No. 19-287

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

REPLY BRIEF FOR PETITIONER

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The government makes no effort to deny that this case, at a minimum, raises "an important question of federal law that has not been, but should be, settled by this Court. . . ." Sup. Ct. R. 10(c). Nor does the government deny that the questions of whether individuals may challenge an application of 18 U.S.C. § 922(g)(1) and, if so, on what grounds, constantly raise profound issues implicating fundamental rights and public safety.

Yet the decision below does not merely raise a question that this Court should settle. It conflicts with *District of Columbia* v. *Heller*, 554 U.S. 570 (2008) by allowing Congress and state legislatures to define the scope of a constitutional right, in disregard of this Court's instruction that felon disarmament is only "presumptively lawful."

Finally, the decision below squarely implicates the circuit conflict that the government identified when it petitioned for certiorari in *Lynch* v. *Binderup*, No. 16-847 (filed Jan. 5, 2017) ("*Binderup* Pet."). The government misstates the holding of *Binderup* v. *Atty. Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc) and other decisions, while overlooking other notable precedents. But there is no sense denying that the decision below is the latest entry in a mature and well-developed circuit split that requires this Court's resolution.

1. The government understands the importance of the issues raised here when such understanding suits its needs. "Section 922(g)(1) is by far the most

frequently applied of Section 922(g)'s firearms disqualifications, forming the basis for thousands of criminal prosecutions and tens of thousands of firearm-purchase denials each year." *Binderup* Pet. 23 (footnoted omitted) (referring to Title 18 of the United States Code). "In addition, '[b]ans on the possession of firearms by convicted felons are the most common type of gun control regulation' in the States, and many States apply the standard definition of felony to bar persons convicted of crimes punishable by imprisonment for more than one year." *Id.* 23-24 (quoting Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 721 (2007)) (other quotation marks and footnote omitted).

Moreover, this Court has acknowledged that Section 922(g)(1)'s broad reach encompasses many potential crimes that the government might be reluctant to prosecute for fear of risking jury nullification. "[A]n extremely old conviction for a relatively minor felony that nevertheless qualifies under the statute might strike many jurors as a foolish basis for convicting an otherwise upstanding member of the community of otherwise legal gun possession." *Old Chief* v. *United States*, 519 U.S. 172, 185 n.8 (1997).

Such gun possession is not merely "otherwise legal." It is a fundamental constitutional right, the denial of which may harm public safety no less than the possession of firearms by dangerous people. Yet the brief in opposition is silent as to Medina's observation that the issues here recur constantly, impact

countless individuals, and implicate matters of the highest public concern.

2. The brief in opposition fails to address the conflicts that courts have identified between the government's position and this Court's decision in *Heller*. As the government notes, "this Court described felon-disarmament laws as 'longstanding' and 'presumptively lawful.'" BIO 3 (quoting *Heller*, 554 U.S. at 626, 627 n.26). But the qualifying effect of the term "presumptively" has not been lost on courts. Affirming the award of relief in two cases, the en banc Third Circuit noted that "[u]nless flagged as irrebutable, presumptions are rebuttable." *Binderup*, 836 F.3d at 350 (citations omitted). "A presumption of constitutionality 'is a presumption . . . [about] the existence of factual conditions supporting the legislation. As such it is a *rebuttable* presumption.'" *Id.* at 361 n.6 (Hardiman, J., concurring) (quoting *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 209 (1934)).

> [W]e doubt the Supreme Court couched its first definitive characterization of the nature of the Second Amendment right so as to completely immunize this statute from any constitutional challenge whatsoever. Put simply, we take the Supreme Court at its word that felon dispossession is *presumptively* lawful.

Id. (internal quotation marks omitted). "*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).

Moreover, immunizing Section 922(g)(1) from as-applied challenges, BIO 8, would allow Congress and state legislatures to define the contours of a fundamental right. Whatever activity legislatures decree felonious (or subject to a particular term of imprisonment) would, by that virtue, place individuals outside the Second Amendment's protective scope. Pet.25-26. That position conflicts with *Heller*'s basic holding, reconfirmed in *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), that the right to arms is secured by the Constitution.

Instead of addressing this conflict with precedent, the government sites the musings of some law professors to the effect that the right to arms is somehow tied to the concept of a virtuous citizenry. BIO 7-8. But neither the government, nor the professors, have shown their work. As Judge Hardiman found, the virtuosity theory "falls somewhere between guesswork and *ipse dixit*." *Binderup*, 836 F.3d at 372 (Hardiman, J., concurring); Pet.23. Consistent with these unsupported assertions, the government ignores the copious contrary historical evidence presented by Medina and his amicus, and recounted in various judicial opinions including Judge Barrett's dissent in *Kanter* v. *Barr*, 919 F.3d 437 (7th Cir. 2019) and Judge Hardiman's *Binderup* concurrence. And of course, were the court below and the government correct, they would place Congress and the state legislatures in the position of doling out fundamental rights based on their

assessment of people's virtue. If *Heller* means anything, it means that litigants must take history seriously. This Court's precedent required more of the court below, and it requires more of the government.

3. The government recently described the circuit conflict to this Court in terms that plainly encompass the decision below. It also misrepresents the state of circuit precedent, the resulting circuit conflict, and Medina's argument.

As the government conceded earlier, *Binderup* "opened the courthouse doors to an untold number of future challenges by other individuals based on their own particular offenses, histories, and personal circumstances." *Binderup* Pet. 10. The "individuals" referenced by the government? "[C]onvicted felons." *Id.* As Medina noted, the government thinks nothing of the felon-misdemeanant distinction in defending Section 922(g)(1) in each and every conceivable application. Pet.24-25 (citing *Binderup* Pet. 16).

The government points to the lower court's theoretical allowance for as-applied challenges, arguing that the matter remains open in the D.C. Circuit and thus, the decision below is not among conflicting precedent. BIO 12. This approach overreads the court's language and minimizes the conflict's scope. The D.C. Circuit's apparent reservation is empty. It might well have been offered for no reason other than to minimize the prospect of this Court's review. Without question, Medina raised an individualized as-applied challenge. The D.C. Circuit rejected that challenge without

explaining why Medina fell short, or even what the standards for such a challenge might be. The government, too, fails to explain how or why this is merely a case that fails for lack of proof.

Absent any actual discussion of the as-applied standard, of Medina's evidence, and of how the two relate, we are left only with the D.C. Circuit's holding "that those convicted of felonies are not among those entitled to possess arms," Pet.App.16a (citation omitted), and that Medina cannot obtain relief for the simple fact that he has a felony conviction, Pet.App.17a. If the court below truly wished to account for as-applied challenges, it should have explained why Medina's as-applied challenge fails rather than merely declared that he is a felon and called it a day.

Beyond this, the government's familiar yet erroneous recitation of circuit precedent it claims to be implicated in this split, such as *United States* v. *Rozier*, 598 F.3d 768 (11th Cir. 2010) (per curiam) and *United States* v. *Scroggins*, 599 F.3d 433 (5th Cir. 2010), has already been anticipated and addressed. Pet.18. The government makes no effort to engage the showing that these decisions did not foreclose individualized as-applied challenges, just as it ignores the petition's detailing of the relevant precedent in the various circuits.

The government also errs in asserting that Judge Ambro's three-judge *Binderup* plurality is circuit law under the rule of *Marks* v. *United States*, 430 U.S. 188 (1977). Judge Ambro's opinion is not in any

sense narrower than Judge Hardiman's five-judge concurrence. It is just different, and its claim to precedential status under *Marks* itself garnered merely three of fifteen votes. Pet.17 n.6.

The government also erroneously denies that Medina claims he would prevail under either *Binderup* approach, BIO 8, *contra* Pet.16-17. And it erroneously argues that Medina would have lost under Judge Ambro's four-factor test. While Medina's predicate conviction "was not violent," BIO 13, the government contends that the other three factors—felony classification, cross-jurisdictional consensus, and imprisonment—weigh against Medina. BIO 13-14. To be sure, Medina's offense was a felony, but the relevance of cross-jurisdictional consensus is doubtful when speaking of federal crimes where only one jurisdiction is at stake.

Even less persuasive is the government's equation of home detention and imprisonment. Sixty days of home detention do, in fact, qualify as "not a single day of jail time." BIO 13 (quoting *Binderup*, 836 F.3d at 352 (Ambro, J.)). Judge Ambro probably did not have a short period of home confinement in mind when he offered that terms of imprisonment reflect a crime's severity. "Home confinement is not incarceration." *United States* v. *Hager*, 288 F.3d 136, 137 (4th Cir. 2002). "While a defendant's movement may be severely curtailed by the conditions of his home confinement, it cannot seriously be doubted that confinement to the comfort of one's own home is not the functional equivalent of incarceration in either a practical or a

psychological sense." *United States* v. *Zackular*, 945 F.2d 423, 425 (1st Cir. 1991); *cf. Reno* v. *Koray*, 515 U.S. 50, 59 (1995).

Medina would have doubtless prevailed under Judge Hardiman's *Binderup* approach, and he would likely have prevailed under Judge Ambro's *Binderup* approach for triggering only two of four or perhaps one of three relevant factors. In any event, either *Binderup* approach differs from the D.C. Circuit's illusory non-approach to resolving such claims, to say nothing of the way a case like this would have been decided under other circuits' precedent. If, as the government would have had in *Binderup*, a conflict merits resolution when lower courts protect fundamental rights, it merits resolution when a court disregards a right that another circuit would enforce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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