No. 06-6911

IN THE

Supreme Court of the United States

JAMES D. LOGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the "civil rights restored" provision of 18 U.S.C. § 921(a)(20) applies to a conviction for which a defendant was not deprived of his civil rights thereby precluding such a conviction as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

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The opinion of the Court of Appeals for the Seventh Circuit is reported at 453 F.3d 804 (7th Cir. 2006) and is reproduced at JA 28-36.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was issued on July 6, 2006. Petitioner timely filed a Petition for Writ of Certiorari on September 29, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 921(a)(20) (2006)

> (a) As used in this chapter –
>
> > (20) The term "crime punishable by imprisonment for a term exceeding one year" does not include –
> >
> > (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
> >
> > (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(33)(B)(ii)

(a) As used in this chapter –

(33)(B)(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 922(g)(1) (2005)

(g) It shall be unlawful for any person –

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

18 U.S.C. § 922(g)(9)

(g) It shall be unlawful for any person –

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

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

18 U.S.C. § 924(e)(1) (2006)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such

> person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(2)(B)(i)

> (e)(2) As used in this subsection –
>
> > (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
> >
> > > (i) has an element the use, attempted use, or threatened use of physical force against the person of another . . . .

STATEMENT OF THE CASE

Congress passed the Firearm Owners' Protection Act ("FOPA")[1] to ensure that federal law respects state law determinations of what prior convictions subject persons to the federal firearm ban and increased penalties under the Armed Career Criminal Act (ACCA).[2] For example, ACCA's enhanced penalties do not apply when, under 18 U.S.C. § 921(a)(20), a state deems a person sufficiently trustworthy, despite a conviction, to exercise his civil rights to vote, sit on a jury, and to run for public office, and to possess a firearm. Petitioner James D. Logan was convicted as a felon in possession of a firearm and was sentenced to 15 years as an armed career criminal, despite the fact that his prior

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[1] Pub. L. No. 99-308, sec. 102, § 922, 100 Stat. 499, 451-53 (1986).

[2] 18 U.S.C. §§ 922(g)(1) (2005) and 924(e)(1) (2006) respectively.

convictions did not result in the loss of civil rights under Wisconsin law.

This case invites the Court to decide whether a state conviction which does not lead to a loss of civil rights satisfies the "exemption" provisions of section 921(a)(20). If it does, then Petitioner does not qualify as an armed career criminal; if it does not, then Petitioner's prior misdemeanor convictions would qualify and his subsequent arrest for possession of a firearm renders him an armed career criminal and subject to the 15 year mandatory minimum enhancement.

A. The District Court

Petitioner entered a guilty plea in the United States District Court for the Western District of Wisconsin to a violation of 18 U.S.C. § 922(g)(1) (felon in possession). This plea followed Petitioner's arrest on May 31, 2005, when law enforcement officers responded to a call at a residence in Janesville, Wisconsin. Petitioner consented to a search of his car and officers located a 9mm pistol in the glove compartment. His prior felony was a 1991 conviction for unlawful possession of a controlled substance.

The Probation Office prepared a presentence report in advance of sentencing. The report suggested that Petitioner qualified as an armed career criminal under § 924(e)(1), based upon three prior misdemeanor convictions for battery in Wisconsin.[3] Under Wisconsin law, the maximum penalties for each of these prior offenses was increased from nine months to three years because Petitioner was considered a repeat offender.[4] The report noted that under 18 U.S.C. § 921(a)(20), state law misdemeanors punishable by more than two years are counted as felonies for the purpose of federal firearms law. Petitioner was convicted for these misdemeanors on December 14, 1988, February 15, 1988, and

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[3] Wis. Stat. § 940.19(1) (2003).

[4] Wis. Stat. § 939.62(1)(a) (2000).

March 6, 2001.[5] Under Wisconsin law, and even under the repeater enhancements, misdemeanor convictions do not result in the loss of any civil rights or the right to possess a firearm.[6]

At Petitioner's sentencing, the District Court adopted the Probation Office's determination that Petitioner's prior convictions qualified him for the ACCA enhancement. The District Court refused to apply the exemption provisions, reasoning that an offender who never lost civil rights cannot have civil rights restored. JA 29. If the District Court had applied the exemption, Petitioner would have been subject to a statutory maximum term of imprisonment of 120 months, 18 U.S.C. § 924(a)(2), and his guideline range under the United States Sentencing Guidelines § 2K2.1 (Nov. 2005) would have been 37-46 months. JA 16.

B. The Court Of Appeals

The United States Court of Appeals for the Seventh Circuit affirmed. Prior to the Seventh Circuit's decision, only two circuit courts had addressed the scope of the exemption clause of § 921(a)(20) in this context. See *United States* v. *Indelicato*, 97 F.3d 627, 630 (1st Cir. 1996) (holding that convictions for which civil rights were retained satisfy the exemption clause); *McGrath* v. *United States*, 60 F.3d 1005, 1009 (2d Cir. 1995) (holding that convictions for which civil rights were retained do not satisfy the exemption clause). Petitioner argued in the Seventh Circuit that civil rights that were retained after a conviction must be included within the "civil rights restored" provision of the exemption clause

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[5] The Court of Appeals for the Seventh Circuit found that he was also convicted of one concededly qualifying felony, but that 1991 conviction was for unlawful possession of a controlled substance, so it would not be a "serious drug felony" for enhanced sentencing under the Armed Career Criminal Act. *See* 18 U.S.C. § 924(e)(2)(A)(ii) (2006).

[6] *See* Wis. Stat. § 6.03(1)(b) (2006); Wis. Const. Art. 13 § 3(2) (1996); Wis. Stat. § 756.02 (1997); *id*. § 973.176(1) (2006).

because the proper inquiry is whether the person may exercise civil rights regardless of whether rights were lost and regained or simply retained.

The Seventh Circuit adopted the District Court's reasoning in holding that "[t]he word 'restore' means to give back something that had been taken away . . . the 'restoration' of a thing never lost or diminished is a definitional impossibility." JA 29 (citing *McGrath*, 60 F.3d at 1007). In response to Petitioner's argument that this interpretation of the statute produced an absurd result, the Court of Appeals declared that because the text of the exemption clause "parses; there is no linguistic garble," the absurdity canon did not apply. Further, it declared that the canon "is limited to solving problems in exposition, as opposed to the harshness that a well-written but poorly conceived statute may produce." *Id*. at 30. Finally, the Court of Appeals examined several circuit cases involving 18 U.S.C. § 921(a)(33)(B)(ii), which defines what qualifies as a conviction for purposes of 18 U.S.C. § 922(g)(9).[7]

Section 921(a)(33)(B)(ii) contains language identical to that of § 921(a)(20), but for a parenthetical that specifically excludes convictions for which civil rights were never lost. The Court of Appeals concluded that in the context of § 921(a)(33)(B)(ii), when Congress addressed this subject directly, it addressed this issue in a manner contrary to Petitioner's interpretation by including the parenthetical. JA 34. While the Court of Appeals acknowledged the likelihood of disparate treatment of similarly situated defendants would result from its holding, it accepted that result as inherent in Congress' choice to base the statute on state law. *Id.* at 35-36. It concluded: "What a federal court *can* do, as a uniform matter, is count all state convictions unless the state extends a measure of forgiveness." *Id*. at 36 (emphasis in original).

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[7] Section 922(g)(9) allows for prosecution in federal court for possession of a firearm subsequent to a conviction for a misdemeanor crime of domestic violence.

SUMMARY OF THE ARGUMENT

FOPA's structure, purpose and history, and this Court's precedents, strongly support Petitioner's reading of § 921(a)(20) to exempt convictions where civil rights were retained, as well as lost and restored, from the ACCA's reach. FOPA gives great deference to state determinations of trustworthiness, as Congress' interaction with the Court on this issue vividly illustrates. In *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103 (1983), *superseded on other grounds by statute*, 18 U.S.C. § 922, *as recognized in Caron* v. *United States*, 524 U.S. 308 (1998), this Court held that a state expungement did not erase a conviction for purposes of serving as a predicate offense for § 922(g)(1). In 1986, Congress enacted the Firearm Owners' Protection Act (FOPA) intending, *inter alia*, to negate the result of *Dickerson.* FOPA therefore, gives effect to a state's determination that, despite a conviction, a person is trustworthy enough to be free from the federal law. This inquiry is satisfied if the state determines that the individual evinces a modicum of trustworthiness as evidenced by an expungement, set aside, pardon, or restoration of civil rights as to that conviction, and that it did not prohibit firearm possession. See 18 U.S.C. § 921(a)(20). A sensible reading of the statute requires that the term "civil rights restored" must include not only rights that were taken away upon conviction and subsequently regained, but rights that were never taken away upon conviction.

This Court recognized that state-based indications of trustworthiness were the guiding interpretive principle for § 921(a)(20) in *Caron* v. *United States*, 524 U.S. 308, 316-17 (1998). There, the Court held that Massachusetts did not treat Caron as trustworthy because even though his civil rights were restored,[8] his right to possess a firearm was not

[8] Massachusetts only restored two of Caron's civil rights – his right to vote was retained subsequent to his conviction.

unqualified – he was not allowed to possess handguns outside of his home. *Caron* also observed that a restoration of civil rights can occur on a case-by-case basis or by operation of law. *Id*. at 313-14.

If, as *Caron* suggests, the process by which civil rights are regained is inconsequential, then the process by which a person obtains his civil rights is also not of consequence. There is no meaningful distinction between rights that were regained through operation of law and rights that are retained by operation of law subsequent to conviction. If there were a meaningful distinction between rights regained and rights retained, all civil rights would need to be regained to qualify for the exemption in § 921(a)(20). But the government conceded and this Court acknowledged in *Caron* that Caron's civil rights had been "restored" even though his right to vote had never been taken away. Rather, the focus of the statute with regard to civil rights is whether the individual possesses all three civil rights subsequent to conviction. If all three rights are possessed, FOPA's trustworthiness inquiry is satisfied, so long as the convicting state did not specifically restrict the individual's firearms rights.

Congress specifically structured FOPA to broaden the exemptions to the definition of a "felony" under the federal gun statutes in order to give full effect to a state's determination whether a particular conviction is of the sort that should restrict an individual's right to possess a firearm. This, in turn, narrowed the prosecutorial reach of § 922(g)(1) (felon in possession of a firearm) as fewer convictions would qualify as a "crime punishable by more than a year." In contrast, the Seventh Circuit's interpretation expands the prosecutorial reach of § 922(g)(1) and the possibility of enhanced penalties under 18 U.S.C. § 924(e). Refusing to exempt convictions for which no civil rights were lost, applies the statute in a way contrary to Congress' expressed desire to respect a state's trustworthiness decision. Indeed, the statute and legislative history are absolutely silent

regarding the possibility of including convictions where civil rights were retained following an otherwise qualifying conviction. In such circumstances, the Court must interpret the language to avoid the unintended result.

When § 921(a)(20) is read in light of the related statutory provisions, it is clear that under the proper reading of the statute, "civil rights restored" includes convictions where civil rights were never lost. Petitioner's reading is supported by the language of two related firearms provisions: 18 U.S.C. §§ 921(a)(33) and 925(c). The language of § 921(a)(33) is almost identical to § 921(a)(20). While § 921(a)(20) applies to felons, § 921(a)(33) applies to persons convicted of misdemeanor domestic violence crimes. The only difference in § 921(a)(33) is that the enumerated exemptions (pardon, expungement, restoration of civil rights) only apply "if the law of the applicable jurisdiction provides for the loss of civil rights under such offense." Thus, § 921(a)(33) explicitly excludes from the exemption individuals who never lost their civil rights. This language in § 921(a)(33) must be given some effect; it must be differentiated from § 921(a)(20). If "civil rights restored" only includes situations where rights are lost to begin with, the extra language in § 921(a)(33) would be superfluous. Section 925(c) sets forth the process by which an individual who is prohibited from possessing a firearm under federal law can get relief from federal disability.[9] Section 925(c) further demonstrates that trustworthiness inquiry is the touchstone for determining who should be exempt from federal firearm prohibitions.

Petitioner's reading of the statute is "a sensible construction" that avoids "an unjust or absurd conclusion." *United States* v. *Granderson*, 511 U.S. 39, 56 (1994). Felons in Wisconsin are in a better position than Petitioner because for felons, the rights to vote and serve on a jury are restored

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[9] 18 U.S.C. § 925(c), however, is an unfunded mandate and currently, relief under § 925(c) is unattainable.

automatically and the right to hold public office and the right to possess a firearm can be restored through a pardon. Meanwhile, Petitioner is left with no remedy as pardons and expungement are not available to misdemeanants in Wisconsin. No sound reasoning supports such disparate treatment.

Finally, if this Court is to choose between interpretations of § 921(a)(20), under the rule of lenity, the Court should reject the Seventh Circuit's. The Seventh Circuit's interpretation imposes a substantial risk of enhanced penalties upon persons who might reasonably consider their past crimes not to be grave transgressions in light of their state's determination that they should retain and enjoy all of their civil rights. Imposition of a 15-year mandatory minimum sentence ought only to occur when Congress has plainly and unequivocally said it should be so, in a fashion that gives fair warning to persons whose prior crimes included only misdemeanors for which they never lost their civil rights.

ARGUMENT

I. A SENSIBLE READING OF § 921(a)(20) IN LIGHT OF THIS COURT'S PRECEDENTS REQUIRES INCLUDING CONVICTIONS FOR WHICH CIVIL RIGHTS WERE RETAINED WITHIN THE "CIVIL RIGHTS RESTORED" EXEMPTION.

Rarely is the Court confronted with such clear development of a statute as it is here. Congress explicitly structured The Firearms Owners' Protection Act ("FOPA"), Pub. L. No. 99-308, sec. 102, § 922, 100 Stat. 449, 451-53 (1986) to ensure that federal law respects state law determinations of what prior convictions subject persons to the federal firearm ban and increased penalties. A sensible reading of FOPA, as supported by this Court's rulings, requires that if, despite a conviction, a state determined that a person is trustworthy enough to exercise his civil rights and an unqualified right to possess a firearm under its laws, then the federal statute gives

effect to that determination insofar as that conviction cannot be considered a qualifying prior conviction under ACCA.

FOPA amended 18 U.S.C. § 921(a)(20) to provide the following definition of a qualifying prior conviction:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include –
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

FOPA sec. 101, § 921, 100 Stat. at 449-50. The second-to-last sentence is referred to as the "choice-of-law" clause. The first part of the last sentence is known as the "exemption clause," while the second part of the last sentence pertaining to whether a state has explicitly banned a person from possessing a firearm is known as the "unless clause." *Beecham* v. *United States*, 511 U.S. 368, 369 (1994); *Caron*, 524 U.S. at 312.

Prior to FOPA's enactment, this Court had decided that whether a conviction qualified as a "crime punishable by imprisonment for a term exceeding one year" was determined by federal, not state, law. *Dickerson*, 460 U.S. at 106. This

Court held that a conviction expunged by a state still counted as a conviction for purposes of federal firearms law because "expunction under state law does not alter the historical fact of the conviction." *Id*. at 115. Congress subsequently enacted FOPA with the express intent of avoiding the holding of *Dickerson* by making the "convicted felon" status dependent upon state law. S. Rep. No. 98-583 observed in a footnote:

> For instance the Supreme Court, in *Dickerson* construed this definition to include guilty pleas where no final judgment had been rendered by the Court. S. 914, as reported, would leave such a determination to the states and would render the *Dickerson* decision inapposite where individual State courts or legislatures have decided to the contrary.

S. Rep. No. 98-583, at 7 n.16 (1984).

The choice-of-law clause's purpose is axiomatic: "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." § 921(a)(20). As the Court later noted, it logically follows that the law of the state of conviction controls the exemption clause. *Beecham*, 511 U.S. at 371 ("[A]sking whether a person has had civil rights restored is thus just one step in determining whether something should 'be considered a conviction.' By the terms of the choice-of-law clause, this determination is governed by the law of the convicting jurisdiction").

The exemption clause requires a court to determine whether the state of conviction has granted a person a pardon, expungement, set aside, or has restored the convicted person's civil rights with regard to the prior conviction at issue. Congress required district courts to assess whether the state had given some indication that, despite a conviction, the person was trustworthy. As relevant here, Congress chose the status of civil rights following a conviction as a barometer for

a state's determination of trustworthiness. Because the choice-of-law clause controls the exemption clause, state law determines the restoration of civil rights.[10] *Caron*, 524 U.S. at 318 (agreeing with majority in recognizing that the "primacy of state law in the statutory scheme" requires that "whether a prior state conviction qualifies as a violent felony conviction under § 924(e) turns entirely on state law") (Thomas, J., dissenting). Indeed, FOPA's "Findings" section makes clear Congress' purpose in enacting the legislation was in part to not "place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms." FOPA § 1(b)(D)(2), 100 Stat. at 449. Certainly, the most concrete indicia of a trustworthy citizen, even one who has been convicted of a misdemeanor, is one whom the state allows to participate fully in civic life.

If a person satisfies the exemption clause, he must also satisfy the unless clause. The unless clause dictates that, even if a state pardons, expunges, sets aside, or restores a person's civil rights, the federal ban still applies if the state specifically bans that person from possessing firearms. If a conviction satisfies both the exemption clause and the unless clause, the state's treatment of the individual as trustworthy is acknowledged by the federal statute; and the individual will be exempt from prosecution or increased penalties under federal law. In short, trustworthiness is the touchstone of the

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[10] Although Congress did not define "civil rights" in the statute, a defendant's "civil rights" are widely accepted to include that person's right to vote, hold public office, and serve on a jury. *Caron*, 524 U.S. at 313 (commenting that the parties agreed that Massachusetts had restored Caron's civil rights); *United States* v. *Caron*, 77 F.3d 1, 2 (1st Cir. 1996) (en banc) (stating that "'[c]ivil rights,' within the meaning of § 921(a)(20), have been generally agreed to comprise the right to vote, the right to seek and hold public office, and the right to serve on a jury," and confirming that Massachusetts had restored Caron's right to hold public office and juror service, while he retained his right to vote) (citing *United States* v. *Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990)).

exemption clause. *Indelicato*, 97 F.3d at 630 ("[t]o key the federal statute to these civil rights makes sense only on one assumption: that Congress thought of the attribution of these rights as expressing 'a state's judgment that a particular person or class of persons is, despite a prior conviction, sufficiently trustworthy to possess firearms'" (quoting *McGrath*, 60 F.3d at 1009 (2d Cir. 1995)); see *e.g.*, *Caron*, 524 U.S. at 315-17.[11]

The Court's decision in *Caron* addresses the trustworthiness principle in the context of the unless clause. The defendant in *Caron* was a convicted felon. Massachusetts restored two of Caron's civil rights, while he retained one throughout. Under Massachusetts law, he was allowed to possess certain firearms, but his conviction precluded him from possessing handguns outside his home. *Caron*, 524 U.S. at 311-12. The Court held that when a state even partially bans firearm possession, the unless clause operates as a complete federal ban. *Id*. at 316. The Court found that because Massachusetts treated Caron as not trustworthy enough to possess all firearms, federal law forbids him from possessing any firearm. *Id*. at 316-17. Thus, the holding in *Caron* was that a state's determination that a person is trustworthy enough to possess a firearm must be unqualified in order for that person's conviction to be exempt under § 921(a)(20). Otherwise, a state's partial ban on handguns is interpreted by the federal statute as that state's finding of dangerousness or untrustworthiness. *Id*.

The Court's opinion in *Caron* further emphasizes that the process by which a person's status is achieved is irrelevant to the trustworthiness inquiry:

> Nothing in the text of § 921(a)(20) requires a case-by-case decision to restore civil rights to this particular

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[11] *See also* 18 U.S.C. § 925(c), which examines a person's trustworthiness for federal exemption. For further discussion *see infra* at Section III.

> offender. While the term "pardon" connotes a case-by-case determination, "restoration of civil rights" does not. Massachusetts has chosen a broad rule to govern this situation, and federal law gives effect to its rule. All Courts of Appeals to address the point agree.

Id. at 313-14 (citations omitted). Thus, an affirmative act of forgiveness such as a pardon is no different from, for example, an automatic statutory restoration of civil rights upon completion of a sentence. It logically follows from the Court's recognition in *Caron* that if process is not of import, then there can be no meaningful difference between rights that were *regained* through operation of law versus rights that are *retained* through operation of law. Both are means to the same end. If anything, when civil rights are retained by broad legislative determination, it is a state's ultimate expression of trustworthiness in that the state legislature has plainly indicated that *no* person who has committed this crime ought to lose his or her civil rights.

The circumstances present in *Caron* with respect to the status of the defendant's civil rights further demonstrate that retention and restoration are indistinguishable for purposes of the exemption clause. In *Caron*, the government agreed, and this Court acknowledged, that the defendant's civil rights had been "restored" even though the status of Caron's civil rights was really a mix of rights restored and retained. Two of Caron's rights were restored by operation of statute and he had retained his right to vote all along. *Id.* at 313 ("[a]side from the unless clause, the parties agree Massachusetts law has restored petitioner's civil rights"). Neither the Court nor the government recognized any distinction among civil rights restored or retained in determining the applicability of the unless clause. The same analysis should hold true for the exemption clause. Accordingly, for purposes of the statute, restoration occurs when fewer than all three civil rights are restored. "Civil rights restored" therefore must mean that *any civil rights taken away have been restored*. It follows then, *a*

fortiori, that the result is the same where all three rights were retained. It is immaterial whether one, two, or all three civil rights were retained, so long as all three are possessed by a person following a conviction.[12]

II. EXCLUDING FROM THE EXEMPTION CLAUSE CIVIL RIGHTS RETAINED IS DIRECTLY CONTRARY TO THE PURPOSE OF FOPA.

Congress specifically structured FOPA to broaden the exemption clause and give full effect to a state's determination that a particular conviction is not serious enough to warrant subjecting the person to prosecution and increased penalties under the federal statute.[13] This, in turn,

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[12] In at least ten states, a convicted person retains either the right to sit on a jury (*e.g.*, Colorado, Illinois, Iowa, New Hampshire, Tennessee, Maine) or the right to hold public office (*e.g.*, Michigan, New Jersey, New York, Texas, Utah, Vermont). Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* app. B (2006). Additionally, in at least thirteen states and the District of Columbia, a person loses the right to vote only if that person is incarcerated (*e.g.*, California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, New York, North Dakota, Ohio, Pennsylvania, Oregon, and Utah). *Id*. at 85-95, 135-39. For updated information see generally FAMM/NACDL *Amicus* Br.

[13] Senate Report 98-583 explains FOPA's deference to state determinations as follows:

> Third, it requires that a 'conviction' must be determined in accordance with the law of the jurisdiction where the underlying proceeding was held. This is intended to accommodate state reforms adopted since 1968, which permit dismissal of charges after a plea and successful completion of a probationary period, or which create 'open-ended' offenses, conviction for which may be treated as misdemeanor or felony at the option of the court. Since the Federal prohibition is keyed to the state's conviction, state law should govern in these matters.

S. Rep. No. 98-583, at 7.

Further, in explaining the broadening effect of the exemption clause, the report continues:

narrowed the prosecutorial reach of §§ 922(g)(1) and 924(e), as fewer convictions qualified as "a crime punishable by more than a year." Refusing to exempt convictions for which no civil rights were lost produces unacceptable results because it ignores a state's trustworthiness determination, thereby applying the statute in a way Congress clearly did not intend. An interpretation of a statute cannot stand when "the application of the statute as written will produce a result 'demonstrably at odds with the intentions of its drafters'" and "so bizarre that Congress 'could not have intended' it." *Demarest* v. *Manspeaker*, 498 U.S. 184, 190-91 (1991).

Congress simply did not consider the possibility of persons who never lost their civil rights upon an otherwise qualifying conviction. See Nat'l Rifle Ass'n of Am. *Amici* Br. at 16-26. In such circumstances the Court may interpret the language to avoid the unintended result. *Green* v. *Bock Laundry Mach. Co*., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (departing from the plain language is permissible when the history of a statute reveals that an unthinkable result was indeed unthought of). The history of the exemption clause reveals that Congress focused upon situations where, following a conviction, a person lost his civil rights but then later had them restored. The legislative history is replete with references to pardons, expungement, and restoration of civil rights. The statute and the legislative history are absolutely silent, however, as to situations like Petitioner's where civil

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> Finally, S. 914 would exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record. Existing law incorporates a similar provision with respect to pardons in 18 U.S.C. app. 1202, relating to possession of firearms, but through oversight does not include any conforming provision in 18 U.S.C. 922, dealing with their purchase or receipt. This oversight, which resulted in a ruling that a state pardon does not permit a pardoned citizen to receive or purchase a firearm, despite the express provision in the pardon that he may posses it, be corrected.

Id.

rights were retained despite the crime being punishable by more than two years, thereby falling outside of the purview of § 921(a)(20)(B). Section 921(a)(20) mostly concerns felonies. Under federal law, the language used in §§ 922(g)(1) and 924(e)(1) is the same language that defines "felony" in 18 U.S.C. § 1(1). In § 921(a)(20), Congress endeavored to redefine "felony" for the purpose of the gun statutes. While it includes certain serious misdemeanors punishable by more than two years as felonies, Congress presupposed that convictions for any of those crimes would result in the loss of civil rights; it did not contemplate situations where misdemeanors would be punishable by more than two years, but civil rights would not be lost.

Excluding these overlooked convictions from the exemption clause results in application of the statute beyond its original purpose. In a similar circumstance, this Court has refused to interpret the federal firearms statute in a manner that assumes Congress intended to expand liability where it is plain that the situation presented was never considered by Congress. In *Small* v. *United States*, 544 U.S. 385, 393 (2005), the Court found that "Congress did not consider" the inclusion of foreign convictions as predicate offenses for § 922(g)(1) when it used the phrase "convicted in any court." *Id.* at 392. The statute was silent as to whether foreign convictions counted. "If 'convicted in any court' refers only to domestic convictions, this language creates no problem." *Id.* This is true because certain domestic convictions fit within the exemption in § 921(a)(20), which specifies that certain "state or federal" convictions may be exempt. However, foreign convictions would not be exempt because the statute made no mention of them. After reviewing the language of the provisions and the legislative history, the Court concluded: "We have no reason to believe that Congress considered the added enforcement advantages flowing from inclusion of foreign crimes, weighing them

against, say, the potential unfairness of preventing those with inapt foreign convictions from possessing guns." *Id*. at 394.

Similarly, there is no reason to believe Congress considered in any fashion the utility or disutility of using convictions for which civil rights were retained as predicate convictions. In fact, Congress was explicit in passing FOPA that the Court's broad interpretation in *Dickerson* of what qualified as a prior conviction was to be avoided. Surely then, Congress would not have intended to exclude from the exemption clause convictions for which a state arguably deems an individual more trustworthy (by allowing him to retain his civil rights despite the conviction) while exempting convictions for which a state determined the person is untrustworthy enough to initially revoke his rights, but later restore them.[14]

III. THE SURROUNDING STATUTORY PROVISIONS SUPPORT THE READING THAT "CIVIL RIGHTS RESTORED" INCLUDES CONVICTIONS FOR WHICH CIVIL RIGHTS WERE NEVER LOST.

Related statutory provisions reveal that "civil rights restored" concerns the trustworthiness of an individual as determined by the status of that individual's civil rights; not by the mechanism by which those rights are retained or regained.

The meaning of statutory language, plain or not, depends on context. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (citing *King* v. *St. Vincent's*, 502 U.S. 215, 220-21, n.9

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[14] Instead, FOPA requires that the exemption clause must be interpreted broadly to include persons deemed trustworthy by the state as evidenced by the state allowing those persons to retain civil rights despite a conviction: "additional legislation [FOPA] is required to reaffirm the intent of the Congress . . . that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." FOPA § 1(b)(D)(2), 100 Stat. at 449 (quotation marks omitted).

(1991)). What the Court "seek[s] to discern is the plain meaning of the whole statute, not of isolated sentences." *Beecham*, 511 U.S. at 372. See also *Robinson* v. *Shell Oil, Co.*, 519 U.S. 337, 341 (1997) (stating that proper analysis should include not only the language itself, but also . . . its context within the "statute as a whole"). The Court must look beyond the definition of words in isolation, and consider the whole statutory text, the purpose and context of the statute, and consult any precedents or authorities that inform the analysis. *Dolan* v. *USPS*, 126 S. Ct. 1252, 1257 (2006).

First, a similar statute provides an enlightening contrast. In 1996, Congress amended § 922(g)(9) to read in relevant part:

> It shall be unlawful for any person – who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess in or affecting commerce, any firearm.

Section 921(a)(33) defines predicate offenses for § 922(g)(9) just as § 921(a)(20) defines predicates for § 922(g)(1). Section 921(a)(33)(A) defines what qualifies as a "misdemeanor crime of domestic violence." Paragraph (B)(ii) provides the exemptions:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (*if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense*) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms

§ 921(a)(33)(B)(ii) (emphasis added). This language is identical to § 921(a)(20) ("(a)(20)") with one meaningful difference: section 921(a)(33)(B)(ii) ("(a)(33)") expressly provides that the exemption only applies "if the law of the

applicable jurisdiction provides for the loss of civil rights under such an offense." Thus, it specifically excludes from the exemption individuals who never lost their civil rights.

The Seventh Circuit seized on this similarity, but misconstrued the importance of the differing language. It concluded that Congress intended (a)(20), written ten years earlier, to have the same meaning as (a)(33). The Seventh Circuit's conclusion flatly contradicts the rules of statutory interpretation.

Differing language within the same statute should yield different results. *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452-54 (2002) ("[w]e refrain from concluding here that the differing language in the two subsections has the same meaning in each . . . [w]here Congress wanted to provide for successor liability in the . . . Act, it did so explicitly"). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) (alteration in original). "[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (citations omitted).

In (a)(33), when Congress wanted to exclude convictions for which civil rights were retained from exemption, it did so explicitly. While the exemption clause in (a)(33) was enacted by a different Congress some ten years after FOPA, Congress was cognizant of the language in (a)(20) to the point that, except for the parenthetical language, it wrote the exemption verbatim. Thus, where Congress wanted to explicitly exclude from an exemption convictions for which civil rights were never lost, it did. It did not, however, amend (a)(20) to conform to the new language of (a)(33), even though it had the opportunity to do so, and despite numerous circuit court

decisions having already interpreted the provision contrary to the Seventh Circuit. See, *e.g.*, *United States* v. *Thomas*, 991 F.2d 206, 212 (5th Cir. 1993); *United States* v. *Cassidy*, 899 F.2d 543, 549 n.13 (6th Cir. 1990); *United States* v. *Hall*, 20 F.3d 1066, 1069 (10th Cir. 1994) (stating that if Congress intended to exclude rights retained it "would (and easily could) have been more explicit"). Knowledge of these interpretations of (a)(20) is imputed to Congress. See *Cannon* v. *University of Chi.*, 441 U.S. 677, 697-99 (1979). Indeed, the fact that Congress found it necessary to insert the parenthetical language shows that the drafters of § 921(a)(33) were aware that "civil rights restored" could include persons whose civil rights were never taken away. Plainly, where Congress wanted to narrow the exemption provision to encompass only offenders whose civil rights were restored, it knew how to do so.

The parenthetical language in the (a)(33) exemption must be given some effect. Otherwise, if the exemption in (a)(20) is given the same meaning as the exemption in (a)(33), the parenthetical language in (a)(33) is superfluous and void. See *Bates*, 522 U.S. at 29-30. This would subvert Congress' efforts in passing the provision as it authored. The Court should, as it did in *Sigmon Coal*, 534 U.S. at 454, "refrain from concluding here that the differing language in the two subsections has the same meaning in each."

Section 925(c) also supports the conclusion that trustworthiness, and a focus on the status of an individual's civil rights (not whether they happened to be taken away and restored), is the touchstone for who should be exempt from firearm disabilities and increased penalties. It sets forth the process by which an individual who is prohibited from possessing a firearm by way of federal law can get relief from the federal disability. The Attorney General may grant such relief to an applicant if "the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety." 18 U.S.C. § 925(c). With the

statute's focus on record, reputation, and likely future civility, this provision squarely addresses a person's trustworthiness with respect to possessing a firearm. It is analogous to the inquiry in § 921(a)(20) as to whether a state has deemed an individual trustworthy enough to possess his civil rights.[15]

In sum, when § 921(a)(20) is read in the context of the surrounding statutory provisions, the only sensible reading that emerges is that convictions for which a person retains his civil rights, whether taken away and later restored, or never taken away in the first place, should be exempt from prosecution under § 922(g)(1) and the 15-year mandatory minimum of § 924(e)(1).

IV. INCLUDING CIVIL RIGHTS RETAINED IN THE EXEMPTION CLAUSE AVOIDS AN ABSURD RESULT.

In enacting FOPA, Congress structured the statute to give full effect to a state's determination that a person, despite a criminal conviction, is trustworthy. To exclude convictions for which civil rights were retained, as the Seventh Circuit has done, ignores this fundamental inquiry in favor of a mechanical federal test that requires the state to revoke civil rights and later restore them. This mechanical test produces

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[15] Section 925(c) is not, however, a practical solution to the problem presented here; namely a means by which persons like Petitioner may seek a federal "restoration" even though they retained their right to possess firearms under state law. In *United States* v. *Bean*, 537 U.S. 71 (2002), this Court held that in the absence of an actual denial by the ATF of a felon's petition precludes judicial review under § 925(c). In reaching its conclusion, the Court acknowledged that "Since 1992 . . . the appropriations bar has prevented ATF, to which the Secretary has delegated authority to act on § 925(c) applications, from using 'funds appropriated herein . . . to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. [§] 925(c).'" *Id.* at 74-75 (second omission in original). So, while § 925(c) is instructive on the trustworthiness inquiry, it is not a means by which the void in the exemption clause of § 921(a)(20) is filled.

results that directly contradict the purpose of FOPA, and which offend the societal norm of treating less serious offenders accordingly, and is plainly irrational and unjust.

The absurd results arising from the Seventh Circuit's interpretation of the exemption clause militate strongly against its adoption. In contrast, if the exemption clause includes convictions for which civil rights were retained, then the exemption clause simply gives full effect to state determinations of trustworthiness, which is consistent both with the manifest purpose of FOPA and this Court's understanding of that purpose. Petitioner's interpretation also naturally extends this Court's acknowledgment in *Caron*, that if the process by which civil rights are restored is irrelevant then so too is the process by which civil rights are attained. Moreover, it avoids attributing to Congress a purposeful contemplation of exposing offenders with less serious convictions to a 15-year mandatory minimum.

A. The Court Must Avoid Absurd Results.

Generally, when interpreting a statute, the Court must choose "'a sensible construction' that avoids attributing to the legislature either 'an unjust or an absurd conclusion.'" *Granderson*, 511 U.S. at 56 (finding the plain meaning of the statute as absurd because it would result in the revocation of Granderson's 60-month term of probation in favor of a sentence of 20 months' probation) (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)). "[I]t is a venerable principle that a law will not be interpreted to produce absurd results." *K-Mart Corp.* v. *Cartier, Inc*., 486 U.S. 281, 325 n.2 (1988) (Scalia, J., concurring in part and dissenting in part). "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence." *United States* v. *Kirby*, 74 U.S. (7 Wall.) 482, 486 (1868).[16] This

[16] "The common sense of man approves the judgment mentioned by *Puffendorf*, that the Bolognian law which enacted 'that whoever drew

principle applies with equal force to a statute written with clear language. *K-Mart Corp.*, 486 U.S. at 325 n.2 (Scalia, J., concurring in part and dissenting in part); *Clinton* v. *City of N.Y.*, 524 U.S. 417, 429 (1998) (expanding the word "individual" in 2 U.S.C. § 692(a)(1) to include corporations and other entities . . . to avoid "an absurd and unjust result which Congress could not have intended") (quotation marks omitted); *Caron*, 524 U.S. at 315.

In other words, "[w]here the plain language of the statute would lead to 'patently absurd consequences,' that 'Congress could not possibly have intended,' we need not apply the language in such a fashion . . ." a statute is absurd "where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 470-71 (1989) (internal citations omitted) (Kennedy, J., concurring). Regardless of how the Court has articulated the principle, it is a long-standing one, and ultimately concerns the results of a statute that can objectively be seen as absurd and unjust. See *Bock Laundry*, 490 U.S. at 509-10. The Seventh Circuit's interpretation of § 921(a)(20) produces precisely such results.[17]

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blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by *Plowden*, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire – 'for he is not to be hanged because he would not stay to be burnt.'" *K-Mart Corp*., 486 U.S. at 325 n.2 (quoting *Kirby*, 74 U.S. (7 Wall.) at 487) (Scalia, J., concurring in part and dissenting in part) (concurring in Court's interpretation of statute, "not . . . because of ambiguity" in the law, but because "a law will not be interpreted to produce absurd results.")

[17] The Seventh Circuit rejected Petitioner's absurdity argument and stated that the anti-absurdity canon is linguistic rather than substantive. JA 30 (citing *Jaskolski* v. *Daniels*, 427 F.3d 456, 462-64 (7th Cir. 2005)). The Seventh Circuit offered no real support for that notion. In fact, it is

B. The Seventh Circuit's Interpretation Is Absurd Because It Would Treat Persons Convicted Of Less Serious Offenses The Same Or Worse Than Persons Convicted Of More Serious Offenses.

The Seventh Circuit's application of the statute leads to unjust and patently absurd results. Petitioner was convicted of three misdemeanor batteries that were punishable by more than two years. As of February 1, 2003, the same misdemeanors of which Petitioner was convicted are punishable by only two years.[18] Therefore, a person who was sentenced on or after February 1, 2003, for a battery as a repeater is now fully exempt from the federal ban and increased penalties under § 921(a)(20)(B). Each person has the same rights under Wisconsin law, but under the Seventh Circuit's interpretation, the later-convicted person would risk no additional liability, while someone like Petitioner would be subject to a fifteen-year mandatory minimum. Wisconsin law provides that, without qualification, a person in Petitioner's position is sufficiently trustworthy to retain the right to vote, hold public office, serve on a jury, and possess a

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well-settled that the inquiry under the absurdity canon is whether the result of applying the statute as written is absurd, not whether the exposition of language itself is absurd. Rather, this Court articulates the inquiry as "[w]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co*. v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)).

For well over a hundred years this Court has treated the absurdity doctrine as substantive because it looks at the disposition of the language. *See Kirby*, 74 U.S. (7 Wall.) at 486-87 (1868). Under the Seventh Circuit's exposition analysis, the venerable examples of the surgeon drawing blood in the street and the prisoner escaping the fire would be out of luck because the text of the laws were not linguistically absurd.

[18] *See* Wis. Stat. § 939.62(1)(a) (2001), *amended by* Wis. Act. 109 (S.B. 1), § 562 (eff. Feb. 1, 2003).

firearm under Wisconsin law,[19] and the federal statute must give effect to Wisconsin's judgment.

Moreover, despite Wisconsin's unqualified repose of trust in persons in Petitioner's position, the Seventh Circuit's interpretation also treats Petitioner as harshly as felons in Wisconsin. Under Wisconsin law, felons lose all three civil rights, two of which are automatically restored, while the right to hold public office is not. This last right can be restored through a pardon, thus satisfying the exemption clause. A Wisconsin felon also loses the right to possess a firearm but may have it restored by pardon as well.[20]

Unlike felons, misdemeanants in Wisconsin would have no way to satisfy § 921(a)(20)'s exemption clause under the Seventh Circuit's interpretation. This is because pardons are generally unavailable to misdemeanants, see State of Wisconsin Office of the Governor, Executive Clemency, ("Pardons, commutations and reprieves are available for felonies only, not misdemeanors," which may be waived only if an applicant can "demonstrate that there are extraordinary circumstances showing that you should be eligible to apply even though you seek executive clemency for a misdemeanor"),[21] expungement is not available to those convicted of a misdemeanor as an adult, Wis. Stat. § 973.015, and Wisconsin has no "set aside" procedure.[22] The Seventh

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[19] *See* Wis. Stat. § 6.03(1)(b); Wis. Const. Art. 13, § 3(2); Wis. Stat. § 756.02; *id*. § 973.176(1)

[20] *See* Wis. Stat. § 941.29(5)

[21] *Available at* http://www.wi-doc.com/index_adult.htm.

[22] Wisconsin takes the common sense view that when a person does not lose rights, he need not have them restored in order to avoid a state-imposed disability. *See*, *e.g.*, Wis. Stat. § 304.078(2); *id*. § 973.09(5); Note, 1998 Wis. Legis. Serv. Act 289 (1997 A.B. 747) (WEST) ("certificate of discharge" is required as evidence that the "person is restored to his or her civil rights" when a felon is discharged from probation, but not when a misdemeanant is discharged from probation,

Circuit's mechanical reading of "civil rights restored" thus creates an unavoidable lifetime prohibition against possessing firearms for certain Wisconsin misdemeanants, regardless of the fact that Wisconsin itself deems misdemeanants automatically capable of participating in civic life and possessing firearms.[23] As the dissent in *Caron* recognized "it is bizarre to hold that the *legal* possession of firearms under state law subjects a person to a sentence enhancement under federal law." 524 U.S. at 318 (Thomas, J., dissenting) (emphasis in original).

Florida misdemeanants would suffer a similarly bizarre disadvantage under the Seventh Circuit's interpretation. Felons in Florida lose civil rights and firearms rights but misdemeanants do not, even if convicted of a misdemeanor punishable by more than two years.[24] See Fla. Const. Art. 6, § 4(a) (rights to vote and hold office lost by felony conviction); Fla. Stat. § 40.013(1) (right to serve on jury lost by felony conviction). Most felons regain their civil rights

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because "persons on probation for misdemeanors do not lose any civil rights, which obviates the need for a discharge document to be filed on their behalf").

[23] The Seventh Circuit suggested that Petitioner's battery convictions would be considered felonies in most states. JA 32-33. What the crime would be in other states is irrelevant. In fact, Wis. Stat. § 940.19(1), for which Petitioner was convicted, is the least serious form of battery in Wisconsin, and is clearly a misdemeanor. In Wisconsin, felony battery requires substantial bodily harm or great bodily harm under Wis. Stat. § 940.19(2) and (4) respectively. Petitioner was not initially charged with, or convicted of either of those felony level offenses.

[24] Until July 1, 1999, misdemeanors committed while evincing prejudice were punishable by up to five years imprisonment. *See* Fla. Stat. § 775.082 (1998) (third degree felonies punishable by maximum term of five years imprisonment); *id*. § 775.085(1)(b) (1998) (first degree misdemeanors committed with evident prejudice punishable as if classified as third degree felony). Since July 1, 1999, offenses committed while evincing prejudice are reclassified to the next-higher class of offense. *See id*. § 775.085(1)(a).

automatically upon completion of sentence or after a waiting period, and can regain firearms rights by application eight years after completion of sentence, thus satisfying § 921(a)(20)'s exemption. See Rules of Executive Clemency at 5(I)(D), 9-10.[25] In contrast, misdemeanants who never lose civil rights or firearms rights would need to obtain an expungement or "set aside" (neither of which is available in Florida) or a pardon (which is rarely granted) in order to satisfy the exemption clause.

This result directly contradicts Florida law governing firearm rights. Florida prohibits a person convicted of a felony from possessing a firearm if civil rights have not been restored. See Fla. Stat. § 790.23(1), (2).[26] In *Doyle* v. *Florida Department of State*, 748 So. 2d 353 (Fla. 1st Dist. 1999), the Florida District Court of Appeal held that § 790.23 did not prohibit a person convicted of a misdemeanor in another jurisdiction from possessing a firearm in Florida even if the crime of conviction would have been a felony in Florida because "if section 790.23 does not apply to a person whose civil rights have been *restored*, it certainly cannot apply to a person whose civil rights were never suspended, as in the case of one convicted only of a misdemeanor." See *id.* at 355-56 (emphasis in original). In Florida, therefore, the Seventh Circuit's interpretation not only creates absurd results, but its reasoning has been rejected by Florida courts. This contradicts Florida's rules governing restoration, which this Court has stated should be squarely within Florida's province. See *Caron*, 524 U.S. at 316 (stating "[r]estoration of the right to vote, the right to hold office, and the right to sit on a jury

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[25] *Available at* https://fpc.state.fl.us/Clemency.htm

[26] Certain misdemeanants are prohibited from obtaining a license to carry a concealed weapon for three years following either the date of conviction or the completion of any release conditions. *See* Fla. Stat. § 790.06(2)(e)-(f). None of those misdemeanors is punishable by more than two years, however, and would thus be exempt from the federal definition of a "conviction" under § 921(a)(20)(B).

turns on so many complexities and nuances that state law is the most convenient source for definition").

In at least eleven other jurisdictions, despite the States' clear indications that certain persons are trustworthy enough to be exempted from federal law, persons convicted of less serious crimes are treated as harshly or worse than those persons with more serious convictions. See FAMM/NACDL *Amici* Br. 11-25. In essence, the Seventh Circuit's interpretation would revive *Dickerson* in that federal law, not state law, would control what is meant by "trustworthiness," or "law abiding" in the context of the civil rights restored exemption and § 921(a)(20).

C. Excluding Convictions For Which Civil Rights Were Retained Upsets Societal Norms And Is An Irrational Distinction.

The underlying principle and common sense application of the statute is to determine whether the convicting jurisdiction has deemed an individual trustworthy following a particular conviction. The Seventh Circuit ignored this common sense application. When construing a statute, courts "must be guided to a degree by common sense." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Courts also try to avoid interpretations of statutes that would upset long-standing and widely held mores and social norms, absent an explicit congressional intention to do so. Cf. *Staples* v. *United States*, 511 U.S. 600, 610 (1994) (narrowly interpreting 26 U.S.C. § 5861(d) to require knowledge, in light of "the long tradition of widespread lawful gun ownership" in America).

It is a universal American legal norm that less serious offenders should be treated accordingly. All other things being equal, we do not punish more harshly those who are less culpable, and less harshly those who are more culpable. For example, in North Dakota, felons who are sentenced to probation retain all three civil rights. Felons who are

sentenced to a term of incarceration, however, lose all three civil rights and have them automatically restored upon completion of the sentence.[27] North Dakota plainly has made a determination that the former is a less serious offense and offender than the latter. As this Court has noted: "A sentence of probation, however, even if 'lenient,' ordinarily reflects the judgment that the offense and offender's criminal history were not so serious as to warrant imprisonment." *Granderson*, 511 U.S. at 51. Under the Seventh Circuit's interpretation, however, felons sentenced to incarceration would satisfy the exemption clause, while less serious felons sentenced to probation would not.

In *Caron*, this Court specifically addressed the opposite concern – that the most egregious cases should not avoid the federal firearms ban, or the most serious penalties. The Court noted that by prohibiting *Caron* from possessing one type of firearm, "[t]he State has singled out the offender as more dangerous than law-abiding citizens." *Caron*, 524 U.S. at 315. It considered that if it viewed a state's partial ban on firearms as sufficient to satisfy the unless clause in Caron's case, then it "would make these partial restrictions a nullity under federal law, indeed in the egregious cases with the most dangerous weapons." *Id*. It concluded that "Congress cannot have intended this bizarre result." *Id*. Here, the Seventh Circuit's interpretation of the exemption clause results in the exclusion of *less* egregious cases (i.e., those which a state determined not serious enough to take away civil rights at all) from the exemption clause.

Likewise, in *Small*, the Court avoided an interpretation of § 922(g)(1) which would result in a similar senseless

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[27] *See* N.D. Cent. Code § 12.1-33-01(1)(a) (right to vote); *id.* § 12.1-33-01(1)(b) (right to hold public office); *id.* § 27-09.1-08(e) (right to serve on a jury); *id.* § 12.1-33-03(1) (all rights restored upon release from prison). All felons lose firearm rights, which are automatically restored after a waiting period.

distinction when it found that "Congress did not consider" the phrase "convicted in any court" to include foreign convictions as predicate offenses for § 922(g)(1). 544 U.S. at 392. The Court was troubled by the "apparently senseless distinction" in the statute between, for example, three predicate convictions for a "serious drug offense" committed within the United States (which would result in increased penalties) and the same convictions for serious drug offenses committed in a foreign country (which would not result in increased penalties because the penalty provision only specifies state or federal offenses). *Id*. So too should this Court be concerned with a senseless distinction that subjects less serious offenders to enhanced sentences and firearms prohibitions while it exempts more serious offenders.

Those circuit courts in the majority on the question presented here have commented on the irrationality of the distinction later adopted by the Seventh Circuit in this case. See, *e.g.*, *Cassidy*, 899 F.2d at 549 n.13 ("[t]here is no rational basis . . . for distinguishing between civil rights possessed by a felon after his release that were not expressly taken away, and those civil rights which were negated . . . and then reinstated after his release"); *Thomas*, 991 F.2d at 212 ("[W]e [are] unable to embrace an interpretation that results in convicting a person under § 922(g) who has never lost his civil rights, and who is not prohibited by the state from possessing a gun, while simultaneously immunizing from such a conviction one who was stripped of his civil rights . . . but has subsequently had them affirmatively 'restored' [such a result is a] wonderland").

Moreover, a person deemed more trustworthy by a state because he was allowed to retain his civil rights despite a conviction is *better* situated than a person whose civil rights were taken away. The Seventh Circuit's interpretation of "civil rights restored" treats the less serious offender more harshly by requiring a restoration.

The only possible legitimate government interest in drawing such a distinction is best summarized by the Second Circuit in *McGrath*:

> By the *affirmative act* of pardon, expungement or restoration, the state has declared its renewed trust in that person. This rationale does not apply with equal force, however, where the legislature of the state has simply failed to provide that those found guilty of misdemeanors will lose any civil rights as a collateral consequence of their convictions. *There is no individualized official judgment*, as in a pardon or expungement, that the particular person in question has demonstrated some reason to be singled out from Congress's overall judgment that persons convicted of serious crimes not be allowed to carry weapons.

McGrath, 60 F.3d at 1007-08 (quoting *United States* v. *Ramos*, 961 F.2d 1003, 1009 (1st Cir. 1992)) (emphasis in original). But even the Second Circuit, in its very next sentence, acknowledged that a majority of circuits disagreed with such a justification. *McGrath*, 60 F.3d at 1008. As this Court concluded in *Caron*, restoration by operation of law is sufficient to trigger the exemption clause, 524 U.S. at 313-14, and it is the more frequent means of restoring civil rights. See NACDL/FAMM *Amici* Br. app 2. Accordingly, the Second Circuit's assumption that restoration is somehow different because it involves in all cases an individualized determination of trustworthiness is demonstrably incorrect and the argument fails for that reason alone.

Nor should the Second Circuit's argument succeed even if the assumption were correct for the simple reason that an individualized determination of trustworthiness is no more of an "affirmative act" than a broad legislative determination that persons who commit certain crimes nonetheless deserve to retain their civil rights. Indeed, such a non-individualized determination is an even bolder affirmative statement of inherent trustworthiness than an individualized requirement.

The Second Circuit's reasoning in *McGrath* gives absolutely no effect to a state legislature's affirmative statement in this regard and the Court should reject its holding for this reason as well.

V. LENITY REQUIRES "CIVIL RIGHTS RESTORED" TO INCLUDE CIVIL RIGHTS RETAINED.

When the "text, structure, and history fail to establish that the Government's position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *Granderson*, 511 U.S. at 54. The rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Albernaz* v. *United States*, 450 U.S. 333, 342 (1981). "[T]he rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota* v. *United States*, 471 U.S. 419, 427 (1985). It also ensures that "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Albernaz*, 450 U.S. at 342. It reflects "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *United States* v. *Bass*, 404 U.S. 336, 348 (1971).

At the very least, including rights retained in the exemption clause is a plausible interpretation. The Seventh Circuit's interpretation, however, offends both purposes of the rule of lenity. First, the clause's uncertainty as to whether convictions for which civil rights were retained are included within the exemption clause fails to provide fair warning to individuals who may be prosecuted under § 922(g)(1). A misdemeanant or less serious felon would see that the statute allows a comparatively more serious felon to be exempt from prosecution under certain circumstances that are not unlike his. It is reasonable for that less serious offender to presume

that he, too, would be exempt. Second, excluding convictions for which civil rights were retained from the exemption clause can result in increased penalties under § 924(e)(1).

Reading the exemption clause broadly to include civil rights retained solves both of these inequities. First, Congress did not contemplate a broad reading which results in an expansive prosecutorial reach of § 922(g)(1). Second, it reduces the number of convictions that would qualify for increased penalties under § 924(e)(1) to include only the worst of offenders. As to Petitioner in particular, the district court found that he was an armed career criminal and sentenced him to 180 months imprisonment. The Seventh Circuit affirmed the finding that Petitioner's three misdemeanor convictions qualified as violent felonies for purposes of § 924(e)(1). If the Court accepts Petitioner's interpretation of the exemption clause, then his statutory maximum penalty is 120 months imprisonment, and his guideline range is 37-46 months. A broad reading of the exemption clause, therefore, is the less harsh alternative, and provides fair warning of prosecutorial reach. It also ensures that individuals will not languish in prison for mandatory minimum periods of 15 years when Congress did not clearly say or intend they should.

CONCLUSION

For the reasons stated, the Court should reverse the judgment of the United States Court of Appeals for the Seventh Circuit, and remand this case for further proceedings consistent with the Court's opinion.

Respectfully Submitted,

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