APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 11, 2018 Decided January 18, 2019

No. 17-5248

JORGE L. MEDINA,
APPELLANT

v.

MATTHEW G. WHITAKER,
APPELLEE

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

Alan Gura 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 for the Court filed by *Senior Circuit Judge* SENTELLE.

SENTELLE, *Senior Circuit Judge*: 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 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 (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; *McDonald*, 561 U.S. 742, 786 (2010). The practice of barring convicted felons from

possessing firearms is a "presumptively lawful regulatory measure[]." *Heller*, 554 U.S. at 627 n.26.

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,* 138 S. Ct. 500 (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 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,* 137 S. Ct. 2323 (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 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 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. 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 (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

non-violent 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 (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 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

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

Amendment was understood to exclude more than just individually identifiable dangerous individuals.

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. 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 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. 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 (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 (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 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.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JORGE L. MEDINA, Plaintiffs, v. **JEFFERSON B. SESSIONS, III,**[1] *in his official capacity as Attorney General of the United States*, Defendants.	Case No. 16-cv-01718 (CRC)

MEMORANDUM OPINION

Due to a decades-old felony conviction for making a false statement on a bank loan application, Plaintiff Jorge Medina, a Los Angeles area small business owner, is barred by federal law from ever possessing a firearm. See 18 U.S.C. § 922(g)(1). Medina contends that this ban violates the Second Amendment as applied to him because he has been a responsible and largely law-abiding citizen in the 25-plus years since his conviction. While the Court has no cause to doubt Medina's rehabilitation, it finds little support for his as-applied challenge in the relevant Second

[1] Attorney General Sessions, as former Attorney General Lynch's successor, has been automatically substituted as a party pursuant to Fed. R. Civ. P. 25(d).

Amendment precedent. The Court will therefore grant the government's motion to dismiss Medina's complaint.

I. Background

Jorge Medina is a longtime resident of the Los Angeles area. Pl.'s Compl. ¶ 5. In 1990, Medina made a false statement on two loan applications to a local bank, inflating his income five-fold in order to meet the qualification standards. Id. ¶¶ 12, 17–19. Medina fessed up to the falsifications upon being questioned by the FBI and in November 1991 pled guilty to one count of making a false statement to a federally-insured financial institution in violation of 18 U.S.C. § 1014. Id. ¶¶ 21–22. Medina was sentenced to sixty days of home confinement, a $10,000 fine, and three years of probation (which was terminated early). Id. ¶ 24. Despite the relatively light sentence, Medina's conviction disqualified him from possessing a gun because 18 U.S.C. § 922(g)(1) prohibits firearm possession by any person convicted of "a crime punishable by a term exceeding one year" and section 1014 carried a 30-year maximum sentence. Id. ¶ 23.

Medina attests to being a law-abiding citizen since his 1991 conviction, with one exception. In the mid-1990s, Medina purchased a partnership in a hunting ranch in Wyoming, where he occasionally hunted

game.[2] Id. ¶ 27. He later applied for and obtained a series of Wyoming resident hunting licenses. Id. ¶ 31. On the applications, Medina listed the address of the ranch. Id. But that was not sufficient under Wyoming law to establish individual residency for the purpose of resident hunting licenses. Id. ¶ 20. Medina claims he was unaware of the law. Id. ¶ 32–33. In any case, after the authorities learned of the issue and filed a criminal information against Medina, he pled guilty to three class-five misdemeanors covering each license he had obtained. Id. ¶¶ 33, 37; see Wyo. Stat. § 23-3-403(b). He was given a $2,500 fine and his hunting privileges were revoked for eight years. Id. ¶ 38.

Medina filed this suit in August 2016. He contends that the federal felon-in-possession ban violates the Second Amendment as applied to him because he has led a responsible and law-abiding life since his convictions. The complaint thus seeks an order declaring section 922(g)(1) unconstitutional as applied and an injunction barring its enforcement against Medina on the basis of his 1991 felony conviction. The government has moved to dismiss Medina's complaint under Rules 12(b)(1) and 12(b)(6). It argues first that Medina lacks standing, and thus the Court lacks subject matter jurisdiction, because California's firearm statute erects an independent bar to Medina's ability to possess a gun. And on the merits, the government submits that section 922(g)(1) passes constitutional muster both as

---

[2] Medina claims to have hunted with a bow and a replica firearm, which are excluded from section 922(g)(1)'s general felon-in-possession ban. See 18 U.S.C. § 921(a)(3).

a categorical ban against possession of firearms by convicted felons and as applied to Medina's particular circumstances. The Court held a hearing on the motion on May 26, 2017.

II. Legal Standards

Because "[f]ederal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute," Gunn v. Minton, 133 S.Ct. 1059, 1064 (2013) (quotation marks omitted), they have "an affirmative obligation to consider whether the constitutional and statutory authority exist for [them] to hear each dispute" brought before them, James Madison Ltd. ex rel. Hecht v. Ludwig, 82 F.3d 1085, 1092 (D.C. Cir. 1996) (quotation marks omitted). If the "court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

"[D]efect[s] of standing" constitute "defect[s] in subject matter jurisdiction." Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987). The "plaintiff bears the burden of . . . establishing the elements of standing," and each element " 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.' " Arpaio v. Obama, 797 F.3d 11, 19 (D.C. Cir. 2015) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). Accordingly, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual

matter, accepted as true, to state a claim [of standing] that is plausible on its face." Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)) (alterations in original). "[T]hreadbare recitals of the elements of [standing], supported by mere conclusory statements, [will] not suffice," id. (quoting Iqbal, 556 U.S. at 678) (second alteration in original), and the Court need not "assume the truth of legal conclusions" nor must it "'accept inferences that are unsupported by the facts set out in the complaint,'" id. (quoting Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 732 (D.C. Cir. 2007)).

To survive a 12(b)(6) motion, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A court "accept[s] as true all of the allegations contained in [the] complaint," disregarding "[t]hreadbare recitals of the elements of a cause of action" and "mere conclusory statements." Id. Then, the Court examines the remaining "factual content [to determine if it may] draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

III. Analysis

A. Whether Medina has standing to bring his claim in federal court

The Supreme Court has established that the constitutional requirement of standing involves three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560–61 (internal citation and footnote omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements. . . . At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the Court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim." Id. at 561 (internal citations omitted).

The government challenges Medina's standing on both traceability and redressability grounds. Medina's alleged harm is not *traceable* to section 922(g)(1), the government contends, because California law independently precludes him from owning, possessing, or purchasing a firearm. And the government argues that Medina's alleged injury is not *redressable* because even if the Court were to hold section 922(g)(1) unconstitutional as applied to him, California law would still prevent him from obtaining a firearm and his injury

would persist. Def.'s MTD 9–10. In relevant part, the California penal code states that "[a]ny person who has been convicted of . . . a felony under the laws of the United States, the State of California, or any other state . . . and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony." Cal. Penal Code § 29800(a)(1).

The flaw in the government's argument, however, is that section 922(g) sweeps more broadly than its California counterpart. California law effectively prevents Medina from purchasing a firearm in any state (while he is a California resident) and possessing one in California. But it does not stop Medina from *possessing* a firearm in another state, because California courts lack the authority to penalize conduct that takes place wholly outside the state's borders. See, e.g., People v. Betts, 103 P.3d 883, 887 (Cal. 2005) (explaining that there must be a territorial nexus to California, such as a significant preparatory act or intended harm inside the state, for California courts to have jurisdiction to enforce criminal laws). In states that do not have local statutes preventing felons from possessing firearms, only the federal felon-in-possession ban prevents Medina from firearm possession. Therefore, if the federal statute were to no longer apply, Medina could lawfully possess a firearm in certain states outside of California.

Medina's complaint vaguely suggested a desire to use a firearm outside of California. See Pl.'s Opp'n MTD ("Opp'n") 8 ("The removal of the federal felon-in-possession ban would, therefore, permit Mr. Medina to

possess a firearm in some states, other than California, where he retains property."). At the invitation of the Court, see July 19, 2017 Minute Order, Medina filed a declaration confirming his intention to possess a firearm for "lawful recreational purpose[s], such as target shooting and hunting." Declaration of Jorge L. Medina ("Medina Decl.") ¶ 1. He also specified a state—New Mexico—where he currently owns residential property and could lawfully possess a gun. Id. Considering his history of recreational hunting outside of California, Medina's sworn intentions—which the Court must accept as true at the motion-to-dismiss stage—are sufficient to identify a particularized and non-conjectural injury that is traceable to section 922(g)(1) and that could be redressed by its invalidation. See Jerome Stevens Pharm., Inc. v. Food & Drug Admin., 402 F.3d 1249, 1253–54 (D.C. Cir. 2005) ("[T]he district court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction. . . ." (internal citation omitted)). Accordingly, Medina has established his standing to bring this suit, and jurisdiction is proper.

B. Whether Medina has stated a viable claim for relief

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. At the core of this right, the Supreme Court has said, is the "right of law-abiding responsible citizens to use

arms in defense of home and hearth." District of Columbia v. Heller ("Heller I"), 554 U.S. 570, 635 (2008). Yet the Second Amendment right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Id. at 626.

As noted above, federal law forbids convicted felons from possessing a firearm. 18 U.S.C. § 922(g)(1). The Supreme Court, in its two key decisions on the Second Amendment, was clear that it had no intention of "cast[ing] doubt on longstanding prohibitions on the possession of firearms by felons[.]" Heller I, 554 U.S. at 626; see also McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality) ("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' . . . We repeat those assurances here." (quoting Heller I, 554 U.S. at 626)). Unsurprisingly given this language, since Heller I the Courts of Appeals have unanimously upheld the constitutionality of section 922(g)(1) against facial attacks. Schrader v. Holder, 704 F.3d 980, 989 (D.C. Cir. 2013); see also United States v. Bogle, 717 F.3d 281, 282 n. 1 (2th [sic] Cir. 2013) (per curiam) (listing cases).

With no route to a facial challenge to section 922(g)(1), Medina attempts to mount an as-applied challenge. Compl. ¶ 1. "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." Binderup v. Att'y General, 836 F.3d 336, 345 (3d Cir. 2016) (en

banc) (quotation marks omitted), *cert. denied*, 137 S. Ct. 2323 (2017). The D.C. Circuit has not squarely addressed whether such challenges are available although it has suggested in dicta that they are, as will be discussed below. See Schrader, 704 F.3d at 991.

The other Courts of Appeals have divided on the permissibility of such challenges. Five circuits have held that section 922(g)(1) is constitutional as applied to all felons. See Hamilton v. Pallozzi, 848 F.3d 614, 626 (4th Cir. 2017) ("[W]e simply hold that conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment[.]"); United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010) (recognizing that "criminal prohibitions on felons (violent or nonviolent) possessing firearms [do] not violate" the Second Amendment); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010) ("[F]elons are categorically different from the individuals who have a fundamental right to bear arms[.]"); In re United States, 578 F.3d 1195, 1200 (10th Cir. 2009) ("We have already rejected the notion that Heller mandates an individualized inquiry concerning felons pursuant to § 922(g)(1)."); United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010) ("[S]tatutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment.").[3]

---

[3] The Sixth Circuit also appears to subscribe to this position. While its case law is not perfectly clear, a panel has stated that it has "affirmed that prohibitions on felon possession of firearms do not violate the Second Amendment." United States v. Carey, 602

Two circuit courts have allowed as-applied challenges in theory, though neither has ever granted one by a felon. See United States v. Williams, 616 F.3d 685, 693 (7th Cir. 2010) ("[W]e recognize that § 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent[.]"); United States v. Woolsey, 759 F.3d 905, 909 (8th Cir. 2014) (recognizing that "the Eighth Circuit has left open the possibility that a person could bring a successful as-applied challenge to § 922(g)(1)"). While the Third Circuit has allowed such challenges for misdemeanants, it has indicated that a felon would bear an "extraordinarily high—and perhaps even insurmountable" burden in making such a challenge. Binderup, 836 F.3d at 353 n.6 (plurality); see also id. at 380 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments) (rejecting all as-applied challenges). The First Circuit, while not completely foreclosing the possibility of an as-applied challenge, has expressed deep skepticism about them. United States v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011) (recognizing the "serious problems of administration, consistency, and fair warning" that such a regime of as-applied challenges would create).

F.3d 738, 741 (6th Cir. 2010); see also id. ("Congress's prohibition on felon possession of firearms is constitutional[.]"). At least one other circuit has interpreted this language as upholding a felon possession ban in all circumstances. Baer v. Lynch, 636 F. App'x 695, 697 n.2 (7th Cir. 2016).

The D.C. Circuit, like its sister circuits, has opined on this subject before. In Schrader, the Circuit decided a claim that section 922(g)(1) was unconstitutional as applied to a particular class of offenders—common-law misdemeanants convicted of offenses that carried no upper limits on the permissible term of imprisonment and thus qualified for the federal felon-in-possession ban—and upheld the district court's Rule 12(b)(6) dismissal, thereby affirming prohibitions on firearm possession by convicted offenders. 704 F.3d at 988. The court explained that the statute's principal purpose of "curb[ing] crime" was important and the categorical ban was substantially related to this objective as "individuals with prior criminal convictions for felonies or domestic violence misdemeanors can . . . pose a heightened risk of future armed violence." Id. at 989–90 (internal citation and quotation marks omitted).

The decision in Schrader would obviously preclude Medina's claim if not for the court's passing commentary on the question of a potential *individual as-applied* challenge. Responding to the argument "that the statute is invalid as applied to Schrader" himself, the court noted that "[w]ere this argument properly before us, Heller might well dictate a different outcome." Schrader, 704 F.3d at 991. But unfortunately for Schrader, there was no "need [to] wade into these waters because plaintiffs never argued in the district court that section 992(g)(1) was unconstitutional as applied to Schrader." Id. The court concluded that "the wisest course of action is to leave the resolution of these difficult constitutional questions to a case where

the issues are properly and fully briefed." Id. While this language in Schrader seemingly invited future as-applied challenges from individuals like Schrader, it does not conclusively resolve the question presented here, to which the Court now turns.

In determining whether Medina states a claim, the parties agree that the Court should apply the two-part test laid out in Schrader for deciding if a challenged firearms restriction warrants heightened scrutiny:

> [The Court] first ask[s] whether the activity or offender subject to the challenged regulation falls outside the Second Amendment's protections. If the answer is yes, that appears to end the matter. If the answer is no, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny.

704 F.3d at 988-89 (emphasis added). This Court concludes that under this test, Medina fails to state a claim that section 922(g)(1) is unconstitutional as applied to him. At the first step, a convicted felon like Medina falls outside the Second Amendment's protection. And even if he did not, the application of section 922(g)(1) to Medina passes intermediate scrutiny.

1. Step One: Whether the activity or offender subjected to the challenged regulation falls outside the Second Amendment's protection

The Second Amendment right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Heller I, 554 U.S. at 626. As the Supreme Court explained in Heller I, the Second Amendment "was widely understood to codify a pre-existing right, rather than to fashion a new one." Id. at 603. The Second Amendment therefore is "no different" than other amendments: just as the "First Amendment contains the freedom-of-speech that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets," the Second Amendment contains the limitations on the right as understood by the Founders. Id. at 635; see also Heller v. District of Columbia ("Heller II"), 740 F.3d 1244, 1252-53 (D.C. Cir. 2011); United States v. Chester, 628 F.3d 673, 679 (4th Cir. 2010) ("[T]he scope of the Second Amendment is subject to historical limitations.").

Historical scholarship—as recounted in more detail by several Court of Appeals decisions—reveals a "common law tradition that permits restrictions [on gun ownership] directed at citizens who are not law-abiding and responsible." United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011); see also United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) ("That *some* categorical limits [on gun ownership] are proper is part of the original meaning[.]"); United

States v. Rene E., 583 F.3d 8, 15 (1st Cir. 2009) (referencing the "longstanding practice of prohibiting certain classes of individuals from possessing firearms" and citing Founding-era literature).

This literature further illustrates that convicted criminals were one such class of citizens deemed not to be law-abiding and responsible. See, e.g., Binderup, 836 F.3d at 349 (plurality) ("The view that anyone who commits a serious crime loses the right to keep and bear arms dates back to our founding era."); United States v. Carpio-Leon, 701 F.3d 974, 980 (4th Cir. 2012) (referencing "the historical evidence supporting the notion that the government could disarm individuals who are not law-abiding members of the political community"); Bena, 664 F.3d at 1183; Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 200–01 (5th Cir. 2012); Skoien, 614 F.3d at 640. For instance, the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania—which the Supreme Court has identified as a "highly influential" precursor to the Second Amendment, Heller I, 554 U.S. at 604—"asserted that citizens have a right to bear arms 'unless *for crimes committed* or real danger of public injury.' " Skoien, 614 F.3d at 640 (quoting Bernard Schwartz, 2 *The Bill of Rights: A Documentary History* 662, 665 (1971)) (emphasis added); see also Binderup, 836 F.3d at 349 (plurality).

This restriction on gun ownership by convicted criminals was not simply about future dangerousness. Rather, "most scholars of the Second Amendment

agree that the right to bear arms was 'inextricably . . . tied to' the concept of a 'virtuous citizen[ry]'" and "that 'the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals).'" Vongxay, 594 F.3d at 1118 (citation omitted); see also Binderup, 836 F.3d at 348 (plurality) ("Several of our sister circuits endorse the 'virtuous citizen' justification for excluding felons and felon-equivalents from the Second Amendment's ambit.").

In sum, the historical evidence shows that "persons who have committed serious crimes forfeited the right to possess firearms much the way they 'forfeit other civil liberties, including fundamental constitutional rights.'" Binderup, 836 F.3d at 349 (plurality) (citation omitted). A standard felony[4] is by all accounts a serious crime: "[w]here the sovereign has labeled the crime a felony, it represents the sovereign's determination that the crime reflects 'grave misjudgment and maladjustment[.]'" Hamilton, 848 F.3d at 626. This is as true for non-violent felonies as for violent felonies.

---

[4] This case thus does not involve some sort of nominal crime that has been labeled a felony, perhaps with the purpose of triggering section 922(g)(1)'s applicability. In such a situation, a lengthy term of imprisonment for a nominal crime—two years in prison for jaywalking or leaving bubble gum on the sidewalk outside the White House, for instance—could be deemed unconstitutional if found to be disproportionate to the underlying conduct such that the crime would no longer qualify for the federal felon-in-possession ban. See Solem v. Helm, 463 U.S. 277, 290 (1983) ("[W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. . . . [A] single day in prison may be unconstitutional in some circumstances.").

Theft, fraud, manufacture of illegal drugs, bribery of officials, and identity theft are all non-violent felonies that still evince a disconcerting disregard for the law and the rights of others. See id. at 726 ("Theft, fraud, and forgery are not merely errors in filing out a form or some regulatory misdemeanor offense; these are significant offenses reflecting disrespect for the law."); United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004) ("Irrespective of whether his offense was violent in nature, a felon has shown a manifest disregard for the rights of others."). The crime that Medina was convicted of—knowingly making a false statement to a lending institution in order to influence a lending decision—is no exception. This crime, a variant of fraud, bears a penalty of up to 30 years in prison or $1 million in fines, a clear sign that Congress considered the crime a serious one. See 18 U.S.C. § 1014. For such a crime, the Founders would have considered Medina, like any convicted felon, an "unvirtuous citizen" unable to claim the right to bear a firearm. Thus, it seems that Medina fails at the first step: he falls outside the protections of the Second Amendment.

2. Whether the regulation meets the requisite level of scrutiny

Even assuming that Medina progresses to the second step of the test in Schrader, he still fails to state a claim. Under Schrader, the appropriate level of scrutiny here is intermediate scrutiny. The D.C. Circuit applied intermediate scrutiny to Schrader's claim because the case involved "individuals who cannot be

said to be exercising the *core* of the Second Amendment right identified in Heller, i.e., 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home'" since "common-law misdemeanants as a class cannot be considered law-abiding and responsible." Schrader, 704 F.3d at 989 (quoting Heller I, 554 U.S. at 635). Medina, as a convicted felon, similarly does not qualify as "law-abiding and responsible." See Hamilton, 848 F.3d 626 ("[W]e simply hold that conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment.").

Intermediate scrutiny requires the government to prove that the restriction is substantially related to an important governmental objective by showing that "the harms to be prevented by the regulation are real, not merely conjectural," "that the regulation will in fact alleviate these harms in a direct and material way[,]" and that the "means chosen are not substantially broader than necessary to achieve that interest." Heller II, 801 F.3d at 272–73 (internal quotation marks and citations omitted). In considering the governmental interest, courts should not second-guess the legislature's aims in enacting the statute, but rather assess "only whether the [legislature] has drawn reasonable inferences based on substantial evidence." Id. And in evaluating the means, "the fit between the challenged regulation and the asserted objective [need only] be reasonable, not perfect[,]" and proper deference is accorded to Congress's predictive judgments. Schrader, 704 F.3d at 990.

The primary purpose of the federal felon-in-possession ban is "to keep guns out of the hands of presumptively risky people" and to "suppress[] armed violence." United States v. Yancey, 621 F.3d 681, 683-84 (7th Cir. 2010). As Schrader itself recognized, this interest in preventing crime and violence is "without doubt an important one." 704 F.3d at 990. And Congress's decision to ban gun access for those who commit serious crimes and have shown a disregard for law and the rights of others—the Founders' "unvirtuous citizens"—is sufficiently tailored to advancing the governmental interest in public safety. See Schrader, 704 F.3d at 990. As the D.C. Circuit has observed, "nonviolent offenders not only have a higher recidivism rate than the general population, but certain groups—such as property offenders—have an even higher recidivism rate than violent offenders, and a large percentage of the crimes nonviolent recidivists later commit are violent." Kaemmrling v. Lappin, 553 F.3d 669, 683 (D.C. Cir. 2008). Preventing those who have already shown a disregard for the law from obtaining a weapon that could make any future crimes more violent and even deadly is reasonably tailored to furthering the government's interest in public safety and preventing violence.

Medina retorts that the Court must focus instead on whether the felon-in-possession ban is sufficiently tailored to him on an individual level. See Compl. ¶¶ 54–56. But "Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons." Schrader, 704 F.3d at 991

(quoting Skoien, 614 F.3d at 641); cf. United Public Workers of Am. v. Mitchell, 330 U.S. 75, 102 (1947) (rejecting argument that Hatch Act limitations on political speech for public employees were unconstitutional as applied to industrial workers and explaining that "[w]hether there are such differences [between administrative and industrial workers] and what weight to attach to them, are all matters of detail for Congress"). And even in the case that Medina relies on, the plurality looked to whether the government's evidence that restricting "people like [the plaintiffs] (*i.e.*, people who decades ago committed similar misdemeanors) from possessing firearms promotes public safety," not whether preventing the individual plaintiffs from owning a firearm adequately promoted public safety. Binderup, 836 F.3d at 354 (plurality). As discussed above, sufficient evidence indicates that preventing "people like" Medina—that is, those convicted of serious crimes such as felonies—from owning guns promotes public safety.

Moreover, the kind of individualized assessment regime that Medina envisions would prove a logistical and administrative nightmare for the courts. See Binderup, 836 F.3d at 409 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgment) (a plaintiff-by-plaintiff scheme "places an extraordinary administrative burden on district courts"); Torres-Rosario, 658 F.3d at 113 (such an approach "applied to countless variations in individual circumstances, would obviously present serious problems of administration"). Determining, as Medina urges this

Court to do, whether a particular plaintiff presents a danger sufficient to restrict access to firearms "presupposes an inquiry into that [plaintiff's] background—a function best performed by the Executive which, unlike courts, is institutionally equipped for conducting a neutral, wide-ranging investigation." United States v. Bean, 537 U.S. 71, 77 (2002); see also S. Rep. No. 102-353, at 19 (1992) (noting the "approximately 40 man-years spent annually" by the Department of Justice on whether to restore convicts' firearms rights). Nor is this inquiry one that should be undertaken lightly: it is "a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made." S. Rep. No. 102-353, at 19 (1992); see also United States v. Masciandro, 638 F.3d 458, 475 (4th Cir. 2011) ("This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.").

As importantly, such a regime would pose "serious problems" of "consistency and fair warning," which in turn raises constitutional due process concerns. See Torres-Rosasio, 658 F.3d at 113. If determining whether a specific individual fell outside the scope of section 922(g)(1) depended on "facts about himself and his background," Pl.'s Opp'n MTD 6, such as his behavior since his conviction, it would be nigh impossible for any individual to know if he fell inside or outside section 922(g)(1)'s prohibition. Because section 922(g)(1) is a criminal statute, this lack of notice could subject it

to the same vagueness problems that doomed its sister provision, the residual clause in section 924(e)(2)(B). See Johnson v. United States, 135 S. Ct. 2551, 2557 (2015) (holding the residual clause void for vagueness because "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges"); see also Binderup, 836 F.3d at 411 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgment) (warning that if courts adopt a regime of plaintiff-specific as-applied challenges "it will only be a matter of time before void-for-vagueness challenges to § 922(g)(1) start to percolate").

In any event, Congress has already tried and rejected such an individualized regime. Under section 925(c), an individual who falls within the scope of section 922(g) can petition the Attorney General to restore her right to own firearms. 18 U.S.C. § 925(c). But in 1992, Congress expressly ended the appropriation for this program, citing its unworkability and high stakes. See S. Rep. No. 102-353, at 19 (1992). A House Report in a later appropriations bill that continued the defunding warned that the regime had also proven mistake-prone: "We have learned sadly that too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms." H.R. Rep. No. 104-183, at 15 (1995). This legislative judgment as to the workability of an individualized regime is precisely the sort of "predictive judgments of Congress" that courts generally defer to. Schrader, 704 F.3d

at 990. In other words, it is relevant for purposes of intermediate scrutiny that Congress has tried to apply a more narrowly-tailored regime and found it both insufficient to remedy the harm and impossible to administer. For this reason as well, Medina's envisioned case-by-case scheme is not commanded by the Second Amendment. And since section 922(g)(1) passes intermediate scrutiny as applied to convicted felons, as discussed above, Medina fails to state a claim that the statute is unconstitutional as applied to him.

IV. Conclusion

Nothing in this decision is intended to call into question Medina's character or to cast doubts on his admirable conduct since his convictions. But no single decision by a Court of Appeals has upheld an as-applied challenge to section 922(g)(1) brought by a convicted felon. This Court, guided by longstanding tradition, deference to the legislature's well-supported "predictive judgment," and the relevant Circuit and Supreme Court precedent, will not do so first.

For the foregoing reasons, the Court finds that Medina has failed to state a claim for relief under the Second Amendment. Accordingly, it will grant the government's motion to dismiss and direct the Clerk to close this case. An appropriate Order accompanies this Memorandum Opinion.

/s/ Christopher R. Cooper
CHRISTOPHER R. COOPER
United States District Judge

Date: September 6, 2017

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JORGE L. MEDINA, Plaintiff, v. **JEFFERSON B. SESSIONS, III**,[1] *in his official capacity as Attorney General of the United States*, Defendant	Case No. 16-cv-1718 (CRC)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that [8] Defendant's Motion to Dismiss is GRANTED. This is a final appealable order.

[1] Attorney General Sessions, as former Attorney General Lynch's successor, has been automatically substituted as a party pursuant to Fed. R. Civ. P. 25(d).

SO ORDERED.

/s/ Christopher R. Cooper
CHRISTOPHER R. COOPER
United States District Judge

Date: September 6, 2017

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5248 **September Term, 2018**

1:16-cv-01718-CRC

Filed On: April 2, 2019

Jorge L. Medina,

Appellant

v.

William P. Barr,

Appellee

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao*, Circuit Judges; Sentelle, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

---

* Circuit Judge Rao did not participate in this matter.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

APPENDIX E

U.S. Const. amend. II:

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

---

18 U.S.C. § 921:

(a) As used in this chapter –

* * *

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include –

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon,

expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

---

18 U.S.C. § 922(g)(1):

18 U.S.C. § 922: Unlawful acts

* * *

(g) It shall be unlawful for any person–

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

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

---

18 U.S.C. § 924(a)(2):

Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

---

18 U.S.C. § 1014 (1992):

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978 [12 USCS § 3101(1), (3)]), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan,

or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years or both.