like "victims of domestic violence," may be "less willing to cooperate with prosecutors, who may need to reduce charges to obtain even limited cooperation and thus some convictions." *Id.* (citing Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 177-89 (3d ed. 2002)). "Indeed, either forgiveness or fear induces many victims not to report the attack to begin with." *Id.* And prosecutors also might be more inclined to accept a plea deal for a lesser sentence to avoid forcing a victim to suffer the added trauma of a trial.

Similarly, the district court's focus on the length of time since Binderup's conviction was misplaced. 1 App. 82-83. The Ninth Circuit recently rejected the argument that the length of time since conviction is sufficient to render a statute unconstitutional as applied. *See Chovan*, 735 F.3d at 1142 (reasoning that the plaintiff had failed to "directly prove[] that if a domestic abuser has not committed domestic

violence for fifteen years, that abuser is highly unlikely to do so again"). As the Ninth Circuit explained, "Congress permissibly created a broad statute that only excepts those individuals with expunged, pardoned, or set aside convictions and those individuals who have had their civil rights restored." *Id.* (citing *Skoien*, 614 F.3d at 641).

Finally, while the district court reasoned that Binderup's crime did not qualify as statutory rape under Pennsylvania law (1 App. 80-81), the conduct underlying Binderup's conviction would qualify as statutory rape or sexual assault in a number of States, (*see supra* p. 16-19 & n.4), and there is substantial evidence that individuals convicted of such crimes are significantly more likely than the general population to commit future crimes. For example, Binderup's conduct would qualify as aggravated statutory rape in Tennessee, *see* Tenn. Code Ann. § 39-13-506, and statutory rapists had the highest rearrest rates of sex offenders released from Tennessee jails and prisons in 2001, with a rearrest rate of 30.7%, *see* Tennessee Bureau of Investigation, Crime Statistics Unit, *Recidivism Study*, at 5 (Aug. 17, 2007).[10] Binderup's conduct would qualify as sexual assault in Illinois, 720 Ill. Comp. Stat. Ann. 5/11-1.20(a)(4), where there was a 37.4% rearrest rate among sex offender arrestees between 1990 and 1997 whose victims were between 13 and 18 years of age, *see* Lisa L. Sample &

[10] Available at http://www.tbi.tn.gov/tn_crime_stats/publications/SexOffenderRecidivism2007.pdf.

Timothy L. Bray, *Are Sex Offenders Different? An Examination of Rearrest Patterns*, 17 Crim. Just. Pol'y Rev. 83, 93 (2006). Binderup's conduct would qualify in Alaska as sexual abuse of a minor in the second degree and a class B felony, *see* Alaska Stat. Ann. §§ 11.41.436(a)(6), 11.41.470(5), and individuals convicted of sexual abuse of a minor in Alaska and released from prison in 2001 had a rearrest rate of 49.7%, *see* Alan R. McKelvie, *Recidivism of Alaska Sex Offenders*, Alaska Justice Forum Vol. 25, No. 1-2, tbl.3 (Feb. 2009).[11] Binderup's conduct would constitute unlawful sexual conduct with a minor in Arizona, *see* Ariz. Rev. Stat. Ann. § 13-1405, where there was a 39.1% rearrest rate among statutory rapists released from prison in 2001, *see* Arizona Criminal Justice Commission, *Recidivism of Sex Offenders Released from the Arizona Department of Corrections in 2001*, at 10, 28 (Feb. 2009).[12] And Binderup's conduct would qualify as rape in the fourth degree in Delaware, *see* 11 Del. Code Ann. § 770(a)(2), where 45.5% of statutory rapists released from prison in 2001 were rearrested for a felony offense, *see* Delaware Office of Management & Budget Statistical Analysis Center, *Recidivism of Delaware Adult Sex Offenders Released from Prison in 2001*, at 11 (July 2007).[13]

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[11] *Available at* http://justice.uaa.alaska.edu/forum/25/1-2springsummer2008/f_recidivism.html.

[12] *Available at* http://cvpcs.asu.edu/sites/default/files/content/projects/Rodriquez%20stevenson.pdf.

[13] *Available at* http://cjc.delaware.gov/pdf/recidivism_adult_2007.pdf.

Individuals convicted of crimes involving the same conduct underlying Binderup's conviction therefore have proven to be particularly likely to commit additional crimes in the future. Application of section 922(g)(1) to such individuals serves the government's compelling interest in preventing crime by keeping firearms out of the hands of individuals who have been shown to be untrustworthy.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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REQUIRED CERTIFICATIONS

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,545 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

I further certify to the following:

As counsel for the federal government, I am not required to be a member of the bar of this Court.

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/s/ Patrick G. Nemeroff
Patrick G. Nemeroff

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2015, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Patrick G. Nemeroff
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