15-2859

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

v.

ONE (1) PALMETTO STATE ARMORY PA-15 MACHINEGUN RECEIVER/FRAME UNKNOWN CALIBER, SERIAL NUMBER LW001804; WATSON FAMILY GUN TRUST, Claimant,
(D.C. No. 15-cv-02202)

and

RYAN S. WATSON, Individually and as Trustee of the Watson Family Gun Trust,
Plaintiff-Appellant,

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA; DIRECTOR BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES,
Appellee.
(D.C. No. 14-cv-06569)

Appeal from the United States District Court for the Eastern District of Pennsylvania
D. Ct. Civil No. 2:15-cv-02202 (consolidated with 2:14-cv-06569) (Dalzell, J.)

APPELLANT'S PETITION FOR REHEARING EN BANC

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We express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the Supreme Court of the United States and the United States Court of Appeals for the Third Circuit, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court. Specifically, the panel's decision is contrary to the holdings of this Court in *Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012), and the holdings of the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), and *United States v. Miller*, 307 U.S. 174 (1939). This appeal also involves a question of exceptional importance, the scope of Second Amendment rights, particularly whether the Second Amendment extends, prima facie, to machineguns.

STATEMENT OF THE CASE

18 U.S.C. § 922(o) generally bans the transfer or possession of a machinegun manufactured after May 19, 1986. The statute provides:

> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
> (2) This subsection does not apply with respect to—
>> (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
>> (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

This provision was enacted in 1986 as § 102(9) of the Firearm Owners' Protection Act, which amended the Gun Control Act of 1968. Machineguns are additionally regulated through the National Firearms Act ("NFA"), codified at 26 U.S.C. § 5801 et seq. The NFA imposes a $200 tax on machineguns, suppressors, short-barreled rifles, short-barreled shotguns and destructive devices. Despite the ban on post-May 19, 1986 machineguns and the tax upon them, there are thousands of machineguns lawfully possessed by private individuals. But for the ban, there would likely be hundreds of thousands more lawfully possessed machineguns by private individuals.

Appellant, Ryan S. Watson, Individually and as Trustee of the Watson Family Gun Trust ("Watson") challenged the constitutionality of 18 U.S.C. § 922(o), both facially and as applied, under the Second Amendment. Additionally, Watson alleged that, as a trustee of the trust, he was not prohibited as the definition of "person" under the Gun Control Act did not preclude his trust from manufacturing a machinegun.

The panel refused the "person" interpretation and stated, "We refuse to conclude that with one hand Congress intended to enact a statutory rule that would restrict the transfer or possession of certain firearms, but with the other hand it created an exception that would destroy that very rule." U*.S. v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame, Unknown Caliber Serial No. LW001804*, 14-CV-06569, 2016 WL 2893670, at *3 (3d Cir. May 18, 2016) (attached). The panel additionally upheld the constitutionality of the ban and stated that the "… Second Amendment does not

protect the possession of machine guns. They are not in common use for lawful purposes." *Id.* at *5.

The panel's holding that Watson is "… prohibited from performing any of the acts forbidden of natural persons under the Gun Control Act[]" and "[h]is inability to comply with the Gun Control Act, in turn, prevents ATF from granting his application under the National Firearms Act[]" is contrary to 922(o)(2)(A), as Watson *first* received approval from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE") *before* the machinegun was manufactured pursuant to that approval (and thus, authority). The panel does not address the exception. The panel treated Watson's as-applied challenge as a facial challenge because it found that "… Watson offers no facts to distinguish why the challenged laws should not apply to him." *Id.* at *4.

ARGUMENT

I. THE DECISION CONFLICTS WITH THE HOLDINGS OF *HELLER* AND *MILLER*

The panel relied on *Heller* for the proposition that *Heller*

> …discusses machine guns on several occasions, and each time suggests that these weapons may be banned without burdening Second Amendment rights. *See Heller*, 554 U.S. at 627–28 ("It may be objected that if weapons that are most useful in military service—M–16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause.... But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right."); id. at 624 (suggesting that it would be a "startling" reading of Miller that restrictions on machine guns are unconstitutional).

Id. at *4. However, when read in context, the "startling" language, refers to the National Firearms Act's taxation on machineguns and *not* the Gun Control Act's ban on post-May 19, 1986 machineguns. For context, the full quote is as follows:

> Read in isolation, *Miller*'s phrase "part of ordinary military equipment" could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939.

D.C. v. Heller, 554 U.S. 570, 624 (2008). This statement should not be read for more than what it states. But in order to understand the reference, it is important to look at *United States v. Miller*, 307 U.S. 174 (1939) which held that:

> …in ***the absence of any evidence*** tending to show that a possession or use of 'a shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or the efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within the judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. (emphasis added).

Id. *Miller* did not "hold" that a short barrel shotgun was not protected by the Second Amendment, only that the Court had no evidence before it to determine whether or not a short barreled shotgun was related to the preservation or the efficiency of the militia.[1] The *Heller* Court, while not limiting the scope of *Miller*, stated that "*Miller* stands

[1] "… *Miller* qualified even the rejection of sawed-off shotguns, by limiting the holding to a case where there was no evidence, and judicial notice could not be taken, of any 'reasonable relationship' of sawed-

only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." *D.C. v. Heller*, 554 U.S. 570, 623 (2008). As stated in *Heller*:

> We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U.S., at 179, 59 S.Ct. 816. We think that limitation is *fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons*." (emphasis added).

Heller, 554 U.S. at 627.

Heller's discussion of arms "in common use" does not order the lower courts to engage in a numerical count of a particular weapon in order to determine whether or not it is protected by the Second Amendment. This is an invitation by the Court to review its earlier decision in *Miller* alongside *Heller* in order to determine whether an arm is protected by the Second Amendment. In *Miller* the Court ruled only arms that aid in the preservation or the efficiency of the militia are protected. Based on *Heller,* we know that aiding with personal self-defense fulfills that test and grants Second Amendment protection. *Miller* established that an arm being part of the ordinary soldier's equipment is another way to fulfill that test.

The fact that weapons which fulfill this test are protected is fairly supported by the tradition of prohibiting carrying dangerous and unusual weapons. The antecedent of

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off shotguns to militia use." *Silveira v. Lockyer*, 328 F.3d 567, 587 (9th Cir. 2003) (Kleinfeld, J.) (Dissenting).

this argument holds true as well. There are weapons that are outside of the militia right. Weapons such as surface to air missiles are neither part of the ordinary soldier's equipment nor useful for personal self-defense. Therefore, they are not weapons in common use. Hence, not only is it lawful to ban their ownership, but their carry is not implicated via the dangerous and unusual doctrine. Rather their carry can be banned without a government interest shown. This is because these arms are presumably outside the scope of the Second Amendment. Accordingly, *Heller*'s common use language is an order by the Court to refer to its previous decision in *Miller* and to history in order to determine the scope of the Second Amendment.

Weapons in common use are protected which is supported by the tradition of prohibiting carrying dangerous and unusual weapons. This tradition only refers to the regulations on the carrying of protected arms and armor. At Common Law, subjects had a general right to carry protected arms as these arms were protected by our Common Law right to defense. If an arm was protected, English and early American governments could not strip the right to carry it without cause. Rather to strip one of their rights, the government had to establish conduct with a dangerous weapon was unusual. For example, walking down to the market in full plate with a head axe could be prohibited because this conduct disturbed the peace or "terrified" normal citizens.

A modern day comparison would be if one carried a rifle dressed in SWAT gear or military fatigues through a residential area. This conduct would certainly be unusual because this behavior would be unusual and it would likely disturb the peace or "terrify.

However, if these arms are determined to be protected under the Second Amendment, the burden, per *Heller*, now shifts to the government to prove that they have an interest in regulating said activity. Shifting the burden to the government fairly supports the premise that certain arms are protected. With arms that were not protected, the government can restrict carry without any interest shown. The tradition of prohibiting dangerous and unusual *carry* of arms in common use supports the fact one had a historical right to *own* protected arms at Common Law. The carry of unprotected arms can be banned with no government interest shown because these arms receive no Second Amendment protection. Thus, there was no need to apply the dangerous and unusual doctrine. The tradition of prohibiting the carry of dangerous and unusual weapons supports that weapons in common use are protected. And a faithful reading of *Heller* supports that the weapons in common use are those that survive the *Miller* test.

If, however, as the panel held, machineguns are not protected by the Second Amendment, then Justice Scalia's comments in 2012 about the scope of the Second Amendment make little sense: "I mean, obviously, the (2nd) amendment does not apply to arms that cannot be hand-carried. It's to 'keep and bear.' So, it doesn't apply to cannons. But I suppose there are hand-held rocket launchers that can bring down airplanes that will have to be -- it will have to be decided."[2] There would simply be no

[2] http://cnsnews.com/news/article/justice-scalia-2nd-amendment-limitations-it-will-have-be-decided (last visited 6/3/2016).

need to question whether the Second Amendment protects a hand-held rocket launcher as under the panel's interpretation of *Heller*, it is a foregone conclusion that it is not protected.

However, it is clear that machineguns are protected under the Second Amendment. A machinegun is the modern musket. A proper historical analysis demonstrates that a machinegun is protected under the Second Amendment. See *Aymette v. State*, 21 Tenn. 154, 158 (1840) (limiting "arms" to mean those "such as are usually employed in civilized warfare, and that constitute the ordinary military equipment"). This definition of arms was expanded, not limited, by *Heller*.

II. DANGEROUS AND UNUSUAL IS A CONJUNCTIVE TEST

Simply put, a weapon may not be banned unless it is both dangerous and unusual. "As the per curiam opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016) (Alito, J., Concurring) (italics in original). The panel did not take into account *Caetano*, but instead stated that machineguns "are not in common use for lawful purposes." *Palmetto State Armory*, at *5. The facts in *Caetano* demonstrated "approximately 200,000 civilians owned stun guns as of 2009." *Caetano,* at 1032. Therefore, the concurrence stated, "[w]hile less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country." *Id.* The number of privately owned stun guns is about equal to the number of machineguns possessed by law-abiding citizens for lawful purposes. This statistic is

shocking since newly manufactured machineguns have been banned from private ownership since May 19, 1986. The panel's opinion regarding machineguns being unusual when the Supreme Court recently stated that a relatively equal number of stun guns are not unusual is illogical. *Caetano* ultimately forecloses the government's circular argument that machineguns are unusual and therefore they can be banned, even though they were effectively banned since May 19, 1986. But for the ban, the number of civilians that legally owned machineguns would far surpass the number of those who legally own stun guns. Therefore, machineguns are not unusual and cannot be banned

III. *MARZZARELLA* DOES NOT CONTROL THE OUTCOME

In *U.S. v. Marzzarella*, 614 F.3d 85, 94-95 (3d Cir. 2010), this Court stated:

> … the Supreme Court has made clear the Second Amendment does not protect those types of weapons [machine guns or short-barreled shotguns]. *See Miller*, 307 U.S. at 178, 59 S.Ct. 816 (holding that short-barreled shotguns are unprotected); *see also United States v. Fincher*, 538 F.3d 868, 874 (8th Cir.2008) ("Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use."), *cert. denied*, 129 S.Ct. 1369 (2009).

The comments regarding machineguns in *Marzzarella* are, respectfully, dicta and unnecessary to the holding regarding firearms with obliterated serial numbers. Further, *Marzzarella*'s statement that *Miller* held short-barreled shotguns not protected by the Second Amendment is a misreading of *Miller*. As explained above, the Court in *Miller* held that it did not have specific evidence that a short-barreled shotgun was either related to the preservation or the efficiency of the militia, not that a short-barreled

shotgun was not protected under the Second Amendment. It is not a distinction without a difference as lack of evidence is not the same as proclaiming something a truism.

The panel in this case cited to *Marzzarella* for the proposition that "'[a]t its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home,'" distilling *Heller*'s holding into protection for "non-dangerous weapons for self-defense in the home." *Palmetto State Armory*, at *5

But, in contrast and as stated in *Heller*, "… the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller* at 582. The Second Amendment does not only protect "those arms in existence in the 18th century." *Id.* "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Id.* at 634. As such, the Second Amendment extends, prima facie, to a bearable machinegun, the exact type of which is at issue in this case.

IV. THE DECISION DISCARDS THE BENEFITS OF TRUSTS FOR EVADING THE RIGID STRICTURES OF THE LAW

The panel's decision regarding the use of a trust as an exception to the prohibition on "persons" possessing post-May 19, 1986 machineguns treats an enumerated right, the Second Amendment, as something less than a congressionally

created benefit: Medicaid. The panel stated: "[i]nterpreting the statute so as to include this exception would thereby swallow the rule. We refuse to conclude that with one hand Congress intended to enact a statutory rule that would restrict the transfer or possession of certain firearms, but with the other hand it created an exception that would destroy that very rule." *Palmetto State Armory*, at *3.

This Circuit has heretofore discussed trusts as vessels to hold things. "A trust is a legal instrument in which assets are held in the name of the trust and managed by a trustee for the benefit of a beneficiary." *Lewis v. Alexander*, 685 F.3d 325, 332 (3d Cir. 2012) (citing Black's Law Dictionary 1546 (8th ed. 2004)). "This structure means that the beneficiary does not actually own the assets of the trust, but instead has an equitable right to derive benefits from them… *The trust has long been a tool for evading the rigid strictures of the law, which has generally been a positive development.* For example, in feudal England—the trust's birthplace—the trust allowed younger sons and daughters to inherit land despite strict rules at law against devising land by will." *Id* at 332 (emphasis added).

This is precisely the case here. The Appellant was given permission, under the authority of the BATFE, to manufacture the machinegun. The trust, as explained by this Court in *Alexander*, is used to evade the "rigid strictures of the law" and instead of "swallowing the rule" as suggested by the panel, § 922(o) reads perfectly in line with the exception for trusts. A trust is not a "person" and therefore not prohibited under the law from possessing the machinegun at issue.

V. WATSON DISTINGUISHED HIMSELF IN THIS AS-APPLIED CHALLENGE

The panel's decision is at odds with the facts of the case with regard to Watson's as-applied challenge. Watson included in his complaint facts that distinguish himself from the vast majority of firearms cases; the fact that he is not a prohibited person, he "… desires to own machineguns for all lawful purposes including in defense of hearth and home [and] … is a member of the bar of two states, a practicing attorney and does not pose any threat to public safety." A82. Additionally, Watson "… passed substantial background checks and character and fitness evaluations from each respective licensing authority for his license to practice law…" A83. These are not trivial facts but instead serve as distinguishing characteristics in firearms cases as Watson is not a criminal or a person prohibited from owning firearms. The Appellees have not alleged that he would be a public safety risk if he had a machinegun, and if that were the case the government would need more than mere accusations to justify its position.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the case be reheard en banc.

Dated: June 10, 2016.

Respectfully Submitted,

/s/ Alan Beck
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/s/ Stephen D. Stamboulieh
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REQUIRED CERTIFICATIONS

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 35(b)(2) as it is 12 pages long.

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify to the following:

The text of the electronic brief will be identical to the text in the paper copies if requested.

A copy of the Judgment and Opinion is attached hereto.

The electronic brief has been scanned for viruses by Kaspersky Internet Security, version 16.0.1.445(c) and found to be virus free.

/s/ Stephen D. Stamboulieh
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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2016, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Stephen D. Stamboulieh
Stephen Dean Stamboulieh
Counsel for Appellant

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 15-2859

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UNITED STATES OF AMERICA

v.

ONE (1) PALMETTO STATE ARMORY PA-15
MACHINEGUN RECEIVER/FRAME, UNKNOWN
CALIBER SERIAL NUMBER: LW001804;
WATSON FAMILY GUN TRUST, Claimant

(D.C. No. 15-cv-02202)

RYAN S. WATSON, Individually and as Trustee of the
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ATTORNEY GENERAL UNITED STATES OF AMERICA;
DIRECTOR BUREAU OF ALCOHOL, TOBACCO,
FIREARMS, AND EXPLOSIVES

(D.C. No. 14-cv-06569)

Ryan S. Watson, Individually and as
Trustee of the Watson
Family Gun Trust,
Appellant

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. Nos. 2-15-cv-02202 and 2-14-cv-06569)
District Judge: Honorable Stewart Dalzell

_____

Argued April 4, 2016

Before: AMBRO and KRAUSE, *Circuit Judges*,
and THOMPSON,[*] *District Judge*

(Opinion filed: May 18, 2016)

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OPINION OF THE COURT

_____

THOMPSON, *District Judge*

Appellant Ryan S. Watson ("Watson"), individually and on behalf of the Watson Family Gun Trust, filed this action claiming that the de facto ban on the possession of a

machine gun[1] found in 18 U.S.C. § 922(o) is unconstitutional facially and as-applied to him under the Second Amendment to the U.S. Constitution. Alternatively, Watson argues that § 922(o) does not apply to the Watson Family Gun Trust because it only applies to "persons" and a trust is not a "person" under the statute's definition. The District Court granted the government's motion to dismiss, explaining that under the Supreme Court's opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and this Court's opinion in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), the Second Amendment does not protect the possession of machine guns. Moreover, the Court found that a trust is not exempt from § 922(o) because a trust is not an entity distinct from its trustees, and therefore it cannot own property. Because we agree that the Second Amendment does not protect the possession of machine guns, and because trustees, and by extension trusts, are not exempt from § 922(o), we affirm.

I. BACKGROUND

The National Firearms Act provides that prior to manufacturing a firearm, any prospective maker must apply for permission from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). 26 U.S.C. §§ 5822, 5841. ATF will deny the application if making or possessing the firearm would place the person applying in violation of any law. *See* 26 U.S.C. § 5822; 27 C.F.R. § 479.65. Although a machine gun qualifies as a firearm under the National Firearms Act, 26 U.S.C. § 5845(a), a separate federal law, the

[1] Federal statutes and caselaw alternate between the spellings "machinegun" and "machine gun." We will use "machine gun" except when quoting materials that spell the term otherwise.

Gun Control Act, prohibits the private manufacture of machine guns in most instances by making it unlawful for any person "to transfer or possess a machine gun," with narrow exceptions for certain government entities and machine guns lawfully possessed before 1986. 18 U.S.C. § 922(o). The Gun Control Act defines a "person" as an "individual, corporation, company, association, firm, partnership, society, or joint stock company." 18 U.S.C. § 921(a)(1).

Watson is the sole trustee of the Watson Family Gun Trust ("the Trust"). On May 23, 2014 and June 24, 2014, Watson submitted applications on behalf of the Trust for permission to make and register an M-16-style machine gun. On August 5, 2014, an ATF examiner mistakenly approved one of Watson's applications. Shortly thereafter, Watson had a machine gun manufactured pursuant to that approval. However, on or about September 10, 2014, ATF informed Watson that the approval had been a mistake and that his application had been "disapproved." ATF explained in a letter that Watson's application was denied because he was prohibited by law from possessing a machine gun. Watson claimed to be exempt from the prohibition on possessing machine guns because he had applied on behalf of a trust, which he argued was not a "person" covered by the Gun Control Act. ATF explained that although a trust is not a "person" under the Act, a trust cannot legally make or hold property. Therefore, ATF considers the individual acting on behalf of the trust to be the proposed maker and possessor of the machine gun.

Watson received a telephone call from an ATF agent on October 10, 2014 inquiring whether a machine gun had been made pursuant to the initial application approval. The ATF agent indicated that if any machine gun had been made, the gun must be surrendered to ATF. On November 14, 2014, Watson met with an ATF agent and surrendered his

machine gun under protest. That same day, he filed suit against the U.S. Attorney General and the ATF Director (collectively, "the government"), seeking declarative and injunctive relief from 18 U.S.C. § 922(o), 26 U.S.C. § 5801 *et seq.*, and the implementing regulations found in 27 C.F.R. § 479.1 *et seq.* Watson alleged that these statutory and regulatory provisions act as a de facto ban on an entire class of arms in violation of the Commerce Clause and the Second, Ninth, and Tenth Amendments to the Constitution. Additionally, Watson alleged violations of his due process rights under the Fifth Amendment and his equal protection rights under the Fourteenth Amendment, as well as a claim for detrimental reliance based on the ATF's initial approval of his application. The government separately initiated a forfeiture action for Watson's machine gun, which was later consolidated with his challenge.

On January 16, 2015, the government moved to dismiss Watson's action for lack of standing and failure to state a claim. On July 22, 2015, the District Court ruled that Watson did have standing, but that he failed to state a claim upon which relief can be granted.[2] Among other holdings, the Court held that Watson failed to state a claim under the Second Amendment because the Second Amendment does not protect the possession of machine guns. He appeals that decision as well as the District Court's finding that a trust is incapable of owning a machine gun under § 922(o). Because these are the only issues briefed by Watson on appeal, we will not discuss the District Court's other holdings. *See Laborers'*

[2] On appeal, the government continued to argue that Watson lacked standing, but based on Watson's position at oral argument that he is challenging the Gun Control Act and not the National Firearms Act, the government essentially conceded this point.

Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp., 26 F.3d 375, 398 (3d Cir. 1994) (issues not briefed on appeal are waived). However, we note that all of Watson's claims against the government were dismissed.

The government's consolidated forfeiture claims are still pending, which led us to question whether the decision being appealed was a final order, and thus whether we had jurisdiction. But on August 13, 2015, the District Court issued a certification of entry of final judgment. This cured any jurisdictional defect in the case. *See In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, 751 F.3d 150, 156 (3d Cir. 2014).

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1346. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's grant of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n.1 (3d Cir. 2014); *Ballentine v. United States*, 486 F.3d 806, 808 (3d Cir. 2007). We "are required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the nonmovant." *Foglia*, 754 F.3d at 154 n.1 (citations omitted).

III. DISCUSSION

As a matter of constitutional avoidance, we will first turn to Watson's argument that § 922(o) of the Gun Control Act does not apply to a trust. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this

Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). Watson argues that § 922(o) of the Gun Control Act does not apply to a trust because § 922(o) applies only to "persons" and a trust is not a "person" under the terms of the statute.

With certain narrow exceptions, the provision states that "it shall be unlawful for any person to transfer or possess a machinegun." 18 U.S.C. § 922(o). The Gun Control Act defines a person as "any individual, company, association, firm, partnership, society, or joint stock company." 18 U.S.C. § 922(a)(1). As Watson notes, a "trust" is not one of the listed entities. However, this does not mean that a trust is therefore entitled to possess a machine gun.

As the District Court stated, a trust is not an entity distinct from its trustees, nor is it capable of legal action on its own behalf. 76 Am. Jur. 2d Trusts § 3 (citing Restatement (Third) of Trusts § 2 (2003)). Indeed, Watson himself does not dispute that he is the "individual human being" seeking to possess a gun on behalf of the Trust. He argues, however, that because trusts are not "persons" under the statute, he may act on behalf of the Trust in his capacity as a trustee without triggering the prohibition on natural persons transferring or possessing a machine gun. Appellant's Br. 55-56. But nothing in the Gun Control Act supports such a reading. Irrespective of whether Watson is a trustee, he is also a natural person and therefore prohibited from performing any of the acts forbidden of natural persons under the Gun Control Act. His inability to comply with the Gun Control Act, in turn, prevents ATF from granting his application under the National Firearms Act. *See* 26 U.S.C. § 5822; 27 C.F.R. § 479.65.

Moreover, this holding is necessarily correct because to interpret the Gun Control Act as Watson suggests would allow any party—including convicted felons, who are

expressly prohibited from possessing firearms under 18 U.S.C. § 922(g)(1)—to avoid liability under this section simply by placing a machine gun "in trust." Any "individual, company, association, firm, partnership, society, or joint stock company" could lawfully possess a machine gun using this method. 18 U.S.C. § 921(a)(1). Interpreting the statute so as to include this exception would thereby swallow the rule. We refuse to conclude that with one hand Congress intended to enact a statutory rule that would restrict the transfer or possession of certain firearms, but with the other hand it created an exception that would destroy that very rule. *See Abdul-Akbar v. McKelvie*, 239 F.3d 307, 315 (3d Cir. 2001) (rejecting an interpretation of a statute that would allow the exception to swallow the rule); *In re New York City Shoes, Inc.*, 880 F.2d 679, 685 n.6 (3d Cir. 1989) (same); *see also Elrod v. Burns*, 427 U.S. 347, 359 n.13 (1976) (same).

We turn next to Watson's argument that § 922(o) is unconstitutional facially and as-applied to Watson under the Second Amendment. We agree with the District Court that Watson offers no facts to distinguish why the challenged laws should not apply to him. Therefore, we will treat Watson's claim as a facial challenge. The Second Amendment reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. To determine whether § 922(o) impermissibly burdens the Second Amendment right, we must begin with *District of Columbia v. Heller*, 554 U.S. 570 (2008).

In *Heller*, the Supreme Court struck down several statutes in the District of Columbia prohibiting the possession of handguns and requiring lawfully owned firearms to be kept inoperable. 554 U.S. at 635. Grounding its inquiry in historical analysis, the Court found that the Second Amendment protects an individual's right to possess firearms,

at least for purposes of self-defense in the home. *Id.* at 576, 636. However, the Court warned that "the right [is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626; *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion). The Court recognized that "the Second Amendment right, whatever its nature, extends only to certain types of weapons," *Heller*, 554 U.S. at 623 (citing *United States v. Miller*, 307 U.S. 174 (1939)), and specified that it was referring to those weapons "in common use" and not "those weapons not typically possessed by law-abiding citizens for lawful purposes," *id.* at 625, 627. Turning to the handgun ban at issue in the case, the Court struck down the ban because it "amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society" for the "lawful purpose" of self-defense in the home, "where the need for defense of self, family, and property is most acute." *Id.* at 628.

Based on *Heller*, we adopted a two-pronged approach to Second Amendment challenges. *Marzzarella*, 614 F.3d at 89. "First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id.* If it does not, the inquiry ends. *Id.* If it does, we move on to the second step: "[W]e evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid." *Id.*

Heller and subsequent decisions in our Court make clear that the de facto ban on machine guns found in § 922(o) does not impose a burden on conduct falling within the scope of the Second Amendment. Turning first to *Heller*, we note that that opinion discusses machine guns on several occasions, and each time suggests that these weapons may be banned without burdening Second Amendment rights. *See*

Heller, 554 U.S. at 627-28 ("It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. . . . But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right."); *id.* at 624 (suggesting that it would be a "startling" reading of *Miller* that restrictions on machine guns are unconstitutional).

Next, we turn to our Circuit's caselaw. We examined this question in *Marzzarella*. *Marzzarella* concerned whether Appellant Michael Marzzarella's conviction under 18 U.S.C. § 922(k) for possession of a handgun with an obliterated serial number violated his Second Amendment rights. 614 F.3d at 87. We reiterated that "[a]t its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home," and thus, under *Heller*, "restrictions on the possession of dangerous and unusual weapons are not constitutionally suspect because these weapons are outside the ambit of the amendment." *Id.* at 91, 92 (citing *Heller*, 554 U.S. at 625, 635). Marzzarella argued that because he possessed the unlawful weapon in his home, the challenged statute regulated protected conduct. However, we found that "it cannot be the case that possession of a firearm in the home for self-defense is a protected form of possession under all circumstances." *Id.* at 94. If this were the case, "[p]ossession of machine guns or short-barreled shotguns—or any other dangerous and unusual weapon—so long as they were kept in the home, would then fall within the Second Amendment. But the Supreme Court has made clear that the Second Amendment does not protect those types of weapons." *Id.* (citing *Miller*, 307 U.S. at 178; *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008), *cert. denied*, 555 U.S. 1174 (2009)).

In case *Marzzarella* left any doubt, we repeat today that the Second Amendment does not protect the possession of machine guns. They are not in common use for lawful purposes. *See, e.g.*, *Haynes v. United States*, 390 U.S. 85, 87 (1968) (describing machine guns as "weapons used principally by persons engaged in unlawful activities"); *United States v. Jennings*, 195 F.3d 795, 799 n.4 (5th Cir. 1999) (noting "machine guns . . . are primarily weapons of war and have no appropriate sporting use or use for personal protection") (quoting S. Rep No. 90-1501, at 28 (1968)); H.R. Rep. No. 99-495, at 4 (1986) (noting that machine guns are "used by racketeers and drug traffickers for intimidation, murder and protection of drugs and the proceeds of crime"); H.R. Rep. No. 90-1956, at 34 (1968) (Conf. Rep.), *as reprinted in* 1968 U.S.C.C.A.N. 4426, 4434 (describing machine guns as "gangster-type weapons"). They are also exceedingly dangerous weapons. *See, e.g.*, *United States v. O'Brien*, 560 U.S. 218, 230 (2010) (noting "[t]he immense danger posed by machineguns"); *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 996 (2013) ("A modern machine gun can fire more than 1,000 rounds per minute, allowing a shooter to kill dozens of people within a matter of seconds. Short of bombs, missiles, and biochemical agents, we can conceive of few weapons that are more dangerous than machine guns.") (internal citation omitted); *United States v. Kirk*, 105 F.3d 997, 1001 (5th Cir. 1997) (en banc) (per curiam) (Higginbotham, J., concurring) ("Machine guns possess a firepower that outstrips any other kind of gun."). As such, *Heller* dictates that they fall outside the protection of the Second Amendment.

Our sister circuits have consistently come to similar conclusions. In *Fincher*, the Eighth Circuit found that "[m]achine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the

category of dangerous and unusual weapons that the government can prohibit for individual use." 538 F.3d at 874. We previously quoted this very sentence in our opinion in *Marzzarella*. In *Henry*, the Ninth Circuit ruled that "machine guns are highly 'dangerous and unusual weapons' that are not 'typically possessed by law-abiding citizens for lawful purposes.'" 688 F.3d at 640. And in *Heller v. District of Columbia* ("*Heller II*"), the D.C. Circuit noted that "*Heller* suggests that 'M-16 rifles and the like' may be banned because they are 'dangerous and unusual.'" 670 F.3d 1244, 1263 (D.C. Cir. 2011); *cf. Hamblen v. United States*, 591 F.3d 471, 474 (6th Cir. 2009), *cert. denied*, 559 U.S. 1115 (2010) (the Second Amendment does not protect the possession of unregistered machine guns); *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 408 (7th Cir.), *cert. denied sub nom. Friedman v. City of Highland Park, Ill.*, 136 S. Ct. 447 (2015) (upholding a ban on semi-automatic assault weapons against a Second Amendment challenge).

Watson nonetheless argues that the District Court misapplied *Heller*'s "dangerous and unusual" language because the doctrine does not pertain to "the mere *possession* of a firearm," but only applies to "the *manner* in which that right is exercised." Appellant's Br. 18. As the above discussion suggests, Watson's unconventional reading contradicts the interpretation adopted by all of the federal circuits that have considered this language. *See, e.g.*, *Friedman*, 784 F.3d at 409; *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015); *Henry*, 688 F.3d 637; *Heller II*, 670 F.3d 1244; *Marzzarella*, 614 F.3d 85; *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010); *Fincher*, 538 F.3d 868. Watson himself concedes that "a majority of courts" interpret the "dangerous and unusual" language in *Heller* to describe possession of a weapon, Appellant's Reply Br. 12, but in fact no case was found adopting the alternative analysis proposed by Watson.

This is likely because *Heller* plainly states that mere possession of certain weapons may be prohibited. *See, e.g.*, *Heller*, 554 U.S. at 626 (noting that the Second Amendment is "not a right to *keep* and carry any weapon whatsoever") (emphasis added); *id.* at 627 (suggesting that the possession of "M-16 rifles and the like" may be banned); *id.* at 624 (same); *see also Miller*, 307 U.S. at 178 (holding that short-barreled shotguns are unprotected under the Second Amendment). And looking at the "dangerous and unusual" phrase in context, the most logical reading is that "dangerous and unusual" describes certain categories of weapons, and not the manner in which the weapons are used. The Court discusses "dangerous and unusual" weapons immediately after discussing what "sorts of weapons" *Miller* protects, and just before the Court discusses why certain types of weapons, even those "that are most useful in military service—M-16 rifles and the like—" may be banned. *See Heller*, 554 U.S. at 627. We therefore decline to adopt Watson's interpretation of *Heller*'s "dangerous and unusual" language.

Similarly, Watson's arguments against categorical bans on certain firearms fail to persuade. *Heller* limits its holding to bans on "handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 636. *Heller* gives special consideration to the District of Columbia's categorical ban on handguns because they "are the most popular weapon chosen by Americans for self-defense in the home." *Id.* at 629. This does not mean that a categorical ban on any particular type of bearable arm is unconstitutional. As explained above, *Heller* contains clear statements to the contrary.

Nor does our opinion in *Marzzarella* support Watson's argument, as he suggests. When *Marzzarella* discusses categorical decisions, the opinion objects to the idea of categorically *protecting* certain weapons, not categorically

banning them. *See Marzzarella*, 614 F.3d at 94 ("[I]t also would make little sense to categorically protect a class of weapons bearing a certain characteristic wholly unrelated to their utility."). In fact, *Marzzarella* specifically recognizes that there are particular categories of weapons that fall outside the protection of the Second Amendment. *See, e.g.*, *id.* at 90-91 (noting that "the right to bear arms, as codified in the Second Amendment, affords no protection to weapons not typically possessed by law-abiding citizens for lawful purposes"); *id.* at 92 (noting that "the Second Amendment affords no protection for the possession of dangerous and unusual weapons"). When discussing machine guns and short-barreled shotguns, the opinion states that "the Supreme Court made clear the Second Amendment does not protect those types of weapons." *Id.* at 94-95. Nothing in *Heller* or *Marzzarella* supports Watson's argument.

Because we find that under *Heller* and *Marzzarella* the possession of a machine gun is not protected under the Second Amendment, our inquiry is at an end. These cases make clear that § 922(o) does not burden conduct falling within the scope of the Second Amendment, and thus, Watson's facial challenge to § 922(o) must fail.

IV. CONCLUSION

Since the Supreme Court's opinion in *Heller*, courts nationwide have debated the parameters of that decision, and the extent to which government regulation may be reconciled with the Second Amendment. However, on at least one issue the courts are in agreement: governments may restrict the possession of machine guns. This finding follows from prior caselaw and the plain language provided by the Supreme Court. We decline to depart from this standard today. Further, we decline to reinterpret the Gun Control Act to allow an individual to circumvent the law through the use of a

trust. For these reasons, the District Court's opinion will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 15-2859

_____

UNITED STATES OF AMERICA

v.

ONE (1) PALMETTO STATE ARMORY PA-15 MACHINEGUN RECEIVER/FRAME, UNKNOWN CALIBER SERIAL NUMBER: LW001804;
WATSON FAMILY GUN TRUST, Claimant

(D.C. No. 15-cv-02202)

RYAN S. WATSON, Individually and as Trustee of the Watson Family Gun Trust

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA; DIRECTOR BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES

(D.C. No. 14-cv-06569)

Ryan S. Watson, Individually and as Trustee of the Watson Family Gun Trust,
Appellant

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. Nos. 2-15-cv-02202 and 2-14-cv-06569)
District Judge: Honorable Stewart Dalzell

_____

Argued April 4, 2016

Before: AMBRO and KRAUSE, *Circuit Judges*, and THOMPSON,[*] *District Judge*

[*] The Honorable Anne E. Thompson, District Judge for the United States Court for District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to be considered on the record on appeal from the United States District Court for the Eastern District of Pennsylvania and was argued on April 4, 2016. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the District Court's judgment is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Clerk

DATED: May 18, 2016