No. 18-3595

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RAYMOND HOLLOWAY, JR.

Plaintiff-Appellee,

v.

WILLIAM P. BARR, *et al.*

Defendants-Appellants.

Second Amendment *As-Applied* Challenge
on Appeal from the United States District Court
for the Middle District of Pennsylvania
Case No. 1:17-CV-00081

Brief of the Appellee

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SUMMARY OF ARGUMENT

Plaintiff Raymond Holloway, Jr. successfully brought at the district court an *as-applied* challenge to the constitutionality of 18 U.S.C. § 922(g)(1), which, *inter alia*, prohibits individuals convicted of a state law misdemeanor crime punishable by more than two-years imprisonment from purchasing or possessing firearms and ammunition. Mr. Holloway was subject to the prohibition enumerated in § 922(g)(1) as the result of a single conviction for DUI under 75 Pa.C.S. § 3802(c), that did not involve any property damage or loss of life or limb, which is also the only offense for which he has ever been convicted.

Chief Judge Christopher C. Conner of the United States District Court for the Middle District of Pennsylvania held that § 922(g)(1), *as-applied* to Mr. Holloway, was unconstitutional, granted summary judgment to Mr. Holloway and denied it to the Government. Judge Conner correctly applied this Court's precedent under *Binderup v. AG of United States*, 836 F.3d 336 (3d Cir. 2016) (*en banc*) in concluding that *as-applied* to Mr. Holloway, it was unconstitutional to deny him, in perpetuity, the right to keep and bear arms, as the result of a single DUI conviction, where, with the exception of extremely egregious offenses for which the death penalty applies, the right to keep and bear arms is the *only* constitutional right that the Government putatively strips in perpetuity.

Binderup recognized that individuals who could successfully distinguish their circumstances from those historically barred from possessing firearms and prevail under an intermediate scrutiny analysis were entitled to relief from the disability imposed by § 922(g)(1). The Government was unable to present any meaningful evidence, under the *Binderup* analysis, that would prevent Mr. Holloway from prevailing, as it relied on a number of studies and propositions that were not directly applicable to Mr. Holloway. By contrast, Mr. Holloway presented evidence that he should not be subjected to the prohibition imposed by § 922(g)(1) and highlighted the deficiencies in the Government's indirect arguments. As such, this Court should affirm Judge Conner's Order and Opinion.

ARGUMENT

1. Holloway's Constitutional Challenge to Section 922(g)(1) Does Not Lack Merit

This Court in *Binderup v. AG of United States*, 836 F.3d 336 (3d Cir. 2016) (*en banc*) held that *as-applied* Second Amendment challenges were cognizable and controlled by the two-step analysis [1] previously articulated in *United States v.*

[1] While Appellee acknowledges the Third Circuit's precedent, he respectfully calls into question this two-pronged approach, based on the Supreme Court's decisions in *Heller* and *McDonald*, as discussed *infra. See also* Doc. 59 at 18-19.

Marzzarella, 614 F.3d 85 (3d Cir. 2010). [2] The first prong of the test is to consider "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." [3] If the challenger does not meet this burden, the claim should be dismissed. [4] However, if the law burdens protected conduct, then the court must "evaluate the law under some form of means-end-scrutiny". [5] In this instance, this Court has stated intermediate scrutiny is the appropriate level to apply to such a challenge. [6]

Furthermore, this Court has held that under an *as-applied* Second Amendment challenge, the plaintiff "must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections." [7] This Court also found that the traditional justification of § 922(g)(1) was the disarmament of individuals likely to commit *violent* offenses. [8] Moreover, these crimes of violence were "commonly understood to include only those offenses 'ordinarily committed with the aid of firearms.'" [9]

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[2] *Binderup,* 836 F.3d at 339.
[3] *Id.* at 346 (citing *Marzzarella,* 614 F.3d at 89).
[4] *Id. at 346.*
[5] *Id.* at 346 (citing *Marzzarella,* 614 F.3d at 89).
[6] *Marzzarella,* 614 F.3d at 97.
[7] *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011).
[8] *Barton,* 633 F.3d at 173.
[9] *Id.* at 173 (citing Why Can't Martha Stewart Have a Gun?, 32 Harv. J.L. & Pub. Pol'y 695, 702 (2009)).

This understanding was reaffirmed in *Binderup* where this Court proclaimed that under *Barton* "[w]e looked to the 'historical pedigree' of the statute to ascertain 'whether the traditional justifications underlying the statute support a finding of permanent disability in this case.'" [10] This Court stated that it "determined that the exclusion of felons and other criminals from the scope of the Second Amendment's protections was tethered to the time-honored practice of keeping firearms out of the hands of those likely to commit violent crimes." [11]

a. Prohibitions on the Possession of Firearms by Felons

In *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), the Supreme Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons…" However, the Court also stated that it did not "undertake an exhaustive historical analysis … of the full scope of the Second Amendment," which leaves those interpretations up for debate. [12]

The longstanding prohibitions the Court referred to are those that date back to the founding of this Country as evidenced by the historical analysis the Court engaged in when deciding *Heller*. As acknowledge by the Supreme Court,

[10] *Binderup,* 836 F.3d at 361 (citing *Barton,* 633 F.3d at 175).
[11] *Id*. at 362 (citing *Barton,* 633 F.3d 173).
[12] *Heller,* 554 U.S. at 626.

"English common-law felonies [13] [only] consisted of murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem, and burglary." [14]

In 1938, for the first time, Congress codified a prohibition against certain felons that barred them from acquiring additional firearms and ammunition. [15] This law was known as the Federal Firearms Act (hereinafter "FFA"). The statute specifically made it unlawful for any person who was under indictment or convicted of *a crime of violence* or a fugitive from justice to ship, transport or receive a firearm or ammunition. [16] Moreover, the law defined a crime of violence to mean:

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[13] "The word 'felony' was used at common law to denote offenses which occasioned a forfeiture of the lands or goods of the offender, to which capital or other punishment might be superadded, according to the degree of guilt." *Bannon v. U.S.*, 156 U.S. 464, 467 (1895). (Internal citations omitted)

[14] *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943); Wayne R. LaFave, Criminal Law, § 2.1(b) (5th ed. 2010)).

[15] In reviewing the pertinent provision, it is well established that Congress knew how to use the word "possess" and did not bar individuals from maintaining possession of firearms and ammunition that were in their possession, prior to their conviction. *See* Doc. 6-1 at 7. ("(f) It shall be unlawful for any person who has been convicted of a crime of violence…to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person *shall be presumptive evidence* that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act."). (Emphasis added). This is similar to the provision in Pennsylvania – 18 Pa.C.S. § 6105(c)(3) – which only prohibits a person convicted of DUI for a third time within a five-year period from receiving new firearms but permits the individual to maintain control over firearms already possessed.

[16] *See* Doc. 58-4 at 3-5.

> murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking; assault with intent to kill, commit rape or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year. [17]

Notably absent from those who were prohibited from acquiring additional firearms and ammunition were those convicted of non-violent offenses. It was not until 1961 that Congress levied a total ban on the possession of firearms and ammunition – to include firearms and ammunition already in possession of the individual – that applied to violent and non-violent felons alike. [18] Thus, approximately 170 years passed from the time the Bill of Rights became effective until the time where individuals who were not violent felons (and misdemeanants) were barred from possessing firearms and ammunition. [19] At the time Mr. Holloway was charged with the prohibiting offense, the prohibition against non-violent felons had only been in place for approximately 43 years. [20] From a historical analysis, the prohibition that prevents Mr. Holloway from possessing firearms or ammunition accounts for a period of time less than 20% of the total period of time in which the constitutional right was enumerated. This can hardly be found to be a "longstanding prohibition on the possession of firearms by felons". Moreover, historical evidence suggests that the only individuals who were

[17] Doc. 58-4 at 3.
[18] *See* Pub. L. No. 87-342, 75 Stat. 757 (1961).
[19] Actual time was 169 years, 9 months and 18 days.
[20] Actual time was 43 years, 3 months and 26 days.

categorically barred from possessing firearms were those who committed violent offenses. [21]

i. DUI is Not a Crime that is Tethered to the "Time-Honored" Practice of Keeping Firearms Out of the Hands of Those Likely to Commit Violent Crimes

The "historical justification for stripping felons…of their Second Amendment rights… '[is] tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm unvirtuous citizens.'" [22] "People who have committed or are likely to commit 'violent offenses'—crimes 'in which

[21] *Binderup,* 836 F.3d at 348. *See also*, C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695 (2009); Carlton F.W. Larson, *Four Exceptions in Search of A Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1376 (2009).

[22] *Id.* at 348 (quoting *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010)). *Cf Heller*, 554 U.S. 634-35 ("[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures ... think that scope too broad.") and *Binderup*, 836 F.3d 372, n. 20 (Hardiman, J. concurring in part and concurring in judgments) ("The import of this analogy for the Second Amendment is straightforward: although certain types of criminals are excluded from the right to keep and bear arms, this traditional limitation on the scope of the right may not be expanded by legislative fiat. To hold otherwise would treat the Second Amendment 'as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' *McDonald*, 561 U.S. at 780 (plurality opinion). The historical record indicates that the right to keep and bear arms was publicly understood at the time of the Constitution's enactment to secure a broadly held natural right that did not extend to violent criminals. To redefine the type of "criminal" that would qualify for dispossession via a malleable 'virtuousness' standard in order to capture former nonviolent misdemeanants who are in all other respects indistinguishable from normal, law-abiding citizens would be akin to redefining 'fighting words' to encompass run-of-the-mill 'trash talk.' The Constitution takes each of these temptations 'off the table.' *Heller*, 554 U.S. at 636.").

violence (actual or attempted) is an element of the offense,' undoubtedly qualify as 'unvirtuous citizens' who lack Second Amendment rights.'" [23] While the Government sets forth a number of arguments for the proposition that the Appellee's sole DUI conviction [24] is a "serious crime", it offers nothing to show that a DUI qualifies as a "violent offense". More importantly, the Appellee has never been convicted of a violent offense. [25]

There are several other factors the Appellee can point to in order to bolster the claim that a DUI is not a violent offense. First, none of the elements of Pennsylvania's DUI statute involve or makes reference to the use, attempted use, or threatened use of physical force against another. [26] The Supreme Court of the United States proclaimed that a DUI fell outside the scope of the Armed Career Criminal Act's definition of a "violent felony". [27] The Supreme Court also found that DUI was not within the definition of a "crime of violence" as defined by 18 U.S.C. § 16. [28] While the entire gamut of crimes involving violence has not been delineated, there are certain elements such as the use, attempted use, or threatened

[23] *Id*. (Internal citation omitted).
[24] The Appellants assert that Mr. Holloway "is subject to section 922(g)(1) as a result of his second conviction under Pennsylvania law for driving under the influence (DUI)." Appellants' Brief at 9. However, Mr. Holloway has only ever been *once* convicted under Pennsylvania law for DUI. *See* Supp. App. Vol. I at 1-2. (Pennsylvania State Police Access and Review Background Check).
[25] *See* Supp. App. Vol. I at 1-2.
[26] *See* 75 Pa.C.S. § 3802.
[27] *See Begay v. United States*, 553 U.S. 137, 148 (2008).
[28] *See Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004).

use of physical force, which are necessary in order to qualify. [29] Chief Judge Conner stated, in relation to DUI, that "[t]he offense is therefore nonviolent…" [30] Clearly, a DUI falls outside the scope of a "violent offense".

The Appellants quote various courts and statistics in their brief to support the notion that DUI amounts to a serious crime, which should strip an individual of their right to keep and bear arms in perpetuity. [31] Their quotes and statistics – which were previously cited in their briefing before the district court and dismissed by Chief Judge Conner – should not be read in the vacuum proffered.

Justice Scalia's concurring opinion in *Begay v. United States*, 553 U.S. 137, 153-154 (2008) sheds some light as to the seriousness of DUI.

> The Government cites the fact that in 2006, 17,062 persons died from alcohol-related car crashes, and that 15,121 of those deaths involved drivers with blood-alcohol concentrations of 0.08 or higher. Drunk driving is surely a national problem of great concern. *But the fact that it kills many people each year tells us very little about whether a single act of drunk driving "involves conduct that presents a serious potential risk of physical injury to another."* It may well be that an even greater number of deaths occurs annually to pedestrians crossing the street; but that hardly means that crossing the street presents a serious potential risk of injury. Where the issue is "risk," the annual number of injuries from an activity must be compared with the annual incidents of the activity. Otherwise drunk driving could be said to pose a more serious risk of physical harm than murder. In addition, drunk driving is a combination of two activities: (1) drinking and (2)

[29] *See also United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (observing that the term "violent felony" in 18 U.S.C. § 924(e) "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence").
[30] *Holloway v. Sessions*, 349 F.Supp.3d 451, 457 (M.D. Pa. 2018).
[31] *See* Appellants' Brief at 18-23.

> driving. If driving alone results in injury in a certain percentage of cases, it could hardly be said that the entirety of the risk posed by drunk driving can be attributed to the combination. [32]

This Court likewise acknowledged in *Binderup* that Suarez's 1998 DUI conviction was a dangerous act – but neither in the sense of the traditional concerns motivating felon dispossession nor sufficient in denying Suarez's *as-applied* challenge. [33] In this matter, Chief Judge Conner stated

> That driving under the influence is risky behavior is undisputed. It places others in danger of bodily harm. Yet only seven states permanently suspend a repeat DUI offender's driving privileges, and only after a third DUI conviction. The Commonwealth of Pennsylvania has clearly indicated that a repeat DUI offender is not so unvirtuous that he or she must be disarmed until a third DUI conviction in five years and, even then, the disability has an automatic ten-year expiration date. [34]

ii. DUI Offenses Classified by States

Appellants claim "[f]orty-six states punish some recidivist DUI offenses as felonies [] and at least thirteen states punish a second DUI offense by more than one year in prison in some circumstances." [35] Such a claim sounds damning to Appellee's claim. [36] But not all is as it seems. In most instances, a second DUI is

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[32] Internal citations omitted. (emphasis added).
[33] *Binderup*, 836 F.3d at 377, n. 25. (Hardiman, J. concurring in part and concurring in judgments)
[34] *Holloway*, 349 F.Supp.3d at 459.
[35] Appellants' Brief at 21.
[36] As contended in the District Court, Appellee argues that any analysis should be conducted on how a state punishes a first DUI, as he was only convicted of a single

rarely felonious. In fact, the disingenuous nature of the Appellants' claim that "[f]orty-six states punish DUIs as felonies on a first or subsequent conviction" caused Chief Judge Conner to declare that "*[t]his statement is rather misleading.* Not a single state punishes a first DUI offense as a felony, and only three states impose a maximum possible sentence greater than one year's imprisonment [for a first DUI offense]." [37]

Even the Appellants own exhibit submitted to the district court shows that in context, this statement is misleading. [38] Out of all 50 states, as Chief Judge Connor acknowledged, [39] only four punish a second DUI as a felony, [40] with the remainder treating it as a misdemeanor, which the *Binderup* Court declared to be "an indication of non-seriousness." [41] Further, the claim that states punish a "second DUI offense by more than one year in prison *in certain circumstances*" warrants further review.

First, it is imperative to note, in the context of state law misdemeanors, that it is only one which could be punishable by *more than two years* that invokes 18

DUI offense. However, even if, *arguendo*, this Court were to consider how a second DUI is punished, the outcome remains the same. *See* Doc. 73 at 4 fn 3.
[37] *Holloway*, 349 F.Supp.3d. at 458, n. 7. (emphasis added).
[38] *See* Supp. App. Vol. I at 3-5.
[39] *Holloway*, 349 F.Supp.3d. at 458.
[40] *See* Supp. App. Vol. I at 6-30. *See* Connecticut, Indiana, New York, and Oklahoma.
[41] *Binderup*, 836 F.3d at 353, n. 6.

U.S.C. § 922(g)(1)'s prohibition. [42] Thus, any state law misdemeanor that could be punished by more than one year, up to and including two years, is not of any significance to the analysis.

Second, the Appellants' qualify the statement with the phrase "in certain circumstances," indicating that there are limited instances where this is even applicable. As acknowledged by Chief Judge Connor,[43] a review of all 50 states' DUI laws shows that *only ten states* punish a second DUI with a potential term of imprisonment exceeding one year. [44, 45] Only four states punish a second DUI with a potential term of imprisonment exceeding two years. [46, 47] The remaining states

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[42] *See* 18 U.S.C. § 921(a)(20)(B) ("The term 'crime punishable by imprisonment for a term exceeding one year' does not include…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.*"). (emphasis added).
[43] *Holloway*, 349 F.Supp.3d. at 458.
[44] *See* Supp. App. Vol. I at 6-30. *See* Connecticut (graded as a felony), Delaware, Indiana (graded as a felony), Iowa, Maryland, Massachusetts, New York (graded as a felony), North Carolina, Oklahoma (graded as a felony), and Vermont.
[45] That number grows to thirteen once enhanced penalties for elevated BAC are considered. *See* Idaho (I.C. § 18-8004C(2)(a) – BAC ≥ .20, *but only if* the first DUI involved a BAC ≥ .20 and the second DUI also involves a BAC ≥ .20 and occurs within five years of the first DUI; otherwise, a second DUI cannot be punished by more than a year, per I.C. § 18-8005(4)(a)), Pennsylvania (75 Pa.C.S. § 3803(b)(1) and (b)(4) – BAC ≥ .10), and South Carolina (Code 1976 § 56-5-2933(a)(2) - BAC ≥ .10)). However, only three would have applied to the facts (**contd.**) relevant to Appellee. For example, Idaho's would not apply to Mr. Holloway's conviction, since it would require a first conviction to have occurred within the past 5 years and for both the first and second convictions to involve a BAC ≥ .20.
[46] *See* Supp. App. Vol. I at 6-30. *See* Indiana, Massachusetts, New York, and Oklahoma.

classify the second offense, even with elevated BACs, as punishable by imprisonment ranging from several days up to two years and all as misdemeanors.[48]

As reflected in the overview of all 50 states' DUI laws, most states do not view a second DUI as a serious offense, at least in the context of an *as-applied* challenge. At best, the Appellants can show that the behavior is criminalized across all 50 states but with no consensus as to the punishment for the offense. Even worse for their position is that only seven states [49] have potential terms of imprisonment exceeding two years for a second DUI, even accounting for

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[47] Accounting for increased penalties for elevated BAC, the number grows to only seven states that punish a second DUI by a potential term of imprisonment for a period of more than two years. *See* Idaho (I.C. § 18-8004C(2)(a) "Shall be sentenced to the custody of the state board of correction for a term not to exceed five (5) years"), Pennsylvania (75 Pa.C.S. § 3803(b)(4) "commits a misdemeanor of the first degree" and 18 Pa.C.S. § 1104 "A person who has been convicted of a misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall be not more than…[f]ive years in the case of a misdemeanor of the first degree."), and South Carolina (Code 1976 § 56-5-2933(A)(2) "[if the person's BAC is ≥ 0.16] then the person must be punished by…imprisonment for not less than ninety days nor more than three years."). As noted *supra*, Idaho's enhanced sentence would not apply because it would require a first conviction to have occurred within the past 5 years and for both the first and second convictions to involve a BAC ≥ .20.

[48] *See* Supp. App. Vol. I at 6-30. *(*The exception to the misdemeanors is Connecticut, which grades the offense as a felony but is punishable by *up to* two years imprisonment.)

[49] Had Mr. Holloway been convicted in Idaho, the enhanced penalty would not have applied as discussed *supra*.

increased penalties for higher BAC.

As Chief Judge Conner found

> For a second DUI offense, 40 states prescribe a maximum term of imprisonment of one year or less. Ten states enforce a maximum term of imprisonment of more than one year for a second DUI offense, only four of which classify the second DUI offense as a felony. Defendants note that 48 states impose enhanced penalties for DUI offenses when the driver's BAC exceeds a "particularly high threshold." These enhanced penalties for elevated BAC levels include increased fines, license suspension, installation of ignition interlock devices, and heightened minimum terms of imprisonment. However, only three states increase the maximum possible term of imprisonment above one year for a BAC of .16 or higher during a second offense. The government has not shown there is a consensus regarding the seriousness of a generic second DUI offense, let alone a second DUI offense at a high rate of alcohol. [50]

The lack of uniformity in punishment is a factor that weighs heavily in the Appellee's favor, especially when one considers, based on the review of the 50 states, that it does not appear that a single state, other than Pennsylvania and Massachusetts, would cause an individual to become prohibited under § 922(g)(1) as a result of a single, isolated conviction for DUI. [51] Had Mr. Holloway been

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[50] *Holloway*, 349 F.Supp.3d at 458.

[51] Contrary to Appellants' assertion that "…the record does not indicate whether Holloway's 2002 DUI arrest record was expunged," the record clearly does indicate the arrest record was expunged. Appellants' Brief at 8, n. 3. (**contd.**) *See* Supp. App. Vol. I at 1-2. (Pennsylvania State Police Access and Review Background Check indicating one isolated arrest and charging – the 2005 DUI at issue in this matter). *See also* Doc. 58-2 at 3, ¶ 5 (Declaration of Raymond O. Holloway, Jr. stating, in relation to the 2002 DUI, "I successfully completed the ARD program, resulting in my record being expunged…"

charged and convicted in any other state, the conviction would not have triggered the prohibition found in 18 U.S.C. § 922(g)(1).

Perhaps even more telling as to the lack of seriousness as to DUI convictions across the U.S., only a handful of states permanently suspend an individual's driving *privilege* [52] and counsel has been unable to find *any* state law that strips an individual's *right* to purchase or possess a vehicle [53] – let alone in perpetuity – as a result of a DUI. To argue that the public welfare would be endangered by an individual possessing a firearm after a single DUI conviction – where the individual's sole-criminal conviction was that DUI – but it would not be endangered by allowing him to continue to drive in every state, is beyond comprehension. The denial of an enumerated constitutional right but the allowance of a privilege in relation to a single DUI conviction cannot comport with any constitutional analysis

[52] Alaska, Connecticut, and New Hampshire "permanently" suspend an individual's ability to possess a driver's license, although the laws do provide for a discretionary restoration of the privilege. Only North Carolina, Oregon, Vermont, and Virginia permanently suspend an individual's ability to possess a driver's license. Notably, in both instances, the suspension does not occur before a third DUI. (*See* Supp. App. Vol. I at 6-30).

[53] It also appears that in those states where an individual's driving privileges are permanently suspended, it does not preclude the individual from driving a vehicle on his/her own or non-state controlled property and there are legal procedures for restoration of the individual's driving privileges.

iii. DUI Offenses in Pennsylvania and Firearms Ownership

While a cross-jurisdictional consensus is a factor that this Court held was pertinent under the *Binderup* analysis, it is important to consider how Pennsylvania treats the offense Mr. Holloway was convicted of in relation to firearms ownership. 18 Pa.C.S. § 6105 dictates who, under Pennsylvania law, is no longer permitted to own or possess firearms.

Under the statute, the only individuals who would be prohibited for DUI related offenses under state law would be those who were convicted of a third DUI in a five-year period. [54] Interestingly enough, the prohibition is *only* in relation to firearms transfers or purchases of firearms after the third conviction. [55] Meaning that an individual who would be prohibited under state law would be able to keep their firearms that they had prior to the third conviction.

While the Appellants try to discount the significance of this provision by stating, "[t]he Pennsylvania legislature's decision to apply the state law prohibition to those individuals not already subject to section 922(g)(1) does not reflect any

[54] *See* 18 Pa.C.S. § 6105(c)(3). It also bears noting that if an individual were convicted of three DUIs in a six-year period, the individual would not be under any state disability. In fact, an individual could have ten or more DUIs and still not be prohibited under state law, unless three of the DUIs occurred in a five-year period and if so, the individual would still be permitted to retain possession of the firearms he/she owned but would simply be prohibited from purchasing new firearms.

[55] *Id*.

meaningful judgment about the seriousness of Holloway's crime", [56] they fail to take into consideration that the General Assembly could have worded the provision to include those convicted of a second DUI offense or those who were convicted of DUI at the highest rate of alcohol but *chose* not to do so. [57] Further, they provide no evidence that the General Assembly was even aware of the prohibition imposed by 18 U.S.C. § 922(g)(1). Perhaps the final blow to the Appellants' argument on this point is the inconvenient fact that the General Assembly intended for those individuals to receive relief after 10 years.[58]

As discussed *supra*, Mr. Holloway is not prohibited under state law from owning firearms. Clearly, Pennsylvania did not believe that a second DUI, even at the highest rate, was worthy of stripping an individual of their right to keep and bear arms in perpetuity. As noted by Chief Judge Conner, "[t]he Commonwealth of Pennsylvania has clearly indicated that a repeat DUI offender is not so unvirtuous

[56] Appellants' Brief at 27.
[57] *See Com. v. Zortman*, 23 A.3d 519, 525 (Pa. 2011) ("It is well-settled that the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly and that the plain language of the statute is generally the best indicator of such intent." 1 Pa.C.S. § 1921(a), (b)).
[58] *See* 18 Pa.C.S. § 6105(e)(2), wherein the General Assembly utilized the language that "the court *shall* grant such relief if a period of ten years," unlike the discretionary language found in Section 6105(f)(1), where the General Assembly utilized the language that "the court *may* grant such relief;" thereby reflecting that the General Assembly intended that, in the absence of discretion, a court grant relief after 10 years in relation to a disability pursuant to 18 Pa.C.S. § 6105(c)(3).

that he or she must be disarmed until a third DUI conviction in five years and, even then, the disability has an automatic ten-year expiration date." [59]

If 18 U.S.C. § 922(g)(1) were not at issue, Mr. Holloway would not have been barred from possessing or purchasing firearms or ammunition under Pennsylvania law nor under the laws of the supermajority of other states.

b. Mr. Holloway's Claim is Within the *Binderup* Analytical Framework

This Court, in *Binderup*, declared that "the threshold question in a Second Amendment challenge is one of scope: whether the Second Amendment protects the person, the weapon, or the activity in the first place." [60] The answer in this matter is an unequivocal "yes". As such, first a determination needs to be made as to whether Mr. Holloway can distinguish himself from the class of individuals historically barred from the possession of firearms and ammunition. The answer, again, is an unequivocal "yes".

[59] *Holloway*, 349 F.Supp.3d at 459.
[60] *Binderup,* 836 F.3d. at 362.

i. Step One of the Marzzarella Framework

1. Challenged Law Imposes a Burden on Conduct Falling Under the Scope of The Second Amendment's Guarantee

Under the first step of the *Marzzarella* test, the challenger must identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member. Appellants contend that Mr. Holloway is currently prohibited under 18 U.S.C. § 922(g)(1) due to his conviction of a "crime punishable by imprisonment for a term exceeding one year." [61] As with Plaintiffs Binderup and Suarez, Mr. Holloway was convicted of a state law misdemeanor crime that was punishable by more than two years imprisonment, thus meeting the definition of a "felony". [62]

The *Binderup* Court stated that the justification of denying "felons" the right to keep and bear arms dates back to the Second Amendment's drafting. [63, 64]

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[61] *Id.* at 347.
[62] *Id*.
[63] As held by the U.S. Supreme Court, the felony offenses at the time of founding were murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem, and burglary. *Jerome*, 318 U.S. at 108 n.6.
[64] As addressed *supra* and by *Amici* Firearms Policy Coalition, *et al*., in Part III of their brief, contrary to the assertions of some, the disarmament of categorical felons only came into being in the 1960's. At the time of our Founding, the laws were devoid of any felon disarmament. In fact, as Professor Larson declares "no colonial or state law in eighteenth-century America formally restricted the ability of felons to own firearms" and "felon disarmament laws significantly postdate both the Second Amendment and the Fourteenth Amendment." Carlton F.W. Larson,

"[T]he right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens'." [65] "The category of 'unvirtuous citizens' is thus broader than violent criminals; it covers any person who has committed a serious criminal offense, violent or non-violent." [66] As such, clearly the traditional justifications for preventing the class of individuals of which Mr. Holloway appears to be a member is that they are "unvirtuous citizens".

2. Mr. Holloway can Distinguish his Circumstances from the Historically Barred Class

To show that Mr. Holloway is not part of the historically barred class, he must show that the crime for which he was convicted was not "serious". [67] *Binderup* identified several factors to determine whether a crime was "serious," which included: 1) whether the crime is classified as a felony or misdemeanor; 2) whether the crime was "violent"; 3) the punishment that was actually imposed on the Plaintiff; and 4) whether there exists cross-jurisdictional consensus as to the "seriousness" of the offense. [68]

Four Exceptions in Search of A Theory: District of Columbia v. Heller and Judicial Ipse Dixit, 60 Hastings L.J. at 1374, 1376.

[65] *Binderup,* 836 F.3d. at 348 (quoting *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010)).

[66] *Id.* at 348.

[67] *Id*. at 349.

[68] *Id*. at 351-353.

Mr. Holloway's 2005 DUI offense was graded as a misdemeanor of the first degree. As *Binderup* proclaimed "a state legislature's classification of an offense as a misdemeanor is a powerful expression of its belief that the offense is not serious enough to be disqualifying." [69] The Appellants argue

> The Pennsylvania criminal code is unusual in that many of its misdemeanor crimes are the functional equivalent of felonies, punishable by more than one year of imprisonment. *See* 18 Pa. Cons. Stat. § 1104. The legislature chose to punish Holloway's offense far beyond a traditional felony, forgoing classification as a misdemeanor of a lesser degree, or even a "summary offense." *See id*. (first degree misdemeanor punishable by five years, second degree by two years, and third degree by one year); id. § 1105 (summary offense punishable by 90 days). [70]

Appellants try to conjure an image that this offense is only a misdemeanor because "of the preexisting structures of Pennsylvania's sentencing laws." [71] Yet, they neglect to mention that the General Assembly determined that a felony, of the lowest degree, should carry a penalty of potential imprisonment for up to seven years. [72] Moreover, the General Assembly, should it have felt it necessary to define a crime punishable by up to five years imprisonment as a felony rather than a

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[69] *Id*. at 351.
[70] Appellants' Brief at 20.
[71] Appellants' Brief at 24.
[72] *See* 18 Pa.C.S. § 1103. (stating "[i]n the case of a felony of the first degree, for a term which shall be fixed by the court at not more than 20 years", "[i]n the case of a felony of the second degree, for a term which shall be fixed by the court at not more than ten years", and "[i]n the case of a felony of the third degree, for a term which shall be fixed by the court at not more than seven years".)

misdemeanor, had the capacity to alter the law in order to do so. [73] To accept the Appellants' premise that the offense which Mr. Holloway was convicted of is only a misdemeanor because the General Assembly had no choice in its name due to "preexisting structures of Pennsylvania's sentencing laws" would render any discussion about how an offense is classified by a state's legislature as superfluous.

As discussed *supra*, the General Assembly did not view a second DUI as an offense worthy of rising to the level of stripping an individual of their right to keep and bear arms. The General Assembly only believed that an individual who managed to accrue three DUIs within a period of five years should be prohibited from purchasing or transferring *new* firearms but even an individual who was in such a position would be able to keep their currently owned firearms. Further, those individuals who were barred from obtaining new firearms because they had accrued three DUIs within a five-year period would be eligible for relief after a period of ten years, rendering the disability, at best, temporary.

Moreover, as Chief Judge Conner found, a maximum possible punishment is "certainly probative" of the offense's seriousness, but the General Assembly's classification of the offense as a misdemeanor rather than a felony is "a powerful expression of its belief that the offense is not serious enough to be

[73] *See Com. v. Zortman*, 23 A.3d 519, 525-526 (Pa. 2011) (finding that the General Assembly was "more than capable" of drafting a section of law to differentiate between two scenarios or, alternatively, include a requirement that would render a different result.).

disqualifying." [74]

Further, the offense for which Mr. Holloway was convicted of has no element of violence. None of the elements of Pennsylvania's DUI statute involves or makes reference to the use, attempted use, or threatened use of physical force against another. [75] As discussed *supra*, even the U.S. Supreme Court has declared that DUIs do not fall into the category of offenses that are "violent" in nature and Chief Judge Conner also concluded that DUI was a "nonviolent" offense. [76]

Appellants argue that the lack of violence in the offense does not alter their version of the analysis. [77] Yet, an element of violence is one of the criteria, which this Court in *Binderup* specifically enumerated as a factor to consider.

Turning to the third element of the analysis proclaimed in *Binderup*, Mr. Holloway was only sentenced to 60 months intermediate punishment, [78] whereby he received a work release for 90 days, was ordered to pay court costs, a fine of $1,500 and complete a recommended drug and alcohol treatment. While the offense was punishable by up to five years imprisonment, it is telling that the Judge

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[74] *Holloway*, 349 F.Supp.3d at 457. (Internal citations omitted).
[75] *See* 75 Pa.C.S. § 3802.
[76] *Holloway*, 349 F.Supp.3d at 457.
[77] Appellants' Brief at 25-26.
[78] *See* 42 Pa.C.S. § 9763. *See also* 42 Pa.C.S. § 9802 (defining "Eligible offender" to include "a person convicted of an offense who would otherwise be sentenced to a county correctional facility, *who does not demonstrate a present or past pattern of violent behavior* and who would otherwise be sentenced to partial confinement [] or total confinement []."") (emphasis added) and *Commonwealth v. Syno*, 791 A.2d 363 (Pa.Super.2002) (only court empowered to determine eligibility).

granted Mr. Holloway work release, particularly in light of the statutory requirement that an "eligible offender" has not demonstrated a present or past pattern of violent behavior.

While some may argue that having to report to jail each night after work is a serious deprivation of freedom, it is important to compare it to actual incarceration, where an individual is not released to go to work. Additionally, a comparison between the sentence of Binderup and Suarez is warranted, although not controlling.

Binderup was sentenced to three (3) years probation. [79] While Mr. Holloway was sentenced to 90-days imprisonment, he was allowed to take part in the work release program. Further, the sentence was only for 90 days, a far cry from the sentence of three (3) years of probation that Mr. Binderup received. Suarez received a suspended sentence of 180 days imprisonment and a year of probation. [80] Again, Mr. Holloway's punishment was hardly severe relative to Mr. Binderup and Mr. Suarez. Chief Judge Conner agreed, finding that "Holloway's sentence was relatively minor as compared to both the threshold term of imprisonment of more than one year defined in 18 U.S.C. § 922(g), and the maximum possible punishment of five years' imprisonment he faced under Pennsylvania law." [81]

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[79] *Binderup,* 836 F.3d at 340.
[80] *Id*.
[81] *Holloway*, 349 F.Supp.3d at 457.

Chief Judge Conner also found that one of the *Binderup* plaintiffs received a suspended sentence of 180 days imprisonment, which reflected "*discretionary authority that Holloway's sentencing judge lacked*." [82]

While there is a cross-jurisdictional consensus that DUI is a crime, that is where the consensus ends. The severity in which a second DUI is punished varies between numerous jurisdictions. As discussed *supra*, most states' statutory punishments for imprisonment range from several days up to two years and are graded as a misdemeanor. Few states punish the offense by more than two years imprisonment. Only four states punish a second DUI offense as a felony. [83] If anything, this shows that while states believe that DUI should be punished in some capacity, it is hardly what is considered a "serious crime" for the purposes of an *as-applied* Second Amendment challenge. As discussed further *infra*, Chief Judge Conner determined that "[t]he government has not shown there is a consensus regarding the seriousness of a generic second DUI offense, let alone a second DUI offense at a high rate of alcohol." [84]

In *Binderup*, this Court found that the vast majority of states did not treat consensual sexual relationships between a 41-year-old and a 17-year-old as a

[82] *Id*. at 9.
[83] *See* Supp. App. Vol. I at 6-30.
[84] *Holloway*, 349 F.Supp.3d at 458.

serious crime. [85] Likewise, this Court found that while some states punish the unlicensed carrying of a firearm, more than half prescribe a penalty that does not meet the threshold of a traditional felony. [86] DUI is no different. Moreover, Chief Judge Conner found that Plaintiff Holloway "distinguished himself from the class of persons historically barred from possessing a firearm by establishing that his crime of conviction was not sufficiently serious." [87]

Thus, much like the challengers in *Binderup*, Mr. Holloway has shown that he has carried the burden of showing that his misdemeanor was not a serious offense despite its maximum possible punishment. As such, he has distinguished his circumstances from individuals who historically were barred from possessing firearms.

3. No Further Analysis is Supported by *Heller* or *McDonald*

As stated *supra,* Mr. Holloway respectfully calls into question this two-pronged approach as outlined in *Binderup*, based on the Supreme Court's decisions in *Heller* and *McDonald*, where the Court specifically stated that lower courts should *not* conduct interest balancing or apply levels of scrutiny. *Heller*, 554 U.S. at 634-35 (noting that "[w]e know of no other enumerated constitutional right

[85] *Binderup,* 836 F.3d at 352.
[86] *Id*.
[87] *Holloway*, 349 F.Supp.3d at 459-60.

whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon."); *McDonald*, 561 U.S. at 790-91 (noting that the *Heller* Court "specifically rejected" "an interest-balancing test"). Mr. Holloway believes that if he prevails at step one of the *Marzzarella* test, the analysis should end and relief should be granted.

However, if the Court believes that the balancing test should be applied, the Appellee would argue that strict scrutiny, rather than intermediate scrutiny, is the proper test to apply, since Appellee is denied his core Second Amendment right – the right to even possess a firearm in the home for purposes of self-defense – as held by the Supreme Court's decisions in *Heller* and *McDonald*.

ii. Step Two of the Marzzarella Framework

In the event, *arguendo*, this Court applies a balancing test, it should first consider that the Government previously granted relief to individuals in identical and far more egregious situations than Mr. Holloway's and then review the restriction under the lens of strict scrutiny, since, as the *Helle*r Court announced, it involves the core of the Second Amendment – the right to possess a firearm in the home. Alternatively, even if this Court reviews the matter under the lens of intermediate scrutiny, as Chief Judge Connor found, Mr. Holloway is still entitled

to the identical relief provided to Mr. Binderup and Mr. Suarez and affirmed by this Court in *Binderup*.

1. *As-Applied* Challenge

Of note is that the challenge before this Court is a Second Amendment *As-Applied* challenge. "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.'" [88] As this Court stated in *Binderup* "our review of [the Challenger's] as-applied challenges *requires us to consider whether their particular circumstances* remove them from the constitutional sweep of §922(g)(1)." [89]

The Government seeks to cast wide aspersions as to reasons that Mr. Holloway should be denied his Second Amendment right based on general premises not directly related to him or his situation. In particular, a variety of studies relied upon by the Government's expert report, addressed *infra,* examined individuals who were either previously convicted of violent crimes, were

[88] *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011)(quoting *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010)); see *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("It is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another." (internal quotation marks omitted)).
[89] *Binderup*, 836 F.3d at 346. (emphasis added).

diagnosed with alcohol abuse or dependence issues, or other issues that are not comparable to Mr. Holloway. In fact, there is nothing of record that shows Mr. Holloway suffered or suffers from alcohol abuse or dependence issues, had been previously convicted of a violent crime, or had been convicted of any crime other than a single DUI offense, which did not involve any property damage or loss of life or limb.

This Court, in *Binderup*, stated

> As discussed, evidence of how individuals have lived their lives since committing crimes is irrelevant under *Marzzarella*'s first step, as there is no historical support for rehabilitation being a consideration in determining whether someone has Second Amendment rights. *However, at step two of the analysis the question is no longer whether the Challengers fall within the Second Amendment's protections. They do.* Our task now is to decide whether the Government can disarm them despite these protections. Whereas our obligation at step one is to draw constitutional lines—separating those who have Second Amendment rights from those who do not—at step two we must ask whether the Government has made a strong enough case for disarming a person found after step one to be eligible to assert an as-applied challenge. *This turns in part on the likelihood that the Challengers will commit crimes in the future.* Thus, under the right circumstances the passage of time since a conviction can be a relevant consideration in assessing recidivism risks. [90]

At the time of Mr. Holloway's 2005 DUI, he was 23 years old. As of the time of this appeal, Mr. Holloway is now 38 years old and has not since been criminally convicted of any state or federal offense.

[90] *Binderup*, 836 F.3d at 354, n7. (emphasis added).

Moreover, as noted by the District Court, after the 2005 DUI, Mr. Holloway went on to "obtain a bachelor's degree in psychology, worked as an educator with juveniles housed in a residential treatment center, and was not *criminally convicted of any state or federal offense*." [91] Several individuals also submitted letters of recommendation to the Court.

His colleagues state, *inter alia*, that "Mr. Holloway has illustrated the ability to work well with others, demonstrate emotional intelligence despite chaotic situations and portray self-control;" [92] "I see no reason [Mr. Holloway] should not be allowed to own/possess a firearm;" [93] and, "Mr. Holloway has never demonstrated any acts of violence at work. I do not believe that Mr. Holloway should not be prohibited from possessing firearms or ammunition. He is very responsible and follows all safety procedures and policies at work." [94]

2. The Government's Prior Grants of Relief to Individuals Convicted of Similar and Far More Egregious Crimes

Prior to 1993, ATF regularly conducted federal firearms relief determinations as provided for by 18 U.S.C. § 925(c); however, ATF no longer is

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[91] *Holloway*, 349 F.Supp.3d at 462, n. 11. (emphasis added). *See also* Doc. 58-3 ¶¶ 8-12.
[92] *See* Supp. App. Vol. I at 99.
[93] *Id*. at 100.
[94] *Id*. at 102.

able to conduct these determinations because Congress has inserted language into the appropriations bill which states "[p]rovided further, That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." [95] Prior to Congress prohibiting ATF from conducting those determinations, ATF granted relief to 7,722 individuals from 1968 to 1992 for a multitude of different crimes, [96]

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[95] https://fas.org/sgp/crs/misc/R44686.pdf at 24. *See also* The Consolidated Appropriations Act, 2018, Pub. L. No. 115–141, 132 Stat. 348.

[96] *See,* 34 Fed. Reg. 10006 (June 28, 1969), 34 Fed. Reg. 12229 (July 24, 1969), 36 Fed. Reg. 20449 (Oct. 22, 1971), 36 Fed. Reg. 21364 (Nov. 6, 1971), 36 Fed. Reg. 22321 (Nov. 24, 1971), 36 Fed. Reg. 23731 (Dec. 14, 1971), 37 Fed. Reg. 23 (Jan. 4, 1972), 37 Fed. Reg. 2893 (Feb.9, 1972), 37 Fed. Reg. 4921 (Mar. 7, 1972), 37 Fed. Reg. 6361 (Mar. 28, 1972), 37 Fed. Reg. 6769 (Apr. 4, 1972), 37 Fed. Reg. 7168 (Apr. 11, 1972), 37 Fed. Reg. 8403 (Apr. 26, 1972), 37 Fed. Reg. 10406 (May 20, 1972), 37 Fed. Reg. 11790 (June 14, 1972), 37 Fed. Reg. 13352 (July 7, 1972), 37 Fed. Reg. 15009 (July 27, 1972), 37 Fed. Reg. 16113 (Aug. 10, 1972), 37 Fed. Reg. 18636 (Sept. 14, 1972), 37 Fed. Reg. 23462 (Nov. 3, 1972), 37 Fed. Reg. 26352 (Dec. 9, 1972), 37 Fed. Reg. 28640 (Dec. 28, 1972), 38 Fed. Reg. 1944 (Jan. 19, 1973), 38 Fed. Reg. 3414 (Feb. 6, 1973), 38 Fed. Reg. 4524 (Feb.15, 1973), 38 Fed. Reg. 4583 (Feb. 16, 1973), 38 Fed. Reg. 8071 (Mar. 28, 1973), 38 Fed. Reg. 14299 (May 31, 1973), 39 Fed. Reg. 9212 (Mar. 8, 1974), 41 Fed. Reg. 7550 (Feb. 19, 1976), 41 Fed. Reg. 50368 (Nov. 15, 1976), 42 Fed. Reg. 21156 (Apr. 25, 1977), 43 Fed. Reg. 25755 (June 14, 1978), 43 Fed. Reg. 51736 (Nov. 6, 1978), 44 Fed. Reg. 71492 (Dec. 11, 1979), 45 Fed. Reg. 6878 (Jan. 30, 1980), 45 Fed. Reg. 26868 (Apr. 21, 1980), 45 Fed. Reg. 39998 (June 12, 1980), 45 Fed. Reg. 49733 (July 25, 1980), 45 Fed. Reg. 65393 (Oct. 2, 1980), 45 Fed. Reg. 76838 (Nov. 20, 1980), 46 Fed. Reg. 11751 (Feb. 10, 1981), 46 Fed. Reg. 23646 (Apr. 27, 1981), 46 Fed. Reg. 33410 (June 29, 1981), 46 Fed. Reg. 46456 (Sept. 18, 1981), 46 Fed. Reg. 57812 (Nov. 25, 1981), 47 Fed. Reg. 10132 (Mar. 9, 1982), 47 Fed. Reg. 47714 (Oct. 27, 1982), 48 Fed. Reg. 10508 (Mar. 11, 1983), 48 Fed. Reg. 28385 (June 21, 1983), 48 Fed. Reg. 29650 (June 27, 1983), 48 Fed. Reg. 36720 (Aug. 12, 1983), 48 Fed. Reg. 50977 (Nov. 4, 1983), 49 Fed. Reg. 25060 (June 19, 1984), 49 Fed. Reg. 29503 (July 20, 1984), 49 Fed. Reg. 35707

some of which were identical to and some far more egregious than Mr. Holloway's – in fact, some had more than six separate federal prohibitions [97, 98] and some had been convicted of vehicular homicide while DUI. [99]

Unfortunately, the Federal Register publications do not specify the crime, which the individual was convicted of but rather only specify the date of conviction and court where they were convicted for which relief was granted. As such, Appellee sought records from a sampling of several courts to identify the types of crimes individuals had previously been convicted of and were subsequently granted relief in relation to, after ATF determined, pursuant to 27

(Sept. 11, 1984), 49 Fed. Reg. 48252 (Dec. 11, 1984), 50 Fed. Reg. 1026 (Jan. 8, 1985), 50 Fed. Reg. 23374 (June 3, 1985), 54 Fed. Reg. 33108 (Aug. 11, 1989), 54 Fed. Reg. 43378 (Oct. 24, 1989), 55 Fed. Reg. 5939 (Feb. 20, 1990), 55 Fed. Reg. 14549 (Apr. 18, 1990), 55 Fed. Reg. 33208 (Aug. 14, 1990), 55 Fed. Reg. 48951 (Nov. 23, 1990), 56 Fed. Reg. 14971 (Apr.12, 1991), 56 Fed. Reg. 26713 (June 10, 1991), 56 Fed. Reg. 36865 (Aug. 1, 1991), 56 Fed. Reg. 65926 (Dec. 19, 1991), 57 Fed. Reg. 6160 (Feb. 20, 1992).

[97] *See* 36 F.R. 22321 (Morrow, Clyde Franklin), 37 F.R. 18636 (Cook, Judson Vernon. Jr.), 46 F.R. 46456 (Crawford, Cleo J., Metz, Ira G.), 48 F.R. 28385 (Blackburn, Vaughn), 49 F.R. 25060 (Karl, Earl Jerome), 49 F.R. 29503 (Adams, Richard Gerald), and 55 F.R. 14549 (Search, Herman Samuel).

[98] For example, Mr. Earl Matthews, who was granted relief, had, between 1960 and 1961, twenty-three forgery convictions, three burglary convictions, three larceny convictions, three receiving stolen property convictions, and a fraudulently making a written instrument conviction, all of which were individually prohibiting. *See* 39 FR 9212 (Matthews, Earl E.).

[99] *See* Supp. App. Vol. I at 31-32. *Id.* at 33-41. (The Court records of John Kraszewski, granted relief on February 20, 1992 (57 F.R. 6160-02), from a 1984 Pennsylvania conviction, which included one count of homicide by vehicle). *See also Id. at* 69-87. (The Court records of Kim Blake, granted relief on August 11, 1989 (54 F.R. 33108), from a 1981 Pennsylvania conviction)

C.F.R. § 478.144, that that the individual would "not be likely to act in a manner dangerous to public safety, and that the granting of the relief would not be contrary to the public interest." [100] Unfortunately, there is no way – other than contacting the court of conviction relative to each individual's offense(s), paying a search fee, and attempting to procure any records that may still exist – for the Appellee to identify all the other individuals who were convicted of DUI (such as the offense Mr. Holloway was convicted of) and subsequently granted relief from the information contained in the Federal Register. At the present, Appellee's counsel has obtained approximately 1/100th of the court records relating to the grants of relief, many of which are identified *supra* and *infra*.

a. John Kraszewski and Kim Blake

Mr. Kraszewski was granted federal firearms relief on February 20, 1992 from a 1984 Pennsylvania conviction. [101] The court records show that Mr.

[100] Noteworthy is the language utilized in the earlier publications of the Federal Register for grants of relief. "Notice is hereby further given that I have considered [name's] application and have found: (1) The conviction was made upon a charge which did not involve the use of a firearm or other weapon or a violation of Chapter 44, Title 18, United States Code, or of the National Firearms Act; and (2) It has been established to my satisfaction that the circumstances regarding the conviction and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety, and that the granting of the requested relief to [name] from disabilities incurred by reason of his conviction, would not be contrary to the public interest." *See* 34 F.R. 12229.
[101] 57 F.R. 6160-02.

Kraszewski had been charged with and pled guilty to one count of driving under the influence and *one count of homicide by vehicle*. [102]

Likewise, Mr. Kim Blake was granted federal firearms relief on August 11, 1989 from a 1981 Pennsylvania conviction. [103] The court records reflect that he was charged, *inter alia*, with one count of driving under the influence and *one count of homicide by vehicle*.[104]

While the Appellants contends that individuals, like Mr. Holloway, should not be allowed to exercise their Second Amendment rights because they are "unvirtuous" citizens, it finds itself in an untenable position having granted relief to at least two individuals who not only were convicted of DUI but also homicide by vehicle, where the court records establish that homicide by vehicle was the result of their driving under the influence. 18 U.S.C. § 925(c) required ATF to find the individual would not be "likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." Even though Mr. Kraszewski and Mr. Blake were responsible for the loss of life through their actions, ATF determined that they should be granted relief and that such was not contrary to the public interest. Mr. Holloway's DUI did not result in any property damage or loss of life or limb to an individual.

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[102] *See* Supp. App. Vol. I at 33-41.
[103] 54 F.R. 33108.
[104] *See* Supp. App. Vol. I at 69-87.

Accordingly, the Appellants are unable to show that Mr. Holloway is likely to act in a manner dangerous to public safety as there is no evidence of record to support such a proposition. Moreover, as discussed *infra*, this Court has stated that the intended purpose of § 922(g)(1) is to "promot[e] public safety by 'preventing armed mayhem.'" [105] The record is devoid of any evidence that would support a position that finding the § 922(g)(1) prohibition is unconstitutional, as applied to the Appellee, would be contrary to that intended purpose.

b. Barry Shoop

Mr. Shoop was granted federal firearms relief on April 11, 1977 from a 1975 Pennsylvania driving under the influence conviction, which was prohibiting like Mr. Holloway's. [106]

Here, again, is another example of an individual who was convicted of DUI, who was later granted relief by ATF, finding that Mr. Shoop would not be "likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." To find the § 922(g)(1) prohibition against Mr. Holloway furthers an important government interest when the Government previously granted relief to individuals convicted of the same or more egregious offenses, simply cannot withstand any form of scrutiny.

[105] *Binderup,* 836 F.3d at 353. (quoting *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010)).
[106] 42 F.R. 21156. *See also* Supp. App. Vol. I at 42-47.

c. Carl Fareri [107]

Mr. Fareri was granted federal firearms relief on November 23, 1990 from a 1984 conviction. [108] The court records show that Mr. Fareri was convicted of felonious burglary twice, felonious conspiracy, theft by unlawful taking or disposition and receiving stolen property. [109]

While Mr. Fareri's crimes are not directly related to DUI, it does show that even when an individual committed a crime that is considered to be felonious in nature and deprives an individual of their property, that the grant of relief was not considered contrary to the public safety or interest. [110]

d. Charles Spangler

Mr. Spangler was granted federal firearms relief on June 10, 1991 from five convictions in 1963, 1965, and 1985. [111] Mr. Spangler had been convicted of

[107] The court records reflect a spelling of "Fareli" and "Fareri," but it is believed that the proper spelling is "Fareri".
[108] 55 F.R. 48951-03 (spelled "Fareri" in the publication).
[109] *See* Supp. App. Vol. I at 48-62.
[110] Appellee also obtained records for Ronald Sahara Brown, who was convicted of felonious larceny from a person in 1973, felonious possession of heroin in 1975 and felonious larceny in a building in 1977 and William White, who was convicted of felonious larceny of a truck in 1965 and a prior felonious juvenile burglary. *See* Doc. 59 at 25 fn. 81.
[111] 56 F.R. 26713-02.

adultery, statutory rape, contributing to the delinquency of a minor, possession of a firearm and resisting an officer. [112]

Mr. Spangler's multiple convictions show that not only did his crimes cover a broad spectrum, but that ATF considered an individual who had five convictions ranging from statutory rape to resisting an officer to be of such little threat to society that the restoration of his right to own and possess firearms and ammunition would not be contrary to the public safety or interest. Most interesting, is that Mr. Spangler's last conviction was a mere six (6) years prior to him being granted relief and it was for the possession of a firearm and *resisting an officer*.

Mr. Spangler is not the only individual who had multiple prohibiting convictions and who was granted relief by ATF. The Federal Register denotes numerous instances where an individual who had multiple prohibiting convictions was granted federal firearms relief. [113]

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[112] *See* Supp. App. Vol. I at 63-68.

[113] *See* 36 F.R. 20449, 36 F.R. 22321, 36 F.R. 23731, 37 F.R. 10406, 37 F.R. 11790, 37 F.R. 13352, 37 F.R. 15009, 37 F.R. 16113, 37 F.R. 18636, 37 F.R. 23, 37 F.R. 23642, 37 F.R. 26352, 37 F.R. 28640, 37 F.R. 2893, 37 F.R. 4921, 37 F.R. 6361, 37 F.R. 6769, 37 F.R. 7168, 37 F.R. 8403, 38 F.R. 14299, 38 F.R. 1944, 38 F.R. 3414, 38 F.R. 4524, 38 F.R. 4583, 38 F.R. 8071, 39 F.R. 9212, 41 F.R. 50368, 41 F.R. 7550, 42 F.R. 21156, 43 F.R. 25755, 43 F.R. 51736, 44 F.R. 71492, 45 F.R. 26868, 45 F.R. 39998, 45 F.R. 49733, 45 F.R. 65393, 45 F.R. 6878, 45 F.R. 76838, 46 F.R. 11751, 46 F.R. 23646, 46 F.R. 33410, 46 F.R. 46456, 46 F.R. 57812, 47 F.R. 10132, 47 F.R. 47714, 47 F.R. 47714, 48 F.R. 10508, 48 F.R. 28385, 48 F.R. 29650, 48 F.R. 36720, 48 F.R. 50977, 49 F.R. 25060, 49 F.R. 29503, 49 F.R. 35707, 49 F.R. 48252, 50 F.R. 1026, 50 F.R. 23374, 54 F.R. 33108,

3. Appellants' Expert Report Should be Ignored, or in the Alternative, Given Little Deference

The expert report relied upon by the Appellants was littered with data that was relevant to individuals who had alcohol dependency or abuse issues, were convicted of a prior misdemeanor crime of violence and, in one instance, utilized data between 1959-1991 [114] from a *single* state to support the proposition that – in the absence of ever meeting Mr. Holloway, let alone evaluating him – an individual such as Mr. Holloway should be barred from the possession of firearms and ammunition in perpetuity. [115]

There is no evidence of record that Mr. Holloway had or has an alcohol abuse or dependence issue and Judge Conner agreed. [116] In relation to the expert report proffered by the Appellants, Judge Conner determined

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54 F.R. 43378, 55 F.R. 14549, 55 F.R. 33208, 55 F.R. 48951, 55 F.R. 5939, 56 F.R. 14791, 56 F.R. 26713, 56 F.R. 36865, 56 F.R. 65926, and 57 F.R. 6160.

[114] "[A] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146-47 (1997).

[115] *See* Supp. App. Vol. I at 96-97. (Two noteworthy points. Mr. Webster did not contend that Mr. Holloway had or currently does suffer from alcohol dependence, abuse, or had ever been convicted of any crime, let alone a crime involving an element of violence. Second, Mr. Webster is the Director of the Johns Hopkins Center for Gun Policy and Research. Its website states: "The Johns Hopkins Center for Gun Policy and Research is engaged in original scholarly research, policy analysis and *agenda-setting* public discourse." (Emphasis added). Clearly, this reflects a bias in any opinions rendered.) *See also* Appellants' Brief at 29.

[116] *Holloway*, 349 F.Supp.3d. at 461.

> The expert report states that individuals with alcohol dependency or abuse are more prone to violence and cites one study that suggests just over 50 percent of DUI offenders were alcohol dependent. (Doc. 61-4 at 4-5 & n.8). It further notes that alcohol abuse is often comorbid with mental illness and is strongly linked with domestic violence, youth violence, violent crime, and road rage. (Id. at 6-7). *But nothing in the record suggests that Holloway was ever diagnosed with or suffered from alcohol dependence, alcohol abuse, or mental illness*. Moreover, the report acknowledges that "it is not possible to determine with certainty whether these associations are causal." (Id. at 6).
>
> The report further opines that laws prohibiting "high risk" individuals from purchasing firearms reduce future violent and firearms-related offenses. (Id. at 13-14). In support of this proposition, the report cites two studies which collected data on individuals with at least one prior misdemeanor conviction for a crime of violence. (Id. at 13-14 & n.50) Both studies found that barring said individuals from purchasing firearms reduced the commission of future crimes involving firearms or violence, and intimate partner homicides, respectively. (Id.) *Defendants can draw no reasonable conclusion from these studies about the risk posed by Holloway's potential possession of a firearm as his disqualifying misdemeanor was nonviolent.* [117]

The Appellants argue that Mr. Holloway's BAC from his prior DUI offense is evidence of such a disorder but offer no support for their statement other than mere conjecture, no different than they did in *Binderup* regarding Binderup and Suarez. [118] Even if, *arguendo*, this Court were to agree with the Appellants that this

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[117] *Id.*

[118] Appellants' Brief at 31. *Cf. Binderup*, 836 F.3d at 354-355 (The Government claims that someone like Suarez is "particularly likely to misuse firearms" because he belongs to a category of "potentially irresponsible persons," Gov't *Suarez* Br. at 27–28, and that someone like Binderup is "particularly likely to commit additional crimes in the future," Gov't *Binderup* Br. at 35. But it must "present some meaningful evidence, not mere assertions, to justify its predictive [and here

constituted evidence of such a disorder, there is nothing in the record to suggest that Mr. Holloway continues to suffer from it.

The Appellants also argue that

> Relatedly, there is a longstanding tradition of prohibiting the carrying of arms by people who are "under the influence of intoxicating drink." And Congress has recognized the relationship between substance abuse and firearm crimes in prohibiting users of illegal controlled substances from possessing firearms. See 18 U.S.C. § 922(g)(3). [119]

As an initial point, the Appellants' citation to two cases is hardly evidence of a "longstanding tradition." Regardless, a prohibition of the carrying of arms by people "under the influence of intoxicating drink" is not the same as a prohibition of carrying arms by people who at some point were under the influence of intoxicating drink. In fact, the quote the Appellants use points to an instance where an individual, *currently under the influence of an intoxicating drink*, may not carry a firearm.

In that same vein, the relationship between prohibiting users of illegal controlled substances from possessing firearms is similarly irrelevant. As Appellants are acutely aware, alcohol is lawful to consume and does not come

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conclusory] judgments." *Heller*, 670 F.3d at 1259. In these cases neither the evidence in the record nor common sense supports those assertions….We need not delve into the weeds here, as, much like the more general studies discussed above, the sex-offender specific studies focus on people who were incarcerated. It is not helpful to draw inferences about the usefulness of disarming Binderup from those off-point studies….)

[119] Appellants' Brief at 30. (internal citations omitted).

under the purview of 18 U.S.C. § 922(g)(3). Had Congress been concerned about an individual's alcohol consumption and possession of firearms, assuming such would be constitutional, it could have enumerated any number of instances that would prohibit an individual from possessing firearms for that very reason. Notably absent are any federal prohibitions against the consumption of alcohol and possession of firearms or ammunition.

At the district court, the Appellants cited to a reference manual on Scientific Evidence for the proposition that some flaws in studies are inevitable given the limits of technology and resources, in an attempt to downplay the significance of this matter. [120] Flaws in a study when the result does not impede on one's constitutional rights may be permissible, but this Court surely cannot stand for the proposition that flawed studies may be used to strip someone of an enumerated constitutional right.

More importantly, the manual does not state or imply that the absence of necessary factors for an opinion constitute "flaws" that can be ignored. As the Appellants' expert report heavily relies upon an individual being an alcohol dependent or alcohol abuser and there is no evidence of record that Mr. Holloway was or is an alcohol dependent or alcohol abuser, the opinions proffered in the

[120] *See* Doc. 71 at 11.

Report are inapplicable to Mr. Holloway and should be dismissed as inapplicable by this Court.

4. 18 U.S.C. § 922(g)(1) As Applied to Mr. Holloway Cannot Survive Strict Scrutiny

Step two of the *Binderup* analysis requires the Government to show that the restriction meets "some form of heightened scrutiny." [121] As discussed *supra,* Appellee believes strict scrutiny should control. Strict scrutiny requires that the Government bear the burden to show that the law is "narrowly tailored to serve a compelling state interest." [122]

The Appellants cannot make such a showing given the factual circumstances. The Government is unable to provide any persuasive authority, let alone compelling authority, to show that such a bar would meet the criteria of being "narrowly tailored to serve a compelling state interest" of preventing "armed mayhem." In fact, the Appellants' expert report is littered with decades old studies and broad generalizations that are not even applicable to the Appellee in this matter.

As recounted in the Appellee's objections to Appellants' expert report of Daniel Webster, ScD: 1) a number of the findings in the Appellants' Expert Report

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[121] *Binderup,* 836 F.3d at 347.
[122] *Marzzarella,* 614 F.3d at 99. (citing *FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 465 (2007)).*

are premised on individuals who suffer from alcohol or abuse issues; and there is no evidence that Mr. Holloway currently suffers from any alcohol or dependency issues; 2) there exists a statistical significance in relation to reduction of future violent crime when *those previously convicted of a violent crime* were barred from purchasing a handgun; however, there is no evidence Mr. Holloway has committed, let alone, been charged with or convicted of a violent crime; and 3) the report states that individuals who were *previously convicted of a misdemeanor crime of violence* are more likely to commit crime in the future and opines that prohibitions against individuals like Mr. Holloway prove a public safety benefit, even though Mr. Holloway was never convicted of such an offense.[123]

In other words, the Appellants' expert report simply has no value when applied to Mr. Holloway and certainly does not lend itself to establishing that such a prohibition would pass muster under a strict scrutiny analysis. This Court, in *Binderup,* stated "[i]t is not helpful to draw inferences about the usefulness of disarming [Plaintiffs] from those off-point studies." [124]

This Court, in *Binderup*, concluded that the intended purpose of § 922(g)(1) is to "promot[e] public safety by 'preventing armed mayhem.'" [125] Applying the strict scrutiny analysis to the purpose of § 922(g)(1), the Government cannot show

[123] *See* Supp. App. Vol. I at 91-93, ¶ 3 and ¶ 4.
[124] *Binderup*, 836 F.3d at 355.
[125] *Binderup,* 836 F.3d at 353. (quoting *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010)).

that preventing an individual convicted of a single DUI, where no property damage or loss of life or limb occurred and wherein he was not prohibited from possessing firearms under state law, nor would have been prohibited under 18 U.S.C. § 922(g)(1) had he been convicted in the vast majority of other states, to be narrowly tailored to prevent the compelling governmental interest of "preventing armed mayhem".

5. 18 U.S.C. § 922(g)(1) As Applied to Mr. Holloway Cannot Survive Intermediate Scrutiny

Should this Court reject the Appellee's argument that strict scrutiny applies, then it should follow the intermediate scrutiny analysis as declared in *Marzzarella*. [126] Intermediate scrutiny requires that the Government bear the burden of showing the appropriateness of its means to further its interest. [127]

It is evident that the Appellants believe there is a reasonable fit between the 922(g)(1) prohibition on individuals like the Appellee and the Government's interest in protecting public safety. [128] However, much like in *Binderup*, the Government has failed to produce credible evidence why banning people like Mr. Holloway, in perpetuity, from possessing firearms promotes public safety. [129] As discussed *supra,* the Appellants rely on an expert report which utilizes old studies

[126] *Id.* at 353.
[127] *Id*.
[128] *See* Appellants' Brief at 27-32.
[129] *Binderup,* 836 F.3d at 353-54.

whose data is not recent and which even admits 1) they have obvious limitations and 2) that there is nothing concrete suggesting a relationship between alcohol consumption and violence. [130] Moreover, studies cited in the expert report are just outright inapplicable to Mr. Holloway's past.

> To allow the Government to defeat an as-applied challenge by demonstrating that the statute was a reasonable fit to its important interest in general would mean that the challengers' efforts to distinguish themselves from the overall class are rendered futile. In essence, *without considering the challengers' specific characteristics*, the second step of the *Marzzarella* framework is the same in both facial and as-applied challenge, rendering the first prong in as-applied challenges superfluous and done in vain. [131]

The Government's expert report casts a broad net of general assertions about individuals convicted of DUI in an attempt to have this Court reject Mr. Holloway's claim, that as-applied to him, the § 922(g)(1) prohibition is unconstitutional. "But [the Appellants] must 'present some meaningful evidence, not mere assertions, to justify [their] predictive [and here conclusory] judgments.'" [132] The Appellants have failed to do so.

As Chief Judge Conner stated "[the] defendants' evidence fails to account

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[130] *See* Doc. 61-4. (Of particular interest is the reliance on Dr. Wintermute's study *Firearms, Alcohol and Crime: Convictions for Driving Under the Influence (DUI) and Other Alcohol-Related Crimes and Risk for Future Criminal Activity Among Authorised Purchasers of Handguns,* Doc. 61-4 at 9-10, which itself proclaims "[t]his study has the obvious limitation that the data are old and from a single state. A large longitudinal study now under way will provide further information based on contemporary data."). *See also* Supp. App. Vol. I at 91-93, ¶ 3 and ¶ 4.
[131] *Keyes, et. al. v. Sessions, et al.*, 282 F.Supp.3d 858, 876-877, (M.D. Pa. 2017).
[132] *Binderup,* 836 F.3d at 354 (quoting *Heller, 554 U.S.* at 1259).

for key characteristics of Holloway and similarly situated persons. They have presented no evidence indicating that individuals like Holloway—after over a decade of virtuous, noncriminal behavior—"remain [so] potentially irresponsible" that they should be prohibited from owning a firearm. The government has not demonstrated a substantial fit between Holloway's continued disarmament and the important government interest of preventing armed mayhem." [133]

Applying the intermediate scrutiny analysis to the purpose of § 922(g)(1), "preventing armed mayhem", the Appellants cannot show that preventing an individual convicted of a single instance of DUI, where no property damage or loss of life or limb occurred and wherein he was not prohibited from possessing firearms under state law or under 18 U.S.C. § 922(g)(1) had he been convicted in the vast majority of other states to fit reasonably within the important governmental interest of "preventing armed mayhem".

6. The Hardiman, *et al.*, Alternative Basis for Relief

Judge Hardiman, joined by Judges Fisher, Chagares, Jordan and NyGaard in a concurring opinion, revisited the ways described in *Barton* that an individual could present facts about themselves to distinguish their circumstances from those

[133] *Holloway*, 349 F.Supp.3d at 462. (Internal citations omitted).

historically barred from possessing firearms. [134] One of those was the passage of time. [135]

In a footnote, Judge Hardiman noted that

> Our colleagues reject *Barton*'s mention of the possibility that "the passage of time or evidence of rehabilitation [might] restore the Second Amendment rights of people who committed serious crimes." Ambro Op. 26. We have not been presented with historical evidence one way or another whether this might be a route to restoration of the right to keep and bear arms in at least some cases, so we would leave for another day the determination whether that turns out to be the case. [136]

As noted by the *Amici* Firearms Policy Coalition, *et al*, "[t]here is no tradition in American history of banning peaceable citizens from owning firearms…the historical justification [that] *Heller* [] relied on…must have been the tradition of disarming dangerous persons. [137] Thus Mr. Holloway should be able to pass step one of the *Binderup* analysis based solely on the offense for which he was convicted. As discussed *supra*, the Government cannot meet the burden under strict or intermediate scrutiny to deny Mr. Holloway of his right to keep and bear arms in perpetuity.

Should this Court determine that Appellant cannot present facts about himself and his background that distinguish his circumstances from those in the

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[134] *Binderup,* 836 F.3d at 366. (Hardiman, J. concurring in part and concurring in judgments) citing *Barton*, 633 F.3d at 174.
[135] *Id*.
[136] *Id*. at n. 12.
[137] *Amici* Brief at Part III, which Appellant incorporates herein by reference.

historically barred class, Appellant urges this Court to reconsider whether the passage of time, particularly in relation to a nonviolent offense, can be considered to determine that an old conviction poses no continuing threat to society and thus entitles one to relief. [138]

2. Attorney Fees and Costs

As the District Court, as a result of the joint motion of the Parties, stayed any request for attorney fees and costs for the pendency of any appeal, [139] Mr. Holloway would respectfully request that in affirming Chief Judge Connor's decision that this Court remand the matter back to Judge Connor for a decision on an award of attorney fees and costs, including those incurred in this appeal.

CONCLUSION

For the foregoing reasons, the Judgment of the District Court should be affirmed and Appellees' request for reasonable attorney's fees and costs should be remanded to the district court for award.

Respectfully Submitted,

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[138] *Cf*. Restoration of rights after administration of an oath or pledge of allegiance and 3-year prohibition on the bearing of arms by individuals involved in Shay's Rebellion. *Amici* Brief at Part III, Section D.
[139] *See* Doc. 87.

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit set forth in Fed. R. App. P. 32(a)(7)(B)(ii) because, according to the word-count feature of Microsoft Word, it contains 12,794 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I hereby certify that Joshua Prince, Esq. and myself are admitted to practice in the Third Circuit Court of Appeals. I further certify that Joshua Prince, Esq. and myself are members in good standing.

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I, Adam Kraut, Esq., of Prince Law Offices, P.C. hereby certify that I served a copy of the *BRIEF OF THE APPELLEE* and the *SUPPLEMENTAL APPENDIX Vol. I*, through the Court's ECF system, as follows:

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