No. 16-_____

# In The
# Supreme Court of the United States

JAMES HAMILTON,

*Petitioner,*

v.

WILLIAM L. PALLOZZI AND BRIAN E. FROSH,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

James Hamilton was convicted of non-violent Virginia felonies for which he served no jail time. Virginia restored all of Hamilton's rights lost as a consequence of his convictions, including his right to possess firearms.

Hamilton has since been licensed as an armed guard and a firearms instructor, and he currently works as a Federal Protective Officer for the Department of Homeland Security. He has no record of violent conduct, and leads a stable family life. Nonetheless, Maryland, where Hamilton resides, forbids him from possessing firearms on account of his Virginia convictions.

The Third, Seventh, Eighth, and District of Columbia Circuits recognize that individuals may pursue as-applied Second Amendment challenges to firearm dispossession laws. The First and Ninth Circuits are open to the concept. But the Fourth and Tenth Circuits bar such challenges. Accordingly, the Fourth Circuit below affirmed the dismissal of Hamilton's as-applied Second Amendment challenge to Maryland's firearm dispossession law.

The question presented is:

Whether, based on his personal circumstances, a law-abiding, non-violent individual may raise a Second Amendment challenge to the application of a law generally barring the possession of firearms by felons.

## LIST OF PARTIES

The petitioner is James Hamilton.

Respondents are William L. Pallozzi, in his official capacity as Superintendent of the Maryland State Police; and Brian E. Frosh, in his official capacity as Maryland's Attorney General.

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James Hamilton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## INTRODUCTION

The federal appellate courts are divided on the critical questions raised by this petition. May a person

barred from possessing firearms on account of a criminal conviction seek relief from such prohibition, on grounds that it violates his Second Amendment rights? And if so, how should courts evaluate such claims?

Acknowledging that its decision works an "apparently absurd result," App. 27a, the court below held that any individual disarmed by a legislature on account of a felony conviction stands entirely outside the Second Amendment's protection. Relief is available only if the underlying conviction is no longer valid.

The underlying offense's nature, and the individual's lack of dangerousness, rehabilitation, and personal circumstances, are all irrelevant, as is the passage of time. All that matters is that a legislative choice has been made to disarm the individual – and that choice is judicially unreviewable under the Second Amendment.

Accordingly, the lower court upheld Maryland's disarmament of James Hamilton – by all accounts, a responsible, law-abiding citizen once convicted of nonviolent offenses, who has since been licensed as an armed guard, and employed as a Protective Security Officer with the Department of Homeland Security.

But a very different rule, informed by this Court's opinion in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), prevails in other circuits, as it recently did even in the court below. Most courts that have decided the issue will consider whether there exist constitutionally adequate grounds to justify prohibiting an individual

from possessing firearms. After all, legislatures cannot define the scope of a constitutional right.

The time has arrived for this Court to resolve this circuit conflict. This case presents as good a vehicle as any for doing so.

## OPINIONS AND ORDERS BELOW

The Fourth Circuit's opinion (App., *infra*, 1a-29a) is reported at 848 F.3d 614. The district court's opinion (App., *infra*, 30a-53a) is reported at 165 F. Supp. 3d 315.

## JURISDICTION

The court of appeals entered its judgment on February 17, 2017, and denied a petition for rehearing en banc on March 17, 2017. The Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment, Section One of the Fourteenth Amendment, and relevant provisions of the Maryland Public Safety Code are reproduced at App. 58a-63a.

## STATEMENT

### A. Statutory Background

1. Maryland bars anyone "convicted of a disqualifying crime" from possessing handguns. Md. Pub. Safety Code Ann. §§ 5-101(r)(1) (defining "regulated firearm" to include handguns), 5-133(b)(1) (restricting possession of "regulated" firearms). Violation of this provision is a misdemeanor punishable by up to 5 years imprisonment, a $10,000 fine, or both. *Id.* § 5-144(b); *Jones* v. *State*, 420 Md. 437 (2011). The same punishment applies to "[a] dealer or other person," who provides a handgun to a person "who the dealer or other person knows or has reasonable cause to believe . . . (2) has been convicted of a disqualifying crime. . . . " Md. Pub. Safety Code Ann. § 5-134(b).

Maryland also licenses the acquisition and possession of handguns. *Id.* §§ 5-117, 5-117.1. An applicant for Maryland's "Handgun Qualification License" must state under penalty of perjury that he or she "has never been convicted of a disqualifying crime." *Id.* § 5-118(b)(3)(ii). Possession of a handgun without a permit is a misdemeanor punishable by up to 5 years' imprisonment, a $10,000 fine, or both. *Id.* § 5-144(b).

2. Maryland forbids the possession of rifles and shotguns by anyone convicted of a "disqualifying crime." *Id.* § 5-205(b)(1). A violation of this provision is a misdemeanor punishable by up to 3 years' imprisonment, a $1,000 fine, or both. *Id.* § 5-205(d).

3. "Disqualifying crime" includes "a violation classified as a felony in the State." *Id.* § 5-101(g)(2). The term extends to crimes committed in other states, if the equivalent crime is a felony in Maryland. *McCloud* v. *Dep't of State Police*, 426 Md. 473 (2011).

### B. The Second Amendment

This Court began its interpretation of the Second Amendment "with the strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Heller*, 554 U.S. at 581. It did not detail the Second Amendment right's full contour, but held (among other conclusions) that "law-abiding, responsible citizens" enjoyed the right. *Id.* at 635.

In guiding dictum, this Court afforded presumptive validity to "longstanding prohibitions on the possession of firearms by felons," among other restrictions, because such laws might reflect the right's "scope" as would be revealed by "historical analysis." *Id.* at 626-27 & n.26. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Id.* at 634-35.

"The Founding generation had no laws . . . denying the right [to keep and bear arms] to people convicted of crimes." Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009). "Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding." *Id.*

### C. James Hamilton

1. James Hamilton accepted a laptop purchased on a stolen credit card in satisfaction of a debt. D. Md. No. 15-2142, Dkt. 11-2, ¶ 6. As a result, on November 6, 2006, Hamilton was convicted by the Circuit Court for Rockbridge County, Virginia, of three felonies: one count of credit card fraud, in violation of Va. Code Ann. § 18.2-195; one count of credit card theft, in violation of Va. Code Ann. § 18.2-192; and one count of credit card forgery, Va. Code Ann. § 18.2-193. He received a suspended sentence of four years, and was ordered to pay $1,247.90 in restitution and $1,090.00 in court costs. *Id.*; App. 3a-4a.

2. Hamilton successfully completed probation, made restitution, and paid his costs. But owing to this conviction, Hamilton lost his political rights in Virginia: the rights to vote; hold public office; sit on a jury; serve as a notary; and ship, transport, possess or receive firearms.

On November 20, 2013, Virginia's Governor restored Hamilton's rights to vote, hold public office, sit on a jury, and serve as a notary. App. 4a. On April 22, 2014, the Circuit Court for Spotsylvania County, Virginia, restored Hamilton's firearms rights under Virginia law. *Id.* "Hamilton subsequently was registered as an Armed Security Officer with the Virginia Department of Criminal Justice Services, and is certified in the use of handguns and shotguns." *Id.* He is now "employed through a contractor as a Protective Security

Officer with the Department of Homeland Security." *Id.*[1]

Hamilton "has no history of violent behavior." *Id.* He "is married, has three children, [and] serves as the head coach of a junior league wrestling team." *Id.*

3. Now residing in Maryland, Hamilton intends to possess a handgun and a long gun to defend himself at home. App. 3a, 4a.

Prior to obtaining any firearms, Hamilton sought a permit to carry a handgun from the Maryland State Police. The Police's Licensing Division informed Hamilton that he could not possess a firearm in Maryland, owing to his Virginia convictions, unless he were to obtain a full pardon from Virginia's governor. App. 6a.[2] Hamilton's attorney asked Respondent Frosh's office to recognize Virginia's restoration of her client's firearms rights, and was refused in an email copied to Respondents' counsel below, who was also designated as the point of contact for any further discussion. App. 11a, 37a; C.A. App. 30-33.

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[1] The full loss and subsequent restoration of Hamilton's rights under Virginia law relieved Hamilton of the federal "felon in possession" ban. See 18 U.S.C. § 921(a)(20).

[2] Maryland's provisions equivalent to those of which Hamilton was convicted in Virginia are Md. Crim. Law Code Ann. § 8-204, credit card theft, a misdemeanor; Md. Crim. Law Code Ann. § 8-205, credit card counterfeiting, a felony; and Md. Crim. Law Code Ann. § 8-209, receiving property by stolen, counterfeit, or misrepresented credit card, a felony on the facts of Hamilton's case.

"Fearing arrest, prosecution, incarceration, and fines, Hamilton has refrained from attempting to obtain a handgun, rifle or shotgun." App. 6a.

### D. The Proceedings Below

1. Hamilton sued Respondents, Maryland's State Police Superintendent and Attorney General, in the United States District Court for the District of Maryland, seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. Hamilton's one count complaint alleged that application of Maryland's felon firearm prohibitions against him violates his Second Amendment rights. The District Court had jurisdiction of the matter under 28 U.S.C. §§ 1331, 1343, 1346, 2201 and 2202.

2. The District Court denied Hamilton's motion for summary judgment and granted Respondents' motion to dismiss for failure to state a claim, with prejudice. The court began by rejecting Respondents' argument that the case was not ripe because Hamilton had not formally applied for a handgun license.[3] Respondents claimed that Hamilton should have applied for a handgun license, not because he is eligible for one – they "never refute[d] [Hamilton's] basic assertion"

[3] No license is required to acquire or possess the long gun that Hamilton has refrained from acquiring.

that the challenged provisions bar him from possessing firearms, App. 38a – but because a futile application might have caused them to discover additional, unknown reasons for the denial.

"While Defendants speculate that Plaintiff *might* have been denied a license for some unknown reason, they provide no evidence whatsoever in support of their conjecture. Plaintiff, conversely, denies having any disqualifying characteristics other than his felony convictions." App. 38a. Moreover, whatever unknown law might operate against Hamilton, an injunction would shield him from prosecution under the challenged provisions. App. 38a-39a.

The district court sua sponte raised, only to dismiss, another justiciability concern. It explored whether, under circuit precedent, Maryland's decision to disarm Hamilton was not yet final, as Hamilton had not sought a pardon from Virginia's governor. In *Doe* v. *Virginia Dept. of State Police*, 713 F.3d 745 (4th Cir. 2013), *reh'g denied*, 720 F.3d 212 (4th Cir. 2013) (en banc), a divided court held that a sex offender's challenge to restrictions on her movement were unripe because she had not administratively petitioned for relief. Absent that relief, the appellate court asserted that the restrictions were not finalized as against her.

But the district court answered its own speculation by noting that a significant question existed as to whether *Doe* was consistent with *Patsy* v. *Bd. of Regents of Fla.*, 457 U.S. 496 (1982); that *Doe* is typically construed narrowly; and that in any event, Hamilton's

case is factually distinguishable from *Doe* in that Virginia's governor is not a Maryland decisionmaker. App. 42a-43a.

Turning to the merits of Hamilton's case, the district court held that the Fourth Circuit "recognized that a felon could – *theoretically* – prevail in an as-applied attack" on a presumptively valid firearm dispossession law. App. 46a-47a. "In order to succeed, the felon would have to show that his factual circumstances remove his challenge from the realm of ordinary challenges." App. 47a (internal quotation marks omitted).

This much, the district court held, Hamilton had failed to do . . . because he was once convicted of a felony. "The problem, of course, is that Plaintiff is *not* an average law-abiding responsible citizen: he is a felon who was convicted not ten years ago of three serious crimes." App. 49a. Hamilton's offenses "are black-letter *mala in se* felonies reflecting grave misjudgment and maladjustment." App. 50a. After all, "theft crimes are as old as the Babylonian Code of Hammurabi." *Id.* n.24 (citation omitted).

Hamilton's rehabilitation was irrelevant. "The point of this discussion is not, of course, to impugn Plaintiff's motives or even to assess his rehabilitation." App. 52a. Acknowledging that Hamilton had "made a number of commendable, socially responsible choices in the years following his convictions," the district court nonetheless rejected Hamilton's claim because

once convicted, he was outside the Second Amendment's scope. App. 52a.

3. The Fourth Circuit affirmed. The court began by agreeing that the case was ripe, in that Hamilton "need not go through the futile exercise of applying for a permit when he has been told already that it will be rejected." App. 9a-10a. "Hamilton has been informed by no less than an Assistant Attorney General" that he is barred from possessing firearms, and that much suffices to establish ripeness. App. 11a.

The court also confirmed that the case is justiciable in the sense that a hypothetical Virginia pardon is irrelevant to the finality of Maryland's decision regarding Hamilton. "The initial decisionmaker here is the [Maryland State Police] who is in charge of determining whether a previous conviction is disqualifying. The Governor of Virginia is entirely outside the process of determining who is eligible for handgun permits in Maryland." App. 14a.

With respect to the merits, the court set out to follow the now-familiar two-step process for resolving Second Amendment claims, wherein the court first asks whether the Second Amendment applies in a given situation and, if so, proceeds to apply a level of means-ends scrutiny. App. 15a.

Previous circuit opinions had recognized as-applied challenges to felon disarmament laws. "[T]he phrase '*presumptively* lawful regulatory measures' suggests the possibility that one or more of these 'longstanding' regulations could be unconstitutional in

the face of an as-applied challenge." *United States* v. *Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (internal quotation marks omitted).

> [W]e do not hold that any person committing any crime automatically loses the protection of the Second Amendment. The *Heller* Court's holding that defines the core right to bear arms by law-abiding, responsible citizens does not preclude some future determination that persons who commit some offenses might nonetheless remain in the protected class of "law-abiding, responsible" persons.

*United States* v. *Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012).

Indeed, the Fourth Circuit had held that in such challenges, the inquiry is "streamlined" in that the first step asks whether the challenger is a "law-abiding, responsible citizen" entitled to Second Amendment protection. *United States* v. *Pruess*, 703 F.3d 242, 245 (4th Cir. 2012); *United States* v. *Moore*, 666 F.3d 313, 318-19 (4th Cir. 2012).

But refusing to consider Hamilton's claim that he had become a law-abiding, responsible citizen, the court below explained that its earlier opinions "streamlining" the process in as-applied challenges meant only that "we need not undertake an extensive historical inquiry to determine whether the conduct at issue was understood to be within the scope of the Second Amendment at the time of ratification." App. 17a. And a second interest-balancing step would still apply, even if Hamilton's possession of firearms would constitute

conduct protected by the Second Amendment at step one. App. 18a-19a. Presumably, then, Maryland might still have an adequate reason to disarm a law-abiding, responsible citizen.

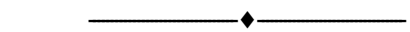
But in the lower court's view, Hamilton could not even pass step one. "[W]e today hold that a challenger convicted of a state law felony generally cannot satisfy step one. . . ." App. 20a.

"[W]e simply hold that conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment, absent [two] narrow exceptions. . . ." App. 23a. "A felon cannot be returned to the category of 'law-abiding, responsible citizens' for the purposes of the Second Amendment and so cannot succeed at step one . . . unless the felony is pardoned or the law defining the crime of conviction is found unconstitutional or otherwise unlawful." *Id.* (footnote omitted).

"[W]e also hold that evidence of rehabilitation, likelihood of recidivism, and passage of time are not bases for which a challenger might remain in the protected class of 'law-abiding, responsible' citizen." App. 23a-24a (footnote omitted). The lower court believed that allowing such challenges would inexorably lead to jury nullification, App. 24a, and that Maryland is entitled to enforce its own gun laws regardless of what other sovereigns might decide, "bound only by the strictures of the Second Amendment." App. 28a.

The lower court did, at least, acknowledge that the result here is "apparently absurd." App. 27a.

On March 17, 2017, the Fourth Circuit denied Hamilton's petition for rehearing en banc.



## REASONS FOR GRANTING THE PETITION

### I. The Courts Of Appeals Are Split On The Question Of Whether Individuals May Bring As-Applied Challenges To Felon Firearm Dispossession Laws.

The decision below conflicts with those of most other circuits to have considered as-applied challenges to felon firearm dispossession laws. Six circuits have either expressly approved of such challenges or confirmed that they remain open on the question. Only one other circuit has gone as far as the court below.

1. The Third, Seventh, Eighth, and D.C. Circuits agree that individuals may ask whether, under their particular circumstances, the application of a felon firearm dispossession law comports with constitutional values.

In *Binderup* v. *Atty. Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc), *petition for certiorari pending*, No. 16-847 (filed Jan. 5, 2017), the Third Circuit affirmed two judgments that upheld as-applied Second Amendment challenges to the so-called "felon in possession" ban of 18 U.S.C. § 922(g)(1). The majority fractured as to why, exactly, prohibiting the challengers from possessing firearms was unconstitutional. Three judges offered that the challengers retained the Second Amendment's protection because they were not convicted of serious

crimes, and that the government had not shown that the challengers' possession of firearms would endanger public safety. *Binderup*, 836 F.3d at 356-57 (Ambro, J.). Five judges determined that the challengers must prevail because there was no reason to believe that they have a "propensity for violence." *Id.* at 380 (Hardiman, J., concurring in part and concurring in the judgments).

While these challenges arose in contexts where the prohibition was leveled at non-violent misdemeanants, the concepts developed there are readily applicable in challenges brought by those convicted of felonies – and the court below specifically rejected the Third Circuit's approach. App. 23a.

The Seventh Circuit held that "*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." *United States* v. *Williams*, 616 F.3d 685, 692 (7th Cir. 2010). The Eighth Circuit rejected an as-applied challenge to Section 922(g)(1) where the felon "has not shown that he is no more dangerous than a typical law-abiding citizen." *United States* v. *Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014) (internal quotation marks omitted). Added the D.C. Circuit,

> Without the relief authorized by [18 U.S.C. § 925(c)], the federal firearms ban will remain vulnerable to a properly raised as-applied constitutional challenge brought by an individual who, despite a prior conviction, has

> become a "law-abiding, responsible citizen[]" entitled to "use arms in defense of hearth and home."

*Schrader* v. *Holder*, 704 F.3d 980, 992 (D.C. Cir. 2013).

2. The First Circuit has acknowledged that "the Supreme Court may be open to claims that some felonies do not indicate potential violence and cannot be the basis for applying a categorical [firearms] ban," or, phrased differently, "that the Supreme Court might find some felonies so tame and technical as to be insufficient to justify [a firearms] ban." *United States* v. *Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011).

The Ninth Circuit has also left the matter open. No personal criteria were at issue in *United States* v. *Phillips*, 827 F.3d 1171 (9th Cir. 2016), which rejected a categorical challenge to basing 18 U.S.C. § 922(g)(1)'s disability upon a traditional, if non-violent felony, but the court otherwise left open the as-applied question. "Can a conviction for stealing a lollipop . . . serve as a basis under § 922(g)(1) to ban a person for the rest of his life from ever possessing a firearm, consistent with the Second Amendment? That remains to be seen." *Phillips*, 827 F.3d at 1176 n.5.

3. Only the Tenth Circuit has apparently, like the court below, rejected the concept that individuals subject to a disarmament provision might nevertheless retain or regain their Second Amendment rights. "We have already rejected the notion that *Heller* mandates an individualized inquiry concerning felons pursuant to § 922(g)(1)." *In re United States*, 578 F.3d 1195, 1200

(10th Cir. 2009) (citing *United States* v. *McCane*, 573 F.3d 1037 (10th Cir. 2009)) (unpublished order but attached to published dissent). Notably, until the decision here below, none of the circuits that have addressed the question since the Tenth Circuit have followed that approach. The decision below represents a departure from the trend.

## II. This Case Presents An Excellent Vehicle For Resolving The Circuit Split.

Felon disarmament laws exist, and are facially constitutional, for a good reason: people convicted of felonies are often dangerous. And so it follows that most Second Amendment challenges to felon firearm dispossession laws are brought by individuals who would never be good candidates for as-applied relief. Indeed, the cases often arise in the context of criminal appeals, where the Second Amendment argument may satisfy counsel's duty of zealous representation if nothing else.

This case is different. The court below itself recognized that the result is "apparently absurd." App. 27a. Without question, James Hamilton is a non-violent, fully rehabilitated individual. He has done all that a person might ordinarily do to restore his firearm rights under the laws of the state that convicted him, and, by extension, under federal law – and succeeded. Hamilton was licensed as an armed guard, and is now a federal Homeland Security officer. Why can't he defend his family with a firearm in his Maryland home? What

legitimate interest does his continued disarmament advance?

This is not a case of hard facts making bad law. Rather, it's a case of exceptionally compelling facts presenting this Court with an opportunity to resolve a ripe and important circuit split touching upon critical issues of public safety and fundamental rights.

## III. The Decision Below Cannot Be Reconciled With This Court's Decisions Acknowledging A Fundamental Right To Keep And Bear Arms, And Will Lead To Additional Absurd, Unjust, and Dangerous Results.

1. In "streamlining" away any inquiry into the existence of any traditional grounds for disarmament, App. 17a, the court below willfully blinded itself to what the Second Amendment requires when the state sets out to disarm people.

This history-free, fact-free, Constitution-free approach liberated the court to jump from "we do not hold that any person committing any crime automatically loses the protection of the Second Amendment," *Carpio-Leon*, 701 F.3d at 981, to "conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment," App. 23a, if the conviction is still valid. Unsurprisingly, the result was not just "absurd," App. 27a, but seriously erroneous.

As discussed supra, most other circuits have understood that the "presumptively lawful" status of felon disarmament laws means that as-applied challenges remain available. As Judge Hardiman noted, "[a] presumption of constitutionality 'is a presumption . . . [about] the existence of factual conditions supporting the legislation. As such it is a rebuttable presumption.'" *Binderup*, 836 F.3d at 361 n.6 (Hardiman, J., concurring) (quoting *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 209 (1934)). "Put simply, we take the Supreme Court at its word that felon dispossession is *presumptively* lawful." *Id.* (internal quotation marks omitted).

The condition that would support the constitutionality of disarming an individual has always been dangerousness. "[A]ctual 'longstanding' precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates a present danger that one will misuse arms against others and the disability redresses that danger." C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 698 (2009).

"The most germane evidence available directly supports the conclusion that the founding generation did not understand the right to keep and bear arms to extend to certain categories of people deemed too dangerous to possess firearms." *Binderup*, 836 F.3d at 367 (Hardiman, J., concurring). Consider the evidence from

the Pennsylvania, Massachusetts, and New Hampshire ratifying conventions that this Court has described as "highly influential." *Heller*, 554 U.S. at 604. Pennsylvania's convention saw a proposal that "no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals." The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents, *reprinted in* Bernard Schwartz, 2 *The Bill of Rights: A Documentary History* 662, 665 (1971). At the Massachusetts ratifying convention, Samuel Adams proposed that the "Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Journal of Convention: Wednesday, February 6, 1788, *reprinted in Debates and Proceedings in the Convention of the Commonwealth of Massachusetts Held in the Year 1788*, at 86 (Boston, William White 1856). And New Hampshire's convention proposed that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." Schwartz 761; see also *Nat'l Rifle Ass'n* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012) (recounting Revolutionary Era disarmament of Loyalists as a safety measure).

Simply put: in this country, non-dangerous, law-abiding and responsible citizens enjoy a fundamental right to keep and bear arms. And by refusing to acknowledge as-applied challenges to dispossession laws, contrary to *Heller*'s instruction, the court below

has created a new creature in our constitutional order: the fundamental right whose dimensions are drawn by legislatures. After all, "[a] crime's maximum possible punishment is 'purely a matter of legislative prerogative,'" *Binderup*, 836 F.3d at 351 (Ambro, J.) (quoting *Rummel* v. *Estelle*, 445 U.S. 263, 274 (1980)). "*Heller* was a constitutional decision. It recognized the scope of a passage of the Constitution. The boundaries of this right are defined by the Constitution. They are not defined by Congress." *United States* v. *Chovan*, 735 F.3d 1127, 1148 (9th Cir. 2013) (Bea, J., concurring). But if courts will now rubber-stamp *at Second Amendment step one* the disarmament of anyone who has triggered a potential sentencing range, the Second Amendment lacks content.

Worse still, the lower court held that even a pardoned felon, restored to the status of a law-abiding, responsible citizen, would still need to pass step two means-ends scrutiny to regain Second Amendment rights. But if an individual has been confirmed as a law-abiding, responsible citizen, what legitimate, let alone strong or compelling interest, might the state have in disarming him?

The court below justified this "apparently absurd result," App. 27a, on grounds that courts allegedly cannot be bothered with administering Second Amendment claims for relief. That wouldn't be a priority for federal courts these days, unlike, say, convicting and incarcerating people for possessing firearms in violation of some law that may or may not be constitutional

under the circumstances. The specter of "jury nullification" in felon-in-possession cases, App. 24a, is wholly unwarranted. An as-applied challenge such as Hamilton's presents in large part a question of law. At the very least, courts could refuse to give a Second Amendment instruction where a felon has not or cannot make a credible argument of non-dangerousness. And why, exactly, would it be a problem if prosecutors thought twice about pursuing charges that would result in an unconstitutional conviction?

2. The lower courts' circular approach to Hamilton's claims lack rigor. Faced with circuit precedent allowing as-applied challenges to felon disarmament laws, the district court stressed that such challenges are "*theoretically*" allowed, but, alas, held that they cannot be sustained by felons.

The Fourth Circuit was hardly better. The panel could not undo the allegedly theoretical recognition of such challenges by earlier panels, so it merely added a qualification: as-applied challenges may proceed, so long as the felon has been pardoned (and is thus no longer a felon), or the underlying offense has been declared unconstitutional (so the felon might as well seek a writ of coram nobis).

This turn of events was entirely predictable. The question in many federal courts is not whether they will ever find a Second Amendment violation, but rather, what rationale will they next conjure to avoid giving the provision any practical effect? "[T]he passage of time has seen *Heller*'s legacy shrink to the point that

it may soon be regarded as mostly symbolic." Richard Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L.J. 921, 962-63 (2016). Allowing decisions such as the one below to pass without review raises difficult questions about the value of "fundamental rights" generally, and the role of vertical precedent in the judicial hierarchy.

3. Any firearms prohibition based solely on arbitrary legislative classifications is bound to have absurd – and unconstitutional – applications. The list of such "apparently absurd" outcomes, App. 27a, can be long. See, *e.g.*, *Binderup*, 836 F.3d at 372 n.20 (Hardiman, J., concurring) (noting potential disarmament of the three previous Presidents for simple possession of marijuana, *Seinfeld*'s Newman and Kramer for redeeming bottle deposits across state lines, and anyone who might steal $150 worth of material from a Pennsylvania library).

But more than mere absurdity and injustice, the unchecked application of such laws can also be dangerous. It must be remembered that the Second Amendment reflects a policy choice: that the private ownership of firearms for lawful purposes, including self-defense, has a value that merits protection. One case in point involves former felon Thomas Yoxall, who in 2003 successfully asked that his 2000 felony theft conviction be reduced to a misdemeanor so that he might regain his firearm rights. Earlier this year, Yoxall used his gun to save an Arizona trooper who had been shot and was being beaten to death on the side of

a highway.[4] The harm posed by some individuals on account of non-violent crimes is, at best, theoretical. Trooper Andersson being alive today is real.

Yoxall is apparently an ordinary citizen. James Hamilton has been twice entrusted, first by Virginia and then by the Department of Homeland Security, to use firearms in the maintenance of public safety and security. Preventing him from possessing firearms at home for self-defense and for the defense of his family carries a potentially significant cost.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 2017

[4] See Megan Cassidy, *A visceral reaction with no time to spare: Arizona man gives emotional account of saving DPS trooper*, Arizona Republic, Jan. 24, 2017, available at http://www.azcentral.com/story/news/local/southwest-valley/2017/01/24/phoenix-man-gives-emotional-recount-taking-life-save-trooper/97005886/ (last visited June 12, 2017).

**APPENDIX A**

**PUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 16-1222**

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JAMES HAMILTON,

Plaintiff-Appellant,

v.

WILLIAM L. PALLOZZI, Superintendent of the Maryland State Police; BRIAN E. FROSH, Attorney General of Maryland,

Defendants-Appellees.

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CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; DOWNSIZE DC FOUNDATION; DOWNSIZEDC.ORG; GUN OWNERS FOUNDATION; GUN OWNERS OF AMERICA, INC.; INSTITUTE ON THE CONSTITUTION; THE HELLER FOUNDATION; UNITED STATES JUSTICE FOUNDATION,

Amici Supporting Appellant.

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Appeal from the United States District Court for the District of Maryland, at Baltimore. James K. Bredar, District Judge. (1:15-cv-02142-JKB)

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Argued: October 25, 2016 Decided: February 17, 2017

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Before SHEDD, DUNCAN, and FLOYD, Circuit Judges.

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Affirmed by published opinion. Judge Floyd wrote the opinion, in which Judge Shedd and Judge Duncan joined.

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**ARGUED:** Alan Gura, GURA & POSSESSKY, PLLC, Alexandria, Virginia, for Appellant. Mark Holdsworth Bowen, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Pikesville, Maryland, for Appellees. **ON BRIEF:** Cary Hansel, HANSEL LAW, P.C., Baltimore, Maryland, for Appellant. Brian E. Frosh, Attorney General of Maryland, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees. Michael Connelly, Ramona, California, for Amicus United States Justice Foundation; Robert J. Olson, Herbert W. Titus, William J. Olson, John S. Miles, Jeremiah L. Morgan, WILLIAM J. OLSON, P.C., Vienna, Virginia, for Amici Conservative Legal Defense and Education Fund, Downsize DC Foundation,

*DownsizeDC.org*, Gun Owners Foundation, Gun Owners of America, Inc., Institute on the Constitution, and The Heller Foundation.

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FLOYD, Circuit Judge:

Appellant James Hamilton is a convicted felon in Virginia who has had his civil rights restored by the Governor of Virginia and his firearms rights restored by the Virginia courts. Now, as a resident of Maryland, he desires to obtain a permit for a handgun and possess a long gun, both of which he is unable to do in Maryland absent a full pardon from the Governor of Virginia. He brought this as-applied Second Amendment challenge to Maryland's firearms regulatory scheme, arguing that the scheme is unconstitutional as applied to him. The district court dismissed his complaint for failure to state a claim, and Hamilton appealed. For the reasons discussed below, we affirm.

## I.

Hamilton pleaded guilty on November 6, 2006, in Virginia to three felonies: (1) credit card fraud, in violation of Va. Code § 18.2-195; (2) credit card theft, in violation of Va. Code § 18.2-192; and (3) credit card forgery, in violation of Va. Code § 18.2-193(1)(a). He was sentenced to four years imprisonment, which was suspended, a term of four years of probation, and ordered

to pay $1,247.90 in restitution and an additional $1,090.00 in court costs.[1]

On November 20, 2013, the Governor of Virginia restored Hamilton's rights to vote, hold public office, sit on a jury, and serve as a notary, but specifically did not restore his "right to ship, transport, possess or receive firearms, which must be restored in accordance with Va. Code. § 18.2-308.2." J.A. 22; *see also* J.A. 7, ¶ 10. His firearms rights were restored pursuant to that code section on April 22, 2014, by the Circuit Court for Spotsylvania County, Virginia. Hamilton subsequently was registered as an Armed Security Officer with the Virginia Department of Criminal Justice Services, and is certified in the use of handguns and shotguns. Additionally, as of the filing of his reply brief before this Court, he is employed through a contractor as a Protective Security Officer with the Department of Homeland Security (DHS). *See* Appellant's Reply Br. at 1. Hamilton is married, has three children, serves as the head coach of a junior league wrestling team, and has no history of violent behavior.

Hamilton desires to purchase and possess both a handgun and a long gun for self-defense within his own home, but asserts that he is unable to do so due to Maryland's regulatory scheme for firearm ownership.

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[1] Hamilton's complaint makes no mention of his guilty plea or probation period, only stating that he was "convicted." *See* J.A. 7, II 9. However, on a motion to dismiss for failure to state a claim, we may take judicial notice of the order of conviction, as it is a matter of public record. *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

Maryland prohibits possession of a handgun, rifle, or shotgun by anyone who has been "convicted of a disqualifying crime." *See* Md. Code Ann., Pub. Safety §§ 5-133(b)(1), 5-205(b)(1). A "disqualifying crime" includes both a violation classified as a felony in Maryland and a violation classified as a misdemeanor in Maryland that is punishable by more than two years imprisonment. *Id.* § 5-101(g).[2]

Additionally, in order to possess a handgun, a person must first apply for and obtain a permit from the Maryland State Police (MSP). *See id. §§* 5-101(r)(1), 5-117, 5-118, 5-303. As part of that application, the applicant must state under penalty of perjury that the applicant "has never been convicted of a disqualifying crime," and must certify that the applicant is not otherwise prohibited from possessing a handgun under § 5-133(b). *Id.* §§ 5-118(b)(3), 5-306(a)(2)(i). Possession of a handgun without a permit is a misdemeanor punishable by up to five years imprisonment, *id.* § 5-144, and possession of a rifle or shotgun in violation of the regulatory scheme is a misdemeanor punishable by up to three years imprisonment, *id.* § 5-205(d).

The crimes for which Hamilton was convicted in Virginia each have a Maryland equivalent: (1) receiving property by stolen, counterfeit, or misrepresented credit card, in violation of Md. Code Ann., Crim. Law

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[2] A crime committed out of state is a disqualifying crime if the Maryland equivalent is a disqualifying crime. *McCloud v. Dep't of State Police*, 44 A.3d 993, 995 (Md. 2012).

§ 8-209, a felony under the facts of Hamilton's conviction; (2) credit card theft, in violation of Md. Code Ann., Crim. Law § 8-204, a misdemeanor subject to eighteen months imprisonment; and (3) credit card counterfeiting, in violation of Md. Code Ann., Crim. Law § 8-205, a felony. Thus, on the basis of at least two of his Virginia felony convictions, Hamilton has two disqualifying convictions in Maryland.

Hamilton wanted to obtain a permit to carry a handgun from the MSP, and although he did not formally apply for such a permit, he made inquiries regarding obtaining a permit and was ultimately informed by an Assistant Attorney General that he could not possess a firearm in Maryland unless he obtained a full pardon from the Governor of Virginia. Fearing arrest, prosecution, incarceration, and fines, Hamilton has refrained from attempting to obtain a handgun, rifle, or shotgun.

This suit was brought in July 2015 against Appellees William L. Pallozzi, Superintendent of the MSP, and Brian E. Frosh, Attorney General of Maryland (collectively, the "Maryland Defendants"), both in their official capacities. Hamilton seeks a declaration that the regulatory scheme is unconstitutional under the Second Amendment as applied to him, and further seeks a permanent injunction against the Maryland Defendants and their employees from enforcing the regulatory scheme against him as it pertains to his Virginia convictions. The Maryland Defendants moved to dismiss the complaint for failure to state a claim, and Hamilton subsequently moved for summary judgment.

In their opposition to summary judgment, the Maryland Defendants raised a concern regarding justiciability.

With both motions fully briefed, the district court proceeded to decide the matter on the Maryland Defendants' motion to dismiss in a published opinion. *Hamilton v. Pallozzi*, 165 F. Supp. 3d 315 (D. Md. 2016). The district court first, with a great deal of hesitation, determined that the case was justiciable. *Id.* at 323. Then, the district court found that under our two-step approach to Second Amendment challenges as announced in *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010), Hamilton failed to state a claim at the first step. Specifically, the court held:

> [B]ecause of [Hamilton]'s criminal past, the State of Maryland has acted well within its discretion in choosing to withhold firearms privileges from him – at least until he obtains a full pardon under Virginia law. [Hamilton] has not shown that his factual circumstances "remove his challenge from the realm of ordinary challenges." Accordingly, he has not carried – *and cannot carry* his burden at *Chester* prong one, and the Court will dismiss his § 1983 claim.

*Hamilton*, 165 F. Supp. 3d at 328 (quoting *United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012)). The court dismissed the complaint with prejudice, and Hamilton timely noticed this appeal.

II.

Although the Maryland Defendants did not notice a cross-appeal of the district court's determination that the case was justiciable, the issue was briefed by the parties. *See* Appellant's Br. at 15-24; Appellee's Br. at 5-11. Justiciability is an issue of subject-matter jurisdiction, and we have an independent obligation to evaluate our ability to hear a case before reaching the merits of an appeal. *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 389 (4th Cir. 2004) (en banc). Once satisfied that we have jurisdiction, we will reach the merits of the appeal.

The district court decided this case on the basis of the Maryland Defendants' motion to dismiss rather than Hamilton's competing motion for summary judgment. *Hamilton*, 165 F. Supp. 3d at 318 n.1. As to justiciability, we review the factual findings for clear error and the legal conclusions de novo. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 154 (4th Cir. 2016). As to the merits of Hamilton's claim, we review de novo a dismissal for failure to state a claim, assume as true all factual allegations in Hamilton's complaint, and draw all reasonable inferences in Hamilton's favor. *Kloth v. Microsoft Corp.*, 444 F.3d 312, 319 (4th Cir. 2006). However, "we need not accept the legal conclusions drawn from the facts, and we need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Id.* (internal quotations and citations omitted).

## III.

Hamilton challenges two different statutes that have two different requirements for justiciability. The first challenge, as to the permitting scheme for a handgun, is one in which he argues the injury has already occurred. The second challenge, as to the criminalization of possession of a long gun, is a pre-enforcement challenge.

"When a party . . . brings a preenforcement challenge to a statute or regulation, it must [1] allege 'an intention to engage in a course of conduct arguably affected with constitutional interest,' and [2] there must exist 'a credible threat of persecution' under the statute or regulation." *Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 386 (4th Cir. 2001) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). There is no dispute that Hamilton meets both requirements for the preenforcement challenge. Thus, the focus of our discussion is on the challenge to the permit scheme, and we find the challenge justiciable.

### A.

The Maryland Defendants argue that because Hamilton has not yet applied for a permit, and might be denied a permit for reasons other than a disqualifying conviction, the issue of his disqualifying conviction may be irrelevant. Thus, they submit his claim is not ripe because of his failure to apply for a permit. Hamilton responds that he need not go through the futile

exercise of applying for a permit when he has been told already that it will be rejected. We agree with Hamilton.

As our sister circuits have recognized in the context of similar Second Amendment challenges, "the Government cannot so easily avoid suit when it has erected a regulatory scheme that precludes [a plaintiff] from truthfully completing the application form the Government requires for the purchase of a firearm." *Dearth v. Holder*, 641 F.3d 499, 502 (D.C. Cir. 2011); *see Horsley v. Trame*, 808 F.3d 1126, 1129 (7th Cir. 2015) (refusing to require an under-21 plaintiff to go through the process of appealing a denial of a gun possession permit where the plaintiff was challenging the requirement that under-21 applicants have a parent or guardian signature on their application); *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012) (explaining that "[f]ailure to apply for a license would not preclude Decastro's challenge if he made a 'substantial showing' that submitting an application 'would have been futile,'" but ultimately finding that the challenger did not make a substantial showing (quoting *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997))); *see also Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639, 643 (3d Cir. 1995) ("Litigants are not required to make such futile gestures to establish ripeness.").

We have yet to be so clear, but we agree with our sister circuits that plaintiffs are not required to undertake futile exercises in order to establish ripeness, and may demonstrate futility by a substantial showing.

Here, based on the pleadings and the evidence produced in support of justiciability,[3] Hamilton has been informed by no less than an Assistant Attorney General of Maryland that the state will not consider his disqualifying conviction removed unless and until Hamilton obtains a full pardon from the Governor of Virginia. J.A. 9 ¶ 20; J.A. 32. Thus, any attempt to apply for a permit – regardless of any other reason Maryland may potentially have to find Hamilton ineligible – would be futile. As such, we agree with the lower court and find that Hamilton's claims are ripe.

B.

The district court itself raised a concern in finding this case justiciable that although the application for a permit would have been futile, obtaining a pardon from the Governor of Virginia may not have been. *See Hamilton*, 165 F. Supp. 3d at 321-23.[4] The district court nonetheless concluded that this case was justiciable, after considering our decision in *Doe v. Virginia Department of State Police*, 713 F.3d 745 (4th Cir.), *reh'g*

[3] We may consider on a motion to dismiss evidence beyond the complaint and its integral documents when considering a factual challenge to subject-matter jurisdiction, as presented here, without converting the motion into one for summary judgment. *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005).

[4] When jurisdiction is implicated, it is irrelevant to our standard of review whether the issue was raised by a litigant or by the lower court. *Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009).

*en banc denied*, 720 F.3d 212 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1538 (2014).

In *Doe*, the plaintiff was registered as a sex offender and was not permitted onto school or church grounds without permission from the school board or church, respectively, in addition to permission from the state court. 713 F.3d at 751. The plaintiff declined to obtain relief using the prescribed methods, and instead brought suit pursuant to 42 U.S.C. § 1983. This Court held that:

> [Doe] does not allege harm merely from being placed on the Registry, but rather from the consequences her categorization entails for her ability to access school and church property. However, as of yet, these consequences do not affect her with finality, as she has not taken any of the steps necessary to access those properties. Because Doe has not attempted to petition a Virginia circuit court, the [School] Board, or any church, it is far from clear whether she will ultimately be barred from entering those properties. Therefore, any injury to her [constitutional] rights she would suffer from not being able to enter a school or church remains hypothetical.

*Id.* at 754. We concluded that requiring Doe to "seek permission from state entities prior to bringing suit in federal court does not amount to requiring exhaustion of state remedies for her constitutional claims." *Id.* at 754 n.5. We also held that "[b]ecause Doe has yet to petition a Virginia circuit court for permission to enter school or church property, all of her constitutional

claims are dependent on future uncertainties and thus not ripe for judicial decision." *Id.* at 758-59.

The dissent in *Doe* feared that this holding amounted to an exhaustion requirement, in contravention of the Supreme Court's holding in *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982). *See id.* at 764 (King, J., dissenting). In a concurring opinion responding to this concern, Judge Keenan explained that the decision turned on the "clear distinction between the requirement that administrative remedies be exhausted and the requirement that a challenged action be final before it is judicially reviewable." *Id.* at 762 (Keenan, J., concurring) (citing *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192 (1985)). In elucidating this distinction, Judge Keenan explained that we were not requiring Doe to file suit in state court contesting the legality of her designation as a sex offender, nor appeal a rejection from the school board to state court; rather, we required her to obtain that initial decision. *Id.* at 762-63. Judge Keenan concluded that "[t]he Virginia legislature expressly has designated the Virginia circuit courts and the local school boards as the initial decisionmakers in cases of this nature. . . . Manifestly, federal courts do not possess such expertise, and should not serve as vehicles for parties to circumvent state law by considering premature constitutional challenges." *Id.* at 763. We reaffirm this position today, and find the instant matter distinguishable.

Hamilton aptly notes in addressing the *Doe* issue that "Virginia's Governor is not an 'initial decisionmaker,' or indeed, any kind of decisionmaker, as to

what Maryland law forbids or how it applies." Appellant's Br. at 22-23. We agree with this. But he then goes on to argue that requiring him to seek a pardon from the Governor of Virginia, who has already restored all of his civil rights except for firearms ownership, would be an administrative hurdle in violation of *Patsy.* On this point, he is incorrect.

The initial decisionmaker here is the MSP who is in charge of determining whether a previous conviction is disqualifying. The Governor of Virginia is entirely outside the process of determining who is eligible for handgun permits in Maryland. Hamilton has received his initial decision, albeit somewhat informally, that he is ineligible to obtain a permit on the basis of his disqualifying Virginia convictions. He thus is "aggrieved from a final, reviewable decision," *see Doe*, 713 F.3d at 762 (Keenan, J., concurring), and the "consequences do . . . affect [him] with finality," *see id.* at 754 (majority opinion). Therefore, we affirm the district court's finding that the case is justiciable, and proceed to the merits of Hamilton's claim.

## IV.

### A.

The Supreme Court has twice recognized that "prohibitions on the possession of firearms by felons" are presumptively lawful, first in *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008), and again two years later in *McDonald v. City of Chicago*, 561

U.S. 742, 786 (2010).[5] Operating under this presumption of lawfulness, we have recognized the possibility that an as-applied challenge to a felon disarmament law could succeed in rebutting the presumption. *See, e.g.*, *United States v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012). The framework under which we review a Second Amendment challenge has been laid out clearly:

> *Chester* established a two-prong test for assessing a Second Amendment challenge. The first prong, reflecting *Heller's* observation that the Second Amendment embodies rights existing at its ratification, requires our historical review to evaluate whether those rights, as understood in 1791, are "burdened or regulated" by the statute in question. *Chester*, 628 F.3d at 680. If so, under the second prong, the statute must pass constitutional muster in accordance with the appropriate level of judicial scrutiny. *Id. Moore* refined and crystallized our approach, however, explaining that "the *Chester* analysis is more streamlined when a presumptively lawful regulatory measure is under review." *Moore*, 666 F.3d at 318.
>
> In order for [a party] to rebut the presumption of lawfulness regarding § 922(g)(1) as applied to him, he "must show that his factual circumstances remove his challenge from the realm

[5] The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

> of ordinary challenges." *Moore*, 666 F.3d at 319.

*United States v. Smoot*, 690 F.3d 215, 221 (4th Cir. 2012). Our two-step approach in *Chester* derives from the Third Circuit's opinion in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010). *See Chester*, 628 F.3d at 680-83.

Using our two-step approach, we have rejected challenges to disarmament laws from domestic violence misdemeanants, *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1937 (2012), persons subject to domestic violence protective orders, *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012), and undocumented aliens, *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 58 (2013). With respect to felon disarmament provisions, we have rejected challenges from not only felons with "violent" predicate offenses, *e.g.*, *Smoot*, 690 F.3d at 221, but also felons with "non-violent" predicate offenses, *United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012).

The Maryland laws at issue are substantially similar to the federal prohibition on possession of guns by convicted felons found at 18 U.S.C. § 922(g)(1). Thus, our discussion focuses primarily on case law surrounding § 922(g), as the analysis from those cases is equally applicable to the challenged Maryland laws.[6]

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[6] Supporting this, the parties and the district court both cited to case law surrounding 18 U.S.C. § 922(g)(1). Further, the Maryland gun laws were expanded to include the disarmament of

The district court determined that Hamilton did not fall within the category of "law-abiding responsible citizens" to whom Second Amendment protections enure, and so ended its inquiry at step one of the streamlined analysis. *Hamilton*, 165 F. Supp. 3d at 326-28. Hamilton's first argument is that the district court did not actually engage with the streamlined analysis of *Moore*. We disagree, finding that Hamilton misreads both our precedent and the district court's opinion.

Hamilton argues that in a streamlined analysis, we "essentially dispense[] with the second step in as-applied felon-disarmament challenges," Appellant's Br. at 29, assume there can be no justification for disarming someone who is a "law-abiding, responsible citizen," and evaluate all the factual circumstances of the challenger at step one of the *Chester* inquiry. This is incorrect, and misreads the holding of *Moore*.

The streamlined portion of the analysis as explained in *Moore* is that for a presumptively lawful regulation, at the first step of the Second Amendment inquiry, we need not undertake an extensive historical inquiry to determine whether the conduct at issue was understood to be within the scope of the Second Amendment at the time of ratification. *Moore*, 666 F.3d at 318-19; *see Pruess*, 703 F.3d at 245-46 & n.3 ("Because the presumption of constitutionality from *Heller* and *Moore* governs, we need not pursue an analysis of

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all felons as opposed to only violent felons on the basis of the federal disqualification. *See Oglesby v. State*, 109 A.3d 1147,1158 (Md. 2015); *Brown v. Handgun Permit Review Bd.*, 982 A.2d 830, 842-43 (Md. Ct. Spec. App. 2009).

the historical scope of the Second Amendment right."). However, as we have recently reaffirmed, we still conduct the traditional second step of applying an appropriate means-end scrutiny even for laws that receive a streamlined analysis. *See United States v. Hosford*, 843 F.3d 161, 167 (4th Cir. 2016) (citing *Woollard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013)).

At the first step, we effectively supplant the historical inquiry with the more direct question of whether the challenger's conduct is within the protected Second Amendment right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635; *Moore*, 666 F.3d at 318-19; *see also Pruess*, 703 F.3d at 245 (explaining that "a presumptively lawful regulation could not violate the Second Amendment unless, as applied, it proscribed conduct 'fall[ing] within the category of . . . *law-abiding responsible* citizens . . . us[ing] arms in defense of hearth and home' (quoting *Moore*, 666 F.3d at 319) (further internal quotations omitted) (alterations made by quoting source)).

Additionally, we have explained that in an as-applied challenge to a presumptively lawful firearms regulation, "a litigant claiming an otherwise constitutional enactment is invalid as applied to him must show that his factual circumstances remove his challenge from the realm of ordinary challenges." *Moore*, 666 F.3d at 320. Indeed, after explaining the streamlined analysis, the court in *Moore* held that Moore's challenge failed at step one of *Chester* because "Moore

undoubtedly flunks the 'law-abiding responsible citizen' requirement." *Id.*

If Hamilton is able to demonstrate that he is outside the "realm of ordinary challenges," such that his conduct is within the protected right of "law-abiding, responsible citizens to use arms in defense of hearth and home," we are still then required to proceed to the means-end scrutiny discussed in *Chester*. Therefore, the streamlined analysis of *Moore* requires that we determine at step one whether Hamilton is a "law-abiding, responsible citizen," there being no dispute between the parties that he intends to own arms "in defense of hearth and home."[7]

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[7] Although briefly addressed by the Maryland Defendants, *see* Appellee's Br. at 16-17, our case law appears to consider these as two separate and independent inquiries for which a Second Amendment challenger must plead factual circumstances that remove the challenger's circumstances from the "realm of ordinary challenges." We have rejected challenges as being in the realm of ordinary challenges with respect to "in defense of hearth and home" on the basis that a "fear of being robbed . . . is far too vague and unsubstantiated to remove [a] case from the typical felon in possession case." *Moore*, 666 F.3d at 320; *see Smoot*, 690 F.3d at 222 (rejecting a desire to possess a weapon premised on a tip that "other people were looking for [the defendant]" on the same basis); *see also Pruess*, 703 F.3d at 246 (rejecting desire to possess ammunition primarily for hunting purposes on the same basis). There is some concern that Hamilton's pleaded basis for owning a gun – "self-defense within his own home," J.A. 5 ¶ 1 – is precisely the kind of "far too vague and unsubstantiated" fear we have rejected before. In light of what will eventually be a denial of Hamilton's challenge on the basis that he is not a "law-abiding, responsible citizen," we do not address this further.

B.

In arguing for how he is a "law-abiding, responsible citizen," Hamilton relies on dicta from the Third Circuit establishing two categories of felons who might raise successful as-applied challenges and argues that he falls within both: (1) "a felon convicted of a minor, non-violent crime [who] might show that he is no more dangerous than a typical law-abiding citizen;" and (2) "a felon whose crime of conviction is decades-old [and who] poses no continuing threat to society." *United States v. Barton*, 633 F.3d 168,174 (3d Cir. 2011), *overruled-in-part by Binderup v. Att'y Gen. U.S.*, 836 F.3d 336 (3d Cir. 2016) (en banc). For the reasons that follow, we today hold that a challenger convicted of a state law felony generally cannot satisfy step one of the *Chester* inquiry, and accordingly disagree that these are bases on which a challenger may attempt to satisfy step one of the *Chester* inquiry.

1.

As the citation indicates, the dicta on which Hamilton relies has been overruled in a recent fractured en banc opinion from the Third Circuit, that "reject[s] [*Barton's*] claim that the passage of time or evidence of rehabilitation will restore the Second Amendment rights of people who committed serious crimes." *Binderup*, 836 F.3d at 349-50.[8] In overruling *Barton*,

[8] This portion of the opinion technically only garnered support from seven of the fifteen judges of the en banc court. However, the overruling of the dicta in *Barton* can be considered the opinion of a majority of the court, because as acknowledged by the

the Third Circuit explained that "[a] challenger's risk of violent recidivism tells us nothing about whether he was convicted of a serious crime, and the seriousness of the purportedly disqualifying offense is our sole focus throughout *Marzzarella's* first step." *Id.* at 350. The court held that "only the seriousness of the purportedly disqualifying offense determines the constitutional sweep of statutes like § 922(g)(1) at step one." *Id.*

The Third Circuit in *Binderup* also explained that "to satisfy step one in the context of an as-applied challenge to § 922(g)(1), a challenger must prove that he was not previously convicted of a serious crime . . . [and] evidence of a challenger's rehabilitation or his likelihood of recidivism is not relevant to the step-one analysis." *Id.* at 356. The court relied on the "seriousness" of an offense as the narrowest basis for its holding, determining that the traditional justification for denying felons the right to bear arms stemmed from the disarmament of "unvirtuous citizens" who had committed "serious criminal offense[s]." *Id.* at 348-49. This comports with our Circuit's holding in *United States v. Carpio-Leon*, 701 F.3d 974, 979-80 (4th Cir. 2012), and relies on the same language from *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010), on which we relied in *Carpio-Leon*.[9]

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court in *Binderup*, three additional judges expressed a desire to overrule *Barton* entirely, finding it wholly irreconcilable with *Marzzarella*, and refused to agree with leaving any portion of *Barton* intact. *See Binderup*, 836 F.3d at 339 n.1.

[9] Indeed, the court noted that this Circuit "endorse[s] the 'virtuous citizen' justification for excluding felons and felon-equivalents

The court in *Binderup* ultimately upheld the as-applied challenges presented, but the court noted that its holding was limited to state-law misdemeanants who nonetheless fall within the sweep of § 922(g)(1). 836 F.3d at 353 n.6 (noting in dicta that a state-law felon's "burden would be extraordinarily high – and perhaps insurmountable" to show that the crime was not serious).[10]

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from the Second Amendment's ambit." *Binderup*, 836 F.3d at 348 (citing, *inter alia, Carpio-Leon*, 701 F.3d at 979-80).

[10] The court broke down when it came to deriving and applying a standard. A majority of the court voted to find the as-applied challenges successful, but split on the reasoning. Only three judges ultimately signed onto the portion of the opinion relying on the seriousness of the prior convicted offense as the basis for determining whether a challenger satisfies the first step of the two-step inquiry, though the court considers it controlling as the narrowest ruling *See Binderup*, 836 F.3d at 356. The concurring opinion on behalf of five judges of the court rejected the idea that "virtue" was the underlying cause of felon disarmament and would have held that "non-dangerous persons convicted of offenses unassociated with violence may rebut the presumed constitutionality of § 922(g)(1) on an as-applied basis." *Id.* at 358 (Hardiman, J., concurring-in-part and concurring in judgment). The concurrence would prefer to rest its decision on the violence of the underlying crime rather than the seriousness of the offense, and also rejected overturning the relevant portion of *Barton*. *Id.* at 361-62, 365-66. The concurrence additionally believed that no means-end scrutiny was needed once the as-applied challenger passed step one of the *Marzzarella/Barton* test when challenging a "presumptively lawful regulation that *entirely bars* the challenger from exercising the core Second Amendment right." *Id.* at 363. This is presumably the position Hamilton is arguing for us to adopt here, and we decline to do so.

2.

We find the main opinion in *Binderup* well-reasoned and thoughtful, but decline to adopt it in its entirety. Rather than adopting the "seriousness" test elucidated in *Binderup* at step one of the *Chester* inquiry, we simply hold that conviction of a felony necessarily removes one from the class of "law-abiding, responsible citizens" for the purposes of the Second Amendment, absent the narrow exceptions mentioned below.

Where the sovereign has labeled the crime a felony, it represents the sovereign's determination that the crime reflects "grave misjudgment and maladjustment," as recognized by the district court. A felon cannot be returned to the category of "law-abiding, responsible citizens" for the purposes of the Second Amendment and so cannot succeed at step one of the *Chester* inquiry, unless the felony conviction is pardoned or the law defining the crime of conviction is found unconstitutional or otherwise unlawful.[11]

By confining the step one analysis to the challenger's criminal history, we consider only the conviction or convictions causing the disability to the challenger. As a result, we also hold that evidence of

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[11] However, we leave open the possibility that persons who are not convicted of felonies, but otherwise fall within the sweep of what we refer to as "felon disarmament laws," such as persons convicted of crimes labeled as a misdemeanors [sic], but punishable by a term of prison such that the misdemeanor falls within the sweep of a felon disarmament law, may still potentially succeed at step one of the *Chester* inquiry.

rehabilitation, likelihood of recidivism, and passage of time are not bases for which a challenger might remain in the protected class of "law-abiding, responsible" citizen.[12]

We reject rehabilitation, recidivism, and passage of time evidence at step one of *Chester* for the additional greater consequences it has on our criminal justice system. Were we to permit this type of evidence on an as-applied Second Amendment challenge, it would invite any criminal defendant charged with a violation of § 922(g) or a state law analogue to argue what is essentially jury nullification. The criminal defendant would be able to freely admit violation of the law in the past, but request that the jury not convict on the grounds of rehabilitation, unlikeliness of re-offending, or the length of time that had passed since conviction. We do not believe that the Second Amendment so requires in the context of felony convictions.

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[12] We expressly do not close these off as being potentially relevant inquiries in bringing as-applied challenges to other disarmament laws, for example, laws disarming the mentally ill such as 18 U.S.C. § 922(g)(4) and Md. Code Ann., Pub. Safety § 5-133(b)(7), (9), & (10). Indeed, the Sixth Circuit has recently held that a person who was involuntarily committed thirty years ago during a brief depressive episode successfully proved that 18 U.S.C. § 922(g)(4), the federal disarmament provision for the mentally ill, was unconstitutional as applied to him using a highly similar two-step analysis. *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016) (en banc).

C.

Having clarified the standard applicable to Hamilton's challenge, we now apply our two-step approach to the circumstances of this case, and find that Hamilton fails at step one of the *Chester* inquiry. Hamilton cannot rebut the presumption that he falls outside the category of "law-abiding, responsible citizens," and so cannot succeed in his as-applied challenge.

1.

The district court found it dispositive that Hamilton was convicted of three different felonies under Virginia law that it considered serious property crimes, regardless of their non-violent nature. *See Hamilton*, 165 F. Supp. 3d at 326. Because Hamilton's theft and fraud crimes were "black-letter *mala in se* felonies reflecting grave misjudgment and maladjustment," the district court found no possibility that he was a "law-abiding, responsible citizen." *Id.* The court further rejected the contention that merely having committed non-violent offenses meant that Hamilton should be considered a "law-abiding, responsible citizen." *Id.* at 326-27.

The district court's findings comport with our holding today. Hamilton's commission of theft and fraud crimes resulting in over $1,200.00 in court-ordered restitution that are considered to be felonies

by Maryland is dispositive of his challenge.[13] Theft, fraud, and forgery are not merely errors in filling out a form or some regulatory misdemeanor offense; these are significant offenses reflecting disrespect for the law.[14]

Hamilton is a state law felon, has not received a pardon, and the basis for his conviction has not been declared unconstitutional or otherwise unlawful. As such, he cannot state a claim for an as-applied Second Amendment to Maryland's regulatory scheme for handguns and long guns.

2.

Finally, Hamilton submits that his (1) restored firearms rights in Virginia; and (2) ability to possess firearms in the course of his employment as not only

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[13] The fact that both Virginia, where Hamilton committed the crime, and Maryland, the disarming state, consider at least two of the charges to be felonies only underscores this point.

[14] Hamilton tries to paint these crimes in the least negative light, saying that he "had agreed to let an individual buy him a laptop on a stolen credit card." Appellant's Br. at 5. However, Hamilton does nothing to counter the conclusion that these reflect significant disrespect for the law, neglecting the fact that stolen credit cards damage not only the actual cardholder, but also the merchant from whom the merchandise was purchased and the bank that issued the card. Hamilton additionally argues that because he has pleaded that he is "responsible" and "law-abiding" we must accept these characteristics as true on a motion to dismiss. This is incorrect. These are more appropriately considered "legal conclusions drawn from the facts" which we strike and disregard on a motion to dismiss. *See Kloth*, 444 F.3d at 319.

an armed guard in Virginia but also as an armed Protective Services Officer for DHS in Washington, D.C. will work absurd results should we reject his challenge. However, the apparently absurd result does not ultimately affect the outcome of this case, and neglects to consider the impact of federalism on his challenge.

For the purposes of Maryland law, Hamilton is deemed a felon. Maryland has determined that unless and until Virginia issues Hamilton a full pardon, he will continue to be deemed a felon in Maryland. In our federal system, each state is permitted to create its own laws so long as they do not run afoul of the Constitution, federal laws, and treaties, *see* U.S. Const. art. VI, cl. 2., specifically as relevant here, the Second Amendment. Virginia may have opted to restore Hamilton's gun ownership rights within its borders, but Maryland need not do so within its own borders.[15] Maryland has opted to enforce its own requirement that Hamilton has not yet met, namely, that the disabling felony be pardoned by the executive in the jurisdiction wherein Hamilton was convicted.

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[15] Amicus Gun Owners of America, Inc. attempts to argue otherwise based on the Full Faith and Credit Clause. Both parties have disavowed such an argument, and we agree it is incorrect. "The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)).

Further, the restoration of firearms rights to a felon in Virginia appears to be a rather pro forma matter. Once a felon has had his or her rights restored by the Governor, that person may then petition the court for a permit to possess or carry firearms in Virginia, which the court "may, in its discretion and for good cause shown" grant. Va. Code § 18.2-308.2(C). The order entered here by the Spotsylvania County Circuit Court indicates no special factors related specifically to Hamilton; rather, the order merely indicates that Hamilton met the statutory requirements in the Commonwealth of Virginia, and as such restored his right to possess firearms within the boundaries of the Commonwealth. J.A. 24.

With respect to his ability to possess arms in the course of his employment, this again is a matter of different sovereigns making different determinations about gun ownership rights, bound only by the strictures of the Second Amendment. Although Virginia and DHS have determined that Hamilton may be armed in his employment, this additionally entails acting under supervision and ultimately under some form of accountability to another person.

None of this mandates that Maryland must permit Hamilton to be armed in his home, nor does it make Hamilton "law-abiding," although it may provide some evidence that he is "responsible." It further underscores the reasons different sovereigns may have to permit a person to be armed in certain contexts, and possibly not in others.

V.

In sum, today we hold that a state law felon cannot pass the first step of the *Chester* inquiry when bringing an as-applied challenge to a law disarming felons, unless that person has received a pardon or the law forming the basis of conviction has been declared unconstitutional or otherwise unlawful. Relatedly, we hold that evidence of rehabilitation, the likelihood of recidivism, and the passage of time may not be considered at the first step of the *Chester* inquiry as a result. Hamilton thus fails at step one of the *Chester* analysis. Accordingly, for the foregoing reasons, the judgment of the district court is

AFFIRMED.

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| **JAMES HAMILTON,** | * | |
| **Plaintiff** | * | |
| | * | |
| **v.** | * | **CIVIL NO. JKB-15-2142** |
| **WILLIAM L. PALLOZZI, *et al.*,** | * | |
| | * | |
| **Defendants** | * | |

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### MEMORANDUM

(Filed Feb. 18, 2016)

James Hamilton ("Plaintiff") brought an action under 42 U.S.C. § 1983 against William L. Pallozzi in his official capacity as Superintendent of the Maryland State Police ("MSP"), and against Brian E. Frosh in his official capacity as Attorney General of Maryland (collectively, "Defendants"). Plaintiff challenges the constitutionality of certain Maryland statutes that Defendants are charged with enforcing; Plaintiff alleges that these statutes, as applied to him, violate his Second Amendment rights.

Now pending before the Court is Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (ECF No. 7.) Also pending is Plaintiffs Motion for Summary Judgment pursuant to Rule 56. (ECF No. 11.) The issues have been briefed, and no hearing is required, *see* Local Rule 105.6 (D.

Md. 2014). For the reasons explained below, Plaintiffs Motion will be DENIED, and Defendants' Motion will be GRANTED.

## *I. Background*[1]

Plaintiff, a Maryland resident, was convicted in November 2006 in Rockbridge County, Virginia, of three felony offenses: credit-card theft in violation of Va. Code Ann. § 18.2-192; credit-card forgery in violation of Va. Code Ann. § 18.2-193; and credit-card fraud in violation of Va. Code Ann. § 18.2-195. (ECF No. 1 ¶¶ 1, 9.) Plaintiff received a four-year suspended sentence, and he paid restitution and court costs totaling $2337.90. (*Id.* ¶ 9.) Although Plaintiff's felony convictions triggered forfeiture of certain of his political rights in Virginia, those rights were restored in 2013 and 2014. (*Id.* ¶¶ 9-11.)[2]

According to Plaintiff, in the years following his convictions he has become a "responsible, law-abiding

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[1] Because the Court will resolve this action on Defendants' Motion to Dismiss, the facts are recited here as alleged in the Complaint. *See Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997).

[2] Specifically, the Governor of Virginia restored Plaintiff's rights to vote, hold public office, sit on a jury, and serve as a notary (ECF No. 1 ¶ 10), while the Circuit Court for Spotsylvania County, Virginia, restored Plaintiff's right to bear arms (*id.* ¶ 11). The process for securing restoration of civil rights differs under Maryland law: in Maryland, a "gubernatorial pardon of [a] felony conviction [is] necessary to restore . . . firearm possession rights." *Washington v. United States*, Crim. No. RWT-11-0380, 2015 WL 4069489, at *1 n.1 (D.Md. July 2, 2015).

American citizen." (*Id.* ¶ 15.)[3] A married father of three children, he serves as head coach of a junior-league wrestling team; he is also an armed security officer registered with the Virginia Department of Criminal Justice Services. (*Id.* ¶¶ 13-14.) In spite of his past crimes, Plaintiff alleges that he has "no history of violent behavior." (*Id.* ¶ 15.) He wishes to obtain a handgun and a long gun, ostensibly for self-defense purposes within his Maryland home. Unfortunately for Plaintiff, he is barred from possessing such weapons due to the operation of certain Maryland statutes (collectively, "Firearms Prohibitions"). Specifically, Md. Code Ann., Pub. Safety § 5-133(b)(1) prohibits any person who has been convicted of a "disqualifying crime" from possessing a "regulated firearm,"[4] while § 5-205(b)(1) forbids any person who has been convicted of such a crime from possessing a rifle or shotgun. The glossary accompanying these statutes defines "disqualifying crime" to include any offense that is classified as a felony in Maryland. § 5-101(g)(2). Two of

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[3] Several of Plaintiff's allegations seem at first blush oddly self-congratulatory: he avers, for instance, that he is neither a fugitive from justice nor a habitual drunkard and that he has never been adjudicated incompetent. (ECF No. 1 ¶¶ 6-7.) It turns out, however, that these averments correspond to specific proscriptions on handgun and long-gun possession under Maryland law. *See* Md. Code Ann., Pub. Safety §§ 5-133, -205. Of course, the fact that Plaintiff is not barred from possessing regulated weapons under *most* of the enumerated proscriptions has no bearing on the propriety of the *one* proscription that plainly applies to him – conviction of a "disqualifying crime," discussed *infra*.

[4] Handguns are included on the list of regulated firearms. *See* Md. Code Ann., Pub. Safety § 5-101(r)(1).

Plaintiff's Virginia convictions fit within this rubric.[5] Possession of a restricted weapon in violation of the Firearms Prohibitions is a misdemeanor, punishable by a fine and/or incarceration. *See* §§ 5-144(b), -205(d).

At some unspecified point, Plaintiff contacted the MSP Licensing Division to request a Handgun Wear and Carry Permit. (ECF No. 1 ¶ 20.) Plaintiff was advised that, due to his disqualifying convictions, he cannot possess a firearm in Maryland unless he first obtains a full pardon from the Governor of Virginia. (*Id.*) Subsequently, on July 22, 2015, Plaintiff filed the present action under 42 U.S.C. § 1983, claiming that enforcement of the Firearms Prohibitions violates his Second and Fourteenth Amendment rights on an as-applied basis.[6] Plaintiff seeks declaratory and injunctive relief, as well as costs and attorneys' fees.

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[5] Plaintiff acknowledges that Virginia's credit-card forgery statute is equivalent to Maryland's credit-card counterfeiting statute, Md. Code Ann., Crim. Law § 8-205, while Virginia's credit-card fraud statute is equivalent to Maryland's statute proscribing receipt of property by stolen, counterfeit, or misrepresented credit card, § 8-209. Violations of these Maryland statutes would constitute felonies on the facts of Plaintiff's conviction. (*See* ECF No. 1 ¶ 19.) *See also McCloud v. Dep't of State Police*, 44 A.3d 993, 1001 (Md. 2012) (holding that out-of-state convictions are included within the definition of "disqualifying crimes" under the Firearms Prohibitions); *Jones v. State*, 23 A.3d 880, 882 (Md. 2011) (same).

[6] Although Plaintiff cites the Fourteenth Amendment, he does not appear to be raising a freestanding Due Process or Equal Protection claim, and the Court assumes that Plaintiff's Fourteenth Amendment reference is for incorporation purposes only. *See McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) ("We . . . hold that the Due Process Clause of the Fourteenth Amendment

On October 6, 2015, Defendants moved to dismiss. (ECF No. 7.) Plaintiff filed a response in opposition (ECF No. 10); thereafter, Defendants did not reply within the period prescribed by Local Rule 105.2(a) (D. Md. 2014). Then, on October 26, 2015, Plaintiff moved for summary judgment. (ECF No. 11.) Plaintiff's summary-judgment motion is fully briefed (ECF Nos. 11-1, 14 & 18), and both motions are ripe for decision.

## *II. Standard of Review Under Rule 12(b)(6)*[7]

A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In analyzing a Rule 12(b)(6) motion, the Court views all well-pleaded allegations in the light most favorable to the plaintiff. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). Nevertheless, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In conducting its analysis, the Court "need

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incorporates the Second Amendment right recognized in [*District of Columbia v.* ]*Heller*.").

[7] As noted above, Plaintiff moved for summary judgment shortly after filing his response in opposition to Defendants' Motion to Dismiss. However, the Court concludes herein that Plaintiff failed to state a claim for which relief can be granted. Because of the Court's determination, and because the exhibits appended to the summary-judgment briefs do nothing to alter the Court's analysis, the Court will resolve this matter under Rule 12(b)(6) without conducting a separate and superfluous analysis under Rule 56.

not accept legal conclusions couched as facts or 'unwarranted inferences, unreasonable conclusions, or arguments.'" *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (quoting *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008)).

## *III. Analysis*

### *A. Constitutional Standing and Ripeness*

Before turning to the merits of Plaintiff's § 1983 claim, the Court must address a justiciability concern that Defendants first raised in their response to Plaintiff's Motion for Summary Judgment.[8] Defendants contend that "Plaintiff's claim is not ripe for adjudication because [he] has not even applied to obtain a handgun carry permit or handgun qualification license and . . . Defendants have taken no action . . . against Plaintiff." (ECF No. 14 at 5.)

Federal courts are courts of limited jurisdiction, the contours of which are circumscribed by the case-or-controversy requirement of Article III. The doctrines of

[8] Despite Plaintiff's assertion that "it is too late in the day for Defendants to suddenly claim that their dispute with [Plaintiff] isn't ripe" (ECF No. 18 at 5), ripeness is a jurisdictional matter that "may be raised at any point during the proceedings and may . . . be raised *sua sponte* by the court." *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004); *see also Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013) ("A claim should be dismissed as unripe if the plaintiff has not yet suffered injury and any future impact 'remains wholly speculative.'" (quoting *Gasner v. Bd. of Supervisors*, 103 F.3d 351, 361 (4th Cir. 1996))), *reh'g denied*, 720 F.3d 212 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1538 (2014).

constitutional standing and ripeness are integral components of that requirement. To establish standing, "(1) the plaintiff must allege that he or she suffered an actual or threatened injury that is not conjectural or hypothetical[;] (2) the injury must be fairly traceable to the challenged conduct; and (3) a favorable decision must be likely to redress the injury." *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). In the context of a preenforcement challenge to a penal statute, a litigant may satisfy constitutional standing where (1) the litigant alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest" but (2) there exists a "credible threat of prosecution" under the challenged law. *W. Va. Citizens Def. League, Inc. v. City of Martinsburg*, 483 F. App'x 838, 839 (4th Cir. 2012) (per curiam) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).[9]

Ripeness overlaps with standing: the ripeness doctrine "prevents judicial consideration of issues until a controversy is presented in 'clean-cut and concrete form.'" *Miller*, 462 F.3d at 318-19 (quoting *Rescue Army v. Mun. Court*, 331 U.S. 549, 584 (1947)). In evaluating ripeness, courts must "'balance the fitness of the issues for judicial decision [with] the hardship to the parties of withholding court consideration.' A case

[9] *See also Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 774 n.3 (D. Md. 2014) (finding that plaintiff-challengers to Maryland assault-weapons ban faced credible threat of prosecution and thus brought justiciable claims where they alleged that they possessed banned weapons and would purchase additional banned weapons but for the ban), *vacated in part on other grounds sub nom. Kolbe v. Hogan*, No. 14-1945, 2016 WL 425829 (4th Cir. Feb. 4, 2016).

is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Id.* at 319 (quoting *Franks v. Ross*, 313 F.3d 184, 194 (4th Cir. 2002)).

The thrust of Defendants' justiciability argument is that the MSP never had an opportunity to formally determine whether Plaintiff qualifies for a handgun license or carry permit. Had Plaintiff submitted an application, Defendants reason, he would have been subject to a background check – and he might have been denied a license for a reason unrelated to his felony record, mooting his argument in these proceedings. (ECF No. 14 at 7-8.) Plaintiff counters that he "refrained from filling out a useless application" because agents at the MSP Licensing Division *told him* that his application would be futile; the Maryland Office of the Attorney General subsequently confirmed the MSP's position. (ECF No. 18 at 6.)[10]

The Court finds Plaintiff's position here more persuasive. While Defendants speculate that Plaintiff *might* have been denied a license for some unknown

[10] To prove his point, Plaintiff supplies a declaration by his former attorney, Margaret Love, as well as an e-mail chain between Ms. Love and Susan Howe Baron, an assistant attorney general in Maryland. (ECF Nos. 18-2 & 18-3.) Although the Court generally confines its analysis to the four corners of the Complaint at the 12(b)(6) stage, the Court may look to extrinsic evidence in determining a threshold justiciability question, *see Neal v. Residential Credit Sols., Inc.*, Civ. No. JKB-11-3707, 2013 WL 428675, at *1 (D. Md. Feb. 1, 2013). Accordingly, the Court has taken notice of Plaintiff's exhibits.

reason, they provide no evidence whatsoever in support of their conjecture. Plaintiff, conversely, denies having any disqualifying characteristics other than his felony convictions; in fact, he included pleadings in his Complaint that specifically negate most of the disabling factors under Md. Code Ann., Pub. Safety §§ 5-133, -205. And Defendants never refute Plaintiff's basic assertion – *i.e.*, that because of the Firearms Prohibitions, he is barred from lawfully possessing a handgun or long gun in the State of Maryland. Had Plaintiff gone through the motions of formally applying for a license or carry permit, it is uncontroverted that the MSP would have denied his request. The law does not require Plaintiff to avail himself of a hopeless administrative process before looking to the courts for relief. *See Thetford Props. IV Ltd. P'ship v. U.S. Dep't of Housing & Urban Dev.*, 907 F.2d 445, 449 (4th Cir. 1990) ("To be sure, no litigant is obliged to exhaust inadequate administrative procedures."); *see also Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639, 643 (3d Cir. 1995) ("Litigants are not required to make . . . futile gestures to establish ripeness.").

Furthermore, Plaintiff's lawsuit does not challenge Maryland's firearms licensing scheme *per se*; rather, he asks the Court to enjoin enforcement of the Firearms Prohibitions as against him – and specifically those provisions that prohibit firearm possession on the basis of a disqualifying conviction. As Plaintiff aptly observes, "[e]ven if [he] suffered some other firearms disability . . . he could still be prosecuted by Defendants for violating the laws whose application he

challenges here." (ECF No. 18 at 8-9.) Conversely, were the Court to grant the declaratory and injunctive relief that Plaintiff seeks, he would be shielded from prosecution under those provisions.

Although Defendants' justiciability argument is unpersuasive, the Court has identified a separate issue that is potentially more problematic. In his Complaint, Plaintiff alleges that the MSP informed him he could not possess a firearm in Maryland "*unless* he were to obtain a full pardon from Virginia's governor." (ECF No. 1 ¶ 20 (emphasis added).) An e-mail chain appended to Plaintiff's summary-judgment reply brief reinforces the possibility of relief via a pardon: Susan Howe Baron, Assistant Attorney General for the Maryland Department of Public Safety and Correctional Services, indicated that "[a]fter [Plaintiff] is pardoned by the Governor of Virginia, Maryland will give effect to the restoration of his rights by Virginia." (ECF No. 18-3 at 1.) However, Plaintiff's former attorney, Margaret Love, indicated in a declaration that a pardon is "not practically available": she did not elaborate on the reasons for such impracticability. (ECF No. 18-2 at 1.)[11]

[11] The Constitution of Virginia endows the Governor with the power of executive clemency. *See* Va. Const. art. V, § 12. Under current administrative practice, simple pardons are available at the Governor's discretion after the petitioner has (1) fulfilled all conditions associated with his conviction and (2) satisfied a five-year waiting period. *See Simple Pardons*, Off. Secretary Commonwealth, https://commonwealth.virginia.gov/judicial-system/pardons/simple-pardons/ (last visited Feb. 11, 2016).

While applying for a handgun license or carry permit would have been a futile endeavor for Plaintiff at this juncture, the same cannot necessarily be said of a pardon petition. And if Plaintiff could have averted the sting of the Firearms Prohibitions by requesting (and securing) executive clemency, it is not clear that his as-applied challenge to the constitutionality of the statutes is properly before the Court: that is, it is not clear that he has *actually* suffered an injury the likes of which the Court is the proper institution to redress.[12]

*Doe v. Virginia Department of State Police* is instructive. 713 F.3d 745 (4th Cir. 2013), *reh'g denied*, 720 F.3d 212 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1538 (2014). In *Doe*, the plaintiff – who had been convicted decades earlier of "carnal knowledge of a minor" – brought an action under § 1983 to challenge the constitutionality of a state law that had reclassified her crime as a "sexually violent offense," resulting in her exclusion from certain school facilities unless she received permission from both a state court and the school board. Ms. Doe alleged, *inter alia*, that the law interfered with her fundamental right to raise and educate her children as well as with certain of her First

[12] The Court is particularly attuned to jurisdictional issues when a litigant invites the Court to invalidate or enjoin the enforcement of a state law, given the weighty federalism concerns implicated by such an exercise of federal judicial power. *Cf. Valenti v. Rockefeller*, 292 F. Supp. 851, 867 (W.D.N.Y. 1968) ("We are . . . aware of the basic principle of federalism which requires that a federal court exercise great caution before striking down a state statute as repugnant to the Constitution."), *aff'd*, 393 U.S. 405 (1969) (per curiam).

Amendment rights. Significantly, however, Doe never filed a petition with any state court or school board. The district court dismissed Doe's case, and the Fourth Circuit affirmed, finding that (1) Doe lacked Article III standing and (2) Doe's claims were not ripe for judicial review.[13] Writing for the majority, Judge Duncan explained that the harms Doe complained of did "not affect her with finality, as she ha[d] not taken any of the steps necessary to access [restricted] properties." *Id.* at 754. "Therefore, any injury to her [constitutional] rights [that] she would suffer from not being able to enter a school . . . remain[ed] hypothetical." *Id.* Similarly, because Doe had not availed herself of the petition process under state law, her claims were "dependent on future uncertainties and thus not ripe for judicial decision." *Id.* at 759.[14]

The Court notes the parallels between Ms. Doe's claims and Plaintiff's claim. Both litigants brought § 1983 actions challenging the constitutionality of state laws as applied to them. Moreover, both litigants declined to avail themselves of a state process that, if successful, could have granted them the relief they sought. In light of *Doe*, the Court has reservations

[13] Doe brought an additional procedural due process claim that the court addressed on the merits; that claim is not apposite to this discussion.

[14] Judge Duncan noted the "limited nature" of the court's determination, explaining that, were Doe simply to file a proper petition under state law, the court's justiciability concerns would be addressed. *Doe*, 713 F.3d at 759.

about the justiciability and, in particular, the ripeness of Plaintiff's challenge here.

That being said, the Court recognizes that (1) the parties neither discussed the consequences of Plaintiff's failure to petition for clemency nor addressed the relevance of *Doe* in their briefs; and (2) *Doe* may be distinguishable on its facts.[15] The Court also acknowledges Judge King's thoughtful and vigorous dissent in *Doe*, through which Judge King questioned whether the Fourth Circuit had erected an administrative hurdle to § 1983 relief that is improper under *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982).[16] The

[15] Judge Keenan's concurring opinion in *Doe* illustrates one potentially significant distinction. Citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), Judge Keenan explained the principle of administrative finality, which is "concerned with whether [an] initial decisionmaker has arrived at a definitive position on [an] issue that inflicts an actual, concrete injury," *id.* at 193. In *Doe*, the panel concluded that the plaintiff was "required . . . to petition a Virginia circuit court and the local school board, in their capacities as 'initial decisionmaker[s],' to determine whether and under what conditions she [would] be granted access to school property." *Doe*, 713 F.3d at 763 (Keenan, J., concurring) (alteration in original). But in this case, there are two unrelated decisionmakers with separate decisionmaking processes – *i.e.*, the Governor of Virginia and Defendant Frosh. Defendant Frosh (through his agents) has indicated that Plaintiff's firearms rights will be restored *if but only if* he first secures a pardon in Virginia. Perhaps that "decision" is sufficiently final to bring Plaintiff's challenge within the ambit of federal jurisdiction.

[16] In *Patsy*, the Court held that "exhaustion of state administrative remedies [is] not . . . required as a prerequisite to bringing an action pursuant to § 1983." 457 U.S. 496, 516 (1982); *see*

Circuit has not had occasion to revisit *Doe*, and the few district courts that have discussed the case in any detail have distinguished it. For these reasons, and in spite of its reservations, the Court deems it prudent to turn to the merits of Plaintiff's § 1983 claim.

### *B. § 1983 Claim*

#### *1. Legal Framework*

Plaintiff asserts that application of the Firearms Prohibitions as against him violates his Second Amendment rights. He seeks declaratory and injunctive relief via § 1983, which provides that any person who, under color of state law, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law, *suit in equity*, or other proper proceeding for redress" (emphasis added).

Until recently, the nature and extent of the Second Amendment right was ill-defined. But in *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008), the Supreme Court held that self-defense is the "*central component*" of the right. According to *Heller*, foremost among the interests protected by the Second Amendment is the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. *Heller* clarified, however, that the self-defense right is

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*also Porter v. Nussle*, 534 U.S. 516, 523 (2002) ("Ordinarily, plaintiffs pursuing civil rights claims under 42 U.S.C. § 1983 need not exhaust administrative remedies before filing suit in court.").

not unlimited, and the Court specifically advised that nothing in its opinion should be taken to cast doubt on "presumptively lawful regulatory measures" such as "longstanding prohibitions on the possession of firearms by felons." *Id.* at 626 & 627 n.26. Two years after *Heller*, the Court held that the Second Amendment right – and its concomitant limitations[17] – is "fully applicable to the States." *McDonald v. City of Chicago*, 561 U.S. 742, 748 (2010).

In the aftermath of *Heller* and *McDonald*, the Fourth Circuit – along with appellate courts nationwide – began developing a framework through which district courts might evaluate Second Amendment challenges to firearms regulations. In *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010), the Circuit set forth a two-prong approach. When faced with a Second Amendment challenge, a court must first determine "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id.* at 680 (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)). If the law *does* burden a Second Amendment interest, the court must move to the "second step of applying an appropriate form of means-end scrutiny." *Id. Chester* held that the proper degree of scrutiny turns on whether the interest implicated falls within the "core right identified

[17] "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons'. . . . We repeat those assurances here. . . . [I]ncorporation does not imperil every law regulating firearms." *McDonald*, 561 U.S. at 786 (citation omitted).

in *Heller* – the right of a *law-abiding*, *responsible* citizen to possess and carry a weapon for self-defense." *Id.* at 683. For persons who, by virtue of their criminal history, do not qualify as law-abiding, responsible citizens, intermediate scrutiny is the appropriate standard of review. *Id.*[18] Under the intermediate scrutiny standard, "the government must demonstrate . . . that there is a 'reasonable fit' between the challenged regulation and a 'substantial' government objective." *Id.* (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989)).

Picking up where *Chester* left off, the Fourth Circuit in *United States v. Moore*, 666 F.3d 313 (4th Cir. 2012), confronted a repeat offender's challenge to his conviction for violating the Gun Control Act of 1968 ("GCA"), as amended, 18 U.S.C. §§ 921 *et seq.* The GCA makes it unlawful for any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" to possess a firearm or ammunition in or affecting commerce. § 922(g)(1). The appellant in *Moore* had multiple felony convictions on his record, bringing him well within the

[18] Nothing in the Fourth Circuit's most recent Second Amendment decision, *Kolbe v. Hogan*, No. 14-1945, 2016 WL 425829 (4th Cir. Feb. 4, 2016), alters this analysis. Though *Kolbe* held that strict scrutiny is the appropriate standard of review for a challenge to Maryland's assault-weapons ban, it did so only after recognizing that the ban "implicates the core protection of the Second Amendment – 'the right of law-abiding responsible citizens to use arms in defense of hearth and home.' " *Id.* at *1 (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008)). Where a law restricts firearm access for convicted criminals, the law does not implicate *Heller*'s "core protection," and strict scrutiny is inappropriate.

purview of § 922(g)(1); he argued, however, that the statute violated his Second Amendment rights. The *Moore* court began its analysis by acknowledging that every circuit court of appeals to consider the constitutionality of § 922(g)(1), whether through a facial attack or an as-applied challenge, has upheld the statute.[19] The court next explained that, because § 922(g)(1) falls within the scope of "presumptively lawful regulatory measures" under *Heller*, a facial challenge to the statute cannot succeed. *Moore*, 666 F.3d at 318. Nevertheless, picking up on dicta in *Chester*,[20] *Moore* recognized that a felon could – *theoretically* – prevail in an

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[19] As of this writing, the circuit courts of appeals have continued to speak with one voice, unanimously upholding § 922(g)(1) in the face of Second Amendment attacks. *See, e.g.*, *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011); *United States v. Bogle*, 717 F.3d 281, 281-82 (2d Cir. 2013) (mem.); *Bell v. United States*, 574 F. App'x 59, 60 (3d Cir. 2014) (mem.), *cert. denied*, 135 S. Ct. 693 (2014); *United States v. Taylor*, 594 F. App'x 784, 790 (4th Cir. 2014) (per curiam), *cert. denied*, 135 S. Ct. 2339 (2015); *United States v. Powell*, 574 F. App'x 390, 397 (5th Cir. 2014) (per curiam), *cert. denied*, 135 S. Ct. 767 (2014); *United States v. Griffin*, 476 F. App'x 592, 598 (6th Cir. 2011); *United States v. Shields*, 789 F.3d 733, 750-51 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 420 (2015); *United States v. Siegrist*, 595 F. App'x 666, 667-68 (8th Cir. 2015) (mem.); *Van Der Hule v. Holder*, 759 F.3d 1043, 1051 (9th Cir. 2014); *United States v. Molina*, 484 F. App'x 276, 285-86 (10th Cir. 2012); *United States v. Ponce-Cortes*, 574 F. App'x 876, 876-77 (11th Cir. 2014) (mem.); *Schrader v. Holder*, 704 F.3d 980, 991 (D.C. Cir. 2013).

[20] *Chester* had suggested that *Heller*'s reference to *presumptively lawful* regulatory measures "suggests the possibility that one or more of these 'longstanding' regulations 'could be unconstitutional in the face of an as-applied challenge.' " *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (quoting *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)).

as-applied attack on such a presumptively valid law. In order to succeed, the felon would have to "show that his factual circumstances remove his challenge from the realm of ordinary challenges." *Id.* at 319. Although *Moore* offered little guidance on what might constitute such an exceptional set of factual circumstances, the court flatly rejected the appellant's challenge in that case, noting that his "extensive and violent criminal history" moved his conduct "plainly outside the scope of the Second Amendment." *Id.* at 320.

Following *Moore*, the Fourth Circuit has repeatedly upheld § 922(g)(1) and other provisions of the GCA in the face of constitutional attack. *See, e.g.*, *United States v. Taylor*, 594 F. App'x 784, 790 (4th Cir. 2014) (per curiam) (rejecting challenge to § 922(g)(1)), *cert. denied*, 135 S. Ct. 2339 (2015); *United States v. Izaguirre-De La Cruz*, 510 F. App'x 233, 234 (4th Cir. 2013) (per curiam) (rejecting challenge to § 922(g)(5), which proscribes firearm possession by an illegal alien); *United States v. Larson*, 502 F. App'x 336, 339 (4th Cir. 2013) (per curiam) (rejecting challenge to § 922(g)(8), which proscribes firearm possession by a person subject to a restraining order); *United States v. Elkins*, 495 F. App'x 330, 333 (4th Cir. 2012) (per curiam) (same); *United States v. Mudlock*, 483 F. App'x 823, 828 (4th Cir. 2012) (per curiam) (same).

In this case, of course, Plaintiff is not challenging the GCA; rather, he assails Maryland's Firearms Prohibitions as applied to him. The case law construing the constitutionality of the Firearms Prohibitions is

admittedly quite sparse.[21] But because of the material overlap between § 922(g)(1) and the Firearms Prohibitions (both of which prohibit gun possession by felons), the GCA case law is relevant to the Court's present analysis. Accordingly, the Court will apply the *Chester-Moore* framework in evaluating the plausibility of Plaintiff's § 1983 claim.

### *2. Application*

Because the Firearms Prohibitions, as felon-disarmament statutes, are included within that class of regulatory measures that is presumptively lawful under *Heller*, the burden is on Plaintiff in the first instance to rebut the presumption of lawfulness. Before the Court even considers whether the Firearms Prohibitions as applied to Plaintiff are reasonably tailored to a substantial government objective, *Chester*, 628 F.3d at 683, Plaintiff must demonstrate that "his factual circumstances remove his challenge from the realm of ordinary challenges," *Moore*, 666 F.3d at 319. But taking Plaintiff's Complaint at face value, he has failed to plausibly allege that he "fall[s] within the category of citizens to which the *Heller* court ascribed the Second Amendment protection of 'the right of

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[21] *But see Spencer v. State*, No. 1164, 2015 WL 6108245, at *9 (Md. Ct. Spec. App. Oct. 15, 2015) ("§ 5-133 is exactly the type of regulatory measure prohibiting the possession of firearms by those convicted of a disqualifying crime that the Supreme Court stated that its holdings in *McDonald* and *Heller* did not touch. As a result, . . . § 5-133 does not violate the Second Amendment." (citation omitted)).

*law-abiding responsible* citizens to use arms in defense of hearth and home.'" *Id.* (quoting *Heller*, 554 U.S. at 635). Consequently, the Court can resolve this dispute – and dismiss Plaintiff's Complaint – without undertaking a complicated means-ends inquiry.[22]

Plaintiff's theory is, at bottom, a simple one: he sees himself as a "responsible, law-abiding American citizen" with "no history of violent behavior, or of any other conduct that would suggest he would pose any more danger by possessing firearms than an average, law-abiding responsible citizen." (ECF No. 1 ¶ 15.)[23] The problem, of course, is that Plaintiff is *not* an average, law-abiding, responsible citizen: he is a felon who was convicted not ten years ago of three serious crimes. Although the particular statutes that Plaintiff violated are directed toward misappropriation of credit cards, the underlying misconduct is the kind of misconduct

[22] Given that the Fourth Circuit has continually upheld the GCA in the face of constitutional attack (even at prong two of the *Chester* test) the Court has little doubt that the Firearms Prohibitions would likewise survive intermediate scrutiny. But the Court need not ultimately decide that question – because taking Plaintiff's allegations as true, he cannot carry his burden at prong one.

[23] Elsewhere, Plaintiff declares that he is "plainly not a typical felon." (ECF No. 11-1 at 9.) Given the wide array of culpable acts and omissions that can give rise to a felony conviction, the Court is unsure what it means to be a "typical" felon. In any event, in emphasizing his (allegedly) nonviolent history and his (alleged) rehabilitation, Plaintiff would deflect attention from his three grave offenses of conviction. But it is those felonies that bring Plaintiff's factual circumstances squarely within the "realm of ordinary challenges" to the Firearms Prohibitions, *see United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012).

that the law has proscribed from time immemorial. Plaintiff's crimes are not technical or regulatory offenses: they are black-letter *mala in se* felonies reflecting grave misjudgment and maladjustment.[24]

While Plaintiff emphasizes the nonviolent nature of his crimes, studies show a statistically significant risk that persons who commit property crimes may engage in other maladaptive behaviors. For instance, a 2014 study published by the Bureau of Justice Statistics, which tracked recidivism patterns of 404,638 state prisoners released in 2005, found that 82.1% of former property offenders were arrested for a new offense within five years following their release.[25] Notably, while 54% of former property offenders committed subsequent property offenses during that five-year period,

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[24] Theft crimes are as old as the Babylonian Code of Hammurabi. *See* John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 Nw. J.L. & Soc. Pol'y 195, 216 (2009). Fraud crimes likewise date back centuries; in 1601, for example, the Star Chamber in *Twyne's Case* concluded that "fraud and deceit abound in these days more than in former times" and that, consequently, "all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud." 76 Eng. Rep. 809, 815-16; 3 Co. Rep. 80 a, 82 a-82 b (K.B.). Forgery, too, is a crime deeply rooted in the common law. *See Union Bank v. Barker*, 3 Barb.Ch. 358, 359 (1848) (describing fraud by means of forgery as an "offence involving the highest degree of moral turpitude, which . . . has long . . . been made a felony by our statutes").

[25] Matthew R. Durose et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, at 8 (2014), http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf.

28.5% of former property offenders committed subsequent violent offenses.[26] *Cf. United States v. Barton*, 633 F.3d 168, 175 (3d Cir. 2011) ("[D]enying felons the right to possess firearms is entirely consistent with the purpose of the Second Amendment to maintain 'the security of a free State.' It is well-established that felons are more likely to commit violent crimes than are other law-abiding citizens." (citation omitted)).

For that matter, courts in this Circuit and elsewhere have repeatedly rejected Second Amendment challenges to disarmament statutes brought by felons with nonviolent offenses of conviction. *See United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) ("We now join our sister circuits in holding that application of the felon-in-possession prohibition to allegedly nonviolent felons like Pruess does not violate the Second Amendment."); *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004) ("Irrespective of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens."); *see also United States v. Kline*, 494 F. App'x 323, 325 (4th Cir. 2012) (per curiam) (rejecting challenge by felon convicted of eluding a law-enforcement officer); *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011) (rejecting challenge by felon convicted of drug offenses); *Wilson v. United States*, No. 4:14-CV-158-A, 2014 WL 2445788,

[26] *Id.* at 9.

at *2 (N.D. Tex. May 30, 2014) (rejecting challenge by felon convicted of mail fraud).[27]

The point of this discussion is not, of course, to impugn Plaintiff's motives or even to assess his rehabilitation. Assuming the truth of Plaintiff's allegations, it appears that he has made a number of commendable, socially responsible choices in the years following his convictions, and he has been rewarded for those choices (*e.g.*, by the restoration of his civil rights in Virginia). That said, because of Plaintiff's criminal past, the State of Maryland has acted well within its discretion in choosing to withhold firearms privileges from him – at least until he obtains a full pardon under Virginia law. Plaintiff has not shown that his factual circumstances "remove his challenge from the realm of ordinary challenges," *Moore*, 666 F.3d at 319. Accordingly, he has not carried – *and cannot carry* – his burden at

[27] Plaintiff pins his hopes on two cases litigated by Plaintiff's counsel and recently decided by district courts in Pennsylvania: *Suarez v. Holder*, No. 1:14-CV-968, 2015 WL 685889 (M.D. Pa. Feb. 18, 2015), and *Binderup v. Holder*, No. 13-cv-06750, 2014 WL 4764424 (E.D. Pa. Sept. 25, 2014). In both cases, the courts departed from the overwhelming current of authority and approved as-applied challenges to § 922(g)(1). Both cases are pending on appeal, so they have limited persuasive value at this point. Moreover, regardless how the Third Circuit rules in *Suarez* and *Binderup*, those cases are factually distinguishable from the case at bar. In *Suarez*, the plaintiff's predicate offense was a nearly 25-year-old conviction for carrying a handgun without a license, a regulatory misdemeanor under state law. In *Binderup*, the plaintiff's predicate offense was a 16-year-old conviction for corruption of minors, also a misdemeanor under state law. In this case, by contrast, Plaintiff's predicate offenses were felonies under Virginia law, and he committed them within the past decade.

*Chester* prong one, and the Court will dismiss his § 1983 claim.

### *IV. Conclusion*

For the foregoing reasons, an Order shall enter DENYING Plaintiff's Motion for Summary Judgment (ECF No. 11); GRANTING Defendants' Motion to Dismiss (ECF No. 7); DISMISSING WITH PREJUDICE Plaintiff's § 1983 claim; and CLOSING THIS CASE.

DATED this 18th day of February, 2016.

BY THE COURT:

/s/
James K. Bredar
United States District Judge

## APPENDIX C

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| **JAMES HAMILTON,** | * | |
| **Plaintiff** | * | |
| **v.** | * | **CIVIL NO. JKB-15-2142** |
| **WILLIAM L. PALLOZZI, *et al.*,** | * | |
| **Defendants** | * | |

* * * * * * * * * *

**ORDER**

For the reasons stated in the foregoing Memorandum, it is ORDERED:

1. The Motion for Summary Judgment filed by Plaintiff James Hamilton (ECF No. 11) is DENIED;

2. The Motion to Dismiss filed by Defendants William L. Pallozzi and Brian E. Frosh (ECF No. 7) is GRANTED;

3. Plaintiff's claim for relief pursuant to 42 U.S.C. § 1983 is DISMISSED WITH PREJUDICE; and

4. The Clerk is DIRECTED to CLOSE THIS CASE.

DATED this 18th day of February, 2016.

BY THE COURT:

/s/
James K. Bredar
United States District Judge

**APPENDIX D**

FILED: March 17, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 16-1222
(1:15-cv-02142-JKB)

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JAMES HAMILTON

Plaintiff-Appellant

v.

WILLIAM L. PALLOZZI, Superintendent of the Maryland State Police; BRIAN E. FROSH, Attorney General of Maryland

Defendants-Appellees

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CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; DOWNSIZE DC FOUNDATION; DOWNSIZEDC.ORG; GUN OWNERS FOUNDATION; GUN OWNERS OF AMERICA, INC.; INSTITUTE ON THE CONSTITUTION; THE HELLER FOUNDATION; UNITED STATES JUSTICE FOUNDATION,

Amici Supporting Appellant

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ORDER

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The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

The court denies the motion to file amicus curiae brief.

For the Court

/s/ Patricia S. Connor, Clerk

## APPENDIX E

**U.S. Const. amend. II**

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

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**U.S. Const. amend. XIV, § 1**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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**Md. Pub. Safety Code Ann. § 5-101(g)**

Disqualifying crime. – "Disqualifying crime" means:

* * *

(2) a violation classified as a felony in the State;. . . .

* * *

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**Md. Pub. Safety Code Ann. § 5-101(r)**

Regulated firearm. – "Regulated firearm" means:

(1) a handgun;. . . .

* * *

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**Md. Pub. Safety Code Ann. § 5-117**

A person must submit a firearm application in accordance with this subtitle before the person purchases, rents, or transfers a regulated firearm.

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**Md. Pub. Safety Code Ann. § 5-117.1**

* * *

(b) In general. – A dealer or any other person may not sell, rent, or transfer a handgun to a purchaser, lessee, or transferee unless the purchaser, lessee, or transferee presents to the dealer or other person a valid handgun qualification license issued to the purchaser, lessee, or transferee by the Secretary under this section.

(c) Requirements. – A person may purchase, rent, or receive a handgun only if the person:

(1)(i) possesses a valid handgun qualification license issued to the person by the Secretary in accordance with this section;

* * * and

(2) is not otherwise prohibited from purchasing or possessing a handgun under State or federal law.

(d) Qualifications for license. – Subject to subsections (f) and (g) of this section, the Secretary shall issue a handgun qualification license to a person who the Secretary finds:

* * *

(4) based on an investigation, is not prohibited by federal or State law from purchasing or possessing a handgun.

---

**Md. Pub. Safety Code Ann. § 5-118**

* * *

(b) Required information. – A firearm application shall contain:

* * *

(3) a statement by the firearm applicant under the penalty of perjury that the firearm applicant:

* * *

(ii) has never been convicted of a disqualifying crime;

* * *

(c) Required warning. – Each firearm application shall contain the following statement: "Any false information supplied or statement made in this application is a crime which may be punished by imprisonment for a period of not more than 3 years, or a fine of not more than $ 5,000, or both.".

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**Md. Pub. Safety Code Ann. § 5-133(b)**

Possession of regulated firearm prohibited. – Subject to § 5-133.3 of this subtitle, a person may not possess a regulated firearm if the person:

(1) has been convicted of a disqualifying crime;

* * *

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**Md. Pub. Safety Code Ann. § 5-134(b)**

Sale, rental, or transfer of regulated firearm prohibited. – A dealer or other person may not sell, rent, or transfer a regulated firearm to a purchaser, lessee, or transferee who the dealer or other person knows or has reasonable cause to believe:

* * *

(2) has been convicted of a disqualifying crime;

* * *

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**Md. Pub. Safety Code Ann. § 5-144**

(a) Prohibited. – Except as otherwise provided in this subtitle, a dealer or other person may not:

(1) knowingly participate in the illegal sale, rental, transfer, purchase, possession, or receipt of a regulated firearm in violation of this subtitle;. . . .

* * *

(b) Penalty. – A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $ 10,000 or both.

(c) Separate crime. – Each violation of this section is a separate crime.

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**Md. Pub. Safety Code Ann. § 5-205**

* * *

(b) In general. – A person may not possess a rifle or shotgun if the person:

(1) has been convicted of a disqualifying crime as defined in § 5-101 of this title;

* * *

(d) Penalty. – A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding $ 1,000 or both.

* * *