No. 12-1443

In the Supreme Court of the United States

JEFFERSON WAYNE SCHRADER, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Gun Control Act of 1968, 18 U.S.C. 922(g)(1), makes it unlawful for any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." The statute further provides that the term "'crime punishable by imprisonment for a term exceeding one year' does not include" a "State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. 921(a)(20)(B).

The questions presented are as follows:

1. Whether the classes of persons prohibited from firearm possession by 18 U.S.C. 922(g)(1) include persons convicted of a common-law misdemeanor offense that does not limit the maximum amount of time to which a defendant may be sentenced.

2. Whether application of 18 U.S.C. 922(g)(1) to common-law misdemeanants as a class violates the Second Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 704 F.3d 980. The memorandum opinion and order of the district court (Pet. App. 26a-43a) is reported at 831 F. Supp. 2d 304.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2013. A petition for rehearing was denied on March 13, 2013 (Pet. App. 45a-47a). The petition for a writ of certiorari was filed on June 11, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1216, prohibits specified classes of persons from possessing firearms "shipped or

transported in interstate or foreign commerce." 18 U.S.C. 922(g). Those classes include, *inter alia*, persons "convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1). Section 921(a)(20)(B) exempts certain misdemeanors from Section 922(g)(1)'s coverage, providing that "[t]he term 'crime punishable by imprisonment for a term exceeding one year' does not include" a "State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. 921(a)(20)(B).

2. a. Petitioners Jefferson Wayne Schrader and the Second Amendment Foundation, Inc., a nonprofit membership organization, brought this suit in the United States District Court for the District of Columbia, alleging that (1) Section 922(g)(1) does not apply to persons convicted of common-law misdemeanor offenses that have no statutory maximum sentence; and (2) if the provision does apply to such offenders, it violates the Second Amendment. Pet. 7; Pet. App. 2a. Petitioners alleged that in 1968, "Schrader was convicted of common-law misdemeanor assault and battery in a Maryland court and fined $100." Pet. App. 4a. At the time of petitioner's conviction, "the common law crimes of assault and battery in Maryland had no statutory penalty," and "the maximum term of imprisonment for these offenses was ordinarily limited only by the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and Articles 16 and 25 of the Maryland Declaration of Rights." *Id.* at 5a (quoting *Robinson* v. *State*, 728 A.2d 698, 702 n.6 (Md. 1999) (brackets omitted)).

The complaint alleges that Schrader's attempts to acquire firearms were denied when the Federal Bureau of Investigation's background-check system "indicated that Mr. Schrader is prohibited under federal law from purchasing firearms * * * on the basis of his 1968 Maryland misdemeanor assault conviction." Pet. App. 4a (quotation marks omitted).

b. The district court dismissed the complaint for failure to state a claim. Pet. App. 43a. The court held that Sections 922(g)(1) and 921(a)(20)(B), which restrict firearms possession by persons convicted of a misdemeanor "punishable" by more than two years of imprisonment, apply to common-law misdemeanor offenses that lack a statutorily defined maximum sentence because the sentencing court may lawfully impose a sentence of "more than two years in jail" for such convictions. *Id.* at 36a-37a. The court further held that restrictions on firearm possession by common-law misdemeanants as a class do not violate the Second Amendment. *Id.* at 41a-42a.

3. The court of appeals affirmed. Pet. App. 1a-25a. The court first concluded that Section 922(g)(1) encompasses common-law misdemeanor offenses that lack a statutory maximum sentence, reasoning that "the commonsense meaning of the term 'punishable,' * * * refers to any punishment capable of being imposed, not necessarily a punishment specified by statute." *Id.* at 11a. The court of appeals explained that petitioner's offense—common-law assault—was "punishable" by more than two years of imprisonment, and thus fell outside Section 921(a)(20)(B)'s exemption from Section 922(g)(1), because Maryland state courts were legally empowered to, and regularly did, sentence persons convicted of common-law assault to

terms of up to 20 years of imprisonment. *Id.* at 9a-12a.

The court of appeals next held that Section 922(g)(l)'s application to common-law misdemeanants as a class does not violate the Second Amendment. Pet. App. 16a-22a. The court explained that, in *District of Columbia* v. *Heller*, 554 U.S. 570, 626, 635 (2008), this Court stated that "the right guaranteed by the Second Amendment is not unlimited," but instead is focused on "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Pet. App. 16a (internal quotation marks omitted). Thus, as this Court observed, "nothing in [the *Heller*] opinion should be taken to cast doubt on longstanding prohibitions" such as those on "possession of firearms by felons and the mentally ill." *Ibid.* (quoting 554 U.S. at 626-627).

Applying the two-step analysis that courts of appeals have generally adopted in the wake of *Heller*, the court looked first to whether the "activity or offender subject to the challenged regulation falls outside the scope of the Second Amendment's protections." Pet. App. 17a. Although the court observed that "common-law misdemeanants as a class cannot be considered law-abiding and responsible," *id.* at 19a, the court assumed arguendo that common-law misdemeanants are entitled to the Second Amendment's protections. *Id.* at 18a. Turning to the second part of the inquiry, the court determined that intermediate scrutiny was appropriate, because Section 922(g)(1) does not impinge upon the core right of law-abiding citizens to possess firearms. *Id.* at 19a. Applying that level of scrutiny, the court then concluded that "the government has carried its burden of demonstrating a

substantial relationship between [its] important objective—crime prevention—and [S]ection 922(g)(1)'s firearms ban." *Id.* at 20a. The court observed that petitioners acknowledged a substantial connection between disarming felons and reducing gun violence but argued that no such connection existed with respect to common-law misdemeanor offenses. *Id.* at 21a. The court rejected that argument, reasoning that many common-law misdemeanors "involved serious, violent conduct, and many offenders received sentences of ten or twenty years' imprisonment." *Id.* at 9a.

Finally, the court of appeals noted that petitioners challenge 18 U.S.C. 922(g)(1) only "as applied to common-law misdemeanants as a class." Pet. App. 22a. The court thus held that petitioners forfeited any challenge to Section 922(g)(1) as applied to Schrader himself. *Id.* at 23a-24a.

ARGUMENT

Petitioners renew their contentions that Section 922(g)(1) does not apply to common-law misdemeanors lacking a statutory maximum (Pet. 13-23), and that disarming people convicted of such offenses violates the Second Amendment (Pet. 24-35). The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other circuit. Further review is not warranted.

1. Petitioners first contend (Pet. 13-23) that the court of appeals erred in concluding that Section 922(g)(1) applies to common-law misdemeanor offenses that lack a statutory maximum.

a. The court of appeals correctly held that petitioner's conviction for common-law misdemeanor assault is a conviction for a "a crime punishable by imprisonment for a term exceeding one year" under

Section 922(g)(1), and it does not fall within Section 922(a)(20)'s exemption for state-law misdemeanors that are "punishable by a term of imprisonment of two years or less." As the court explained, the word "punishable" in the statute means "capable of being punished." See Pet. App. 11a. Because there was no statutory maximum punishment for common-law assault at the time of petitioner's conviction, and because the common-law offense included nearly "all forms of assault," including aggravated assault, convictions for common-law assault sometimes resulted in "sentences of ten or twenty years' imprisonment." *Id.* at 9a; *Thomas* v. *State*, 634 A.2d 1, 8 & nn.3-4 (Md. 1993) (discussing common-law assault offenses resulting in lengthy sentences). Thus, because a conviction for assault could have been punished by—was "punishable" by—a term exceeding one year, the offense falls within Section 922(g)(1). And because common-law assault could have been punished by a term exceeding two years, it is ineligible for Section 921(a)(20)(B)'s misdemeanor exception.

Petitioners contend (Pet. 13-15) that Schrader's offense was not punishable by a term of imprisonment of more than two years because his actual sentence did not include imprisonment. They argue that in the context of common-law assault, the sentencing judge sets the maximum possible punishment by sentencing the defendant to a particular term that is "reasonable and proportionate" (Pet. 14) based on the circumstances of the offense and the offender. But even if the sentencing judge's assessment of the particular punishment might be thought of as the maximum appropriate punishment in that particular case, Section 922(g)(1) imposes the possession prohibition on

all individuals convicted of "a crime punishable by imprisonment for a term exceeding one year" (and misdemeanors punishable by over two years), regardless of the amount of punishment that was actually imposed in a particular case. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 113 (1983) ("It was plainly irrelevant to Congress whether the individual in question actually receives a prison term."). Once a defendant has been convicted of common-law assault, he has a conviction for "a crime punishable" by a term exceeding two years, regardless of the sentence imposed in his case.

Petitioner next argues that the term "punishable" connotes "giving rise to a *specified punishment*," and that because the state legislature did not specify a penalty range for common-law offenses, those offenses "cannot qualify for felony treatment." Pet. 17 (citation omitted). But as the court of appeals correctly concluded, the legislature decided to leave courts with discretion to determine the appropriate sentences for common-law assault, including sentences that exceed two years of imprisonment. That is no less a "legislative choice" than the adoption of a statute setting sentencing ranges for assault. Pet. App. 13a; see *Walker* v. *State*, 452 A.2d 1234, 1248 (Md. Spec. Ct. App. 1982). Nor does the State's legislative decision indicate that common-law assault was viewed as a minor offense. To the contrary, Maryland courts recognized that common-law assault included a number of forms of aggravated assault, such as assault with a deadly weapon. *Ibid.* In addition, when the Maryland legislature codified the common-law offense of assault in 1996, it made first-degree assault (assault that causes or attempts to cause serious physical injury or

is carried out with a firearm) a felony punishable by up to 25 years of imprisonment, and second-degree assault (all other forms of assault) a misdemeanor punishable by up to ten years of imprisonment. Md. Code Ann., Crim. Law §§ 3-202, 3-203 (LexisNexis 2012); *Pair* v. *State*, 33 A.3d 1024, 1034 (Md. Spec. Ct. App. 2011).

Petitioners also suggest (Pet. 16) that if "punishable" means "capable of being punished," then Section 921(a)(20)(B)'s exemption must be read to exclude from the possession prohibition all misdemeanor offenses that are "capable of being punished by" two years or less—in other words, all offenses, no matter how high their statutory maximum punishment, that do not have a mandatory minimum sentence of two years. That argument—which would apply equally to offenses that have a prescribed statutory maximum punishment of over two years but also permit sentences of under two years—lacks merit. Section 921(a)(20)(B) carves out a category of misdemeanor offenses that are not sufficiently serious to warrant Section 922(g)(1)'s prohibition on firearms possession. Congress's use of the phrase "punishable by a term of imprisonment of two years *or less*" therefore clearly establishes the upper limit of the punishment to which those offenses may be subject. See, *e.g.*, *United States* v. *Matthews*, 498 F.3d 25, 37 n.15 (1st Cir. 2007) (so construing Section 921(a)(20)(B)), cert. denied, 552 U.S. 1238 (2008).

Finally, petitioners invoke (Pet. 20-21) the rule of lenity. That rule, however, "is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of [a statute], such that even after a court has seized every thing from which aid

can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (internal quotation marks, brackets, and citations omitted). For the reasons discussed, including the plain meaning of "punishable," Sections 922(g)(1) and 921(a)(20)(B) are not grievously ambiguous.[1]

b. There is no conflict among the courts of appeals on the question of whether 18 U.S.C. 922(g)(1) encompasses common-law misdemeanor offenses lacking a statutory maximum sentence. The D.C. Circuit is the only court of appeals to have considered that question. And, as petitioners acknowledge (Pet. 15-16), only one other court of appeals—the Fourth Circuit—has "interpreted the term 'punishable' in the context of uncodified common-law offenses." Pet. App. 12a. In *United States* v. *Coleman*, 158 F.3d 199, 204 (1998) (en banc), the Fourth Circuit held that the term "punishable," as used in the mandatory-minimum provision of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B), refers to "the maximum potential punishment a defendant could receive," and that this statutory language "applies equally when the potential term of imprisonment is established by the common law and limited only by the prohibition on cruel and unusual punishments as when the range of possible terms of imprisonment is determined by a statute." 158 F.3d at 204 (overruling *United States* v. *Schultheis*, 486 F.2d 1331 (4th Cir. 1973). As petitioners concede (Pet. 16), *Coleman* is thus consistent with the decision below.

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[1] For the reasons discussed below, see pp. 10-18, *infra*, petitioners are incorrect in arguing (Pet. 21-22) that Section 922(g)(1) must be construed narrowly to avoid constitutional doubt.

Petitioners do not suggest, moreover, that the question of Section 922(g)(1)'s application to common-law misdemeanors that lack a statutory maximum is likely to recur with any frequency. Both the decision below and *Coleman* concerned common-law misdemeanor assault under Maryland law. In 1996, Maryland codified that offense. See pp. 7-8, *supra*. An individual convicted of statutory assault would clearly fall within Section 922(g)(1)'s prohibition on firearm possession, because both first- and second-degree assault have statutory maximum punishments of at least ten years of imprisonment. Nor do petitioners argue that many other States retain common-law misdemeanor offenses that lack a statutory maximum, such that the issue is likely to arise frequently elsewhere. Indeed, the dearth of judicial decisions considering whether such offenses are "punishable" by more than two years for purposes of federal law indicates that the issue arises only rarely. See Pet. App. 11a (noting the "sparse case law" on the question presented). Further review is therefore not warranted.

2. a. Petitioners next contend (Pet. 23-36) that the court of appeals erred in holding that Section 922(g)(1)'s application to the class of common-law misdemeanants does not violate the Second Amendment, and that the court wrongly applied a level of scrutiny "functionally equivalent to rational basis review." Pet. 33 (capitalization altered). Petitioners are incorrect.

i. The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), the Court held that the Second Amend-

ment protects the historical right to bear arms enjoyed by "law-abiding, responsible citizens," *id.* at 635; see also *id.* at 625, and therefore the right "is not unlimited," *id.* at 626. That language reflects the existence of "longstanding prohibitions on the possession of firearms" by certain classes of people, including "felons and the mentally ill." *Ibid.*

In *Heller*, the Court held unconstitutional two District of Columbia statutes to the extent that they banned handgun possession in the home and required all other firearms within the home to be rendered inoperable because those prohibitions infringed the core Second Amendment right of "law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. The Court "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions," *id.* at 634, concluding that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home" a handgun kept by a law-abiding citizen "for protection of [his] home and family would fail constitutional muster," *id.* at 628-629 (internal quotation marks, citation, and footnote omitted).

ii. Like other courts of appeals to have considered Second Amendment challenges, the D.C. Circuit in this case employed a two-step inquiry in evaluating petitioners' claim. The court asked first whether the "activity or offender" fell within the Second Amendment's protection and, if the answer was yes, then considered whether to apply intermediate or strict scrutiny. Pet. App. 17a; see, *e.g.*, *United States* v. *Greeno*, 679 F.3d 510, 518 (6th Cir.), cert. denied, 133 S. Ct. 375 (2012); *Heller* v. *District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell* v. *City of Chi.*,

651 F.3d 684, 701-704 (7th Cir. 2011). With respect to the first question, the court of appeals assumed that petitioners fell within the Second Amendment's protection. Pet. App. 18a. The court then held that intermediate scrutiny was appropriate, because Section 922(g)(1) targets those who have been convicted of a crime and thus does not burden the core Second Amendment right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 19a (quoting *Heller*, 554 U.S. at 635). That conclusion is consistent with those of other courts of appeals, which have uniformly declined to apply strict scrutiny to restrictions that, like Section 922(g)(1), regulate activity outside the core Second Amendment right identified in *Heller*.[2]

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[2] See, *e.g.*, *United States* v. *Chapman*, 666 F.3d 220 (4th Cir. 2012) (upholding 18 U.S.C. 922(g)(8), which disarms persons subject to domestic violence protective orders, under intermediate scrutiny); *United States* v. *Reese*, 627 F.3d 792, 801-802 (10th Cir. 2010) (same), cert. denied, 131 S. Ct. 2476 (2011); *United States* v. *Staten*, 666 F.3d 154 (4th Cir. 2011) (upholding 18 U.S.C. 922(g)(9), which disarms persons convicted of domestic violence misdemeanors, under intermediate scrutiny), cert. denied, 132 S. Ct. 1937 (2012); *United States* v. *Booker*, 644 F.3d 12, 26 (1st Cir. 2011) (upholding Section 922(g)(9) because it "substantially promotes an important government interest in preventing domestic gun violence"), cert. denied, 132 S. Ct. 1538 (2012); *United States* v. *Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc) (upholding Section 922(g)(9) under intermediate scrutiny), cert. denied, 131 S. Ct. 1674 (2011); *United States* v. *White*, 593 F.3d 1199, 1206 (11th Cir. 2010) (same); *United States* v. *Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (upholding 18 U.S.C. 922(k), which prohibits possession of firearms with altered or obliterated serial numbers, under intermediate scrutiny), cert. denied, 131 S. Ct. 958 (2011); *United States* v. *Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (upholding 18 U.S.C. 922(g)(1) under intermediate scrutiny), cert.

Petitioners contend (Pet. 33-35) that the court of appeals assumed that Section 922(g)(1) was "presumptively lawful" based on *Heller*'s statement that "longstanding prohibitions on the firearms possession of felons" are presumptively lawful. 554 U.S. at 626. That is incorrect. Although the presumptive lawfulness of prohibitions on firearms possession by those convicted of serious offenses would have been an appropriate basis on which to reject petitioners' claims, see Gov't C.A. Br. 22-26, the court declined to decide that question. Instead, the court applied intermediate scrutiny, "requir[ing] the government to show that disarming common-law misdemeanants is substantially related to an important governmental objective." Pet. App. 19a (internal quotation marks omitted); *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988).

In applying intermediate scrutiny, the court of appeals correctly concluded that the government had "carried its burden." Pet. App. 20a. Section 922(g)(1)'s purpose—"to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or

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denied, 131 S. Ct. 805 (2010); *United States* v. *Yancey*, 621 F.3d 681 (7th Cir. 2010) (per curiam) (upholding Section 922(g)(3) under intermediate scrutiny); see also *United States* v. *Bena*, 664 F.3d 1180, 1184 (6th Cir. 2011) (upholding Section 922(g)(8) as "consistent with a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens"); *United States* v. *Barton*, 633 F.3d 168, 171 (3d Cir. 2011) (upholding Section 922(g)(1) in light of *Heller*'s "discussion of the presumptive lawfulness of felon gun dispossession statutes"); *United States* v. *Dugan*, 657 F.3d 998 (9th Cir. 2011) (upholding 18 U.S.C. 922(g)(3), which disarms unlawful users of a controlled substance, because it "embodies a long-standing prohibition of conduct similar to the examples mentioned in *Heller*").

incompetency'"—is undeniably important. *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974) (quoting S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968)); *United States* v. *Salerno*, 481 U.S. 739, 750, 754-755 (1987) (Congress's interest in protecting "the safety and indeed the lives of its citizens" is not merely "substantial" but "compelling.").

There is a "substantial fit" between the objective of preventing gun violence and disarming common-law misdemeanants. In enacting Section 922(g)(1), Congress found that the misuse of firearms by persons with prior criminal convictions is a significant problem and that restricting the firearms possession of persons who have already been convicted of serious offenses would help reduce the risk of gun violence. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1201, 82 Stat. 236; S. Rep. No. 1866, 89th Cong., 2d Sess. 1, 53 (1966); S. Rep. No. 1340, 88th Cong., 2d Sess. 4 (1964). Contrary to petitioners' argument (Pet. 32-33), Congress's "predictive judgments" about the risk of firearms misuse by individuals who have been convicted of serious offenses are entitled to deference, because Congress is best positioned to formulate appropriate firearms policy in order to further the goal of public safety. Cf. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 665-666 (1994) (in applying intermediate scrutiny under the First Amendment, courts should accord substantial deference to Congress's predictive judgments); Pet. App. 20a-21a.

Congress's findings apply to common-law misdemeanor convictions as well as felonies. The fact that an offense is characterized as a "misdemeanor" does not suggest that it is a minor offense. See *Tennessee*

v. *Garner*, 471 U.S. 1, 14 (1985) (explaining that the distinction between misdemeanors and felonies is "minor and often arbitrary," as today "numerous misdemeanors involve conduct more dangerous than many felonies," and many common-law misdemeanors have been codified as felonies). Indeed, "at the time of [S]ection 922(g)(l)'s enactment, common-law misdemeanors included a wide variety of violent conduct, much of it quite egregious." Pet. App. 22a; *id.* at 9a (attempted rape and attempted murder were misdemeanors in Maryland); see *Thomas*, 634 A.2d at 8 nn.3-4 (citing numerous cases involving violent assaults charged as common-law assault, for which the defendants received sentences of up to 20 years imprisonment). Maryland's common-law assault offense well illustrates the point: only "certain narrow categories of statutory aggravated assaults * * * were defined as felonies," Pet. App. 9a, and all other types of assaults were classed as misdemeanors regardless of whether they "involve[d] more brutal or heinous conduct than may be present in * * * cases falling within one of the statutory aggravated assaults." *Simms* v. *State*, 421 A.2d 957, 965 (Md. 1980); see also *Walker*, 452 A.2d at 1246. Restricting firearms possession by the class of persons convicted of common-law misdemeanors punishable by more than two years is therefore "substantially related to the important governmental objective of crime prevention." Pet. App. 22a.

Petitioners contend (Pet. 34) that there is no "substantial fit" between preventing gun violence and Section 922(g)(1)'s application to common-law misdemeanants because there are individuals—including Schrader himself—whose common-law offenses were

comparatively minor. The court of appeals held, however, that petitioners had forfeited any challenge to Section 922(g)(1) as applied to Schrader, Pet. App. 23a-24a, and petitioners do not challenge that holding here, Pet. 11. In any event, this Court has recognized that restrictions on firearm possession by certain categories of people—including "felons and the mentally ill"—can be consistent with the Second Amendment. *Heller*, 554 U.S. at 626. Congress is entitled to legislate categorically based on predictive judgments about future behavior, and "Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons." *United States* v. *Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc), cert. denied, 131 S. Ct. 1674 (2011); see *Board of Trs.* v. *Fox*, 492 U.S. 469, 481 (1989) (intermediate scrutiny takes account of the difficulty of crafting precise restriction); *United States* v. *Staten*, 666 F.3d 154, 167 (4th Cir. 2011) ("Intermediate scrutiny does not require a perfect fit; rather only a reasonable one."), cert. denied, 132 S. Ct. 1937 (2012).

b. No circuit conflict exists as to the question whether the Second Amendment permits restrictions on firearm possession by common-law misdemeanants as a class, as no other court has considered the question. Further review is therefore unwarranted.

Petitioners contend, however, that the courts of appeals have applied the two-step Second Amendment inquiry, and intermediate scrutiny, in "highly disparate" ways. Pet. 25. Divergences in the application of a standard to different circumstances do not give rise to a circuit conflict warranting this Court's review. In any event, petitioners are incorrect. Petitioners acknowledge that courts have typically applied the

two-step inquiry employed by the court below, in which the court first asks whether the plaintiff or activity is not entitled to any Second Amendment protection, such that the challenge may be dismissed without further scrutiny, and then, if the Second Amendment does apply, engages in the appropriate level of scrutiny. Pet. App. 17a; Pet. 25. They argue, however, that the Seventh Circuit has required courts to engage in the first step of the inquiry, Pet. 26, while other courts have simply assumed that the Second Amendment protects the conduct at issue. See, *e.g.*, *Woollard* v. *Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013) (assuming that Second Amendment applied and engaging in intermediate scrutiny). To the contrary, the Seventh Circuit has not held that courts are required to decide the scope question before moving on to the scrutiny question, see *Ezell*, 651 F.3d at 701, and like other courts, it has on occasion assumed that the activity at issue falls within the scope of the Second Amendment, and then engaged in an intermediate-scrutiny analysis. See, *e.g.*, *United States* v. *Williams*, 616 F.3d 685, 692 (7th Cir.), cert. denied, 131 U.S. 805 (2010). In addition, the fact that "courts of appeals have sometimes deemed it prudent to * * * resolve post-*Heller* challenges to firearm prohibitions at the second step" without first addressing the first step, *Woollard*, 712 F.3d at 875, simply reflects those courts' exercise of their discretion to determine the best use of judicial resources in light of the circumstances of the case at hand. See *Pearson* v. *Callahan*, 555 U.S. 223, 236-237 (2009) (discussing case-specific considerations that may properly lead courts to bypass the first step of the qualified-immunity inquiry).

Petitioners also argue (Pet. 28-29) that courts have placed varying amounts of emphasis on the "empirical evidence" justifying firearms restrictions. But courts analyzing the fit between an important government objective and the regulation at issue may rely to varying degrees on multiple sources of evidence, including empirical evidence, "history, consensus, and simple common sense." *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995) (internal quotation marks omitted); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). Differences in the degree to which courts have relied on empirical evidence are thus the result of the circumstances of the case, the regulation at issue, and the parties' presentation. See, *e.g.*, *United States* v. *Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (remanding for presentation of empirical evidence supporting Section 922(g)(9), which disarms domestic violence misdemeanants, because the case had proceeded in a manner that left the record undeveloped); *Staten*, 666 F.3d at 159-160, 167 (upholding Section 922(g)(9) based on government's empirical evidence, in addition to "logic and common sense"); *Skoien*, 614 F.3d at 643-647 (considering evidence presented by the government, without discussing the extent to which such evidence was required). Because petitioners have not identified any square conflict among the courts of appeals, and questions concerning Section 922(g)(1)'s application to common-law misdemeanors are unlikely to arise with frequency, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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