No. 18-496

In the Supreme Court of the United States

BARRY MICHAELS, PETITIONER

v.

MATTHEW G. WHITAKER, ACTING ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's as-applied challenge to 18 U.S.C. 922(g)(1), the longstanding federal statute that bars convicted felons from possessing firearms.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-7a) is not published in the Federal Reporter but is reprinted at 700 Fed. Appx. 757. The order of the district court (Pet. App. 10a-19a) is not reported, but is available at 2017 WL 388807.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 2017. A petition for rehearing was denied on March 29, 2018 (Pet. App. 1a-2a). The petition for writ of certiorari was filed on June 27, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed this putative class action in 2016, contending that 18 U.S.C. 922(g)(1), the longstanding

federal statute that bars convicted felons from possessing firearms, violates the Second Amendment as applied to him and others similarly situated to him. Compl. ¶¶ 30-40; Pet. 9.

Petitioner concedes (Pet. 8) that he has been convicted of multiple state and federal crimes. Petitioner states (*ibid.*) that he pleaded guilty in federal court to one count of mail fraud in 1973, and that he pleaded guilty in state court to one count of "kiting checks" in 1975. According to petitioner (*ibid.*), he was sentenced to three years of probation for the first conviction, but received no prison time. He further states (*ibid.*) that he was also not sentenced to any term of imprisonment for the second conviction, but he admits that he served an approximately four-month period of incarceration because the state conviction violated the terms of his probation for his earlier federal offense.

Then, in the mid-1990s, as he told the court of appeals, petitioner "ran into * * * more *serious* trouble." Pet. C.A. Br. 2. In May 1998, petitioner pleaded guilty to one count of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff (1994), and 17 C.F.R. 240.10b-5, and one count of subscribing to a false tax return, in violation of 26 U.S.C. 7206(1). See Gov't C.A. Br. 4; Pet. 8. Petitioner was sentenced to 21 months of imprisonment, to be followed by three years of supervised release. See *ibid.* And he ultimately served 15 months of imprisonment for those crimes. *Ibid.*

As a result of his felony convictions, petitioner is prohibited by 18 U.S.C. 922(g)(1) from possessing a firearm. In his complaint, petitioner alleged that he would like to purchase a firearm, but has refrained from doing so because he feared prosecution under Section 922(g)(1). Compl.¶¶ 1, 35. Petitioner asked the district court to

declare Section 922(g)(1) unconstitutional as applied to him and to similarly situated individuals and to enjoin enforcement of the provision against them. Compl. ¶¶ 30-40.

2. The district court dismissed petitioner's suit. Pet. App. 10a-19a. The court reasoned that Ninth Circuit precedent foreclosed petitioner's constitutional challenge to Section 922(g)(1). *Id.* at 16a-17a (citing *United States* v. *Phillips*, 827 F.3d 1171 (9th Cir. 2016), cert. denied, 138 S. Ct. 56 (2017); *United States* v. *Vongxay*, 594 F.3d 1111 (9th Cir.), cert. denied, 562 U.S. 921 (2010)). Under that precedent, the court explained, "felons are categorically different from individuals who have a fundamental right to bear arms." *Id.* at 16a (quoting *Vongxay*, 594 F.3d at 1115). The court reasoned that the same rationale applies to violent and "non-violent" felons alike. *Ibid.*

3. A panel of the court of appeals affirmed in an unpublished decision, also relying on the court's earlier decisions in *Vongxay*, *supra*, and *Phillips*, *supra*. Pet. App. 5a-7a. The court of appeals denied a petition for rehearing en banc, without noted dissent. *Id.* at 1a-2a.

4. On June 27, 2018, petitioner filed the petition for a writ of certiorari, naming then-Attorney General Jefferson B. Sessions III as respondent and seeking review of the Ninth Circuit's decision. On November 16, after Mr. Sessions resigned as Attorney General and the President designated Matthew G. Whitaker as the Acting Attorney General, petitioner filed a motion to substitute Rod J. Rosenstein as respondent, claiming that the designation of Mr. Whitaker was unlawful on statutory and constitutional grounds. On November 26, the government opposed petitioner's motion, explaining that the motion was procedurally improper, that the lawfulness of Mr. Whitaker's designation has no bearing on the proper disposition of the petition, and that

Mr. Whitaker's designation was lawful in any event. That motion remains pending.

ARGUMENT

Petitioner renews his contention (Pet. 17-18) that 18 U.S.C. 922(g)(1) is unconstitutional as applied to him. The court of appeals correctly rejected that contention, and its conclusion that Section 922(g)(1) may be applied to petitioner does not conflict with any decision of this Court or another court of appeals. In particular, this case does not implicate the circuit conflict created by *Binderup* v. *Attorney General*, 836 F.3d 336 (2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017), in which the Third Circuit held that Section 922(g)(1) violated the Second Amendment as applied to two individuals based on different offenses and circumstances than those presented here. Petitioner's circumstances—including his multiple serious felony convictions and his time in prison—mean that he could not prevail even under the standard applied by the Third Circuit in *Binderup*. In any event, this Court denied the government's petition for a writ of certiorari in that case, see *Sessions* v. *Binderup*, 137 S. Ct. 2323 (No. 16-847) (2017), and has since denied numerous other petitions raising similar questions, see, *e.g.*, *Rogers* v. *United States*, 138 S. Ct. 502 (2017) (No. 17-69); *Hamilton* v. *Pallozzi*, 138 S. Ct. 500 (2017) (No. 16-1517); *Massey* v. *United States*, 138 S. Ct. 500 (2017) (No. 16-9376); *Phillips* v. *United States*, 138 S. Ct. 56 (2017) (No. 16-7541). The same result is warranted here.

1. The court of appeals correctly determined that Section 922(g)(1) does not violate the Second Amendment as applied to petitioner. Federal law has long restricted the possession of firearms by certain categories of individuals. A frequently applied disqualification is

Section 922(g)(1), which generally prohibits the possession of firearms by any person "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)(1). Congress enacted that disqualification based on its determination that the "ease with which" firearms could be acquired by "criminals * * * and others whose possession of firearms is similarly contrary to the public interest" was "a matter of serious national concern." S. Rep. No. 1097, 90th Cong., 2d Sess. 28 (1968); see Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. IV, §§ 901(a)(2), 902, 82 Stat. 225, 226.

In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court held that the Second Amendment protects "the right of law-abiding, responsible citizens" to possess handguns for self-defense. *Id.* at 635; see *id.* at 592 (recognizing an "individual right to possess and carry weapons in case of confrontation"). Consistent with that understanding, the Court stated that "nothing in [its] opinion should be taken to cast doubt" on certain well-established firearms regulations, including "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626. The Court described those "permissible" measures as falling within "exceptions" to the protected right to keep and bear arms. *Id.* at 635. And the Court incorporated those exceptions into its holding, stating that the plaintiff in *Heller* was entitled to keep a handgun in his home "[a]ssuming that [he] is not disqualified from the exercise of Second Amendment rights," *ibid.*—that is, assuming "he is not a felon and is not insane," *id.* at 631. Two years later, a plurality of the Court "repeat[ed]" *Heller*'s "assurances" that its holding "did not cast doubt on such longstanding regulatory measures as

'prohibitions on the possession of firearms by felons.'" *McDonald* v. *City of Chicago,* 561 U.S. 742, 786 (2010) (plurality opinion) (quoting *Heller,* 554 U.S. at 626).

The historical record supports this Court's repeated statements that convicted felons are outside the scope of the Second Amendment. "*Heller* identified * * * as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." *United States* v. *Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (quoting *Heller*, 554 U.S. at 604), cert. denied, 562 U.S. 1303 (2011). That report expressly recognized the permissibility of imposing a firearms disability on convicted criminals, stating that "citizens have a personal right to bear arms '*unless for crimes committed*, or real danger of public injury.'" *Ibid.* (emphasis added) (quoting 2 Bernard Schwarz, *The Bill of Rights: A Documentary History* 665 (1971)).

"[M]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *United States* v. *Yancey*, 621 F.3d 681, 684-685 (7th Cir. 2010) (per curiam) (quoting *United States* v. *Vongxay*, 594 F.3d 1111, 1118 (9th Cir.) (citing Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995) (Reynolds)), cert. denied, 562 U.S. 921 (2010)); see *United States* v. *Carpio-Leon*, 701 F.3d 974, 979-980 (4th Cir. 2012) (same), cert. denied, 571 U.S. 831 (2013). The Second Amendment thus incorporates "a common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible" and it "'does not preclude laws disarming the unvirtuous (i.e. criminals).'" *United States* v. *Bena*, 664 F.3d 1180,

1183 (8th Cir. 2011) (quoting Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143, 146 (1986)); *National Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 201 (5th Cir. 2012) (same), cert. denied, 571 U.S. 1196 (2014); *United States* v. *Rene E.*, 583 F.3d 8, 15-16 (1st Cir. 2009) ("Perhaps the most accurate way to describe the dominant understanding of the right to bear arms in the Founding era is as * * * limited to those members of the polity who were deemed capable of exercising it in a virtuous manner.") (quoting Saul Cornell, "*Don't Know Much About History": The Current Crisis in Second Amendment Scholarship,* 29 N. Ky. L. Rev. 657, 679 (2002)), cert. denied, 558 U.S. 1133 (2010).

In this respect, the right to bear arms is a fundamental right analogous to civic rights that have historically been subject to forfeiture by individuals convicted of crimes, including the right to vote, see *Richardson* v. *Ramirez*, 418 U.S. 24, 56 (1974), the right to serve on a jury, 28 U.S.C. 1865(b)(5), and the right to hold public office, *Spencer* v. *Kemna*, 523 U.S. 1, 10 (1998). *Cf.* Reynolds 480-481 ("[T]he franchise and the right to arms were 'intimately linked' in the minds of the Framers.") (citation omitted).

Section 922(g)(1) comports with the historical understanding of the Second Amendment because it applies only to offenses that satisfy the traditional definition of a felony: "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1); see 18 U.S.C. 3559(a); 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.6(a), at 48 (2d ed. 2003) (LaFave). Just as Congress and the States have required persons convicted of such

crimes to forfeit civic rights, Section 922(g)(1) permissibly imposes a firearms disability "as a legitimate consequence of a felony conviction." *Tyler* v. *Hillsdale Cnty. Sherriff's Dep't*, 837 F.3d 678, 708 (6th Cir. 2016) (en banc) (Sutton, J., concurring in the judgment).

2. Petitioner does not contend that the court of appeals' rejection of an as-applied challenge to Section 922(g)(1) by an individual with petitioner's criminal history conflicts with any decision of another court of appeals. Rather, he contends that the courts of appeals are conflicted on "whether a felon may lodge an as-applied challenge" to Section 922(g)(1). Pet. 12 (capitalization omitted). But this case does not implicate that conflict because only the Third Circuit has thus far actually accepted an as-applied challenge to Section 922(g)(1), and petitioner could not prevail under the standard adopted by the Third Circuit. See *Binderup*, *supra*.

a. Until *Binderup*, the courts of appeals were "unanimous" in holding "that [Section] 922(g)(1) is constitutional, both on its face and as applied." *United States* v. *Moore*, 666 F.3d 313, 316 (4th Cir. 2012).

The Fifth, Tenth, and Eleventh Circuits have held that Section 922(g)(1) is not subject to individualized as-applied Second Amendment challenges. Before *Heller*, the Fifth Circuit had held that the individual right its precedent had recognized under the Second Amendment "does not preclude the government from prohibiting the possession of firearms by felons." *United States* v. *Darrington*, 351 F.3d 632, 633 (2003), cert. denied, 541 U.S. 1080 (2004). After *Heller*, the court reaffirmed its view that "criminal prohibitions on felons (violent or nonviolent) possessing firearms d[o] not violate" the Second Amendment. *United States* v. *Scroggins*, 599 F.3d 433, 451, cert. denied, 562 U.S. 867 (2010); see, *e.g.*,

United States v. *Massey*, 849 F.3d 262, 265, cert. denied, 138 S. Ct. 500 (2017). Similarly, the Tenth and Eleventh Circuits have interpreted *Heller* to mean that "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *United States* v. *Rozier*, 598 F.3d 768, 771 (11th Cir.) (per curiam), cert. denied, 560 U.S 958 (2010); see *United States* v. *McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009), cert. denied, 559 U.S. 970 (2010); 573 F.3d at 1049-1050 (Tymkovich, J., concurring).

As petitioner observes (Pet. 12-14), other courts of appeals have "left open the possibility that a person could bring a successful as-applied challenge to [Section] 922(g)(1)." *United States* v. *Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014).[1] But before *Binderup*, no circuit had held Section 922(g)(1) unconstitutional in any of its applications, and the courts of appeals had "consistently upheld applications of [Section] 922(g)(1) even to non-violent felons." *United States* v. *Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) (emphasis omitted) (collecting cases).

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[1] See *Schrader* v. *Holder*, 704 F.3d 980, 991 (D.C. Cir.) (stating that the plaintiff may have had a valid as-applied claim, but deferring that question "to a case where the issues are properly raised and fully briefed"), cert. denied, 571 U.S. 989 (2013); *United States* v. *Williams*, 616 F.3d 685, 693 (7th Cir.) ("[Section] 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent."), cert. denied, 562 U.S. 1092 (2010). In *Hamilton* v. *Pallozzi*, 848 F.3d 614, cert. denied, 138 S. Ct. 500 (2017), the Fourth Circuit held that, in general, "conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment" and forecloses the possibility of a successful as-applied challenge, but the court "le[ft] open the possibility" of challenges by individuals convicted of state-law misdemeanors. *Id.* at 626 & n.11.

b. In *Binderup*, two individuals sought a declaratory judgment that Section 922(g)(1) could not constitutionally be applied to them because they had been convicted of nonviolent offenses denominated by the state as misdemeanors for which they served no prison time and because their subsequent conduct showed that they could possess firearms without endangering themselves or others. 836 F.3d at 340. The en banc Third Circuit agreed by a fractured 8-7 vote, with no single opinion garnering a majority on the Second Amendment issue.

Ten of the 15 judges on the en banc court recognized that individuals convicted of "serious" crimes forfeit their Second Amendment rights. *Binderup*, 836 F.3d at 349 (plurality opinion); *id.* at 396 (Fuentes, J., concurring in part and dissenting in part). Seven of those judges would have concluded that, consistent with "history," "tradition," and this Court's decision in *Heller*, all of the offenses covered by Section 922(g)(1) are sufficiently "serious" to warrant a firearms disability because those offenses are punishable by more than a year of imprisonment—the traditional definition of a felony. *Id.* at 396 (Fuentes, J., concurring in part and dissenting in part); see LaFave § 1.6(a), at 48.

Judge Ambro and two of his colleagues took a different view. Judge Ambro stated that courts should presumptively "treat any crime subject to [Section] 922(g)(1) as disqualifying" under the Second Amendment "unless there is a strong reason to do otherwise." *Binderup*, 836 F.3d at 351 (plurality opinion). But he concluded that the particular offenses committed by the *Binderup* plaintiffs "were not serious enough to strip them of their Second Amendment rights." *Ibid.* And he further concluded that Section 922(g)(1) did not survive

Second Amendment scrutiny as applied to those plaintiffs because the government had not shown that the plaintiffs' backgrounds and postconviction conduct made them "more likely to misuse firearms" or that they were "otherwise irresponsible or dangerous." *Id.* at 355; see *id.* at 354-356 & nn.7-8. Although it was joined by only two other judges, this portion of Judge Ambro's opinion appears to reflect the narrowest ground for the en banc court's judgment and therefore to constitute "the law of [the Third] Circuit." *Id.* at 356. The remaining votes for the judgment were supplied by five judges who joined Judge Hardiman's concurring opinion. Judge Hardiman disagreed with the plurality's conclusion that all individuals who commit "serious" crimes forfeit their Second Amendment rights. Instead, he stated that the Second Amendment excludes only those who "have demonstrated that they are likely to commit violent crimes." *Id.* at 370. And he concluded that Section 922(g)(1) could not be applied to the *Binderup* plaintiffs because their offenses did not involve "any violence or threat of violence" and because "their subsequent behavior confirms their membership among the class of responsible, law-abiding citizens." *Id.* at 376.

c. The Third Circuit's conclusion that Section 922(g)(1) violates the Second Amendment as applied to the *Binderup* plaintiffs created a circuit conflict as it was the first and only court of appeals to sustain an as-applied challenged to Section 922(g)(1). But that conflict is not implicated here because petitioner could not prevail under the legal standard articulated in Judge Ambro's controlling opinion in *Binderup*.

The *Binderup* plaintiffs had been convicted in state courts of corrupting a minor and carrying a handgun

without a license. 836 F.3d at 340. In concluding that those offenses were not sufficiently serious to support the constitutionality of Section 922(g)(1) as applied, Judge Ambro emphasized four factors: (i) the relevant state legislatures had classified the offenses as misdemeanors rather than felonies;[2] (ii) the offenses were nonviolent; (iii) the *Binderup* plaintiffs received sentences that were "minor * * * by any measure"; and (iv) there was no "cross-jurisdictional consensus" regarding the seriousness of the *Binderup* plaintiffs' crimes because their conduct would have been legal or punishable by less than a year of imprisonment in many States. *Id.* at 352 (plurality opinion); *id.* at 351-352. Petitioner's convictions (including, in particular, his most recent convictions) are sufficiently "serious," *id.* at 349, to justify prohibiting him from possessing a firearm under the *Binderup* factors.

Although petitioner's offenses appear not to have been violent, all of Judge Ambro's other factors weigh against petitioner's as-applied challenge. Most importantly, Congress classified petitioner's offenses as felonies and prescribed possible prison sentences of well over one year. See 15 U.S.C. 78ff (1994) (authorizing a maximum sentence of ten years of imprisonment); 26 U.S.C. 7206 (authorizing a maximum sentence of three years of imprisonment). Judge Ambro stated that where, as here, the

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[2] A few States depart from the traditional felony/misdemeanor distinction and classify some crimes punishable by more than one year of imprisonment as "misdemeanors," as was the case in *Binderup*. See 836 F.3d at 340. Section 922(g)(1) prohibits an individual convicted of such a crime from possessing firearms if his state-law misdemeanor carried a maximum sentence of more than two years. 18 U.S.C. 921(a)(20)(B).

predicate offense "is considered a felony by the authority that created the crime," an individual seeking to bring an as-applied challenge to Section 922(g)(1) faces an "extraordinarily high" burden that is "perhaps even insurmountable." 836 F.3d at 353 n.6 (plurality opinion).

Second, while the *Binderup* plaintiffs received "not a single day of jail time," 836 F.3d at 352 (plurality opinion), petitioner received a sentence of 21 months of imprisonment for his most recent federal convictions. See Pet. 8; Gov't C.A. Br. 4. "[S]evere punishments are typically reserved for serious crimes." *Binderup*, 836 F.3d at 352 (plurality opinion). And the substantial term of imprisonment petitioner received reflects a determination of the seriousness of his particular offenses made by a judge with "firsthand knowledge of the facts and circumstances" of petitioner's crime. *Ibid.*

Finally, because petitioner was convicted of federal felonies, rather than state offenses, his conduct was punishable as a felony throughout the Nation and thus there can be no concern about the absence of "cross-jurisdictional consensus" on the seriousness of his offenses. *Binderup*, 836 F.3d at 352-353 (plurality opinion).

Petitioner therefore could not prevail on his as-applied Second Amendment challenge under the Third Circuit's standard. And because he could not prevail under that standard, this case neither implicates the circuit conflict created by the *Binderup* decision nor would be an appropriate vehicle in which to resolve it. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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