No. 19-1687

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LISA FOLAJTAR

Appellant,

v.

WILLIAM P. BARR, *et al.*

Appellees.

Second Amendment *As-Applied* Challenge
on Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 5:18-cv-02717

Brief of the Appellant

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STATEMENT OF JURISDICTION

The district court had jurisdiction over Appellant's challenge under 28 U.S.C. § 1331. The district court entered final judgment on February 22, 2019. [1] Appellant timely appealed on March 27, 2019. [2] This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Federal law prohibits individuals convicted of a crime punishable by imprisonment for a term exceeding one year from purchasing and possessing firearms and ammunition, even where no element of violence, physical harm or use of a firearm is involved. [3] In fact, in this matter, the underlying putatively prohibiting criminal conviction involves a mere false statement in a tax return. The issue presented is whether the district court erred in granting the Appellee's motion to dismiss, in light of the fact that Ms. Folajtar's sole-criminal conviction is for making a false statement on a tax return almost ten years ago and where, with the exception of extremely egregious offenses for which the death penalty applies, the

[1] App. Vol. I at 3.
[2] *Id.* at 1.
[3] *See* 18 U.S.C. § 922(g)(1).

right to keep and bear arms is the *only* constitutional right that the Government putatively strips in perpetuity. [4]

STATEMENT OF RELATED CASES

Pursuant to L.A.R. 28.1(a)(2), the Appellant advises this Court of two pending proceedings that are similar in nature to the instant matter. *Timothy King v. Attorney General United States, et al.,* No. 18-2571 and *Raymond Holloway, Jr. v. Attorney General United States, et al.,* No. 18-3595, which are currently before this Court. This current matter has not been before this Court before.

STATEMENT OF THE CASE

On March 18, 2011, information was filed in the United States District Court for the Eastern District of Pennsylvania as to Appellant Lisa Folajtar. Ms. Folajtar subsequently pled guilty to making a false statement in her tax return, where on October 19, 2011, she was sentenced to three years of probation and a fine of $10,000.00 and a mandatory special assessment of $100.00. [5] Ms. Folajtar successfully completed her probation without any probation violations.

[4] *See* Doc. 3.
[5] App. Vol. II at Pgs. 19-25.

At no point was Ms. Folajtar informed that her 2011 conviction would strip her of her right to Keep and Bear Arms in perpetuity, pursuant to 18 U.S.C. § 922(g)(1). [6] Furthermore, the court documents, including the Guilty Plea, are noticeably devoid of any reference to the Second Amendment, firearms or rights that Ms. Folajtar would perpetually lose in pleading guilty to the offense. [7] Moreover, the terms of probation, which was entered five months after her guilty plea, only suggests that she would be prohibited from possessing a firearm and ammunition during the term of probation. [8] Other than this single offense, Ms. Folajtar has never been convicted of a crime that would otherwise prohibit her from possessing firearms and ammunition. [9]

In or about 2018, being concerned for her and her family's safety and desiring to be able to protect herself and her family in their home, as well as, being interested in obtaining a Federal Firearms License for Archery Addictions, LTD., Ms. Folajtar first learned that she was prohibited from purchasing and possessing firearms and ammunition, pursuant to Appellees' interpretation and enforcement of

[6] *Id*. at 8, ¶ 21.
[7] *Id*. at 9, ¶ 22.
[8] *Id*. at 19-25.
[9] *Id*. at 7-8, ¶¶ 18-19.

18 U.S.C. § 922(g)(1). [10] As a result, Ms. Folajtar brought an action before the district court. [11]

The Government filed a motion to dismiss on August 27, 2018. [12] After both parties briefed the issue, Judge Joseph F. Leeson, Jr. of the United States District Court for the Eastern District of Pennsylvania granted the Government's motion [13] and issued a brief opinion, without providing Ms. Folajtar an opportunity to file an amended complaint. [14] Ms. Folajtar filed a timely notice of appeal. [15]

SUMMARY OF ARGUMENT

Plaintiff Lisa Folajtar's *as-applied* challenge to the constitutionality of 18 U.S.C. § 922(g)(1), which, *inter alia*, prohibits individuals convicted of a crime punishable by more than one year imprisonment from purchasing or possessing firearms and ammunition, was dismissed *with prejudice,* upon the Defendants' motion to dismiss. Ms. Folajtar is subject to the prohibition enumerated in § 922(g)(1) as the result of a single conviction for making false statements on a tax

[10] *Id*. at 9, ¶ 24.
[11] *Id*. at 1-25.
[12] *See* Doc. 3.
[13] App. Vol. I at 3.
[14] *Id*. at 4-16.
[15] *Id*. at 1.

return, almost ten years ago, which is also the only offense for which she has ever been convicted.

Judge Joseph F. Leeson, Jr. of the United States District Court for the Eastern District of Pennsylvania dismissed Ms. Folajtar's action, finding that § 922(g)(1), *as-applied* to Ms. Folajtar, was constitutional and granted the Government's motion to dismiss with *prejudice*, without giving Appellant the opportunity to amend her complaint. Judge Leeson incorrectly 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 Ms. Folajtar, it was constitutional to deny her, in perpetuity, the right to keep and bear arms, as the result of a single conviction for making false statements on a tax return.

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). This Court, in *Binderup*, stated that it might even be possible for those convicted of a felony to do such.

The Government was unable to present any meaningful evidence, under the *Binderup* analysis, that would prevent Ms. Folajtar from prevailing. By contrast, Ms. Folajtar presented evidence that she 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 reverse Judge Leeson's order and opinion.

STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss for failure to state a claim under Fed.R.C.P. 12(b)(6) *de novo*. [16] This Court is "required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the nonmovant." [17] This Court has held "district courts must offer amendment – irrespective of whether it is requested – when dismissing a case for failure to state a claim unless doing so would be inequitable or futile." [18]

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[16] *U.S. v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame, Unknown Caliber Serial Number: LW001804; Watson Family Gun Trust, Claimant (D.C. No. 15-cv-02202). Ryan S. Watson, Individually and as Trustee of the Watson Family Gun Trust*, 822 F.3d 136, 140 (3d Cir. 2016) (citing *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n.1 (3d Cir. 2014); *Ballentine v. United States*, 486 F.3d 806, 808 (3d Cir. 2007).).

[17] *Foglia*, 754 F.3d at 154 n. 1 (citations omitted).

[18] *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 251 (3d Cir. 2007). *See also*, *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 519 (7th Cir. 2015) ("…a plaintiff whose original complaint has been dismissed under Rule 12(b)(6) should be given at least one opportunity to try to amend her complaint before the entire action is dismissed. We have said this repeatedly."). (internal citations omitted).

ARGUMENT

I. *Plaintiff's Complaint States a Claim that Allows it to Survive a Motion to Dismiss*

a. *As-Applied* Second Amendment Challenge Criteria

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 [19] previously articulated in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010). [20] 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." [21] If the challenger does not meet this burden, the claim should be dismissed. [22] However, if the law burdens protected conduct, then the court must "evaluate the law under some form of means-end-scrutiny". [23] In this instance, this Court has stated intermediate scrutiny is the appropriate level to apply to such a challenge. [24]

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[19] While Appellant acknowledges the Third Circuit's precedent, she respectfully calls into question this two-pronged approach, based on the Supreme Court's decisions in *Heller* and *McDonald*, as discussed *infra. See also* App. Vol. II at 63, n. 49.
[20] *Binderup,* 836 F.3d at 339.
[21] *Id.* at 346 (citing *Marzzarella,* 614 F.3d at 89).
[22] *Id. at 346.*
[23] *Id.* at 346 (citing *Marzzarella,* 614 F.3d at 89).
[24] *Marzzarella,* 614 F.3d at 97.

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." [25] This Court also found that the traditional justification of § 922(g)(1) was the disarmament of individuals likely to commit *violent* offenses. [26] Moreover, these crimes of violence were "commonly understood to include only those offenses 'ordinarily committed with the aid of firearms.'" [27]

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.'" [28] 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." [29]

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[25] *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011).
[26] *Barton,* 633 F.3d at 173.
[27] *Id.* at 173 (citing Why Can't Martha Stewart Have a Gun?, 32 Harv. J.L. & Pub. Pol'y 695, 702 (2009)).
[28] *Binderup,* 836 F.3d at 361 (citing *Barton,* 633 F.3d at 175).
[29] *Id*. at 362 (citing *Barton,* 633 F.3d 173).

i. 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. [30]

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 acknowledged by the Supreme Court, "English common-law felonies [31] [only] consisted of murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem, and burglary." [32] Noticeably absent from these longstanding prohibitions is any mention of false statements in a tax return and there exists a certain irony that the Government contends that a false statement in a tax return is of the ilk to strip an individual of the right to keep and

[30] *Heller*, 554 U.S. at 626.
[31] "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)
[32] *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943) citing Wayne R. LaFave, Criminal Law, § 2.1(b) (5th ed. 2010).

bear arms, when our Founding Fathers took up arms against our English overlords, after refusing to pay the taxes imposed upon them by the King.

In 1938, for the first time, Congress codified a prohibition against certain felons that barred them from acquiring additional firearms and ammunition. [33] 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. [34] Moreover, the law defined a crime of violence to mean:

> 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. [35]

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[33] 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* App. Vol. II at 72 ("(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.

[34] App. Vol. II at 71-73.

[35] *Id.* at 71.

Notably absent from the list of those who were prohibited from acquiring additional firearms and ammunition were individuals convicted of non-violent offenses, including those who made false statements in the filing of a tax return. [36] 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. [37] Thus, approximately 170 years passed from the time the Bill of Rights became effective until the time where individuals who were not violent felons were barred from possessing firearms and ammunition. [38] 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 categorically barred from possessing firearms were those who committed violent offenses. [39]

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[36] Tax returns were not even a requirement until 1913 with the introduction of the Form 1040. *See* https://www.loc.gov/rr/business/hottopic/irs_history.html. Moreover, 26 U.S.C. § 7206, the provision under which Ms. Folajtar pled guilty, was not adopted until 1954. *See* 68A Stat. 852.

[37] *See* Pub. L. No. 87-342, 75 Stat. 757 (1961).

[38] Actual time was 169 years, 9 months and 18 days.

[39] *Binderup,* 836 F.3d at 348. *See also*, Brief of *Amici Curiae* Firearms Policy Coalition, *et al*. at Part III.; 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*).*

ii. Making a False Statement in a Tax Return 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.'" [40] "People who have committed or are likely to commit 'violent offenses'—crimes 'in which violence (actual or attempted) is an element of the offense,' undoubtedly qualify as 'unvirtuous citizens' who lack Second Amendment rights." [41] While the Government previously set forth a number of arguments that the Appellant's

[40] *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.").

[41] *Id*. (Internal citation omitted).

making of a false statement in a tax return is a "serious crime", it offered nothing to show that the making of a false statement in a tax return qualifies as a "violent offense" nor could it, since the act of making a false statement does not include any physical act of violence. In fact, the Appellant has never been convicted of a violent offense. Perhaps more importantly, the Government finds itself in the untenable position of having previously acknowledged that such individuals should not be perpetually barred and are not a risk to society in possession and use of firearms and ammunition, in its grants of relief to numerous individuals and entities that made false statements to it, including in tax returns, as discussed *infra*.

b. Ms. Folajtar's Claim is within the Analytical Framework

This Court declared in *Binderup* 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." [42] The answer in this matter is an unequivocal "yes". As such, first a determination needs to be made as to whether Ms. Folajtar can distinguish herself from the class of individuals historically barred from the possession of firearms and ammunition. The answer, again, is an unequivocal "yes".

[42] *Id*. at 362.

i. Challenged Law Imposes a Burden on Conduct Falling Within 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/she appears to be a member. Appellees contend that Ms. Folajtar is currently prohibited under 18 U.S.C. § 922(g)(1) due to her conviction of a "crime punishable by imprisonment for a term exceeding one year." [43] While Ms. Folajtar pled guilty to an offense under 26 U.S.C. § 7206(1) – which is admittedly graded as a felony [44] – Plaintiffs Binderup and Suarez were convicted of state law misdemeanor crimes that were punishable by upwards of five years of imprisonment, thus meeting the definition of a "felony" and whose crimes were far more heinous than Ms. Folajtar's. [45]

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. [46, 47] "[T]he

[43] *See Binderup,* 836 F.3d at 347.
[44] Worthy of mention is that Section 7206 original prescribed a pecuniary penalty of $5,000 when enacted in 1954. It was not until the law was amended in 1982 that the penalty was increased.
[45] Binderup was charged and convicted for a violation of 18 Pa.C.S. § 6301 – Corruption of Minors and Suarez was charged and convicted for a violation of Md. Code Ann. art 27, § 36B(b) (now codified at Md. Code Ann. Crim. Law § 4-203) – Wearing, carrying, or transporting handgun.
[46] 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.

right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens'." [48] "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." [49] As such, clearly the traditional justifications for preventing the class of individuals of which Ms. Folajtar appears to be a member is that they are "unvirtuous citizens".

1. Ms. Folajtar can Distinguish her Circumstances from the Historically Barred Class

To show that Ms. Folajtar is not part of the historically barred class, she must show that the crime for which she was convicted was not "serious". [50] *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)

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[47] As addressed *supra* and by *Amici* Firearms Policy Coalition, *et al*., 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, *Four Exceptions in Search of A Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. at 1374, 1376.

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

[49] *Binderup,* 836 F.3d at 348.

[50] *Id*. at 349.

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. [51]

Ms. Folajtar's offense was graded as a felony. However, it being graded as a felony does not automatically foreclose the possibility of a successful challenge. [52] Moreover, the offense for which Ms. Folajtar was convicted of has no element of violence and when compared to the offenses of Binderup and Suarez, is hardly in the same league, as it is hard to fathom that one could mount a successful challenge to convictions for corruption of a minor and carrying a firearm without a license, but be precluded from bringing a successful challenge to the making a false statement in a tax return.

Turning to the third element of the analysis proclaimed in *Binderup*, Ms. Folajtar was only sentenced to three years of probation and a fine of $10,000.00 and a mandatory special assessment of $100.00. While the offense was punishable by up to three years imprisonment, it is telling that the Judge did not believe it was

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

[52] *See Binderup,* 836 F.3d at 353 n. 6. ("We are not confronted with whether an as-applied Second Amendment challenge can succeed where the purportedly disqualifying offense is considered a felony by the authority that created the crime. On the one hand, it is possible to read *Heller* to leave open the possibility, however remote, of a successful as-applied challenge by someone convicted of such an offense. At the same time, even if that were so, the individual's burden would be extraordinarily high—and perhaps even insurmountable. In any event, given that neither Challenger fits that description, we need not decide the question.)

worthy of any jail time. [53] More importantly, Ms. Folajtar respectfully points out that the maximum penalty for her offense is two years less than an offense graded as a misdemeanor of the first degree in Pennsylvania for which this Court in *Binderup* found was not a serious offense in relation to Mr. Binderup's conviction for corruption of a minor. [54] Corruption of a minor is a far more egregious offense than Ms. Folajtar's making of a false statement in the filing of a tax return. Thus, prior to reviewing the fourth element, Ms. Folajtar would have at least two, of the three, elements weighing in her favor.

The fourth element, cross-jurisdictional consensus, which the Appellees failed to address and the district court refused to analyze, needs to be explored in a little more detail. In *Binderup*, the plaintiffs were challenging the application of 18 U.S.C. § 922(g)(1) to them based on a state law conviction. The Government argued, in seeming direct defiance of the *Binderup* holding, that "the [district] [c]ourt need not perform a cross-jurisdictional nexus to reject Folajtar's challenge because her underlying conviction is a federal felony." [55] However, Ms. Folajtar believes otherwise, especially in light of the binding precedent from this Court.

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[53] Similarly, the challengers in *Binderup* did not receive any jail time. *See Binderup*, 836 F.3d at 352. ("*Binderup was sentenced to three years' probation*… while Suarez received a suspended sentence of 180 days' imprisonment."). (emphasis added).

[54] *See*, 18 Pa.C.S. § 106(b)(6) (specifying that a misdemeanor of the first degree can be punished by up to five years in jail); *Binderup*, 836 F.3d at 340.

[55] App. Vol. II at 35.

Almost all 50 states have a law, which covers an offense similar to the one that prohibits Ms. Folajtar from the possession of a firearm. However, a conviction or guilty plea in 19 of states, [56] that have such a law, would not have resulted in a loss of the right to keep and bear arms. [57] Simply put, had Ms. Folajtar been convicted under the laws of states like Alabama, Florida, or Maine, she would not be before the Court today, as she would not be prohibited. [58] To limit the analysis to merely an enactment of Congress, without looking to see how the states treat the offense, would unduly limit a Plaintiff's ability to restore his/her right to keep and bear arms and would contravene this Court's precedent. [59]

In *Binderup*, the 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

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[56] An offense in Georgia and Vermont *could* be a felony, depending on whether the underlying offense meets certain criteria. *See* App. Vol. II at 75-76. However, in this matter, the harsher penalties in Georgia or Vermont are not applicable to Ms. Folajtar, had she committed the offense in either of those states.

[57] By way of example, 72 P.S. § 7353 makes it a misdemeanor crime for anyone "who willfully attempts in any manner to evade or defeat any tax imposed by this article or the payment thereof," and punishes them by "a fine not exceeding twenty-five thousand dollars ($25,000) or to undergo imprisonment not exceeding two years, or both." Had Ms. Folajtar been charged and convicted or pled guilty in Pennsylvania, she would still be able to exercise her constitutional right to keep and bear arms, as neither 18 U.S.C. § 922(g) – as defined by 18 U.S.C. § 921(a)(20) – nor 18 Pa.C.S. § 6105 would prohibit her.

[58] App. Vol. II at 75-76.

[59] It should be noted that Judge Leeson did not even address whether there is a consensus among states in relation to the crime. *See Folajtar v. Barr*, 369 F.Supp.3d 617, 624 at n.10 (E.D. Pa. 2019).

serious crime. [60] Likewise, the 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. [61]

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

2. No Further Analysis is Supported by Heller or McDonald

As stated *supra,* Ms. Folajtar respectfully calls into question the 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 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 v.*

[60] *Binderup,* 836 F.3d at 352.
[61] *Id*.

City of Chicago, Ill., 561 U.S. 742, 790-91 (2010) (noting that the *Heller* Court "specifically rejected" "an interest-balancing test"). Ms. Folajtar believes that if she 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 Appellant would argue that strict scrutiny, rather than intermediate scrutiny, is the proper test to apply, since Appellant is denied her 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*.

3. *The Government's Argument that False Statements are a Serious Offense That Should Bar an Individual From Exercising the Right to Keep and Bear Arms is at Odds with Grants of Federal Firearms Relief*

Prior to 1993, ATF regularly conducted federal firearms relief determinations as provided for by 18 U.S.C. § 925(c). Pursuant to 27 C.F.R. § 478.144, in order to grant relief, ATF was required to determine 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." However, ATF no longer conducts these determinations for individuals 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)." [62] That same appropriation rider, however, still allows ATF to conduct firearm relief determinations for corporations and other fictitious entities, as discussed *infra*. Nevertheless, before Congress prohibited ATF from conducting federal firearm relief determinations for individuals, ATF granted relief to 7,722 individuals from 1968 to 1992 for a multitude of different crimes, [63] some of which were similar to

[62] 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.

[63] *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.

or far more egregious [64] than Ms. Folajtars's – in fact, some had more than six separate federal prohibitions [65] – and even included a grant of relief [66] to Lieutenant Colonel Oliver North in relation to his convictions for aiding and

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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 (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).

[64] By way of example, ATF granted relief to (1) John Kraszewski on February 20, 1992 (57 F.R. 6160-02), from a 1984 Pennsylvania conviction, which included one count of homicide by vehicle; (2) Kim Blake on August 11, 1989 (54 Fed. Reg. 33108-02), from a 1981 conviction for homicide by vehicle and DUI; (3) John Deichert on August 11, 1989 (54 Fed. Reg. 33108-02) from a conviction for criminal attempt rape/indecent assault (He was also convicted of and granted relief to a burglary offense stemming from the same incident); (4) Charles Spangler, granted relief on June 10, 1991 (56 Fed. Reg. 26713-02), Roy Brown, granted relief on August 11, 1989 (54 Fed. Reg. 33108-02), and Russell Heckman, granted relief on May 31, 1973 (38 Fed. Reg. 14299-01), all of whom were convicted of statutory rape.

And then there is the relief granted on March 8, 1974 (39 Fed. Reg. 9212) to Mr. Earl Matthews having, 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* App. Vol. II at 81-199.

[65] *See* App. Vol. II at 78-79. *See also* 36 Fed. Reg. 22321 (Morrow, Clyde Franklin), 37 Fed. Reg. 18636 (Cook, Judson Vernon. Jr.), 46 Fed. Reg. 46456 (Crawford, Cleo J., Metz, Ira G.), 48 Fed. Reg. 28385 (Blackburn, Vaughn), 49 Fed. Reg. 25060 (Karl, Earl Jerome), 49 Fed. Reg. 29503 (Adams, Richard Gerald), and 55 Fed. Reg. 14549 (Search, Herman Samuel).

[66] 55 Fed. Reg. 14549.

abetting an endeavor to obstruct Congress, destroying, altering, or removing official NSC documents, and accepting an illegal gratuity. [67]

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, the Appellant sought and continues to seek records from a sampling of courts to identify the types of crimes individuals have previously been convicted of and were subsequently granted relief in relation to, after ATF determined, pursuant to 27 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." [68] 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 Appellant to identify all the other individuals who were convicted of 26 U.S.C. §

[67] His convictions would later be overturned. *See*, *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990).

[68] 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.

7206 (the offense Ms. Folajtar was convicted of) and subsequently granted relief from the information contained in the Federal Register. At the present, Appellant has obtained approximately 1/100th of the court records relating to the grants of relief, many of which are identified *supra* and *infra*.

While the Government contends that a false statement on a tax return is so egregious that an individual cannot exercise their right to keep and bear arms, it finds itself in the untenable position of having granted federal firearms relief to individuals and corporations which have been convicted of offenses that are the same, arguably the same, or far more heinous than that of Ms. Folajtar.

a. Sylvester and Dorthy Skrinjorich, *et al.* – Specific Tax Offenses

Sylvester and Dorthy Skrinjorich were granted federal firearms relief on December 19, 1991 from a 1981 violation of 26 U.S.C. § 7206(1) (Willfully and knowingly making and subscribing a W.S. Individual Income Tax Return to the IRS which they did not believe to be true and correct as to every material matter.). [69]

The Skrinjorichs were convicted of the *exact* offense at issue in this matter, yet the Government takes the untenable position that Ms. Folajtar's offense was a serious one having granted relief for two individuals who were convicted of the

[69] 56 FR 65926.

same. Moreover, Sylvester was sentenced to 90 days' imprisonment prior to being released on probation and a fine of $2,500. [70] Dorothy received the same sentence. Unlike Ms. Folajtar, both individuals actually were imprisoned in a correctional facility.

Arnold Knutson was granted federal firearms relief on August 11, 1989 from, *inter alia*, a 1982 violation of 26 U.S.C. § 7206(1) (Willfully and knowingly making and subscribing a W.S. Individual Income Tax Return to the IRS which they did not believe to be true and correct as to every material matter), which is also identical to Ms. Folajtar's conviction. [71]

On August 1, 1991, James Reese was likewise granted relief for making false statements on his tax return and income tax evasion and Edward Francis Sullivan and Patrick Sidney Sullivan were granted relief for income tax evasion. [72] Shortly thereafter, Jasper Irvin Dennison was also granted relief for income tax evasion on February 20, 1992. [73]

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[70] App. Vol. II at 226-227. The Court may consider on a 12(b)(6) motion any "matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record." *Buck v. Hampton Twp. Sch. Dist*., 452 F.3d 256, 260 (3d Cir. 2006).
[71] 54 Fed. Reg. 33108-02. *See* App. Vol. II at 228-231.
[72] 56 Fed. Reg. 36865-01; U.S. District Court for the Eastern District of Virginia, Case Number 1:89-CR-52; U.S. District Court for the District of Minnesota, Case Number 4:85-CR-33.
[73] 57 Fed. Reg. 6160-02; U.S. District Court for the Middle District of Florida, Case Number 3:81-CR-18.

18 U.S.C. § 925(c) required ATF to find that all these individuals 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."

These are just a few examples of individuals who were convicted of the *exact* or substantially similar offense at issue in this matter and granted relief by the Government; yet, it takes the untenable position that Ms. Folajtar should be prohibited in perpetuity from being able to purchase, possess and utilize firearms and ammunition, for an identical offense it previously granted numerous people relief from and where it has failed to "present [any] meaningful evidence, not mere assertions, to justify its predictive [and here conclusory] judgments." [74] Identical to the situation this Court confronted in Binderup, "neither the evidence in the record nor common sense supports those assertions." [75] Moreover, as discussed *supra* and *infra*, this Court has stated that the intended purpose of § 922(g)(1) is to "promot[e] public safety by 'preventing armed mayhem'" [76] and the Government has failed to establish that Ms. Folajtar's poses any threat to public safety in possession and use of a firearm and ammunition.

[74] *Binderup,* 836 F.3d at 354 (quoting *Heller, 554 U.S.* at 1259).
[75] *Id.*
[76] *Id.* at 353. (quoting *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010)).

b. Raymond Wetsell

Raymond Wetsell was granted federal firearms relief on November 26, 1991 from, *inter alia*, a 1986 violation of 29 U.S.C. § 439(c) (Destroying books & records of labor organization.) and 29 U.S.C. § 501(c) (Embezzlement of funds of labor organization). [77]

While not the exact offense at issue in this matter, § 439(c) makes it a crime to "willfully make[] a false entry in or willfully conceal[], withhold[], or destroys[] any books, records, reports, or statements" required to be kept. Thus, it is substantially similar to the offense of Ms. Folajtar.

c. Robert McCurdy and Aaron Blossom

Robert McCurdy was granted federal firearms relief on February 3, 1992 from, *inter alia*, a 1985 violation of 18 U.S.C. § 472 (Knowingly passing & uttering counterfeited obligation of the United States). [78] Similarly, Aaron Blossom was granted federal firearm relief on August 1, 1991 from a 1987 violation of 18 U.S.C. § 471 (Manufacturing counterfeit currency). [79]

[77] 56 Fed. Reg. 65926-03. *See* App. Vol. II at 232-233.
[78] 57 Fed. Reg. 6160-02; U.S. District Court for the Western District of Pennsylvania, Case Number 85-CR-238. *See* App. Vol. II at 234-235.
[79] 56 Fed. Reg. 36865-01; U.S. District Court for the Eastern District of Michigan, Case Number CR-86-20046.

As with Mr. Wetsell's offense, Mr. McCurdy and Mr. Blossom were not convicted of the exact crime at issue in this matter, but it is substantially similar.

d. Northrop Grumman Systems Corporation and Xisico USA, Inc.

Northrop Grumman Systems Corporation ("Northrop Grumman") was granted federal firearms relief on September 19, 2012 from a 1986 violation of, among other things, 18 U.S.C. §§ 287, 1001, 1341 (False, fictitious, or fraudulent claims; Statements or entries generally; and Frauds and swindles) and a 1994 violation of 18 U.S.C. §§ 371, 1343 (Conspiracy to commit offense or to defraud United States; and Fraud by wire, radio, or television). [80] Northrop Grumman, *again*, received federal firearms relief on December 12, 2014 from a 1987 conviction of 18 U.S.C. § 1001 (Statements or entries generally), and a 1988 conviction of 18 U.S.C. § 371 (Conspiracy to commit offense or to defraud United States). [81]

Xisico USA, Inc. ("Xisico") was granted federal firearms relief on February 3, 2019 from a 2011 violation of, *inter alia*, 18 U.S.C. § 541 (Entry of Goods Falsely Claimed). [82]

[80] 77 Fed. Reg. 58150-01.
[81] 79 F.R. 73906-01. *See also* App. Vol. II. at 201-205.
[82] *See* 84 F.R. 1491-02.

While Appellant acknowledges that a corporation is not a natural person, for the purposes of the GCA, they are the same. [83] In these instances, we have a known defense contractor and another corporation, both of which defrauded the United States Government and were granted relief by ATF, with a finding that the grants of relief were not considered contrary to the public safety or interest.

ii. 18 U.S.C. § 922(g)(1) As Applied to Ms. Folajtar Cannot Survive Strict Scrutiny

Step two of the *Binderup* analysis requires the Government to show that the restriction meets "some form of heightened scrutiny." [84] 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." [85]

The Appellees 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

[83] *See* 18 U.S.C. § 921 defining the term "person" to mean "any individual, *corporation*, company, association, firm, partnership, society, or joint stock company." (emphasis added).
[84] *Binderup,* 836 F.3d at 347.
[85] *Marzzarella,* 614 F.3d at 99. (citing *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 465 (2007)).

"narrowly tailored to serve a compelling state interest" of preventing "armed mayhem."

This Court, in *Binderup*, concluded that the intended purpose of § 922(g)(1) is to "promot[e] public safety by 'preventing armed mayhem.'" [86] Applying the strict scrutiny analysis to the purpose of § 922(g)(1), the Government cannot show that preventing an individual convicted of making a false statement on a tax return wherein she was not sentenced to imprisonment nor prohibited from possessing firearms under state law to be narrowly tailored to prevent the compelling governmental interest of "preventing armed mayhem".

iii. 18 U.S.C. § 922(g)(1) As Applied to Ms. Folajtar Cannot Survive Intermediate Scrutiny

Should this Court reject the Appellant's argument that strict scrutiny applies, then it should follow the intermediate scrutiny analysis as declared in *Marzzarella*. [87] Intermediate scrutiny requires that the Government bear the burden of showing the appropriateness of its means to further its interest. [88]

The Government did not articulate a single example of why prohibiting an individual like Ms. Folajtar, whose offense was nonviolent, would be a reasonable

[86] *Binderup,* 836 F.3d at 353. (quoting *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010)).
[87] *Id.* at 353.
[88] *Id*.

means to further an interest in public safety. [89] The Government merely recited quotes from various non-binding cases in an attempt to bolster its indefensible position.

Appellees point to *King v. Sessions*, No. 17-884, 2018 WL 3008527 (E.D. Pa. Jun. 15, 2018) to further support its argument. [90] As argued to the district court, a case decided by a district court is not binding in the same judicial district, let alone the same judge in future cases. [91] Further, *King* is currently under review by this Court, rendering Judge Schmehl's opinion and findings wholly irrelevant, as they are not final.

However, even if this Court were to consider *King* applicable, there is an important distinction between the offense – making a false statement on a tax return – Ms. Folajtar pled guilty to and those far more heinous offenses for which the plaintiff in *King* pled guilty to. Notably, the plaintiff in *King* in 1982 pled guilty to 6 offenses under Pennsylvania's Uniform Firearms Act, which could have – individually – been punished by up to 5 years in jail as misdemeanors of the first

[89] *See*, *Amici* Brief at Part V, which Appellant incorporates herein by reference.
[90] King has appealed his case to this Court. *See King v.* Sessions, 18-2571 (3d. Cir.).
[91] "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." 18 J. Moore et al., Moore's Federal Practice § 134.02[1] [d], p. 134–26 (3d ed.2011); *Camreta v. Greene*, 563 U.S. 692, 709, fn.7 (2011).

degree, with a consecutive sentence range of up to 30 years. [92] As a result, each offense disqualified him under 18 U.S.C. § 922(g)(1), as defined by 18 U.S.C. § 921(a)(20). Thereafter, in 1992, after being found in possession of firearms as a prohibited person, he pled guilty to violations of 18 U.S.C. §§ 922(a)(6) and 922(g)(1), both individually punishable by up to 10 years in prison and a fine of up to $250,000.00. As a result, Mr. King has 7 different prohibiting convictions under federal law. This is a far cry from Ms. Folajtar's false statement on a tax return and a far more severe punishment than that of which Ms. Folajtar faced.

The Government also contended that *Hamilton v. Pallozzi*, 848 F.3d 614, 629 (4th Cir. 2017) is instructive on Ms. Folajtar's ability to bring a challenge in this Court. This argument is foreclosed by this Court's ruling in *Binderup*, which stated that a plaintiff convicted of a felony *may* bring a successful Second Amendment *as-applied* challenge, thus leaving the door open for a non-violent felon to challenge his/her prohibition.[93, 94]

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[92] *See* Mr. King's docket available at https://ujsportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=MC-51-CR-0609771-1982&dnh=TQCfKqlBGNYfQol7zskZ4A%3d%3d.

[93] *Binderup*, 836 F.3d at 353, fn.6.

[94] As discussed *supra* both Binderup and Suarez's offenses were punishable by significantly more imprisonment than what Ms. Folajtar could have been sentenced to; yet, this Court determined that they were able to mount a successful *as-applied* challenge. It is important to view the label of Ms. Folajtar's offense – a "felony" – as nothing more than a title, consistent with that of common law. However, from a standpoint of seriousness as compared to two misdemeanants who were granted relief, it is not in the same realm.

Moreover, to the extent that the Government believes an individual, who pled guilty to making a false statement on a tax return, is foreclosed from exercising their Second Amendment rights, it is wrong. "There are no fixed criteria for determining whether crimes are serious enough to destroy Second Amendment rights." [95] Simply put, the Government does not just get to assert a crime is "serious" based on its punishment. As discussed *supra*, Ms. Folajtar's offense pales in comparison to that of which Binderup was convicted.

Regardless, *Binderup* is instructive on the matter and binding precedent. Much like in *Binderup*, the Government has failed to produce credible evidence why banning people like Ms. Folajtar from possessing firearms promotes public safety. [96] Further, the Appellees failed to produce any cognizable data to support their position.

The Government has attempted to cast a broad net of general assertions about individuals convicted of other "serious offenses" in an attempt to have this Court reject Ms. Folajtar's claim that as-applied to her, the § 922(g)(1) prohibition is unconstitutional. "But it must 'present some meaningful evidence, not mere assertions, to justify its predictive [and here conclusory] judgments.'" [97] The Government has failed to do so.

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[95] *Binderup*, 836 F.3d at 351.
[96] *Id.* at 353-54.
[97] *Id.* at 354 (quoting *Heller, 554 U.S.* at 1259).

This Court has stated that the intended purpose of § 922(g)(1) is to "promot[e] public safety by 'preventing armed mayhem.'" [98] Applying the intermediate scrutiny analysis to the purpose of § 922(g)(1), the Government cannot show that preventing an individual convicted of making a false statement on a tax return wherein she was not sentenced to imprisonment nor prohibited from possessing firearms under state law to fit reasonably within the interest of "preventing armed mayhem". Perhaps even more importantly, "[r]ationally, there does not seem to be even a legitimate state interest in disarming someone like [Ms. Folajtar], apart from increasing her punishment; yet simple vindictiveness is hard to accept as sufficient ground for stripping someone of a constitutional right." C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y at 731.

c. 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

[98] *Id.* at 353. (quoting *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010)).

historically barred from possessing firearms. [99] One of those was the passage of time. [100]

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. [101]

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. [102] Thus Ms. Folajtar should be able to pass step one of the *Binderup* analysis based solely on the offense for which she was convicted. As discussed *supra*, the Government cannot meet the burden under strict or intermediate scrutiny to deny Ms. Folajtar of her right to keep and bear arms in perpetuity.

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

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[99] *Binderup,* 836 F.3d at 366. (Hardiman, J. concurring in part and concurring in judgments) citing *Barton*, 633 F.3d at 174.
[100] *Id*.
[101] *Id*. at n. 12.
[102] *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. [103]

d. The District Court Erred in Granting the Appellees' Motion to Dismiss

> [W]hen presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts. [104]

i. Appellant's Well-Pleaded Facts

In the complaint, Appellant pleaded that she 1) is a United States citizen; 2) is over the age of 21; 3) is not under indictment; 4) has never been convicted of a felony or misdemeanor crime of domestic violence; 5) has only *once* been convicted of a crime punishable by more than one (1) year; 6) is not a fugitive

[103] *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.
[104] *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009).

from justice; 7) is not an unlawful user of, or addicted to, any controlled substance; 8) has not been adjudicated a mental defective or been committed to a mental institution; 9) has not been discharged from the Armed Forces under dishonorable conditions; 10) has never renounced her citizenship; and, 11) is not the subject of a restraining order relating to an intimate partner. [105]

Further, the complaint alleges Ms. Folajtar's *sole* prohibiting offense is her guilty plea to 26 U.S.C. § 7206(1), which can be punished up to 3 years in jail. [106] Exhibit A to the complaint shows that Ms. Folajtar was sentenced to three years of probation, a fine of $10,000 and a mandatory special assessment of $100. [107]

ii. Facts Alleged Are Sufficient to Show Appellant Has a "Plausible Claim for Relief"

Under the *Binderup* analysis, the facts pled by Ms. Folajtar are sufficient to show that she has a "plausible claim for relief". As recounted *supra*, this Court stated

> We are not confronted with whether an as-applied Second Amendment challenge can succeed where the purportedly disqualifying offense is considered a felony by the authority that created the crime. On the one hand, it is possible to read *Heller* to leave open the possibility, however remote, of a successful as-applied challenge by someone convicted of such an offense. At the same time,

[105] App. Vol. II at 7-8, ¶18a-k.
[106] *Id*. at 8, ¶19.
[107] *Id*. at 8, ¶ 20 and 19-25.

> even if that were so, the individual's burden would be extraordinarily high—and perhaps even insurmountable. In any event, given that neither Challenger fits that description, we need not decide the question. [108]

Moreover, the Supreme Court in *Heller* stated "[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." [109] As noted *supra*, the Form 1040 was not even created until the 20th century.

The district court stated "the [*Binderup*] factors [] weigh in favor of treating Folajtar's federal conviction as a serious crime." [110] However, in order to survive a motion to dismiss, the plaintiff only needs to show there is a plausible claim for relief.

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[108] *Binderup,* 836 F.3d at 353 n. 6.

[109] *Heller*, 554 U.S. at 634-635. *See also 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.").

[110] *Folajtar*, 369 F.Supp.3d at 625.

26 U.S.C. § 7206(1) is punishable by up to three years imprisonment, a fine of $100,000 and the costs of prosecution. [111] Ms. Folajtar's actual punishment was probation, a fine one tenth of the possible amount she could have been responsible for and a special assessment of $100.

Additionally, there is nothing in the complaint to suggest that denying Ms. Folajtar her ability to exercise her Second Amendment rights would impede the Government's goal of "preventing armed mayhem." *See also*, *Amici* Brief at Part V.

In the alternative, in the event this Court is inclined to agree with the district court's decision but agrees that one may be able to articulate a plausible Second Amendment *as-applied* challenge to a violation of 26 U.S.C. § 7206(1), as Judge Leeson did not provide the Appellant with an opportunity to submit an amended complaint after granting the Appellee's motion to dismiss *with prejudice*, this Court should reverse and remand with directions that Appellant be afforded an opportunity to submit an amended complaint. [112]

[111] *See* 26 U.S.C. § 7206.
[112] *See* FN 18.

CONCLUSION

For the foregoing reasons, the district court's Order should be reversed and this matter remanded for further proceedings. In the alternative, Appellant requests this Court remand to the district court for an opportunity to amend her complaint.

Respectfully Submitted,

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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 9,867 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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CERTIFICATE OF SERVICE

I, Adam Kraut, Esq., of Civil Rights Defense Firm, P.C. hereby certify that I served a copy of the *BRIEF OF THE APPELLANT* and *APPENDIX VOLS. I AND II*, through the Court's ECF system, as follows:

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