

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States v. Jimenez

No. 17-287-cr, United States Court of Appeals for the Second Circuit (July 10, 2018)

SUMMARY

The Second Circuit upheld 18 U.S.C. § 922(g)(6), which prohibits firearm and ammunition possession by persons dishonorably discharged from the military, as applied to a defendant convicted of felony-equivalent conduct by court-martial. Assuming Second Amendment protection, the court held that such individuals are not "law-abiding and responsible" citizens at the Amendment's core, and the statute withstands intermediate scrutiny because it is substantially related to the important government interest in public safety. The court declined to address facial challenges or hypothetical applications, finding the statute constitutional as applied.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Pooler; Raggi; Droney
JURISDICTION	Federal
DECIDED	July 10, 2018
DOCKET	17-287-cr
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the United States District Court for the Southern District of New York from a judgment of conviction after a guilty plea.
STANDARD OF REVIEW	De novo review of a district court's determination that the application of a law does not violate the Second Amendment.
PRECEDENTIAL VALUE	published
PARTIES	Jose Jimenez v. United States of America

TOPICS

- second amendment
- constitutional law
- criminal procedure
- appellate procedure
- standard of review

PRACTICE AREAS

- Criminal Law
- Constitutional Law
- Firearms Regulation

QUESTIONS PRESENTED

1. Whether Jimenez's prosecution and conviction for possessing ammunition after being dishonorably discharged from the military violates the Second Amendment.

HOLDINGS

1. The statute does not violate the Second Amendment. Jimenez is not among the 'law-abiding and responsible' citizens whose interests in possessing firearms are at the core of the Second Amendment, and the statute withstands intermediate scrutiny.

KEY QUOTATIONS

“When a defendant has already been convicted for specific conduct under the challenged law, we will examine the complainant's conduct before analyzing other hypothetical applications of that law.” (5)

“Since the Supreme Court announced that the Second Amendment protects an individual right to possess and carry weapons in case of confrontation, we have developed a two-step framework for determining whether legislation infringes on this right.” (7)

“Heller reads the Second Amendment as elevating above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” (12)

“Consistent with this precedent, we hold that those who, like Jimenez, have been found guilty of felony-equivalent conduct by a military tribunal are not among those law-abiding and responsible persons whose interests in possessing firearms are at the Amendment's core.” (14)

“To withstand intermediate scrutiny, a law must generally be substantially related to the achievement of an important governmental interest.” (16)

FACTUAL BACKGROUND

On June 3, 2015, Jose Jimenez was arrested after being found in possession of a bullet during an attempted undercover firearms purchase. He had driven Oscar Sanchez to a meeting where Sanchez planned to sell handguns to an undercover NYPD detective. After the sale failed, Sanchez removed a round from his handgun and handed it to Jimenez. Law enforcement discovered the bullet during a pat-down. Further investigation revealed Jimenez had been dishonorably discharged from the Marines in 2012 after being convicted by court-martial for offenses including conspiracy to sell military property, drug use, and dealing stolen firearms.

PROCEDURAL HISTORY

Jimenez filed a motion to dismiss the indictment challenging the constitutionality of 18 U.S.C. § 922(g)(6) under the Second Amendment. The district court denied the motion. Jimenez then pled guilty pursuant to Rule 11(a)(2), preserving his right to appeal. The district court sentenced him to three years' supervised release and entered judgment on January 11, 2017. Jimenez filed a notice of appeal the next day.

DISPOSITION

affirmed

CASES CITED

- District of Columbia v. Heller, 554 U.S. 570 (2008)
- United States v. Decastro, 682 F.3d 160 (2d Cir. 2012)
- Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012)
- Chafin v. Chafin, 568 U.S. 165 (2013)
- United States v. Farhane, 634 F.3d 127 (2d Cir. 2011)
- New York State Rifle & Pistol Association, Inc. v. Cuomo, 804 F.3d 242 (2d Cir. 2015)
- New York State Rifle & Pistol Association, Inc. v. City of New York, 883 F.3d 45 (2d Cir. 2018)
- United States v. Bogle, 717 F.3d 281 (2d Cir. 2013)
- United States v. Stuckey, 317 F. App'x 48 (2d Cir. 2009)
- United States v. Bryant, 711 F.3d 364 (2d Cir. 2013)
- United States v. Bena, 664 F.3d 1180 (8th Cir. 2011)
- United States v. Vongxay, 594 F.3d 1111 (9th Cir. 2010)
- Binderup v. Attorney General United States of America, 836 F.3d 336 (3d Cir. 2016)
- Hamilton v. Pallozzi, 848 F.3d 614 (4th Cir. 2017)
- United States v. Rozier, 598 F.3d 768 (11th Cir. 2010)
- Tyler v. Hillsdale County Sheriff's Department, 837 F.3d 678 (6th Cir. 2016)
- United States v. Chester, 628 F.3d 674 (4th Cir. 2010)
- United States v. Skoien, 614 F.3d 638 (7th Cir. 2010)
- United States v. Day, 476 F.2d 562 (6th Cir. 1973)
- Solorio v. United States, 483 U.S. 435 (1987)
- Grafton v. United States, 206 U.S. 333 (1907)
- United States v. Dixon, 509 U.S. 688 (1993)
- Ortiz v. United States, 585 U.S. ____ (2018)
- United States v. Kebodeaux, 570 U.S. 387 (2013)
- Osterweil v. Bartlett, 706 F.3d 139 (2d Cir. 2013)
- United States v. Reese, 627 F.3d 792 (10th Cir. 2010)
- Kwong v. Bloomberg, 723 F.3d 160 (2d Cir. 2013)

OPINION

PER CURIAM.

17-287-cr United States v. Jimenez 17-287-cr United States v. Jimenez 1 UNITED STATES
COURT OF APPEALS 2 FOR THE SECOND CIRCUIT 3 _____ 4 5 August
Term, 2017 6 7 (Argued: March 8, 2018 Decided: July 10, 2018) 8 9 Docket No. 17-287-cr 10 11

_____ 12 13 UNITED STATES OF AMERICA, 14 15 Appellee, 16 17 v. 18 19
JOSE JIMENEZ, 20 21 Defendant-Appellant.

22 23 _____ 24 25 Before: POOLER, RAGGI, and DRONEY, Circuit Judges.
26 27 Jose Jimenez pled guilty to possession of ammunition after having been 28 dishonorably
discharged from the military, in violation of 18 U.S.C. § 922(g)(6). 29 Having properly objected at
the district court and reserved his right to appeal, he 30 now challenges the validity of Section
922(g)(6) under the Second Amendment.

1 Assuming that he is entitled to Second Amendment protection, we find that 2 Section 922(g)(6)
as applied to Jimenez withstands intermediate scrutiny. 3 Affirmed. 4 _____ 5
DANIEL HABIB, Federal Defenders of New York, Inc., 6 New York, N.Y., for Defendant-
Appellant. 7 8 SAMUEL RAYMOND, Assistant United States Attorney 9 (Margaret Garnett,
Assistant United States Attorney, on 10 the brief), for Geoffrey S. Berman, United States Attorney
11 for the Southern District of New York, New York, N.Y., 12 for Appellee.

13 14 POOLER, Circuit Judge: 15 Jose Jimenez pled guilty to possession of ammunition after
having been 16 dishonorably discharged from the military, in violation of 18 U.S.C. § 922(g)(6).
17 Having properly objected at the district court and reserved his right to appeal, he 18 now
challenges the validity of Section 922(g)(6) under the Second Amendment. 19 Assuming he is
entitled to Second Amendment protection, we find that Section 20 922(g)(6) as applied to Jimenez
withstands intermediate scrutiny.

Accordingly, 21 we AFFIRM the judgment of the district court. 22 2 1 BACKGROUND 2 On
June 3, 2015, Jose Jimenez was arrested in unlawful possession of a 3 bullet retrieved from his
person following an attempted undercover firearms 4 purchase. Jimenez had agreed to drive Oscar
Sanchez to the parking lot of a fast 5 food restaurant in the Bronx on June 3, 2015 in exchange for
\$40.

Sanchez had 6 arranged to sell 20 handguns to a person who was, in fact, an undercover 7
detective from the New York Police Department (“NYPD”). Jimenez claims that 8 Sanchez did not
inform him of the purpose of the trip. 9 After arriving at the parking lot, the detective and Sanchez
got out of their 10 cars, whereupon Sanchez showed the detective a 9-millimeter handgun and 11
transferred a black bag into the trunk of the detective’s car.

At the detective’s 12 request, Sanchez opened the bag. Inside was a box of Capri Sun and a carjack
but 13 no guns. No deal having been done, Sanchez removed the bag from the 14 detective’s
trunk, got back in the car with Jimenez and an unnamed woman, and 15 they drove away. 16 But
that was not the end of the matter.

As part of a plan with the 17 undercover NYPD purchaser, two agents from the Department of
Alcohol, 18 Tobacco, and Firearms (“ATF”) had followed Jimenez’s car. After the sale did not 3 1

occur, these agents ordered Jimenez to pull over several blocks from the parking 2 lot.

As the law enforcement officials approached the car, Sanchez removed a 3 round from the chamber of his 9-millimeter handgun and handed it to Jimenez. 4 The officials searched Jimenez's car, found Sanchez's weapon—which was 5 loaded with 12 rounds of ammunition—and brought everybody to the ATF office 6 in the Bronx for questioning. At the office, ATF agents patted down Jimenez and 7 discovered the 9-millimeter round in his pocket.

8 Further investigation revealed that Jimenez had been dishonorably 9 discharged from the Marines in 2012 after serving 18 months in a military prison 10 for conspiracy to sell military property, wrongful disposition of military 11 property, use and possession of a controlled substance, and conduct of a nature 12 to bring discredit upon the armed forces, in violation of 10 U.S.C. §§ 881, 908, 13 912a, 934.

He had been convicted of these offenses after confessing to using and 14 dealing ecstasy and to possessing and selling firearms and night vision goggles 15 that had been stolen from the military. 16 Federal law prohibits anybody who “has been discharged from the Armed 17 Forces under dishonorable conditions” from possessing firearms or ammunition 4 1 “in or affecting commerce.” 18 U.S.C. § 922(g)(6).

On July 6, 2015 Jimenez was 2 arrested, and on July 28 he was indicted, for violating this law. 3 In the district court, Jimenez filed a motion to dismiss the indictment 4 challenging the constitutionality of Section 922(g)(6) under the Second 5 Amendment.

After the district court denied this motion, *United States v. Jimenez*, 6 15-cr-496, 2016 WL 8711451 (S.D.N.Y. June 3, 2016), he pled guilty pursuant to 7 Rule 11(a)(2) of the Federal Rules of Criminal Procedure, preserving his right to 8 appeal the denial of his motion to dismiss.

The district court sentenced him 9 principally to three years' supervised release and entered judgment on January 10 11, 2017. Jimenez filed a notice of appeal the next day. 11 **DISCUSSION**
12 **I. The Nature of the Challenge** 13 The sole question in front of us is whether Jimenez's prosecution and 14 conviction for possessing ammunition after having been dishonorably 15 discharged violates the Second Amendment.

Jimenez presents his argument as a 16 facial challenge to the statute under which he was convicted, but it is not. 17 “When a defendant has already been convicted for specific conduct under 18 the challenged law,” we will “examine the complainant's conduct before 5 1 analyzing other hypothetical applications” of that law. *United States v. Decastro*, 2 682 F.3d 160, 163 (2d Cir.

2012) (internal quotation marks omitted); see also 3 *Kachalsky v. County of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012). If a defendant's 4 conviction presents constitutional problems, those problems may be with the 5 face of the statute or they may pertain only to the application of the

statute to 6 certain situations. But if the statute is constitutionally applied to the defendant, 7 we follow the principal that “[f]ederal courts may not decide questions that 8 cannot affect the rights of litigants in the case before them or give opinions 9 advising what the law would be upon a hypothetical state of facts.” *Chafin v. 10 Chafin*, 568 U.S. 165, 172 (2013) (alterations and quotation marks omitted).

11 Contrary to Jimenez’s urgings, a defendant to whom a statute constitutionally 12 applies has no standing to challenge the statute’s constitutionality as it applies to 13 others differently situated. See *United States v. Farhane*, 634 F.3d 127, 138 (2d Cir. 14 2011).

Because we find that Jimenez’s Second Amendment rights were not 15 violated, we will not hear his arguments about alleged constitutional problems 16 with other potential applications of the statute under which he was convicted. 17 He has “necessarily failed to state a facial challenge.” *Decastro*, 682 F.3d at 163 18 (internal punctuation omitted). 6 1 II. Evaluating Second Amendment Challenges 2 Since the Supreme Court announced that the Second Amendment protects 3 an “individual right to possess and carry weapons in case of confrontation,” 4 *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), we have developed a two- 5 step framework for determining whether legislation infringes on this right, see 6 *New York State Rifle & Pistol Association, Inc. v. Cuomo*, 804 F.3d 242, 254-55 (2d 7 Cir.

2015) (“*NYSRP v. Cuomo*”). First, “we must determine whether the 8 challenged legislation impinges upon conduct protected by the Second 9 Amendment.” *Id.* at 254. Second, if we find that a law implicates the Second 10 Amendment as *Heller* instructed us to interpret it, we determine the appropriate 11 level of scrutiny to apply and evaluate the constitutionality of the law using that 12 level of scrutiny.

See *id.* at 257-58, 261. We review de novo a district court’s 13 determination that the application of a law does not violate the Second 14 Amendment. See *New York State Rifle & Pistol Association, Inc. v. City of New York*, 15 883 F.3d 45, 54 (2d Cir. 2018) (“*NYSRP v. City*”). 16 III. Step One: Whether the Second Amendment Applies to Jimenez 17 There is some reason to think the Second Amendment does not apply to 18 Jimenez.

As far as we can tell, no other federal appellate court in the post-*Heller* 7 1 era has examined the ban we review today. But see *United States v. Day*, 476 F.2d 2 562, 568 (6th Cir. 1973) (before *Heller*, finding that 18 U.S.C. § 922(g)(6) complies 3 with the Second Amendment). But precedent does provide some guidance. *Heller* 4 instructed that its reading of the Second Amendment not “be taken to cast doubt 5 on longstanding prohibitions on the possession of firearms by felons and the 6 mentally ill” and other “presumptively lawful regulatory measures.” 554 U.S. at 7 626, 627 n.26.

We have previously relied on this passage to uphold the federal 8 ban on ex-felons’ access to firearms and ammunition. *United States v. Bogle*, 717 9 F.3d 281, 281-82 (2d Cir. 2013); see also

United States v. Stuckey, 317 F. App'x 48, 50 10 (2d Cir. 2009) (a previous non-precedential summary order coming to the same 11 conclusion). Heller also emphasized that not all gun regulations implicate the 12 right it announced.

See 554 U.S. at 595, 626. The individual right that Heller found 13 in the Second Amendment “protects only ‘the sorts of weapons’ that are (1) ‘in 14 common use’ and (2) ‘typically possessed by law-abiding citizens¹ for lawful 1 Although the Court uses “citizens”, presumably at least some non-citizens are covered by the Second Amendment. Heller quoted favorably Verdugo-Urquidez’s reading that “‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with 8 1 purposes.’” NYSRP v. Cuomo, 804 F.3d at 254-55 (quoting Heller, 554 U.S. at 627, 2 625).

Applying this limitation, we have held that “the Second Amendment does 3 not protect the unlawful purpose of possessing a firearm in furtherance of a drug 4 trafficking crime.” United States v. Bryant, 711 F.3d 364, 370 (2d Cir. 2013) 5 (emphasis omitted). Some of our sister circuits have found that individuals who 6 have failed to abide by the law or are otherwise “unvirtuous,” as that word was 7 understood by the political elite of the Founding generation, are not entitled to 8 Heller’s protections.

See United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011) 9 (“[T]he concept of a right to arms was inextricably and multifariously tied to that 10 of the ‘virtuous citizen,’ such that the right to arms does not preclude laws 11 disarming the unvirtuous (i.e. criminals) or those who, like children or the 12 mentally unbalanced, are deemed incapable of virtue...” (internal quotation 13 marks omitted)); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir.

2010) 14 (“[F]elons are categorically different from the individuals who have a this country to be considered part of that community.” Heller, 554 U.S. at 580 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)). It would seem, then, that at least members of the “national community” or those with a “sufficient connection” with that community are part of the “people” covered by the Second Amendment.

9 1 fundamental right to bear arms, and Vongxay’s reliance on Heller is 2 misplaced...”); see also Binderup v. Attorney General United States of America, 836 3 F.3d 336, 348-49 (3d Cir. 2016) (discussing the exclusion of “unvirtuous citizens” 4 from Second Amendment protection); Hamilton v. Pallozzi, 848 F.3d 614, 625 (4th 5 Cir. 2017) (same); United States v. Rozier, 598 F.3d 768, 771 (11th Cir.

2010) (“While 6 felons do not forfeit their constitutional rights upon being convicted, their status 7 as felons substantially affects the level of protection those rights are accorded.”). 8 However, we

have never determined which particular conduct or 9 characteristics can disqualify some individuals from the right that Heller 10 recognized. Beginning to elaborate a test for who qualifies for the Second 11 Amendment's protections risks introducing difficult questions into our 12 jurisprudence, including questions that have divided other courts.

See, e.g., 13 *Binderup*, supra; *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 14 2016). Given the "vast terra incognita" that Heller left in its wake, *Kachalsky*, 701 15 F.3d at 89 (internal quotation marks omitted), we have routinely assumed that 16 the Second Amendment applies to a given application of a firearms (or 17 ammunition) regulation in order to determine whether the law being challenged 18 would withstand the requisite level of scrutiny.

If it would, we need not grapple 10 1 with whether the law actually implicates the Second Amendment, since it would 2 comport with that Amendment's dictates in any case. See *NYSRP v. City*, 883 F.3d 3 at 61-62; *NYSRP v. Cuomo*, 804 F.3d at 257; *Kwong v. Bloomberg*, 723 F.3d 160, 168 4 (2d Cir. 2013); *Kachalsky*, 701 F.3d at 89. Proceeding with our usual caution, we 5 find that it is unnecessary to determine whether Jimenez can claim any Second 6 Amendment protections because even if we assume (without deciding) that he 7 can, we conclude that those protections do not preclude his conviction under 8 Section 922(g)(6).

9 IV. Step Two: Scrutinizing Section 922(g)(6) 10 A. Determining the Appropriate Level of Scrutiny 11 On the assumption that Jimenez maintained an individual right to bear 12 arms under the Second Amendment, we must first determine the appropriate 13 level of scrutiny to apply.

In doing so, "we consider two factors: (1) how close the 14 law comes to the core of the Second Amendment right and (2) the severity of the 15 law's burden on the right." *NYSRP v. Cuomo*, 804 F.3d at 258 (internal quotation 16 marks omitted). Laws that place substantial burdens on core rights are examined 17 using strict scrutiny. See *NYSRP v. City*, 883 F.3d at 56.

But laws that place either 18 insubstantial burdens on conduct at the core of the Second Amendment or 11 1 substantial burdens on conduct outside the core of the Second Amendment (but 2 nevertheless implicated by it) can be examined using intermediate scrutiny. See 3 *id.*, 883 F.3d at 57-58 (applying intermediate scrutiny to non-substantial burden 4 on core conduct); *id.* at 58-59 (applying intermediate scrutiny to substantial 5 burden on non-core conduct); *NYSRP v. Cuomo*, 804 F.3d at 258-60 (substantial 6 burden on non-core conduct); *Kwong*, 723 F.3d at 167-68 (non-substantial burden 7 on core conduct); *Kachalsky*, 701 F.3d at 96 (substantial burden on non-core 8 conduct).

9 It is clear from *Heller* and our decisions applying it that protecting oneself 10 in one's home with a weapon in common use is at the core of the Second 11 Amendment. See *Heller*, 554 U.S. at 634-35; *NYSRP v. City*, 883 F.3d at 56; 12 *Kachalsky*, 701 F.3d at 93-94. Jimenez argues that this precedent establishes that a 13 categorical ban on firearms or ammunition possession based on an

individual's 14 unfavorable military record necessarily places a substantial burden on core 15 Second Amendment protections because it will always prevent those subject to 16 the ban from any use of any weapon for any purpose, including self-defense 17 within the home.

This argument rests on a misunderstanding of the relevant 18 precedent. *Heller* reads the Second Amendment as "elevat[ing] above all other 12 1 interests the right of law-abiding, responsible citizens to use arms in defense of 2 hearth and home." 554 U.S. at 635 (emphasis added).

The Supreme Court thus 3 identified the core of Second Amendment protections by reference not only to 4 particular uses and particular weapons but also to particular persons, namely, 5 those who are "law-abiding and responsible." Since *Heller*, our court has 6 consistently included the "law-abiding and responsible" qualification when 7 identifying the Second Amendment's core protections.

See *Decastro*, 682 F.3d at 8 166 (observing that heightened scrutiny is triggered only by restrictions that 9 operate as a "substantial burden" on "ability of law-abiding citizens to possess 10 and use a firearm for lawful purposes"); *NYSRP v. City*, 883 F.3d at 56 (quoting 11 *Decastro*); *NYSRP v. Cuomo*, 804 F.3d at 259 (same). Other circuits have 12 emphasized *Heller*'s specific concern for the rights of law-abiding and 13 responsible individuals.

See *United States v. Chester*, 628 F.3d 674, 682-83 (4th Cir. 14 2010) ("Although Chester asserts his right to possess a firearm in his home for 15 the purpose of self-defense, we believe his claim is not within the core right 16 identified in *Heller*—the right of a law-abiding, responsible citizen to possess and 17 carry a weapon for self-defense..."); *Tyler*, 837 F.3d at 691 (Because "the risk 18 inherent in firearms and other weapons distinguishes the Second Amendment 13 1 right from other fundamental rights...we should caution against imposing too 2 high a burden on the government to justify its gun safety regulations, 3 particularly where Congress has chosen to rely on prior judicial determinations 4 that individuals pose a risk of danger to themselves or others." (internal citation 5 and quotation marks omitted)); *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir.

6 2010) ("That some categorical limits are proper is part of the original meaning, 7 leaving to the people's elected representatives the filling in of details."). 8 Consistent with this precedent, we hold that those who, like Jimenez, have 9 been found guilty of felony-equivalent conduct by a military tribunal are not 10 among those "law-abiding and responsible" persons whose interests in 11 possessing firearms are at the Amendment's core.

The commission of a felony is 12 a failure to abide by laws that our government has deemed especially important. 13 See *Felony*, *Black's Law Dictionary* (10th ed. 2014) (defining felony as a "serious 14 crime"). The Supreme Court recognized this fact in specifically identifying felon 15 bans as "presumptively lawful." *Heller*, 554 U.S. at 627. There is no reason to 16 depart from that

presumption here, given that Jimenez was court martialed for, 17 among other things, trafficking in stolen firearms, conduct for which civilians 18 can be convicted of a felony pursuant to 18 U.S.C. § 922(a)(1).

14 1 Though Jimenez objects to the lesser procedural protections of military 2 tribunals, it is well established that “the requirements of the Constitution are not 3 violated where...a court-martial is convened to try a serviceman who was a 4 member of the Armed Services at the time of the offense charged.” *Solorio v. 5 United States*, 483 U.S. 435, 450-51 (1987). “It is alike indisputable that if a court- 6 martial has jurisdiction to try an officer or soldier for a crime, its judgment will 7 be accorded the finality and conclusiveness as to the issues involved which 8 attend the judgments of a civil court in a case of which it may legally take 9 cognizance.” *Grafton v. United States*, 206 U.S. 333, 345 (1907); see also *United States 10 v. Dixon*, 509 U.S. 688, 726 (1993) (“Grafton, and the principle it embodies, are 11 controlling.”); see also *Ortiz v. United States*, 585 U.S. ____ (2018) (slip op. at 2, 6) 12 (discussing how the “court-martial system” resembles “civilian structures of 13 justice” such that “the judicial character and constitutional pedigree” thereof 14 “enable [the Supreme] Court...to review the decisions of the court sitting at its 15 apex”) Thus, those convicted of felony-equivalent conduct by a military tribunal 16 have been duly removed from the category of “law-abiding” as that term is used 17 in *Heller*.

15 1 Though Jimenez’s interest is outside the core protections of the Second 2 Amendment, it is burdened substantially. Section 922(g)(6) makes it “unlawful 3 for any person...who has been discharged from the Armed Forces under 4 dishonorable conditions...to ship or transport in interstate or foreign commerce, 5 or possess in or affecting commerce, any firearm or ammunition; or to receive 6 any firearm or ammunition which has been shipped or transported in interstate 7 or foreign commerce.” 18 U.S.C. § 922(g)(6).

Jimenez was dishonorably 8 discharged. This law thus prohibits Jimenez from possessing firearms or 9 ammunition of any kind for any purpose. It leaves him no alternative means of 10 doing so, let alone adequate alternatives. See *NYSRP v. City*, 883 F.3d at 56, 60 11 (discussing the role of “adequate alternatives” in determining the burden). 12 We have usually analyzed substantial burdens on non-core rights with 13 intermediate scrutiny.

See *NYSRP v. Cuomo*, 804 F.3d at 258-60; *Kachalsky*, 701 14 F.3d at 96. 15 B. Applying Intermediate Scrutiny 16 To withstand intermediate scrutiny, a law must generally be “substantially 17 related to the achievement of an important governmental interest.” *NYSRP v. 18 City*, 883 F.3d at 62. Jimenez “concedes the importance of the government’s 16 1 interest,” Appellant’s Br. at 51, as he must, since we have repeatedly held that 2 “[t]he regulation of firearms is a paramount issue of public safety,” *Osterweil v. 3 Bartlett*, 706 F.3d 139, 143 (2d Cir.

2013), which is always a “compelling” 4 governmental interest. *NYSRP v. City*, 883 F.3d at 62; *NYSRP v. Cuomo*, 804 F.3d 5 at 261; *Kwong*, 723 F.3d at 169; *Kachalsky*, 701. F.3d at 97; see

also, e.g., *United States v. Reese*, 627 F.3d 792, 804 n.4 (10th Cir. 2010); *Tyler*, 837 F.3d at 693.

Because “state regulation of the right to bear arms has always been more robust than analogous regulation of other constitutional rights,” we have found a substantial relation between the means chosen and the compelling end of safety “[s]o long as the [government] produce[s] evidence that fairly supports [its] rationale.” *NYSRP v. Cuomo*, 804 F.3d at 261 (alterations and citations omitted).

Jimenez argues that, as to Section 922(g)(6), “the mismatch between means and end is comical.” Appellant’s Br. at 51. Specifically, he points to the fact that the government presents “no studies, no empirical data, no expert testimony, no legislative findings...to substantiate the belief that no dishonorably discharged veteran may be trusted with a bullet.” *Id.* He is correct that the government does not present any statistical evidence about the propensity for violence among the dishonorably discharged.

Instead, the government relies on the fact that those convicted of felonies have been widely found to be more dangerous with deadly weapons. Since Jimenez was discharged for felony-equivalent conduct, the government argues, the reasoning that applies in those cases applies here.² We agree with the government. Section 922(g)(6) became law as part of the Gun Control Act of 1968, which creates similar bans for other “special risk groups”: felons, fugitives, illegal drug users and addicts, the mentally incompetent, those who have “been committed to a mental institution,” undocumented immigrants, individuals with nonimmigrant visas, those who have renounced United States citizenship, those subject to a domestic violence order of protection, and those convicted of a misdemeanor crime of domestic violence.

U.S.C. § 922(g)(1)-(9); Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. Legal Stud. 133, 152 (1975) (using the term “special risk groups” to describe this list). When the military discharge provision of the Gun Control Act was introduced, it was treated as of a piece with all of ² Much of the briefs argue over the wisdom of preventing those dishonorably discharged for non-felony-equivalent conduct from possessing firearms.

We do not reach these arguments or the questions they present. Since we find that the statute is constitutionally applied to those, like Jimenez, who have been dishonorably discharged for felony-equivalent conduct, Jimenez does not have standing to raise questions about other applications of the statute. ¹⁸ ¹ these special risk groups and specifically with the felon ban.

See 114 Cong. Rec. 2 13,868-69 (1968) (statement of Sen. Long). That portion of the Gun Control Act ³ was meant to deprive those who had demonstrated an inability or unwillingness ⁴ to take others’ safety into account, or otherwise might be especially dangerous ⁵ with a gun, from possessing deadly weapons. ⁶ There is no reason to think that Jimenez is more likely to handle a

gun 7 responsibly just because his conviction for dealing drugs and stolen military 8 equipment (including firearms) occurred in a military tribunal rather than in 9 state or federal court.

Dishonorable discharges are generally reserved for 10 members of the military who have “been convicted [by court-martial] of offenses 11 usually recognized in civilian jurisdictions as felonies, or of offenses of a military 12 nature requiring severe punishment.”³ Manual for Courts-Martial United States 3 There are two other forms of “punitive separation”: a “dismissal,” which is reserved for commissioned officers, and a “bad-conduct discharge,” which is generally for less serious offenses.

Manual for Courts-Martial United States (2016 ed.) Rule 1003(b)(8)(A), (C); see also 53A Am. Jur. 2d Military and Civil Defense § 164. The legislative history of Section 922(g)(6) suggests that all of these discharges as well as any other discharge “on conditions less than honorable” were meant to be included. 114 Cong. Rec. 13,868 (1968) (statement of Sen. Long).

Because Jimenez was dishonorably discharged, we focus on that form of separation. We leave it up to future courts to determine which others fall within 19 1 (2016 ed.) Rule 1003(b)(8)(B).⁴ Those who, while in the military, receive extensive 2 training on how to use deadly weapons are likely to be more dangerous with 3 firearms should they be thoughtless or heartless enough to turn them onto 4 civilians.

Section 922(g)(6) was added to the Gun Control Act at least in part 5 based on the example of Lee Harvey Oswald, who used his Marine 6 marksmanship training to assassinate President John F. Kennedy. See 114 Cong. 7 Rec. 13,868-69 (1968) (statement of Sen. Long) (discussing Oswald’s discharge 8 and noting that he would be prohibited from owning a gun under the Act); 9 Report of the President’s Commission on the Assassination of President 10 Kennedy, 191-92 (1964) (discussing Oswald’s marksmanship training).

11 That military tribunals have fewer procedural protections than civilian 12 courts does not by itself make Congress’s reliance on those tribunals for a 13 determination of who should and should not be dishonorably discharged 14 unreasonable.

As discussed above, those tribunals have been found to operate the meaning of “discharged from the Armed Forces under dishonorable conditions.” 18 U.S.C. § 922(g)(6). 4 This manual has guided courts-martial since enacted by executive order in 1984. See Exec. Order 12473, 49 Fed. Reg. 17152 (Apr. 13, 1984). It is amended every year. See, e.g., Exec. Order No. 13825, 83 FR 9889 (Mar.

1, 2018). The provisions on punitive separation seem to have remained unchanged since 1984. 20 1 consistently with the Constitution and their judgments bar subsequent civilian 2 prosecution for charges resolved therein.

Moreover, the Supreme Court has 3 previously approved of Congress's reliance on convictions by courts-martial in 4 determining which members of the military are subject to civil disabilities such 5 as mandatory sex-offender registration. See *United States v. Kebodeaux*, 570 U.S. 6 387 (2013).

As we have said before, "[i]n the context of firearm regulation, the 7 legislature is far better equipped than the judiciary to make sensitive public 8 policy judgments (within constitutional limits) concerning the dangers of 9 carrying firearms and the manner to combat those risks." *Kachalsky*, 701 F.3d at 10 97 (internal quotation marks omitted). It was reasonable for Congress to rely 11 upon the military's determination that one of its members is no longer 12 responsible enough to bear arms on the battlefield as a basis for preventing that 13 person from bearing arms in civilian life.

14 Finally, Jimenez contends that his conviction for possession of ammunition 15 rather than firearms changes the analysis. He argues that "[a] bullet is 16 categorically less dangerous than a gun" since "even an unloaded gun can be 17 used to menace, threaten, or strike a victim." Appellant's Br. at 45-46.

We are not 18 convinced. Congress is just as justified in banning certain people from possessing 21 1 ammunition as it is in banning them from possessing guns. Guns are not 2 regulated because they can be used as blunt objects: tire irons and baseball bats 3 remain legal. Guns are regulated because of their capacity to launch bullets at 4 speeds sufficient to cleave flesh and shatter bone.

Without bullets, guns do not 5 have that capacity. Congress has the same interest in regulating bullet possession 6 as firearm possession. 7 CONCLUSION 8 Jimenez's conviction for possessing a bullet after being dishonorably 9 discharged for felony-equivalent conduct does not violate the Second 10 Amendment.

The judgment of the district court is AFFIRMED. 22