No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ISRAEL TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Date Sent by Federal Express Overnight Delivery: August 27, 2020

QUESTION PRESENTED

May an individual charged with violating a law barring the possession of firearms by felons bring an as-applied Second Amendment challenge to his prosecution?

RULE 14.1(b) STATEMENT

(i) All parties to the proceeding are listed in the caption.

(ii) The petitioner is not a corporation.

(iii) The following are directly related proceedings: *United States v. Torres*, No. 2:17-cr-00265-JAT (D. Ariz.) (judgment entered Feb. 23, 2018); *United States v. Torres*, No. 18-10076 (9th Cir.) (judgment entered Jan. 10, 2020).

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Petitioner Israel Torres respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 10, 2020. App. A.

OPINIONS BELOW

The court of appeals' memorandum is designated Not for Publication, but is available at 789 F. App'x. 655. The district court's order also is not officially published, but is available at 2017 WL 11466627.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over the government's federal charges against Mr. Torres pursuant to 18 U.S.C. § 3231. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 10, 2020. App. A at 1. The court of appeals denied Mr. Torres' timely petition for rehearing en banc on April 3, 2020. App. C. On March 19, 2020, in light of concerns relating to COVID-19, the Court extended the deadlines for filing a petition for certiorari due on or after that date to 150 days from the date of the order denying a timely petition for rehearing.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the United States Constitution provides as follows:

> 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.

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[1] https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

U.S. Const. amend. II.

18 U.S.C. § 922(g)(1) provides as follows:

§ 922. Unlawful acts

* * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1) (West, Westlaw, Current through Pub. L. No. 116-158).

STATEMENT OF THE CASE

Israel Torres is a 35-year-old son of a pastor, husband, and father of three. In early 2017 Mr. Torres kept a number of firearms in his home, where they were available for the defense of himself and his family. But on February 16th of that year, federal law enforcement agents entered his home, forcibly removed his firearms, and arrested him for having them.

The agents' justification for disarming Mr. Torres was that, twelve and six years earlier, he had been convicted of driving-under-the-influence (DUI) offenses. In 2004, Mr. Torres was convicted of aggravated DUI with a person under 15 in the vehicle, a Class 6 undesignated felony under Arizona law, for which he was sentenced to one day in jail, 18 months' probation, and nine days suspended. In

2010, Mr. Torres was convicted of aggravated driving or actual physical control of a vehicle while under the influence of intoxicating liquor or drugs, a Class 4 felony under Arizona law, for which he was sentenced to eight months of imprisonment followed by three years of probation. In light of these convictions, the government charged Mr. Torres with two counts (relating to two different sets of firearms and dates of possession) of violating 18 U.S.C. § 922(g)(1), which provides that "[i]t shall be unlawful for any person . . . who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" to possess a firearm.

Mr. Torres filed a motion to dismiss the indictment on the ground that, as applied to him, Section 922(g)(1) violated the Second Amendment to the United States Constitution, which provides: "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. Mr. Torres cited *District of Columbia v. Heller*, 554 U.S. 570 (2008), wherein this Court held that the Second Amendment protects an individual right to keep and bear arms.

Mr. Torres acknowledged that *Heller* described "longstanding prohibitions on the possession of firearms by felons" as "presumptively lawful." *Id*. at 626-27 & n.26. But he observed that many circuit courts have found the "presumpt[ion]" rebuttable in individual cases, and accordingly have entertained as-applied Second Amendment challenges to Section 922(g)(1). One circuit court, in fact, has found merit and granted relief in two such challenges. *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc). Mr. Torres further acknowledged that the court of

appeals' opinion in *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), could be read to preclude as-applied Second Amendment challenges to Section 922(g)(1), but he argued that *Vongxay* did not actually settle the issue, and that if it did, it was wrongly decided. Mr. Torres also demonstrated that his as-applied Second Amendment challenge had merit, because his felonies were non-violent and would not have historically resulted in the loss of his right to keep and bear arms.

The government filed a response arguing that Mr. Torres' claim was foreclosed by *Vongxay*. The government also challenged Mr. Torres' characterization of his DUI offenses as non-violent, noting that drunk-driving accidents cause many fatalities.

Mr. Torres filed a reply in which he addressed the government's arguments, and showed that his DUI offenses would not be treated as felonies in many states.

The district court denied Mr. Torres' motion to dismiss, agreeing with the government's argument that "current Ninth Circuit precedent prevents this Court from entertaining an as-applied challenge to 18 U.S.C. § 922(g)(1) at this time." App. B at 4 (*citing Vongxay*, 594 F.3d at 1114). At the same time, the court acknowledged that in *United States v. Phillips*, 827 F.3d 1171 (9th Cir. 2016), the court of appeals had observed that *Heller* "only endorsed 'longstanding' regulations limiting the individual right to firearm possession," and that "'courts and scholars are divided over how "longstanding" these bans really are.'" App. B at 3 (*quoting Phillips*, 827 F.3d at 1174; *and citing* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009) (hereinafter *Marshall*)).

Mr. Torres entered into a conditional plea agreement that preserved his right to appeal the denial of his motion to dismiss. In the court of appeals, he again pressed his Second Amendment challenge, arguing that precedent did not bar his Second Amendment claim. In the alternative, he suggested that the panel request a vote on whether the case should be heard initially en banc. *See* Ninth Circuit General Order 5.2.b.

After holding an oral argument, a divided panel of the court of appeals rejected Mr. Torres' Second Amendment claim. App. A. The majority held that it was "bound under *Vongxay* and *Heller* to assume the propriety of felon firearm bans." *Id*. at 4. Judge Lee filed a concurrence in which he agreed that Mr. Torres' conviction should be affirmed pursuant to *Vongxay*, but rejected the majority's view "that felons are categorically barred from bringing as-applied Second Amendment challenges to § 922(g)(1)." *Id*. at 5. Judge Lee believed that *Heller* and circuit precedent left open the possibility of an as-applied challenge where the defendant's felony is "minor or regulatory in nature and has no analogue in the Founding era." *Id*.

Mr. Torres filed a timely petition for rehearing en banc, supported by amicus briefs filed by the Ninth Circuit federal public and community defenders, and by a group of organizations devoted to preserving the right enshrined in the Second Amendment. The court of appeals denied Mr. Torres' petition in an order filed on April 3, 2020. App. C.

REASONS FOR GRANTING THE WRIT

This case presents a question that is the subject of deeply entrenched divisions between the circuits, between the last-resort courts of several states – and in two instances, between state and federal courts covering the same geographic areas. It has also divided judges in individual decisions, and has been the focus of extensive scholarly debate regarding the historical backdrop and original understanding of the Second Amendment. The extraordinary attention that this question has received is unsurprising, because it implicates the fundamental constitutional rights of millions of Americans, as well as one of the most frequently charges offenses in the federal and state criminal justice systems.

This Court's guidance with respect to this important question consists essentially of two cryptic sentences that were included in its opinion in *Heller*, and reiterated in its opinion in *McDonald v. City of Chicago*, 561 U.S. 742 (2010) – neither of which involved a charge of unlawful firearm possession by a felon. Judges and scholars have pored over these 88 words, reaching a wide array of conflicting conclusions regarding their meaning and significance. Each new examination of the question only serves to push courts, judges, and scholars still further apart.

Only this Court can resolve these inveterate disagreements. This case – in which the question has been clearly presented and thoroughly briefed at every possible stage, and in which the answer carries concrete implications for the petitioner – offers a perfect vehicle for the Court to do so.

ARGUMENT

I. The question presented is exceptionally important.

The question presented in this case is exceptionally important. This Court's resolution of the question will determine whether, and under what circumstances, a fundamental constitutional right "deeply rooted in this Nation's history and tradition" may be absolutely and permanently stripped from several million Americans. *McDonald*, 561 U.S. at 768 (internal quotation marks omitted).[2] For Mr. Torres and others like him, a threat from an attacker may render this question a matter of life and death. And there are many more like him, because offenses under 18 U.S.C. § 922 are the third-most-charged crimes in the federal system.[3]

Presumably because it was enacted several decades before *Heller*, Section 922(g)(1) demonstrates strikingly little regard for the fundamental right enshrined in the Second Amendment. Indeed, for the millions of Americans who fall within its scope, the statute does not merely *regulate* their ability to exercise this right; it "completely eviscerates" it. *Binderup*, 836 F.3d at 364 (Hardiman, J., concurring part and concurring in the judgments).

The importance of the question presented also derives from its broader implications. The court of appeals – and the three other circuits on its side of the

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[2] Alan Flurry, *Study estimates U.S. population with felony convictions*, UGA Today Oct. 1, 2017 (noting that University of Georgia study estimated that as of 2010 there were 19 million people in the United States with a felony record), available at https://news.uga.edu/total-us-population-with-felony-convictions/ (last visited Aug. 24, 2020).

[3] https://trac.syr.edu/tracreports/bulletins/overall/monthlyjun20/fil/ (last visited Aug. 24, 2020).

split – believe that conviction of *any* offense formally designated a felony nullifies the protections of the Second Amendment. App. A at 4. This view effectively empowers state and federal legislatures to control the degree to which the Second Amendment constrains them, by the simple expedient of expanding the scope of crimes they designate as felonies. *See Binderup*, 836 F.3d at 351 (refusing to "defer blindly" to legislature's designation of maximum punishment) (Op. of Ambro, J.); *id.* at 372 n.20 (Hardiman, J., concurring in part and concurring in the judgments) ("although certain types of criminals are excluded from the right to keep and bear arms, this traditional limitation on the scope of the right may not be expanded by legislative fiat"); *see also Phillips*, 827 F.3d at 1176 n.5 (questioning whether a person could be permanently disarmed for "stealing a lollipop" if petty larceny were to be defined as a felony). In effect, it allows legislatures to turn the Second Amendment on and off at will.

Moreover, even in the absence of deliberate legislative action, blind deference to the felony label sanctions the disarmament of a set of individuals that is both vastly broader, and substantially more arbitrary, than the group of individuals who could have been subject to felon-disarmament laws when the Second Amendment was ratified.

The felons of today are not the felons of the founding era. In the late eighteenth century, "the common law term 'felony' applied to only a few select categories of serious crimes." Alexander C. Barrett, *Taking Aim at Felony Possession*, 93 B.U. L. Rev. 163, 195 (2013). Today, by contrast, federal felonies are

so numerous, and cover such a broad array of conduct, that it is estimated that "citizens, on average, apparently commit three felonies per day." Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 Geo. J.L. & Pub. Pol'y 17, 38 (2016). Federal felonies now encompass a vast array of nonviolent offenses, including not only tax and financial crimes, but also such obscure matters as offering to barter a migratory bird feather (16 U.S.C. §§ 703, 707), and issuing a false crop report (18 U.S.C. § 2072). Moreover, as Judge Lee observed below, state legislatures, too, have been busy expanding their stables of felonies since ratification. App. A at 7-8 & n.2 (Lee, J., concurring). The state-law offenses that may destroy one's Second Amendment right now include shoplifting for the third time in West Virginia, making an illicit recording in a movie theater for the second time in Utah, and "releasing a dozen heart-shaped balloons in a misguided romantic gesture" in Florida. *Id*.

The designation of felons as individuals whose Second Amendment rights are defeasible is also strikingly arbitrary. There was "ambiguity in the meaning of felony" at the founding, and the concept has developed differently across jurisdictions. Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 Clev. St. L. Rev. 461, 465, 467-87 (2009). Even today, the term "felony" does not have a unitary meaning: While many jurisdictions use the punishable-in-excess-of-one-year definition, others use the place of confinement, and still others do not use the terms "felony" and "misdemeanor" at

all. *See id*. at 487; Nat'l Conf. of State Legislatures, *Misdemeanor Sentencing Trends* (Jan. 29, 2019).[4]

Moreover, there are wide variations as to which offenses justify the "felon" label. In 2015, for example, the monetary threshold for a felony theft offense ranged from $200 in New Jersey and Virginia to $2,500 in Wisconsin. Nat'l Conf. of State Legislatures, *Making Sense of Sentencing: State Systems and Policies*, Fig. 1 (June 2015).[5] States variously classify statutory rape offenses as felonies based on the age of consent; age of the victim; age of the perpetrator; age differential between victim and perpetrator, or some combination of these factors. Asaph Glosser *et al*., *Statutory Rape: A Guide to State Laws and Reporting Requirements* 18-126 (Dec. 15, 2004).[6] The treatment of state DUI laws – like those underlying Mr. Torres' prosecution – are equally varied, as reflected in the table attached hereto. App. D.

In short, the answer to the question presented will determine whether millions of Americans are powerless to oppose the nullification of a fundamental constitutional right by overbroad and arbitrary laws. In light of these facts, the importance of the question is evident.

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[4] Available at https://www.ncsl.org/research/civil-and-criminal-justice/misdemeanor-sentencing-trends.aspx (last visited Aug. 24, 2010).
[5] Available at https://www.ncsl.org/documents/cj/sentencing.pdf (last visited Aug. 24, 2020).
[6] Available at https://aspe.hhs.gov/system/files/pdf/75531/report.pdf (last visited Aug. 24, 2020).

II. The question presented is the subject of entrenched conflicts between federal circuit courts, state appellate courts, and in two instances, circuit and state courts covering the same geographic areas.

This Court's most pertinent statement regarding the question presented is an 88-word passage, referencing "presumptively lawful" "longstanding prohibitions," that was included in *Heller* and reiterated in *McDonald*:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[26]
>
> [26] We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

Heller, 554 U.S. at 626-27 & n.26; *McDonald*, 561 U.S. at 786 ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' We repeat those assurances here.") (citation omitted) (plurality opinion).

These two enigmatic sentences have become the Rosetta Stone of as-applied Second Amendment challenges to felon-in-possession laws, attracting the painstaking scrutiny of judges and scholars. If they were intended to forestall disagreement regarding the question presented, they have failed.

Courts are in agreement regarding the unavailability of *facial* Second Amendment challenges to felon-in-possession statutes. *See Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019) ("Relying on the 'presumptively lawful' language in *Heller* and *McDonald*, every federal court of appeals to address the issue has held that § 922(g)(1) does not violate the Second Amendment on its face.") (citing cases). "However, courts of appeals are split as to whether *as-applied* Second Amendment challenges to § 922(g)(1) are viable." *Id.*; *accord Medina v. Whitaker*, 913 F.3d 152, 155-56 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 645 (2019) (surveying the circuits); *see also* Carly Lagrotteria, Note, Heller*'s Collateral Damage: As-Applied Challenges to the Felon-in-Possession Prohibition*, 86 Fordham L. Rev. 1963, 1966 (2018) (noting "deep circuit split" on the question) (hereinafter *Lagrotterria*). In fact, the division extends beyond federal circuit courts to state courts of last resort – and, in two instances, to state and federal courts covering the same geographic areas.

A. The question presented divides the federal and state courts of appeals.

The Fifth, Ninth, Tenth, and Eleventh Circuits have taken the position exemplified by the court of appeals decision below, finding as-applied Second Amendment challenges to felon-in-possession statutes to be categorically barred. *United States v. Massey*, 849 F.3d 262, 263, 265 (5th Cir. 2017) (holding that circuit precedent precluded appellant's claim that "Section 922(g) [wa]s unconstitutional as applied to him"); *Vongxay*, 594 F.3d at 1115 ("felons are categorically different from the individuals who have a fundamental right to bear arms"); *In re U.S.*, 578 F.3d 1195, 1200 (10th Cir. 2009) (noting that circuit had "rejected the notion that *Heller*

mandates an individualized inquiry concerning felons pursuant to § 922(g)(1)"); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (reasoning that *Heller*'s language "suggests that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment").

The courts of last resort of Alaska, the District of Columbia, Massachusetts, and Nevada have taken the same position. *Farmer v. State*, 235 P.3d 1012, 1016 (Alaska 2010) ("The adverse consequences of conviction that Farmer argues violate his constitutional rights are, in fact, the natural and intended collateral consequences of having been convicted.") (internal quotation marks omitted); *Hooks v. United States*, 191 A.3d 1141, 1146 (D.C.[7] 2018) (reasoning that, because appellant's felony conviction disqualified him from obtaining a license to carry a pistol, his conviction "f[ell] squarely within the constitutional exceptions" this Court recognized in *Heller*); *Chardin v. Police Comm'r of Boston*, 989 N.E.2d 392, 402-03 (Mass. 2013) (holding that firearm licensing statute "embodie[d] a long-standing and well-recognized prohibition on the possession of firearms by a particular group of individuals – those who have committed a felony – and is clearly encompassed within the 'presumptively lawful regulatory measures' that *Heller* has declared to be outside the ambit of the Second Amendment") (*quoting Heller*, 554 U.S. at 626-27 & n.26); *Pohlabel v. State*, 268 P.3d 1264, 1267-68 (Nev. 2012) (rejecting appellant's individualized challenges to application of felon-disarmament statute because they

[7] *See* 28 U.S.C. § 2113 (defining "highest court of a state," for purposes of Title 28, Chapter 133, to include D.C. Court of Appeals).

did not "bring[] Pohlabel, a convicted felon, within the ambit of the Second Amendment").[8]

On the other side, the First, Third, Fourth, Seventh, Eighth, and D.C. Circuits have held the door open to as-applied challenges. *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011) ("[G]iven the 'presumptively lawful' reference in *Heller* – 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 ban. Possibly it might even be open to highly fact-specific objections."); *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011), *overruled in part on other grounds by Binderup*, 836 F.3d at 349 ("*Heller*'s statement regarding the presumptive validity of felon gun dispossession statutes does not foreclose Barton's as-applied challenge."); *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017) (permitting as-applied challenges where challenger has received a pardon or the law forming the basis of conviction has been declared unconstitutional or otherwise unlawful); *Kanter*, 919 F.3d at 450-51 (rejecting appellant's as-applied challenge because he "was convicted of a serious federal felony for conduct broadly understood to be criminal"); *United States v. Adams*, 914 F.3d 602, 605-07 (8th Cir. 2019) (noting it "ha[d] yet to address squarely" availability of as-applied challenge, then conducting as-applied analysis); *Medina*, 913 F.3d at 160-61 (reserving question of

[8] Intermediate appellate courts in Illinois, Kansas, and North Carolina have also refused to entertain as-applied challenges to felon-disarmament statutes. *People v. Montgomery*, 53 N.E.2d 1084, 1087-90 (Ill. App. Ct. 2016); *State v. Curtiss*, 242 P.3d 1281, at *3-*4 (Kan. Ct. App. 2011) (Table); *State v. Fernandez*, 808 S.E.2d 362, 367-68 (N.C. Ct. App. 2017).

availability of as-applied challenges and noting that: "To prevail on an as-applied challenge, Medina would have to show facts about his conviction that distinguish[] him from other convicted felons encompassed by the § 922(g)(1) prohibition"). The en banc Third Circuit, albeit in a case involving misdemeanants, has actually upheld two as-applied Second Amendment challenges to Section 922(g)(1). *Binderup*, 836 F.3d at 356-57 (Op. of Ambro, J.); *id.* at 379-80 (Hardiman, J., concurring in part and concurring in the judgments).

The last-resort courts of Minnesota and Missouri have sided with these circuits. *State v. Craig*, 826 N.W.2d 789, 795 (Minn. 2013) (adopting Third Circuit's analysis in *Barton*); *Alpert v. State*, 543 S.W.3d 589, 600-01 (Mo. 2018) (assuming *arguendo* that Third Circuit's analysis in *Binderup* applied, and applying it to appellant's claim).[9]

B. Federal and state appellate courts and judges are further divided regarding their reasoning for allowing or disallowing as-applied Second Amendment challenges to felon-disarmament statutes.

Within the ranks of courts willing to contemplate as-applied challenges, there is internal disagreement as to whether the particularized examination of a litigant's Second Amendment claim goes no further than a "categorical"-type examination of her prior felony convictions (*cf. Taylor v. United States*, 495 U.S. 575 (1990)), or may instead draw in more individualized facts regarding her criminal conduct and

[9] Intermediate appellate courts in Michigan and Wisconsin have also entertained as-applied challenges to felon-disarmament statutes. *People v. Williams*, No. 302154, 2013 WL 163818, at *5 (Mich. Ct. App. Jan. 15, 2013); *State v. Pocian*, 814 N.W.2d 894, 897-98 (Wis. Ct. App. 2012).

personal character. *Compare Medina*, 913 F.3d at 160 (deeming present contributions to his community, passage of time, and evidence of rehabilitation "not relevant" to as-applied challenges brought by "unpardoned convicted felons"); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) ("Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons[.]"); *with Torres-Rosario*, 658 F.3d at 113 (noting that this Court "[p]ossibly" might be "open to highly fact-specific objections" to the application of felon-in-possession laws); *Binderup*, 836 F.3d at 354 n.7 (Op. of Ambro, J.) (noting that "under the right circumstances" the passage of time since conviction may be a relevant consideration in an as-applied Second Amendment challenge); *id.* at 376-77 (Hardiman, J., concurring in part and concurring in the judgments) (noting that challengers had "presented compelling evidence that they are responsible citizens, each with a job, a family, and a clean record since 1997 and 1998").

The conflicts reach within individual courts as well, spawning numerous dissents and concurrences. *See*, *e.g.*, App. A at 5-8 (Lee, J., concurring) (disagreeing with majority as to whether circuit precedent categorically bars felons from bringing as-applied Second Amendment challenges to § 922(g)(1)); *Kanter*, 919 F.3d at 451-69 (Barrett, J., dissenting) (opining that government failed to prove necessary fit between appellant's non-violent offense and governmental interest in preventing gun violence); *Adams*, 914 F.3d at 607-11 (Kelly, J., concurring in the judgment) (disagreeing with majority's decision to conduct as-applied analysis). In the Third

Circuit's leading *Binderup* decision, the issue generated a confusing trio of non-majority opinions that judges in that circuit are still struggling to untangle. *Compare Holloway v. Attorney General*, 948 F.3d 164, 170-76 (3d Cir. 2020); *with id.* at 178-91 (Fisher, J., dissenting) (disagreeing over substance of circuit law).

The upshot of these divisions is that the Second Amendment right is substantially less robust in some parts of the country than others. An individual with a minor, non-violent felony might successfully vindicate his Second Amendment right in Philadelphia, for example, but become powerless to prevent that right from being permanently stripped away if he moves to Phoenix.

C. In two jurisdictions, the question presented divides federal and state appellate courts covering the same geographic area.

The situation is still more unfair and confusing for residents of Massachusetts and the District of Columbia – where state and federal courts covering the same geographic area have taken opposite positions. *Compare Torres-Rosario*, 658 F.3d at 113, *with Chardin*, 989 N.E.2d at 327; *and compare Medina*, 913 F.3d at 160-61, *with Hooks*, 191 A.3d at 1146. The vitality of the Second Amendment right in these areas resembles that of Schrödinger's cat: It remains indeterminate until a felon-in-possession charge is brought, and then it is determined by whether the prosecutor who brings it works for the federal government, or for a state.[10]

[10] A similar intra-jurisdictional conflict is foreshadowed by intermediate appellate court decisions in Illinois. *Compare Kanter*, 919 F.3d at 451, *with Montgomery*, 53 N.E.3d at 1089-90; *People v. Campbell*, 8 N.E.2d 1229, 1240-41 (Ill. App. Ct. 2014); *and People v. Garvin*, 994 N.E.2d 1076, 1085 (Ill. App. Ct. 2013).

D. These disagreements arise from conflicting interpretations of each essential component of the Court's reference to "presumptively lawful" regulations in *Heller*.

A close examination of the decisions on either side of these conflicts reveals sharp disagreements over each essential component of the much-scrutinized two sentences in *Heller*.

(1) Holding, or dicta?

These disagreements begin with the question of whether the *Heller* statement is authoritative. Several courts and judges have characterized the statement, which appears in two opinions that do not involve felon-disarmament laws, as dicta. *See*, *e.g.*, *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J., concurring); *Skoien*, 614 F.3d at 647-48 (Sykes, J., dissenting). Others view it as authoritative, but only as to its identification of questions that the *Heller* and *McDonald* opinions do *not* address. *Skoien*, 614 F.3d at 640 (characterizing statement as mere "precautionary language" identifying "matters [that] have been left open"); *Vongxay*, 594 F.3d at 1115 (characterizing *Heller* statement as "limit[ing] the scope of [its] holding[]"). Still others, pointing to this Court's statement that the respondent in *Heller* was entitled to a license provided that he was not "disqualified from the exercise of Second Amendment rights" (*Heller*, 554 U.S. at 647), view the statement as an outcome-determinative holding. *Barton*, 633 F.3d at 171-72.

(2) "longstanding prohibitions"

The next aspect of the *Heller* statement that has generated disagreement is the Court's reference to "longstanding prohibitions" on the possession of firearms by felons. *Heller*, 554 U.S. at 626. It is unclear whether the Court intended to affirmatively characterize felon-disarmament laws as "longstanding," or instead to suggest that the *subset* of such laws that qualify as "longstanding" are not drawn into question by the Court's holding.

If the Court intended to make the former assertion, its premise has been the subject of extensive scholarly and judicial debate. Although some have suggested that felons were commonly subject to disarmament laws at the time of ratification, *see*, *e.g.*, Don B. Kates and Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings L.J. 1339, 1360-61 (2009), recent scholarship has challenged this view, finding that felons were not broadly prohibited from possessing firearms before 1968. *Marshall*, *supra*, at 698-99; *see also* Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1374-76 (2009) (finding that felon disarmament laws "significantly postdate both the Second Amendment and the Fourteenth Amendment").

If the Court intended to make the latter assertion, it invites the questions of how long a law must have been in place to be deemed "longstanding," and whether, if the answer is more than 51 years, there are *any* felon-disarmament laws that qualify. *See Marshall*, *supra*, at 698-99 (tracing current version of Section 922(g)(1)

to 1968). Moreover, as Judge Easterbrook mused, it would be "weird" to say that a law that violates the Second Amendment today might become constitutional with the passage of time. *Skoien*, 614 F.3d at 641. Some judges have sidestepped this difficulty by adopting an alternative approach to the notion of "longstanding" prohibitions, scrutinizing the historical record in an attempt to ascertain which types of *people* were deemed unworthy to possess firearms at the time of ratification. *See*, *e.g.*, *Medina*, 913 F.3d at 159-60 (non-"law-abiding and responsible" citizens); *Binderup*, 836 F.3d at 348-49 (Op. of Ambro, J.) ("unvirtuous citizens"); *id*. at 367 (Hardiman, J., concurring in part and concurring in the judgments) ("those likely to commit violent offenses").

(3) "presumptively lawful"

Finally, courts and judges are sharply divided over the implications of the Court's characterization of felon-disarmament statutes as "presumptively lawful." *Heller*, 554 U.S. at 627 n.26. Some, including the majority in the instant case, view this language as flatly barring the possibility of a successful as-applied Second Amendment challenge to such a law. App. A at 2-4; *Rozier*, 598 F.3d at 771. Others, including Judge Lee in the decision below, view this language as affirmatively *inviting* as-applied challenges, reasoning that presumptions "may be rebuttable." App. A at 5-6 & n.1 (Lee, J., concurring) (citing cases).

In sum, with respect to the question presented, *Heller* has thrown the state and inferior federal courts into a hopelessly complex muddle, which only this Court can untangle. Indeed, several judges and scholars have urged the Court to do so –

lamenting the "almost complete absence of guidance from [this Court] about the scope of the Second Amendment right" (*Binderup*, 836 F.3d at 387 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments); regretting this Court's employment of "odd" "*deus ex machina* dicta" that has short-circuited "a more sophisticated interpretation of § 922(g)(1)'s scope" (*McCane*, 573 F.3d at 1049 (Tymkovich, J., concurring)); and exhorting the Court to "deal with the uncertainty and chaos created by its decision in *Heller*." *Lagrotterria*, *supra*, at 1995.[11]

III. This case is an ideal vehicle for the Court to address this important issue.

This case is a perfect vehicle for the Court to address the question presented. Mr. Torres first raised his as-applied Second Amendment claim in a detailed motion to dismiss the indictment. The motion was thoroughly briefed, and ruled on by the district court in a four-page order that expressly acknowledged the circuit split. App. B at 2 & n.2. Mr. Torres then entered into a conditional plea agreement that preserved his right to press the issue in the court of appeals, and made it the sole issue in his appeal. When a divided panel of that court denied his claim (App. A), Mr. Torres filed a petition for rehearing en banc, in which his position was

[11] *See also* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 736 (2012) ("judges remain baffled by the Supreme Court's inscrutable declaration that some longstanding types of gun laws are presumptively constitutional"); Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 Hastings L.J. 1371, 1386 (2009) (expressing hope that, when this Court revisits its "presumptively lawful" statement in *Heller*, it "does what it conspicuously failed to do in *Heller*, that is, explain not only what it has decided, but why").

supported by sophisticated amicus briefs from the Ninth Circuit Federal Public and Community Defenders, and a group of five prominent firearms-rights organizations. In short, the question presented was exhaustively litigated in the lower courts, and has been clearly preserved and ruled on at every possible stage of the litigation. No question has been raised at any stage regarding Mr. Torres' ability to raise this claim, or the lower courts' jurisdiction to address it.

Moreover, Mr. Torres' Second Amendment claim is outcome-determinative: If this Court were to find merit in the claim, the district court's denial of his motion to dismiss the indictment would have to be reversed, and all of the charges against him dismissed. That outcome would have a concrete impact upon Mr. Torres, who – absent reversal of his convictions – has another seven months of custody, followed by a three-year term of supervised release, left to serve.

In short, this case has everything this Court could hope for in a clean and efficient vehicle to address the question presented.

IV. Mr. Torres' as-applied Second Amendment challenge has merit.

Finally, Mr. Torres' as-applied Second Amendment challenge to his convictions has merit, both as to the availability of as-applied challenges in general, and as to his individual entitlement to relief.

A. As-applied Second Amendment challenges to felon-disarmament laws should be permitted.

As noted above, state and lower federal courts agree that *facial* Second Amendment challenges to felon-disarmament laws are precluded. *Kanter*, 919 F.3d at 442. It follows that if as-applied challenges are likewise barred, these laws enjoy

absolute immunity from the Second Amendment. Such immunity, for laws that "completely eviscerate[]" the Second Amendment right, would be impossible to reconcile with this Court's recognition of this right as "fundamental to *our* scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767 (internal quotation marks omitted); *see also Binderup*, 836 F.3d at 364 (Hardiman, J., concurring part and concurring in the judgments) ("[T]he Government's contention that one can fall within the protective scope of the Second Amendment yet nevertheless be permanently deprived of the right transforms what it means to possess a 'right.'").

Indeed, deeming the Second Amendment impotent in the face of such laws would seem to reflect the misguided view that it protects a mere "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that [the Court] ha[s] held to be incorporated into the Due Process Clause." *McDonald*, 561 U.S. at 780 (plurality opinion); *see also Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) ("At oral argument the Government could not identify any other fundamental constitutional right that a person could lose forever by a single conviction for an infraction punishable only by a fine."); *United States v. Duckett*, 406 F. App'x 185, 187 (9th Cir. 2010) (Ikuta, J., concurring) ("[O]ther than felon disenfranchisement laws, which are grounded in § 2 of the Fourteenth Amendment . . ., I can think of no other constitutional disability that applies only to a 'certain category of *persons* . . . [who] may be excluded from ever exercising the right.'" (*quoting Skoien*, 614 F.3d at 650 (Sykes, J., dissenting)).

Moreover, as discussed above, such a holding would find no support in the Second Amendment's original understanding or historical context; it would sanction firearms disabilities stretching well beyond any known to the Framing generation; and it would effectively authorize legislatures to control the degree to which the Second Amendment constrains them. This Court should accordingly side with those circuit and state courts that have remained open to as-applied Second Amendment challenges to felon-disarmament laws.

B. The application of Section 922(g)(1) to Mr. Torres cannot survive Second Amendment scrutiny.

Mr. Torres' as-applied challenge to the application of Section 922(g)(1) has merit.

In *Heller*, this Court declined to identify the level or type of scrutiny that should apply to a Second Amendment challenge, although it did reject both rational basis scrutiny and the "interest-balancing" approach suggested by Justice Breyer. *Heller*, 554 U.S. at 628 n.27, 634-35. The circuits have coalesced around an intermediate level of scrutiny, which examines whether the regulation in question is substantially related to an important governmental interest. *United States v. Chovan*, 735 F.3d 1127, 1134-38 (9th Cir. 2013) (surveying the circuits). Here, this is presumably the government's interest in promoting public safety, which it seeks to advance by keeping firearms out of the hands of people who, because they have committed serious crimes, are deemed too dangerous to be trusted with weapons.

The record reveals no substantial relationship between this interest and the disarmament of Mr. Torres. Mr. Torres's felonies were non-violent offenses that did

not harm anyone. *Binderup*, 836 F.3d at 352 (Op. of Ambro, J.) (noting that appellants' offenses did not have actual or attempted violence as an element); *id*. at 376 (Hardiman, J., concurring in part and concurring in the judgments) (noting that appellant's offense "did not involve violence, force, or threat of force"); *Britt v. State*, 681 S.E.2d 320, 322 (N.C. 2009) (noting, in finding that state felon-disarmament statute violated state constitutional provision identical to Second Amendment, that "the State d[id] not argue that any aspect of plaintiff's crime involved violence or the threat of violence"). His felonies may reasonably be described as "dangerous," but "not in the sense of the traditional concerns motivating felon dispossession," which relate to crimes involving "purposeful, violent, and aggressive conduct." *Binderup*, 836 F.3d at 377 n.25 (Hardiman, J., concurring in part and concurring in the judgments) (internal quotation marks omitted).

Mr. Torres's 2004 offense was an Arizona Class 6 felony, meaning that it carried a "presumptive" sentence of one year and could not trigger any greater sentence unless he admitted, or the court found, "aggravating circumstances" – which did not occur. Ariz. Rev. Stat. Ann. §§ 13-701.C.5, 13-702 (West 2004). He received a sentence of fines and probation, and his plea agreement specified that the offense would be designated a misdemeanor upon his "successful completion of probation." Unfortunately he was later found to have breached the terms of his probation, causing the offense to be designated a felony – but this does not alter the nature of his original offense, and thus it should not affect the Second Amendment analysis. Mr. Torres' 2010 offense, which involved driving under the influence with

a suspended license, was an Arizona Class 4 felony for which the "presumptive" sentence was 2½ years – but he received a sentence of only eight months of imprisonment followed by probation. *Binderup*, 836 F.3d at 352 (Op. of Ambro, J.) (noting that appellants had received "minor sentence[s]" for their felonies).

In addition, there is no "cross-jurisdictional consensus" regarding the seriousness of his offenses. *Id*. Only four states criminalize driving under the influence with a minor present in the vehicle as a specific felony offense, while nineteen states criminalize this conduct as a misdemeanor, nineteen states use it to enhance or aggravate a DUI offense, four permit it to be treated as felony child endangerment, and three treat it as a misdemeanor child endangerment offense. App. D. Only two states specifically criminalize driving under the influence with a suspended license as a felony, while four deem this conduct a misdemeanor, and forty-five do not specifically criminalize this conduct, instead treating it under the rubric of driving with a suspended license. *Id*.

Moreover, Mr. Torres's felonies would not historically have barred him from legally possessing weapons. At the time of the Founding, his felonies did not exist. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2167 (2016) (noting that "perhaps the Nation's first drunk-driving law" was enacted in 1906). "The first federal statute disqualifying felons from possessing firearms" was the Federal Firearms Act of 1938, 52 Stat. 1250 (Jun. 30, 1938) (*Barton*, 633 F.3d at 173), and it "only restricted firearm possession for those individuals convicted of a 'crime of violence,' defined as murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking, and

certain forms of aggravated assault." *Chovan*, 735 F.3d at 1137. It was not until 1961 that Congress extended the law to non-violent felons, and it did not amend the law to completely ban the possession of firearms by the targeted groups until 1968. *Barton*, 633 F.3d at 173; *Marshall*, *supra*, at 698.

Moreover, Mr. Torres' personal history and character do not indicate that he poses a danger or threat that could overcome his fundamental Second Amendment right. Mr. Torres is a family man, with a wife and three children. The government has characterized him as the leader of a "militia group" that conducts "training exercises" and "shooting events" in the desert, but has not alleged that he or his "militia" have committed acts of violence against others. In fact, Mr. Torres' criminal history is unremarkable, consisting of his now nine- and fifteen-year-old DUI convictions and a handful of incidents from his teen years. Today, Mr. Torres works in his family's appliance store, attends and helps out at church regularly, and volunteers to bring food to homeless veterans in the community.

In short, there is no justification for disarming Mr. Torres that is sufficiently compelling to overcome his fundamental Second Amendment right. *Binderup*, 836 F.3d at 376-77 (Hardiman, J., concurring in part and concurring in the judgments) (noting that challengers had "presented compelling evidence that they are responsible citizens, each with a job, a family, and a clean record since 1997 and 1998").

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari. In the alternative, the Court should defer ruling on this petition pending its resolution of the anticipated petition for certiorari with respect to the Third Circuit's decision in *Holloway v. Attorney General*, 948 F.3d 164 (3d Cir. 2020). The *Holloway* case, in which the Third Circuit denied the appellant's petition for rehearing on July 9, 2020 (*Holloway v. Attorney General*, No. 18-3595 (3d Cir.) (Doc. 101)), addresses an as-applied Second Amendment challenge to Section 922(g)(1) brought by an individual who, like Mr. Torres, was subject to that statute because of a DUI offense. *Holloway*, 948 F.3d at 168. This Court's resolution of the Second Amendment claims in either of these cases would directly implicate the other.

Respectfully submitted on August 27, 2020.

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