No. 18-1478

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RICKEY I. KANTER

Plaintiff-Appellant

v

JEFFERSON B. SESSIONS, III, Attorney General of the United States, and BRAD D. SCHIMEL

Defendant-Appellees.

Appeal From The United States District Court
for the Eastern District of Wisconsin,
Case No. 2:16-CV-1121
The Honorable William C. Griesbach, Presiding

BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT

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INTERESTS OF THE *AMICUS CURIAE*[1]

This brief is respectfully submitted by the Cato Institute ("Cato") as *amicus curiae*, by counsel and pursuant to Federal Rule of Appellate Procedure 29(a). Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. It also participates in litigation as *amicus curiae* around the country.

This case concerns Cato because it addresses the scope of the Second Amendment, particularly as it applies to non-violent offenders who have had their fundamental right to bear arms denied by federal and/or state law. This is an area of increasing concern. "Beyond the thousands of criminal statutes enacted by legislatures, there are also thousands of regulations that carry criminal penalties," many of which are classified as felonies, vastly increasing the number of Americans subject to firearms disabilities under federal and state law. Timothy Lynch,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* represents that no party's counsel authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel, has contributed money to fund its preparation or submission.

"Overcriminalization," *Cato Handbook for Policymakers*, 197 (8th ed. 2017), https://bit.ly/2qsikoA.

Cato has taken an active role in Second Amendment cases, including in the two key Supreme Court decisions addressing the Second Amendment, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Cato regularly advocates in courts on the legal questions of the appropriate standard of review for firearm restrictions, whether on classes of firearms or classes of citizens. Just this Supreme Court term, Cato has briefed "the proper analysis to be applied to the now-established right to keep and bear arms," urging the Court to clarify and demand faithful application of rigorous scrutiny. *See* Brief of the Cato Institute as *Amicus Curiae*, *Silvester v. Becerra,* No. 17-342, 2017 WL 8180777, at *8 (Oct. 26, 2017).

Since the *Heller* decision, this Court has had occasion to grapple with many questions about the scope and function of the Second Amendment. This case raises a significant question that affects the constitutional rights of thousands of non-violent felons. Cato seeks to help the Seventh Circuit identify and apply appropriate scrutiny and avoid an overbroad approach that relieves the government of its burden to justify restrictions on individual rights.

SUMMARY OF ARGUMENT

This case asks whether a citizen convicted of any felony—regardless of the age, type or seriousness of the crime—can be completely barred for life from exercising his fundamental Second Amendment right to possess a firearm for self-defense. The federal and Wisconsin governments (collectively, "the government") contend that the Second Amendment does not protect citizens at all once they have been convicted of any felony. *See* Def. Mem. In Supp. of Mot. to Dismiss 8, ECF No. 24-1. It does not matter to the government that the nature and number of felonies has expanded dramatically in American criminal law. Nor does it matter how long ago an individual's conviction was, or what the crime was. The government does not distinguish convictions for terrorism, armed robbery, and falsification of fishing records.

Fundamental rights cannot be so summarily disregarded. Allowing the legislature to determine the scope of the Second Amendment simply by labeling certain crimes—no matter how minor—felonies is directly contrary to the existence of fundamental rights in the first place. This Court should clarify that the Second Amendment applies to citizens convicted of non-violent felonies—such as Appellant Rickey I. Kanter—and that the complete ban of an individual's core Second Amendment rights is unconstitutional as applied to that individual. And to the extent the Court applies the two-step approach adopted by the district court—which it need

not do—it should further clarify that courts must meaningfully review as-applied challenges by non-violent felons who seek to exercise their Second Amendment rights, requiring the government to provide actual evidence that a deprivation of an individual's right survives exacting scrutiny.

ARGUMENT

I. The Complete Bar on Mr. Kanter's Second Amendment Rights Is Necessarily Unconstitutional.

In its landmark *Heller* decision, the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms. *See District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). The government may not bar an individual's exercise of that fundamental right. Although the "right secured by the Second Amendment is not unlimited," the Supreme Court made clear that a complete ban of the "core" right protected by the Second Amendment is unconstitutional and cannot be subjected to means-end scrutiny. As the Court explained, "[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." *Id.* at 634 (emphasis in original).

Although the Seventh Circuit often applies a two-step framework for analyzing Second Amendment challenges, *see infra* § II, this Court has recognized,

consistent with *Heller*, that laws completely prohibiting the exercise of core Second Amendment rights are *per se* unconstitutional. As the Court has explained, "[b]oth *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional." *See Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (*Ezell I*) (citing *Heller*, 554 U.S. at 628–35; *McDonald v. City of Chicago*, 561 U.S. 742, 786–77 (2010)).[2] In other words, in considering whether a complete firearm ban is unconstitutional, there is only one question: does it implicate the core Second Amendment right?

Here, as applied to Mr. Kanter, § 922(g)(1) and the Wisconsin statute operate as a complete ban of Mr. Kanter's core Second Amendment rights. That is, there is

[2] Other circuit courts have agreed. *See Wrenn v. Dist. of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017) ("'[C]omplete prohibition[s]' of Second Amendment rights are always invalid." (citing *Heller*, 554 U.S. at 629)); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014) (citing *Heller*, 554 U.S. at 629) ("A law that imposes such a severe restriction on the core right of self-defense that it 'amounts to a destruction of the [Second Amendment] right,' is unconstitutional under any level of scrutiny."); *see also Heller*, 554 U.S. at 629 (citing *State v. Reid*, 1 Ala. 612, 616–617 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.")); *Binderup v. Att'y Gen.*, 836 F.3d 336, 364 (3d Cir. 2016) (en banc) (Hardiman, J., concurring) ("[A] law that burdens persons, arms, or conduct protected by the Second Amendment and that does so with the effect that the core of the right is eviscerated is unconstitutional" (footnote omitted)).

no dispute that Mr. Kanter is banned for life from possessing a firearm for the purpose of self-defense.[3] Therefore, the only question this Court must answer is whether Mr. Kanter—as a citizen who committed one, non-violent felony—falls within the Second Amendment's protection. As explained in § II, *infra*, he plainly does. The inquiry should end there; as *Heller* explained, no "interest balancing" is necessary or appropriate. *Heller*, 554 U.S. at 634. And it is no answer to simply say, as the government does, that all citizens with a felony conviction are outside of the Second Amendment's protection. This is the sort of "broadly prohibitory" approach that *Heller* said is impermissible. *See Ezell I*, 651 F.3d at 703 (citing *Heller*, 554 U.S. at 628–35). The Court should declare § 922(g)(1) and the Wisconsin statute unconstitutional as applied to Mr. Kanter.

Mr. Kanter's argument that the district court employed "circular" logic in holding that a firearms prohibition with respect to all non-violent felons survives intermediate scrutiny, *see* Br. of Pl.-App. at 24–25 (April 10, 2018), highlights the need to apply the *Heller* one-step approach to the complete ban on Mr. Kanter's Second Amendment rights in this case. As Mr. Kanter states, "By holding that a felony conviction is enough to defeat an as-applied challenge to the felon

[3] As explained in more detail *infra*, 18 U.S.C. § 925(c) contemplates an administrative restoration of rights process for felons seeking to possess a firearm. That process has not been funded by Congress since 1992, however, foreclosing it as an avenue for Mr. Kanter to regain his Second Amendment rights. *See United States v. Bean*, 537 U.S. 71, 75–76 (2002) (describing the appropriations bar).

disarmament law [as the district court did], it forecloses all as-applied challenges to the federal and Wisconsin felon disarmament laws in everything but name." Br. of Pl.-App. at 25. In other words, while purporting to apply a two-step legal analysis, the district court simply applied intermediate scrutiny to the core Second Amendment right and held that all felons can be banned from possessing a firearm for self-defense, effectively reading them out of the Second Amendment's protections. This is not only contrary to *Heller*'s and *Ezell I*'s analysis of complete bans of Second Amendment rights, it also ignores this Court's explicit recognition, consistent with *Heller*, of the viability of an as-applied challenge to § 922(g). *See infra* sect. II.A. For this reason alone, the district court should be reversed.

II. Even If the Court Applies a Two-Step Framework to Mr. Kanter's As-Applied Challenge, Mr. Kanter Should Still Prevail.

Although the Seventh Circuit has recognized that complete bans of core Second Amendment rights—like the one at issue here—are "categorically unconstitutional," *see Ezell I*, 651 F.3d at 703, it has sometimes analyzed laws that do not implicate such a ban under a two-step framework, whereby the Court first decides whether the challenged conduct falls within the scope of the Second Amendment's protection, and if it does, applies some level of judicial scrutiny to determine whether the law is nevertheless constitutional.[4] To the extent this Court

[4] This Court's application of a two-step analysis has not been consistent. *See Hatfield v. Sessions*, No. 3:16-cv-383, 2018 WL 1963876, at *3 (S.D. Ill. Apr. 26,

determines that Mr. Kanter's challenge does not implicate a complete ban on core Second Amendment rights, it should still reverse the district court because § 922(g)(1) and the Wisconsin statute are unconstitutional as applied to Mr. Kanter under this two-step framework.

A. As a Citizen with a Single, Non-Violent Felony, Mr. Kanter Falls Squarely within the Scope of the Second Amendment.

As the Seventh Circuit explained in *Ezell I*, "the threshold inquiry in some Second Amendment cases will be a 'scope' question: Is the restricted activity protected by the Second Amendment in the first place?" 651 F.3d at 701; *Baer v. Lynch*, 636 F. App'x 695, 698 (7th Cir. 2016) (stating that in applying the two-step analysis, a court must first determine "if the challenged restriction covers conduct falling within the scope of the Amendment's protection"); *Horsley v. Trame*, 808 F.3d 1126, 1130 (7th Cir. 2015) (same). The answer, according to this Court, "requires a textual and historical inquiry into original meaning." *Ezell I*, 651 F.3d at 701. That is, as *Heller* makes clear, courts must consider the intended scope of the Second Amendment at the time of the founding because the provision codified a "*pre-existing* right." *Heller*, 554 U.S. at 592; *see also Ezell I*, 651 F.3d at 701.

2018) (describing certain cases). Some cases skip step one and go straight to step two. *See, e.g.*, *Baer*, 636 F. App'x at 698; *Horsley*, 808 F.3d at 1131; *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). Only one case has analyzed both steps. *See Ezell I*, 651 F.3d at 700–10.

This Court has analogized the Second Amendment scope analysis to the Supreme Court's First Amendment jurisprudence. "The Court has long recognized that certain well-defined and narrowly limited classes of speech—e.g., obscenity, defamation, fraud, incitement—are categorically outside the reach of the First Amendment." *Ezell I*, 651 F.3d at 702 (internal quotations omitted). That is, "some categories of speech are unprotected as a matter of history and legal tradition." *Id.* Similarly, in *Heller*, the Supreme Court recognized that some "activity fall[s] outside the terms of the [Second Amendment] right as publicly understood when the Bill of Rights was ratified," such that regulation of that activity receives no Second Amendment protection. *See id.* (citing *Heller*, 554 U.S. at 625–28)

Importantly, it is *the government's burden* to demonstrate that the regulated activity—or in this case, the regulated individual—falls outside the scope of the Second Amendment. *See Ezell I*, 651 F.3d at 702–03. This Court has never held that *violent* felons, let alone *non-violent* felons like Mr. Kanter, are unprotected by the Second Amendment. On multiple occasions, the Court has specifically refrained from "deciding the question of whether those convicted of *violent crimes* were outside the scope of the Second Amendment's protection at the founding." *United States v. Williams*, 616 F.3d 685, 691 (7th Cir. 2010) (emphasis added); *see Baer*, 636 F. App'x at 698 (explaining that the Seventh Circuit has "not decided if felons historically were outside the scope of the Second Amendment's protection and

instead [has] focused on whether § 922(g)(1) survives intermediate scrutiny"); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).

As Mr. Kanter argues, the Seventh Circuit has repeatedly said that the historical record about whether citizens who have committed felonies fall within the scope of the Second Amendment is "inconclusive." This alone is enough to demonstrate that the government has failed to meet its burden to show that Mr. Kanter, a citizen with one non-violent felony conviction, lacks Second Amendment protection. Br. of Pl.-App at 16-17 (quoting *Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017) (*Ezell II*)). In fact, as the Seventh Circuit has indicated, *Heller* contemplated that felons *do* fall within the Amendment's scope. "*Heller* referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." *Williams*, 616 F.3d at 692; *see Baer*, 636 F. App'x at 697 ("We have left open the possibility that a felon might be able to rebut that presumption by showing that a ban on possession is overbroad as applied to him." (citing *Williams*, 616 F.3d at 693)).

It is also important to note that even if "felons" did not fall within the Second Amendment's scope at the time of the founding, the historical record is conclusive that non-violent criminals like Mr. Kanter did fall within its scope. *Cf. Binderup*, 836 F.3d at 357 (Hardiman, J., concurring) ("The most cogent principle that can be

drawn from traditional limitations on the right to keep and bear arms is that *dangerous* persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment." (emphasis added)). Although much has been made of the statement in *Heller* that "nothing in our opinion should be taken to cast doubt on longstanding prohibition[] on the possession of firearms by felons," *Heller*, 554 U.S. at 626, Mr. Kanter—who committed a non-violent, fraud-based crime—would not have been considered a "felon" at the time of the Second Amendment's ratification.

To the contrary, at common law, felonies were violent crimes. When felonies were not defined by statute, the word "felony" "[was] used to designate such serious offenses as were formerly punishable by death, or by forfeiture of the lands or goods of the offender." *Bannon v. United States*, 156 U.S. 464, 468 (1895) (citing *Ex parte Wilson*, 114 U.S. 417, 423 (1885)). At common law, only "murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny were felonies." *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943) (citing Wharton, Criminal Law (12th ed.) § 26; *Bannon*, 156 U.S. at 467); Wayne R. LaFave, Subst. Crim. Law § 2.1(c) (3d ed. 2017).

All other crimes were misdemeanors. *See United States v. Watson*, 423 U.S. 411, 440–41 (1976) (Marshall, J., dissenting) ("Only the most serious crimes were

felonies at common law, and many crimes now classified as felonies under federal or state law were treated as misdemeanors."). One commentator has explained:

> At common law an assault was a misdemeanor and it was still only such even if made with the intent to rob, murder, or rape. Affrays, abortion, barratry, bribing voters, challenging to fight, compounding felonies, cheating by false weights or measures, escaping from lawful arrest, eavesdropping, forgery, false imprisonment, forcible and violent entry, forestalling, kidnapping, libel, mayhem, maliciously killing valuable animals, obstructing justice, public nuisance, perjury, riots and routs, etc. were misdemeanors . . . .

Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 572-573 (1924); *see also Watson*, 423 U.S. at 439–41 (Marshall, J., dissenting). The closest historical analogs to Mr. Kanter's offense of wire fraud were not even considered crimes at the time of the founding. "[E]mbezzlement, obtaining money under false pretenses, bigamy, etc., were not crimes at all until made so by statute." Wilgus, *Arrest Without Warrant*, 22 Mich. L. Rev. at 573.

But even if Mr. Kanter's offense would have been considered a misdemeanor at common law, "most of the characteristics of criminal proceedings did not attach to misdemeanours." *United States v. Chovan*, 735 F.3d 1127, 1144–45 (9th Cir. 2013) (quoting Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* 456 (1956)). That is, "there was a fundamental difference between felons and misdemeanants." *Chovan*, 735 F.3d at 1144; *see Baldwin v. New York*, 399 U.S. 66, 70 (1970) (explaining "that a felony conviction is more serious than a misdemeanor conviction"). Therefore, disqualification of non-violent

criminals like Mr. Kanter—*i.e.*, common law misdemeanants—entirely from the protection of the Second Amendment does not "make[] sense from a[] historical perspective." *Chovan*, 735 F.3d at 1145; *cf*. *Binderup*, 836 F.3d at 353 (finding that certain modern misdemeanor crimes were not serious offenses, outside of the Second Amendment's protections). As the Southern District of Illinois recently concluded, "if the Founders intended to allow Congress to disarm unvirtuous citizens, that intent would have necessarily been limited to individuals convicted of one of th[e] nine [common law] felonies." *Hatfield*, 2018 WL 1963876, at *5. Because Mr. Kanter did not commit any of these common law felonies—or any violent crime at all—he plainly falls within the Second Amendment's scope.[5]

B. As Applied to Mr. Kanter, § 922(g)(1) and the Wisconsin Statute Do Not Pass the Requisite Judicial Scrutiny.

Under the Seventh Circuit's two-step analysis (to the extent it applies), because Mr. Kanter falls within the Second Amendment's scope (step one), the Court must next (step two) consider whether the laws' application to Mr. Kanter satisfies some level of means-ends scrutiny. That is, the Court must "evaluate the regulatory means the government has chosen and the public-benefits end it seeks to

[5] Notably, Appellees did not present any historical evidence in the lower court indicating that non-violent, one-time felons like Mr. Kanter fall outside the Second Amendment's protection. They argued only that the Second Amendment does not protect felons at all. *See* Def. Mem. In Supp. of Mot. to Dismiss 8, ECF No. 24-1; Br. in Supp. of Wis. Mot. for J. on the Pleadings 11, ECF No. 26. This omission alone dooms Appellees' argument that Mr. Kanter lacks Second Amendment rights.

achieve." *Ezell I*, 651 F.3d at 703. Again, it is *the government's burden* to satisfy the level of scrutiny applied by the Court. *Id.* at 702–03.

Because Mr. Kanter is a one-time, non-violent felon, and § 922(g)(1) and the Wisconsin statute operate as a complete ban of his Second Amendment rights, the Court should subject this as-applied challenge to strict scrutiny or, at a minimum, heightened intermediate scrutiny. The government fails to meet its burden under either level of scrutiny. Nothing about the circumstances of Mr. Kanter's offense or his personal profile suggests that he is more likely than a non-felon to commit gun violence. Section 922(g)(1) and the Wisconsin statute are thus unconstitutional as applied to Mr. Kanter.

1. This Court Should Apply Strict Scrutiny to Mr. Kanter's As-Applied Challenge.

The Supreme Court and this Court have made clear that heightened scrutiny—*i.e.*, some level of scrutiny greater than rational-basis review—is appropriate for laws regulating conduct or individuals that fall within the scope of the Second Amendment. *See Heller*, 554 U.S. at 628 n.27; *Skoien*, 614 F.3d at 641 ("If rational basis were enough, the Second Amendment would not do anything—because a rational basis is essential for legislation in general."). The exact level "depend[s] on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Ezell I*, 651 F.3d at 703 (citations omitted); *see also Baer*, 636 F. App'x at 698 (finding that the level of review "depend[s] on

whether the conduct in question falls at the core or at the periphery of the Amendment's protection"); *Horsley,* 808 F.3d at 31. "[L]aws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified." *Ezell I*, 651 F.3d at 708; *see also Ezell II*, 846 F.3d at 892.

Although the Seventh Circuit has never specifically addressed where a complete firearm ban for non-violent felons like Mr. Kanter falls on the Second Amendment spectrum, two Seventh Circuit cases provide guidance with respect to the level of scrutiny to which Mr. Kanter is entitled. *First*, in *Williams*, the Court applied *standard intermediate scrutiny* to the ban on *violent* felony offenders. *See Williams*, 616 F.3d at 692 ("In *Skoien* we declined to adopt a level of scrutiny applicable to every disarmament challenge, although we hinted that it might look like what some courts have called intermediate scrutiny."). There, the plaintiff—who brought an as-applied challenge to § 922(g)(1)—was convicted of felony robbery, which involved "beating the victim so badly that the victim required sixty-five stitches." *Id.* at 693. Notwithstanding the vicious crime at issue there, the Seventh Circuit still found him entitled to significantly heightened scrutiny: the Court considered whether the prohibition was substantially related to an important government objective (which the Court defined as keeping firearms out of the hands of those most likely to misuse firearms). *See id.*

Second, in *Ezell I*, this Court applied *heightened intermediate scrutiny* to regulations banning shooting ranges—which infringed on citizens' Second Amendment rights to engage in range training and target practice—because that claim came "much closer to implicating the core of the Second Amendment right." *Ezell I*, 651 F.3d at 708. Specifically, although the range ban was not a complete ban of Second Amendment rights, it constituted "a severe burden on the core Second Amendment right of armed self-defense," and thus the government was required to provide "an extremely strong public-interest justification and a close fit between the government's means and its end." *Id.*; *see Ezell II*, 846 F.3d at 899; *Hatfield*, 2018 WL 1963876 at *6.

In light of *Williams* and *Ezell I*, this Court should apply strict scrutiny to Mr. Kanter's as-applied challenge. As an initial matter, because this Court has already applied standard intermediate scrutiny to violent felons,[6] it necessarily follows that Mr. Kanter, a non-violent felon, is entitled to heightened scrutiny. Put differently, Mr. Kanter is nothing like Mr. Williams. Having no history of violent crime (or any violence, for that matter), Mr. Kanter—who wishes to possess a firearm in his home for self-defense—is at or near the core Second Amendment right. *See Heller*, 554 U.S. at 628 ("[T]he inherent right of self-defense has been central to the Second

[6] Notably, the Seventh Circuit has also applied standard intermediate scrutiny to habitual drug users. There is no evidence in the record that Mr. Kanter has any history of drug use. *United States v. Yancey*, 621 F.3d 681, 683–84 (7th Cir. 2010).

Amendment right."); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 205 (5th Cir. 2012) ("A law that burdens the core of the Second Amendment guarantee—for example, the right of law-abiding, responsible citizens to use arms in defense of hearth and home—would trigger strict scrutiny, while a less severe law would be proportionately easier to justify." (internal quotation marks and citations omitted)); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) ("As we observe that any law regulating the content of speech is subject to strict scrutiny, we assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny." (internal citation omitted)). As noted, a non-violent, one-time fraud offender like Mr. Kanter would not have been deprived of his Second Amendment rights under common law—the Court's scrutiny should reflect that historical understanding.

Moreover, the burden on Mr. Kanter's Second Amendment rights is absolute. For Mr. Kanter, § 922(g)(1) and the Wisconsin statute operate as a complete lifetime firearm ban, making the law even more onerous than the shooting range ban that received heightened intermediate scrutiny in *Ezell I*. In other words, the plaintiffs in *Ezell* could obtain a firearm for defense in the home, but Mr. Kanter is prohibited from ever doing so. This complete stripping of the Second Amendment rights of an

individual for which there is no evidence of a propensity of gun violence should be subject to the highest level of scrutiny.

2. Section 922(g)(1) and the Wisconsin Statute Plainly Fail Strict Scrutiny as Applied to Mr. Kanter.

Under the well-known strict scrutiny standard, the government has the burden of demonstrating that the challenged law is "narrowly tailored to serve a compelling governmental interest." *Ezell I*, 651 F.3d at 707 (citations omitted). The Seventh Circuit has stated in the context of intermediate scrutiny review that felon-in-possession laws advance an important government interest in "preventing armed mayhem," *Skoien*, 614 F.3d at 642, and Mr. Kanter has conceded the point, *see* Br. of Pl.-App. at 20–22. Even if that correctly describes the government's interest,[7] and that interest were deemed compelling, the government utterly fails here to demonstrate that restricting Mr. Kanter—a one-time fraud offender with no history of violence—in any way is related to that interest. That is, Section 922(g)(1) and the Wisconsin statute are not narrowly tailored because they lump all felons together, regardless of their propensity for gun violence.

[7] As Mr. Kanter points out, the Seventh Circuit has also described the government's interest as "keep[ing] firearms out of the hands of violent felons," *Williams*, 616 F.3d at 693, and "keep[ing] guns out of the hands of presumptively risky people," *Yancey*, 621 F.3d at 683. But both of these interests support the broader point that the government is trying to "suppress[] armed violence." *Id.* at 684. That is, the government is not trying to disarm such individuals for the sake of disarming them. It is trying to prevent gun violence, and that is the interest that must be furthered by § 922(g) and the Wisconsin statute.

a. *In Evaluating Mr. Kanter's As-Applied Challenge, the District Court Should Have Considered Mr. Kanter's Circumstances.*

Before addressing the absence of narrow tailoring here, it is important to point out, as Mr. Kanter does, *see* Br. of Pl.-App. at 23, that the district court should have considered Mr. Kanter's circumstances in reviewing this as-applied challenge. "An as-applied challenge is not stating that the law is unconstitutional as written, but that the law's application to a particular person under certain circumstances deprive that individual person of a constitution right." *Hatfield v. Lynch*, No. 16-cv-00383, 2016 WL 7373768, at *5 (S.D. Ill. Dec. 20, 2016). Therefore, an as-applied challenge "requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right." *Field Day, LLC v. Cty. of Suffolk*, 463 F.3d 167, 174–75 (2d Cir. 2006) (citing *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006)); *see also Almengor v. Schmidt*, 692 F. Supp. 2d 396, 397 (S.D.N.Y. 2010) (defining an as-applied challenge as a "claim that the manner in which a statute or regulation was applied to a plaintiff in particular circumstances violated the Constitution" (citing *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566, 592 (7th Cir. 2002))), *aff'd sub nom. Schain v. Schmidt*, 396 F. App'x 713 (2d Cir. 2010).

Courts regularly perform such individualized factual analyses, and they are well-equipped to do this in an as-applied constitutional challenge. *Cf. United States v. Hernandez-Vasquez*, 513 F.3d 908, 915 (9th Cir. 2008) (noting in a criminal trial context that "the importance of an asserted governmental interest is an issue that this Court is well-equipped to review and evaluate for itself in the first instance"). The district court's failure to conduct this analysis effectively—and improperly—converted Mr. Kanter's as-applied challenge to a facial challenge. This alone requires reversal.

Individualized analysis should not be short-circuited by accepting Appellees' position that the Court should scrutinize the law as applied to all non-violent felons, even if that seems simpler. As the Southern District of Illinois recently stated, "there are scores of non-violent felons in this country, all with massive discrepancies in prison sentences, fines, restitution payments, and more." *Hatfield*, 2018 WL 1963876, at *7. These citizens deserve individualized opportunities to assert their rights which § 922(g)(1) broadly restricts.

Notably, when Congress passed the Omnibus Crime Control and Safe Streets Act of 1968—enacting § 922(g)(1) in its current form—it recognized the statute's overbreadth and undifferentiated application.[8] Pub. L. No. 90-351, 82 Stat. 197

[8] As explained *infra*, Congress also included within the Omnibus Crime Control and Safe Streets Act of 1968 an exception to the broad reach of § 922(g), limiting the felonies that trigger the statute. It exempts from § 922(g) "any Federal or State

(1968). Congress anticipated that citizens convicted of felonies would need to get their rights restored. Congress provided "a relief valve for felons . . . to restore their firearms rights by application to the Attorney General." *Id.* at *8. Specifically, 18 U.S.C. § 925(c) provides:

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General . . . and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, 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 relief would not be contrary to the public interest.

The statute also provides for judicial review of the attorney general's decision. Congress's decision not to fund this program since 1992, *see Bean*, 537 U.S. at 74–75, n.3 (describing appropriation decisions), does not mean the Court should ignore Mr. Kanter's circumstances and treat his complaint as a facial challenge. To the contrary, the lack of an administrative review process makes meaningful judicial review here all the more vital.

If the Court is not willing to analyze Mr. Kanter's personal history, the Court should adopt the approach taken by the Southern District of Illinois and consider the circumstances surrounding Mr. Kanter's non-violent felony. *Hatfield*, 2018 WL

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offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." Gun Control Act of 1968, Pub. L. No. 90-618 § 102, 82 Stat. 1213, 1216 (1968) (codified at 18 U.S.C. § 921(a)(20)(A)).

1963876 at *7. Because a prior felony is the trigger for § 922(g)(1) and the Wisconsin statute, the most relevant circumstances for evaluating application of the laws are those surrounding the prior felony. And unlike Appellees' approach, this level of particularity would still satisfy the Court's responsibility in reviewing an as-applied constitutional challenge. *See id.* Under this slightly higher-level analysis, Mr. Kanter's non-violent fraud offense does not in any way suggest a propensity for gun violence, and the government has presented no evidence to suggest as much.

b. *Section 922(g)(1) and the Wisconsin Statute Are Not Narrowly Tailored as Applied to Mr. Kanter.*

Mr. Kanter's brief explains why, given the circumstances surrounding his non-violent felony and his personal history, there is no evidence to suggest that he has a greater propensity for gun violence than the average citizen. Br. of Pl.-App. at 26–28. For that reason, § 922(g)(1) and the Wisconsin statute are not narrowly tailored as applied to Mr. Kanter. But to the extent the Court has any doubts, it should consider three additional points regarding the laws' unconstitutional overbreadth.

First, the fact that Congress included the "relief valve" in § 925(c) amounts to a "tacit admission . . . that § 922(g)(1) is overbroad by facially applying to all felons regardless of their underlying crime or circumstances—indicating a bad fit between § 922(g)(1) and the Government's purpose of keeping firearms out of the hands of dangerous criminals who may create armed mayhem." *Hatfield*, 2018 WL

1963876 at *8. When Congress codified § 922(g)(1) in 1938, it banned only those "convicted of a crime of violence" from owning a gun. National Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250, 1251 (1938). Thus, it would not have applied to Mr. Kanter. In 1961, it amended the statute to apply to all felons, Act of Oct. 3, 1961, Pub. L. No. 87-342, 75 Stat. 757, 757 (1961), and in 1968, it added § 925(c), Gun Control Act of 1968, Pub. L. No. 90-618 § 102, 82 Stat. at 1225. Congress recognized, after it expanded § 922(g)(1) to non-violent felons, that individuals like Mr. Kanter should have the opportunity to have their Second Amendment rights restored. *See also* 18 U.S.C. § 921(a)(20) (stating that a felony excludes "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored").

When Congress defunded the restoration of rights program in 1992 and foreclosed that avenue of relief,[9] it opened the door to the exact type of challenge raised here. *See Binderup*, 836 F.3d at 355 (finding that § 922(g) was unconstitutional as applied, in part, because this avenue of relief is

[9] Due to the lack of funding, § 925(c) "has been rendered inoperative." *Logan v. United States*, 552 U.S. 23, 28 n.1 (2007); *see also Bean*, 537 U.S. at 75–76 (describing the appropriations bar); *see, e.g.*, Treasury, Postal Service, and General Government Appropriations Act of 1993, Pub. L. 102–393, 106 Stat. 1729 (1993) (providing "[t]hat 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)."). No legislative history offers justifications or evidence to support the blanket application of § 922(g)(1) to non-violent felons like Mr. Kanter.

"closed . . . altogether" and that the limited availability of expungement, pardon, or civil rights restoration "do not satisfy even intermediate scrutiny"). Or, as the Seventh Circuit astutely predicted in *Williams*, § 922(g)(1) "may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent." *Williams*, 616 F.3d at 693; *see also id.* ("[T]he government may face a difficult burden of proving § 922(g)(1)'s 'strong showing' in future cases."); *Yancey*, 621 F.3d at 685 (noting that "felon-in-possession laws could be criticized as 'wildly overinclusive' for encompassing nonviolent offenders . . . .").

Second, Congress has determined that some serious, non-violent felonies do not warrant a lifetime ban, and the government has offered no evidence that Mr. Kanter's crime is any different. Specifically, the definition of the term "felony" used in 18 U.S.C. § 922 excludes "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." 18 U.S.C. § 921(a)(20)(A). There is simply no principled basis—let alone evidence—for the conclusion that Mr. Kanter's non-violent felony is more indicative of a propensity for gun violence than the non-violent felonies listed in § 921(a)(20)(A). At the very least, to satisfy strict scrutiny, the government would need to offer evidence to justify treating Mr. Kanter differently than an antitrust felon. Otherwise, the distinction is not only an

unconstitutional application of the Second Amendment, its arbitrariness raises Equal Protection concerns.

Third, and most importantly, upholding the district court decision would lead to absurd and even more blatantly unconstitutional results. Under it, Congress can determine whether an individual's Second Amendment rights are forever extinguished by simply labeling any crime a felony. But "[w]hen the Second Amendment applies, its core guarantee cannot be withdrawn by the legislature or balanced away by the courts." *Binderup*, 836 F.3d at 365 (Hardiman, J., concurring) (footnote omitted); *see also Chovan*, 735 F.3d at 1148 (Bea, J., concurring) ("The boundaries of this right are defined by the Constitution. They are not defined by Congress." (citation omitted)); *City of Boerne v. Flores*, 521 U.S. 507, 545 (1997) (O'Connor, J., dissenting) ("Congress lacks the ability independently to define or expand the scope of constitutional rights by statute."); *United States v. Soderna*, 82 F.3d 1370, 1386 (7th Cir. 1996) (Kanne, J., concurring in part and dissenting in part) ("A legislature cannot by statutory enactment define the limits of a constitutional right."). The idea contravenes the purpose of the Bill of Rights, in which "[t]he very enumeration of the right takes [it] out of the hands of government . . . ." *Heller*, 554 U.S. at 634. And the expansion of felonies to include all manner of minor legal and regulatory infractions demonstrates why Congress's definition of felony cannot define the scope of the Second Amendment.

Almost 80 years ago, the Supreme Court noted that "[f]elony . . . is a verbal survival which has been emptied of its historic content." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272 n.2 (1942); *see Watson*, 423 U.S. at 438 (Marshall, J., dissenting) ("For the fact is that a felony at common law and a felony today bear only slight resemblance …."). Today, that is a massive understatement. By some estimates, there are over 4,000 crimes and more than 300,000 regulations at the federal level alone that may be enforced criminally. *See* John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation (June 16, 2008), https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes; *see also* Harvey Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (2011); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2009). Criminal laws now cover a broad array of conduct that most people would not recognize as criminal, let alone felony behavior that reflects a propensity for gun violence and can support a lifetime bar on firearm possession.

Examples of such felonies abound. In *United States v. Yates*, 135 S. Ct. 1074, 1079–80 (2015), the Supreme Court reversed a conviction for impeding a federal investigation, a violation of 18 U.S.C. § 1519, for a fisherman's disposal of three undersized grouper that were 1.25 inches under the required 20-inch size. *See also United States v. McNab*, 331 F.3d 1228, 1232 (11th Cir. 2003) (affirming convictions for felonies related to importing under-sized and improperly packaged

Honduran lobsters); *United States v. Hoflin*, 880 F.2d 1033, 1034 (9th Cir. 1989) (affirming conviction for felony offense of aiding and abetting the disposal of leftover road paint without a proper permit under 42 U.S.C. § 6928(d)(2)(A)); *Binderup*, 836 F.3d at 340 (reviewing consequences of conviction for corrupting a minor arising out of a consensual sexual relationship with a 17-year-old who was over the state's legal age of consent (16)). As the court in *Hatfield* made clear, the offenses that can trigger a lifetime firearms ban are many and varied, 2018 WL 1963876, at *5 (listing offenses for which conviction would result in a lifetime firearm ban).

Under the district court's decision here (and the government's position), any of these minor crimes can properly result in a lifetime firearm ban without implicating the Second Amendment at all. If the government decided to label jaywalking a felony, jaywalkers would lose their Second Amendment rights. *Hatfield* illustrates the point. Larry Hatfield pled guilty in 1992 to a single count of making a false statement regarding benefits under the Railroad Unemployment Insurance Act, a violation of 18 U.S.C. § 1001(a). *See Hatfield*, 2018 WL 1963876, at *1. He obtained approximately $1,600 as a result of his false statements; upon his guilty plea, he was sentenced to repay that amount and to three years' probation. *Id.* Mr. Hatfield has not had any further trouble with the law and he has not been convicted of any additional criminal conduct. Due to the broad application of

§ 922(g)(1), however, he was—at least until the Southern District of Illinois's recent decision—banned from possessing a firearm.

Second Amendment rights cannot be so easily ignored. Only if the government can demonstrate *with evidence* that a non-violent felon poses a danger to commit gun violence can a lifetime firearm ban—such as the one facing Mr. Kanter—be upheld. "[The government] must present some meaningful evidence, not mere assertions, to justify its predictive [and here conclusory] judgments." *Binderup*, 836 F.3d at 354 (citation and internal quotation marks omitted) (alterations in original)). No such evidence has been offered, and if this Court adopts the district court's reasoning, Mr. Kanter and other non-violent felons who committed minor criminal infractions—like Mr. Hatfield—will have no recourse.

C. Even if the Court Does Not Apply Strict Scrutiny, Mr. Kanter Should Still Prevail.

Even if the Court determines that Mr. Kanter is not at or near the core of the Second Amendment's protection, it should still apply the heightened scrutiny standard articulated in *Ezell I*. *See Hatfield*, 2018 WL 1963876, at *6. As a non-violent felon, Mr. Kanter is necessarily closer to the core Second Amendment right than the violent felons who were entitled to standard intermediate scrutiny in previous Seventh Circuit decisions. *See, e.g.*, *Williams*, 616 F.3d at 692. And the burden on Mr. Kanter's rights is even more substantial than the burden in *Ezell I*, 651 F.3d at 708.

Accordingly, at a minimum, the government must show (1) an extremely strong public-interest justification for banning non-violent felony offenders from possessing firearms for self-defense purposes and (2) a close fit between that purpose and § 922(g). *Id.* The government cannot survive heightened intermediate scrutiny. No evidence was presented of aggravating circumstances demonstrating violence or evidence indicating that Mr. Kanter is at risk for any future crime, much less a violent crime or a crime involving a firearm. Section 922(g)(1) and the Wisconsin statute are unconstitutional as applied to Mr. Kanter under this level of scrutiny.[10]

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court dismissing Plaintiff-Appellant's as-applied constitutional challenge.

[10] To be clear, should the Court apply standard intermediate scrutiny, Mr. Kanter would prevail. *Cf. United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny and stating that "[t]he government has offered numerous plausible reasons why the disarmament of domestic violence misdemeanants is substantially related to an important government goal; however, it *has not attempted to offer sufficient evidence to establish a substantial relationship between § 922(g)(9) and an important governmental goal*" (emphasis added)).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Seventh Circuit Rule 29 because it contains 6,926 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a) because this brief contains proportionally spaced typeface in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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18 U.S.C. § 921 Firearms: Definitions

(a) As used in this chapter--

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

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

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

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 922 Firearms: Unlawful acts

(g) It shall be unlawful for any person--

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

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

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

18 U.S.C. § 925 Firearms: Exceptions: Relief from disabilities

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, 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 relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Attorney General grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

National Firearms Act of 1938,
Pub. L. No. 75-785, 52 Stat. 1250 (1938)

SEC. 2.

(d) It shall be unlawful for any person to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is under indictment or has been convicted in any court of the United States, the several States, Territories,possessions (including the Philippine Islands), or the District of Columbia of a crime of violence or is a fugutive from justice.

(e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence or who is a fugutive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition .

(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugutive from justice 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.

Act of Oct. 3, 1961,
Pub. L. No. 87-342, 75 Stat. 757 (1961)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Federal Firearms Act, as amended (52 Stat. 1250; 15 U.S.C. 901-909), is further amended by repealing paragraph (6), by deleting the words "crime of violence" m paragraph (7) and inserting in lieu thereof the words "crime punishable by imprisonment for a term exceeding one year", and by renumbering paragraphs (7) and (8) as paragraphs (6) and (7).

SEC. 2. Section 2 of such Act is amended by deleting the words "crime of violence" in subsections (d), (e), and (f) and inserting in lieu thereof the words "crime punishable by imprisonment for a term exceeding one year."

Treasury, Postal Service, and General Government Appropriations Act of 1993, Pub. L. 102–393, 106 Stat. 1729 (1993)

Bureau of Alcohol, Tobacco and Firearms: Salaries and Expenses

For necessary expenses of the Bureau of Alcohol, Tobacco and Firearms, including purchase of not to exceed six hundred and fifty vehicles for police-type use for replacement only and hire of passenger motor vehicles; hire of aircraft; and services of expert witnesses at such rates as may be determined by the Director; for payment of per diem and/or subsistence allowances to employees where an assignment to the National Response Team during the investigation of a bombing or arson incident requires an employee to work 16 hours or more per day or to remain overnight at his or her post of duty; not to exceed $10,000 for official reception and representation expenses; for training of State and local law enforcement agencies with or without reimbursement; provision of laboratory assistance to State and local agencies, with or without reimbursement; $366,372,000, of which $22,000,000 shall be available solely for the enforcement of the Federal Alcohol Administration Act during fiscal year 1993 and, of which not to exceed $1,000,000 shall be available for the payment of attorneys' fees as provided by 18 U.S.C. 924(d)(2); and of which $1,000,000 shall be available for the equipping of any vessel, vehicle, equipment, or aircraft available for official use by a State or local law enforcement agency if the conveyance will be used in drug-related joint law enforcement operations with the Bureau of Alcohol, Tobacco and Firearms and for the payment of overtime salaries, travel, fuel, training, equipment, and other similar costs of State and local law enforcement officers that are incurred in joint operations with the Bureau of Alcohol, Tobacco

and Firearms: Provided, That no funds appropriated herein shall be available for administrative expenses in connection with consolidating or centralizing within the Department of the Treasury the records of receipts and disposition of firearms maintained by Federal firearms licensees or for issuing or carrying out any provisions of the proposed rules of the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, on Firearms Regulations, as published in the Federal Register, volume 43, number 55, of March 21, 1978: Provided further, That none of the funds appropriated herein shall be available for explosive identification or detection tagging research, development, or implementation: Provided further, That not to exceed $300,000 shall be available for research and development of an explosive identification and detection device: Provided further, That this provision shall not preclude ATF from assisting the International Civil Aviation Organization in the development of a detection agent for explosives or from enforcing any legislation implementing the Convention on the Marking of Plastic and Sheet Explosives for the Purpose of Detection: Provided further, That funds made available under this Act shall be used to achieve a minimum level of 4,304 full-time equivalent positions for fiscal year 1993, of which no fewer than 1,440 full-time equivalent positions shall be allocated for the Armed Career Criminal Apprehension Program: Provided 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).