No. 19-1687

In the United States Court of Appeals for the Third Circuit

LISA M. FOLAJTAR
Plaintiff–Appellant

v.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES; THOMAS E. BRANDON, ACTING DIRECTOR, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; AND CHRISTOPHER A. WRAY, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION
Defendants–Appellees

Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 5:18-cv-02717

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, FIREARMS OWNERS AGAINST CRIME, AND SECOND AMENDMENT FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL

Joseph G.S. Greenlee
Counsel of Record
Firearms Policy Coalition
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 378-5785
jgr@fpchq.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* make the following statements:

Firearms Policy Coalition, Inc. has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Firearms Policy Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Firearms Owners Against Crime has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Second Amendment Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

/s/ *Joseph G.S. Greenlee*
Joseph G.S. Greenlee
Counsel for *Amici Curiae*

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STATEMENT OF *AMICI CURIAE*

Firearms Policy Coalition, Inc. ("FPC") is a nonprofit membership organization that defends constitutional rights and promotes individual liberty, including the right to keep and bear arms, throughout the United States. FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, and education.

Firearms Policy Foundation ("FPF") is a nonprofit organization with members throughout the United States. FPF serves its members and the public through charitable programs including research, education, and legal efforts, with a focus on constitutional rights and the People's rights, privileges, and immunities.

Firearms Owners Against Crime ("FOAC") is a non-partisan, non-connected Political Action Committee organized to empower gun owners, outdoors enthusiasts, and supporters of the right to keep and bear arms with the information necessary to protect freedom. FOAC is a member-driven organization with over 1,600 members in Pennsylvania.

Second Amendment Foundation ("SAF") is a nonprofit foundation dedicated to protecting the right to arms through educational and legal

action programs. SAF has over 650,000 members, in every State of the Union. SAF organized and prevailed in *McDonald v. City of Chicago*.

CONSENT TO FILE

All parties have consented to the filing of this brief.[1]

[1] No counsel for a party in this case authored this brief in whole or in part. No party or counsel for a party contributed money intended to fund the preparation and submission of this brief. No person other than *amici* and their members contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

To succeed in her as-applied challenge, Ms. Folajtar must identify the traditional justifications for excluding felons from Second Amendment protections, and then present facts that distinguish her circumstances from those historically barred felons.

Both English and American tradition support firearm prohibitions on dangerous persons—namely, disaffected persons posing a threat to the government and persons with a proven proclivity for violence. This tradition of disarming dangerous persons has been practiced for centuries, and it was reflected in the debates and proposed amendments from the ratifying conventions of Massachusetts, Pennsylvania, and New Hampshire.

But there is no tradition of banning peaceable citizens from owning firearms. Historically, no person similar to Ms. Folajtar has been prohibited from keeping arms—she has never committed nor threatened violence against anyone. Thus, she is distinct from those who have historically been barred from keeping arms, and the government bears the burden of justifying a complete prohibition of her Second Amendment rights.

The government cannot satisfy that burden, however, having produced no evidence. This Court and the Supreme Court require much more, even under intermediate scrutiny. Thus, the law should be held unconstitutional as applied to Ms. Folajtar.

ARGUMENT

I. This Court applies a Two-Part Test to Second Amendment challenges, first determining whether the person is protected by the Second Amendment, and if so, then applying means-end scrutiny.

This Court applies a Two-Part Test to Second Amendment challenges. "We first consider 'whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.' If not, the challenged law must stand. But if the law burdens protected conduct, the proper course is to 'evaluate the law under some form of means-end scrutiny.'" *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 346 (3d Cir. 2016) (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)).

II. In Part One, for "presumptively lawful" regulations, this Court determines whether the historical justifications underlying the statute support a permanent prohibition on the challenger.

In *District of Columbia v. Heller*, the Supreme Court identified a series of "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons." 554 U.S. 570, 626–27 & n.26 (2008). The Court repeated these "longstanding regulatory measures" in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

The *Heller* Court promised that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned." 554 U.S. at 635. *See Binderup*, 836 F.3d at 343 ("*Heller* catalogued a non-exhaustive list of 'presumptively lawful regulatory measures' that have historically constrained the scope of the right."); *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) ("the Supreme Court contemplated [] a historical justification for the presumptively lawful regulations") (quoting *Heller*, 554 U.S. at 627).

Thus, to rebut the presumption and succeed in an as-applied challenge to a firearm regulation, "At step one . . . a challenger must prove . . . that a presumptively lawful regulation burdens his Second Amendment rights. This requires a challenger to clear two hurdles: he must (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class." *Binderup*, 836 F.3d at 346–47 (quoting *United States v. Barton*, 633 F.3d 168, 173, 174 (3d Cir. 2011)). *See Barton*, 633 F.3d at 173 ("[T]o evaluate [an] as-applied challenge, we look to the historical

pedigree of 18 U.S.C. § 922(g) to determine whether the traditional justifications underlying the statute support a finding of permanent disability in this case.").

III. The historical justification for firearm prohibitions on felons is the tradition of disarming dangerous persons, which Ms. Folajtar is not.

There is no tradition in American history of banning peaceable citizens from owning firearms. A historical analysis shows that the historical justification the *Heller* Court relied on to declare the felon ban "presumptively lawful" must have been the tradition of disarming dangerous persons. Ms. Folajtar is not dangerous—she never committed nor threatened violence against anyone—so she is distinct from those who have historically been barred from keeping arms.

A. In English tradition, arms prohibitions applied to disaffected and other dangerous persons.

England's historical tradition cannot be directly applied to an interpretation of the Second Amendment. "Ultimately, the American Revolution came because the colonists were no longer English, having become a new people. Among the exceptional characteristics of this new people was their hybrid arms culture, the product of meeting and blending of English and Indian arms cultures." Nicholas Johnson, et al.,

FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 240 (2d ed. 2017).

Americans were contemptuous of the constricted nature of the English arms right.[2] "The arms ethos of the American Revolution and the Early Republic was a conscious repudiation of what Americans saw as an insufficiently robust right in England. Nevertheless, the English arms culture of the middle ages was an ancestor of the later American one, and is therefore relevant to understanding the background of the American right." David Kopel & Joseph Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203,

[2] *See e.g.*, James Madison, Notes for Speech in Congress Supporting Amendments, June 8, 1789, *in* THE ORIGIN OF THE SECOND AMENDMENT 645 (David Young ed., 1991) (Introducing the Second Amendment in Congress, Madison's notes show that he denounced the limited scope of the "English Decln. of Rts," including that it protected only "arms to [Protestants]"); 1 William Blackstone, COMMENTARIES 143-44 n.40 & n.41 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803) ("Tucker's Blackstone") (denouncing statutory infringements of the English right, and noting that the American right was broader); William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 126 (2nd ed. 1829) ("In most of the countries of Europe, this right does not seem to be denied, although it is allowed more or less sparingly"); 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 747 (1833) ("under various pretences the effect of this provision [in England's 1689 Declaration of Rights] has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege.").

208 (2018).

The English tradition of preventing dangerous persons from accessing weapons dates back to at least the year 602, when The Laws of King Aethelbirht made it unlawful to "furnish weapons to another where there is strife…" ANCIENT LAWS AND INSTITUTES OF ENGLAND 3 (Benjamin Thorpe, ed. 1840).

A millennium later, the practice became more prevalent. In 1660, instructions were issued to the Lord Lieutenants for "disaffected persons [to be] watched and not allowed to assemble, and their arms seized." 1 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1660–1661, at 150 (1860). Additionally, Charles II ordered the Lord Mayor and Commissioners for the Lieutenancy of London "to make strict search in the city and precincts for dangerous and disaffected persons, seize and secure them and their arms, and detain them in custody." 10 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, 1670, at 237 (1895).

England's 1662 Militia Act empowered officials "to search for and seize all arms in the custody or possession of any person or persons whom the said lieutenants or any two or more of their deputies shall judge dangerous to the peace of the kingdom." 8 Danby Pickering, THE

STATUTES AT LARGE, FROM THE TWELFTH YEAR OF KING CHARLES II, TO THE LAST YEAR OF KING JAMES II 40 (1763).

That same year, Charles II ordered Sir Thomas Peyton and two other deputy lieutenants of Kent "to seize all arms found in the custody of disaffected persons in the lathe of Shepway, and disarm all factious and seditious spirits." 1 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II at 538.

Charles II issued orders to eighteen lieutenants in 1684 to seize arms "from dangerous and disaffected persons." 27 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1684–1685, at 26–27, 83–85, 102 (1938).[3]

A 1695 statute forbade the carrying and possession of arms and ammunition by Irish Catholics in Ireland. 7 William III ch. 5 (1695). In addition to "papists," a legal manual instructed constables to search for arms possessed by persons who are "dangerous." Robert Gardiner, THE COMPLEAT CONSTABLE 18 (3d ed. 1708).

[3] "Disaffected persons" were those not loyal to the current government, who might want to overthrow it. Until the Glorious Revolution of 1688, this included Whigs and non-Anglican Protestants. When roles were reversed after the Glorious Revolution, "disaffected persons" included Tories loyal to James II.

Like his predecessor, William III called in 1699 for the disarming of "great numbers of papists and other disaffected persons, who disown his Majesty's government." 5 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF WILLIAM III, 1699–1700, at 79–80 (1937).

The following year, The House of Lords prayed that William III "would be pleased to order the seizing of all Horses and Arms of Papists, and other disaffected Persons, and have those ill Men removed from London according to Law." 2 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF LORDS, FROM THE RESTORATION IN 1660, TO THE PRESENT TIME 20 (1742). In response, William III "assured them he would take Care to perform all that they had desired of him." *Id.*

Then in 1701, King William III "charge[d] all lieutenants and deputy-lieutenants, within the several counties of [England] and Wales, that they cause search to be made for arms in the possession of any persons whom they judge dangerous." 6 CALENDAR OF STATE PAPERS: DOMESTIC SERIES, OF THE REIGN OF WILLIAM III, 1700–1702, at 234 (1937) (second brackets in original).

As demonstrated, disarmament actions in English tradition focused on potentially dangerous persons—violent persons and disaffected persons perceived as posing a threat to the crown.

B. In colonial America, arms prohibitions applied to disaffected and other dangerous persons.

Similar to England, disarmament laws in colonial America were designed to keep weapons away from those perceived as posing a dangerous threat. Such laws were often discriminatory and overbroad—and thus unconstitutional—but even those were intended to prevent danger. *See e.g.*, LAWS AND ORDINANCES OF NEW NETHERLAND, 1638–1674, at 234–35 (1868) (1656 New York law "forbid[ing] the admission of any Indians with a gun . . . into any Houses" "to prevent such dangers of isolated murders and assassinations").

Inspired by England's Statute of Northampton, some American laws forbade carrying arms in an aggressive and terrifying manner. A 1736 Virginia legal manual allowed for confiscation of arms, providing that a constable "may take away Arms from such who ride, or go, offensively armed, in Terror of the People" and may bring the person and their arms before a Justice of the Peace. George Webb, THE OFFICE OF AUTHORITY OF A JUSTICE OF PEACE 92–93 (1736).

Additionally, determining that "it is dangerous at this time to permit Papists to be armed," Virginia in 1756 authorized the seizure from those unwilling to take an oath of allegiance of "any arms, weapons, gunpowder or ammunition." 7 William Waller Hening, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 35–37 (1820). An exception was made, however, for "such necessary weapons as shall be allowed to him, by order of the justices of the peace at their court, for the defence of his house or person." *Id.* at 36.

Approaching the Revolutionary War, disaffected colonists became a greater concern as dangerous persons who should be disarmed—due to their likelihood of partaking in or supporting insurrections.

Connecticut punished disaffected colonists in 1775. While persons who actively assisted the British were imprisoned and forfeited their entire estate, persons who libeled or defamed acts of Congress were disfranchised and prohibited from keeping arms, holding office, or serving in the military. 4 THE AMERICAN HISTORICAL REVIEW 282 (1899). "Early in the ensuing year (January 2, 1776) Congress again recommended 'the most speedy and effectual measures to frustrate the mischievous machinations and restrain the wicked practices of these

men;' that 'they ought to be disarmed, the dangerous kept in safe custody, or bound with sureties for good behavior.'" *Id.* at 283. The Connecticut Courant on May 20, 1776, complained of "[a] gang of Tories," and exclaimed that "[i]f these internal enemies are suffered to proceed in their hellish schemes, our ruin is certain." *Id.* Soon after, such Tories were "convicted of high treason, and sentenced to death," rather than merely disarmed or imprisoned. *Id.* at 284.

In 1776, in response to General Arthur Lee's plea for emergency military measures, the Continental Congress recommended that colonies disarm persons "who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies." 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 285 (1906).

Massachusetts acted within months "to cause all persons to be disarmed within their respective colonies who are notoriously disaffected to the cause of America, or who have not associated, and refuse to associate, to defend by arms these United Colonies against the hostile attempts of the British fleets and armies; and to apply the arms taken from such persons, in each respective colony, in the first place, to the

arming of the continental troops raised in said colony." 1776 Ma. Laws 479, ch. 21. Pennsylvania enacted a similar law in April 1776. 8 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 559–60 (1902).

In 1777, New Jersey empowered its Council of Safety "to deprive and take from such Persons as they shall judge disaffected and dangerous to the present Government, all the Arms, Accoutrements, and Ammunition which they own or possess." 1777 N.J. Laws 90, ch. 40 § 20.

That same year, North Carolina went further, essentially stripping "all Persons failing or refusing to take the Oath of Allegiance" of any citizenship rights. Those "permitted . . . to remain in the State" could "not keep Guns or other Arms within his or their house." 24 THE STATE RECORDS OF NORTH CAROLINA 89 (1905). In May 1777, Virginia did the same. 9 William Waller Hening, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 282 (1821).

In 1779, Pennsylvania, declaring that "it is very improper and dangerous that persons disaffected to the liberty and independence of this state shall possess or have in their own keeping, or elsewhere, any firearms," "empowered [militia officers] to disarm any person or persons

who shall not have taken any oath or affirmation of allegiance to this or any other state." THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 193 (1782).

Like the English, and out of similar concerns of violent insurrections, the colonists disarmed those who might rebel against them. "American legislators had determined that permitting these persons to keep and bear arms posed a potential danger." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012).

C. Influential proposals at ratifying conventions called for disarming dangerous persons while protecting the right of all peaceable persons.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634–35. *Heller* thus concluded with "our adoption of the original understanding of the Second Amendment." *Id.* at 625. The ratifying conventions are therefore instructive in interpreting the right that was ultimately codified.

Samuel Adams opposed ratification without a declaration of rights. Adams proposed at Massachusetts's convention an amendment

guaranteeing that "the said constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms." 2 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675 (1971). Adams's proposal was celebrated by his supporters as ultimately becoming the Second Amendment. *See Editorial*, BOSTON INDEPENDENT CHRONICLE, Aug. 20, 1789, at 2, col. 2 (calling for the paper to republish Adams's proposed amendments alongside Madison's proposed Bill of Rights, "in order that they may be compared together," to show that "every one of [Adams's] intended alterations but one [i.e., proscription of standing armies]" were adopted, "[i]n justice therefore for that long tried Republican."); Stephen Halbrook, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 86 (revised ed. 2013) ("[T]he Second Amendment . . . originated in part from Samuel Adams's proposal . . . that Congress could not disarm any peaceable citizens.").

"Peaceable" did not necessarily mean law-abiding. A contemporary dictionary defined "peaceable" as "Free from war, free from tumult; quiet, undisturbed; not quarrelsome, not turbulent." Thomas Sheridan, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789). Noah

Webster defined "peaceable" as "Not violent, bloody or unnatural." AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster, 1828).[4] Notably, the *Heller* Court relied on both Sheridan's and Webster's definitions in defining the Second Amendment's text. For Sheridan, *see Heller*, 554 U.S. at 584 (defining "bear"). For Webster, s*ee id.* at 581 ("arms"), 582 ("keep"), 584 ("bear"), 595 ("militia"). *See also* BLACK'S LAW DICTIONARY 1130 (6th ed. 1990) (defining "peaceable" as "Free from the character of force, violence, or trespass.").

New Hampshire proposed a bill of rights that allowed the disarmament of only violent insurgents: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 1 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed. 1836).

After Pennsylvania's ratifying convention, the Anti-Federalist minority—which opposed ratification without a declaration of rights—proposed the following right to bear arms:

> That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game, and no law shall be passed for disarming the

[4] http://webstersdictionary1828.com/Dictionary/peaceable.

> people or any of them, unless for crimes committed, or real danger of public injury from individuals.

Nathaniel Breading et al., *The Address and reasons of dissent of the minority of the convention, of the state of Pennsylvania, to their constituents*, LIBR. OF CONGRESS (Dec. 12, 1787).[5] While the language did not expressly limit "crimes committed" to violent crimes, every arms prohibition to that point had been based—justified or not—on perceived dangerousness. And the non-criminal basis—"real danger of public injury"—was also based on violence. There is no indication that the anti-federalists hoped to expand arms prohibitions for the first time beyond dangerousness.

"[T]he 'debates from the Pennsylvania, Massachusetts and New Hampshire ratifying conventions, which were considered 'highly influential' by the Supreme Court in *Heller* ... confirm that the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses.'" *Binderup*, 836 F.3d at 368 (Hardiman, J., concurring in part and concurring in the judgments) (quoting *Barton*, 633 F.3d at 174) (brackets omitted). "Hence, the best evidence we have

[5] https://www.loc.gov/resource/bdsdcc.c0401/?sp=1.

indicates that the right to keep and bear arms was understood to exclude those who presented a danger to the public." *Id.*

D. Prohibited persons could have their arms rights restored in the founding era.

Persons who would have been prohibited from keeping arms in the founding era were often punished by death. And "[w]e may presume that persons confined in gaols awaiting trial on criminal charges were also debarred from the possession of arms." Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983).

There were some examples, however, of prohibited persons having their right to keep and bear arms restored. Connecticut's 1775 law disarmed "inimical" persons only "until such time as he could prove his friendliness to the liberal cause." 4 THE AMERICAN HISTORICAL REVIEW 282 (1899). Massachusetts's 1776 law disarming disaffected persons provided that "persons who may have been heretofore disarmed by any of the committees of correspondence, inspection or safety" may "receive their arms again . . . by the order of such committee or the general court." 1776 Ma. Laws 484. Once the perceived danger abated, the arms disability was lifted.

Another instructive example came from Shays's Rebellion, "a series of violent attacks on courthouses and other government properties in Massachusetts, beginning in 1786, which led to a full-blown military confrontation in 1787." *Shays' Rebellion*, HISTORY.COM, Aug. 21, 2018.[6] After the rebellion ceased in June 1787, Massachusetts established "the disqualifications to which persons shall be subjected, who have been, or may be guilty of treason, or giving aid or support to the present rebellion, and to whom a pardon may be extended." 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS FROM 1780–1805, at 145 (1805). Among these disqualifications were the temporary forfeiture of many civil rights, including a 3-year prohibition on bearing arms. *Id.* at 146–47.

By comparison to the treasonous rebels who took up arms to overthrow the government and had their arms rights restored after three years, Ms. Folajtar never committed nor threatened violence against anyone.

[6] https://www.history.com/topics/early-us/shays-rebellion.

E. Nineteenth-century bans applied to slaves and freedmen, while lesser restrictions focused on disaffected and dangerous persons.

The *Heller* Court looked to nineteenth-century experiences only for help "understanding [] the origins and continuing significance of the Amendment." 554 U.S. at 614.

Nineteenth-century prohibitions on arms possession were scarce, aside from discriminatory bans on slaves[7] and freedmen.[8] But two Kansas restrictions are relevant. In 1868, Kansas prohibited from bearing—but not keeping—"any pistol, bowie-knife, dirk, or other deadly weapon," "[a]ny person who is not engaged in any legitimate business, any person under the influence of intoxicating drink, and any person who has ever borne arms against the government of the United States." 2 GENERAL STATUTES OF THE STATE OF KANSAS 353 (1897).

Fifteen years later, Kansas prohibited the transfer of "any pistol, revolver or toy pistol, by which cartridges or caps may be exploded, or any dirk, bowie-knife, brass knuckles, slung shot, or other dangerous

[7] *See e.g.*, 1804 Miss. Laws 90; 1804 Ind. Acts 108; 1806 Md. Laws 44.
[8] *See e.g.*, 1851 Ky. Acts 296; 1860–61 N.C. Sess. Laws 68; 1863 Del. Laws 332.

weapons . . . to any person of notoriously unsound mind." 1883 Kan. Sess. Laws 159 § 1.

The Kansas Supreme Court held that "other deadly weapons" did not include long guns. *Parman v. Lemmon*, 244 P. 232 (Kan. 1926).[9] Thus, Kansas's laws did not prohibit anyone from keeping any arms, nor did they apply to long guns, making the laws far less burdensome than 18 U.S.C. § 922(g)(1).

F. Most early twentieth-century bans applied to non-citizens, who were blamed for rising crime and social unrest.

Since the *Heller* Court found limited historical value in nineteenth-century sources, it is particularly dubious to rely on twentieth-century sources. 554 U.S. at 614 ("Since those [post-Civil War] discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources."). Nevertheless, it is telling that disarmament practices continued to focus on potentially violent persons in the twentieth

[9] After initially holding that shotguns (and therefore all firearms) were included based on the rule of ejusdem generis, *Parman v. Lemmon*, 244 P. 227 (Kan. 1925), the court reversed itself on rehearing, *Parman*, 244 P. 232.

century. And it is especially telling that no previous law was as burdensome as 18 U.S.C. § 922(g)(1).

In the early twentieth century, as immigration increased and immigrants were blamed for surges in crime and social unrest, several states enacted firearms restrictions on non-citizens. Johnson, et al., at 501.

Some states prohibited non-citizens from possessing arms under the guise of preserving game.[10] Pennsylvania, for the stated purpose of giving "additional protection to wild birds and animals and game," made it "unlawful for any unnaturalized foreign born resident, within this commonwealth, to either own or be possessed of a shotgun or rifle of any make." 1909 Pa. Laws 466 § 1. North Dakota and New Jersey enacted similar laws, 1915 N.D. Laws 225–26, ch. 161 § 67; 1915 N.J. Laws 662–

[10] England had similarly used game laws to disarm segments of the population. *See* 1 Tucker's Blackstone, at App. 300 ("In England, the people have been disarmed, generally, under the specious pretext of preserving the game"); Rawle, at 121–23 ("An arbitrary code for the preservation of game in that country has long disgraced them."). *But see* 2 William Blackstone, COMMENTARIES 412 n.2 (Edward Christian ed., 12th ed. 1793–95) ("everyone is at liberty to keep or carry a gun, if he does not use it for the destruction of game.").

63, ch. 355 § 1, followed by New Mexico. 1921 N.M. Laws 201–02, ch. 113 § 1.

Connecticut—without the pretense of protecting game—forbade any "alien resident of the United States" to "own or be possessed of any shot gun or rifle." 1923 Conn. Acts 3732, ch. 259 § 17. Notably, all these laws still allowed handgun ownership.

Other states went further and prohibited ownership of all firearms. Utah forbade "any unnaturalized foreign born person . . . to own or have in his possession, or under his control, a shot gun, rifle, pistol, or any fire arm of any make." 1917 Utah Laws 278. Minnesota passed a similar law that same year, 1917 Minn. Laws 839–40, ch. 500 § 1, followed by Colorado, 1919 Colo. Sess. Laws 416–417 § 1, and Michigan, 1921 Mich. Pub. Acts 21 § 1. In 1925, both Wyoming and West Virginia prohibited anyone who was not a United States citizen from owning any firearm. 1925 Wyo. Sess. Laws 110, ch. 106 § 1; 1925 W.Va. Acts 31, ch. 3 § 7.

G. Early twentieth-century prohibitions on Americans applied to only violent criminals—the few laws that applied to non-violent criminals did not restrict long gun ownership.

In establishing a concealed carry permitting system in 1919, Illinois provided that "[c]onviction of a licensee for a felony shall operate as a

revocation of any such license." 1919 IL Laws 431 § 4. The law elaborated: "Whoever, after having been convicted of murder, manslaughter, burglary, rape, mayhem, assault with a deadly weapon, or assault with intent to commit a felony, shall violate section 4 of this Act . . . " *Id.* § 7.

New York had made it especially difficult for "any alien" to acquire a concealed carry license, and also made "[t]he conviction of a licensee of a felony in any part of the state [] operate as a revocation of the license." 1917 N.Y. Laws 1645, ch. 580 § 1. Neither the Illinois nor New York law prohibited any alien or felon from possessing any firearm.

New Hampshire passed a law in 1923 providing that, "No unnaturalized foreign-born person and no person who has been convicted of a felony against the person or property of another shall own or have in his possession or under his control a pistol or revolver . . . " 1923 N.H. Laws 138, ch. 118 § 3. North Dakota and California passed similar laws that same year, 1923 N.D. Laws 380, ch. 266 § 5; 1923 Ca. Laws 696, ch. 339 § 2, as did Nevada in 1925. 1925 Nev. Laws 54, ch. 47 § 2. California amended its law in 1931 to include persons "addicted to the use of any narcotic drug." 1931 Ca. Laws 2316, ch. 1098 § 2. Then in 1933, Oregon

passed a version of the law that also prohibited machine guns, 1933 Or. Laws 488. Notably, none of these laws applied to rifles or shotguns.

Pennsylvania's 1931 law applied to handguns and *some* long guns. It provided that, "No person who has been convicted in this Commonwealth or elsewhere of a crime of violence shall own a firearm, or have one in his possession or under his control." 1931 Pa. Laws 498, ch. 158 § 4. It defined "firearm" as "any pistol or revolver with a barrel less than twelve inches, any shotgun with a barrel less than twenty-four inches, or any rifle with a barrel less than fifteen inches." 1931 Pa. Laws 497, ch. 158 § 1. "Crime of violence" was defined as "murder, rape, mayhem, aggravated assault and battery, assault with intent to kill, robbery, burglary, breaking and entering with intent to commit a felony, and kidnapping." 1931 Pa. Laws 497, ch. 158 § 1.

The only law that applied to citizens and prohibited the keeping of all firearms was from Rhode Island in 1927. Importantly, it applied to only violent criminals. The law provided that, "No person who has been convicted in this state or elsewhere of a crime of violence shall purchase own, carry or have in his possession or under his control any firearm." 1927 R.I. Pub. Laws 256 § 3. "Crime of violence" was defined as "any of

the following crimes or any attempt to commit any of the same, viz.: murder, manslaughter, rape, mayhem, assault or battery involving grave bodily injury, robbery, burglary, and breaking and entering." 1927 R.I. Pub. Laws 256 § 1.

18 U.S.C. § 922(g)(1) itself was originally intended to keep firearms out of the hands of violent persons. "Indeed, the current federal felony firearm ban differs considerably from the version of the proscription in force just half a century ago. Enacted in its earliest incarnation as the Federal Firearms Act of 1938, the law initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses." *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) (citing Federal Firearms Act, ch. 850, §§ 1(6), 2(f), 52 Stat. 1250, 1250–51 (1938)). "The law was expanded to encompass all individuals convicted of a felony (and to omit misdemeanants from its scope) several decades later, in 1961." *Id.* (citing An Act to Strengthen the Federal Firearms Act, Pub.L. No. 87–342, § 2, 75 Stat. 757, 757 (1961)).

H. The historical tradition of disarming dangerous persons provides no justification for disarming Ms. Folajtar.

The *Heller* Court promised a "historical justification" for bans on felons. 554 U.S. at 635. Indeed, there may be such a justification for violent felons. Violent and potentially violent persons have historically been banned from keeping arms in several contexts—specifically, persons guilty of committing violent crimes, persons expected to take up arms against the government, persons with violent tendencies, distrusted groups of people, and those of presently unsound mind. While many of these bans have been unjust and discriminatory, the purpose was always the same: to disarm those who posed a danger. There is no historical justification whatever for completely and forever depriving a peaceable citizen like Ms. Folajtar of her right to keep and bear arms. Put differently, Ms. Folajtar's conviction does not represent a "serious" crime that has historically disqualified one from exercising her Second Amendment rights. *Binderup*, 836 F.3d at 349 ("The view that anyone who commits a serious crime loses the right to keep and bear arms dates back to our founding era.").

IV. In Part Two of the test, the government bears the burden of justifying the law.

Heller makes clear that in examining the text of the Second Amendment in light of the history, tradition, and original public meaning, if the regulation prohibits conduct that falls within the core protection of the right, it is categorically unconstitutional. Thus, the requirement that firearms be kept inoperable "makes it impossible for citizens to use them for the core lawful purpose of self-defense and *is hence unconstitutional*." *Heller*, 554 U.S. at 630 (parentheticals omitted) (emphasis added). And a "complete prohibition" of "the most popular weapon chosen by Americans for self-defense in the home . . . *is invalid*." *Id.* at 629 (emphasis added). Here, it is self-evident that forbidding a person with Second Amendment rights to exercise any Second Amendment rights prohibits conduct at the core of the right.

At a minimum, "if the challenger succeeds at step one, the burden shifts to the Government to demonstrate that the regulation satisfies some form of heightened scrutiny." *Binderup*, 836 F.3d at 347. "[W]hether we apply intermediate scrutiny or strict scrutiny . . . the Government bears the burden of proof on the appropriateness of the means it employs to further its interest." *Id.* at 353.

This is a tall order. The *Heller* Court declared that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to 'keep' and use for protection of one's home and family, would fail constitutional muster." 554 U.S. at 628–29 (quotations omitted). Presumably, banning from the home of a protected person *all* firearms would fail constitutional muster as well.

V. The government failed to carry its burden by failing to provide evidence.

"Here the Government falls well short of satisfying its burden—even under intermediate scrutiny. The record before us . . . contains no evidence explaining why banning people like [Ms. Folajtar (i.e., non-violent felons convicted of filing a false tax return)] from possessing firearms promotes public safety." *Binderup*, 836 F.3d at 353–54. "The Government . . . must 'present some meaningful evidence, not mere assertions, to justify its predictive and here conclusory judgments.'" *Id.* at 354 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1259 (D.C. Cir. 2011) ("*Heller III*")) (brackets omitted).

Even under intermediate scrutiny, "the [government] must prove not merely that its regulation will advance its interest, but also that it will

do so 'to a material degree.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). "This burden is not satisfied by mere speculation or conjecture." *Edenfield*, 507 U.S. at 770– 71. While "courts must accord substantial deference to the predictive judgments" of legislatures, this "does not mean, however, that they are insulated from meaningful judicial review altogether." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665–66 (1994) ("*Turner I*"). Thus, the government cannot "get away with shoddy data or reasoning." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002). Rather, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them." *Edenfield*, 507 U.S. at 770–71. The demonstration must be based on "substantial evidence." *Turner I*, 512 U.S. at 666; *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 195 (1997) ("*Turner II*").

Turner II deferred to the government's "[e]xtensive testimony," "volumes of documentary evidence and studies," and "extensive anecdotal evidence." 520 U.S. at 198, 199, 202. In contrast, the government here provided no data, no statistics, no studies, nor any other empirical evidence. The failure to adequately support the ban closely resembles *44*

Liquormart, where the government failed to justify a ban on price advertising for alcoholic beverages "without any findings of fact." 517 U.S. at 505. Similarly, *Edenfield* struck down a ban on in-person solicitation by CPAs because the government "presents no studies" nor "any anecdotal evidence." 507 U.S. at 771.

Consistent with Supreme Court precedent, this Court in *Binderup* determined that "off-point" and "obviously distinguishable studies" were insufficient. 836 F.3d at 354. "The problem . . . is that because the Government's evidence sweeps so broadly, it does not establish that the restriction serves an important interest even as applied to people *like* the Challengers, let alone to the Challengers themselves." *Id.* at 355.

Here, the problem is more severe. The Government offered no evidence whatever. None involving Ms. Folajtar herself, nor even any involving people *like* her. Courts have consistently struck down laws in Second Amendment challenges where the government failed to provide any evidence. *See Ezell v. City of Chicago*, 651 F.3d 684, 709 (7th Cir. 2011) ("*Ezell I*") (striking a citywide firing-range ban because "the City produced no empirical evidence whatsoever and rested its entire defense of the range ban on speculation about accidents and theft."); *Ezell v. City*

of Chicago, 846 F.3d 888, 895, 897–98 (7th Cir. 2017) ("*Ezell II*") (striking zoning restrictions on firing-ranges, and a range ban on minors, while repeatedly emphasizing the City's lack of evidence); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 n.73 (2d Cir. 2015) (striking a ban on a pump-action rifle because the State's evidence focused on semi-automatic weapons); *People v. Chairez*, 2018 IL 121417, ¶ 54 (striking restrictions on public carriage because "the State provides no evidentiary support for its claims.").

Nearly a half-century after the government started implementing lifetime prohibitions on non-violent felons, it still fails here to offer any empirical evidence. When "evidence is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense." *Alameda Books*, 535 U.S. at 459 (Souter, J., dissenting).

By failing to provide evidence specific to Ms. Folajtar, or even people like Ms. Folajtar, the government failed to carry its burden under the standard established by this Court and the Supreme Court.

CONCLUSION

The decision below should be reversed, and the ban should be held unconstitutional as applied to Ms. Folajtar.

Respectfully submitted,

/s/ *Joseph G.S. Greenlee*
Joseph G.S. Greenlee
Counsel of Record
Firearms Policy Coalition
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 378-5785
jgr@fpchq.org

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Dated this 27th day of June 2019.

/s/ *Joseph G.S. Greenlee*
Joseph G.S. Greenlee
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Third Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 27th day of June 2019.

/s/ *Joseph G.S. Greenlee*
Joseph G.S. Greenlee
Counsel for Amici Curiae