No. 20-_____

In The

Supreme Court of the United States

RAYMOND HOLLOWAY, JR.,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a lifetime firearms prohibition based on a nonviolent misdemeanor conviction violate the Second Amendment?

PARTIES TO THE PROCEEDING

The petitioner is Raymond Holloway, Jr., who was the plaintiff and appellee below.

The respondents are William P. Barr, in his official capacity as Attorney General of the United States, Christopher A. Wray, in his official capacity as Director of the Federal Bureau of Investigation, Regina Lombardo, in her official capacity as Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the United States of America.

Mr. 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 appellants below.

Mr. Wray's predecessors in office, James B. Comey and Andrew G. McCabe, were defendants in the district court.

Ms. Lombardo's predecessor in office, Thomas E. Brandon, was a defendant in the district court and appellant below.

STATEMENT OF RELATED PROCEEDINGS

1. *Holloway v. Sessions*, United States District Court for the Middle District of Pennsylvania, No. 17-cv-81. The district court entered its judgment for Holloway on September 28, 2018.

2. *Holloway v. Attorney General United States of America*, United States Court of Appeals for the Third Circuit, No. 18-3595. The court of appeals entered its judgment, reversing, on January 17, 2020. The court of appeals denied petitioner's petition for rehearing en banc on July 8, 2020, and filed an amended order denying the petition on July 9, 2020.

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The Third Circuit's opinion is reported at 948 F.3d 164 and reproduced at App. 1–63. The order denying rehearing en banc is reproduced at App. 87–88. The amended order denying rehearing en banc is reproduced at App. 89–90. The district court's opinion is reported at 349 F. Supp. 3d 451 and reproduced at App. 64–86.

JURISDICTION

The court of appeals entered its judgment on January 17, 2020. Petitioner filed a timely petition for rehearing en banc, which the court denied on July 8, 2020, followed by an amended order denying the petition on July 9, 2020. On March 19, 2020, this Court extended the deadline 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. This petition is therefore due December 7, 2020. This 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), 18 Pa. Cons. Stat. § 1104(1), and 75 Pa. Cons. Stat. §§ 3802(c), 3804(c)(2) are reproduced at App. 91–94.

STATEMENT OF THE CASE

The lifetime firearms ban in 18 U.S.C. § 922(g)(1)—which applies to most felons and many misdemeanants—is the most litigated Second Amendment issue since *District of Columbia v. Heller*, 554 U.S. 570 (2008). And it has created the most conflicts among lower courts.

Because *Heller* deemed felon disarmament laws "presumptively lawful," *id.* at 626–27 n.26, many lower courts have held that felon bans cannot be challenged—even by misdemeanants affected by such bans. Courts that allow challenges are unclear about how a challenge may be successful. While these courts agree that challengers must distinguish themselves from the historically barred class, they disagree over who was historically barred. Some judges believe that only dangerous persons can be disarmed. Others believe that persons can be disarmed for lacking virtue.

This case presents an excellent vehicle to clarify whether and how prohibited persons can bring successful as-applied challenges to laws forever denying their fundamental right to keep and bear arms. Holloway is subject to a lifetime firearms ban due to a 2005 misdemeanor conviction for driving under the influence—although he retained all firearm rights under state law, his conviction falls within the scope of the federal felon ban. Holloway is neither dangerous nor a felon. And his law-abiding history since the 2005 conviction shows that he is completely rehabilitated. This Court should grant certiorari to restore Holloway's

rights and resolve the widespread conflict among the lower courts.

A. Regulatory Background

In 1938, Congress prohibited persons 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).[1] In 1961, Congress expanded the prohibition to include persons convicted of some nonviolent crimes, replacing the "crime of violence" predicate with "crime punishable by imprisonment for a term exceeding one year." 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 one year's imprisonment. Codified at 18 U.S.C. § 922(g)(1), this prohibition on possession includes many nonviolent misdemeanants.

Section 922(g)(1) implicates all offenses punishable by over one year's imprisonment, regardless of any link to violence or felony classification. But it does not apply to convictions "pertaining to antitrust violations, unfair trade practices, restraints of trade, or other

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[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." Federal Firearms Act § 1(6), 52 Stat. at 1250.

similar offenses relating to the regulation of business practices" or to state misdemeanors "punishable by a term of imprisonment of two years or less." *Id.* § 921(a)(20).

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

B Factual Background

In 2005, Holloway pleaded guilty to driving under the influence (DUI) at the highest blood alcohol content, a misdemeanor under 75 Pa. Cons. Stat. § 3802(c). App. 4. Because Holloway had an earlier misdemeanor DUI charge from 2002—which was later dismissed—the 2005 offense became a misdemeanor of the first degree, punishable by up to five years' imprisonment. App. 4; App. 66 & n.3; 18 Pa. Cons. Stat. § 1104(1). Notwithstanding the maximum possible sentence, Holloway received only the mandatory minimum sentence; 90 days' confinement on a work-release program, a $1,500 fine, 60 months' probation, and a drug and alcohol evaluation. App. 4; App. 67; 75 Pa. Cons. Stat. § 3804(c)(2). He completed his jail sentence in March 2006. App. 67.

Since his 2005 conviction, Holloway earned a bachelor's degree in psychology, worked as an educator with juveniles housed in residential treatment centers, and has been a law-abiding citizen with no further alcohol-related or legal issues. App. 84 n.11.

Holloway's conviction never prevented him from purchasing or possessing firearms under Pennsylvania law. App. 76–77. But because the 2005 misdemeanor was punishable by more than two years' imprisonment—regardless of the mandatory minimum sentence he actually received—Holloway is forever prohibited from possessing firearms under 18 U.S.C. § 922(g)(1).

In 2016, unaware that he was a prohibited person, Holloway applied to purchase a firearm, and his application was denied. He appealed the denial to the Pennsylvania State Police, which affirmed the denial based on the 2005 misdemeanor conviction. App. 67–68.

C. Procedural History

1. Holloway brought suit in the United States District Court for the Middle District of Pennsylvania, arguing that Section 922(g)(1)'s lifetime firearms ban based on his conviction for a nonviolent misdemeanor violated the Second Amendment. App. 68.

The district court agreed, holding Section 922(g)(1) unconstitutional as applied to Holloway and granting him summary judgment. *Id.* at 86.

The district court applied Judge Ambro's test from the Third Circuit's highly fractured en banc decision in *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336 (3d Cir. 2016) (en banc). App. 70–71. Based on the premise that "[h]istorically, persons convicted of a felony could be stripped of their Second Amendment

rights because they ostensibly lacked 'virtue,'" the test allows for the disarmament of a "class of 'unvirtuous citizens'" who commit "a serious criminal offense, violent or nonviolent." *Id.* at 72 (quoting *Binderup*, 836 F.3d at 348–49 (Ambro, J., opinion)). Moreover, because felon bans are "presumptively lawful," and Holloway is prohibited from possessing arms by a statute that also prohibits felons, his misdemeanor conviction was deemed a "presumptively lawful" disqualification. *Id.* (citing *Binderup*, 836 F.3d at 351 (Ambro, J., opinion)).

The district court determined that Holloway was able to overcome *Heller*'s presumption of the ban's lawfulness by proving that he is not the type of unvirtuous citizen who has historically been disarmed. App. 79. Particularly significant were the offense's classification as a misdemeanor, the absence of violence as an element of the offense, Holloway's actual sentence of far less than the one-year initial threshold for Section 922(g)(1), and the lack of consensus among states regarding the seriousness of the crime. App. 73–76.

Having concluded that Holloway is not unvirtuous, the court proceeded to apply heightened scrutiny, settling on intermediate scrutiny on the theory that persons who violate the law, even misdemeanants, are not within the Second Amendment's core protections. *Id.* at 80 n.9.

Even under intermediate scrutiny, however, the government's evidence was insufficient. Holloway did not bear the hallmarks of "high risk" individuals; no evidence suggested that Holloway ever suffered from

alcohol dependence or abuse, and his disqualifying misdemeanor was nonviolent. *Id.* at 82. There was also "no evidence indicating that individuals like Holloway—after over a decade of virtuous, noncriminal behavior—remain so potentially irresponsible that they should be prohibited from owning a firearm." *Id.* at 84 (quotations and brackets omitted).

The government appealed.

2. On appeal, the Third Circuit, over a dissent, reversed and remanded for the entry of judgment in favor of the government. *Id.* at 4. Unlike the district court, and Judge Fisher in dissent, the majority—Judges Shwartz and Fuentes—determined that Holloway's DUI was "serious" enough to make him the type of "'unvirtuous citizen' who was historically barred from possessing firearms and fell out of the Second Amendment's scope." *Id.* at 11 (citing *Binderup*, at 348–49 (Ambro, J., opinion), 387 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments)) (brackets omitted).

The majority did not dispute that Holloway's crime was a misdemeanor; that it did not involve the use of force; that he received the mandatory minimum sentence; or that there is no cross-jurisdictional consensus regarding the punishment for identical behavior. *Id.* at 18, 23–24. But eschewing any "fixed rules for determining whether an offense is serious" enough to indicate a lack of virtue, the majority added a factor to the precedential analysis and decided that a DUI's mere "potential for danger and risk of harm to self and

others" was sufficient to remove someone from the Second Amendment's protections. *Id.* at 13, 15. It thus found Holloway to be "within the class of 'persons historically excluded from Second Amendment protections.'" *Id.* at 25 (quoting *Binderup*, 836 F.3d at 347 (Ambro, J., opinion)).

Judge Fisher dissented. Although questioning the appropriateness of the multifactor "virtue" test from *Binderup*, *id.* at 30–31, he nonetheless concluded that even under such a test, all four of the factors articulated in *Binderup* favored Holloway, *id.* at 34–50. Judge Fisher further concluded that the majority's new factor—whether the crime "presents a potential for danger and risk of harm to self and others"—was "too broad" and too far removed from the traditional limitations on the right to be worthy of consideration. *Id.* at 39, 42.

Then applying heightened scrutiny, Judge Fisher found Section 922(g)(1)'s application to Holloway underinclusive because "a significant majority of jurisdictions—thirty-nine out of fifty-one—do not consider Holloway's second DUI offense to be a crime worthy of punishment in accord with that of a traditional felony." *Id.* at 49 (Fisher, J., dissenting).

3. Holloway timely sought rehearing and rehearing en banc, which the Third Circuit denied. *Id.* at 89–90.

REASONS FOR GRANTING THE PETITION

The Third Circuit's analysis reflects deep divisions among the federal circuit courts. Section 922(g)(1) has been the most challenged law under the Second Amendment post-*Heller*, with more than 50 challenges reaching the federal circuit courts. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 253 n.16 (2020) (listing 54 federal circuit court cases). The more opportunities the lower courts have had to consider the issue, the more divided they have become.

I. Lower courts are conflicted about which regulations are "presumptively lawful."

In *Heller*, this Court labeled certain regulatory measures "presumptively lawful"—specifically, "longstanding 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, [and] laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626–27.

Adding in a footnote that the list was nonexhaustive, *Heller* indicated that some other laws deserve a presumption of validity. *Id.* at 627 n.26. But lower courts disagree about what those laws are.

This is important because presumptively lawful regulations typically escape the rigorous constitutional scrutiny appropriate for most regulations. For example, in typical Second Amendment challenges, the government bears the burden of proving that the regulated activity is not protected by the Second Amendment. *See United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (citing *Ezell v. City of Chicago*, 651 F.3d 684, 702–03 (7th Cir. 2011)). But the presumption shifts the burden: "a challenger must prove . . . that a presumptively lawful regulation burdens his Second Amendment rights." *Binderup*, 836 F.3d at 347 (Ambro, J., opinion). "Not only is the burden on the challenger . . . but the challenger's showing must also be strong." *Id.*

Because this Court twice described the presumptively lawful regulations as "longstanding," some courts require any unlisted law to also be longstanding to earn presumptive validity. *Heller*, 554 U.S. at 626–27; *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). For example, the Ninth Circuit refused to consider a prohibition on domestic violence misdemeanants "presumptively lawful" because it is not longstanding. *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013). For the same reason, the Sixth Circuit declined to apply the presumption to a dangerous weapon enhancement or domestic violence misdemeanants. *Greeno*, 679 F.3d at 517; *Stimmel v. Sessions*, 879 F.3d 198, 205 (6th Cir. 2018). On the other hand, where handgun registration was found to be longstanding, the D.C. Circuit granted the

presumption of validity. *Heller v. District of Columbia*, 670 F.3d 1244, 1254 (D.C. Cir. 2011) ("*Heller II*").

There is confusion, however, over what *is* longstanding. *Compare id.* (finding sufficiently longstanding a registration requirement "accepted for a century in diverse states and cities"), *and Drake v. Filko*, 724 F.3d 426, 432 (3d Cir. 2013) (finding "nearly 90 years" sufficiently longstanding for a requirement that concealed carry permit applicants demonstrate a "justifiable need"), *with Mance v. Sessions*, 896 F.3d 699, 704 (5th Cir. 2018) (assuming that restrictions from 1909 "are not 'longstanding regulatory measures.'") (citations omitted).

Other courts take a more problematic approach, eschewing the requirement of longstandingness and merely requiring unlisted laws to be analogous to the listed presumptively lawful regulations. *See*, *e.g.*, *United States v. Bena*, 664 F.3d 1180 (8th Cir. 2011) (domestic violence restraining orders); *In re U.S.*, 578 F.3d 1195 (10th Cir. 2009) (domestic violence misdemeanors); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010) (domestic violence misdemeanors); *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010) (drug users). The Fourth Circuit criticized the practice of analogizing modern laws to longstanding laws, because it creates "a kind of 'safe harbor' for unlisted regulatory measures" and thus "approximates rational-basis review." *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010).

The Third Circuit here applied the presumption of validity to the ban on Holloway, even though bans on nonviolent misdemeanants were neither listed in *Heller* nor longstanding. *Heller* said "prohibitions on the possession of firearms by felons" were presumptively lawful, not "18 U.S.C. § 922(g)(1)." Moreover, Congress first prohibited nonviolent criminals from possessing firearms in 1968, only a few years before the District of Columbia enacted the handgun ban struck down in *Heller*. And historical state prohibitions, as explained below, applied to only dangerous persons. But because the ban on Holloway was codified within the same statute as some felonies, the Third Circuit found the prohibition on Holloway "presumptively lawful" as well. This stretched *Heller*'s language too far.

II. Lower courts are conflicted over whether, and how, the presumption of lawfulness can be rebutted.

Once a law is deemed presumptively lawful—no matter how the court got there—lower courts splinter again in their approach to evaluating the law.

Specifically, regarding § 922(g)(1), while "every federal court of appeals to address the issue has held that § 922(g)(1) does not violate the Second Amendment on its face . . . courts of appeals are split as to whether *as-applied* Second Amendment challenges to § 922(g)(1) are viable." *Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019). Courts that allow as-applied challenges agree that challengers must distinguish

themselves from the historically barred class, but they disagree over who was historically barred—violent persons or those who lack virtue.

A. The Second, Fourth, Fifth, Tenth, and Eleventh Circuits have treated the presumptive validity of regulations as irrebuttable.

The Second, Fourth, Fifth, Tenth, and Eleventh Circuits have treated "presumptively lawful" measures as "conclusively lawful" by not allowing them to be challenged. *See United States v. Bogle*, 717 F.3d 281, 281–82 (2d Cir. 2013); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *In re U.S.*, 578 F.3d at 1200; *Flick v. Attorney Gen., Dep't of Justice*, 812 F. App'x 974, 975 (11th Cir. 2020) (interpreting *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010) as foreclosing as-applied challenges to § 922(g)(1)).

The Fourth Circuit switched from allowing the presumption to be rebutted to not. *Compare United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012) (a challenger "must show that his factual circumstances remove his challenge from the realm of ordinary challenges"), *with Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017) ("we simply hold that conviction of a felony necessarily removes one from the class of

'law-abiding, responsible citizens' for the purposes of the Second Amendment").[2]

B. The Third, Fourth, Ninth, and D.C. Circuits apply a virtue-based test.

Many Circuits have endorsed the theory that the Second Amendment protected only "virtuous" citizens in the founding era, so citizens today can be disarmed for lacking virtue. *See Binderup*, 836 F.3d at 348–49; *United States v. Carpio-Leon*, 701 F.3d 974, 979–80 (4th Cir. 2012); *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010); *Medina v. Whitaker*, 913 F.3d 152, 158–59 (D.C. Cir. 2019). But historically no

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[2] The irrebuttable presumption approach is especially problematic with the increasing number of crimes that constitute felonies. "For instance, a radio talk show host can become a felon for uttering 'any obscene, indecent, or profane language by means of radio communication.' In New Jersey, opening a bottle of ketchup at the supermarket and putting it back on the shelf is a third-degree felony, punishable by up to five years' imprisonment. And in Pennsylvania, reading another person's email without permission is a third-degree felony, punishable by up to seven years." *Folajtar v. Attorney Gen. of the United States*, No. 19-1687, 2020 WL 6879007, at *20 (3d Cir. Nov. 24, 2020) (Bibas, J., dissenting) (citations omitted).

Indeed, this Court has previously acknowledged that 18 U.S.C. § 922(g)(1) is so broad that its application might sometimes be considered unreasonable. In *Old Chief v. United States*, this Court noted that "an 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." 519 U.S. 172, 185 n.8 (1997). Such foolish bases could "prejudice the Government's case" so severely that "the Government would have to bear the risk of jury nullification." *Id.*

citizens were disarmed based on virtue, making the standard and any test derived from it specious. *See Kanter*, 919 F.3d at 464 (Barrett, J., dissenting) (the Second Amendment's "limits are not defined by a general felon ban tied to a lack of virtue or good character"); *Folajtar*, No. 19-1687, at *18 (Bibas, J., dissenting) ("The focus on virtue rests on strained readings of colonial laws and ratifying conventions perpetuated by scholars and courts' citing one another's faulty analyses."); Greenlee, *Historical Justification*, at 275–83 (tracing the virtuous-citizen theory to its roots in scholarship from the 1980s and finding no historical law disarming anyone based on virtue).

In fact, unvirtuous citizens sometimes were expressly allowed to maintain their arms in the founding era. For example, a 1786 Massachusetts law provided for the estates of criminal tax collectors and sheriffs to be sold to recover money they stole, but the necessities of life—including firearms—could not be sold. 1786 Mass. Laws 265. Additionally, the federal Uniform Militia Act in 1792 exempted militia arms "from all suits, distresses, executions or sales, for debt or for the payment of taxes." 1 Stat. 271, § 1 (1792). Maryland and Virginia had similar exemptions. 13 Archives of Maryland, PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, APRIL 1684 - JUNE 1692, at 557 (William Hand Browne ed., 1894); 3 William Waller Hening, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 339 (1823).

The virtuous-citizen test contradicts this Court's "adoption of the original understanding of the Second Amendment." *Heller*, 554 U.S. at 625. It is unjust for

courts to hold people like Holloway to this manufactured standard.

C. The First, Sixth, and Eighth Circuits, and many concurring and dissenting judges, prefer a test based on dangerousness.

Some courts and many judges have found that the historically accurate approach is to allow the disarmament of only dangerous persons. *See* Greenlee, *Historical Justification* (summarizing disarmament laws from seventh-century England through mid-twentieth century America).

The Sixth Circuit declined to adopt a virtue test for prohibited persons and instead focused on violence. *Stimmel*, 879 F.3d at 204–05. Likewise, the First Circuit acknowledged "an ongoing debate among historians about the extent to which the right to bear arms in the founding period turned on concerns about the possessor's 'virtue,'" but ultimately defined the scope by relying on the "longstanding practice of prohibiting certain classes of individuals from possessing firearms—those whose possession poses a particular danger to the public." *United States v. Rene E.*, 583 F.3d 8, 15, 16 (1st Cir. 2009).

In *Binderup*, five judges concluded that "[t]he most cogent principle that can be drawn from traditional limitations on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment." *Binderup*, 836 F.3d at 357

(Hardiman, J., concurring). Recently, Judge Bibas became the sixth Third Circuit judge to endorse a dangerousness test. *Folajtar*, No. 19-1687, at *12 (Bibas, J., dissenting) ("The historical touchstone is danger, not virtue."). This had previously been circuit precedent set in *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011), but the virtue test replaced it in *Binderup*.

The Eighth Circuit, by contrast, transitioned from a virtue standard to a dangerousness standard. After endorsing the virtue standard in *Bena*, 664 F.3d at 1183–84, the court later adopted *Barton*'s violence test. *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014); *United States v. Brown*, 436 F. App'x 725, 726 (8th Cir. 2011) (quoting *Barton*, 633 F.3d at 174).

The Seventh Circuit initially embraced the virtuous-citizen approach in *United States v. Yancey*, when it stated that "most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" 621 F.3d 681, 684–85 (7th Cir. 2010). But after then-Judge Barrett provided a historical analysis proving that the Second Amendment's limits were based on danger rather than virtue, the Seventh Circuit relented. *Kanter*, 919 F.3d at 447 ("we need not resolve this difficult issue regarding the historical scope of the Second Amendment"). Indeed, the virtuous-citizen test cannot withstand scrutiny, and this Court should grant certiorari to quash it before the doctrine further develops as a justification for the deprivation of constitutional rights.

Rather, "[h]istory . . . demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*. Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting). Here, the district court, Third Circuit majority, and Third Circuit dissent all agreed that Holloway's misdemeanor crime was nonviolent. And he has been an upstanding, law-abiding citizen since 2005. He is not the type of dangerous person likely to use firearms for illicit purposes who historically fell outside the Second Amendment's protections. He should be able to keep a firearm for self-defense.

III. The decision below will lead to further unjust and conflicting outcomes.

An individual's residency currently determines whether he can challenge a lifetime ban on his constitutional rights, and whether to do so successfully he must distinguish himself from violent or unvirtuous persons. And this case proves it goes well beyond that.

Under the test applied below, "there are no fixed criteria for determining whether crimes are serious enough to destroy Second Amendment rights." *Binderup*, 836 F.3d at 351 (Ambro, J., opinion). Consequently, even though the virtue factors set forth in the en banc *Binderup* decision favored Holloway, the panel majority below nevertheless applied a new factor.

When the next challenger satisfies the original *Binderup* factors as well as the new *Holloway* factor, the court can invent another one—because when "[t]here are no fixed rules for determining whether an offense" is disqualifying, any offense can be disqualifying. App. 13.

Constitutional rights require more. Indeed, this Court has made clear that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634–35. But the Third Circuit leaves the scope of the Second Amendment in constant flux. Under its virtue test, "the category of serious [disqualifying] crimes changes over time as legislative judgments regarding virtue evolve." *Binderup*, 836 F.3d at 351 (Ambro, J., opinion).

This problem is not limited to the Third Circuit. The Third Circuit's prohibited persons doctrine has influenced courts beyond its jurisdiction. For example, the Supreme Court of Missouri recently applied the Third Circuit's virtue test, without expressly adopting it. *Alpert v. State*, 543 S.W.3d 589, 599–601 (Mo. 2018). *See also People v. Martin*, 2018 IL App (1st) 152249, ¶¶ 24–29 (applying the test in a challenge to an armed habitual criminal statute). What is more, the many courts that categorically refuse as-applied challenges to felon bans allow Congress and state legislatures the opportunity to constrain the scope of the Second Amendment to whatever extent desired by classifying any act as a felony.

It is well-recognized that the Second Amendment receives second-class treatment in the lower courts. *See Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari); *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari); *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring); *id.* at 1544 (Alito, J., joined by Gorsuch, J., dissenting); *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (Thomas, J., joined by Kavanaugh, J., dissenting from denial of certiorari).

Many lower courts are candid about the second-class treatment. The Second, Third, and Tenth Circuits, for example, have expressly declined to provide the Second Amendment the same respect as the First Amendment. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 92 (2d Cir. 2012); *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 124 n.28 (3d Cir. 2018); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015). The Third Circuit treated the Second Amendment as inferior to the equal protection clause. *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.*, 910 F.3d at 124 n.28. And the Tenth Circuit refused to treat the Second Amendment equal to the right to marry. *Bonidy*, 790 F.3d at 1126. Here, the

majority noted that even had the court applied intermediate scrutiny, "our precedent is cautious in applying the intermediate scrutiny test used in First Amendment cases," and suggested that the Second Amendment deserves less protection than commercial speech. App. 25 n.16.

The Second Amendment demands better than an ahistorical virtue test with "no fixed rules" that begins with a presumption of validity and is followed by a watered-down version of intermediate scrutiny. Without this Court's intervention, the Second Amendment risks further dilution.

CONCLUSION

This Court assured in *Heller* that "there will be time enough to expound upon the historical justifications for" felon disarmament when the opportunity arises. 554 U.S. at 635. Using history and tradition to interpret the Second Amendment's text, as *Heller* did, "the people" who have the right to keep and bear arms excludes only dangerous citizens—not merely the unvirtuous.

This case—in which a nonviolent misdemeanant has been treated as a violent felon based on a specious "virtue" standard—offers an ideal opportunity to set forth the historical justifications for disarmament and

demonstrates why additional guidance by this Honorable Court is needed.

Respectfully submitted,

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