IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DANIEL BINDERUP, Plaintiff, v. ERIC H. HOLDER, JR., et al., Defendants.	)	Case. No. 5:13-CV-6750-JKG

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Now comes Plaintiff Daniel Binderup, by and through undersigned counsel, and submits his Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss or for Summary Judgment.

Dated: March 10, 2014

Respectfully submitted,

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PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN
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INTRODUCTION

Mindful of the adage that page limits are bestowed, not imposed, Plaintiff Daniel Binderup will not burden the Court with verbatim repetition of every argument in support of his claims already contained within his concurrently-filed brief supporting his cross-motion for summary judgment. Those arguments are before the Court. A separate brief is, however, necessary, to rebut Defendants' claims that are not addressed by seeking the opposite result.

In large part, Defendants' motion addresses a complaint not filed by Plaintiff. To the very limited extent that Defendants' motion is persuasive, it should result in the dismissal of some other case, but it has little relation to the document that initiated this litigation. For example, Defendants correctly assert that an offense's potential sentence, rather than the sentence actually imposed, determines whether the conviction triggers the felon-in-possession prohibition of 18 U.S.C. § 922(g)(1),[1] *but Plaintiff has not made that argument*. Indeed, Defendants' motion seems largely addressed to a facial challenge also not brought by Plaintiff, and is nearly oblivious to the extremely specific methodology for evaluating as-applied Section 922(g)(1) challenges that the Third Circuit laid down in *United States* v. *Barton*, 633 F.3d 168 (3d Cir. 2011).

Plaintiff's constitutional challenge begins, is controlled by, and ends, with *Barton*. This Court must follow *Barton*, and decide that claim (should it be reached) by examining each *Barton* element of Plaintiff's *Barton* challenge. Means-ends scrutiny (strict, as this is a misdemeanor case) would be fine for a facial challenge, but it plays no role in a *Barton*, as-applied challenge.

The issue is not whether the law, as a general matter, is constitutional. It is.

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

The issue is whether the law, if it applies at all, is constitutional as applied to Plaintiff.

Thus, in considering Plaintiff's *Barton* challenge, some basic facts must be remembered:

- Plaintiff is not a rapist, statutory or otherwise.
- Pennsylvania law does *not* classify Plaintiff as a sex offender.
- A world of difference exists between sex with a nine-year-old (!), everywhere and always an extremely serious and disturbing felony, and consensual sex with a 17-year-old, which Pennsylvania does not generally criminalize.
- Plaintiff does not question the wisdom of criminalizing consensual sex between 17 year olds and adults.
- This lawsuit does not challenge the felon-in-possession ban on its face.
- This lawsuit does not challenge the felon-in-possession ban as generally applied to misdemeanors, types of misdemeanors, or even the corruption of minors.
- Plaintiff's offense had nothing to do with firearms.
- The state court has already adjudicated Plaintiff as being responsible with firearms.
- No evidence exists that Plaintiff would recidivate, Defendants' recidivism statistics being extraordinarily generalized and non-specific.

Defendants' motion lacks merit. It should be denied.

ARGUMENT

I. PLAINTIFF DOES NOT ASSERT THAT THE SENTENCE HE RECEIVED CONTROLS SECTION 922(G)(1)'S APPLICATION.

Defendants' only challenge to Count I of the Complaint asserts:

> Plaintiff's contention that the applicability of the firearms disability in 18 U.S.C. § 922(g)(1) depends on the sentence *actually imposed* rather than the maximum potential sentence applicable to the underlying state court conviction has been rejected by every court to consider it, including the Third Circuit in a case that squarely controls the outcome here.

Def. Br. 4.

A fine argument, except that Plaintiff has not advanced this contention. Defendants' misreading of the Complaint is especially surprising, as in their immediately preceding paragraph, they accurately relate the very different argument Plaintiff actually makes: "Plaintiff contends . . . that this conviction cannot be the basis for a firearms disability under 18 U.S.C. § 922(g)(1) because, he argues, it is a misdemeanor 'punishable by a term of imprisonment of two years or less,' 18 U.S.C. § 921(a)(20)(B), as demonstrated by the fact that his own individual punishment did not include any term of imprisonment." *Id.* (citing Compl. ¶ 27).

The correct paragraph of the Complaint is actually paragraph 26:

> Binderup's conviction for misdemeanor corruption of a minor, in violation of 18 Pa. C.S. § 6301, cannot be the basis for a firearms disability under 18 U.S.C. § 922(g)(1), because it is a state misdemeanor "punishable by a term of imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B), as demonstrated by the fact Binderup's punishment did not include any term of imprisonment.

Compl. ¶ 26. And this claim is not made in a vacuum. After setting out the relevant statutory exemption, the Complaint explains that "Defendants have taken the position that the term 'crime punishable by imprisonment for a term exceeding one year' includes state misdemeanors carrying statutory sentencing ranges exceeding two years, without regard to any mandatory minimum sentence, such as 18 Pa. C.S. § 6301." Compl. ¶ 15.

The syntax here is not ambiguous. Binderup's conviction does not qualify because "it is" within the exemption of the quoted statute—that is the claim—and Binderup's sentence *demonstrates* as much. Claiming that an exemption exists as a matter of statutory application, and is "demonstrated by" the sentence, Compl. ¶ 26, is simply not the same as asserting that the statutory prohibition's "applicability depends on the sentence *actually imposed*," Def. Br. 4.

Because Defendants misread Count I, they err in asserting that "[t]here is no basis for distinguishing Plaintiff's argument here from the one rejected in [*United States* v. *Essig*, 10 F.3d

968 (3d Cir. 1993)]." Def. Br. 5 (footnote omitted). As Plaintiff explains in his brief, *Essig* never considered the argument he advances—and he does not revisit those *Essig* rejected. To the extent *Essig*'s holding is inconsistent with the result Plaintiff seeks, it is also inconsistent with the other Third Circuit case Defendants cite, *United States* v. *Leuschen*, 395 F.3d 155 (3d Cir. 2005), and is superseded by *District of Columbia* v. *Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), as the constitutional avoidance doctrine counsels a different outcome today.

In any event, Defendants' motion is not applicable to the claim asserted in Count I of Plaintiff's complaint. As such, Defendants' motion must be denied.

II. THE TWO-STEP FRAMEWORK FOR ANALYZING FACIAL SECOND AMENDMENT CHALLENGES IS INAPPLICABLE TO PLAINTIFF'S AS-APPLIED *BARTON* CHALLENGE.

Defendants attempt to frame this case in terms of the two-step analytical approach adopted in *United States* v. *Marzzarella*, 614 F.3d 85 (3d Cir. 2010), under which courts first determine whether the challenged law implicates the Second Amendment, and if so, whether it passes means-ends scrutiny under some heightened standard of review.

This is the wrong test. While *Marzzarella* two-step test would be fine in some facial challenges, where a law's generalized constitutional merit is at issue and no other method is proper,[2] it has very little to do with an *as applied* challenge, which begins with the assumptions that the law implicates the Second Amendment (obviating the need for step one) and is generally constitutional (resolving step two). For these types of cases, the Third Circuit has a very different test:

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[2] *Marzzarella*'s two-step approach is not universally applicable even to all facial challenges. Some laws fail simply because they are not compatible with the constitutional right. In *Heller*, for example, the Supreme Court struck down Washington, D.C.'s handgun ban because the Second Amendment guarantees a right to possess handguns, and it struck down that city's functional firearms ban because self-defense is the Second Amendment's core purpose. Like the D.C. Circuit that it affirmed, the Supreme Court did *not* employ any two-step, means-ends analysis.

> To raise a successful as-applied challenge, [an individual] must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections. For instance, a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen. Similarly, a court might find that a felon whose crime of conviction is decades-old poses no continuing threat to society.

Barton, 633 F.3d at 174. Of course, Defendants would like to address this case at a high level of generality, because crime is generally bad and criminals are generally undeserving of relief. But this case does not concern the government's generalized interest in disarming criminals; it concerns the governmental interest, if any, in disarming *Mr. Binderup*—and in *his* particular circumstances.[3]

III. PEOPLE CONVICTED OF MISDEMEANORS DO NOT THEREBY AUTOMATICALLY AND FOREVER LOSE ALL SECOND AMENDMENT RIGHTS.

Defendants suggest, contrary to the Government's position in *Barton*, and to perhaps every federal precedent on the topic, that anyone convicted of a crime is by that virtue excluded from the Second Amendment's protection. "Section 922(g)(1) applies solely to persons with prior criminal convictions; it does not implicate the Second Amendment's protection of 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" Def. Br. 1 (quoting *Heller*, 554 U.S. at 635, 128 S. Ct. at 2821, 171 L. Ed. 2d at 683).

The argument is clever, but it misstates *Heller* and contradicts circuit precedent. The Supreme Court did not define "law-abiding, responsible citizens" as people without "prior criminal convictions," the latter words not found in *Heller*. Nor did the Supreme Court define "law-abiding, responsible citizens" as people who have not been convicted of "a crime punishable by imprisonment for a term exceeding one year," the language of Section 922(g)(1).

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[3]As Defendants note, some courts have applied means-ends scrutiny in the context of an as-applied challenge to Section 922(g)(1). See, *e.g.*, *United States* v. *Williams*, 616 F.3d 685, 692 (7th Cir. 2010). But the Third Circuit took a different approach in *Barton*, and *Barton* controls here.

Rather, the Supreme Court contrasted "law-abiding, responsible citizens" with "*felons* and the mentally ill." *Heller*, 554 U.S. at 626, 128 S. Ct. at 2817, 171 L. Ed. 2d at 683 (emphasis added); see *United States* v. *Chovan*, 735 F.3d 1127, 1148 (9th Cir. 2013) (Bea, J., concurring). And Section 922(g)(1), of course, does not use the word "felons."

Beyond the fact that in this circuit, as in others, presumptively disarmed "felons" may assert as-applied challenges to Section 922(g)(1), in this circuit (among others), misdemeanants are not considered "felons." The Third Circuit observed as much, noting the firearm prohibition leveled at domestic violence misdemeanants, though upheld as constitutional, "was not included in *Heller*'s list of permissible regulations." *Barton*, 633 F.3d at 172 n.2 (citations omitted); see also *Chovan*, 735 F.3d at 1137; *United States* v. *Chester*, 628 F.3d 673, 681-82 (4th Cir. 2010) (misdemeanants not presumptively excluded from Second Amendment rights under *Heller*). Indeed, in another context, the Third Circuit has offered that "*Heller*'s language warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish." *Drake* v. *Filko*, 724 F.3d 426, 431 (3d Cir. 2013), *petition for cert. pending*, No. 13-827 (filed Jan. 9, 2014).

Courts have rejected extending *Heller*'s "felon" presumption beyond actual felons for good reason. There is absolutely zero historical support for the sweeping proposition that *any* sort of "prior criminal convictions" triggered disarmament, let alone for life. The one historical example Defendants supply of a disarmed non-felon undercuts their argument: "a Nottinghamshire laborer was bound 'not to shoot again for seven years' after a misdemeanor conviction for 'shooting with hailshot.'" Def. Br. 8 (quotation omitted). This laborer was disarmed for using prohibited ammunition, and even so, for a period of only seven years. Daniel Binderup was permanently denied his fundamental right to arms sixteen years ago for an offense that did not involve violence, the

threat of violence, or the improper use of a firearm or ammunition.

If domestic violence misdemeanants, whose crimes are specifically violent, dangerous, and associated with a high rate of recidivism, cannot be flatly excluded from the Second Amendment's protection at step one of the *Marzzarella* two-step analysis, generalized non-violent misdemeanants certainly cannot be so excluded, simply because they have, at one time, violated the law.

And for the same reasons, even were this case to be analyzed as one of means-ends scrutiny, the correct test would be strict, not intermediate scrutiny. Plaintiff is neither a felon, nor has he committed a crime of violence, nor is there anything in his background indicating a propensity to violence—the metrics that the Third Circuit has used to measure whether an individual falls under *Heller*'s presumptive disability for the non-law-abiding. *Barton*, 633 F.3d at 173-74.

IV. A CONVICTION FOR MISDEMEANOR CORRUPTION OF MINORS DOES NOT AUTOMATICALLY AND FOREVER EXTINGUISH ALL SECOND AMENDMENT RIGHTS.

In his moving papers, Plaintiff explains why a conviction for misdemeanor corruption of minors lacks "the traditional justifications underlying [Section 922(g)(1) that] support a finding of permanent disability in this case." *Barton*, 633 F.3d at 173. The Third Circuit expects that crimes triggering the "felon" prohibition be either violent, or associated with a likelihood of violence—factors plainly lacking in this case, even before considering the state prosecutor's and state court's support of Plaintiff's desire to regain his firearm rights.

But some of Defendants' specific allegations along these lines demand rebuttal. Grasping at an historic analogy for this offense, Defendants offer that in Elizabethan times, it became a felony to have sex with "any woman child under the age of ten years," prescribing that anyone so convicted "shall suffer as a felon [execution] without allowance of clergy." Def. Br. 10 (quotation omitted). Anticipating an objection to this frankly inappropriate analogy, Defendants offer that the example is

supplied to show that "the nature of the conduct for which Plaintiff was convicted would have been recognized during the Founding Era as punishable by criminal sanctions," and that the difference between sex with nine-year-old and a 17-year-old is "a difference in degree, not in kind." Def. Br. 10 n.7 (citation omitted).

To begin, Defendants misstate the common law. Blackstone recounts the Elizabethan statute making rape a felony,

> as is also the abominable wickedness of carnally knowing and abusing any woman child under the age of ten years . . . . Sir Matthew Hale is indeed of the opinion that such profilgate actions committed on an infant under the age of *twelve years*, the age of female discretion by the common law, either with or without consent, amount to rape and felony : as well since as before the statute of queen Elizabeth : but that law has in general been held only to extend to infants under *ten* : though it should seem that damsels between *ten* and *twelve* are still under the protection of the statute Westm. 1., the law with respect to their seduction not having been altered by either of the subsequent statutes.

4 William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND 212 (1769). In other words, at common law, sex with girls aged 10-12 was a misdemeanor, and the age of consent was 12—until 1875. See Louise A. Jackson, CHILD SEXUAL ABUSE IN VICTORIAN ENGLAND 13 (2000).

Defendants are thus flat wrong in claiming that Plaintiff's admittedly bad behavior "would have been recognized during the Founding Era as punishable by criminal sanctions." Def. Br. 10 n.7. And with all due respect, the difference between a first and second degree misdemeanor is a difference in degree; the difference between a misdemeanor and a felony is a difference in kind. Pennsylvania's Legislature obviously believes that a serious difference exists between Plaintiff's regrettable conduct, a misdemeanor for which he might have received a sentence no greater than five years, and the offense for which the common law deprived the condemned of last rites, a first degree felony today, 18 Pa. C.S.A. § 3121(c).

V. DEFENDANTS FAIL TO ADDRESS PLAINTIFF'S PERSONAL CIRCUMSTANCES.

Not surprisingly, since Defendants steadfastly avoid the required Third Circuit test for Plaintiff's as-applied challenge, instead offering extreme analogies at a high level of generality, they also fail to produce any relevant evidence pertaining to Plaintiff's unique circumstances.

True, as Defendants note, "It is well-established that felons are more likely to commit violent crimes than are other law-abiding citizens." Def. Br. 13 (quotations omitted). But Plaintiff is not a felon.

The argument that "[c]onvicted offenders as a group – including those convicted of crimes that did not involve violence–present a significant risk of recidivism for violent crime," Def Br. 13-14, is too generalized to be serious. First is the problem of selection bias. The cited evidence, Def. Exh. 3, relates to a study of individuals released from state prison, who are more likely to be dangerous than people, like Plaintiff, who were *not* sent to state prison. This is both because prison inmates might acquire new criminal skills and inclination while in prison, and perhaps more so, because judges and prosecutors work hard to ensure that prison resources are not wasted on non-dangerous offenders.

Indeed, the studies' subjects have little to do with Plaintiff: approximately a quarter are alcoholics, "nearly two-thirds of nonviolent offenders . . . had been using illegal drugs in the month preceeding the commitment offense and about 4 in 10 reported using drugs at the time of the offense," "an estimated 95% of nonviolent releasees had an arrest history preceding the arrest which resulted in their imprisonment," and "more than 80%" had a prior conviction. Def. Exh. 3, at 1. If Plaintiff were a drug-using alcoholic with a record of arrests and convictions, the type of person sent to state prison for his offense, perhaps Defendants would have a point. But then they would not need to rely on a bunch of statistics, they could discuss what the Third Circuit holds relevant: the Plaintiff.

The same problems plague Defendants' Exhibit 4, a study that purports to show that individuals who were denied the ability to purchase handguns on account of a past criminal conviction later committed less crime than individuals who were allowed to purchase a handgun. But the latter group consisted of criminals, too. In fact, as the study concedes, "[t]his modest benefit may reflect the fact that members of both study groups had extensive prior criminal records and therefore were at high risk for later criminal activity." Exh. 4, at 2. Indeed,

> the 2470 members of the purchaser cohort had accumulated 14 192 arrest charges (mean: 5.7 ± 6.2; range: 1-90) and 6227 misdemeanor convictions (mean: 2.5 ± 3.2; range: 1-33). One third of charges were felonies; 21% of charges and 16% of convictions involved a weapon or violence.

Exh. 4, at 1. How many of these people were convicted only of one count of misdemeanor corruption of a minor is unknown.

And of course, the same problems plague the litany of studies Defendants list on pages 13-14 of their brief, which relate to sex offenders generally, and to some specific, very serious sex offenses. But Pennsylvania does not classify Plaintiff as a sex offender, and he is not a "statutory rapist." And again, these studies relate to people released from state prison—not Plaintiff's profile. Courts do not accept this level of generality in measuring the relevance of recidivism statistics. In *Chovan*, for example, the Ninth Circuit rejected a domestic violence misdemeanant's citation to generalized recidivism statistics because "none of [his] statistics has to do with individuals convicted of domestic violence crimes specifically." *Chovan*, 735 F.3d at 1141. Conversely, when courts find recidivism statistics useful in assessing the constitutionality of a firearms prohibition, they rely upon *specific* statistics regarding the crime at issue. *United States* v. *Skoien*, 614 F.3d 638, 644 (7th Cir. 2010) (en banc).

There may well not be statistical studies of the recidivism rate of misdmeanant minor-corruptors, let alone statistics examining any linkage between a conviction for misdemeanor corruption of a minor and subsequent *violent* crime, the issue when dealing with firearm prohibitions. But Plaintiff is not required to disprove a negative. This is the Defendants' motion, and they have neither challenged the fact of Plaintiff's history of peaceful, non-criminal conduct over the past sixteen years, nor submitted any evidence suggesting that Plaintiff is any more likely than anyone else to commit a violent crime.

Beyond the flawed and generalized statistical surveys, Defendants erroneously assert that "Plaintiff would need to show, inter alia, that he was convicted of a minor crime." Def. Br. 18. Not so. *Barton*'s reference to "minor crime" reads: "For instance, a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen." *Barton*, 633 F.3d at 174. Two points are obvious. First, "for instance" means that "minor, non-violent crime" is *an example*, not a requirement. Indeed, *Barton*'s next sentence relates to old felonies, without the qualification of being "minor." The rule, before the "for instance," relates to circumstances that "historically" led to disarmament, and as discussed thoroughly in Plaintiff's brief in support of his motion, the focus here is on felonies and crimes indicating a risk of violence.

Second, *Barton* describes a "*felon* convicted of a *minor*, non-violent crime." *Id.* (emphasis added). Thus, the Third Circuit may envision some felonies to be "minor," not a shocking usage if the term is understood in the relative rather than absolute sense. And however serious corruption of a minor may be—Plaintiff takes exception to Defendants' completely unsupportable charge that he maintains a "flawed belief that his offense is trivial," Def. Br. 19 (internal punctuation and quotation marks omitted)—*Pennsylvania's legislature* does not believe it rises to the level of a felony.

Plaintiff's argument does not depend upon calling his conviction "minor." It is, however, far less serious than murder, rape, and arguably, as far as the legislature is concerned, just about any felony.[4]

The Court need not pause for long to consider Defendants' arguments that Plaintiff cannot state an as-applied challenge, because an as-applied challenge was rejected in *Dutton* v. *Pennsylvania*, No. 11-7285, 2012 U.S. Dist. LEXIS 102653 (E. D. Pa. July 23, 2012) (Schiller, J.), *aff'd*, 503 Fed. Appx. 125 (3d Cir. 2012) (per curiam). In *Dutton*, a *pro se* plaintiff filed an apparently incomprehensible complaint that "[did] not seem to allege either that Appellees violated his Second Amendment rights or that 18 U.S.C. § 922(g)(1) violates the Second Amendment." *Id.* at 127 n.1. Moreover, Dutton "presented no facts distinguishing his circumstances from those of other felons who are categorically unprotected by the Second Amendment." *Id.* (quoting *Barton*, 633 F.3d at 175).

Defendants also badly misconstrue this Court's holding. "Citing *Barton*, this Court determined that if the plaintiff had challenged the constitutionality of Section 922(g)(1) as applied to him, 'the Court would have found the claim lacked merit.' [*Dutton*, 2012 WL 3020651] at *2 n.3."

This is, at best, misleading. The relevant portion of footnote 3 reads: "Furthermore, the Third Circuit has also found that Section 922(g)(1) is constitutional as applied to individuals who

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[4]Although this case has *nothing* whatever to do with the propriety of criminalizing sexual relations between adults and 17-year-olds, Defendants' heavy dose of medical literature constrains Plaintiff to point out that such laws are remarkably underinclusive as a means of addressing health risks associated with the early onset of sexual activity. Pennsylvania, and other states, do not criminalize sexual activity among consenting 17-year-olds, and it is well within judicial notice, and common sense, that most sexual activity by 17-year-olds occurs within their peer group. Nothing in Defendants' studies asserting that early sexual activity is unhealthy for women links the health risks to the age of the females' male partners. There is no reason—certainly no evidence submitted by Defendants—suggesting that *Plaintiff's* age, in particular, played any role in raising anyone's risk of disease.

have presented no facts distinguishing their 'circumstances from those of other felons who are categorically unprotected by the Second Amendment.'" *Dutton*, 2012 U.S. Dist. LEXIS 102653 at *5 n.3. This Court did not hold that Dutton's personal circumstances could not substantiate an as-applied challenge. It held that Dutton presented no such evidence, and properly exercised its broad discretion to hear nothing more from a *pro se* plaintiff. To the extent this Court implicitly held that any amendment would be futile, it certainly did not pass on the merits of any proposed amendment.

Finally, Defendants' resort to legislative history is unhelpful. This is, again, an *as-applied* challenge. Whatever Congress believed about its creation, the Third Circuit allows as-applied challenges. At most, they recount that Section 922(g)(1)'s language had changed during the Act's evolution.

The recorded legislative history behind the Federal Gun Control Act of 1968 act is fairly sparse. As the Supreme Court has explained, the law was "added by way of a floor amendment . . . and thus was not a subject of discussion in the legislative reports." *Lewis* v. *United States*, 445 U.S. 55, 62, 100 S. Ct. 915, 919, 63 L. Ed. 2d 198, 207 (1980); see also *United States* v. *Batchelder*, 442 U.S. 114, 120, 99 S. Ct. 2198, 2202, 60 L. Ed. 2d 755, 762 (1979); *Scarborough* v. *United States*, 431 U.S. 563, 569-570, 97 S. Ct. 1963, 1966, 52 L. Ed. 2d 582, 588 (1977); *United States* v. *Bass*, 404 U.S. 336, 344 & n.11, 92 S. Ct. 515, 520 & n.11, 30 L. Ed. 2d 488, 494 & n.11 (1971). However, "[w]hat little legislative history there is that is relevant reflects an intent to impose a firearms disability on any *felon* based on the fact of conviction." *Lewis*, 445 U.S. at 62, 100 S. Ct. at 919, 63 L. Ed. 2d at 207 (emphasis added). Senator Long, who introduced and directed the passage of the Act, explained:

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

> by the President or a State Governor and had been expressedly authorized by his pardon to possess a firearm.

114 Cong. Rec. 14773 (1968); see also *Lewis*, 445 U.S. at 62-63, 100 S. Ct. at 919, 63 L. Ed. 2d at 208 ("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight.") (citation omitted).

The earlier senate report defendants cite 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 Plaintiff.

CONCLUSION

Defendants misread the complaint, ignore controlling circuit precedent regarding how the Court must consider Plaintiff's as-applied challenge, and rather than address the facts of the specific case, unfairly lump the Plaintiff in with the lowest, most repugnant class of criminals—the type from whom medieval executioners withheld the benefit of clergy.

The law, and the facts, warrant denial of Defendants' motion.

Dated: March 10, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2014, I caused the foregoing documents to be served via e-mail and via electronic case filing, as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DANIEL BINDERUP,	)	Case. No. 5:13-CV-6750-JKG
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ERIC H. HOLDER, JR., et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

NOW, this ___ day of March, 2014, upon consideration of Defendants' Motion to Dismiss or for Summary Judgment filed on February 20, 2014, upon consideration of the briefs of the parties,

IT IS ORDERED that the motion is denied.

BY THE COURT:

_____
James Knoll Gardner
United States District Judge