No. 20-5579

IN THE SUPREME COURT OF THE UNITED STATES

ISRAEL TORRES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Ariz.):

United States v. Torres, No. 17-cr-265 (Feb. 23, 2018)

United States Court of Appeals (9th Cir.):

United States v. Torres, No. 18-10076 (Jan. 10, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not published in the Federal Reporter but is reprinted at 789 Fed. Appx. 655. The order of the district court (Pet. App. B1-B4) is not published in the Federal Supplement but is available at 2017 WL 11466627.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2020. A petition for rehearing was denied on April 3, 2020 (Pet. App. C1). The petition for a writ of certiorari was filed

on August 27, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Arizona, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced him to 41 months of imprisonment, to be followed by three years of supervised release. Ibid. The court of appeals affirmed. Pet. App. A1-A8.

1. Petitioner is the leader of a militia group in Arizona. Gov't C.A. Br. 4. In 2004, after he was arrested while driving with a blood alcohol level at twice the legal limit with an infant in the car, he pleaded guilty to aggravated driving, in violation of Ariz. Rev. Stat. Ann. § 28-1383(A) (Supp. 2003). Pet. App. A1-A2; Gov't C.A. Br. 6. Arizona designated that crime a felony and made it punishable by imprisonment for a term exceeding one year; petitioner here was sentenced to ten days in jail (nine of which were deferred) and probation. See Pet. App. A1-A2; Presentence Investigation Report (PSR) ¶ 38. In 2010, after petitioner was found driving the wrong way down a one-way street with a blood alcohol level at three times the legal limit and with marijuana in the car, he pleaded guilty to aggravated felony driving under the influence with a suspended license, in violation of Ariz. Rev. Stat. Ann. § 28-1383(A)(1) (Supp. 2009). Pet. App. A1-A2; Gov't

C.A. Br. 6-7. This time, he was sentenced to eight months in jail and probation. PSR ¶ 39.

In 2017, law enforcement began to investigate petitioner in connection with his militia-related activities. See PSR ¶¶ 7-12. A search of petitioner's home, conducted in accordance with a warrant, uncovered ten firearms and multiple rounds of ammunition. PSR ¶¶ 12-13.

2. A federal grand jury indicted petitioner on two counts of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). Pet. App. B1. Petitioner moved to dismiss the indictment on the ground that Section 922(g) violates the Second Amendment as applied to him, but the district court denied the motion. Id. at B1-B4. The court stated that "current Ninth Circuit precedent prevents [it] from entertaining an as-applied challenge to 18 U.S.C. § 922(g)(1)." Id. at B4.

Pursuant to a plea agreement, petitioner conditionally pleaded guilty to one of the Section 922(g)(1) counts but reserved the right to appeal the denial of the motion to dismiss. See Judgment 1; Plea Agreement 1, 4, 9. The district court sentenced petitioner to 41 months of imprisonment, to be followed by three years of supervised release. Judgment 1.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A8. The court explained that, in District of Columbia v. Heller, 554 U.S. 570 (2008), this Court had held that the Second Amendment protected an individual right to keep and bear arms, but

had recognized that "longstanding prohibitions on the possession of firearms by felons" remain "presumptively lawful." Pet. App. A2 (quoting Heller, 554 U.S. at 626-627 & n.26). The court then observed that, in two earlier cases -- United States v. Phillips, 827 F.3d 1171 (9th Cir. 2016), cert. denied, 138 S. Ct. 56 (2017), and United States v. Vongxay, 594 F.3d 1111 (9th Cir.), cert. denied, 562 U.S. 921 (2010) -- it had rejected constitutional challenges to the application of Section 922(g)(1) to persons convicted of non-violent felonies. Pet. App. A2-A4. The court determined that it was "bound" by those precedents to reject petitioner's as-applied challenge. Id. at A4.

Judge Lee filed a concurring opinion. Pet. App. A5-A8. He "d[id] not believe either the Supreme Court or the Ninth Circuit ha[d] explicitly held that felons are categorically barred from bringing as-applied * * * challenges to § 922(g)(1)." Id. at A5. He explained, however, that "[t]he merit of such as-applied challenges may be minimal in many, most, or even nearly all cases," and he concurred in the court's rejection of petitioner's challenge in particular. Id. at A8; see id. at A5.

ARGUMENT

Petitioner renews his claim (Pet. 6-27) that 18 U.S.C. 922(g)(1) violates the Second Amendment as applied to him. The lower courts' denial of relief on that claim is correct and does not conflict with any decision of this Court, any other court of appeals, or any state supreme court. In particular, this case

does not implicate the circuit conflict created by Binderup v. Attorney General United States, 836 F.3d 336 (2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017), in which the Third Circuit held that Section 922(g)(1) violated the Second Amendment as applied to two individuals based on different offenses and circumstances than those presented here. Petitioner's offenses mean that he could not prevail even under the standard applied by the Third Circuit in Binderup. In any event, the Court denied the government's petition for a writ of certiorari in that case, see Sessions v. Binderup, 137 S. Ct. 2323 (2017) (No. 16-847), and has since denied numerous other petitions raising similar questions, see, e.g., Medina v. Barr, 140 S. Ct. 645 (2019) (No. 19-287); Michaels v. Whitaker, 139 S. Ct. 936 (2019) (No. 18-496); Rogers v. United States, 138 S. Ct. 502 (2017) (No. 17-69); Hamilton v. Pallozzi, 138 S. Ct. 500 (2017) (No. 16-1517); Massey v. United States, 138 S. Ct. 500 (2017) (No. 16-9376); Phillips v. United States, 138 S. Ct. 56 (2017) (No. 16-7541). The same result is warranted here.

1. Federal law has long restricted the possession of firearms by certain categories of individuals. A frequently applied disqualification is 18 U.S.C. 922(g)(1), which generally prohibits the possession of firearms by any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." Congress enacted that disqualification because the "ease with which" firearms could be acquired by

"criminals * * * and others whose possession of firearms is similarly contrary to the public interest" was "a matter of serious national concern." S. Rep. No. 1097, 90th Cong., 2d Sess. 28 (1968); see Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. IV, §§ 901(a)(2), 902, 82 Stat. 225, 226-234.

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

v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion) (quoting Heller, 554 U.S. at 626).

The historical record supports this Court's repeated statements that convicted felons stand outside the scope of the Second Amendment. "Heller identified * * * as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (quoting Heller, 554 U.S. at 604), cert. denied, 562 U.S. 1303 (2011). That report expressly recognized the permissibility of disarming citizens "for crimes committed." Ibid. (citation omitted). Other sources reinforce the permissibility of preventing felons from possessing firearms. See Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461, 480 (1995) ("[F]elons, children, and the insane were excluded from the right to arms."); Robert Dowlut, The Right to Arms: Does the Constitution or the Predilection of Judges Reign?, 36 Okla. L. Rev. 65, 96 (1983) ("Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from the right to keep and bear arms]."); Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 28-29 (1868) (explaining that the term "the people" has

traditionally been interpreted in certain contexts to exclude "the idiot, the lunatic, and the felon").

2. Petitioner does not contend that any court of appeals or state supreme court has held that Section 922(g)(1) violates the Constitution as applied to an individual with petitioner's criminal history. Rather, petitioner contends (Pet. 15-17) that courts of appeals and state supreme courts disagree over the abstract question whether as-applied challenges to Section 922(g)(1) may ever proceed. But this case does not implicate any such conflict, because the court of appeals here did not categorically foreclose as-applied challenges to Section 922(g)(1). In addition, whatever doors other courts of appeals may have left open, only the Third Circuit has actually accepted an as-applied challenge to Section 922(g)(1), and petitioner could not prevail under the standard adopted by the Third Circuit.

Until the Third Circuit's decision in Binderup, the courts of appeals were "unanimous" in holding "that [Section] 922(g)(1) is constitutional, both on its face and as applied." United States v. Moore, 666 F.3d 313, 316 (4th Cir. 2012). In particular, the Fifth, Tenth, and Eleventh Circuits have held that Section 922(g)(1) is not subject to individualized as-applied Second Amendment challenges. See United States v. Massey, 849 F.3d 262, 265 (5th Cir.), cert. denied, 138 S. Ct. 500 (2017); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009), cert. denied, 559 U.S. 970 (2010); United States v. Rozier, 598 F.3d 768, 771 (11th

Cir.) (per curiam), cert. denied, 560 U.S. 958 (2010). As petitioner observes (Pet. 14-15), other courts of appeals and some state supreme courts have "held the door open to as-applied challenges." See United States v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011), cert. denied, 565 U.S. 1271 (2012); Hamilton v. Pallozzi, 848 F.3d 614, 626 & n.11 (4th Cir.), cert. denied, 138 S. Ct. 500 (2017); United States v. Williams, 616 F.3d 685, 693 (7th Cir.), cert. denied, 562 U.S. 1092 (2010); United States v. Adams, 914 F.3d 602, 605-607 (8th Cir. 2019); Medina v. Whitaker, 913 F.3d 152, 160 (D.C. Cir.), cert. denied, 140 S. Ct. 645 (2019); State v. Craig, 826 N.W.2d 789, 796-798 (Minn. 2013); Alpert v. State, 543 S.W.3d 589, 600-601 (Mo. 2018) (en banc). But before Binderup, no court of appeals had actually held that Section 922(g)(1) violated the Second Amendment in any of its applications, and the courts of appeals had "consistently upheld applications of [Section] 922(g)(1) even to non-violent felons." United States v. Pruess, 703 F.3d 242, 247 (4th Cir. 2012) (collecting cases) (emphasis omitted).

In Binderup, a fractured en banc Third Circuit held that Section 922(g)(1) could not constitutionally be applied to two individuals who had been convicted of crimes that state law denominated as misdemeanors, who had served no prison time, and whose subsequent conduct showed that they could possess firearms without endangering themselves or others. See 836 F.3d at 340-341. No single opinion garnered a majority on the Second Amendment

issue, but the Third Circuit has since recognized Judge Ambro's opinion as controlling. See Holloway v. Attorney General United States, 948 F.3d 164, 170-171 (2020). Judge Ambro took the view that courts should presumptively "treat any crime subject to [Section] 922(g)(1) as disqualifying" under the Second Amendment. Binderup, 836 F.3d at 351. But Judge Ambro concluded that the particular crimes at issue there were not disqualifying, in light of four factors: (1) the relevant state legislatures had classified the offenses as misdemeanors rather than felonies, (2) the offenses were nonviolent, (3) the Binderup plaintiffs received only minor sentences, and (4) there was no "cross-jurisdictional" consensus regarding the seriousness of the Binderup plaintiffs' crimes. Id. at 352.

This case does not implicate the circuit conflict created by Binderup. As an initial matter, there is no conflict between the decision below and Binderup on the general question whether felons may bring as-applied challenges to Section 922(g)(1). Judge Lee's concurring opinion observed that the circuit precedent relied upon by the court of appeals' unpublished decision below does not "explicitly h[o]ld that felons are categorically barred from bringing as-applied Second Amendment challenges to § 922(g)(1)." Pet. App. A5. And in a subsequent published opinion, the court of appeals has stated that it "has not directly addressed" the issue whether "a litigant may be able to raise an as-applied challenge"

to Section 922(g)(1). Duncan v. Becerra, 970 F.3d 1133, 1149 n.9 (2020).

Nor is there any conflict between the decision below and Binderup on the more specific question whether Section 922(g)(1) is unconstitutional as applied in the circumstances presented here. The predicate crimes in Binderup were corrupting a minor and carrying a handgun without a license -- not driving under the influence. Binderup, 836 F.3d at 340. And in a subsequent decision, the Third Circuit has determined that, under the test set out in Binderup, a conviction for driving under the influence was sufficiently serious to disqualify a person from bearing firearms. Holloway, 948 F.3d at 172-178. Petitioner's as-applied challenge thus would fail even under the Third Circuit's standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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