No. 19-_____

In The

Supreme Court of the United States

JORGE L. MEDINA,

Petitioner,

v.

WILLIAM P. BARR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Nearly thirty years ago, Jorge Medina was convicted of one felony count of making a false statement to a lending institution in violation of 18 U.S.C. § 1014.

Medina was not imprisoned. The bank sustained no loss, and would resume doing business with him. Medina is a successful entrepreneur and family man, with no record of violence. Yet on account of his single false statement conviction, 18 U.S.C. § 922(g)(1) permanently bars Medina's possession of firearms.

The Third, Seventh, and D.C. Circuits hold that individuals convicted of felonies may challenge the application of firearm dispossession laws under the Second Amendment, although the basis for such challenges remains disputed. The First, Eighth, and Ninth Circuits have expressed openness to such challenges, while the Fourth and Tenth Circuits bar them. The D.C. Circuit below reiterated that as-applied challenges to felony firearm dispossession laws are theoretically possible, but rejected Medina's claim for such relief.

The question presented is:

Whether the Second Amendment secures Jorge Medina's right to possess arms, notwithstanding his conviction for making a false statement to a lending institution 29 years ago.

LIST OF PARTIES

The petitioner is Jorge L. Medina, who was the plaintiff and appellant below.

The respondent is William P. Barr, in his official capacity as Attorney General of the United States. Barr's predecessors in office, Loretta Lynch and Jefferson B. Sessions, III, were defendants in the district court. Mr. Sessions and former Acting Attorney General Matthew G. Whitaker were appellees below.

LIST OF PROCEEDINGS

1. *Medina* v. *Sessions*, United States District Court for the District of Columbia, No. 16-cv-01718-CRC. The district court entered its judgment on September 6, 2017.

2. *Medina* v. *Whitaker*, United States Court of Appeals for the District of Columbia Circuit, No. 17-5248. The court of appeals entered its judgment on January 18, 2019. The court of appeals denied petitioner's petition for rehearing en banc on April 2, 2019.

3. *Medina* v. *Barr*, U.S. Supreme Court, No. 18A1273. The Chief Justice extended the time to file this petition to and including August 30, 2019.

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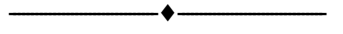
Jorge L. Medina respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

INTRODUCTION

Few of this Court's pronouncements have splintered the courts of appeals as much as the statement that felon disarmament is "presumptively lawful" under the Second Amendment. *District of Columbia* v. *Heller*, 554 U.S. 570, 626-27 n.26 (2008).

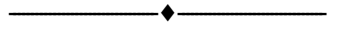
If such laws are only "presumptively lawful," may impacted individuals overcome that presumption? Many lower courts tend to think so, but some disagree. And even those courts that allow for as-applied challenges to felon disarmament laws are unclear as to what grounds merit relief. Everyone agrees that the government may disarm dangerous people, but countless individuals have ancient convictions for non-violent offenses that trigger disarmament, even though their personal histories raise no conceivable public safety concerns. May the government disarm people merely for allegedly lacking virtue? And if courts merely defer to legislative judgments as to who may exercise a "right," does the right exist at all?

Jorge Medina presents an excellent vehicle by which these important issues may finally be resolved. Nearly three decades ago, Medina made a false statement on a mortgage application—an offense involving dishonesty. But by any measure, Medina has been fully rehabilitated. And nothing in his positively remarkable life's story suggests that Medina's possession of firearms poses any heightened risk. This Court should review the judgment refusing Medina relief, and resolve these recurring issues of national importance.



OPINIONS BELOW

The D.C. Circuit's opinion, App.1a-18a, is reported at 913 F.3d 152. The district court's opinion and order, App.19a-44a, are reported at 279 F. Supp. 3d 281.



JURISDICTION

The court of appeals entered its judgment on January 18, 2019, and denied a timely petition for rehearing en banc on April 2, 2019. On June 8, 2019, the Chief Justice extended the time to file this petition to and including August 30, 2019. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment, 18 U.S.C. §§ 921(a)(20), 922(g)(1), 924(a)(2), and 1014, are reproduced at App. 47a-50a.

STATEMENT OF THE CASE

A. Regulatory Background

1. In 1938, Congress prohibited individuals convicted of a "crime of violence" from shipping or receiving firearms in interstate commerce. Federal Firearms Act, Pub. L. No. 75-785, § 2(e), (f), 52 Stat. 1250, 1251 (1938) ("FFA").[1] In 1961, Congress broadened this prohibition's scope to include individuals convicted of

[1] "The term 'crime of violence' means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year." FFA § 1(6), 52 Stat. at 1250.

nonviolent crimes, replacing the "crime of violence" predicate with "crime punishable by imprisonment for a term exceeding one year." *See* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961).

In 1968, Congress prohibited the possession of firearms by individuals convicted of crimes punishable by over a year's imprisonment. Although courts generally refer to this prohibition, now codified at 18 U.S.C. § 922(g)(1), as the "felon in possession" statute, *see*, *e.g.*, *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015), the statute itself does not use "felony" terminology.[2] Section 922(g)(1) implicates all offenses punishable by over a year's imprisonment, regardless of any link to violence or classification as felonies or misdemeanors. But it does not apply to convictions "pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." Section 921(a)(20)(A). Nor does Section 922(g)(1) apply to state misdemeanors "punishable by a term of imprisonment of two years or less," Section 921(a)(20)(B).

A violation of Section 922(g)(1), is a felony criminal offense punishable by fine and imprisonment of up to ten years. *See* Section 924(a)(2).

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[2] All further statutory references are to Title 18 of the United States Code unless noted otherwise.

B. The Second Amendment

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

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

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

C. Jorge Medina

1. Jorge Medina "owns a successful business, supports a family, and engages in philanthropy." App.3a.

Medina and his wife have been married for over twenty years, during which time Medina helped to successfully raise four children. C.A. App.7, ¶ 7. Medina entered the real estate business in 1979 at age 24, and has built a thriving real estate and property management practice with approximately 800 units under management. C.A. App.8, ¶ 8. Others place significant trust in Medina's stewardship. Since 1998, a division of Medina's company has been managing 90% of one client's real estate holdings—ten buildings exceeding $30,000,000 in value. *Id.* ¶ 10.

Medina engages in philanthropic and charitable work with several organizations. As a son of his served in combat with the U.S. military, Medina takes an active role in veterans' organizations. Through Wounded Heroes of America, for example, he has contributed financial and other support to more than 200 children whose parents have fallen or who have been wounded in action. *Id.* ¶ 11.

2. On June 14, 1990, under financial duress, Medina made a serious lapse in judgment by making a false statement on two mortgage loan applications. Medina inflated his gross income to increase his income-to-debt ratio and thereby qualify for loans. Medina received approximately $30,000 from the resultant refinancing, which he fully paid back within six months without being late on a payment. C.A. App.8, ¶ 12; C.A. App.9-10, ¶¶ 17-19.

The bank referred Medina for criminal prosecution upon discovering the falsehood, though it noted

that it did not incur a loss on the loans, and that the loans had no material impact on the institution. C.A. App.10, ¶ 20. When the FBI interviewed Medina, he waived his Miranda rights and confessed to having made the false statements. *Id.* ¶ 21. On November 12, 1991, Medina pleaded guilty to a single violation of Section 1014, making a false statement to a lending institution. *Id.* ¶ 22; *United States* v. *Medina*, No. 91-cr-578 (C.D. Cal. 1991); App.2a.

At sentencing, the Probation Office and the U.S. Attorney concurred that Medina had accepted responsibility for his actions and that he should not be incarcerated. The court agreed. It sentenced Medina to probation for three years, sixty days of home detention, a $10,000 fine, and a $50.00 special assessment. C.A. App.10, ¶ 24; App.2a.

3. After Medina had served one year of probation, the court granted his motion for an early termination of his probation, as supported by the recommendations of the U.S. Attorney, the U.S. Probation Officer, and community members including fellow licensed real estate agents, bankers, and lawyers. By February 18, 1993, Medina had also fully satisfied the $10,000 money judgment against him. C.A. App.11, ¶ 25.

"Medina's rehabilitation has been recognized by several important institutions." App.3a. In 1993, California's real estate licensing board convened a hearing to determine whether Medina's real estate license should be revoked or restricted on account of his false mortgage application statements. Medina's prosecutors and

probation officer supported his continued licensing, and the board declined to revoke or restrict Medina's license. C.A. App.13-14, ¶ 40(a)(i).

In 2005, the bank to which Medina had made the false statement, "recognized his trustworthiness" by extending Medina a $1,000,000 line of credit. App.3a. Moreover, in 2009, the Canadian government determined that Medina has been rehabilitated and removed the bar of his admission to that country on account of his felony conviction. C.A. App.14-15, ¶ 40(c).

At all times after 1991, Medina has been a law-abiding citizen and contributing member of society, with the exception of a minor Wyoming licensing violation in 1996. *Id.* In the early 1990s, Medina obtained Wyoming resident hunting licenses for use at his Wyoming ranch, unaware that the law had redefined the qualifications for a resident hunting license to require domicile and not merely residence. C.A. App.11-12, ¶¶ 26-31.[3] Upon learning that he did not qualify for resident hunting licenses, Medina ceased hunting in Wyoming on such licenses and obtained nonresident licenses. *Id.* C.A. App.12, ¶¶ 32-33. Notwithstanding his lack of criminal intent, Medina pleaded guilty to three violations of Wyo. Stat. Ann. § 23-3-403 (1989) (barring false statements in procuring hunting licenses), then-classified as a class five

[3] Medina hunted game with a bow, and with antique black-powder muzzle-loader replicas whose possession by felons is not forbidden by federal law. C.A. App.11, ¶ 27 & n.1.

misdemeanor, as it appeared that the cost of contesting the charges would far exceed any fine imposed by the court. A class five misdemeanor was punishable by a fine of up to $750 and six months' imprisonment. Wyo. Stat. Ann. § 23-6-202(a)(v) (1996). The Justice Court of Platte County, Wyoming, adopted a stipulated sentence, which barred Medina from obtaining hunting licenses for eight years and imposed a $2,250 fine, as well as a $20.00 special assessment. C.A. App.12-13, ¶¶ 34-38.[4]

4. Section 1014 carries a potential term of imprisonment exceeding one year. Accordingly, Section 922(g)(1) bars Medina from ever possessing firearms on account of that conviction.

Medina intends to possess firearms and ammunition for self-defense and other lawful purposes, in his California home as well as in states where his possession of firearms and ammunition is not unlawful under state law. For example, New Mexico, where Medina also owns a residence, does not bar his possession of firearms. C.A. App.7, ¶ 5; C.A. App.24, ¶¶ 1-2. The government's enforcement of Section 922(g)(1) injures Medina in that it bars him from obtaining arms. *Id.*; *see also* C.A. App.17, ¶ 51.

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[4] Although the complaint averred that Medina was fined $2,500, he was only fined for three violations. *See Wyoming* v. *Medina*, Dkt. No. Cr 9610-0001, Entry of Plea (Justice Court, Platte County, Wyo.) (filed Nov. 5, 1996).

D. Proceedings Below.

1. Medina brought suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief against Section 922(g)(1)'s application against him, pursuant to 28 U.S.C. §§ 1331, 1343, and 2201-2202. The district court "ha[d] no cause to doubt Medina's rehabilitation," but it nonetheless granted the government's motion to dismiss. App.19a.

The court first determined that Medina had standing. The government had argued that because Medina primarily resides in California, whose law independently bars Medina from possessing guns on account of his federal conviction, Medina's injury in being deprived of arms is neither traceable to the federal government nor redressable in the present action. App.24a-25a.

The government's argument was "flaw[ed]." App.25a. Unlike the federal prohibition, California law does not bar Medina from possessing arms outside of that state. Medina had not merely sworn his intention to possess firearms in states where he could do so under local laws; he has a history of using firearms outside California, and owns residential property in New Mexico, which does not bar his possession of arms. "Accordingly, Medina has established his standing to bring this suit, and jurisdiction is proper." App.26a.

Turning to the merits, the district court acknowledged that Medina does not facially challenge Section 922(g)(1), but rather, raises an as-applied challenge based on his personal circumstances. App.27a. Upon

surveying the circuits' varying approaches to this issue, the district court asserted that the parties had agreed that the question of whether Medina states a claim is governed by the familiar two-step process often used in Second Amendment cases. App.31a.[5]

Applying the two-step process, the district court held that Medina's challenge fails at step one, offering that the possession of firearms by felons is activity outside the Second Amendment's scope. App.34a-35a. In the alternative, the court upheld Section 922(g)(1)'s application to Medina under intermediate scrutiny at step two, because "[p]reventing those who have already shown a disregard for the law from obtaining a weapon that could make any future crimes more violent and even deadly is reasonably tailored to furthering the government's interest in public safety and preventing violence." App.37a.

The district court declined to consider whether Section 922(g)(1) is constitutional as applied to Medina "on an individual level." *Id*. It was enough "that preventing 'people like' Medina—that is, those convicted of serious crimes such as felonies—from owning guns promotes public safety." App.38a. The district court added that asking courts to assess whether it is constitutional to deprive individuals of a fundamental right would be too burdensome. App.38a-41a.

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[5] The record is otherwise. Medina argued that the correct test is one that examines whether he is a law-abiding, responsible citizen entitled to possess arms. *See* Opp. to Motion to Dismiss, Dist. Ct. Dkt. 11, at 16.

2. The D.C. Circuit affirmed. The court of appeals claimed that in Blackstone's time, felonies occasioned "total forfeiture of either lands, or goods, or both," with capital punishment as a potential addition. App.11a (internal quotation marks omitted). "Admittedly, the penalties for many felony crimes quickly became less severe in the decades following American independence and, by 1820, forfeiture had virtually disappeared in the United States." App.12a (internal quotation marks omitted). But the court found it "difficult to conclude that the public, in 1791, would have understood someone facing death and estate forfeiture to be within the scope of those entitled to possess arms." *Id.*

The court of appeals then rejected the idea that historically, "*only* dangerous persons could be disarmed." *Id.* It noted that the dissenters at Pennsylvania's constitutional ratifying convention offered an amendment that would have allowed people to be disarmed "for crimes committed, or real danger of public injury from individuals." App.13a (quoting The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, *reprinted in* Bernard Schwartz, 2 The Bill of Rights: A Documentary History 662, 665 (1971)). The court also pointed to the fact that during the Revolutionary War, disloyal people were disarmed. *Id.* "As these examples show, the public in the founding era understood that the right to bear arms could exclude at least some nonviolent persons." *Id.*

The court then noted the theory that the Framers would have accepted the disarmament of people for

lack of virtue. "While we need not accept this theory outright, its support among courts and scholars serves as persuasive evidence that the scope of the Second Amendment was understood to exclude more than just individually identifiable dangerous individuals." App.14a-15a.

"[F]inally," the court of appeals considered this Court's guidance in *Heller*. App.15a. Because this Court offered that felon disarmament is "longstanding" and "presumptively lawful," and some felonies are nonviolent, the court of appeals saw "no reason to think that the Court meant 'dangerous individuals' when it used the word felon." *Id.*

The court of appeals then summarily offered that it would be impractical to determine whether particular individuals are dangerous. *Id.* The court conceded that "[w]hether a certain crime removes one from the category of 'law-abiding and responsible,' in some cases, may be a close question." *Id.* "Those who commit felonies however, cannot profit from our recognition of such borderline cases . . . we hold that those convicted of felonies are not among those entitled to possess arms." App.16a (citation omitted).

Notwithstanding this conclusion, the court then offered that it was not precluding "a convicted felon [from] show[ing] that he may still count as a 'law-abiding, responsible citizen.' To prevail on an as-applied challenge, Medina would have to show facts about his conviction that distinguishes him from other convicted felons encompassed by the § 922(g)(1) prohibition."

App.16a. Alas, Medina "was convicted of felony fraud—a serious crime, *malum in se*, that is punishable in every state," and subsequently sustained his Wyoming hunting license misdemeanors. *Id.* "To the extent that it may be possible for a felon to show that his crime was so minor or regulatory that he did not forfeit his right to bear arms by committing it, Medina has not done so." App.17a. The court declared that "Medina's present contributions to his community, the passage of time, [and] evidence of his rehabilitation" are irrelevant. *Id.*

3. The court of appeals denied Medina's timely petition for rehearing en banc. App.45a. The Chief Justice extended the time to file this petition to and through August 30, 2019. *See* No. 18A1273.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Intractably Split on the Question of Whether Individuals May Challenge Felon Disarmament Laws on an As-Applied Basis.

"All of the circuits to face the issue post *Heller* have rejected *blanket* challenges to felon in possession laws." *United States* v. *Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011) (footnote omitted) (emphasis added). But challenges of the non-blanket variety have produced anything but uniformity.

Three circuits have approved of such challenges, although the degree to which they entertain these

claims varies widely. Three circuits have confirmed that they remain open to the question. Two circuits expressly or effectively refuse to entertain as-applied felon disarmament challenges.

1. The Third, Seventh, and D.C. Circuits agree that individuals may ask whether the application of a felon disarmament law comports with constitutional values. But these courts address such cases in very different ways.

In *Binderup* v. *Atty. Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc), the Third Circuit split 8-7 in upholding two as-applied constitutional challenges to Section 922(g)(1). The majority, however, fractured as to why prohibiting the challengers from possessing firearms was unconstitutional. Three judges offered that the challengers retained the Second Amendment's protection because they were not convicted of serious crimes, and that the government had not shown that the challengers' possession of firearms would endanger public safety. *Binderup*, 836 F.3d at 356-57 (Ambro, J.). Under this view, however, a nonviolent crime could be "serious" and thus preclusive, and rehabilitation was irrelevant to the inquiry as to the crime's severity. *Id.* at 349-50. Five judges, in contrast, determined that challengers must prevail if there is no reason to believe that they have a "propensity for violence." *Id.* at 380 (Hardiman, J., concurring in part and concurring in the judgments).

The Seventh Circuit held that "*Heller* referred to felon disarmament bans only as 'presumptively

lawful,' which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." *United States* v. *Williams*, 616 F.3d 685, 692 (7th Cir. 2010). Although a divided Seventh Circuit panel recently denied as-applied relief to a felon whose crime it found egregious, following the opinion in this case below, it still acknowledged that relief remains available to others. *Kanter* v. *Barr*, 919 F.3d 437, 450 n.12 (7th Cir. 2019). Unlike the D.C. Circuit, the Seventh Circuit assumes that Section 922(g)(1) implicates the Second Amendment and conducts its analysis only at step two. *Id.* at 447-48 & n.9. However, the Seventh Circuit recently divided as to whether the challenger or the government has the burden of proof at the second step. *Hatfield* v. *Barr*, 925 F.3d 950, 953-54 (7th Cir. 2019) (Sykes, J., concurring in part and concurring in judgment).

As the opinion below indicates, the D.C. Circuit remains technically open to as-applied claims, though on what basis is unclear. The court at once offered that a felon may distinguish himself from other felons, App.16a, but held that rehabilitation is irrelevant. App.17a. It held that courts should defer to legislative judgments as to which crimes are sufficiently serious to warrant felon classification and consequences, yet allowed that in some cases, courts may hold that felonies are "so minor or regulatory" that disarmament is unconstitutional. *Id.*

But while the Seventh Circuit would have also rejected Medina's claim, the Third Circuit might well

have approved it. Medina's non-dangerous nature would have qualified him for relief under Judge Hardiman's concurrence. Judge Ambro's plurality would have evaluated the seriousness of Medina's crime by reference to four factors, two of which would have favored the government (felony classification, cross-jurisdictional consensus on criminalizing the activity), but two of which would have favored Medina (nonviolent nature of the offense, lack of imprisonment reflecting trial judge's view of the offense's severity). *See Binderup*, 836 F.3d at 351-53 (Ambro, J.).[6]

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

The Eighth Circuit has "yet to address squarely whether § 922(g)(1) is susceptible to as-applied challenges." *United States* v. *Adams*, 914 F.3d 602 (8th Cir. 2019). But it rejected an as-applied challenge to Section 922(g)(1) where the felon "has not shown that he

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[6] To be sure, Judge Ambro's contingent offered that its test was circuit law. *Binderup*, 836 F.3d at 356. But as Judge Hardiman noted, only three of fifteen judges supported this view. *Id.* at 357 n.2 (Hardiman, J., concurring). The holding-discovery rule of *Marks* v. *United States*, 430 U.S. 188 (1977) is unhelpful because neither opinion forming the majority based its holding on grounds narrower than the other.

is no more dangerous than a typical law-abiding citizen." *United States* v. *Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014) (internal quotation marks omitted).

The Ninth Circuit has also left the matter open. No personal criteria were at issue in *United States* v. *Phillips*, 827 F.3d 1171 (9th Cir. 2016), which rejected a categorical challenge to basing Section 922(g)(1)'s disability upon a traditional, if nonviolent felony. But the court otherwise left open the as-applied question. "Can a conviction for stealing a lollipop . . . serve as a basis under § 922(g)(1) to ban a person for the rest of his life from ever possessing a firearm, consistent with the Second Amendment? That remains to be seen." *Phillips*, 827 F.3d at 1176 n.5. That court later noted the potential for individualized as-applied relief in *Fortson* v. *L.A. City Attorney's Office*, 852 F.3d 1190, 1194 (9th Cir. 2017).

The government often claims that the Fifth and Eleventh Circuits have foreclosed as-applied individualized challenges to Section 922(g)(1). It errs. On plain error review, the Fifth Circuit rejected only a felon's claim that Section 922(g)(1) is unconstitutional because he lacked a violent intent in possessing the gun. *United States* v. *Scroggins*, 599 F.3d 433 (5th Cir. 2010). Similarly, the Eleventh Circuit rejected a challenge to Section 922(g)(1) by a career criminal who, at best, leveled an as-applied claim on grounds that he wanted to possess guns for self-defense. *United States* v. *Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam).

3. The Fourth Circuit, which had repeatedly acknowledged the prospect of as-applied relief from Section 922(g)(1)'s application, recently backtracked in the context of a state law prohibition. "[W]e have recognized the possibility that an as-applied challenge to a felon disarmament law could succeed in rebutting the presumption [of lawfulness]." *Hamilton* v. *Pallozzi*, 848 F.3d 614, 622-23 (4th Cir. 2017) (citation omitted). But that court now bars such claims unless "the felony conviction is pardoned or the law defining the crime of conviction is found unconstitutional or otherwise unlawful." *Id.* at 626. Of course in such cases, no as-applied challenge is required. A pardoned offense cannot trigger Section 922(g)(1)'s application, *see* Section 921(a)(20) (excluding pardoned offenses from definition of predicates), and the writ of *corum nobis* or state expungement procedure would address convictions for crimes that can no longer be crimes.[7]

The Tenth Circuit has rejected the concept that individuals subject to a disarmament provision might nevertheless retain or regain their Second Amendment rights. "We have already rejected the notion that *Heller*

[7] In theory, the Fourth Circuit remains open to as-applied claims by misdemeanants swept within "felon disarmament laws." *Hamilton*, 843 F.3d at 626 n.11. But any misdemeanant contemplating an as-applied Section 922(g)(1) challenge should exercise caution before relying on this statement. Fourth Circuit precedent theoretically allowed felons to challenge felon-disarmament laws on an as-applied basis until *Hamilton* narrowed the grounds for such claims beyond conceivable utility. And the Fourth Circuit has yet to find a Second Amendment violation; considering its body of work in the area, it is unlikely to do so in the foreseeable future.

mandates an individualized inquiry concerning felons pursuant to § 922(g)(1)." *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (citing *United States* v. *McCane*, 573 F.3d 1037 (10th Cir. 2009)) (unpublished order but attached to published dissent).

The issue is plainly of the highest importance, implicating a fundamental constitutional right and matters of public safety. It recurs constantly, as countless Americans are subject to Section 922(g)(1) and its various analogues. The conflicts surrounding this issue have only deepened in the years since the government unsuccessfully petitioned this Court to review it. *Sessions* v. *Binderup*, 137 S. Ct. 2323 (2017). Further percolation will not clarify matters.[8]

II. The Court of Appeals Seriously Erred.

1. The court of appeals' statement that Founding Era felons were typically dispossessed and executed is simply wrong. "[T]he most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker)," *Heller*, 554 U.S. at 594, tells a different story.

Blackstone recalled that in the medieval period, criminally-accused clergy were often afforded the benefit of being tried in lenient ecclesiastical courts, thereby avoiding the King's punishment. 5 St. George

[8] At a minimum, however, the court of appeals in this case might benefit from any guidance this Court may offer in *New York State Rifle & Pistol Ass'n* v. *City of New York*, No. 18-280 (certiorari granted Jan. 22, 2019).

Tucker, Blackstone's Commentaries [Book Four] *365-68 (1803). Over time, the "benefit of clergy" of avoiding capital punishment was extended more broadly throughout society, often on the condition of sustaining alternative punishment. By Blackstone's day, commoners committing their first offense were "discharged of the capital punishment of felonies within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or suffering a discretionary imprisonment . . . or, in case of larciny, upon being transported for seven years, if the court shall think proper." *Id.* at *373.

And having received alternative punishment, a first-time felon was "restored to all capacities and credits, and the possession of his lands, as if he had never been convicted." *Id.* at *374.

As Judge Barrett recounted at some length, the American experience mirrored that described by Blackstone. By the time of the founding, capital punishment became relatively rare, and the concept of "civil death" attached instead to life sentences. *Kanter*, 919 F.3d at 458-61 (Barrett, J., dissenting). "Those who ratified the Second Amendment would not have assumed that a free man, previously convicted, lived in a society without any rights and without the protection of law." *Id.* at 461 (Barrett, J., dissenting).

2. The court of appeals also erred in offering that the Founders would have disarmed people merely for lacking virtue, without regard to whether their possession of arms posed any risk. Dangerousness, not

"virtuousness," has always been the traditional basis for disarmament.

"[A]ctual 'longstanding' precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates a present danger that one will misuse arms against others and the disability redresses that danger." C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 698 (2009). "The most germane evidence available directly supports the conclusion that the founding generation did not understand the right to keep and bear arms to extend to certain categories of people deemed too dangerous to possess firearms." *Binderup*, 836 F.3d at 367 (Hardiman, J., concurring). The Massachusetts, New Hampshire, and Pennsylvania ratifying conventions that this Court described as "highly influential," *Heller*, 554 U.S. at 604, confirmed as much.

At the Massachusetts ratifying convention, Samuel Adams proposed that the "Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Journal of Convention: Wednesday February 6, 1788, *reprinted in* Debates and Proceedings in the Convention of the Commonwealth of Massachusetts Held in the Year 1788, at 86 (Boston, William White 1856). New Hampshire's convention proposed that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." Schwartz, *supra* at 761. Contrary to the panel's

view, App.13a, disloyalty in the context of an active revolution might reasonably be viewed as indicating a potential for violence.

And as the court of appeals noted, the *dissenters* at Pennsylvania's ratification convention offered that people could be disarmed "for crimes committed, or real danger of public injury." *Id.* (internal quotation marks omitted). But "no one even today reads this provision to support the disarmament of literally all criminals, even nonviolent misdemeanants." *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting). The limiting principle is contained in the language referencing "real danger of public injury." *Id.*

"[F]ounding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety." *Kanter*, 919 F.3d at 458 (Barrett, J., dissenting). While early Americans might have viewed dangerous people as lacking virtue, zero historical evidence supports the notion that people were disarmed for being "unvirtuous."

> We have found no historical evidence on the public meaning of the right to keep and bear arms indicating that "virtuousness" was a limitation on one's qualification for the right—contemporary insistence to the contrary falls somewhere between guesswork and *ipse dixit*.

Binderup, 836 F.3d at 372 (Hardiman, J., concurring).

And "[t]his 'virtue' standard—especially in the pliable version articulated by the Government—is implausible because the 'civic republican' view of the scope of the Second Amendment is wrong." *Id.* at 371 (Hardiman, J., concurring). The view is "closely related" to the discredited collective rights notion of the Second Amendment, and "stems from a misreading of an academic debate" concerning "the *rationale* for having the right to keep and bear arms in the first place" rather than who enjoys the right. *Id.* at 371-72 (Hardiman, J., concurring).

"In 1791—and for well more than a century afterward—legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect the public safety." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting). There is no Framing Era predicate for disarming Medina merely because he made a false statement on a bank form nearly three decades ago.

3. By deferring so greatly to legislative decree that something constitutes a "felony," the court of appeals has created a new creature in our constitutional order: The fundamental right whose dimensions are drawn by legislatures.

"[A]s this Court has emphasized, the distinction between felonies and misdemeanors 'is minor and often arbitrary,' and 'numerous misdemeanors involve conduct more dangerous than many felonies.' " Petition for Certiorari, *Lynch* v. *Binderup*, No. 16-847, at 16 (Jan. 5, 2017) (quoting *Tennessee* v. *Garner*, 471 U.S. 1,

14 (1985)).[9] Felonies in some states may not even be crimes at all in others.

Moreover, Section 922(g)(1) does not simply disarm felons. The prohibition reaches many state misdemeanors, but also excludes certain felony categories from its ambit. Why does Medina's false statement, which caused no damage and merited no jail sentence, warrant dismissive condemnation while those who seriously injure others through "unfair trade practices" and other business crimes involving deception or conspiracy against the market, Section 921(a)(20), retain the means of self-defense? Exclusions aside, the prohibition is based upon the potential sentence in a given case. But "[a] crime's maximum possible punishment is 'purely a matter of legislative prerogative,'" *Binderup*, 836 F.3d at 351 (Ambro, J.) (quoting *Rummel* v. *Estelle*, 445 U.S. 263, 274 (1980)).

"*Heller* was a constitutional decision. It recognized the scope of a passage of the Constitution. The boundaries of this right are defined by the Constitution. They are not defined by Congress." *United States* v. *Chovan*, 735 F.3d 1127, 1148 (9th Cir. 2013) (Bea, J., concurring). But if courts will now rubber-stamp *at Second Amendment step one* the disarmament of anyone who has triggered a potential sentencing range, the Second Amendment lacks content. And if an individual has been confirmed as a law-abiding, responsible citizen,

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[9] Note the government's emphasis on dangerousness.

what legitimate, let alone strong or compelling interest might the government have in disarming him?

III. The Decision Below Will Lead to Further Absurd, Unjust, and Dangerous Outcomes.

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

More than mere absurdity and injustice, the unchecked application of such laws is dangerous. It must be remembered that the Second Amendment reflects a policy choice: That the private ownership of firearms for lawful purposes, including self-defense, has a value that merits protection. To be sure, the misuse of firearms causes terrible suffering; governments serve their essential function when acting to reduce that harm. But denying individuals the means of self-defense also inflicts harm. Reasonable people may disagree in good faith about which measures are effective or respectful of the traditional right to arms. But

disarming individuals whose possession of firearms poses no apparent risk only serves to reduce public safety.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 30, 2019