128 S.Ct. 2783
Supreme Court of the United States

DISTRICT OF COLUMBIA et al., Petitioners,
v.
Dick Anthony HELLER.

No. 07–290.
|
Argued March 18, 2008.
|
Decided June 26, 2008.

Synopsis

Background: Special police officer and others brought action seeking, on Second Amendment grounds, to enjoin District of Columbia from enforcing gun-control statutes. The United States District Court for the District of Columbia, Sullivan, J., 311 F.Supp.2d 103, granted District of Columbia's motion to dismiss, and appeal was taken. The District of Columbia Court of Appeals, Silberman, Senior Circuit Judge, 478 F.3d 370, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

[1] the Second Amendment conferred an individual right to keep and bear arms;

[2] statutes banning handgun possession in the home violated Second Amendment; and

[3] statute containing prohibition against rendering any lawful firearm in the home operable for purpose of immediate self-defense violated Second Amendment.

Affirmed.

Justice Stevens filed dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined.

Justice Breyer filed dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined.

2–4 (1768). Other contemporary authorities concurred. See G. Sharp, Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia 17–18, 27 (3d ed. 1782); 2 J. de Lolme, The Rise and Progress of the English Constitution 886–887 (1784) (A. Stephens ed. 1838); W. Blizard, Desultory Reflections on Police 59–60 (1785). Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual ****2799** right protecting against both public and private violence.

And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. A New York article of April 1769 said that "[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence." A Journal of the Times: Mar. 17, New York Journal, Supp. 1, Apr. 13, 1769, in Boston Under Military Rule 79 (O. Dickerson ed.1936) (reprinted 1970); see also, *e.g.,* Shippen, Boston Gazette, Jan. 30, 1769, in 1 The Writings of Samuel Adams 299 (H. Cushing ed. 1904) (reprinted 1968). They understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the ***595** description of the arms right, Americans understood the "right of self-preservation" as permitting a citizen to "repe[l] force by force" when "the intervention of society in his behalf, may be too late to prevent an injury." 1 Blackstone's Commentaries 145–146, n. 42 (1803) (hereinafter Tucker's Blackstone). See also W. Duer, Outlines of the Constitutional Jurisprudence of the United States 31–32 (1833).

[10] [11] There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not, see, *e.g., United States v. Williams,* 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.

2. Prefatory Clause.

The prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State ...."

a. "Well–Regulated Militia." In *United States v. Miller,* 307 U.S. 174, 179, 59 S.Ct. 816, 83 L.Ed. 1206 (1939), we explained that "the Militia comprised all males physically capable

8, 100 S.Ct. 915. The footnote then cites several Court of Appeals cases to the same effect. It is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued.

We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first ***626** held a law to violate the First Amendment's guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified, see *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), and it was not until after World War II that we held a law invalid under the Establishment Clause, see *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.,* 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948). Even a question as basic as the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding. See *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). It is demonstrably not true that, as Justice STEVENS claims, *post,* at 2844 – 2845, "for most of our history, the invalidity of Second–Amendment–based objections to firearms regulations has been well settled and uncontroversial." For most of our history the question did not present itself.

III

[16] Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. See, *e.g., Sheldon,* in 5 Blume 346; Rawle 123; Pomeroy 152–153; Abbott 333. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. See, *e.g., State v. Chandler,* 5 La. Ann., at 489–490; *Nunn v. State,* 1 Ga., at 251; see generally 2 Kent *340, n. 2; The American Students' Blackstone 84, n. 11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession ****2817** of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing ***627** conditions and qualifications on the commercial sale of arms.[26]

26 We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

[17] We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U.S., at 179, 59 S.Ct. 816. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." See 4 Blackstone 148–149 (1769); 3 B. Wilson, Works of the Honourable James Wilson 79 (1804); J. Dunlap, The New–York Justice 8 (1815); C. Humphreys, A Compendium of the Common Law in Force in Kentucky 482 (1822); 1 W. Russell, A Treatise on Crimes and Indictable Misdemeanors 271–272 (1831); H. Stephen, Summary of the Criminal Law 48 (1840); E. Lewis, An Abridgment of the Criminal Law of the United States 64 (1847); F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852). See also *State v. Langford,* 10 N.C. 381, 383–384 (1824); *O'Neill v. State,* 16 Ala. 65, 67 (1849); *English v. State,* 35 Tex. 473, 476 (1871); *State v. Lanier,* 71 N.C. 288, 289 (1874).

It may be objected that if weapons that are most useful in military service—M–16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause ***628** and the protected right cannot change our interpretation of the right.

IV

We turn finally to the law at issue here. As we have said, the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights,[27] banning from the home ****2818** "the most preferred firearm in the nation to 'keep' and use for ***629** protection of one's home and family," 478 F.3d, at 400, would fail constitutional muster.

cases a very brief stay in the local jail), not with significant criminal penalties.[29] They are akin to modern penalties for minor public-safety infractions like speeding or jaywalking. And although such public-safety laws may not contain exceptions for self-defense, it is inconceivable that the threat of a jaywalking ticket would deter someone from disregarding a "Do Not Walk" sign in order to flee an attacker, or that the government would enforce those laws under such circumstances. Likewise, we do not think that a law imposing a ***634** 5–shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a ****2821** gun to protect himself or his family from violence, or that if he did so the law would be enforced against him. The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place. See D.C.Code § 7–2507.06.

29 The Supreme Court of Pennsylvania described the amount of five shillings in a contract matter in 1792 as "nominal consideration." *Morris's Lessee v. Smith,* 4 Dall. 119, 120, 1 L.Ed. 766 (Pa.1792). Many of the laws cited punished violation with fine in a similar amount; the 1783 Massachusetts gunpowder-storage law carried a somewhat larger fine of £ 10 (200 shillings) and forfeiture of the weapon.

Justice BREYER moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Post,* at 2852. After an exhaustive discussion of the arguments for and against gun control, Justice BREYER arrives at his interest-balanced answer: Because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.

[18] We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted ***635** them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See *National Socialist Party of America v. Skokie,* 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) *(per curiam)*. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets,

but not for the expression of extremely unpopular and wrong headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people—which Justice BREYER would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Justice BREYER chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. See *post,* at 2869 – 2870. But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

[19] **[20]** In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as ****2822** does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. 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 home.

* * *

***636** **[21]** We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, see *supra,* at 2816 – 2817, and n. 26. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

We affirm the judgment of the Court of Appeals.

It is so ordered.

130 S.Ct. 3020
Supreme Court of the United States

Otis McDONALD, et al., Petitioners,
v.
CITY OF CHICAGO, ILLINOIS, et al.

No. 08–1521.
|
Argued March 2, 2010.
|
Decided June 28, 2010.

Synopsis

Background: Petitioners filed federal suit against city, which was consolidated with two related actions, seeking a declaration that two Illinois cities' handgun ban and several related city ordinances violated the Second and Fourteenth Amendments. The United States District Court for the Northern District of Illinois, Milton I. Shadur, J., 617 F.Supp.2d 752, dismissed the suits. Petitioners appealed. The United States Court of Appeals for the Seventh Circuit, Easterbrook, Chief Judge, 567 F.3d 856, affirmed. Certiorari was granted.

Holding: The Supreme Court, Justice Alito, held that Second Amendment right to keep and bear arms is fully applicable to the States by virtue of Fourteenth Amendment.

Reversed and remanded.

Justice Scalia, filed concurring opinion.

Justice Thomas, filed opinion concurring in part and concurring in the judgment.

Justice Stevens, filed dissenting opinion.

Justice Breyer, filed dissenting opinion in which Justice Ginsburg and Justice Sotomayor joined.

As a result of *Bombolis,* cases that would otherwise fall within the Seventh Amendment are now tried without a jury in state small claims courts. See, *e.g., Cheung v. Eighth Judicial Dist. Court,* 121 Nev. 867, 124 P.3d 550 (2005) (no right to jury trial in small claims court under Nevada Constitution).

**3047 Municipal respondents and their *amici* complain that incorporation of the Second Amendment right will lead to extensive and costly litigation, but this argument applies with even greater force to constitutional rights and remedies that have already been held to be binding on the States. Consider the exclusionary rule. Although the exclusionary rule "is not an individual right," *Herring v. United States,* 555 U.S. 135, 129 S.Ct. 695, 700, 172 L.Ed.2d 496 (2009), but a "judicially created rule," *id.*, at ——, 128 S.Ct., at 2789, this Court made the rule applicable to the States. See *Mapp, supra,* at 660, 81 S.Ct. 1684. The exclusionary rule is said to result in "tens of thousands of contested suppression motions each year." Stuntz, The Virtues and Vices of the Exclusionary Rule, 20 Harv. J. Law & Pub. Pol'y, 443, 444 (1997).

Municipal respondents assert that, although most state constitutions protect firearms rights, state courts have held that these rights are subject to "interest-balancing" and have sustained a variety of restrictions. Brief for Municipal Respondents 23–31. In *Heller,* however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing, 554 U.S., at —— – ——, 128 S.Ct., at 2820–2821, and this Court decades ago *786 abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," *Malloy, supra,* at 10–11, 84 S.Ct. 1489 (internal quotation marks omitted).

As evidence that the Fourteenth Amendment has not historically been understood to restrict the authority of the States to regulate firearms, municipal respondents and supporting *amici* cite a variety of state and local firearms laws that courts have upheld. But what is most striking about their research is the paucity of precedent sustaining bans comparable to those at issue here and in *Heller*. Municipal respondents cite precisely one case (from the late 20th century) in which such a ban was sustained. See Brief for Municipal Respondents 26–27 (citing *Kalodimos v. Morton Grove,* 103 Ill.2d 483, 83 Ill.Dec. 308, 470 N.E.2d 266 (1984)); see also Reply Brief for Respondents NRA et al. 23, n. 7 (asserting that no other court has ever upheld a complete ban on the possession of handguns). It is important to keep in mind that *Heller,* while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S., at ——, 128 S.Ct., at 2816. We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.*, at —— – ——, 128 S.Ct., at 2816–2817. We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.

government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller, supra,* at ——, 128 S.Ct., at 2821.

* * *

In *Heller,* we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. See *Duncan,* 391 U.S., at 149, and n. 14, 88 S.Ct. 1444. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice SCALIA, concurring.

I join the Court's opinion. Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights "because it is both long established and narrowly limited." *Albright v. Oliver,* 510 U.S. 266, 275, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (SCALIA, J., concurring). This case does not require me to reconsider that view, since straightforward application of settled doctrine suffices to decide it.

I write separately only to respond to some aspects of Justice STEVENS' dissent. Not that aspect which disagrees with the majority's application of our precedents to this case, ***792** which is fully covered by the Court's opinion. But much of what Justice STEVENS writes is a broad condemnation of the theory of interpretation which underlies the Court's opinion, a theory that makes the traditions of our people paramount. He proposes a different theory, which he claims is more "cautiou[s]" and respectful of proper limits on the judicial role. *Post,* at 3119 – 3120. It is that claim I wish to address.

I

836 F.3d 336
United States Court of Appeals,
Third Circuit.

Daniel BINDERUP, Appellant (No. 14-4550),
v.
ATTORNEY GENERAL UNITED STATES OF AMERICA; Director Bureau of Alcohol Tobacco Firearms & Explosives, Appellants (No. 14-4549).
Julio Suarez, Appellant (No. 15-1976),
v.
Attorney General United States of America; Director Bureau of Alcohol Tobacco Firearms & Explosives, Appellants (No. 15-1975).

Nos. 14-4549 & 14-4550
|
Nos. 15-1975 & 15-1976
|
Argued June 1, 2016
|
(Opinion filed: September 7, 2016)

Synopsis

Background: Individuals convicted of state misdemeanors punishable by more than two years' imprisonment brought actions against United States Attorney General and director of Bureau of Alcohol, Tobacco, Firearms & Explosives alleging that federal statute prohibiting them from possessing firearms violated their Second Amendment rights. The United States District Court for the Eastern District of Pennsylvania, James Knoll Gardner, J., 2014 WL 4764424, and the United States District Court for the Middle District of Pennsylvania, William W. Caldwell, J., 2015 WL 685889, ruled that statute was unconstitutional as applied, and defendants appealed. Appeals were consolidated for rehearing en banc.

Holdings: The Court of Appeals, en banc, Ambro, Circuit Judge, held that:

[1] exception to statute did not cover any crime that could be punished by more than two years in prison;

[2] statute was not a per se violation of Second Amendment;

B. The Framework for As-Applied Second Amendment Challenges

Unlike a facial challenge, an as-applied challenge "does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011) (quoting *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010)); *see Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) ***346** ("It is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another." (internal quotation marks omitted)). Accordingly, our review of Binderup's and Suarez's as-applied challenges requires us to consider whether their particular circumstances remove them from the constitutional sweep of § 922(g)(1).

Two of our precedents—*Marzzarella* and *Barton*—have guided how we approach as-applied Second Amendment challenges. The former involved an as-applied challenge to 18 U.S.C. § 922(k), which bars the possession of any firearm with an obliterated serial number. It derived from *Heller* a "two-pronged approach to Second Amendment challenges" to firearm restrictions. 614 F.3d at 89. We first consider "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id.* If not, the challenged law must stand. But if the law burdens protected conduct, the proper course is to "evaluate the law under some form of means-end scrutiny," *id.* that form in *Marzzarella* being intermediate scrutiny, *id.* at 97. "If the law passes muster under [the] standard [applied], it is constitutional. If it fails, it is invalid." *Id.* at 89. As to § 922(k), we held that the law withstood intermediate scrutiny "even if it burden[ed] protected conduct" by fitting reasonably with the important "law enforcement interest in enabling the tracing of weapons via their serial numbers." *Id.* at 95, 98. (We also noted in a *dictum* that the law would survive strict scrutiny, were that the test, because the provision serves a compelling interest through the least-restrictive means. *Id.* at 99–101.)

Nearly every court of appeals has cited *Marzzarella* favorably. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 n.49 (2d Cir. 2015); *Chovan*, 735 F.3d at 1136–37; *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194–96 (5th Cir. 2012); *GeorgiaCarry.org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller*, 670 F.3d at 1252–53; *Ezell v. City of Chicago*, 651 F.3d 684, 701–04 (7th Cir. 2011); *Chester*, 628 F.3d at 680–83; *Reese*, 627 F.3d at 800–05. Indeed, it has escaped disparagement by any circuit court.

A year after *Marzzarella* we decided *Barton*, which involved a felon convicted under the provision now before us—§ 922(g)(1). Barton raised facial and as-applied Second Amendment challenges to the firearm ban. After dispensing with his facial challenge and

confirming the availability of as-applied challenges under the Second Amendment, we ruled that "the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses." 633 F.3d at 173. Because Barton's prior convictions for possession of cocaine with intent to distribute and for receipt of a stolen firearm (as well as his illegal post-conviction sale of a firearm with an obliterated serial number) were "closely related to violent crime," we concluded that he lacked Second Amendment rights. *Id.* at 174. Put another way, Barton did not present "facts about himself and his background that distinguish[ed] his circumstances from those of persons historically barred from Second Amendment protections," *id.* so he was "disqualified from the exercise of Second Amendment rights," *id.* at 174 (quoting *Heller*, 554 U.S. at 635, 128 S.Ct. 2783), and his as-applied challenge could not succeed.

[3] Read together, *Marzzarella* and *Barton* lay out a framework for deciding as-applied challenges to gun regulations. At step one of the *Marzzarella* decision ***347** tree, a challenger must prove, per *Barton*, that a presumptively lawful regulation burdens his Second Amendment rights. This requires a challenger to clear two hurdles: he must (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, *id.* at 173, and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class, *id.* at 174.

No doubt a challenger cannot prevail merely on his say-so. Courts must find the facts to determine whether he has adequately distinguished his circumstances from those of persons historically excluded from Second Amendment protections. Not only is the burden on the challenger to rebut the presumptive lawfulness of the exclusion at *Marzzarella*'s step one, but the challenger's showing must also be strong. That's no small task. And in cases where a statute by its terms only burdens matters (*e.g.*, individuals, conduct, or weapons) outside the scope of the right to arms, it is an impossible one. But if the challenger succeeds at step one, the burden shifts to the Government to demonstrate that the regulation satisfies some form of heightened scrutiny, discussed further below, at step two of the *Marzzarella* analysis.

The Challengers, the District Court in *Binderup*, and some of our colleagues claim that *Marzzarella* and *Barton* set standards for different types of as-applied Second Amendment challenges and that only *Barton* controls challenges to § 922(g)(1); *Marzzarella* has no role in the analysis. Our view is that, at least in pertinent part, each complements the other for an as-applied Second Amendment challenge to a presumptively lawful regulatory measure like § 922(g)(1). *Barton* identifies the two hurdles that an individual presumed to lack Second Amendment rights must overcome to rebut the presumption at step one of the *Marzzarella* framework. [3] Rebutting it permits testing the law or regulation under heightened scrutiny at

step two. With this understanding, *Marzzarella* and *Barton* are neither wholly distinct nor incompatible.

3 Though *Barton* clarifies the types of showings that a challenger must make at step one of the *Marzzarella* framework, it defines too narrowly the traditional justification for why a criminal conviction may destroy the right to arms (*i.e.*, it limits felon disarmament to only those criminals likely to commit a violent crime in the future) and, by extension, defines too broadly the class of offenders who may bring successful as-applied Second Amendment challenges to § 922(g)(1) (*i.e.*, it allows people convicted of serious crimes to regain their right to arms). *See infra* Parts III.C.1–3.a.

C. Step One of the *Marzzarella* Framework

1. The Challengers Presumptively Lack Second Amendment Rights

Heller teaches that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful." 554 U.S. at 626 & 627 n.26, 128 S.Ct. 2783. Traditionally, "felons" are people who have been convicted of any crime "that is punishable by death or imprisonment for more than one year." 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.6 (2d ed. 2015); *cf. Carachuri–Rosendo v. Holder*, 560 U.S. 563, 567, 130 S.Ct. 2577, 177 L.Ed.2d 68 (2010) (quoting 18 U.S.C. § 3559(a)).

Section 922(g)(1) bars the possession of firearms by anyone convicted of "a crime punishable by imprisonment for a term exceeding one year." This means that its prohibition extends to anyone convicted of a crime meeting the traditional definition of a felony, though Congress excluded anyone convicted of a "State offense classified by the laws of the State as a misdemeanor" unless it is punishable by more than ***348** two years' imprisonment. 18 U.S.C. § 921(a)(20)(B).

Binderup and Suarez were each convicted of a misdemeanor subject to § 922(g)(1): Binderup's was punishable by up to five years' imprisonment; Suarez's by up to three years in prison. The Pennsylvania and Maryland legislatures classify their respective offenses as misdemeanors. However, based on their maximum possible punishments, they meet the traditional definition of a felony, and Congress treats them as felonies for purposes of § 922(g)(1). As a result, Binderup and Suarez are subject to a firearm ban that is, per *Heller*, "presumptively lawful."

2. The Traditional Justification for Denying Felons the Right to Arms

Turning to the first hurdle of step one, we look to the historical justification for stripping felons, including those convicted of offenses meeting the traditional definition of a felony, of their Second Amendment rights. "[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); *see, e.g.*, Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 491–92 (2004); Saul Cornell, *"Don't Know Much about History": The Current Crisis in Second Amendment Scholarship*, 29 N. Ky. L Rev. 657, 679 (2002); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588, 626–27 (2000); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, Law & Contemp. Probs., Winter 1986, at 143, 146; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 266 (1983). Several of our sister circuits endorse the "virtuous citizen" justification for excluding felons and felon-equivalents from the Second Amendment's ambit. *See, e.g.*, *United States v. Carpio–Leon*, 701 F.3d 974, 979–80 (4th Cir. 2012) ("[F]elons were excluded from the right to arms because they were deemed unvirtuous." (internal quotation marks omitted)); *Yancey*, 621 F.3d at 684–85; *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) ("[T]he right to bear arms does not preclude laws disarming ... unvirtuous citizens (*i.e.*, criminals)." (quoting Kates, Jr., 49 Law & Contemp Probs. at 146)); *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009) ("In the parlance of the republican politics of the time, these limitations were sometimes expressed as efforts to disarm the 'unvirtuous.' ").

[4] People who have committed or are likely to commit "violent offenses"—crimes "in which violence (actual or attempted) is an element of the offense," *Skoien*, 614 F.3d at 642; *see Voisine*, 136 S.Ct. at 2280—undoubtedly qualify as "unvirtuous citizens" who lack Second Amendment rights. *Barton*, 633 F.3d at 173–74; *see United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011) (recognizing "a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens"); C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 727–28 (2009). But *Heller* recognized "longstanding prohibitions on the possession of firearms by felons," not just violent felons. 554 U.S. at 626, 128 S.Ct. 2783. The category of "unvirtuous citizens" is thus broader than violent criminals; it covers any person who has committed a serious criminal offense, violent or nonviolent. *See Skoien*, 614 F.3d at 640–41; *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004); ***349** Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations & Criminological Considerations*, 60 Hastings L.J. 1339, 1363–64 (2009); *see also Vongxay*, 594 F.3d at 1115 ("[F]elons are categorically different from the individuals who have a fundamental right to bear arms."). To the extent *Barton* suggests that people who commit serious crimes retain or regain their Second Amendment rights if they are not likely to commit a violent crime, 633 F.3d at 174, it is overruled. *See infra* Part III.C.3.a.

The view that anyone who commits a serious crime loses the right to keep and bear arms dates back to our founding era. "*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." *Skoien*, 614 F.3d at 640 (quoting *Heller*, 554 U.S. at 604, 128 S.Ct. 2783). That report "asserted that citizens have a personal right to bear arms 'unless for *crimes committed*, or real danger of public injury.' " *Id.* (emphasis added) (quoting 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 662, 665 (1971)). "[C]rimes committed"—violent or not—were thus an independent ground for exclusion from the right to keep and bear arms. And there is reason to believe that felon disarmament has roots that are even more ancient. *See* Kates, Jr., 82 Mich. L. Rev. at 266 ("Felons simply did not fall within the benefits of the common law right to possess arms.").

[5] The takeaway: persons who have committed serious crimes forfeit the right to possess firearms much the way they "forfeit other civil liberties, including fundamental constitutional rights." *Barton*, 633 F.3d at 175.

3. The Challengers' Circumstances

a. Distinguishing the Historically Barred Class

Having identified the traditional justification for denying some criminal offenders the right to arms—that they are "unvirtuous" because they committed serious crimes—we turn to how other criminal offenders may distinguish their circumstances from those of people who historically lacked the right to keep and bear arms. *Barton* suggests two ways to satisfy this second hurdle of step one: the first is that a challenger may show that he never lost his Second Amendment rights because he was not convicted of a serious crime; the second is that a challenger who once lost his Second Amendment rights by committing a serious crime may regain them if his "crime of conviction is decades-old" and a court finds that he "poses no continuing threat to society." 633 F.3d at 174.

[6] We agree with *Barton* only insofar as it stands for the unremarkable proposition that a person who did not commit a serious crime retains his Second Amendment rights. Setting aside what makes a crime "serious" in the Second Amendment context and whether § 922(g)(1) covers any non-serious crimes—issues we address in Part III.C.3.b and on which there is disagreement, *see* Fuentes Op. Typescript at 19–20—being convicted of a non-serious crime does not demonstrate a lack of "virtue" that disqualifies an offender from exercising those rights.

[7] But our agreement with *Barton* ends there. We reject its claim that the passage of time or evidence of rehabilitation will restore the Second Amendment rights of people who

committed serious crimes. That view stems from *Barton*'s misplaced focus at *Marzzarella*'s step one on the probability of violent recidivism and is inconsistent with the true justification ***350** for the disarmament of people who commit serious crimes: they are "unvirtuous." *See supra* Part III.C.2. A challenger's risk of violent recidivism tells us nothing about whether he was convicted of a serious crime, and the seriousness of the purportedly disqualifying offense is our sole focus throughout *Marzzarella*'s first step.

There is no historical support for the view that the passage of time or evidence of rehabilitation can restore Second Amendment rights that were forfeited. To the extent Congress affords such a remedy in 18 U.S.C. § 921(a)(20) or 18 U.S.C. § 925(c), that is a matter of legislative grace; the Second Amendment does not require that those who commit serious crimes be given an opportunity to regain their right to keep and bear arms in that fashion. Indeed, the Supreme Court and our Court have recognized in the Second Amendment context that the Judicial Branch is not "institutionally equipped" to conduct "a neutral, wide-ranging investigation" into post-conviction assertions of rehabilitation or to predict whether particular offenders are likely to commit violent crimes in the future. *United States v. Bean*, 537 U.S. 71, 77, 123 S.Ct. 584, 154 L.Ed.2d 483 (2002); *see Pontarelli v. U.S. Dep't of the Treasury*, 285 F.3d 216, 230–31 (3d Cir. 2002) (en banc); *cf.* S. Rep. 102-353, at 19 (1992) (doubting that even the Executive Branch could feasibly grant individualized exceptions to § 922(g)(1) based on an offender's supposed rehabilitation because doing so is "a very difficult and subjective task" that "could have devastating consequences for innocent citizens if the wrong decision is made").

In short, only the seriousness of the purportedly disqualifying offense determines the constitutional sweep of statutes like § 922(g)(1) at step one. To the extent *Barton* holds that people convicted of serious crimes may regain their lost Second Amendment rights after not posing a threat to society for a period of time, it is overruled.

b. Application to the Challengers

We now consider whether the Challengers have shown that their crimes are not serious. As a preliminary matter, we note that Judge Fuentes, those colleagues joining his opinion dissenting from the judgment, and the Government deny the possibility of successful as-applied Second Amendment challenges to § 922(g)(1). *See, e.g.*, Gov't *Binderup* Br. at 14; Gov't *Suarez* Br. at 15; Fuentes Op. Typescript at 18–40. In their view, § 922(g)(1), at least in its current form, is constitutional in all its applications because it does not burden the Second Amendment rights of felons or felon-equivalents who, because of their convictions, lack Second Amendment rights. Put another way, they believe that all crimes subject to § 922(g)

(1) are disqualifying because their maximum possible punishments are conclusive proof they are serious.

But that view puts the rabbit in the hat by concluding that all felons and misdemeanants with potential punishments past a certain threshold lack the right to keep and bear arms when, despite their maximum possible punishment, some offenses may be "so tame and technical as to be insufficient to justify the ban." *United States v. Torres–Rosario*, 658 F.3d 110, 113 (1st Cir. 2011). *Heller* confirms such a showing is possible, as it describes prohibitions on the possession of firearms by felons as only "presumptively lawful." 554 U.S. at 626–27 & n.26, 128 S.Ct. 2783. Unless flagged as irrebutable, presumptions are rebuttable. *See Barton*, 633 F.3d at 173; *Williams*, 616 F.3d at 692. Indeed, under the approach of Judge Fuentes and those colleagues who join his opinion dissenting from the judgments, the Government could make an end-run around the ***351** Second Amendment and undermine the right to keep and bear arms in contravention of *Heller*. A crime's maximum possible punishment is "purely a matter of legislative prerogative," *Rummel v. Estelle*, 445 U.S. 263, 274, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), subject only to "constitutional prohibitions on irrational laws," *Heller*, 554 U.S. at 628 n.27, 128 S.Ct. 2783; *see United States v. Walker*, 473 F.3d 71, 79 (3d Cir. 2007). Yet *Heller* teaches that the Government needs more than a rational basis "to overcome the right to keep and bear arms." 554 U.S. at 628 n.27, 128 S.Ct. 2783; *see Marzzarella*, 614 F.3d at 95–96. Therefore, to determine whether the Challengers are shorn of their Second Amendment rights, *Heller* requires us to consider the maximum possible punishment but not to defer blindly to it.

[8] At the same time, there are no fixed criteria for determining whether crimes are serious enough to destroy Second Amendment rights. Unlike the "historically unprotected categories of speech" that are First Amendment exceptions "long familiar to the bar," *United States v. Stevens*, 559 U.S. 460, 468, 470, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010), the category of serious crimes changes over time as legislative judgments regarding virtue evolve. For example, though only a few exceedingly serious crimes were "felonies" at early common law, by the time of our country's founding "many new felonies were added by English statute." 1 *Wharton's Criminal Law* § 17 (15th ed. 2015); *see, e.g.*, 4 William Blackstone, *Commentaries* *18 ("[N]o less than a[ ] hundred and sixty [actions] have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death."); Francis Bacon, *Preparation for the Union of Laws of England and Scotland*, *in* 2 *The Works of Francis Bacon, Lord Chancellor of England* 163–64 (1841) (listing dozens of felonies, including "[w]here a man stealeth certain kinds of hawks" or "invocates wicked spirits"). The upshot is that "exclusions need not mirror limits that were on the books in 1791" to comport with the Second Amendment. *Skoien*, 614 F.3d at 641. Rather, we will presume the judgment of the legislature is correct and treat any crime subject to § 922(g)(1) as disqualifying unless there is a strong reason to do otherwise.

[9] Here, upon close examination of the Challengers' apparently disqualifying convictions, we conclude that their offenses were not serious enough to strip them of their Second Amendment rights. For starters, though the Challengers' crimes meet the generic definition of a felony and Congress's definition of a felony for purposes of § 922(g)(1), the Pennsylvania and Maryland legislatures enacted them as misdemeanors. Misdemeanors are, and traditionally have been, considered less serious than felonies. *See Baldwin v. New York*, 399 U.S. 66, 70, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970); *misdemeanor*, Black's Law Dictionary (10th ed. 2014); 1 LaFave, *Substantive Criminal Law* § 1.6. Congress tried to ensure that only serious crimes would trigger disarmament under § 922(g)(1) by exempting from the ban any state-law misdemeanant whose crime was punishable by less than two years' imprisonment. 18 U.S.C. § 921(a)(20)(B). But we believe that accommodation still paints with too broad a brush, for a state legislature's classification of an offense as a misdemeanor is a powerful expression of its belief that the offense is not serious enough to be disqualifying.

This is not to say that state misdemeanors cannot be serious. No doubt "some misdemeanors are ... 'serious' offenses," *Baldwin*, 399 U.S. at 70, 90 S.Ct. 1886, and "numerous misdemeanors involve conduct more dangerous than many felonies," *Tennessee v. Garner*, 471 U.S. 1, 14, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). *See Johnson v. United States*, 559 U.S. 133, 149–50, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) ***352** (Alito, J., dissenting) ("At common law ... many very serious crimes, such as kidnapping and assault with the intent to murder or rape, were categorized as misdemeanors."). And the maximum possible punishment is certainly probative of a misdemeanor's seriousness. But Congress may not overlook so generally the misdemeanor label, which, in the Second Amendment context, is also important.

Other considerations, however, confirm our belief that the Challengers' crimes were not serious. As explained above, violent criminal conduct—meaning a crime "in which violence (actual or attempted) is an element of the offense," *Skoien*, 614 F.3d at 642; *see Voisine*, 136 S.Ct. at 2280—is disqualifying. *See* Part III.C.2. But neither Challenger's offense had the use or attempted use of force as an element.[4] Though, as explained, it is possible for non-violent crimes to be serious, the lack of a violence element is a relevant consideration.

4 Though we look only to a crime's elements rather than to the way it actually was committed, we note as an aside that the District Court in *Binderup* explained that "[t]here is simply nothing in the record here which would support a reasonable inference that [Binderup] used any violence, force, or threat of force to initiate or maintain the sexual relationship with his seventeen-year-old employee" or "that he even engaged in any violent or threatening conduct." 2014 WL 4764424, at *22. Similarly, the District Court in *Suarez* described Suarez's misdemeanor as "minor and non-violent." —— F.Supp.3d at ——, 2015 WL 685889, at *9.

Also important is that each Challenger received a minor sentence by any measure: Binderup was sentenced to three years' probation (a condition of which was to avoid contact with his employee) and a $300 fine plus court costs and restitution, while Suarez received a suspended

sentence of 180 days' imprisonment and a $500 fine. That is because severe punishments are typically reserved for serious crimes. Additionally, punishments are selected by judges who have firsthand knowledge of the facts and circumstances of the cases and who likely have the benefit of pre-sentence reports prepared by trained professionals. With not a single day of jail time, the punishments here reflect the sentencing judges' assessment of how minor the violations were.

Finally, there is no cross-jurisdictional consensus regarding the seriousness of the Challengers' crimes. Some states treat consensual sexual relationships between 41 and 17 year olds as serious crimes, *see* Gov't *Binderup* Br. at 17–19 & n.4, but the vast majority of states do not, *see* Asaph Glosser *et al.*, *Statutory Rape: A Guide to State Laws and Reporting Requirements* 6–7 (Dec. 15, 2004), *available at* https://aspe.hhs.gov/sites/default/files/pdf/75531/report.pdf (last visited Aug. 25, 2016). Binderup's conduct arguably would have been criminal in a few other states because his 17-year-old sexual partner was his employee, yet it still would have been legal in many states. Similarly, though some states punish the unlicensed carrying of a concealed weapon as a serious crime, *see* Gov't *Suarez* Br. at 16-17 n.5, more than half prescribe a maximum sentence that does not meet the threshold of a traditional felony (more than one year in prison) and others do not even require a specific credential to carry a concealed weapon, *see* Thomson Reuters, *50 State Survey: Right to Carry a Concealed Weapon (Statutes)* (October 2015); U.S. Gov't Accountability Off., *States' Laws and Requirements for Concealed Carry Permits Vary Across Nation* 73–74 (2012), *available at* http://www.gao.gov/assets/600/592552.pdf (last visited Aug. 25, 2016); Law Ctr. to Prevent Gun Violence, *Concealed Weapons Permitting*, http://smartgunlaws.org/gun-laws/ ***353** policy-areas/firearms-in-public-places/concealed-weapons-permitting/ (last visited Aug. 25, 2016). Were the Challengers unable to show that so many states consider their crimes to be non-serious, it would be difficult for them to carry their burden at step one. But because they have shown that there is no consensus regarding the seriousness of their crimes, their showing at step one is that much more compelling. [5]

5 Judge Fuentes and those colleagues who join his opinion dissenting from the judgments caution that this approach is not "workable" and "places an extraordinary administrative burden on district courts," Fuentes Op. Typescript at 2, 71, but the criteria we use to assess the seriousness of a misdemeanor subject to § 922(g)(1)—the elements of the offense, the actual sentence, and the state of the law—are easily administrable. These objective indications of seriousness are well within the ambit of judgment exercised daily by judges. Courts are also well suited to the task of identifying serious crimes in the Second Amendment context, as in other constitutional contexts the Judicial Branch is charged with discerning "objective criteria reflecting the seriousness with which society regards [an] offense." *Baldwin*, 399 U.S. at 68, 90 S.Ct. 1886; *see, e.g.*, *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543–44, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989) (Sixth Amendment); *Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1985) (Fourth Amendment); *Smith v. United States*, 360 U.S. 1, 9, 79 S.Ct. 991, 3 L.Ed.2d 1041 (1959) (Fifth Amendment).

In sum, the Challengers have carried their burden of showing that their misdemeanors were not serious offenses despite their maximum possible punishment. [6] This leads us to conclude that Binderup and Suarez have distinguished their circumstances from those of persons

historically excluded from the right to arms. That, in turn, requires the Government to meet some form of heightened scrutiny at the second step of the *Marzzarella* framework.

6 Our decision is limited to the cases before us, which involve state-law misdemeanants bringing as-applied Second Amendment challenges to § 922(g)(1). This is important because when a legislature chooses to call a crime a misdemeanor, we have an indication of non-seriousness that is lacking when it opts instead to use the felony label. We are not confronted with whether an as-applied Second Amendment challenge can succeed where the purportedly disqualifying offense is considered a felony by the authority that created the crime. On the one hand, it is possible to read *Heller* to leave open the possibility, however remote, of a successful as-applied challenge by someone convicted of such an offense. At the same time, even if that were so, the individual's burden would be extraordinarily high—and perhaps even insurmountable. In any event, given that neither Challenger fits that description, we need not decide the question.

D. Step Two of the *Marzzarella* Framework

[10] Next, we consider whether § 922(g)(1) survives heightened scrutiny as applied. On this record, it does not. No doubt § 922(g)(1) is intended to further the government interest of promoting public safety by "preventing armed mayhem," *Skoien*, 614 F.3d at 642, an interest that is both important and compelling. But whether we apply intermediate scrutiny or strict scrutiny—and we continue to follow the lead of *Marzzarella* in choosing intermediate scrutiny, 614 F.3d at 97—the Government bears the burden of proof on the appropriateness of the means it employs to further its interest. *See, e.g.*, *Bd. of Trs. of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); *Johnson v. California*, 543 U.S. 499, 505, 506 n.1, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005).

Here the Government falls well short of satisfying its burden—even under intermediate scrutiny. The record before us consists of evidence about the Challengers' backgrounds, including the time that has passed since they last broke the law. It contains no evidence explaining why banning ***354** people like them (*i.e.*, people who decades ago committed similar misdemeanors) from possessing firearms promotes public safety. The Government claims that someone like Suarez is "particularly likely to misuse firearms" because he belongs to a category of "potentially irresponsible persons," Gov't *Suarez* Br. at 27–28, and that someone like Binderup is "particularly likely to commit additional crimes in the future," Gov't *Binderup* Br. at 35. But it must "present some meaningful evidence, not mere assertions, to justify its predictive [and here conclusory] judgments." *Heller*, 670 F.3d at 1259. In these cases neither the evidence in the record nor common sense supports those assertions.

The Government relies on a number of off-point statistical studies to argue that it is reasonable to disarm the Challengers because of their convictions. It notes that felons generally commit violent crimes more frequently than nonfelons, *see* Bureau of Justice Statistics, U.S. Dep't of Justice, *Recidivism of Prisoners Released in 1994*, at 6 (2002), and that the "denial of handgun purchases [to convicted felons] is associated with a reduction in risk for later criminal activity of approximately 20–30%," 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). But these studies estimate the likelihood that incarcerated felons will reoffend after their release from prison. The Challengers were not incarcerated and are not felons under state law; they are state-law misdemeanants who spent no time in jail. The Government cannot draw any reasonable conclusions about the risk posed by their possession of firearms from such obviously distinguishable studies. It claims that even criminals placed on probation rather than sent to prison have a heightened risk of recidivism, but the study it cites found that, "[g]enerally, the risk of recidivism was highest during the first year after admission to probation," and that "[a]s released prisoners and probationers age, they tend to exhibit lower rates of recidivism." Iowa Div. of Crim. & Juvenile Justice Planning, *Recidivism Among Iowa Probationers* 2 (July 2005), *available at* http://publications.iowa.gov/15032/ (last visited Aug. 25, 2016). Binderup's and Suarez's offenses are 20 and 26 years old, respectively, so that study tells us little, if anything, about the risk of recidivism in these cases. [7]

7 As discussed, evidence of how individuals have lived their lives since committing crimes is irrelevant under *Marzzarella*'s first step, as there is no historical support for rehabilitation being a consideration in determining whether someone has Second Amendment rights. However, at step two of the analysis the question is no longer whether the Challengers fall within the Second Amendment's protections. They do. Our task now is to decide whether the Government can disarm them despite these protections. Whereas our obligation at step one is to draw constitutional lines—separating those who have Second Amendment rights from those who do not—at step two we must ask whether the Government has made a strong enough case for disarming a person found after step one to be eligible to assert an as-applied challenge. This turns in part on the likelihood that the Challengers will commit crimes in the future. Thus, under the right circumstances the passage of time since a conviction can be a relevant consideration in assessing recidivism risks.

The Government also claims to have studies of particular relevance to each Challenger's situation, but this argument too misses the mark. As to Binderup, the Government cites studies from several states that it contends would classify him as a sex offender on account of his criminal conduct. *See* Gov't *Binderup* Br. at 33–34; *see also id.* at 28 n.8 (citing a Pennsylvania study showing that individuals convicted of ***355** certain sexual offenses have a 50–60% chance of rearrest within three years of release from prison). Binderup unsurprisingly disputes that label. We need not delve into the weeds here, as, much like the more general studies discussed above, the sex-offender specific studies focus on people who were incarcerated. It is not helpful to draw inferences about the usefulness of disarming Binderup from those off-point studies.

As to Suarez, the Government emphasizes that persons arrested for "weapons offenses" are rearrested at high rates, Gov't *Suarez* Br. at 30 & nn.10–11 (citing studies), and relies on a study indicating that California handgun purchasers in 1977 "who had prior convictions for nonviolent firearm-related offenses such as carrying concealed firearms in public, but none for violent offenses," were more likely than people with no criminal histories to be charged later with a violent crime, *see* Garen J. Wintemute *et al.*, *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 Am. Med. Ass'n 2083, 2086 (1998). Yet that study

only addresses the risk of recidivism within 15 years of a conviction for an unspecified "nonviolent firearm-related offense [ ]." *Id.* at 2086. Common sense tells us that recidivism rates would change with the passage of an additional 11 years (Suarez was convicted 26 years ago) and vary based on the circumstances of the prior conviction.

This is not to say that empirical studies are irrelevant to as-applied Second Amendment challenges. Parties may use statistics to show that people who commit certain crimes have a high (or low) likelihood of recidivism that warrants (or does not warrant) disarmament, even decades after a conviction. In these cases, empirical studies could have demonstrated an appropriate fit between the Challengers' total disarmament and the promotion of public safety if they contained reliable statistical evidence that people with the Challengers' backgrounds were more likely to misuse firearms or were otherwise irresponsible or dangerous. The Government simply presented no such evidence. [8]

8 Judge Fuentes and those colleagues who join his opinion dissenting from the judgments suggest that our heightened scrutiny analysis boils down to the Challengers asking us to trust that they will not misuse firearms because we cannot make predictive judgments about the need to disarm the Challengers "with any degree of confidence." Fuentes Op. Typescript at 55. We disagree. Under either form of heightened scrutiny it is the Government's burden to prove that the restriction is appropriately tailored. The problem in our cases is that because the Government's evidence sweeps so broadly, it does not establish that the restriction serves an important interest even as applied to people *like* the Challengers, let alone to the Challengers themselves.

Additionally, that federal law gives Binderup and Suarez opportunities to escape the effect of § 922(g)(1) does not save the statute from unconstitutionality under the circumstances. For starters, several avenues are closed to them altogether: they may not apply for relief under § 925(c) because that provision has been unfunded for years, *see Logan*, 552 U.S. at 28 n.1, 128 S.Ct. 475; and Suarez is ineligible for expungement or the restoration of his civil rights, *see* Md. Code, Crim. P., § 10-105; *Logan*, 552 U.S. at 31–32, 128 S.Ct. 475. Those avenues that remain open to them do not satisfy even intermediate scrutiny. Binderup's record may be expunged only after he reaches age 70 (or is dead for three years), 18 Pa. Cons. Stat. § 9122(b), but as there is no evidence showing it is reasonable to ban Binderup from possessing a firearm today, there is certainly no evidence to show that it is reasonable to keep that ban in place until his 70th birthday. The only remaining option ***356** is for Binderup and Suarez to receive pardons from the Governors of Pennsylvania and Maryland, respectively. (Pardons are, as already noted, an independent ground for relief from the firearm disability in § 922(g)(1), and Binderup must receive a pardon to restore his civil rights. *See* 42 Pa. Cons. Stat. § 4502(a)(3).) But the Government has presented no evidence or explanation as to why a Governor's decisions about pardons—"a classic example of unreviewable executive discretion," *Bowens v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009)—are reasonably related to the risk posed by the Challengers' possession of firearms. Though a pardon would reflect well on Binderup and Suarez, it is hardly reasonable to treat the absence of a pardon—rare by any measure—as adequate proof of a continuing need to disarm them indefinitely.

The Challengers' isolated, decades-old, non-violent misdemeanors do not permit the inference that disarming people like them will promote the responsible use of firearms. Nor is there any evidence in the record to show why people like them remain potentially irresponsible after many years of apparently responsible behavior. Without more, there is not a substantial fit between the continuing disarmament of the Challengers and an important government interest. Thus, § 922(g)(1) is unconstitutional as applied to them.

IV. Conclusion

When sorting out a fractured decision of the Court, the goal is "to find a single legal standard" that "produce[s] results with which a majority of the [Court] in the case articulating the standard would agree." *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991), *modified on other grounds*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)). We have at times "looked to the votes of dissenting [judges] if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue." *Id.* And when no single rationale explaining the result enjoys the support of a majority of the Court, its holding "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion)).

Applying those interpretive tools here, the following is the law of our Circuit: (1) the two-step *Marzzarella* framework controls all Second Amendment challenges, including as-applied challenges to § 922(g)(1); (2) a challenger will satisfy the first step of that framework only if he proves that the law or regulation at issue burdens conduct protected by the Second Amendment; (3) to satisfy step one in the context of an as-applied challenge to § 922(g)(1), a challenger must prove that he was not previously convicted of a serious crime; (4) evidence of a challenger's rehabilitation or his likelihood of recidivism is not relevant to the step-one analysis; (5) as the narrowest ground supporting the Court's judgments for Binderup and Suarez, the considerations discussed above will determine whether crimes are serious (*i.e.*, disqualifying) at step one; and (6) if a challenger makes the necessary step-one showing, the burden shifts to the Government at step two to prove that the regulation at issue survives intermediate scrutiny.

In the cases before us, though Binderup and Suarez fail to show that their misdemeanor offenses are not subject to § 922(g)(1), they have rebutted the presumption that they lack Second Amendment rights by distinguishing their crimes of conviction from those that historically led to exclusion from Second Amendment ***357** protections. This meets the first-

step test of *Marzzarella*. At step two, the Government has failed to present sufficient evidence to demonstrate under even intermediate scrutiny that it may, consistent with the Second Amendment, apply § 922(g)(1) to bar Binderup and Suarez from possessing a firearm in their homes. Accordingly, we affirm the judgments of the District Courts.

HARDIMAN, Circuit Judge, concurring in part and concurring in the judgments, joined by FISHER, CHAGARES, JORDAN, and NYGAARD, Circuit Judges.

The Second Amendment secures an individual "right of the people" to keep and bear arms unconnected to service in the militia. *District of Columbia v. Heller*, 554 U.S. 570, 595, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). This "pre-existing" right was included in the Bill of Rights in light of the troubles the colonists experienced under British rule and the Founders' appreciation of the considerable power that was transferred to the new federal government. Without a specific guarantee in our fundamental charter, it was feared that "the people" might one day be disarmed. *See id.* at 598–99, 128 S.Ct. 2783. At the same time, the Founders understood that not everyone possessed Second Amendment rights. These appeals require us to decide who count among "the people" entitled to keep and bear arms.

The laws of the United States prohibit felons and certain misdemeanants from possessing firearms. 18 U.S.C. § 922(g)(1). Guided by the Supreme Court's characterization of felon dispossession as "presumptively lawful" in *Heller*, we held in *United States v. Barton* that this prohibition does not on its face violate the Second Amendment. 633 F.3d 168 (3d Cir. 2011). In doing so we stated that § 922(g)(1) remains subject to as-applied constitutional challenges. *Id.* at 172–75. These consolidated appeals present two such challenges. Daniel Binderup and Julio Suarez—each permanently barred from possessing firearms because of prior misdemeanor convictions—contend that § 922(g)(1) is unconstitutional as applied to them.

It is. The most cogent principle that can be drawn from traditional limitations on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment. And because Binderup and Suarez have demonstrated that their crimes of conviction were nonviolent and that their personal circumstances are distinguishable from those of persons who do not enjoy Second Amendment rights because of their demonstrated proclivity for violence, the judgments of the District Courts must be affirmed.

I

922(g)(1)], we look to [its] historical pedigree ***363** ... to determine whether the traditional justifications underlying the statute support a finding of permanent disability in this case.").

The fact that *Barton* speaks to scope does not mean, as our colleagues and the Government insist, that it requires application of means-end scrutiny once it is determined that a presumptively lawful regulation has dispossessed someone who falls within the protection of the Second Amendment. It is true that courts typically apply some form of means-end scrutiny to as-applied challenges once it has been determined that the law in question burdens protected conduct. But when, as in these appeals, it comes to an as-applied challenge to a presumptively lawful regulation that *entirely bars* the challenger from exercising the core Second Amendment right, any resort to means-end scrutiny is inappropriate once it has been determined that the challenger's circumstances distinguish him from the historical justifications supporting the regulation. This is because such laws are categorically invalid as applied to persons entitled to Second Amendment protection—a matter of scope.

This principle is based on *Heller* itself. That decision invalidated a municipal law that banned handgun possession in the home and required any lawful firearm to be kept disassembled and bound by a trigger lock at all times, rendering it inoperable. [7] *Heller*, 554 U.S. at 628, 128 S.Ct. 2783. Especially significant for these appeals, the Court eschewed means-end scrutiny in assessing the constitutionality of the ban. Because the law precluded individuals from possessing an important class of firearms in the home even for self-defense (the right at the "core" of the Second Amendment) and required that all firearms within the home be rendered inoperable, it was unconstitutional without regard to governmental interests supporting the law or their overall "fit" with the regulation. *See Heller*, 554 U.S. at 629–30, 128 S.Ct. 2783.

7 *McDonald* involved a similar handgun ban, but the Court limited its analysis to the incorporation question and remanded the case. 561 U.S. at 791, 130 S.Ct. 3020. The City of Chicago subsequently lifted the ban and replaced it with a less restrictive ordinance. *See Ezell,* 651 F.3d at 689.

Heller's reasoning bears this out. Specifically, with respect to the District of Columbia's requirement that all firearms in the home be "kept inoperable at all times," the Court said: "[t]his makes it impossible for citizens to use them for the core lawful purpose of self-defense and *is hence unconstitutional*." *Id.* at 630, 128 S.Ct. 2783 (emphasis added). Conspicuously absent from the Court's analysis is any mention of means-end scrutiny. Instead, the Court reasoned categorically: (1) the regulation entirely deprives protected persons from exercising the core of the Second Amendment right; (2) it's therefore unconstitutional. The same went for the District of Columbia's handgun ban. After concluding that the Second Amendment includes handguns, the Court didn't mince words: "[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is *invalid*." *Id.* at 629, 128 S.Ct. 2783 (emphasis added). A nineteenth century authority quoted by the Supreme Court in the paragraph preceding this conclusion

of serious crimes at the time the Second Amendment was ratified, while in modern times, vast categories of 'non-dangerous' activities qualify as felonious."); Marshall, 32 Harv. J.L. & Pub. Pol'y at 729–30 (explaining that the first federal felony dispossession laws applied only to a core group of crimes including "murder, manslaughter, rape, mayhem, aggravated assault ... robbery, burglary, housebreaking, and attempt to commit any of these crimes"). And at least one of our sister courts faced with the virtuousness argument treated "virtue" as basically synonymous with "non-dangerous." *See United States v. Rene E.*, 583 F.3d 8, 16 (1st Cir. 2009) ("To be sure, there is an ongoing debate among historians about the extent to which the right to bear arms in the founding period turned on concerns about the possessor's 'virtue,' *i.e.*, on a legislative judgment that possession of firearms by a certain class of individuals would pose a *serious danger to the public*." (emphasis added)). Accordingly, we reject the Government's suggestion that Second Amendment protections are limited "to those members of the polity who were deemed capable of exercising [the right to keep and bear arms] in a virtuous manner." Gov't Suarez Br. 14.

C

All this means that Binderup and Suarez must distinguish themselves and their circumstances from those of persons not entitled to keep and bear arms because of their propensity for violence. And as the District Courts found, both men did so. Specifically, each is a misdemeanant convicted of a non-violent crime who has shown "that he is no more dangerous than a typical law-abiding citizen." *See Barton*, 633 F.3d at 174. While we agree with the Government that the felony-misdemeanor distinction is "minor and often arbitrary," especially since "numerous misdemeanors involve conduct more dangerous than many felonies," Gov't Binderup Br. 19 and Gov't Suarez Br. 18 (quoting *Tennessee v. Garner*, 471 U.S. 1, 14, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)), that is beside the point here. Our focus must remain on the legitimate (*i.e.*, traditional) concern that justifies the dispossession of certain offenders: we cannot trust them not to commit violent crimes with firearms. The Government concedes that "the Supreme Court might ***375** find some felonies so tame and technical as to be insufficient to justify the ban," [21] Gov't Binderup Br. 15 and Gov't Suarez Br. 15 (quoting *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011)), but it insists that Binderup's and Suarez's misdemeanors do not qualify. We disagree.

21 The Dissent acknowledges this view, but expresses confidence that "institutional considerations" will prevent particularly absurd disarmaments. Dissent at 405. In our view, questionable disarmaments raise questions of constitutional law.

For purposes of the traditional justifications animating § 922(g)(1), both Binderup's corruption of minors offense and Suarez's licensing violation were nonviolent misdemeanors. In *Barton*, we described the violent crimes of the sort that motivated felon dispossession since 1938 in the following way: "For nearly a quarter century, § 922(g)(1) had a narrower basis

for a disability, limited to those convicted of a 'crime of violence.' 'Crimes of violence' were commonly understood to include only those offenses 'ordinarily committed with the aid of firearms.' " *Barton*, 633 F.3d at 173 (quoting Marshall, 32 Harv. J.L. & Pub. Pol'y at 698, 702 (2009)) (some internal quotation marks omitted); *see also United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) (noting that the "Federal Firearms Act of 1938 only restricted firearm possession for those individuals convicted of a 'crime of violence,' defined as 'murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking, and certain forms of aggravated assault—assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year' "). Dispossession on the basis of a conviction for these sorts of crimes comports with the original public understanding of the scope of the right to keep and bear arms.

Neither Binderup's improper relationship with an employee capable of consent nor Suarez's possession of a handgun that he could have possessed lawfully had he acquired a license meets this description. Nor did their offenses involve any actual violent behavior. It is true that a small handful of States would classify Binderup's offense as statutory rape [22] or sexual abuse. And there are certainly circumstances in which an inappropriate and illegal relationship like Binderup's might involve implicit or genuine violence. Such facts would make his a much different case. But as the District Court explained:

> There is simply nothing in the record here which would support a reasonable inference that [Binderup] used any violence, force, or threat of force to initiate or maintain the sexual relationship with his seventeen-year-old employee. Moreover, there is no record evidence present here which would support a reasonable inference that [he] was convicted of any crime of violence (or that he even engaged in any violent or threatening conduct) before or after his November 1997 conviction for [c]orruption of minors.

Binderup, 2014 WL 4764424, at *22. Nor is there any "record evidence [that] supports a reasonable inference that he has a propensity to commit violent acts, sexual or otherwise." *Id.* at *23. In a real stretch, the Government likens Binderup's conduct to that which was felonized by a 1576 English statute that forbade "carnal[ ] ***376** knowl[edge]" of "any woman child under the age of ten years." Gov't Binderup Br. 15–16 (quoting Mortimer Levine, *A More Than Ordinary Case of "Rape," 13 and 14 Elizabeth I*, 7 Am. J. Legal Hist. 159, 163 (1963)). Deplorable as it was, however, Binderup's conduct involved a seventeen-year-old capable of consent, [23] was not subject to criminal sanction at the time of the founding, and —most importantly—did not involve violence, force, or threat of force.

22 As the District Court pointed out, however, Black's Law Dictionary "defines 'statutory rape' as '[u]nlawful sexual intercourse with a person *under the age of consent* (as defined by statute), regardless of whether it is against that person's will.' " *Binderup*

v. Holder, 2014 WL 4764424, at *24 (E.D. Pa. Sept. 25, 2014) (quoting Black's Law Dictionary 1374 (9th ed. 2009)) (emphasis added).

23 *Cf. Commonwealth v. Hughlett*, 249 Pa.Super. 341, 378 A.2d 326, 329 (1977) (noting that "[i]t is axiomatic that females under the age of 16 may not legally assent to sexual acts of ... any kind").

The nonviolent nature of Suarez's offense is evident as well. The Government's unremarkable observation that Maryland's licensing requirement relates to public safety does not make Suarez's offense a violent crime. It neither involved the actual use or threatened use of force, nor was it "closely related to violent crime" in the way that drug trafficking and receiving stolen weapons are. *See Barton*, 633 F.3d at 174. *Heller* characterized the Second Amendment as guaranteeing "the right of *law-abiding, responsible* citizens to use arms in defense of hearth and home." 554 U.S. at 635, 128 S.Ct. 2783 (emphasis added). The Government relies on the Fourth Circuit's decision in *United States v. Pruess* to argue that Suarez's violation of a lawful, well-established firearm regulation demonstrates that he is not a responsible, law-abiding citizen. That reliance is misplaced.

In *Pruess*, the Fourth Circuit rejected an as-applied challenge to § 922(g)(1) by a felon whose disqualifying convictions related to his prior sales of illegal arms, concluding that Pruess could not "rebut the presumption of lawfulness of the felon-in-possession prohibition as applied to him." 703 F.3d 242, 246 (4th Cir. 2012). Although Pruess, like Suarez, had committed regulatory violations, his circumstances were dissimilar from Suarez's in every other way. For example, Pruess had committed "repeated violations of the firearms laws, leading to at least twenty prior convictions," and admitted that although he "did not intend to use them for violence himself ... he believed that [certain] weapons and ammunition underlying his convictions were stolen." *Id.* His repeated dealings in stolen, illegal weapons —such as fully automatic AK-47's and grenades—appropriately led the court to conclude that Pruess had committed acts "closely related to violent crime" and "flunk[ed] the 'law-abiding responsible citizen' requirement." *Id.* at 244, 246. Suarez, by comparison, committed a nonviolent firearms licensing offense with respect to an otherwise lawful weapon decades ago, the circumstances of which were unassociated with violence. [24]

24 A number of other cases have applied *Barton* in rejecting as-applied challenges to § 922(g)(1). Like Pruess, the challengers in those cases have little in common with Suarez. *See United States v. Moore*, 666 F.3d 313, 319–20 (4th Cir. 2012) ("[T]hree prior felony convictions for common law robbery and two prior convictions for assault with a deadly weapon on a government official clearly demonstrate that [Moore] is far from a law-abiding, responsible citizen."); *United States v. Smoot*, 690 F.3d 215, 221–22, 221 & n.8 (4th Cir. 2012) (32 arrests and 16 convictions for offenses such as assault of a police officer, possession of cocaine with intent to distribute, and destruction of property); *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014) (three prior felony convictions for aggravated assault and resisting arrest).

In addition to showing that neither their offenses nor the circumstances surrounding them involved any violence or threat of violence, Binderup and Suarez have also demonstrated that their subsequent behavior confirms their membership among the class of responsible, law-abiding citizens to whom Second Amendment protection extends. As the District Courts

found, both ***377** men presented compelling evidence that they are responsible citizens, each with a job, a family, and a clean record since 1997 and 1998. Their home State has seen fit to reinstate their right to keep and bear arms. And though it's by no means dispositive in Suarez's case, the fact that the United States deems him upright enough to entrust him with the Nation's secrets is further evidence that he is a "typical law-abiding citizen." *Barton*, 633 F.3d at 174.

The Government has presented no evidence that either Binderup or Suarez has been, or would be, dangerous, violent, or irresponsible with firearms.[25] For all these reasons, the District Courts did not err when they found § 922(g)(1) unconstitutional as applied to Binderup and Suarez.

25 To be sure, Suarez's 1998 DUI conviction was a dangerous act—but not in the sense of the traditional concerns motivating felon dispossession. *See, e.g.*, *Begay v. United States*, 553 U.S. 137, 145, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008) (holding that drunk driving is not a "violent felony" under the Armed Career Criminal Act because it does not involve "purposeful, violent, and aggressive conduct").

D

The Government cites a number of recidivism studies as a final justification for permanently disarming Binderup and Suarez. It notes that felons commit violent crimes more frequently than nonfelons. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *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 the national average). Relatedly, it highlights a 1994 study finding that approximately one in five offenders imprisoned for nonviolent crimes were rearrested for violent offenses within three years of their release. *See* Bureau of Justice Statistics Fact Sheet, *Profile of Nonviolent Offenders Exiting State Prisons*, tbl.11 (Oct. 2004), *available at* http://bjs.gov/content/pub/pdf/pnoesp.pdf. The Government's second piece of evidence is a study comparing denials of handgun purchases to convicted felons with successful purchases by persons arrested but not convicted of a felony. The study found that the "denial of handgun purchases 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).

Finally, with respect to Binderup, it notes that "[s]ex offenders" (which Binderup is not) "present a high risk of recidivism." Gov't Binderup Br. 28 (citing Pennsylvania Dep't of Corrections, *Recidivism Report*, 21 tbl. 12 (Feb. 8, 2013), *available at* http://www.nationalcia.org/wp-content/uploads/2013-PA-DOC-Recidivism-Report.pdf) (finding that 50 percent of persons convicted of *statutory rape* and 60.2 percent of those convicted

594 F.3d 1111
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Peter VONGXAY, Defendant–Appellant.

No. 09–10072.
|
Argued and Submitted Jan. 12, 2010.
|
Filed Feb. 9, 2010.

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of California, Lawrence J. O'Neill, J., of being a felon in possession of a firearm. Defendant appealed.

Holdings: The Court of Appeals, Milan D. Smith, Jr., Circuit Judge, held that:

[1] statute prohibiting felons from possessing a firearm did not violate Second Amendment;

[2] statute did not violate defendant's equal protection rights under the due process clause; and

[3] district court's determination that defendant consented to search was not clearly erroneous.

Affirmed.

Attorneys and Law Firms

***1112** Daniel J. Broderick, Federal Defender, and Douglas J. Beevers, Assistant Federal Defender, Fresno, CA, for defendant-appellant Peter Vongxay.

***1113** Lawrence G. Brown, United States Attorney, Elana S. Landau and Russell L. Carlberg, Assistant United States Attorneys, Fresno, CA, Attorneys for plaintiff-appellee United States of America.

Appeal from the United States District Court for the Eastern District of California, Lawrence J. O'Neill, District Judge, Presiding. D.C. No. 1:08–CR–00030–LJO.

Before: MYRON H. BRIGHT, * HAWKINS, and MILAN D. SMITH, JR., Circuit Judges.

* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Opinion

MILAN D. SMITH, JR., Circuit Judge:

Defendant–Appellant Peter Vongxay appeals his conviction for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He challenges his conviction on three grounds. First, he argues that § 922(g)(1) violates the Second Amendment. Next, he asserts that § 922(g)(1) violates his right to equal protection under the Due Process Clause of the Fifth Amendment. Finally, he claims that the arresting officer's search violated his Fourth Amendment right to be free from unreasonable searches and seizures. We affirm the judgment of the district court on all Vongxay's claims.

FACTUAL AND PROCEDURAL BACKGROUND

Vongxay was arrested outside the After Dark Nightclub, a known venue of gang activity and violence, which was located within the area patrolled by Officer Alfred Campos of the Fresno Police Department. The club was a known hangout for at least two gangs: the Asian Crips and the Tiny Rascals. Based on his experience and training, Campos knew that these gang members typically dressed in blue L.A. Dodgers clothing. Campos testified that the two gangs engaged in "constant shootings at each other, armed with guns" and that they caused "disturbances."

On the night of Vongxay's arrest, Campos approached the After Dark Nightclub in a marked vehicle. He saw a group of Asian males loitering in front of the club dressed in the blue athletic apparel commonly worn by members of the gangs. As soon as the group noticed him they began to retreat out of the parking lot and funnel into the club. After calling for backup, Campos drove around the block and re-approached the club on foot. By that time, the same group of males had once again gathered outside the club. The first person Campos

encountered was Vongxay. Campos "engaged in a conversation with him and asked him if he was leaving, or if he was going to go into the nightclub."

While Campos asked Vongxay about his presence at the club, he noticed that Vongxay appeared to be attempting to conceal something under his waistband. Specifically, Vongxay "turned his body to the left and kept his waist area away from [Campos] ... [a]nd ... he placed his left hand down towards his waist area as if he was covering something." Thinking that Vongxay was armed, Campos positioned himself behind Vongxay and asked him if he had any weapons. Vongxay said that he did not. Campos then asked Vongxay if he could search him for weapons. Vongxay did not verbally respond, but "placed his hands on his head." Campos began the search by feeling Vongxay's waistband and immediately felt the frame of a large handgun. As soon as Campos felt the gun, Vongxay attempted to pull away. A struggle ensued, and a loaded semiautomatic handgun fell from Vongxay's waistband. Vongxay continued to ***1114** fight, bringing Campos down to the ground. It took the assistance of additional officers and a Taser gun to overpower Vongxay and arrest him.

Vongxay was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Vongxay had three previous, non-violent felony convictions: two for car burglary and one for drug possession. Vongxay filed a motion to dismiss the indictment on the ground that § 922(g)(1) violates the Second Amendment. He also argued that § 922(g)(1) violates his right to equal protection under the Fifth Amendment Due Process Clause. Finally, he moved to suppress the gun that was seized from him, asserting that he did not consent to the search, and that Campos had violated his Fourth Amendment right to be free from unreasonable searches and seizures. The district court denied Vongxay's motions in an oral ruling, finding that Vongxay had consented to the search and that § 922(g)(1) does not violate either the Second or Fifth Amendments. After a two-day trial, a jury found Vongxay guilty of being a felon in possession of a firearm.

JURISDICTION AND STANDARD OF REVIEW

[1] [2] [3] We review the constitutionality of a statute de novo. *United States v. Jones,* 231 F.3d 508, 513 (9th Cir.2000). We also review constitutional challenges to the district court's denial of a motion to dismiss de novo. *United States v. Palmer,* 3 F.3d 300, 305 (9th Cir.1993). We review a district court's finding of consent to a search for clear error. *United States v. Shaibu,* 920 F.2d 1423, 1425 (9th Cir.1990). We have jurisdiction under 28 U.S.C. § 1291.

DISCUSSION

Vongxay appeals his conviction for being a felon in possession of a firearm. He argues that 18 U.S.C. § 922(g)(1) violates the Second Amendment, and the equal protection component of the Fifth Amendment Due Process Clause. He also argues that he was searched without his consent in violation of his Fourth Amendment right to be free from unreasonable searches and seizures.

I. Second Amendment Claim

A. *District of Columbia v. Heller*

[4] Vongxay argues that 18 U.S.C. § 922(g)(1) violates his Second Amendment right to bear arms. Section 922(g)(1) reads:

> 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 ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Vongxay cites no authority holding that 18 U.S.C. § 922(g)(1) violates the Second Amendment, but asserts that *District of Columbia v. Heller,* 554U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), requires that conclusion. He is mistaken. Nothing in *Heller* can be read legitimately to cast doubt on the constitutionality of § 922(g)(1).

In *Heller,* a District of Columbia (D.C.) special policeman applied to register a handgun he wished to keep in his home for his personal protection. 128 S.Ct. at 2788. D.C. refused this request because it had a local ordinance making it a crime to carry an unregistered firearm, prohibiting the registration of handguns, and requiring residents to keep lawfully owned firearms unloaded and dissembled or bound by a trigger lock or similar device. *Id.* Heller filed suit on Second Amendment grounds, seeking to enjoin D.C. from enforcing the ***1115** gun ordinance that prohibited him from keeping an unlicensed firearm in his home. He also challenged the trigger-lock requirement to the degree it unduly restricted the use of a functional firearm in his home. *Id.*

After analyzing the history of the Second Amendment, among other things, the Court held "that the Second Amendment conferred an individual right to keep and bear arms." *Heller,* 128 S.Ct. at 2799. Its specific holding as to Heller was that D.C.'s "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Heller,* 128 S.Ct. at 2821–22. The majority then added:

> The Constitution leaves the District of Columbia a variety of tools for combating [the problem of handgun violence in this country], *including some measures regulating handguns.* But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the *absolute* prohibition of *handguns held and used for self-defense in the home.*

Heller, 128 S.Ct. at 2822 (emphases added) (internal citation omitted). Accordingly, Heller had the right to register and keep a loaded firearm in his home for self-defense, provided he was "not disqualified from the exercise of Second Amendment rights." *Id.* The Court explained how such a disqualification could occur, stating:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. ... Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, *nothing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons* and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 128 S.Ct. at 2816–2817 (emphasis added) (internal citation omitted). The Court further noted that "[w]e identify these *presumptively lawful regulatory measures* only as examples; our list does not purport to be exhaustive." *Heller,* 128 S.Ct. at 2817, n. 26 (emphasis added). Thus, felons are categorically different from the individuals who have a fundamental right to bear arms,[1] and Vongxay's reliance on *Heller* is misplaced.

1 In his dissent, Justice Stevens underscores the fact that *Heller* "limits the protected class to 'law abiding, responsible citizens.' " *Heller,* 128 S.Ct. at 2827 (Stevens, J., dissenting).

[5] Vongxay nevertheless contends that the Court's language about certain long-standing restrictions on gun possession is dicta, and therefore not binding. We disagree. Courts often limit the scope of their holdings, and such limitations are integral to those holdings. Indeed, "[l]egal rulings in a prior opinion are applicable to future cases only to the degree one can ascertain from the opinion itself the reach of the ruling." *Penuliar v. Mukasey,* 528 F.3d 603, 614 (9th Cir.2008); *see also* Black's Law Dictionary 1100 (7th ed.1999) (defining dictum as a statement in an opinion that is "unnecessary to the decision in the case and therefore not precedential").

Since *Heller* does not render § 922(g)(1) unconstitutional, we next consider the impact of other case law.

*1116 B. The Impact of Case Law Other Than Heller on the Constitutionality of Section 922(g)(1)

In *United States v. Younger,* 398 F.3d 1179, 1192(9th Cir.2005), we held that § 922(g)(1) does not violate the Second Amendment rights of a convicted felon. However, we performed only minimal analysis of the claim because, at the time, we were bound by *Silveira v. Lockyer,* 312 F.3d 1052 (9th Cir.2002), which held that the Second Amendment does not confer an individual right to possess arms. *Younger,* 398 F.3d at 1192. [2] Like Vongxay, Younger argued that § 922(g)(1) unconstitutionally limits "firearm possession by categories of people who have not been deemed dangerous." Appellant Clydell Younger's Opening Br., 2004 WL 1810097 at *57 (Jul. 2, 2004). We declined to make a distinction between violent and non-violent felons and held that § 922(g)(1), which prohibits all felons from possessing firearms, was constitutional.

2 In *Younger* we also cited a Fifth Circuit case holding that, even though an individual right to bear arms was recognized in the Fifth Circuit, felon restrictions were permissible "narrowly tailored exception [s]" to the right. *Younger,* 398 F.3d at 1192(citing *United States v. Everist,* 368 F.3d 517, 519 (5th Cir.2004)); *see also* our discussion of *Everist infra* at 1117.

The reasoning upon which *Younger* was based—that the Second Amendment does not give individuals a right to bear arms—was invalidated by *Heller.* However, we are still bound by *Younger. See In re Osborne,* 76 F.3d 306, 309(9th Cir.1996) (holding that "[f]irst, a panel of this court may not overrule a decision of a previous panel; only a court *in banc* has such authority" and "[s]econd, the doctrine of *stare decisis* concerns the *holdings* of previous cases, not the rationales" (internal citations omitted)). Therefore, *Younger* controls. [3]

3 Prior to *Heller,* the Supreme Court upheld a previous version of the felon-in-possession statute. *Lewis v. United States,* 445 U.S. 55, 67, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980). However, *Lewis* is not binding with regard to Vongxay's Second Amendment claim because it involved only Fifth and Sixth Amendment challenges; no Second Amendment claim was presented. In fact, Lewis's Second Amendment reference was limited to a sentence that *Heller* itself minimizes, stating:

> No Second Amendment claim was raised or briefed by any party. In the course of rejecting the asserted challenge, the Court commented [on the Second Amendment] gratuitously, in a footnote .... It is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued.

Heller, 128 S.Ct. at 2816 n. 25.

Lewis is therefore inapposite to Vongxay's Second Amendment claim. On the other hand, in making its equal protection determination, the *Lewis* Court necessarily had to find (or assume) that the Second Amendment did not confer an individual, fundamental right to bear arms. *See Lewis,* 445 U.S. at 66 n. 8, 100 S.Ct. 915. To the extent that the Second Amendment conclusion is considered essential to the decision, this court would be bound by *Lewis. See Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). However, because *Younger* more clearly decided this issue on Second Amendment grounds, we need not engage in a protracted analysis of whether or not *Lewis*'s Second Amendment discussion was a reasoned decision or a "gratuitous" comment. *See Heller,* 128 S.Ct. at 2816 n. 25.

Although our legal inquiry ends with Younger, our holding is buttressed by the fact that *Younger* upheld the very type of gun possession restriction that the Supreme Court deemed "presumptively lawful." *Heller,* 128 S.Ct. at 2817 n. 26.

Our examination of cases from other circuits and of historical gun restrictions also lends credence to the post-*Heller* viability of *Younger*' s holding. For example, prior to Heller, the Fifth Circuit upheld ***1117** § 922(g)(1) as a "limited and narrowly tailored exception to the freedom to possess firearms, reasonable in its purposes and consistent with the right to bear arms protected under the Second Amendment." *United States v. Everist,* 368 F.3d 517, 519 (5th Cir.2004). Fifth Circuit cases from that era are particularly instructive for post-*Heller* analyses because, even before *Heller,* the Fifth Circuit held that the Second Amendment guarantees an individual right to possess guns. *See United States v. Emerson,* 270 F.3d 203, 260(5th Cir.2001). Thus, the Fifth Circuit determined that, although there is an individual right to bear arms, felon restrictions are permissible even under heightened scrutiny. *Everist,* 368 F.3d at 519("Irrespective of whether [the] offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens.").

In addition, the D.C. Circuit opinion that *Heller* affirmed recognized an individual right to bear arms. It held:

> [T]he government is [not] absolutely barred from regulating the use and ownership of pistols. The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment. *See Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) ("[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech...."). Indeed, the right to keep and bear arms ... was subject to restrictions at common law. We take these to be the sort of reasonable regulations contemplated by the drafters of the Second Amendment.

Parker v. Dist. of Columbia, 478 F.3d 370, 399(D.C.Cir.2007), *cert. granted in part sub nom. Dist. of Columbia v. Heller,* 552 U.S. 1035, 128 S.Ct. 645, 169 L.Ed.2d 417 (2007), *and aff'd,* 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

We also note that to date "no court that has examined *Heller* has found 18 U.S.C. § 922(g) constitutionally suspect." *United States v. Baron,* Nos. CR–06–2095–FVS, CV–08–3048–FVS, 2008 WL 5102307, at *2 (E.D.Wash. Nov. 25, 2008); *see, e.g., United States v. Smith,* 329 Fed.Appx. 109, 111 (9th Cir.2009) ("*Heller* did not disturb *Lewis*'s narrow holding—that felons have no constitutional right to possess firearms."); *United States v. Gilbert,* 286 Fed.Appx. 383, 386 (9th Cir.2008) (holding that, under *Heller,* convicted felons do not have

the right to possess firearms). Thus, there appears to be a consensus that, even given the Second Amendment's individual right to bear arms, felons' Second Amendment rights can be reasonably restricted.

Denying felons the right to bear arms is also consistent with the explicit purpose of the Second Amendment to maintain "the security of a free State." U.S. Const. amend. II; *see also Parker,* 478 F.3d at 399(holding that "[r]easonable restrictions also might be thought consistent with a 'well-regulated Militia,' " and noting that "felonious conduct" would render a person "unsuitable for service in the militia"). Felons are often, and historically have been, explicitly prohibited from militia duty. *See, e.g.,* D.C.Code § 49–401(outlining current prohibition on felons in the militia). [4]

4 In *Heller,* the Court anticipated the need for such historical analyses, stating that "there will be time enough to expound upon the historical justifications for exceptions we have mentioned if and when those exceptions come before us." 128 S.Ct. at 2821.

***1118** Finally, we observe that most scholars of the Second Amendment agree that the right to bear arms was "inextricably ... tied to" the concept of a "virtuous citizen[ry]" that would protect society through "defensive use of arms against criminals, oppressive officials, and foreign enemies alike," and that "the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals)...." Don B. Kates, Jr., *The Second Amendment: A Dialogue,* 49 Law & Contemp. Probs. 143, 146 (1986); *see also* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment,* 62 Tenn. L.Rev. 461, 480 (1995) (noting that felons "were excluded from the right to arms" because they were "deemed incapable of virtue"). We recognize, however, that the historical question has not been definitively resolved. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?,* 32 Harv. J.L. & Pub. Pol'y 695, 714–28 (2009) (maintaining that bans on felon gun possession are neither long-standing nor supported by common law in the founding era).

In sum, we hold that § 922(g)(1) does not violate the Second Amendment as it applies to Vongxay, a convicted felon. *See Younger,* 398 F.3d 1179.

II. Equal Protection Claim

[6] Vongxay also argues that 18 U.S.C. § 922(g)(1) violates his equal protection right under the Due Process Clause of the Fifth Amendment because the status of "felon" is determined differently from state-to-state, thereby limiting the rights of criminals differently depending on the state in which they live. In response, the government contends that many federal statutes permissibly defer to differing state laws to define their terms.

Vongxay urges us to review § 922(g)(1) under strict scrutiny because, he claims, the right to bear arms is a fundamental right. We acknowledge Vongxay's contention that, if the right to

bear arms is a fundamental right, rational basis analysis may no longer be appropriate for all Second Amendment challenges.[5] *See City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439–40, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (explaining that equal protection claims based on membership in a protected class or unequal burdening of a fundamental right are reviewed under strict scrutiny). However, the Supreme Court has purposefully differentiated the right to bear arms generally from the more limited right held by felons. *Heller,* 128 S.Ct. at 2816–2817 (holding that "like most rights, the right secured by the Second Amendment is not unlimited" and that "nothing in [this] opinion should be taken to case doubt on the longstanding prohibitions on the possession of firearms by felons"). Therefore, whatever standard of review the Court implicitly applied to Heller's right to keep arms in his home is inapplicable to Vongxay, a felon who was explicitly excluded from *Heller*'s holding. *Id.* Accordingly, we are bound by pre-*Heller* case law involving equal protection challenges to § 922(g).

5 Contrary to Vongxay's implication, *Heller* did not establish that Second Amendment restrictions must be reviewed under strict scrutiny. Instead, the Court "decline[d] to establish a level of scrutiny for evaluating Second Amendment restrictions," *Heller,* 128 S.Ct. at 2817(referencing Justice Breyer's dissenting criticism of the failure to announce a level of scrutiny), stating only that rational-basis scrutiny is not appropriate, *Heller,* 128 S.Ct. at 2817 n. 27.

In *Lewis v. United States,* the Supreme Court rejected an equal protection challenge to the predecessor to § 922(g)(1), which proscribed the possession of firearms by any person (violent or non-violent) who "has been convicted by a court of the United States ... of a felony." ***1119** *Lewis,* 445 U.S. at 56 n. 1, 100 S.Ct. 915. In *Lewis,* the Court applied a rational basis test because it found that the right to bear arms was not a fundamental right. Noting that statutes are "consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment if there is some rational basis for the statutory distinctions made or they have some relevance to the purpose for which the classification is made," the Court determined that the felon-in-possession statute "clearly meets that test." *Id.* at 65–66, 100 S.Ct. 915 (internal quotation marks omitted).

Lewis was, as Vongxay contends, based on the now-erroneous presumption that the Second Amendment does not apply to individuals (and is therefore not an individual fundamental right). *Lewis,* 445 U.S. at 65 n. 8, 100 S.Ct. 915 ("[T]he Second Amendment guarantees no right to keep and bear a firearm that does not have some reasonable relationship to the preservation or efficiency of a well regulated militia." (internal quotation marks omitted)). However, because the right established by *Heller* does not apply to felons, we are still bound by *Lewis*'s holding. *See Rodriguez de Quijas,* 490 U.S. at 484, 109 S.Ct. 1917; *see also State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."). For the reasons discussed *supra* Part I, we find this distinction between felons and non-felons grounded in both historical and modern understandings of the purpose of the Second Amendment. Therefore, we hold that § 922(g)(1) does not violate the equal protection guarantee of the Fifth Amendment.

III. Search and Seizure Claim

[7] Vongxay also claims that Campos's pat-down search violated his Fourth Amendment right to be free from unreasonable searches and seizures. As a result, he argues that the district court erred in denying his motion to suppress the gun that was found in his waistband during the search. The district court denied Vongxay's motion to suppress the gun because it found that Vongxay had consented to Campos's search.

[8] **[9]** Although Campos does not claim to have had probable cause to search Vongxay, he was nonetheless entitled to ask Vongxay some questions, including whether or not he would consent to a search, so long as the consent was not coerced. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 225, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The government bears the burden of proving consent, *United States v. Impink,* 728 F.2d 1228, 1232 (9th Cir.1984), and it must prove that the consent was freely and voluntarily given, *Bumper v. North Carolina,* 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). Voluntariness is a question of fact to be determined from all the surrounding circumstances. *United States v. Perez–Lopez,* 348 F.3d 839, 845–46 (9th Cir.2003).

The encounter in question began when Campos approached Vongxay on foot and, after some preliminary questions about his presence at the club, asked him if he had a gun. Vongxay said "no." Campos then asked Vongxay if he could search him for weapons. Vongxay did not answer verbally, but placed his hands on his head. After Campos began the search and felt the semiautomatic handgun in Vongxay's waistband, Vongxay attempted to pull away, leading to a prolonged struggle that ended only with the assistance of additional officers. Vongxay contends that, by putting his hands in the air, he was not consenting but rather was "submi[tting] to an arrest."

[10] **[11]** In general, we consider five factors in determining whether consent was voluntarily given: (1) whether the defendant ***1120** was in custody; (2) whether the arresting officer had his guns drawn; (3) whether *Miranda* warnings were given; (4) whether the defendant was notified that he had a right not to consent; and (5) whether the defendant had been told that a search warrant could be obtained. *United States v. Jones,* 286 F.3d 1146, 1152 (9th Cir.2002). All five factors need not be satisfied in order to sustain a consensual search. *United States v. Cormier,* 220 F.3d 1103, 1113 (9th Cir.2000). Here, Vongxay was not in custody, and Campos did not have his gun drawn or exposed when he asked permission to search Vongxay. Vongxay had not yet been arrested, so the *Miranda* warning factor is inapplicable. *See United States v. Ritter,* 752 F.2d 435, 438 (9th Cir.1985) ("It would ... make little sense to require that *Miranda* warnings ... be given by police before requesting consent."). Vongxay

was not told that a search warrant could be obtained. Thus, the only *Jones* factor not satisfied here is that Vongxay was not notified of his right to decline consent. [6]

6 An officer is not *required* to inform the person being searched that he has a right to refuse consent; doing so simply weighs in favor of finding consent. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 226–27, 93 S.Ct. 2041, 36 L.Ed.2d 854(1973).

Further, Campos's conduct would not have "communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Michigan v. Chesternut,* 486 U.S. 567, 569, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988). Vongxay willingly lifted his arms, so as to enable a search, in response to Campos's request for permission to search him. Given the facts surrounding the search, Vongxay's attempt to pull away after the gun was found is better understood as a flight response than as evidence that he had not consented in the first place.

The district court found that Vongxay's act of raising his hands to his head constituted implied consent to search. It also found that "[t]here were no threats, coercion or otherwise." Considering the totality of the circumstances, we do not find that the district court's finding of consent was clearly erroneous. We therefore affirm the denial of Vongxay's motion to suppress.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of Vongxay's motion to dismiss and AFFIRM the denial of Vongxay's motion to suppress.

All Citations

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827 F.3d 1171
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Lavelle PHILLIPS, Defendant–Appellant.

Nos. 14-10448, 14-10449
|
14-10449
|
Submitted December 7, 2015 * San Francisco, California
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Filed July 6, 2016

* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Synopsis

Background: Defendant pled guilty in the United States District Court for the Eastern District of California, Morrison C. England, Jr., Chief Judge, to possession of drugs with intent to distribute and being a felon in possession of a firearm, and was sentenced to 57 months' imprisonment. Defendant appealed.

Holdings: The Court of Appeals, Bybee, Circuit Judge, held that:

[1] District Court did not procedurally err when imposing concurrent upward variance sentences, and

[2] prior conviction for misprision of felony properly served as predicate for defendant's conviction for being felon in possession of a firearm, and, thus, did not violate his Second Amendment right to bear arms.

Affirmed.

Christen, Circuit Judge, issued concurring opinion.

***1172** Appeal from the United States District Court for the Eastern District of California, Morrison C. England, Jr., Chief District Judge, Presiding, D.C. Nos. 2:12-cr-00292-MCE-1, 2:13-cr-00398-MCE-1

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Before: Alex Kozinski, Jay S. Bybee, and Morgan Christen, Circuit Judges.

Concurrence by Judge Christen

OPINION

BYBEE, Circuit Judge:

Lavelle Phillips pleaded guilty to possession of drugs with intent to distribute, as well as being a felon in possession of a firearm. He was sentenced to 57 months in prison. On appeal he asks us to invalidate his sentence as procedurally flawed and to hold that his conviction violates the Second Amendment. We decline both invitations and affirm.

I. BACKGROUND

Police officers approached Phillips while he was in his car. They smelled marijuana and noticed a partially-empty bottle of alcohol, and tried to arrest him. Phillips violently resisted and fled. After finally subduing him and searching Phillips's car, police found drugs, scales, and money. Three days later, Phillips was released on bail.

Only a few months after that, a different set of officers came upon Phillips talking with another man in front of a home. As they approached, Phillips fled. And this time he got away,

but not before dropping a .45 caliber handgun, a high capacity magazine, and his wallet, complete with several forms of identification and his recent bail receipt.

Phillips was indicted in two separate cases. In August of 2012, he was brought up on charges of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He filed a motion to dismiss the indictment, arguing that § 922(g)(1) was unconstitutional, as applied, under the Second Amendment. The district court denied the motion. Phillips then pleaded guilty. In December of 2013, Phillips was separately indicted for possession of various drugs with intent to distribute. Early the next year he pleaded guilty to these drug charges as well. The district court then consolidated both cases for sentencing purposes.

At sentencing the district court ultimately calculated a Guidelines range of 37 to 46 months. The district court reviewed all the relevant sentencing materials and considered the particulars of Phillips's case (e.g., that he fled police, had an extended magazine with his gun, etc.). Then it ran through the relevant factors under 18 U.S.C. § 3553(a) and varied upward to impose concurrent 57 month sentences on both the gun and drug charges. Phillips timely appealed. He argues that his sentence was procedurally flawed and that his conviction for being a felon in possession violates the Second Amendment. We review the former claim for plain error, since Phillips never raised these particular objections ***1173** below, *United States v. Valencia–Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010), while we review the latter claim de novo, *United States v. Chick*, 61 F.3d 682, 686 (9th Cir. 1995).

II. ANALYSIS

A. *Procedural Error at Sentencing*

[1] We can easily dismiss Phillips's procedural error argument. When we review sentencing for plain error, "reversal is not justified where the [district] court review[ed] and listen[ed] to the defendant's arguments, state [d] that it has reviewed the criteria set forth in § 3553(a), and then impose[d] a sentence, explaining both the sentence and the justification for the decision." *United States v. Rangel*, 697 F.3d 795, 806 (9th Cir. 2012). That is precisely what happened here.

[2] The district court read all relevant materials, understood the proper role of the guidelines (i.e., that they "are advisory and not mandatory"), considered the relevant factors under § 3553(a), and decided to vary upward from the Guidelines range based on Phillips's particular circumstances. Specifically, the court noted that Phillips had come into federal court more than once, understood "right and wrong" but kept making "incredibly stupid decisions," and had a penchant for running from the police. We discern no error here, let alone a plain one.

Phillips's arguments to the contrary are based entirely—and admittedly—on speculation of the first order. Phillips believes that throughout the sentencing, the judge made "vague comments" that "appear to reject several of the Sentencing Commission's basic guidelines." He concludes that these "policy disagreements" ranged from the district court's belief that a six-level enhancement for high capacity magazines was "too lenient," to a disagreement with giving prior convictions that receive prison time only "3 criminal history points." All of Phillips's conclusions are reached, of course, in splendid isolation from the record, for, as he frankly admits in his brief, the district court "never expressly mentioned such a policy disagreement." If the district court judge harbored any policy disagreements, he appropriately kept them to himself and gave no indication that they influenced the sentence whatsoever. Phillips's sentencing, even if not perfect, was about as much as anyone could ask for, and the court committed no procedural error.

B. *Second Amendment Claim*

[3] Phillips's other argument—based on his motion to dismiss the indictment (for felon in possession) on Second Amendment grounds—is more significant. The predicate for Phillips's § 922(g)(1) conviction was a prior conviction for "misprision of felony." 18 U.S.C. § 4. Misprision of felony consists of "having knowledge of the actual commission of a felony cognizable by a court of the United States," and "conceal[ing] [it]" by not "mak[ing] known the same [as soon as possible] to some judge or other person in civil or military authority under the United States." *Id.* It is punishable by a fine and up to three years in prison. *Id.*

Phillips argues that misprision of felony is a non-violent, "passive crime of inaction," and that permitting it to serve as a predicate for his § 922(g)(1) conviction violates the Second Amendment. Although Phillips's situation presents some otherwise interesting issues of Second Amendment jurisprudence, his claim is ultimately foreclosed by our precedent.

The Second Amendment protects the right to "keep and bear arms." U.S. Const. amend. II. The Supreme Court's landmark decision in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), held that this right encompasses an individual right to possess a functioning ***1174** firearm in the home for the lawful purpose of self defense. *Id.* at 595, 635, 128 S.Ct. 2783. But the Court was careful to add a caveat, instructing the lower courts that its holding did not "cast doubt on longstanding prohibitions on the possession of firearms by felons ... [,]" *id.* at 626–27, 128 S.Ct. 2783, adding that such measures were "presumptively lawful," *id.* at 627 n. 26, 128 S.Ct. 2783.

Based on this language, we held in *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), that "felons are categorically different from the individuals who have a fundamental right to bear arms," and we accordingly upheld 18 U.S.C. § 922(g)(1) against a Second Amendment challenge. *Id.* at 1115; *see also Van Der Hule v. Holder*, 759 F.3d 1043, 1050–51 (9th Cir.

2014) (relying on *Vongxay* to again uphold 18 U.S.C. § 922(g)(1) as constitutional); *United States v. Chovan*, 735 F.3d 1127, 1144–45 (9th Cir. 2013) (Bea, J., concurring) ("The Court in *Heller* seemed to equate the status of a felon ... with a presumptive disqualification from the Second Amendment right."). Our decision in *Vongxay* forecloses Phillips's argument, and we accordingly affirm the district court's denial of Phillips's motion to dismiss the indictment.[1]

1 Phillips argues that *Vongxay* is not good law. He contends that it conflicted with circuit precedent when it relied, in part, on *United States v. Younger*, 398 F.3d 1179 (9th Cir. 2005), a pre-*Heller* case that held that there is no individual right to bear arms under the Second Amendment. *See Vongxay*, 594 F.3d at 1116. But *Vongxay* acknowledged *Heller*'s holding—that there *is* an individual right under the Second Amendment—notwithstanding the panel's assertion that it was "still bound by *Younger*." *Id.* ("[O]ur holding is buttressed by the fact that *Younger* upheld the very type of gun possession restriction that the Supreme Court deemed 'presumptively lawful' [in *Heller*].").
If the panel had truly considered itself bound by *Younger* in all respects, it would not have analyzed the Second Amendment question at all, since there would have been no claim to an individual right. If Phillips believes that *Vongxay* is inconsistent with *Heller*, his remedy in this court is to seek rehearing en banc.

Nevertheless, there are good reasons to be skeptical of the constitutional correctness of categorical, lifetime bans on firearm possession by *all* "felons." *Heller*'s caveat endorsed only "longstanding" regulations on firearms, naming felon bans in the process. *Heller*, 554 U.S. at 626–27, 128 S.Ct. 2783. Yet courts and scholars are divided over how "longstanding" these bans really are.[2]

2 For instance, some view bans on felon firearm possession as historically stemming from the common law practice of forfeiture. *See, e.g.*, *Chovan*, 735 F.3d at 1144 (Bea, J., concurring) (justifying blanket felon bans based on the idea that at common law, "felonies resulted in forfeiture of property and rights"); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 266 (1983) ("Felons simply did not fall within the benefits of the common law right to possess arms. That law punished felons with automatic forfeiture of all goods, usually accompanied by death."); Don B. Kates, Jr. & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings L.J. 1339, 1363 (2009) (doubling down on the historical pedigree of the felon ban, but conceding it would be "next to absurd" to claim that conviction for modern day felonies like income tax evasion or antitrust violations would disqualify someone from owning a firearm). Others disagree, however, finding little to no historical justification for the practice. *See, e.g.*, *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (observing that first federal statute disqualifying violent felons did not exist until 1938 and that first complete federal felon ban did not exist until 1961); *id.* at 650 (Sykes, J., dissenting) ("The historical evidence [on categorical, lifetime exclusion of felons] is inconclusive at best."); C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?* 32 Harv. J.L. & Pub. Pol'y 695, 708–14 (2009) (responding to Kates, "The English right to have arms for self-defense that developed after being announced in the 1689 Declaration of Rights did not specifically exclude 'felons.' ... The relevant issue is not whether one *forfeited* 'all goods'—implicitly one's guns—upon a felony conviction. One did at common law forfeit personal property ... upon [felony] conviction.... But it did not follow that one could not thereafter purchase and hold new personal property—including a gun."); *id.* at 708 ("[R]ecognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I.").

[4] We understand Phillips's argument here to be different, however. He contends ***1175** that misprision is non-violent and purely passive and accordingly cannot constitutionally serve as a basis for depriving him of his right to possess a firearm. Although he is right that misprision is not a violent crime, he is wrong about it being "purely" passive. Both in the United States, *United States v. Hodges*, 566 F.2d 674, 675 (9th Cir. 1977), and England, *Sykes v. Director of Public Prosecutions* [1961] 3 All Eng. L. Rep. 33, the crime of misprision of

felony has long been interpreted to contain some element of *active concealment*, though a mere lie might be sufficient, *see United States v. Ciambrone*, 750 F.2d 1416, 1418 (9th Cir. 1984) ("A person who witnesses a crime does not violate 18 U.S.C. § 4 if he simply remains silent"). Not since the days of the "hue and cry" has misprision consisted purely of failing to report one's knowledge of a felony. *See* Rollin M. Perkins, Perkins on Criminal Law 514–15 (2d ed. 1969). [3] *That* crime never crossed the Pond, as it was understood as being inconsistent with American values. *See Marbury v. Brooks*, 20 U.S. (7 Wheat). 556, 575–76, 5 L.Ed. 522 (1822) (Marshall, C.J.) ("It may be the duty of a citizen to accuse every offender, and to proclaim every offence which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man."); Perkins, *supra*, at 514–17. So Phillips's pure-passivity argument falls short.

3 The English "hue and cry" was a duty, at least since the passage of the Statute of Winchester in 1285, requiring any private citizen who became aware of the commission of a felony to publically ("with horn and with voice") call the community together to pursue the felon "from town to town, and from county to county" until apprehended. 4 William Blackstone, *Commentaries on the Laws of England* *290 (1769). Failure by either private citizens or the sheriff to discharge this duty was criminally punished, *id.* at *290–91, though some have contended that "the absence of a reported decision during the four hundred years since the offence first crept into a book" suggests the purely passive form of this crime was "largely theoretical," Perkins, *supra*, at 514–15 (internal quotation marks omitted).

And assuming the propriety of felon firearm bans—as we must under Supreme Court precedent and our own—there is little question that Phillips's predicate conviction for misprision of felony can constitutionally serve as the basis for a felon ban. The statute under which Phillips was convicted here, 18 U.S.C. § 4, is functionally identical to its predecessor, enacted by the First Congress as a part of the Crimes Act of 1790 (*prior* to the ratification of the Second Amendment). And it similarly made misprision of felony a felony. [4] Because ***1176** actions of the First Congress provide " 'contemporaneous and weighty evidence' of the Constitution's meaning," *Bowsher v. Synar*, 478 U.S. 714, 723, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983)), we are hard pressed to conclude that a crime that has always been a federal felony cannot serve as the basis of a felon firearm ban, simply because its actus reus may appear innocuous. [5]

4 *Compare* Crimes Act of 1790, 1 Stat. 113, Sec. 6 ("[I]f any person or persons, having knowledge of the actual commission of ... [a] felony ... within any ... place ... under the sole and exclusive jurisdiction of the United States, shall conceal, and not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States ... such person or persons shall be adjudged guilty of misprision of felony, and shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars."), *with* 18 U.S.C. § 4 ("Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.").

5 Our holding does not address, however, the question of whether there are limits on Congress's and the States' ability to define any old crime as a felony and thereby use it as the basis for a § 922(g)(1) conviction, consistent with the Second Amendment. Misprision of felony was, in England, only a misdemeanor if committed by "a common person" (as opposed

> to "a public officer," in which case the crime was a felony). Blackstone, *supra*, at *121. What little evidence there is of American state misprision law also suggests it was treated as a misdemeanor. *See State v. Wilson*, 80 Vt. 249, 67 A. 533, 533–34 (Vt. 1907); Perkins, *supra*, at 514–17. Because the First Congress made misprision a felony prior to the ratification of the Second Amendment, we presume that Congress (and by extension, the States) have some power to change crimes that were misdemeanors into felonies and thereby make them the basis of a felon firearm ban. It may be that Congress's and the States' power in this regard is unfettered, or it may be that only crimes that were treated as felonies at the Founding can serve as the basis for depriving someone of his or her Second Amendment rights. Can Congress or the States define petty larceny as a felony? Of course. Can a conviction for stealing a lollipop then serve as a basis under § 922(g)(1) to ban a person for the rest of his life from ever possessing a firearm, consistent with the Second Amendment? That remains to be seen.

In short, there may be some good reasons to be skeptical about the correctness of the current framework of analyzing the Second Amendment rights of felons. But in light of *Heller* and *Vongxay*, those issues are beside the point here.

AFFIRMED.

CHRISTEN, Circuit Judge, concurring:

I fully join the Court's rejection of Phillips's procedural challenge to his sentence. I also agree that our prior precedent and Supreme Court precedent foreclose Phillips's argument that use of his prior conviction as a predicate offense for his § 922(g)(1) conviction violates the Second Amendment. Because binding precedent forecloses Phillips's Second Amendment argument, I would not engage in further analysis or discussion of it. *See Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) (Commentary "made during the course of delivering a judicial opinion, but ... unnecessary to the decision in the case" is "nonbinding dicta" and is "not precedential.").

All Citations

827 F.3d 1171, 2016 Daily Journal D.A.R. 6801

913 F.3d 152
United States Court of Appeals, District of Columbia Circuit.

Jorge L. MEDINA, Appellant
v.
Matthew G. WHITAKER, Appellee

No. 17-5248
|
Argued September 11, 2018
|
Decided January 18, 2019

Synopsis

Background: Plaintiff, who was barred by federal law from ever possessing a firearm due to decades-old felony conviction for making a false statement on a bank loan application, brought action against United States Attorney General alleging the federal felon-in-possession ban violated the Second Amendment as applied to him. The United States District Court for the District of Columbia, No. 1:16-cv-01718, Christopher R. Cooper, J., 279 F.Supp.3d 281, dismissed action. Plaintiff appealed.

Holdings: The Court of Appeals, Sentelle, Senior Judge, held that:

plaintiff fell outside the protections of the Second Amendment and, thus, could not bring as-applied challenge to federal statute barring felons from possessing firearms, and

plaintiff failed to show facts about his conviction distinguished him from other convicted felons encompassed by statute and, thus, could not bring as-applied Second Amendment challenge to statute.

Affirmed.

***153** Appeal from the United States District Court for the District of Columbia (No. 1:16-cv-01718)

Attorneys and Law Firms

Alan Gura, Washington, DC, argued the cause for appellant. With him on the briefs was Jason D. Wright.

Patrick G. Nemeroff, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were Jessie K. Liu, U.S. Attorney, and Mark B. Stern and Michael S. Raab, Attorneys.

Before: Rogers and Pillard, Circuit Judges, and Sentelle, Senior Circuit Judge.

Opinion

Sentelle, Senior Circuit Judge:

***154** Jorge Medina was convicted of falsifying his income on mortgage applications twenty-seven years ago. Now, as a convicted felon, he is prohibited from owning firearms by federal law. He argues that the application of this law to him violates the Second Amendment because he poses no heightened risk of gun violence. Because we conclude that felons are not among the law-abiding, responsible citizens entitled to the protections of the Second Amendment, we reject his contention and affirm the district court's dismissal order.

I. Factual Background

In 1990, Medina committed a felony. He grossly misrepresented his income on a mortgage finance application to qualify for a $30,000 loan from the First Federal Bank of California. He was referred for criminal prosecution by the bank. He cooperated with the investigation, confessed to his crime, and pled guilty in 1991 to a felony count of making a false statement to a lending institution in violation of 18 U.S.C. § 1014. Although his crime was punishable by up to thirty years in prison, Medina was sentenced to only three years of probation, home detention for sixty days, and a fine. At the recommendation of the U.S. Attorney, the U.S. Probation Officer, and members of the community, Medina's probation was terminated after only one year.

In the mid-1990s, Medina had another run-in with the law. In 1994 and 1995, he applied for resident hunting licenses in the state of Wyoming, while not actually residing in that state. He claims that the false statements were predicated on a misunderstanding about the residency requirements. Nevertheless, in 1996, he pled guilty to three misdemeanor counts of making a false statement on a game license application in violation of Wyo. Stat. Ann. § 23-3-403 (1989). The crime was classified as a misdemeanor and was punishable by a fine and six

months' imprisonment. Wyo. Stat. Ann. § 23-6-202(a)(v) (1981). Medina was sentenced to an eight-year hunting license revocation and a fine.

Medina has no further criminal record since his 1996 conviction. He owns a successful business, supports a family, and engages in philanthropy. His rehabilitation has been recognized by several important institutions. The California real estate licensing board has continued to license him following his 1991 conviction. The government of Canada restored his right to enter the country in 2009. Even the victim of Medina's false statement, the First Federal Bank of California, recognized his trustworthiness in 2005 by extending him a $1,000,000 line of credit.

Notwithstanding his past misdeeds, Medina wants to own a firearm for self-defense and recreation. He cannot do so, however, because his 1991 felony conviction bars him from possessing firearms under federal law.

II. Legal Background

Since 1968, anyone convicted of "a crime punishable by imprisonment for a term exceeding one year" is prohibited from owning firearms for life under 18 U.S.C. § 922(g)(1). Exempted from this prohibition are those convicted of antitrust violations, those convicted of state misdemeanors with a maximum term of imprisonment of two years or less, and those whose ***155** convictions have been pardoned or expunged. 18 U.S.C. § 921(a)(20). Although the prohibition applies for life, the statute allows the Attorney General to restore firearm rights to those deemed not "likely to act in a manner dangerous to public safety." 18 U.S.C. § 925(c). This remedy has been unavailable since 1992, however, because Congress has prohibited the Attorney General from using public funds to investigate relief applications. To justify this decision, Congress cited the difficulty of the task and the fact that a wrong decision could result in "devastating consequences." S. Rep. No. 102-353 (1992).

In 2008—forty years after the enactment of this statute—the Supreme Court issued its decision in *District of Columbia v. Heller*, which clarified that the Second Amendment protects the right of individual Americans to keep and bear firearms for self-defense. 554 U.S. 570, 595, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). This right, like other fundamental rights, is not unlimited in scope. In *Heller*, and again in *McDonald v. City of Chicago*, the Court explained that the recognition of an individual right to bear firearms does not "cast doubt on longstanding prohibitions on the possession of firearms by felons." *Heller*, 554 U.S. at 626, 128 S.Ct. 2783; *McDonald*, 561 U.S. 742, 786, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). The practice of barring convicted felons from possessing firearms is a "presumptively lawful regulatory measure[ ]." *Heller*, 554 U.S. at 627 n.26, 128 S.Ct. 2783.

Notwithstanding the Supreme Court's statements concerning felon disarmament, the constitutionality of § 922(g)(1) has been challenged several times. Litigation has taken the form of both facial challenges to the statute and challenges to the law's application in particular circumstances. Facial challenges to the statute's constitutionality have failed in every circuit to have considered the issue. *United States v. Bogle*, 717 F.3d 281 (2d Cir. 2013) (per curiam); *United States v. Barton*, 633 F.3d 168, 175 (3d Cir. 2011) (overruled on other grounds by *Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016)); *United States v. Moore*, 666 F.3d 313, 318 (4th Cir. 2012); *United States v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011); *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011); *United States v. Rozier*, 598 F.3d 768, 770–71 (11th Cir. 2010); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009).

As-applied challenges have fared only marginally better, and no circuit has held the law unconstitutional as applied to a convicted felon. The Ninth Circuit takes the view that "felons are categorically different from the individuals who have a fundamental right to bear arms." *Vongxay*, 594 F.3d at 1115. Four other circuits have, in a similar vein, also rejected as-applied challenges by convicted felons. *See Hamilton v. Pallozzi*, 848 F.3d 614, 626–27 (4th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 500, 199 L.Ed.2d 384 (2017); *United States v. Rozier*, 598 F.3d 768, 770–71 (11th Cir. 2010); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009). The Seventh and Eighth Circuits, while leaving open the possibility of a successful felon as-applied challenge, have yet to uphold one. *See United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014); *United States v. Williams*, 616 F.3d 685, 693–94 (7th Cir. 2010).

Only one court has held § 922(g)(1) unconstitutional in any of its applications. In *Binderup v. Attorney General*, the Third Circuit, en banc, considered the application ***156** of the law to two misdemeanants and issued a well-reasoned opinion, concurrence, and dissent that illustrates the various viewpoints in this debate. 836 F.3d 336 (3d Cir. 2016), *cert. denied*, —— U.S. ——, 137 S. Ct. 2323, 198 L.Ed.2d 746 (2017). The court ultimately concluded that the law was unconstitutional as applied, but split sharply on the reasoning. The narrowest ground supporting the judgment held that those who commit serious crimes forfeit their Second Amendment right to arms. *Id.* at 349. It further held that the "passage of time or evidence of rehabilitation" could not restore the lost right; only the seriousness of the crime was relevant to determine if a convicted criminal fell outside the scope of the Second Amendment. *Id.* at 349–50. Applying this reasoning, the misdemeanor crimes at issue in that case were not sufficiently serious to warrant disarmament. *Id.* at 353. In a concurrence to the judgment, five judges disagreed with the seriousness test and took the view "that

non-dangerous persons convicted of offenses unassociated with violence may rebut the presumed constitutionality of § 922(g)(1) on an as-applied basis." *Id.* at 357–58. (Hardiman, J., concurring in the judgment). Finally, seven judges dissented from the judgment and would have rejected the as-applied challenge to § 922(g)(1). Although they agreed that the proper focus was on the seriousness of the crime, they were satisfied that crimes encompassed by the statute were sufficiently serious to warrant disarmament. *Id.* at 381 (Fuentes, J., dissenting from the judgment).

In our 2013 *Schrader v. Holder* decision, we joined our sister circuits in rejecting a categorical Second Amendment challenge to § 922(g)(1). 704 F.3d 980, 989 (D.C. Cir. 2013). In that case, Schrader was barred from possessing firearms because of a forty-year-old, common-law misdemeanor charge arising from a fistfight. *Id.* at 983. Although he was only sentenced to a $100 fine, the misdemeanor carried no maximum possible term of incarceration—triggering the lifetime firearm prohibition under § 922(g)(1). *Id.* Schrader argued that the statute violated the Second Amendment when applied to misdemeanants such as himself because it deprived law-abiding citizens of their right to bear arms. *Id.* at 984. To resolve this claim, we applied the familiar two-step Second Amendment analysis used by circuits throughout the country and adopted by this Court in *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011). The first step requires us to consider whether the challenged law regulates conduct "outside the Second Amendment's protections." *Schrader*, 704 F.3d at 988–89. If so, our inquiry ends, and only rational basis scrutiny applies. If the law regulates activity protected by the Second Amendment, however, the second step of the analysis shifts the burden to the government to show that the regulation is "substantially related to an important governmental objective." *Id.* at 989. Applying this test to Schrader's claim, we found it unnecessary to apply step one because the law survived intermediate scrutiny even if it did regulate conduct within the scope of the Amendment. *Id.* The government's interest in reducing crime was important and bore a substantial relationship to prohibiting firearm ownership by "individuals with prior criminal convictions." *Id.* at 989–90.

Although we upheld the facial constitutionality of § 922(g)(1), we did not decide the constitutionality of the statute as applied to Schrader individually. *Id.* at 991. Schrader had not challenged the application of the statute to himself, but rather to common-law misdemeanants as a class. We noted in dicta that, had he brought an individual as-applied challenge, the length of time between Schrader's minor misdemeanor ***157** and the intervening years of law-abiding behavior would make us hesitant "to find Schrader outside the class of law-abiding, responsible citizens whose possession of firearms is, under *Heller*, protected by the Second Amendment." *Id.* (internal quotations omitted). Ultimately, however, we declined to consider such an argument for the first time on appeal. *Id.*

III. Procedural Background

Seizing upon the dicta in *Schrader*, Medina challenges the application of § 922(g)(1) to himself individually. He argues that his responsible life for many years, the nonviolent nature of his felony conviction, and the lack of evidence that he poses a heightened risk of gun violence, all make the law unconstitutional as applied to him. He sued the Attorney General on August 24, 2016, to enjoin the enforcement of the statute. *Medina v. Sessions*, 279 F.Supp.3d 281 (D.D.C. 2017). The Government moved to dismiss.

The district court relied on our opinion in *Schrader v. Holder* to grant the Government's motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Id.* at 289. The court applied both steps of the *Schrader* analysis. First, it held that Medina failed the first step because convicted felons fall outside of the Second Amendment's protection. *Id.* It cited the decisions of several other circuits in support of its conclusion that the Founders would have considered a convicted felon like Medina to be "unable to claim the right to bear a firearm." *Id.* at 289–91. Alternatively, the district court held that, even if Medina did fall within the scope of the Second Amendment's protection, the law would survive the intermediate scrutiny analysis required by the second step of *Schrader*. *Id.* at 291–92. The government's important interest in public safety was substantially related to the law, and Congress was not limited to "case-by-case exclusions of persons who have been shown to be untrustworthy with weapons." *Id.* at 291–92 (quoting *Schrader*, 704 F.3d at 991). Therefore, the district court granted the Government's motion to dismiss. Medina timely noticed this appeal.

IV. Analysis

We review the dismissal of Medina's complaint de novo. *Schrader*, 704 F.3d at 984. On appeal, Medina reiterates the constitutional arguments made below and contests both prongs of the district court's *Schrader* analysis. At step one, he argues that the district court erred when it found him outside the scope of the Second Amendment's protections because only those who are "dangerous" may be disarmed. He asserts that the district court was incorrect to conclude that "disregard for the law" was sufficient to justify disarmament. Medina also argues the district court failed to conduct a sufficiently individualized assessment of his crime, his life, and his rehabilitation before deciding that he was not within the scope of the Second Amendment. At step two, Medina claims that the district court should not have applied intermediate scrutiny at all. He argues that, once he shows that he is not dangerous, an outright prohibition on his right to possess firearms is indistinguishable from the ban struck down in *Heller* and fails under any form of scrutiny.

A.

The district court concluded that Medina was not within the scope of the Second Amendment because his commission of a serious crime removes him from the category of "law-abiding and responsible" citizens. Medina challenges this and asserts that evidence of past "disregard for the law" is insufficient to disarm him. In his view, the scope of the Second Amendment only excludes dangerous individuals. Since ***158** the government cannot show that he is particularly dangerous, it offends the Second Amendment to bar him from possessing firearms.

To resolve this question, we must look to tradition and history. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634–35, 128 S.Ct. 2783. We recall Justice Scalia's admonishment that "[h]istorical analysis can be difficult" and that it involves "making nuanced judgments about which evidence to consult and how to interpret it." *McDonald*, 561 U.S. at 803–04, 130 S.Ct. 3020 (Scalia, J., concurring). The Second Amendment was ratified in 1791, so we look to the public understanding of the right at that time to determine if a convicted felon would fall outside the scope of its protection.

As a starting point, we consider felony crime as it would have been understood at the time of the Founding. In 1769, William Blackstone defined felony as "an offense which occasions a total forfeiture of either lands, or goods, or both, at the common law, and to which capital or other punishment may be superadded, according to the degree of guilt." 4 William Blackstone, Commentaries on the Laws of England *95 (Harper ed. 1854). Felonies were so connected with capital punishment that it was "hard to separate them." *Id.* at *98. Felony crimes in England at the time included crimes of violence, such as murder and rape, but also included nonviolent offenses that we would recognize as felonies today, such as counterfeiting currency, embezzlement, and desertion from the army. *Id.* at *90-103. Capital punishment for felonies was "ubiquit[ous]" in the late Eighteenth Century and was "the standard penalty for all serious crimes." *See Baze v. Rees*, 553 U.S. 35, 94, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (Thomas, J., concurring in the judgment) (citing Stuart Banner, The Death Penalty: An American History 23 (2002)). For example, at the time of the Second Amendment's ratification, nonviolent crimes such as forgery and horse theft were capital offenses. *E.g.*, Banner, *supra*, at 18 (describing the escape attempts of men condemned to die for forgery and horse theft in Georgia between 1790 and 1805).

Admittedly, the penalties for many felony crimes quickly became less severe in the decades following American independence and, by 1820, forfeiture had "virtually disappeared in the United States." Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early*

American Republic, 57 Clev. St. L. Rev. 461, 468, 473 (2009). Nevertheless, felonies were—and remain—the most serious category of crime deemed by the legislature to reflect "grave misjudgment and maladjustment." *Hamilton*, 848 F.3d at 626. With this perspective, it is difficult to conclude that the public, in 1791, would have understood someone facing death and estate forfeiture to be within the scope of those entitled to possess arms.

Next, we consider whether historical evidence suggests that *only* dangerous persons could be disarmed. None of the sources cited by Medina compels this conclusion. In fact, one source he cites, a 1787 proposal before the Pennsylvania ratifying convention, supports precisely the opposite understanding. The text of that proposal states: "no law shall be passed for disarming the people or any of them unless *for crimes committed*, or real danger of public injury from individuals." The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, *reprinted in* Bernard Schwartz, 2 The Bill of Rights: A Documentary History 662, 665 (1971) (emphasis added). The use of the word "or" indicates ***159** that criminals, in addition to those who posed a "real danger" (such as the mentally ill, perhaps), were proper subjects of disarmament. Additionally, during the revolution, the states of Massachusetts and Pennsylvania confiscated weapons belonging to those who would not swear loyalty to the United States. *See United States v. Carpio-Leon*, 701 F.3d 974, 980 (4th Cir. 2012) (citing Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 506 (2004)). As these examples show, the public in the founding era understood that the right to bear arms could exclude at least some nonviolent persons.

A number of other circuits have also considered this issue and have concluded that history and tradition support the disarmament of those who were not (or could not be) virtuous members of the community. At least four circuits have endorsed the view that "most 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). *See also United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010); *Binderup v. Attorney General*, 836 F.3d 336, 348 (3d Cir. 2016) [1]; *United States v. Carpio-Leon*, 701 F.3d 974, 979 (4th Cir. 2012). The "virtuous citizen" theory is drawn from "classical republican political philosophy" and stresses that the "right to arms does not preclude laws disarming the unvirtuous (i.e. criminals) or those who, like children or the mentally imbalanced, are deemed incapable of virtue." *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009) (quoting Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995)). Several circuits have relied on this theory to uphold the constitutionality of modern laws banning the possession of firearms by illegal aliens and juveniles—classes of people who might otherwise show, on a case-by-case basis, that they are not particularly dangerous. *See*

Carpio-Leon, 701 F.3d at 979–81; *Rene E.*, 583 F.3d at 15. In considering these decisions, we recognize that there is "an ongoing debate among historians about the extent to which the right to bear arms in the founding period turned on concerns about the possessor's virtue." *Rene E.*, 583 F.3d at 16. While we need not accept this theory outright, its support among courts and scholars serves as persuasive evidence that the scope of the Second Amendment was understood to exclude more than just individually identifiable dangerous individuals.

1 This rationale was supported by seven of the fifteen judges of the en banc court. *Binderup*, 836 F.3d at 339.

With few primary sources directly on point, we finally consider the guidance from the Supreme Court in *Heller.* Although the Court declined to "expound upon the historical justifications" for felon firearm prohibitions, it described them as "longstanding" and "presumptively lawful." *Heller*, 554 U.S. at 626, 627 n.26, 635, 128 S.Ct. 2783. Felonies encompass a wide variety of non-violent offenses, and we see no reason to think that the Court meant "dangerous individuals" when it used the word felon.

On balance, the historical evidence and the Supreme Court's discussion of felon disarmament laws leads us to reject the argument that non-dangerous felons have a right to bear arms. As a practical matter, this makes good sense. Using an amorphous "dangerousness" standard to delineate ***160** the scope of the Second Amendment would require the government to make case-by-case predictive judgments before barring the possession of weapons by convicted criminals, illegal aliens, or perhaps even children. We do not think the public, in ratifying the Second Amendment, would have understood the right to be so expansive and limitless. At its core, the Amendment protects the right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller,* 554 U.S. at 635, 128 S.Ct. 2783. Whether a certain crime removes one from the category of "law-abiding and responsible," in some cases, may be a close question. For example, the crime leading to the firearm prohibition in *Schrader*—a misdemeanor arising from a fistfight—may be open to debate. Those who commit felonies however, cannot profit from our recognition of such borderline cases. For these reasons, we hold that those convicted of felonies are not among those entitled to possess arms. *Accord Hamilton*, 848 F.3d at 624.

B.

Having established that a felony conviction removes one from the scope of the Second Amendment, Medina's claim presumptively fails at the first step of the *Schrader* analysis. In his as-applied challenge, however, Medina argues that an examination of his "present, complete character" places him back within the class of "law-abiding, responsible citizens." We disagree.

We need not decide today if it is ever possible for a convicted felon to show that he may still count as a "law-abiding, responsible citizen." To prevail on an as-applied challenge, Medina would have to show facts about his conviction that distinguishes him from other convicted felons encompassed by the § 922(g)(1) prohibition. Medina has not done so. He was convicted of felony fraud—a serious crime, *malum in se*, that is punishable in every state. "American courts have, without exception, included [fraud] within the scope of moral turpitude." *Jordan v. De George*, 341 U.S. 223, 229, 71 S.Ct. 703, 95 L.Ed. 886 (1951). Moreover, just a few years after the end of his probation for his first crime, Medina was convicted of three more counts of misdemeanor fraud. This disregard for the basic laws and norms of our society is precisely what differentiates a criminal from someone who is "law-abiding." To the extent that it may be possible for a felon to show that his crime was so minor or regulatory that he did not forfeit his right to bear arms by committing it, Medina has not done so.

Nor can Medina's present contributions to his community, the passage of time, or evidence of his rehabilitation un-ring the bell of his conviction. While these and other considerations may play a role in some as-applied challenges to firearm prohibitions, such as those brought by misdemeanants or the mentally ill, we hold that for unpardoned convicted felons such as Medina, they are not relevant. *Accord Hamilton,* 848 F.3d at 626. When the legislature designates a crime as a felony, it signals to the world the highest degree of societal condemnation for the act, a condemnation that a misdemeanor does not convey. The commission of a felony often results in the lifelong forfeiture of a number of rights, including the right to serve on a jury and the fundamental right to vote. *See, e.g.*, 28 U.S.C. § 1865(b)(5) (barring convicted felons from serving on a federal jury); *Richardson v. Ramirez*, 418 U.S. 24, 56, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974) (upholding state felon disenfranchisement). A prohibition on firearm ownership, like these other disabilities, is a reasonable consequence of a felony conviction that the legislature is entitled to impose without undertaking the painstaking ***161** case-by-case assessment of a felon's potential rehabilitation.

Because we conclude that convicted felons are excluded from the scope of the Second Amendment, and that nothing about Medina's crime distinguishes him from other felons, Medina's claim fails. Because the claim fails at the first step of the *Schrader* analysis, we need not reach the second step.

V. Conclusion

The Supreme Court said that laws barring the possession of firearms by convicted felons are presumptively lawful. The historical record and the decisions of other circuits reinforce this. Medina has not presented evidence in this case that overcomes this presumption. We therefore affirm the decision of the district court.

All Citations

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