No. 20-782

IN THE

Supreme Court of the United States

RAYMOND HOLLOWAY, JR.,

Petitioner,

v.

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Third Circuit Court of Appeals

BRIEF OF THE CATO INSTITUTE, REASON FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, INDEPENDENCE INSTITUTE, AND THE CENTER TO KEEP AND BEAR ARMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

January 7, 2021

Additional counsel listed on signature page

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The **Cato Institute** was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles. Reason advances its mission by publishing *Reason* magazine, website commentary, and policy research reports. To further Reason's commitment to "Free Minds and Free Markets" and equality before the law, Reason selectively participates as *amicus* in cases raising significant constitutional issues.

The **Individual Rights Foundation** was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF opposes attempts from anywhere along the political spectrum to undermine fundamental rights and equality of rights, and it participates as *amicus curiae* in cases to combat overreaching governmental activity.

---

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

The **Independence Institute** is a nonpartisan public policy research organization based in Denver. The Institute's *amicus* briefs in *Heller* and *McDonald* (under the name of lead amicus International Law Enforcement Educators & Trainers Association) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*).

The **Center to Keep and Bear Arms** is a project of **Mountain States Legal Foundation**, a nonprofit, public interest legal foundation organized under the laws of Colorado. MSLF was founded in 1977 to defend the Constitution, protect private property rights, and advance economic liberty. CBKA was established in 2020 to continue MSLF's litigation regarding Americans' natural right to self-defense. CBKA represents individuals and organizations challenging infringements on the constitutionally protected right to keep and bear arms.

This case interests *amici* because it addresses the Second Amendment's scope, particularly as it applies to nonviolent offenders who have their fundamental right to bear arms denied by federal or state law. This is an area of growing concern given the thousands of regulations that carry criminal penalties.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks whether a citizen convicted of a nonviolent misdemeanor can be completely barred for life from exercising his fundamental Second Amendment right to keep and bear arms. The federal government contends that under the terms of 18 U.S.C. § 922(g)(1), the Second Amendment does not

protect citizens once they have been convicted of a felony or qualifying misdemeanor.

The government justifies this position by embracing a theory that the Second Amendment protects only "virtuous" citizens. But there is no historical justification for forever depriving nonviolent offenders of their Second Amendment rights. Legislatures have the power to prohibit only dangerous offenders from possessing guns.

The proposed "virtue test" would relegate the Second Amendment to second-class status. In *District of Columbia v. Heller*, this Court found that the core right protected by the provision is individually held rather than collective. 554 U.S. 570, 582 (2008). While virtue-based exclusions have been applied to civic rights such as voting and jury duty, importing them into individually held rights would lead to absurd results. Just as a nonviolent conviction does not suspend an individual's First Amendment rights, it should not suspend his Second Amendment rights.

The virtue test becomes more worrisome as it is tethered to the maximum punishment of an offense—a mushy standard that is highly manipulable by any legislature. A legislature seeking to prevent possession of firearms could make any crime a disqualifying felony under § 922(g)(1) by setting the maximum penalty so that the offense is "serious." *Holloway v. Att'y Gen.*, 948 F.3d 164, 168 (3d Cir. 2020) (citing *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc)). By allowing state legislatures to determine the scope of the Second Amendment, the fundamental nature of the right is diluted. This

blanket rule is far from narrowly tailored, labeling almost all felons as dangerous because some are.

ARGUMENT

I. THE VIRTUE TEST IS INAPPROPRIATE FOR INDIVIDUAL RIGHTS

Since *Heller*, lower courts have split on how to deal with Second Amendment challenges. This is true for 922(g)(1), which prohibits felons from possessing firearms.[2] Four circuit courts have used a virtue-based test to limit the right to keep and bear arms to those who have not committed a felony. While the virtue test can be appropriate to certain communal rights, the test is inappropriate for individual rights such as the right to keep and bear arms that is protected by the Second Amendment. There is "no evidence that virtue exclusions ever applied to individual, as opposed to civic, rights." *Kanter v. Barr*, 919 F.3d 437, 463 (7th Cir. 2019) (Barrett, J., dissenting). Any permanent deprivation of an individual right needs to only be as broad as necessary for the government to achieve its interest.

A. The Virtue Test Has Only Been Used for Collective Rights

In denying petitioner relief, the Third Circuit relied on a virtue-based theory of disarmament that allows for the disarmament of a "class of 'unvirtuous

---

[2] Section 922(g)(1) makes it unlawful for any person convicted of "a crime punishable by imprisonment for a term over one year" to possess a firearm. Excluded from this is any crime "classified by the laws of the State as misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20)(B).

citizens'" who commit "a serious criminal offense, violent or nonviolent." *Holloway*, 948 F.3d at 178 (Fisher, J., dissenting). While the court below applied a five-factor test to determine whether the crime was "serious," it largely relied on the maximum punishment of the offense to determine whether it was serious. *Id.* at 176 ("Pennsylvania's decision to impose a mandatory minimum jail term and a maximum penalty of up to five years' imprisonment . . . reflects the seriousness of the offense.").[3]

The virtue test has historically been used in dealing with rights to vote, serve on juries, and assemble. *See*, *e.g.*, *Binderup*, 836 F.3d at 369 n. 14 (3d Cir. 2016) (Hardiman, J., concurring) (noting the history of felon disenfranchisement and that jury service and eligibility for public office are not fundamental rights); Thomas M. Cooley, *A Treatise on The Constitutional Limitations* 29 (1st ed. 1868) (arguing that the disenfranchisement of certain classes of people on the basis of "want of capacity or of moral fitness" was well-documented). The virtue theory of the Second Amendment conceives of the right to keep and bear arms as a right that "was exercised for the benefit of the community (like voting and jury service), rather than for the benefit of the individual (like free speech or free exercise)" and therefore "belonged only to virtuous citizens." *Kanter*, 919 F.3d at 462–63 (Barrett, J., dissenting). Four

[3] The other approach taken by judges is to look at the dangerousness of the offense. Under this approach, the legislature may disarm only those who have "demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting).

circuits have imported the virtue-based test and applied it to the Second Amendment.

But *Heller* expressly rejected the notion that the right to keep and bear arms was a collective right, holding instead that "the Second Amendment confer[s] an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. As other *amici* argue, there is no evidence to support that virtue exclusions ever applied to individual rights. Given the importance of history in this Court's Second Amendment jurisprudence, it is inappropriate to use an ahistorical test to strip people of an individual right.

B. Categorically Stripping Individual Rights from Felons Would Be Unacceptable in Other Contexts

Courts "treat no other constitutional right so cavalierly" as they do the Second Amendment. *Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting); *see also Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012) (refusing to import substantive First Amendment principles into Second Amendment jurisprudence); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) ("The risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination."). No other individual right would be stripped from felons who paid their debts to society.

This is not to say that there cannot be any restrictions on the Second Amendment. History supports that the right to keep and bear arms "was

not unlimited, just as the First Amendment's right of free speech was not." *Heller*, 554 U.S. at 595. We can and should continue restrictions on firearms to truly dangerous individuals, but any deprivation must be narrowly tailored. No court would allow a permanent deprivation of every felon's First or Fourth Amendment right simply because the offense was "serious." The fundamental nature of the Second Amendment should compel this Court to similarly make sure any restriction is narrowly tailored.

1. Suspending Fourth Amendment rights for felons would be unconstitutional.

The search-and-seizure provisions of the Fourth Amendment protect against "unreasonable" searches. This protection applies both to those with and without a criminal record. No court would allow legislatures to deprive all felons their Fourth Amendment rights even though it would arguably improve public safety.

To justify the blanket ban on nonviolent felons, proponents point to recidivism rates, especially among nonviolent offenders. *See Folajtar v. Att'y Gen.*, No. 19-1687, 2020 U.S. App. Lexis 37006, at *25 (3d Cir. Nov. 24, 2020); *Kanter*, 919 F.3d at 449 (highlighting several studies showing a connection between nonviolent offenders and risk of future violent crime); *Kaemmerling v. Lappin*, 553 F.3d 669, 683 (D.C. Cir. 2008) ("[C]ertain groups—such as property offenders—have an even higher recidivism rate than violent offenders, and a large percentage of the crimes nonviolent recidivists later commit are violent."). There are two principal problems with the use of recidivism rates to support firearm bans. First, as then-Judge Barrett wrote, the statistics lump all

nonviolent felons together without taking account individual characteristics that make some riskier than others. *Kanter*, 919 F.3d at 467–68 (Barrett, J., dissenting). Second, recidivism rates would also support the stripping of Fourth Amendment rights from felons. The government certainly has a significant interest in curbing crime. Given that many felons are likely to reoffend, allowing police to regularly search the homes of felons could deter felons from committing crimes. If a state legislature abridged felons' Fourth Amendment rights en masse under the belief that it would improve public safety, would courts blindly defer to that judgment? Yet that's what courts around the country have done to legislative judgments on Second Amendment rights. And just as it would be clearly unconstitutional to abridge felons' Fourth Amendment rights en masse, so too for the Second Amendment.

2. Felons also maintain their First Amendment rights.

Likewise, no court would strip a felon's First Amendment rights solely because of their lack of virtuousness. This past year, the U.S. Bureau of Prisons released Michael Cohen, President Trump's former attorney, due to the COVID-19 pandemic. Matt Zapotosky, "Michael Cohen Released from Federal Prison Over Coronavirus Concerns," Wash. Post, May 21, 2020, https://wapo.st/3hNv57O. He was sent back to prison, however, after tweeting that he was finishing up his book about his experience with President Trump. In a hearing on his reimprisonment, Judge Alvin Hellerstein released Cohen, saying that Cohen's subsequent imprisonment was "retaliatory" solely "because of his desire to

exercise his First Amendment rights." Benjamin Weiser & Alan Feuer, "Judge Orders Cohen Released, Citing 'Retaliation' Over Tell All Book," N.Y. Times July 23, 2020, https://nyti.ms/3rVF9jy.

If the circumstances were different and the court applied the virtuous citizen test to Cohen, they would only look at his felony conviction to determine whether he should be allowed to write his book. No court would apply such a standard to deprive all felons of their First Amendment rights.

3. Any restriction on individual rights needs to be narrowly tailored.

The "right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. This is also true for other individual rights. While incarcerated, the government can curb prisoners' First Amendment rights if the restriction is reasonably related to a valid penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987). Likewise, prisoners and those on parole do not have a reasonable expectation to privacy. *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (prisoners can be searched as a routine matter); *Samson v. California*, 547 U.S. 843, 850 (2006) (allowing warrantless searches at any time).

History also supports the claim that the government can exclude some individuals from possessing guns. Violent and other dangerous persons have historically been banned from keeping arms in several contexts—specifically, persons guilty of committing violent crimes. *See, e.g.*, *Binderup*, 836 F.3d at 367–74 (en banc) (Hardiman, J., concurring). If the Second Amendment were subject to the virtue test, the government would not need to show evidence

that a felon is dangerous. *Kanter*, 919 F.3d at 463 (Barrett, J., dissenting). But a lifetime prohibition should be upheld only if the government can demonstrate with evidence that a nonviolent felon poses a danger to commit gun violence. *Binderup*, 836 F.3d at 354 ("[The government] must present some meaningful evidence, not mere assertions, to justify its predictive [and here conclusory] judgments.").

II. THE VIRTUE TEST ILLEGITIMATELY ALLOWS LEGISLATURES TO DETERMINE THE SECOND AMENDMENT'S SCOPE

With § 922(g)(1) tied to the maximum punishment of an offense, legislatures' have been given the power to define the scope of the Second Amendment. In Holloway's case, Pennsylvania made DUI punishable up to five years' imprisonment, triggering § 922(g)(1). *Holloway*, 948 F.3d at 187. If he had committed his crime in a different state, he might still have his Second Amendment rights.

For legislators wanting to limit possession of firearms, they can do that by designating any offense a felony. It does not matter the offense, the individual circumstances of the offender, or the actual punishment imposed. All that matters is that the offense is punishable by one year's imprisonment. More problematic is that, in blessing this test, lower courts have paid only minor lip service to concerns about the unfettered power placed in the legislatures. A near-blanket rule that strips a person's fundamental rights based on any felony is overinclusive and cannot be constitutionally permissible.

A. The Virtue Test for Individual Rights Would Lead to Absurd Results

1. Modern felonies do not resemble common-law felonies.

Section 922(g)(1) prohibits firearm possession by persons convicted of a "crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). The statute does not account for the nature of the offense, just its punishment. Accordingly, it applies to almost all felons and some misdemeanants, making it "wildly overinclusive." Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 721 (2007).

Part of the problem are changes in how crimes are defined today. At common law, the term "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). "Felony" was a category "used to designate such serious offenses as were formerly punishable by death, or by forfeiture of the lands or goods of the offender." *Bannon v. United States*, 156 U.S. 464, 468 (1895) (citing *Ex parte Wilson*, 114 U.S. 417, 423 (1885)); *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943) (citing Francis Wharton, *Criminal Law* § 26 (12th ed. 1932) (stating the common law felonies were: "murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny")).

Today, a felony is defined by a crime punishable by imprisonment for a term exceeding one year. Thus, any crime could be a felony. One dissenting judge described the definition of a felony as "elastic, unbounded, and manipulable by legislatures and

prosecutors." *Folajtar*, 2020 U.S. App. Lexis 37006, at *56 (Bibas, J., dissenting).

To see how far removed today's felonies are from the common law, consider a few examples. Under 18 U.S.C. § 1464, a radio talk show host can become a felon for uttering "any obscene, indecent, or profane language by means of radio communication." In Pennsylvania, reading another person's email without permission is a third-degree felony, punishable by up to seven years. Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. Crim. L. & Criminology 709, 719 n.44, 46 (2010). There are currently thousands of criminal statutes and regulations that could make someone a felon and unable to possess a firearm.

2. The virtue test is underinclusive, as different states treat the same crime differently.

A state's ability to define their crimes means that an individual who commits a crime in that state might lose her gun rights, whereas someone who committed the same crime in another state would retain her rights. This is seen with adultery law, as many states treat adultery as a misdemeanor. *See, e.g.*, Fla. Stat. § 798.01; N.Y. Penal Law § 255.17. In other states, adultery is not even a crime. Oklahoma, however, makes adultery a felony punishable by up to five years' imprisonment. Okla. Stat. 21 § 872. This means that a convicted adulterer in Tulsa would be prohibited from possessing a gun, whereas an adulterer from Miami or Buffalo would not.

Pennsylvania is one of only eight jurisdictions in which a DUI triggers § 922(g)(1). *Holloway*, 948 F.3d

at 192 (Fisher, J., dissenting). If Mr. Holloway had committed his offense in Florida, he could still possess firearms. "The statute's dependence on state criminal classifications and punishments results in an underinclusive application that raises constitutional concerns, regardless of the reasonableness of disarming recidivist DUI offenders." *Id.*

To be sure, driving under the influence is a serious offense. But the nexus between drunk driving and firearm possession is underinclusive, as different states treat the same conduct differently. Second Amendment rights should not hinge solely on the state where the offense took place.

B. There Are Few Limits on What a Legislature Can Make a Felony, Which Has Dire Consequences for Second Amendment Rights

1. Legislatures control the scope of punishment.

Usually, what a state decides to punish as a crime is "purely a matter of legislative prerogative." *Folajtar*, 2020 U.S. App. Lexis 37006, at *56 (Bibas, J., dissenting) (citing *Rummel v. Estelle*, 445 U.S. 263, 274 (1980); *Heller*, 554 U.S. at 628 n.27). But it is different when a fundamental right is at stake. With § 922(g)(1), the power to determine a felony also provides the power to determine the scope of the Second Amendment. If a legislature wanted to curb firearm possession, it could designate any minor offense—say, jaywalking—as punishable by more than one year's imprisonment and vigorously enforce it. This effectively gives the legislature the power to narrow the Second Amendment. But "[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 834–35.

Legislatures do not act alone in designating which crimes should be a felony. Prosecutors also have that power. Prosecutors often persuade legislatures to add more crimes to that category to give themselves more plea-bargaining options and leverage. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 523–33, 536–37 (2001). Moreover, in some states, prosecutors can choose to prosecute a crime as either a felony or a misdemeanor. *Folajtar*, 2020 U.S. App. Lexis 37006, at *56 (citing *Ewing v. California*, 538 U.S. 11, 16–17 (2003) (plurality opinion)).

2. Maximum punishments do not indicate the seriousness of an offense.

Another shortcoming of using the maximum possible punishment of an offense to determine the seriousness of a crime is that sentencing reflects a culmination of factors. While a maximum possible punishment is "certainly probative" of the offense's seriousness, the wide range of punishments for an offense makes the maximum punishment a poor indicator. *Holloway v. Sessions*, 349 F. Supp. 3d 451, 457 (M.D. Pa. 2018). As the court in *Binderup* recognized, judges must not "defer blindly" to maximum possible punishments because "some offenses may be 'so tame and technical as to be insufficient to justify the ban.'" 836 F.3d at 350–51

(quoting *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011)).

When determining a sentence, courts may consider the history and characteristics of the defendant, and a judge's sentence may reflect a compromise resulting from plea bargaining. This is reflected here as Holloway's offense was punishable by up to five years' imprisonment, but he received only the mandatory minimum sentence of 90 days' confinement on a work-release program. *Holloway*, 948 F.3d at 176. Yet Holloway is still treated based on the offense's most serious punishment.

Under a virtue test, it does not matter if those convicted served time in prison for over a year. The only thing that matters is the maximum punishment. This is especially alarming as a recent study found that 3 in 10 convicted felons were not sentenced to prison. Bureau of Justice Statistics, *Felony Sentences in State Courts*, 2006 – Statistical Tables (Dec. 2009). Despite their offense not being serious enough to be incarcerated, these people will forever be unable to exercise their Second Amendment rights.

3. There is no apparent constitutional limit to punishments legislatures can impose.

A legislature could punish a crime so severely it would violate the Eighth Amendment's protection against cruel and unusual punishments. But this is a high bar to reach, especially since this Court upheld a 25-year sentence for stealing golf clubs under California's three-strikes law. *Ewing*, 538 U.S. 11. When it comes to prison sentences of over a year, it's difficult to imagine courts stepping in.

Recognizing that legislatures have seemingly unfettered power over a fundamental right, lower courts have contended that the punishment label is not dispositive and that they "do not foreclose the possibility that a legislature could be overly punitive and classify as a felony an offense beyond the limits of the historical understanding." *Folajtar*, 2020 U.S. App. Lexis 37006, at *10. Despite this acknowledgment, these same courts have also said that "a felony is generally conclusive in our analysis of seriousness." *Id.* at *9–10; *Medina v. Whitaker*, 913 F.3d 152, 155 (D.C. Cir. 2019) (Sentelle, J.) ("[N]o circuit has held the law unconstitutional as applied to a convicted felon."). Courts have also said that a non-serious felony would be "rare," and the challenger's burden would be "extraordinarily high" to prove that they should have their Second Amendment rights restored. *Folajtar*, 2020 U.S. App. Lexis 37006, at *9–10; *Binderup*, 836 F.3d at 353.

These courts' rationale is that 922(g)(1) is explicit in its punishment. The enumeration of punishment puts those who commit felonies and qualifying misdemeanors on notice that they are committing a serious offense and that they will be forfeiting their rights under the Second Amendment. *Folajtar*, 2020 U.S. App. Lexis 37006, at *18.

Though these courts have argued individuals are on notice, that does not make the piecemeal disarming of anyone who transgresses the whims of the legislature any more acceptable. It is hard to believe that a near-blanket ban on all felons would allow exceptions in only rare circumstances. This "extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by

choosing a label." *Folajtar*, 2020 U.S. App. Lexis 37006, at *33 (Bibas, J., dissenting). Such power would be foreign to any other constitutional right.

C. Regulation of a Fundamental Right Needs to Be Based in Constitutional Text and History

The ability of the legislature to define the scope of the Second Amendment appears even more absurd when compared to the First Amendment. This Court's precedents hold that obscenity and fighting words are unprotected by the First Amendment. *See R. A. V. v. St. Paul,* 505 U.S. 377, 383 (1992). While Congress can restrict speech that amounts to obscenity or fighting words, "it may not substantially redefine what counts as obscenity or fighting words." *Binderup*, 836 F.3d at 372 n.20 (en banc) (Hardiman, J., concurring). History is what determines the scope of the right. Yet respondents argue that Congress and state legislatures have the right to define the types of criminals excluded from the right to keep and bear arms. This treats the Second Amendment "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality).

Today in the United States, about 5 percent of the population has a felony conviction. *See* Sarah Shannon et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010*, 6–7 (2011)) (finding that there are currently about 15 million "ex-felons"). Of the most recent year that BJS published figures for state felony convictions, 18.2 percent of all state felony convictions were for violent offenses.

Bureau of Justice Statistics, *supra*. The overwhelmingly majority of convicted felons committed a nonviolent offense. Yet only a selected few can exercise their Second Amendment right due to an ahistorical test based on virtue.

The historical evidence supports a different proposition: that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. As then-Judge Barrett noted, "[t]his is a category simultaneously broader and narrower than 'felons'—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting). The danger test also justified the disarming of those who refused to pledge loyalty to the colonies. "Loyalists were potential rebels who were dangerous before they erupted into violence." *Folajtar*, 2020 U.S. App. Lexis 37006, at *39 (Bibas, J., dissenting). Similarly, "[r]ebels posed a risk of insurrection and so were dangerous." *Id.*

The case for keeping firearms away from those who have demonstrated violent behavior is strong. But Second Amendment rights cannot be so easily diluted that the government can strip people of their rights based on how it designates their crimes. An amorphous felony standard to determine the scope of a fundamental right requires narrow tailoring. The Second Amendment demands more than kowtowing to the whims of legislatures.

CONCLUSION

The Court should use this case to provide clarity to lower courts about how to evaluate restrictions of fundamental rights. Neither the text of the Second Amendment nor its history supports the permanent disarmament of nonviolent felons.

Respectfully submitted,

Manuel Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
Wells Fargo Center
333 S. Grand Ave., Ste. 4200
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerinc.com

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

David B. Kopel
INDEPENDENCE INSTITUTE
727 East 16th Avenue
Denver, CO 80203
(303) 279-6536
david@i2i.org

Cody J. Wisniewski
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
(303) 292-2021
cody@mslegal.org

January 7, 2021